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NOTICE OF APPEAL.

(Filed November 3, 1938.)

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Estate of BEATRICE E. WESTHALL, Deceased.	On Appeal from Final Decree entered in the Prerogative Court. Notice of Appeal.

Osborne W. Havens, administrator of the Estate of Beatrice E. Westhall, deceased, and Osborne W. Havens, individually, hereby appeal from so much of the final decree made in this cause on October 14, 1938, by the Ordinary of the State of New Jersey, on the advice of Vice-Ordinary Maja Leon Berry, as orders, adjudges and decrees that Osborne W. Havens, individually, pay to Osborne W. Havens, administrator of the Estate of Beatrice E. Westhall, deceased, the sum of $6,400.00, together with interest at 6 per centum from October 1, 1931, to the date of payment thereof, the said sum of $6,400.00, together with interest thereon, to be set aside specially for the said infants mentioned in said decree and paid to their guardian or guardians in due course, and as orders, adjudges and decrees that the proctor for and counsel with the guardian be allowed a counsel fee of $1,000.00, together with the taxed

costs of appeal, the said counsel fee and costs to be paid as follows: One-half thereof to be paid by Osborne W. Havens, individually, and the balance to be paid out of the fund of $6,400.00 and the interest accrued thereon specially set aside for the infants, as in said decree provided, to the Court of Errors and Appeals in the last resort in all causes.

EWART & BENNETT,
Proctors for and of Counsel with Osborne W. Havens, individually and as Administrator of the Estate of Beatrice E. Westhall, deceased.

Dated: October 21, 1938.

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

HOWARD EWART,
Of Counsel with Osborne W. Havens, individually, and as Administrator of the Estate of Beatrice E. Westhall, deceased.

[ENDORSED]

Service of the within notice of appeal is hereby acknowledged this 21st day of October, 1938.

Jno. A. Matthews,
Proctor for Appellee.

PETITION OF APPEAL.

(Filed Nov. 4, 1938.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the Matter of the Estate of BEATRICE E. WESTHALL, Deceased.	On Appeal from Decree of the Prerogative Court. Petition of Appeal.

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

The petition of Osborne W. Havens, individually and as administrator of the Estate of Beatrice E. Westhall, deceased, the appellant in the above-entitled cause, respectfully shows that:

1. Petitioner, both in his individual capacity and as administrator of the Estate of Beatrice E. Westhall, deceased, finds himself aggrieved by a final decree made and entered in the Prerogative Court of New Jersey by his Honor Luther A. Campbell, Ordinary of the State of New Jersey, on the advice of

Honorable Maja Leon Berry, Vice-Ordinary, bearing date October 14, 1938, in a certain cause in the said Prerogative Court of New Jersey entitled: "In the Matter of the Estate of Beatrice E. Westhall, deceased," in these respects, to wit: that the said decree orders and adjudges that Osborne W. Havens, individually, pay to Osborne W. Havens, administrator of the Estate of Beatrice E. Westhall, deceased, the sum of $6,400.00, together with interest at 6% from October 1, 1931, to the date of payment thereof, the said sum of $6,400.00, together with interest thereon, to be set aside specially for the said infants mentioned in these proceedings, and paid to their guardian or guardians, in due course, and in that said decree further orders and adjudges that John A. Matthews, the proctor for and of counsel with the guardian be allowed a counsel fee of $1,000, together with the taxed costs of this appeal, the said counsel fee and costs to be paid as follows: one-half thereof to be paid by Osborne W. Havens, individually, and the balance to be paid out of the fund of $6,400.00, and interest accrued thereon, specially set aside for the infants, as in this decree hereinbefore directed.

Your petitioner appeals from those portions of the decree of the Ordinary, as above-mentioned, upon the grounds that the said decree is erroneous in that:

(A) The surcharge of $6,400.00, with interest, against appellant, Osborne W. Havens, rests upon the basis that the sale of the Westhall undertaking business by Osborne W. Havens, as administrator of the Beatrice E. Westhall Estate, was voidable and

should be avoided, in so far as related to the interests of certain infants, namely of James E. Westhall, Beatrice E. Westhall, and Edmund J. Westhall, of whose estates and persons Lakewood Trust Company was and is guardian, whereas appellant contends that Lakewood Trust Company, as guardian aforesaid, possessed full power and authority in law, as guardian of the persons and property of the said infants, to sell and to consent to the sale by the administrator of the interests of the infants in said undertaking business, and that such sale was valid as against the infants and their guardian.

(B) Lakewood Trust Company, as guardian of the person and property of the aforesaid infants, expressly consented in writing to the sale of the said undertaking business at the price and upon the terms for which the said business was afterwards sold by the administrator, and was and is therefore estopped from objecting to the sale of said undertaking business at the price and upon the terms to which it, the said Lakewood Trust Company, as guardian, expressly assented, prior to the consummation thereof.

(C) The said infants were without power or authority, in fact or in law, to sell or to consent to the sale of said undertaking business, but such power and authority rested solely in the guardian of the person and property of said infants, namely in Lakewood Trust Company, and neither the Lakewood Trust Company, nor the said infants, had power or authority to repudiate a contract for the sale of said undertaking business, to which contract the said

guardian expressly assented, prior to the consummation of such sale.

(D) None of the said infants having attained their majority, none of them are in a position to elect to rescind or to repudiate the sale of the said undertaking business, to which their guardian, Lakewood Trust Company, expressly assented, nor does the Prerogative Court of this State possess authority to elect to rescind, on behalf of such infants, a contract to which the guardian of said infants expressly assented, where the said infants have not yet attained their majority. An election to rescind can only be exercised by a person of full age.

(E) The proofs failed to establish any fraud, misrepresentation or deceit on the part of the administrator, Havens, in effecting the sale of said undertaking business but, on the contrary, disclosed that said business was sold after a full disclosure of the facts, at a fair price, at the time and under the circumstances then existing, by reason whereof the Prerogative Court was not justified in finding that the said undertaking business possessed a value much in excess of the sales price thereof, and in ordering and adjudging that the appellant, Havens, should pay into the Estate of Beatrice E. Westhall a sum representing the difference for which the business was sold and the value fixed thereon by the Prerogative Court, plus interest at 6% upon such difference.

(F) The proofs failed to disclose that said Westhall undertaking business, so sold by the administra-

tor, Havens, possessed any good-will of appreciable value; the Prerogative Court was unwarranted in finding that said undertaking business possessed a good-will of the value of $12,800.00; and the said Court was not justified, under the proofs, in surcharging the administrator, Osborne W. Havens, with the sum of $6,400.00 for the undivided one-half interest of the said infants in the said undertaking business, together with interest thereon at 6% per annum from October 1, 1931.

(G) The Prerogative Court, having found that the sale of the Westhall undertaking business by the administrator, Havens, should be avoided, was without authority to then ratify and confirm the fact of said sale and to impose upon the said Havens payment of an additional consideration for the said sale of $6,400.00, with interest.

(H) In assessing the value of said Westhall undertaking business, including good-will, and in fixing the additional price that should be paid therefor, over and above the sum of money already paid to the estate, the Prerogative Court erroneously failed and neglected to allow the appellant the full value of the consideration named in the said contract of sale, and in fact paid by the appellant, Osborne W. Havens.

(I) The facts and circumstances established by the proofs in this case were insufficient to warrant the Prerogative Court in allowing to Proctor for Lakewood Trust Company, guardian of the persons

and property of said infants, a counsel fee of $1,000.00, and in imposing upon appellant, Osborne W. Havens, personally, the payment of $500.00 of said counsel fee and of the costs taxed in the Prerogative Court.

Petitioner therefore prays that the said decree of the Ordinary, in the particulars aforesaid, may be reversed, set aside, and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

EWART & BENNETT,
Proctors for and of Counsel with Appellant.

PETITION FOR LETTERS OF ADMINISTRATION.

(Filed August 24, 1931.)

To the Surrogate of the County of Ocean:

The petition of Osborne W. Havens, who resides at No. 225 Second Street, in the Township of Lakewood in the County of Ocean and State of New Jersey, respectfully shows that:

1. Beatrice E. Westhall, late of the Township of Lakewood, in the County of Ocean and State of New Jersey, departed this life on the thirteenth day of August 1931, intestate.

2. The next of kin and heirs at law of the said intestate, with their respective residences or post office addresses and the manner and degree in which they severally stand related to the said intestate, so far as the same are known to your petitioner, are as follows:

Names	Residences	Relationship
Jessie M. Havens	225 Second St. Lakewood, N. J.	Daughter
Virginia W. Hooper	4908 Kansas Ave., N. W. Washington, D. C.	Daughter
James Edmund Westhall	20 Seventh St. Lakewood, N. J. child of James E. Westhall, Jr.,	Grandson deceased son
Beatrice E. Westhall	Carey St. Lakewood, N. J.	Granddaughter
Edmund J. Westhall	Carey St. Lakewood, N. J. children of Leon E. Westhall, deceased son	Grandson

All of the foregoing are of full age with the exception of

NAMES	AGES
Beatrice E. Westhall	11
Edmund J. Westhall	6
James E. Westhall	4

3. All of the said next of kin of said deceased entitled to administration upon this estate have re-

nounced in writing their right of administration and requested that the same be granted to your petitioner

Due notice of this application has been given to all of the aforesaid next of kin.

4. Petitioner further states that the value of the personal estate for the administration of which this application is made will not exceed in value the sum of twenty-five thousand dollars, and that the value of the real estate whereof the intestate died seized does not exceed in value the sum of sixty thousand dollars.

Your petitioner therefore prays that letters of administration upon the estate of the aforesaid intestate be granted to him.

OSBORNE W. HAVENS.

Dated Toms River, N. J., August 24th, 1931.

State of New Jersey, }
County of Ocean, } ss.

OSBORNE W. HAVENS, of full age, being duly sworn according to law, upon his oath, deposes and says that he is the petitioner in the foregoing petition named and that the matters and things therein contained are true to the best of his knowledge and belief.

OSBORNE W. HAVENS.

Sworn and subscribed to, this twenty-fourth day of August, A. D. 1931, at Toms River, N. J., before me.

CLINTON O. FOGG,
Surrogate.

LETTERS OF ADMINISTRATION.

(Filed August 25, 1931.)

OCEAN COUNTY SURROGATE'S COURT.

ESTATE OF BEATRICE E. WESTHALL.

State of New Jersey, } ss.
County of Ocean }

I, CLINTON O. FOGG, Surrogate of the County of Ocean, do hereby certify that (L. S.) on the 25th day of August, A. D. 1931, administration of the goods and chattels, rights and credits which were of Beatrice E. Westhall, late of the County of Ocean, who died intestate, was granted by me to Osborne W. Havens, who is duly authorized to administer the same agreeably to law.

Witness my hand and seal of office this 25th day of August, in the year of our Lord one thousand nine hundred and thirty-one.

CLINTON O. FOGG,
Surrogate.

INVENTORY AND APPRAISEMENT.

(Filed September 21, 1934.)

OCEAN COUNTY SURROGATE'S COURT.

In the matter of the ESTATE OF BEATRICE E. WESTHALL, deceased. | Inventory and Appraisement.

An inventory and appraisement of the goods and chattels, rights and credits, moneys and effects of Beatrice E. Westhall, of the Township of Lakewood, Ocean County, New Jersey, deceased, made by Osborne W. Havens, administrator, and Amory J. Parmentier and Arthur R. Smock, appraisers.

HOUSEHOLD FURNITURE

Living Room

1 Carpet	$7.50
1 Small Rug	1.00
1 Music Cabinet	2.50
1 Settee	7.50
1 Arm Chair	2.00
1 UpholsteredArm Chair	3.00
1 Book Stand and 13 Books	1.50

1 Table Lamp and Shade	5.00	
1 Floor Lamp and Shade	5.00	
1 End Table	3.50	
1 Small Stand and Jardiniere	1.00	
1 Silver Bon Bon Dish	1.00	
1 Silver Vase Plated	.50	
1 Silver Card Tray plated	.50	
1 Wall Mirror	2.50	10
6 Framed Pictures	1.00	
1 Small Mahogany Clock (bad order)	1.00	
1 Pair Book Ends	.50	
5 Miscellaneous Vases	1.25	
1 Brass Bowl with handle	2.00	
1 Pillow	.30	
2 Table Runners	.50	
3 Small Doilies	.30	
1 Pair Mahogany Candle Sticks with Candles	.50	
1 Wall Flower Vase	.10	20
3 Pair Lace Curtains	1.50	
1 Pair Wool Damask Portieres	1.00	

Middle Living Room

1 Carpet (bad order)	7.50	
2 Small Rugs	2.00	
1 Oak Table	3.00	
1 Lounge and 4 Pillows	5.00	
1 Oak Secretary-Bookcase	7.50	30
1 Set Home Reference Library—8 volumes	1.50	
1 Lot Books	1.00	
1 Oak Rocker	2.00	
1 Morris Chair and 1 Doily	3.00	
1 Wicker Chair	3.00	
2 Small Straight Chairs	1.00	

1	Atwater Kent Radio Set	20.00
1	Floor Lamp and Shade	3.00
1	Table Lamp	2.50
1	Table Runner	.25
1	Brass Book Rack and Books	1.00
1	Candy Jar—glass	.25
5	Wall Pictures	1.00
1	Small Lamp and Shade	.50
1	Vase	.50
2	Pieces Pottery	1.00
1	Glass Flower Holder	.25
1	Pair Window Drapes	.50
1	Pair Portieres	1.00

Dining Room

1	Dining Room Table—Oak	2.50
5	Straight Chairs and 1 Arm Chair—Oak	3.50
1	Oak Buffet	2.50
1	China Cabinet—wall	1.00
20	Pieces Assorted China and Glassware in wall cabinet	2.00
1	Carpet (bad order)	3.00
2	Wall Mirrors	4.00
1	Pair Silver Candlesticks—plated	2.00
1	Silver Plated Fruit Dish	.50
1	Silver Plated Cake Tray—engraved	.50
1	Silver Cup—engraved	.50
1	Electric Fan—14 inch—oscillating	3.00
1	Electric Fan—10 inch—stationary	2.00
1	Pewter Wall Plaque (one head missing from figure)	.50
1	Brass Bowl	.50
7	Pieces Assorted Bric a Brac	1.00

1	Small Clock (bad order)	.25
1	Serving Tray	.25
1	Bread Tray—plated	.25
1	Set Doilies—assorted sized	.50
1	Centre Doily—on dining room table	.20
1	Glass Flower Vase—cut glass	.50
2	Pair Net Curtains	1.00
2	Pair Drapes	2.00
2	Rugs	1.00
1	Umbrella Stand	.50
7	Cheese Knives	.35
1	Doz. Forks	.60
1	Nut Cracker Set and Bowl	.35
12	Oyster Forks	.50
12	Forks	.60
12	Fruit Spoons	.60
1	Cream Ladle—sterling	.50
1	Berry Spoon	.10
1	Bon Bon Spoon—sterling	.25
1	Butter Knife	.05
1	Cheese Knife	.10
8	Demi Tasse Spoons	.40
1	Olive Spoon	.10
12	Pie Forks	.60
32	Teaspoons	1.60
1	Sugar Spoon	.05
218	Pieces Assorted China	7.50
2	Large China Platters	.30
1	Fern Dish	.25
5	Glass Finger Bowls	.25
2	Glass Flower Vases	.10
1	Celery Jar	.10
1	Old Tray—plated	.15
27	Wine Glasses	1.00

8	Frappe Glasses and Tumblers	.50
4	Sherbert Glasses	.25
5	Punch Glasses	.25
1	Syrup Jar	.10
3	Water Glasses	.15
1	Cut Glass Mustard Jar	.35
2	Individual Saltcellars	.10
2	Cut Glass Celery and Bread Trays	1.00
2	Cut Glass Olive Dishes	1.00
2	Cut Glass Bowls	1.50
1	Silver Appliqued Dish	.50
3	Ice Tea Spoons	.15
1	Water Bottle	.25
1	Flower Vase (chipped)	.10
1	Small Water Bottle	.25
1	Water Glass	.05
1	Silver Plated Jardiniere	.25
1	Cheese Cover	.10
33	Piece of Glassware #2	2.00
1	Sugar and 2 Creams—silver plated	.50
1	Cut Glass Salt and Pepper Set	.25
1	Cut Glass Cream and Sugar Set	.50

(Contents of Side Board)

1	Set of 6 Individual Saltcellars and Spoons	.50
6	Linen Tablecloths (monogramed)	6.00
5	Fancy Linen Tablecloths—kitchen use	1.50
1	Doz. Table Napkins	1.00
11	Steel Bone—Handled Knives	1.00
8	Dessert Spoons—silver plated	.40
1	Table Spoon—silver plated	.05
12	Soup Spoons—silver plated	.60
1	Berry Spoon—silver plated	.10

1	Salad Fork—silver plated	.10
1	Salad Spoon—silver plated	.10
9	Individual Butter Spreaders—silver plated	.45

Kitchen

1	Gas Range	10.00
1	Enameled Top Kitchen Table	3.00
1	Enameled Kitchen Cabinet	3.00
2	Kitchen Chairs	1.00
1	Vacuum Cleaner	3.00
1	Gas Heater	1.50
1	Carpet Sweeper	1.00
1	Electric Iron (bad order)	1.00
1	Lot Cooking Utensils including kitchen forks, spoons, etc.	5.00
1	Lot Kitchen Crockery	2.50
1	Electric Toaster	1.00

Rear Porch

1	Ice Box (old)	7.50
1	Chair	.50
1	Hamper	.50
1	Sewing Machine (old)	1.50

Porch

3	Crex Rugs	10.00
1	Settee—wicker and 4 Pillows	5.00
1	Table Runner and 1 Wicker Table	2.00
1	Flower Stand—Wicker	1.00
1	Stand and Flower Box	1.00
4	Straight Chairs—Wicker	8.00

2 Rockers—Wicker	6.00
1 Floor Lamp	2.50
2 Tabourets	.50
1 Door Mat	.25

Hall—Second Floor

1 Straight Chair	.50
1 Hall and Stair Carpet	7.00
1 Telephone Stand with chair	1.00
1 Wall Mirror	2.00
2 Pair Curtains and Drapes	3.00
2 Mahogany Candle Sticks	.50

East Bed Room

1 Double Iron Bed	7.50
1 Mattress	5.00
1 Spring	2.00
2 Pillows	1.00
1 White Chiffonier	3.50
1 White Dressing Table, Seat and Small Lamp	3.00
1 White Wicker Chair	.50
1 Carpet	3.00
1 Mirror	1.50
1 Picture	.50
1 Pink Bed Spread	1.00
1 Waste Basket	.25
2 Runners	.50
1 Pair Drapes on Closet	1.00
1 Pair Curtains	.50
1 Pair Drapes	1.00
2 Sheets	.50

2 Pillow cases	.25
1 Blanket	.50

South Bed Room

1 Carpet	7.50
2 Pair Curtains	1.00
2 Pair Drapes	2.00

North West Bed Room

1 Carpet	7.50
1 Oak Wood Bed	2.50
1 Mattress	5.00
1 Spring	2.00
2 Pillows	1.00
1 Oak Bureau	2.50
1 Oak Dresser	2.50
1 Rocker	1.00
1 Stand	.25
1 Tabourette	.25
1 Waste Basket (bad order)	.10
3 Pictures	.30
1 Comb and Brush Set, Jewelry Case, Tray, Glass Powder Set	1.00
1 Blue Bed Spread	1.00
2 Sheets	.50
2 Pillow Cases	.25
1 Blanket	.50
3 Doilies	.25
2 Runners	.50
1 China Bedroom Lamp	.50
1 Wall Mirror	2.00
3 Pair Curtains	1.50

3	Pair Drapes	3.00
2	Leather Suit Cases	3.00
1	Leather Hat Box	1.00
1	Travelling Bag	1.00
1	Framed Picture	.50

North Bed Room

1	Carpet	7.50
1	Small Rug (old)	.50
1	Double Wooden Bed—Birch	5.00
1	Spring	2.00
1	Mattress	5.00
2	Pillows	1.00
2	Sheets	.50
2	Pillow Cases	.25
1	Blanket	.50
1	Yellow Spread	1.00
1	Dresser—Birch	5.00
1	Runner	.50
1	Waste Basket	.10
1	Chiffonier—Birch	5.00
1	Runner	.50
1	Oak Table	1.50
1	Table Cover	.25
1	Chair	.50
1	Rocker	.75
1	Small Bed Room Lamp	1.00
2	Pictures	.50
2	Glass Bottles	.20
1	Pair Drapes	1.00
1	Pair Curtains	.50
1	Wicker Hamper—Closet	1.00
1	Cedar Chest—Closet	5.00

1 Pair Drapes—Closet		1.00
1 Pair Muslin Drapes—Closet		1.00

Linens

6 Sheets		1.50
10 Pillow Slips—Monogramed		1.25
12 Towels		.60
Miscellaneous Assorted Scarfs and Bath Towels in bad condition		2.50
		$427.50

BONDS AND MORTGAGES

Bond and Mortgage dated April 18, 1928 due April 18, 1933 at 6% made by George Matthews, property located on Brook Road and Ridge Avenue, Lakewood, New Jersey	$2,000.00	
Interest accrued	38.33	$2,038.33
Bond and Mortgage, dated October 25, 1927 due October 25, 1928 at 6% made by Robert Rice and Lucy J. Rice, property located on S/S of Sixth Street, Lakewood, New Jersey	$7,210.20	
Interest accrued from April 25, 1929	970.53	$8,180.73
		$10,219.06

STOCKS AND BONDS

	$200.00 Mecca Temple 5's due 1942 Nos. C322 and C2339, with September 1, 1930 and subsequent coupons attached	$100.00	
10	Accrued interest	14.50	114.50
	7000 roubles Russian Government 5½'s due February 1, 1926, Nos. 327277-83, with coupon No. 2 and subsequent coupons attached		
	In default		no value
	$100.00 Ocean Holding Company 2's due 1947, No. 12—		
20	wiped out by foreclosure		no value
	$1,200.00 Metropolitan Real Estate and Trust Co. 6% accumulation bond Class "A" No. 3701, in the name of Edmund J. Westhall endorsed for transfer to Beatrice E. Westhall		no value
	30 shares Standard Match Co., Inc. of New York, preferred stock, certificate No. 70, par		
30	value $100.00, in the name of E. J. Westhall, endorsed for transfer to Beatrice E. Westhall		no value
	30 shares Standard Match Co., of New York, common stock, certificate No. 70, par value $100.00, in the name of E. J.		

Westhall, endorsed for transfer to Beatrice E. Westhall — no value

224 shares Pennsylvania Gasoline Co., of Delaware, common stock, certificate No. B1193, par value $10.00, in the name of E. J. Westhall, endorsed for transfer to Beatrice E. Westhall — no value

50 shares The Locomobile Co. of Delaware, interim receipt for common stock, certificate No. NY932, no par value, in the name of Edward J. Westhall, endorsed for transfer to Beatrice E. Westhall — no value

40 shares of Locomobile Co. of Delaware, temporary certificate for common stock, certificate No. TC01808, no par value, in the name of Edmund J. Westhall, endorsed for transfer to Beatrice E. Westhall — no value

10 shares Farmers Dairy Association of New Jersey, capital stock, certificate No. 28, par value $100.00, in the name of Charles R. LeCompte, endorsed in blank — no value

22,500 shares La Reina de Plata Mining Co., of Arizona, capital stock, par value $1.00 certificates No. 115 for 10,000 shares, No. 86 for 7,500 shares, and No. 71 for 5000 shares, in the name

of E. J. WESTHALL, endorsed for transfer to Beatrice E. Westhall — no value

640 shares The Cigar Machine Corporation of America, of Delaware, common stock, par value $10.00, certificates No. 831 for 500 shares, No. 3559 for 100 shares and No. 581 for 40 shares, in the name of E. J. Westhall, endorsed for transfer to Beatrice E. Westhall — no value

40 shares Lakewood Coal Company, of New Jersey, par value $100.00, certificates No. 43 for 30 shares and No. 88 for 10 shares, in the name of E. J. Westhall, endorsed for transfer to Beatrice E. Westhall — no value

In hands of Receiver

249 shares Walter R. Thompson, Inc., Lakewood, N. J., certificates No. 17 in the name of Leon E. Westhall endorsed in blank, and certificate No. 32 in the name of E. J. Westhall, endorsed for transfer to Beatrice E. Westhall — no value

15 shares East Jersey Match Company, of New Jersey, par value $100.00, certificates No. 88 for 5 shares, No. 138 for 5 shares, and No. 206 for 5 shares, in the name of E. J. Westhall,

endorsed for transfer to Beatrice E. Westhall — no value

60 shares Consolidated Quarry Co. of Vermont, par value $50.00, certificates No. 422 for 30 shares, and No. 216 for 30 shares in the name of Edmund J. Westhall, endorsed for transfer to Beatrice E. Westhall — no value

50 shares The International Cap and Sealing Machine Company of Delaware, par value $100.00, certificate No. 26 in the name of E. J. Westhall, endorsed for transfer to Beatrice *W.* Westhall—obsolete since 1921 — no value

1 share Thomas G. Plant Corporation of Mass., 1st preferred stock, par value $100.00, temporary certificate No. TFP 131 in the name of Edmund J. Westhall, endorsed for transfer to Beatrice E. Westhall — no value

75 shares Verex Chemical Co. of New Jersey, no par value, certificate No. 9 in the name of Edmund J. Westhall, endorsed for transfer to Beatrice E. Westhall — no value

25 shares Sterling Tire Corporation, common stock, of Delaware, no par value, certificate No. 0734 in the name of E. J.

Westhall, endorsed for transfer to Beatrice E. Westhall	no value
Receipt of Lakewood Lodge No. 174 F. and A. M. for $50.00 in the name of E. J. Westhall	$1.00
5 shares of the sixth series of the Bradley Building and Loan Association, certificate No. 605 in the name of E. J. Westhall endorsed for transfer to Beatrice E. Westhall	399.20
427 shares United Shoe Machinery Corporation of New Jersey, common stock, par value $25.00, in the name of Beatrice E. Westhall, certificates Nos. 249098, 249099, 249100, 249101 and 249102 for 25 shares each; Nos. 249093, 249094, 249095, 249096 and 249097 for 10 shares each; No. 249108 for 2 shares; Nos. 249103, 249104, 249105, 249106, and 249107 for 50 shares each	21,621.88
4 shares Goodwin Chapter Temple Association, Inc. of New Jersey capital stock, par value 50.00, certificate No. 469 in the name of Beatrice E. Westhall	100.00
15 shares National Public Service Corporation of Virginia, 7% Series "A" preferred stock, par value $100.00, certificate No.	

NPO 1698, in the name of Beatrice E. Westhall	$1215.00	
Accrued interest	12.54	1,227.54
15 shares National Public Service Corporation, of Virginia, Class "A" common stock, no par value, certificate No. NA01393, in the name of Beatrice E. Westhall		$270.00
25 shares Durant Motors, Inc. of Delaware, capital stock, no par value, certificate No. 0228634 in the name of Beatrice E. Westhall		31.25
1 shares Metedeconk Company of New Jersey, capital stock, par value $500.00, certificate No. 55		500.00
10 shares Lakewood Trust Company, Lakewood, N. J. of New Jersey, capital stock, par value $100.00, certificate No. A206		1,650.00
15 shares The Heart of Lakewood, Inc. of New Jersey, capital stock, par value $100.00, certificate No. 7		1,500.00
$6000.00 The Heart of Lakewood, Inc. of New Jersey, 20 year non-interesting bearing Debenture Bonds, registered in the name of Beatrice E. Westhall, due February 1, 1950, Nos. 201, 202, 203 and 204 for $50.00		

each; Nos. 111, 112, 113, 114, 115, 116, 117 and 118 for $100.00 each; Nos. 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 for $500.00 each 6,000.00

JEWELRY

1 Scarf Pin—clover and white sapphire .50
1 Scarf Pin—turquoise stones .50
1 White Gold Diamond Pendant and Chain 15 diamonds 39.00
1 Gold Pansy Brooch—1½ dwt. 14K .84
1 White Gold Diamond Brooch—long 5.00
1 Ladies Elgin Wrist Watch 10.00
1 Man's Waltham Watch—open faced—16 size—14K Yellow case—engraved E. J. W. on back 25.00
1 14K Short Watch Chain 5½ dwt. 3.08
1 Ladies 10K Watch Chain—12 dwt. 4.80
1 Dollar Gold Piece 1.00
1 18K Wedding Ring 5 dwt. 3.60
4 Rings 1.00
1 Sea Shell Pencil—gold plated .25
1 Gold Tooth Pick and Ear Pick 1.00
1 White Gold Diamond and Sapphire Bracelet 400.00
1 10K Yellow Gold Bracelet—3 very imperfect diamonds 25.00
1 3 Diamond Ladies Ring—2½ carat 750.00
1 1 Diamond Ladies Ring—1 carat 225.00

AUTOMOBILES (Personal)

1 Buick Sedan—4 Door—5 Passenger 1930 Model No. 8-67, Engine No. 2674362 Serial No. 2514009

Blue Book Value	$755.00	
Estimated Value		$850.00

AUTOMOBILES (Business)

1 Motor Hearse—Lorraine Car Company Engine No. 11497 Car No. 4990

No Blue Book Value		
Estimated Value		100.00

1 Chevrolet Commercial Delivery —Capital Model Serial No. 2AA53620 Motor No. 3366821

Blue Book Value	60.00	
Estimated Value		75.00

1 Meteor Motor Car Company Hearse—1929 Engine No. 15 s 2669 Serial No. 11269

No Blue Book Value		
Estimated Value		1,000.00

1 Oakland 5 Passenger Sedan 1929 Engine No. 252595 Serial No. 240671 Model AAS

Blue Book Value	265.00	
Estimated Value		350.00

CASH IN BANKS AND ON HAND

(Personal)

Lakewood Trust Co., Lakewood, N. J.	
Savings Account No. 6962	19,552.87
Lakewood Trust Co., Lakewood, N. J.	
Checking Account	385.44
Cash	25.01
Gold Coin	192.50
1 English Gold Sovereign	4.75

CASH IN BANKS AND ON HAND

Cash and checks	$4,427.05
Lakewood Trust Co., Lakewood, N. J.	1,127.32

CHECKS AND NOTES

Check—Chas. F. McCue	$100.00	
Dated March 30, 1928 on Lakewood Trust Co., Lakewood, N. J.		
Paid on account	50.00	
Balance	$50.00	no value
Note—Harvey A. Pitcher	15.00	
Dated April 19, 1928		no value
Demand Note—Chas. J. Myers	200.00	
Balance due $30.00 payable at Lakewood Trust Co., dated Mar. 1, 1920 last payment Feb. 4, 1928		no value
Demand Note—Joseph H. Dabney	140.00	
Dated Feb. 24, 1917 last payment		

May 15, 1925 Balance due $52.00		no value
Demand Note—Thomas Johnson	10.00	
Dated July 14, 1926 payable at Lakewood Trust Co. Lakewood, N. J.		no value
Demand Note—Katherine B. Woolley	175.00	
Dated Dec. 23, 1927 payable at Lakewood Trust Co. last payment June 25, 1928 Balance due $100.00		no value
Demand Note—Margaret McDevitt	140.00	
Dated June 30, 1928 payable at Lakewood Trust Co.		no value
Note—John C. Rose	240.00	
Dated July 2, 1928 payable at Lakewood Trust Co.		no value
Note—J. Wesley Brower	325.00	
Dated August 10, 1931 payable three months after date to Beatrice E. Westhall Balance due $302.75		$302.75

FURNITURE, ACCESSORIES AND EQUIPMENT

(Business)

5 Floor Rugs	20.00
1 Desk	5.00
1 Desk Chair	1.00
1 Safe	5.00
4 Wicker Chairs (Bad order)	3.00

1	Wicker Settee	2.00
1	Waste Basket	.10
13	Assorted Mounted Birds	5.00
7	Assorted Pictures	1.75
1	Electric Fan 14 inch—old	2.00
1	Clock—old	1.00
1	Single Book Case and books	2.00
1	Desk Lamp	1.00
1	Fireplace Screen	.50
1	Pair Brass Sconces	1.00
1	Lecturn	2.50
1	Oak Chair	2.50
1	Bible	.50
20	yds. Casket Mattress	15.00
3	doz. Grave Markers	10.80
3	doz. Grave Vases	6.00
2	baskets artificial flowers	8.00
3	Artificial Door badges	9.00
1	Casket Bier	25.00
1	Casket Lamp	2.00
3	Flower Racks and Stand	20.00
1	Tarpaulin	5.00
	Odd lot Excelsior	3.00
	Odd lot Sheet Cotton	8.00
6	¾ gr. Escutcheons and thumb screws	33.00
1	gr. Bolts and sleeves for Bx. Hdles	2.50
1	lb. 3 oz. tacks	.20
2	gr. #6 Screws	1.00
8	gr. #9 Screws	6.00
2	lb. Escutcheon Pins	.50
	Babies Carrying Case	4.00
1	Mens Robe	9.00
1	sewing machine, 1 hair picker and mattress stuffing machine, miscellaneous	

	assortment paint brushes, broken chairs, etc.	5.00	
4	old wooden supply cabinets	5.00	
2	old work benches	5.00	
6	Ladies' Robes	26.00	
	Broken Bx. Memo Books	15.00	
	Broken Bx. Announcements Cards	5.00	
30	½ doz. pr. Gloves	86.80	10
5	¾ cases Embalming Fluid	136.00	
2	bottles San O Spray	6.00	
45	Caskets	751.08	
22	Outside Boxes	268.36	
14	doz. prs. Casket Handles	170.94	
14	sets Casket Handles	112.25	
4	Casket Pillows	10.00	
33	yds Casket Lining	23.10	
37	sets Casket Linings	188.62	
7	1/3 doz. Pr. Bx. Handles	51.00	20
3	sets Grave Lining	80.50	
	Lot of odd lumber	10.00	
20	doz. Camp Chairs	20.00	
6	doz. Camp Chairs	12.00	
2	Chests old tools	7.00	
	Miscellaneous small tools, nails, etc.	10.00	
4	Bx. Picture Glass	4.00	
	Odd lot old picture molding	5.00	
2	old Mahogany Tables	10.00	
2	Ladders	4.00	30
5	Embalming Boards	15.00	
1	Child's Embalming Board	3.00	
1	Carrying Basket	5.00	
3	prs. Casket Pedestals (old)	3.00	
5	Floor Rugs	20.00	
1	Gray Plush Carriage Robe	1.50	

1	pr. Black Horse Blankets	2.00
1	Fur Carriage Robe	3.00
4	pr. Bench Pedestals	4.00
2	Casket Trucks	6.00
1	frigid Lowering Device	15.00
10	lb. Candles	3.00

ACCOUNTS RECEIVABLE

Harvey R. Crouch	135.00
Carrie D. Fisher	146.80
Margaret Hagaman	18.00
Chas. Henry Brown	238.50
Joseph Coffman	60.00
Charles H. Scott	13.18
Harold Sanford	13.50
Charles G. Johnson	262.70
John Wesley Morey	48.52
Annie Meyers	168.20
John J. Bradley	23.00
Donald Simmonds	47.00
Edward F. Murphy	66.80
Nettie M. Clayton	35.00
Mary Hans	25.50
Gordon C. Frey	16.00
Annie M. Brown	58.00
George Felton	74.00
John B. Walker	18.00
Gertrude Spice	7.85
Franklin C. Braisted	108.10
Rodolph S. Diciana	41.80
Hannah L. Guice	96.94
Charles A. Estelle	206.65
Rachel Leet	15.00

Elsie Miller	59.00
Mildred Snyder	26.00
Hermine C. Hoerth	196.71
Una Williams	34.13
Clarence W. Smith	235.05
Jacob Walters	73.00
Cleveland Woodson, Jr.	77.00
Andrew J. Reynolds	26.00
Theo. A. Freeze	94.00
Ada B. Jones	35.20
Gloria May Hans	28.00
Frank A. Gargare	1.10
Victor C. H. Schwartz	14.00
Ethel May Reid	466.50
Frank G. Conklin	208.00
Rosa D. Clinton	62.63
Theodore Gardner	4.92
Doris E. Simmonds	32.00
Katherine Meyer	11.20
Frank H. Clayton	54.25
Bernard Snyder	32.00
Dominica Lippicello	8.00
Anna Thompson	504.50
Samuel W. Angel	151.00
Helena Luebben	100.00
Stanley A. Bennett	18.00
Harold H. Fielder	65.15
Theo. E. Milow	200.00
Rebecca Jones	27.80
Mamie Clinch	64.30
Dorothy B. Wilson	40.00
Elizabeth Whitfield	42.00
Elizabeth H. Sculthorpe	338.00
Joseph Vasapoli	60.00

	Rosa Fuentes	90.00
	Elizabeth Arasz	24.00
	Victor C. H. Schwartz	8.00
	Jas. W. Martin	40.00
	Alfred Barker	47.00
	Mary Stilwell	485.50
	Andrew F. Philips	28.00
10	Katie A. Johnson	277.00
	Leo Rubbin	43.00
	Sarah J. Bowe	325.05
	Rubin G. Wood	40.00
	Vincenzina Muriano	100.00
	Hazel Lane	238.00
	Alfred Bennett	16.00
	Lessie Ann Wiley	281.00
	Robert Evans	315.00
	Johanna L. Wedemeyer	80.00
20	Jenny Santandrea	134.20
	Cornelia Mary Clickner	280.00
	Henrietta M. Hawksford	50.00
	Geraldine Haley	25.00
	Abraham Kooper	50.00
	Phoebe Rockewell	79.25
	Euzelle Wiley	272.00
	Elmira Burdge	109.00
	Louis H. Arnold	457.50
	Emily Cline	144.94
30	Letitia Bishop	49.70
	Joseph A. Twyne	86.00
	Anna May Newman	35.31
	Paulina Saxton Pope	701.30
	Victoria V. Kelly	325.35
	William C. Eichacher	105.90
	Anna J. Edwards	235.00

Rebecca Church	263.34
William R. Boutilier	116.75
Sarah H. Skidmore	348.20
Elizabeth V. Hannon	565.45
C. Albert Voorhees	379.00
Charles A. Bye	617.35
Isadore Biesky	75.00
John Robert McPherson	34.25
Josiah B. Kinsey	523.10
Charles V. Johnson	70.00
Ella A. Thompson	50.00
Seymour Weinstein	50.00
Mr. and Mrs. William H. Comstock Rents	700.00
Susie D. Hicks Rents	1,688.54
C. E. McKelvey Rents	40.00
Newman School	12.00
	$92,726.65

Dated Lakewood, N. J.
October 5, 1931

OSBORNE W. HAVENS
Administrator
ARTHUR R. SMOCK
AMORY J. PARMENTIER
Appraisers

State of New Jersey, }
County of Ocean, } ss.

Osborne W. Havens, being duly sworn according to law upon his oath, deposes and says, that he is the Administrator of the Estate of Beatrice E. Westhall, deceased, in the foregoing inventory named, and that the foregoing is a true and perfect inventory of all and singular the goods and chattels, rights and credits, moneys and effects of the said Beatrice E. Westhall, deceased, so far as the same have come to his possession or knowledge.

Osborne W. Havens.

Sworn and Subscribed to before me this fifth day of October, nineteen hundred and thirty-one.

W. Durward McCloskey,
Master in Chancery of New Jersey.

State of New Jersey, }
County of Ocean, } ss.

Amory J. Parmentier, being duly sworn according to law upon his oath, deposes and says that he is one of the appraisers in the foregoing inventory named; that the goods and chattels, rights and credits and effects in said inventory specified were by him appraised at their just and true respective values according to the best of his judgment, and that Arthur R. Smock, the other appraiser in said inventory named, was present at the same time with deponent and consented to the said valuation and appraisement.

Amory J. Parmentier.

Sworn and Subscribed to before me this fifth day of October, nineteen hundred and thirty-one.

W. DURWARD MCCLOSKEY,
Master in Chancery of New Jersey.

PETITION AND ACCOUNT.

(Filed Sept. 21, 1934.)

OCEAN COUNTY ORPHANS' COURT.

In the matter of the Estate of BEATRICE E. WESTHALL, Deceased.	On Accounting. Petition.

To the Orphans' Court of the County of Ocean:

The petition of Osborne W. Havens, of the Township of Lakewood, County of Ocean and State of New Jersey, respectfully shows as follows:

1. Your petitioner is the administrator of the Estate of Beatrice E. Westhall, deceased, and herewith presents his account of his administration of the aforesaid estate.

2. The names and addresses of all persons interested in said accounting are as follows:

Virginia Hooper, of full age, daughter, Washington, D. C.

Jessie M. Havens, of full age, daughter, Lakewood, N. J.

Osborne W. Havens, administrator, Lakewood, N. J.

James E. Westhall, Jr., minor, grandchild, Lakewood, N. J.

Jane Westhall, of full age, mother of James E. Westhall, Jr., Lakewood, N. J.

Edmund J. Westhall, minor, grandchild, Lakewood, N. J.

Beatrice E. Westhall, minor, grandchild, Lakewood, N. J.

Elizabeth Westhall, of full age, mother of Edmund J. Westhall and Beatrice E. Westhall, Lakewood, N. J.

Lakewood Trust Company, guardian of James E. Westhall, Jr., Edmund J. Westhall and Beatrice E. Westhall, Lakewood, N. J.

Norman Underhill, bondsman, Lakewood, N. J.

Charles McCue, bondsman, Lakewood, N. J.

3. The following is a summary of his aforesaid account and accountant charges himself as follows:

To amount of inventory	$92,726.65
Amount collected in addition to inventory	5,586.04
	$98,312.69

Accountant prays allowance as follows:

Amount of expenditures, depreciations, distributions to residuary legatees, etc.	9,653.68
Balance in hands of administrator	$88,659.01

Your petitioner therefore prays that said account may be allowed, and also for the allowance of commissions and counsel fees.

OSBORNE W. HAVENS,
Administrator.

State of New Jersey, }
County of Ocean, } ss.

OSBORNE W. HAVENS, being duly sworn according to law upon his oath, deposes and says:

That he is the petitioner in the foregoing petition named and that the matters and things therein contained are true to the best of his knowledge and belief.

OSBORNE W. HAVENS.

Sworn and subscribed to before me this 20th day of September, nineteen hundred and thirty-four.

BEATRICE G. PENDLE,
Notary Public of New Jersey.

ACCOUNT.

OCEAN COUNTY ORPHANS' COURT.

In the matter of the Estate of BEATRICE E. WESTHALL, Deceased. } On Accounting. Account.

The account of Osborne W. Havens, administrator of the Estate of Beatrice E. Westhall, deceased, shows as follows:

FIRST

Said Accountant charges himself as follows:

1931	
Oct. 5—To amount of Inventory and Appraisement	$92,726.65
Aug. 22—Workmen's Compensation Insurance, Commercial Casualty Company, Harry Brown, employee; June 25, 1931 to July 5, 1931	31.42
Aug. 26.—A. W. Pettit—rental for chairs	10.00
Sept. 15—To Dividend, Class A. Common Stock — National Public Service Corp.	6.00
Oct. 2—To Dividend, 7% Series A Preferred Stock—National Public Service Corp.	

Amount of payment	$26.25	
Amount included in Inventory	12.54	
		13.71
Oct. 5—To Dividend United Shoe Machinery Corp.—Common Stock		693.88
Dec. 15—To Dividend, Class A Common Stock—National Public Service Corp.		6.00
Dec. 31—To Interest on deposit Lakewood Trust Co.		26.17
1932		
Jan. 1—To Interest on Savings Account —Lakewood Trust Co.		$391.04
Jan. 5—To Dividend United Shoe Machinery Corp.		266.88
Jan. 7—To Dividend, 7% Series A Preferred Stock—National Public Service Corp.		26.25
Jan. 13—To Interest on Savings Account—Lakewood Trust Co.		28.80
Mar. 16—To Dividend, Class A. Common Stock—National Public Service Corp.		6.00
Apr. 1—To Dividend, 7% Series A Preferred Stock—National Public Service Corp.		26.25
Apr. 6—To Dividend United Shoe Machinery Corp.		266.88
June 9—To Interest Mecca Temple 5's, due 1942		
Amount of payment	$20.00	
Amount included in Inventory	14.50	
		5.50

July 5—To Dividend United Shoe Machinery Corp.		266.88
Aug. 11—To Interest on Mortgage—George Matthews		
Amount of payment	$158.33	
Amount included in Inventory	38.33	
		120.00
Oct. 5—To Dividend United Shoe Machinery Corp.		266.88
Oct. 15—To refund from amount paid on account of New Jersey State Inheritance Tax		128.91
1933		
Jan. 5—To Dividend United Shoe Machinery Corp.		266.88
Jan. 16—To Interest Katherine B. Woolley note		18.00
Apr. 5—To Dividend United Shoe Machinery Corp.		266.88
July 5—To Dividend United Shoe Machinery Corp.		266.88
Oct. 5—To Dividend United Shoe Machinery Corp.		253.53
Dec. 2—To rent—Lucy J. Rice		15.00
1934		
Jan. 2—To rent—Lucy J. Rice		15.00
Jan. 5—To Dividend United Shoe Machinery Corp.		1,267.66
Feb. 13—To rent—Lucy J. Rice		20.00
Mar. 17—To rent—Lucy J. Rice		20.00
Apr. 5—To Dividend United Shoe Machinery Corp.		266.88
Apr. 7—To rent—Lucy J. Rice		20.00

May 10—To rent—Lucy J. Rice		20.00
June 13—To rent—Israel Whissel (Rice)		5.00
July 5—To Dividend United Shoe Machinery Corp.		266.88
July 13—To rent—Israel Whissell (Rice)		5.00
Aug. 13—To rent—Israel Whissell (Rice)		5.00
		$98,312.69

SECOND

Said accountant prays allowances as follows:

1931

One Buick Sedan, one three-diamond Ladies Ring, 2½ carat, one one-diamond Ladies Ring, 1 carat, delivered to Jessie M. Havens on account of distributive share		1,825.00
One Ladies 10K Watch Chain, 12 dwt., and one White Gold Diamond and Sapphire Bracelet delivered to Virginia W. Hooper on account of distributive share		404.80
	Voucher No. (Lkwd Trust Co.)	
Sept. 3—O. M. Cochran—Flowers	1	54.40
Sept. 3—Lakewood Transportation Co.—Cartage	2	9.50
Sept. 15—C. O. Fogg, Surrogate	3	40.00
Sept. 16—Worldwide Advertising Co.—Death notices	4	51.80
Sept. 16—N. J. Bell Telephone Co.—Telephone charges	5	41.20
Sept. 16—Henry Johnson—Ice	6	8.64

Sept. 16—Lakewood Water Co.—Light & Water	7	38.73
Sept. 17—Steinbach Company—Merchandise	8	10.74
Sept. 17—E. G. Herbener—Physician	9	45.00
Sept. 22—Charles B. Curtis—Opening grave for deceased	10	12.00

Voucher No. (Lkwd Trust Co.)

1931

Sept. 24—Lakewood Trust Co.—Safe Deposit Box Rent	11	$7.50
Oct. 5—Underhill & Underhill—Automobile repairs	12	10.80
Oct. 6—Arthur R. Smock—Appraisal fee on personal property	13	150.00
Oct. 6—A. J. Parmentier—Appraisal fee on personal property	14	150.00
Oct. 8—Lakewood Water Co.—Light & Water	15	34.17
Oct. 10—Robert Rice—Grave openings	16	390.00
Oct. 10—Greenwood Cemetery—Graves	17	68.00
Oct. 16—C. J. Brown—Plumbing	18	5.75
Dec. 8—Alex McDonald—Funeral expense-marker	19	45.00
Dec. 10—H. J. Woolley—Appraisal fee—jewelry	20	5.00
Dec. 31—Matthews & Muller — Insurance premium on Rice property	21	116.05

	Voucher No. (Peoples Nat'l Bk)		
1932			
Feb. 25—Dunn Applegate—Cartage	1	$4.00	
Feb. 25—Margaret Clayton—Music lessons	2	4.00	
May 4—Peoples National Bank—Safe Deposit Box rent	3	10.00	10
Aug. 11—Treasurer State of N. J.——State Inheritance Tax	4	1,000.00	
Aug. 18—Lakewood Building & Loan Association—Balance due on Mtge—Leon E. Westhall	5	3,246.99	
Aug. 20—Arthur R. Smock—Appraisal fee—Second St. property	6	10.00	
Aug. 20—Joel P. Hendrickson—Appraisal fee—Second St. property	7	10.00	
Nov. 18—Matthews & Muller — Insurance premium — Rice property	8	110.30	20
	Voucher No.		
1933			
Jan. 11—J. F. Baldwin—St. Mary's Church—Masses	9	$60.00	
Aug. 3—Elizabeth C. Westhall—Refund on account of over-payment—E. J. Westhall and Beatrice E. Westhall — Lakewood Bldg & Loan	10	220.30	30
Oct. 18—W. Durward McCloskey—Foreclosure costs—Rice	11	300.71	
Nov. 29—James R. Hensler—Sheriff's fees—Rice	12	79.16	

1934			
Mar. 20—W. Durward McCloskey—Account legal services		13	1,000.00
Apr. 9—Matthews & Muller—Insurance premium—Rice		14	51.90
July 5—Peoples National Bank—Safe Deposit Box rent		15	22.00
Federal tax on checks			.24
			$9,653.68

SUMMARY

This accountant charges himself with	$98,312.69
This accountant prays allowance for	9,653.68
Balance	$88,659.01

OSBORNE W. HAVENS,
Administrator.

Dated—Lakewood, N. J.
September 12, 1934.

State of New Jersey, }
County of Ocean, } ss.

OSBORNE W. HAVENS, being duly sworn according to law upon his oath, deposes and says:

That he is the administrator in the foregoing account named, and that the said account is in all things just and true, both as to the charges and discharges thereof, according to the best of his knowledge and belief.

OSBORNE W. HAVENS.

Sworn and subscribed to before me this twelfth day of September, nineteen hundred and thirty-four.

BEATRICE G. PENDLE,
Notary Public of New Jersey.

STATEMENT OF ASSETS.

The following is a full statement or list of the securities, investments and assets of which the balance of the aforesaid Estate of Beatrice E. Westhall, deceased, in the hands of the said Osborne W. Havens, administrator as aforesaid, consists, and a statement of all changes made in the securities of the said estate since the filing of the inventory:

Securities now in the hands of accountant

BONDS AND MORTGAGES

(Converted into Real Estate)

Bond and Mortgage, dated October 25, 1927, due October 25, 1928, at 6%, made by Robert Rice and Lucy J. Rice, property located on S/S side of Sixth Street, Lakewood, New Jersey.

The mortgage held by Beatrice E. Westhall at the time of her decease was foreclosed and the premises purchased by the Administrator at Sheriff's Sale, Toms River, N. J., on November 28, 1933, and Deed of Sheriff to Administrator recorded in

the Ocean County Clerk's Office, Toms River, N. J., on December 27, 1933, in Book 951 of Deeds for said County on pages 366, &c. $7,767.73

STOCKS AND BONDS

10 $200.00 Mecca Temple 5's, due 1942, Nos. C322 and C2339, with September 1, 1930, and subsequent coupons attached 100.00

7000 roubles Russian Government 5½'s, due February 1, 1926, Nos. 327277-83, with coupon No. 2 and subsequent coupons attached
In default no value

$100.00 Ocean Holding Company 2's, due
20 1947, No. 12 — wiped out by foreclosure no value

$1,200.00 Metropolitan Real Estate and Trust Co. 6% accumulation bond Class "A" No. 3701, in the name of Edmund J. Westhall, endorsed for transfer to Beatrice E. Westhall no value

30 shares Standard Match Co., Inc. of New York, preferred stock, certificate No. 70, par value $100.00, in the
30 name of E. J. Westhall, endorsed for transfer to Beatrice E. Westhall no value

30 shares Standard Match Co. of New York, common stock, certificate No. 70, par value $100.00, in the name of E. J. Westhall, endorsed for transfer to Beatrice E. Westhall no value

224 shares Pennsylvania Gasoline Co. of Delaware, common stock, certificate No. B1193, par value $10.00, in the name of E. J. Westhall, endorsed for transfer to Beatrice E. Westhall — no value

50 shares The Locomobile Co. of Delaware, interim receipt for common stock, certificate No. NY932, no par value, in the name of Edward J. Westhall, endorsed for transfer to Beatrice E. Westhall — no value

40 shares Locomobile Co. of Delaware, temporary certificate for common stock, certificate No. TC01808, no par value, in the name of Edmund J. Westhall, endorsed for transfer to Beatrice E. Westhall — no value

10 shares Farmers Dairy Association of New Jersey, capital stock, certificate No. 28, par value $100.00, in the name of Charles R. LeCompte, endorsed in blank — no value

22,500 shares La Reina de Plata Mining Co., of Arizona, capital stock, par value $1.00, certificates No. 115 for 10,000 shares, No. 86 for 7,500 shares, and No. 71 for 5000 shares, in the name of E. J. Westhall, endorsed for transfer to Beatrice E. Westhall — no value

640 shares The Cigar Machine Corporation of America, of Delaware, common stock, par value $10.00, certificates No. 831 for 500 shares, No. 3559 for 100 shares and No. 581 for 40

shares, in the name of E. J. Westhall, endorsed for transfer to Beatrice E. Westhall — no value

40 shares Lakewood Coal Company, of New Jersey, par value $100.00, certificates No. 43 for 30 shares and No. 88 for 10 shares, in the name of E. J. Westhall, endorsed for transfer to Beatrice E. Westhall

In hands of Receiver — no value

249 shares Walter R. Thompson, Inc., Lakewood, N. J., certificates No. 17 in the name of Leon E. Westhall, endorsed in blank, and No. 32 in the name of E. J. Westhall, endorsed for transfer to Beatrice E. Westhall — no value

15 shares East Jersey Match Company, of New Jersey, par value $100.00, certificates No. 88 for 5 shares, No. 138 for 5 shares, and No. 206 for 5 shares, in the name of E. J. Westhall, endorsed for transfer to Beatrice E. Westhall — no value

60 shares Consolidated Quarry Co. of Vermont, par value $50.00, certificates No. 422 for 30 shares, and No. 216 for 30 shares in the name of Edmund J. Westhall, endorsed for transfer to Beatrice E. Westhall — no value

50 shares The International Cap and Sealing Machine Company of Delaware, par value $100.00, certificate No. 26 in the name of E. J. Westhall, endorsed for transfer to Beatrice E. Westhall — obsolete since 1921 — no value

1 share Thomas G. Plant Corporation of Mass., 1st preferred stock, par value $100.00, temporary certificate No. TFP 131 in the name of Edmund J. Westhall, endorsed for transfer to Beatrice E. Westhall	no value
75 shares Verex Chemical Co. of New Jersey, no par value, certificate No. 9 in the name of Edmund J. Westhall, endorsed for transfer to Beatrice E. Westhall	no value
25 shares Sterling Tire Corporation, common stock, of Delaware, no par value, certificate No. 0734, in the name of E. J. Westhall, endorsed for transfer to Beatrice E. Westhall	no value
Receipt of Lakewood Lodge No. 174 F. and A. M. for $50.00 in the name of E. J. Westhall	$1.00
5 shares of the sixth series of the Bradley Building & Loan Association, certificate No. 605 in the name of E. J. Westhall, endorsed for transfer to Beatrice E. Westhall	$399.20
427 shares United Shoe Machinery Corporation of New Jersey, common stock, par value $25.00, in the name of Beatrice E. Westhall, certificates Nos. 249098, 249099, 249100, 249101 and 249102 for 25 shares each; Nos. 249093, 249094, 249095, 249096 and 249097 for 10 shares each; No. 249108 for 2 shares; Nos. 249103, 249104,	

249105, 249106 and 249107 for 50 shares each	$21,621.88
4 shares Goodwin Chapter Temple Association, Inc. of New Jersey Capital stock, par value $50.00, certificate No. 469 in the name of Beatrice E. Westhall	100.00
15 shares National Public Service Corporation of Virginia, 7% Series "A" preferred stock, par value $100.00, certificate No. NPO 1698, in the name of Beatrice E. Westhall	1,215.00
15 shares National Public Service Corporation, of Virginia, Class "A" common stock, no par value, certificate No. NAO1393, in the name of Beatrice E. Westhall	270.00
25 shares Durant Motors, Inc., of Delaware, capital stock, no par value, certificate No. 0228634 in the name of Beatrice E. Westhall	31.25
1 share Metedeconk Company of New Jersey, capital stock, par value $500.00, certificate No. 55	500.00
10 shares Lakewood Trust Company, Lakewood, N. J., of New Jersey, capital stock, par value $100.00, certificate No. A206	1,650.00
15 shares The Heart of Lakewood, Inc. of New Jersey, capital stock, par value $100.00, certificate No. 7	1,500.00
$6000.00 The Heart of Lakewood, Inc. of New Jersey, 20 year non-interest bearing Debenture Bonds, registered	

in the name of Beatrice E. Westhall, due February 1, 1950, Nos. 201, 202, 203, and 204 for $50.00 each; Nos. 111, 112, 113, 114, 115, 116, 117 and 118 for $100.00 each; Nos. 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 for $500.00 each		6,000.00

CASH IN BANKS AND ON HAND

Lakewood Trust Co., Lakewood, N. J.—Savings Account		$19,972.71
Lakewood Trust Co., Lakewood, N. J.—Checking Account		8,865.16
Lakewood Trust Co., Lakewood, N. J.—Checking Account		1,519.28
The Peoples National Bank of Lakewood, N. J.—Checking Account		1,309.07
Peoples National Bank of Lakewood—Checking Account		1,759.59
Cash on hand		2,723.78

CHECKS AND NOTES

Check—Chas. F. McCue	$100.00	
Dated March 30, 1928 on Lakewood Trust Co., Lakewood, N. J.—Paid on account	50.00	
Balance	$50.00	no value
Note — Harvey A. Pitcher	15.00	
Dated April 19, 1928		no value
Demand Note — Chas. J. Myers	200.00	
Balance due $30.00 payable at		

Lakewood Trust Co., dated Mar. 1, 1920 last payment Feb. 4, 1928		no value
Demand Note — Joseph H. Dabney	140.00	
Dated Feb. 24, 1917 last payment May 15, 1925—Balance due $52.00		no value
Demand Note — Thomas Johnson	10.00	
Dated July 14, 1926 payable at Lakewood Trust Co., Lakewood, N. J.		no value
Demand Note — Katherine B. Woolley	175.00	
Dated Dec. 23, 1927, payable at Lakewood Trust Co., last payment June 25, 1928 — Balance due $100.00		no value
Demand Note — Margaret McDevitt	140.00	
Dated June 30, 1928, payable at Lakewood Trust Co.		no value
Note — John C. Rose	240.00	
Dated July 2, 1928, payable at Lakewood Trust Co.		no value

ACCOUNTS RECEIVABLE

Harvey R. Crouch	$135.00
Carrie D. Fisher	146.80
Margaret Hagaman	18.00
Chas. Henry Brown	238.50
Joseph Coffman	60.00

Charles H. Scott	13.18
Harold Sanford	13.50
Charles G. Johnson	262.70
John Wesley Morey	48.52
Annie Meyers	168.20
John J. Bradley	23.00
Donald Simmonds	47.00
Nettie M. Clayton	35.00
Mary Hans	25.50
Gordon C. Frey	16.00
Annie M. Brown	58.00
George Felton	74.00
John B. Walker	18.00
Gertrude Spice	7.85
Franklin C. Braisted	108.10
Rodolph S. Diciana	41.80
Hannah L. Guice	96.94
Charles A. Estelle	206.65
Rachel Leet	15.00
Elsie Miller	59.00
Mildred Snyder	26.00
Hermine C. Hoerth	196.71
Una Williams	24.13
Clarence W. Smith	235.05
Jacob Walters	73.00
Andrew J. Reynolds	26.00
Theo. A. Freeze	94.00
Ada B. Jones	35.20
Gloria May Hans	28.00
Victor C. H. Schwartz	14.00
Ethel May Reid	466.50
Frank G. Conklin	208.00
Rosa D. Clinton	62.63
Theodore Gardner	4.92

	Doris E. Simmonds		32.00
	Katherine Meyer		11.20
	Bernard Snyder		32.00
	Dominica Lippicello		8.00
	Anna Thompson		504.50
	Samuel W. Angel		151.00
	Helena Luebben		100.00
10	Stanley A. Bennett		18.00
	Harold H. Fielder		65.15
	Theo. E. Milow	$200.00	
	Paid on account	100.00	
			100.00
	Mamie Clinch		64.30
	Elizabeth Whitfield		42.00
	Elizabeth H. Sculthorpe		338.00
	Joseph Vasapoli		60.00
	Rosa Fuentes		90.00
20	Elizabeth Arasz		24.00
	Victor C. H. Schwartz		8.00
	Jas. W. Martin		40.00
	Alfred Barker		47.00
	Mary Stilwell		485.50
	Andrew F. Philips		28.00
	Katie A. Johnson		277.00
	Leo Rubbin		43.00
	Sarah J. Bowe		325.05
	Rubin G. Wood		40.00
30	Hazel Lane		238.00
	Alfred Bennett		16.00
	Lessie Ann Wiley		281.00
	Robert Evans		315.00
	Johanna L. Wedemeyer	$80.00	
	Paid on account	40.00	
			40.00

Jenny Santandrea		134.20
Cornelia Mary Clickner	$280.00	
Paid on account	110.00	
		170.00
Henrietta M. Hawksford		50.00
Geraldine Haley		25.00
Phoebe Rockewell		79.25
Euzelle Wiley		272.00
Emily Cline	$144.94	
Paid on account	90.00	
		54.94
Letitia Bishop	$49.70	
Paid on account	39.50	
		10.20
Joseph A. Twyne		86.00
Anna May Newman		35.31
Rebecca Church		263.34
William R. Boutilier	$116.75	
Paid on account	30.00	
		86.75
C. Albert Voorhees		379.00
John Robert McPherson	$34.25	
Paid on account	15.00	
		19.25
Mr. and Mrs. Wm. H. Comstock—Rents		700.00
Susie D. Hicks—Rents		1,688.54
Seymour Weinstein	50.00	
Paid on account	15.00	
		35.00
Louis H. Arnold	457.50	
Paid on account	457.00	
		.50
		$88,659.01

The following Changes in the Investments have been made by the Accountant since the filing of the Inventory:

HOUSEHOLD

Household furniture and furnishings, and Undertaking Business together with equipment and automobiles sold to Osborne W. Havens and the proceeds deposited. Inventory value $4,284.50

BONDS AND MORTGAGES

Bond and Mortgage dated October 25, 1927, due October 25, 1928 at 6% made by Robert Rice and Lucy J. Rice, property located on S/S of Sixth Street, Lakewood, New Jersey.

The mortgage held by Beatrice E. Westhall at the time of her decease was foreclosed and the premises purchased by the Administrator at Sheriff's Sale, Toms River, N. J., on November 28, 1933, and Deed of Sheriff to Administrator recorded in the Ocean County Clerk's Office, Toms River, N. J., on December 27, 1933, in Book 951 of Deeds for said County on pages 366 &c. 7,767.73

Bond and Mortgage of George Matthews for $2000. on premises located on Brook Road, Lakewood, N. J., was paid on the 11th day of August, 1932,

by the said mortgagor and the proceeds deposited.

Amount of principal	$2000.00	
Accrued interest	38.33	
		2,038.33

STOCKS AND BONDS

$200.00 Mecca Temple 5's, due 1942, Nos. C322 and C2339, with September 1, 1930 and subsequent coupons attached. Accrued interest received and deposited 14.50

15 shares National Public Service Corporation of Virginia, 7% Series "A" Preferred Stock, par value $100.00, certificate No. NPO 1698, in the name of Beatrice E. Westhall. Accrued interest received and deposited 12.54

JEWELRY

1 Scarf Pin, turquoise stones; 1 Gold Pansy Brooch, 1½ dwt. 14K; 1 White Gold Diamond Brooch — long; 1 Ladies Elgin Wrist Watch; 1 10K Yellow Gold Bracelet, 3 very imperfect diamonds, sold to Elizabeth Westhall and the proceeds deposited. Inventory value 41.34

1 18K Wedding Ring, 5 dwt; 1 Sea Shell Pencil, gold plated; 1 Gold Tooth Pick and Ear Pick, sold to Osborne W. Havens and the proceeds deposited.

Inventory value 4.85

1 Scarf Pin, clover and white sapphire; 1 White Gold Diamond Pendant and Chain, 15 diamonds; 1 Man's Waltham Watch, open faced, 16 size, 14K Yellow Gold case, engraved E. J. W. on back; 1 14K Short Watch Chain, 5½ dwt; 1 Dollar Gold Piece; 4 Rings, sold to Jane Westhall and the proceeds deposited. Inventory value 69.58

1 Ladies 10K Watch Chain, 12 dwt. and 1 White Gold Diamond and Sapphire Bracelet delivered to Virginia W. Hooper as advance on distributive share. Inventory value 404.80

1 3 Diamond Ladies Ring, 2½ carat and 1 1 Diamond Ladies Ring, 1 carat, delivered to Jessie M. Havens as advance on distributive share. Inventory value 975.00

AUTOMOBILES

1 Buick Sedan — 4 door, 5 passenger 1930 Model No. 8-67, Engine No. 2674362, Serial No. 2514009 delivered to Jessie M. Havens as advance on distributive share. Inventory value 850.00

CASH IN BANKS AND ON HAND

Cash on hand (Gold coin) deposited in Lakewood Trust Company 192.50

Cash on hand deposited in Lakewood Trust Co. 25.01

1 English Gold Sovereign sold and proceeds deposited	4.75
Cash and checks deposited in Lakewood Trust Co.	4,427.05
Lakewood Trust Co., Lakewood, N. J. Business Account deposited in General Checking Account	1,133.84

CHECKS AND NOTES

Note—J. Wesley Brower, dated August 10, 1931, payable three months after date, in the sum of $325. Balance due in the sum of $302.75 collected and proceeds deposited	$302.75

ACCOUNTS RECEIVABLE

	Inventory Value	Amt. collected
C. E. McKelvey	$40.00	$40.00
Paid in full and proceeds deposited		
Abraham Kooper	50.00	50.00
Paid in full and proceeds deposited		
Isadore Biesky	75.00	75.00
Paid in full and proceeds deposited		
Vincenzina Muriano	100.00	100.00
Paid in full and proceeds deposited		
Letitia Bishop	49.70	39.50

	Paid on account and proceeds deposited	39.50	
			10.20
	Charles V. Johnson	70.00	70.00
	Paid in full and proceeds deposited		
10	Ella A. Thompson	50.00	50.00
	Paid in full and proceeds deposited		
	Josiah B. Kinsey	523.10	523.10
	Paid in full and proceeds deposited		
	Charles A. Bye	617.35	617.35
	Paid in full and proceeds deposited		
	Victoria V. Kelly	325.35	325.35
20	Paid in full and proceeds deposited		
	Cornelia Mary Clickner	280.00	110.00
	Paid on account and proceeds deposited	110.00	
			170.00
	William R. Boutilier	116.75	30.00
	Paid on account and proceeds deposited	30.00	
30			86.75
	Newman School	12.00	12.00
	Paid in full and proceeds deposited		
	Sarah H. Skidmore	348.20	348.20

Paid in full and proceeds deposited			
Cleveland Woodson, Jr.	77.00	77.00	
Paid in full and proceeds deposited			
Louis H. Arnold	457.50	457.50	
Paid on account and proceeds deposited	457.00		10
	.50		
Emily Cline	144.94	90.00	
Paid on account and proceeds deposited	90.00		
	54.94		
Paulina Saxton Pope	701.30	701.30	
Paid in full and proceeds deposited			20
Johanna L. Wedemeyer	80.00	40.00	
Paid on account and proceeds deposited	40.00		
	40.00		
Elmira Burdge	109.00	109.00	
Paid in full and proceeds deposited			
Anna J. Edwards	235.00	235.00	
Paid in full and proceeds deposited			30
Theo. E. Milow	200.00	100.00	
Paid on account and proceeds deposited	100.00		
	100.00		

Dorothy B. Wilson	40.00	40.00
Paid in full and proceeds deposited		
William C. Eichacher	105.90	105.90
Paid in full and proceeds deposited		
John R. McPherson	34.25	15.00
Paid on account and proceeds deposited	15.00	
	19.25	
Seymour Weinstein	50.00	15.00
Paid on account and proceeds deposited	15.00	
	35.00	
Rebecca Jones	27.80	27.80
Paid in full and proceeds deposited		
Frank A. Gargare	1.10	1.10
Paid in full and proceeds deposited		
Elizabeth Hannon	565.45	565.45
Paid in full and proceeds deposited		
Frank H. Clayton	54.25	54.25
Paid in full and proceeds deposited		
E. F. Murphy Estate	66.80	66.80
Paid in full and proceeds deposited		

Dated—Lakewood, N. J.
September 12, 1934.

OSBORNE W. HAVENS,
Administrator.

EXCEPTIONS TO INVENTORY AND FINAL ACCOUNT OF ADMINISTRATOR.

(Filed October 13, 1934.)

OCEAN COUNTY ORPHANS' COURT.

In the matter of the ESTATE OF BEATRICE E. WESTHALL, deceased.	Exceptions to Inventory and Final Account of Administrator.

William H. Kelly, Commissioner of Banking and Insurance in charge of Lakewood Trust Company, in liquidation, pursuant to Chapter 171, Laws of 1913, as amended, guardian of property of Beatrice E. Westhall, a beneficiary of the estate of Beatrice E. Westhall, deceased, Edmund J. Westhall, a beneficiary of the estate of Beatrice E. Westhall, deceased, James E. Westhall, a beneficiary of the estate of Beatrice E. Westhall, deceased, respectfully excepts to the inventory and account of Osborne W. Havens, administrator of the estate of Beatrice E. Westhall, deceased, in each and every of the following particulars.

Jane Westhall, mother and guardian of James E. Westhall, a beneficiary of the estate of Beatrice E.

Westhall, deceased, respectfully excepts to the inventory and account of Osborne W. Havens, administrator of the estate of Beatrice E. Westhall, deceased, in each and every of the following particulars.

Elizabeth Westhall, mother and guardian of Beatrice E. Westhall and Edmund J. Westhall, beneficiaries of the estate of Beatrice E. Westhall, deceased, respectfully excepts to the inventory and account of Osborne W. Havens, administrator of the estate of Beatrice E. Westhall, deceased, in each and every of the following particulars.

FIRST EXCEPTION.

Exception is taken to the inventory as filed by the administrator on the ground that the business assets of Beatrice E. Westhall, deceased, were not appraised at their true and respective values.

SECOND EXCEPTION.

Exception is taken to the inventory in that the affidavit of the administrator and one of the appraisers was taken by the proctor for the estate.

THIRD EXCEPTION.

Administrator has failed to account for both revenue and expenses of the undertaking business of Beatrice E. Westhall, deceased, as carried on by the administrator from August 13, 1931, up to and including August 9, 1932.

FOURTH EXCEPTION.

Exception is taken to the payment of $150.00 to Arthur R. Smock (voucher No. 13, Lakewood Trust Company) on the ground that the said Arthur R. Smock was not familiar with the values of the articles listed on the appraisal and was unable to make a true appraisal of said articles.

FIFTH EXCEPTION.

Exception is taken to the payment of $150.00 to Amory J. Parmentier (voucher No. 14, Lakewood Trust Company) on the ground that the said Amory J. Parmentier was not familiar with the values of the articles listed on the appraisal and was unable to make a true appraisal of the said articles.

SIXTH EXCEPTION.

Exception is taken to the alleged payment of $390.00 to Robert Rice (voucher No. 16, Lakewood Trust Company) on the ground that nothing was due to the said Robert Rice and that the said Robert Rice never received any part of the said $390.00.

SEVENTH EXCEPTION.

Exception is taken to the alleged payment of $68.00 to Greenwood Cemetery Association on the ground that nothing was due to the Greenwood Cemetery Association and on the further ground that the Greenwood Cemetery Association never received

the alleged payment of $68.00 or any part thereof (voucher No. 17, Lakewood Trust Company).

EIGHTH EXCEPTION.

Exception is taken to the payment (check No. 13, People's National Bank in Lakewood) of $1,000.00 to W. Durward McCloskey, dated March 20, 1934, on account of alleged legal services. The accountant has filed no voucher explaining the nature of the alleged legal services, to whom said services were rendered, and for what purpose the said services were rendered. Accountant has not properly explained this item. If the payment referred to purports to be a payment for legal services rendered the administrator, then said payment was improper and should not have been paid for the reason that it was not authorized by this Court and for the further reason that it was excessive and unwarranted in fact and in law.

NINTH EXCEPTION.

Exception is taken to the accountant's statement of cash in banks, page 11 of account, on the ground that the only cash available for distribution at present which is on deposit is in the amount of $1,739.59 on deposit in the People's National Bank in Lakewood.

TENTH EXCEPTION.

Exception is taken to accountant's report of cash on deposit in Lakewood Trust Company, Lakewood,

N. J., in the aggregate sum of $30,357.15. The aggregate sum of $30,357.15 is divided as follows:

213 shares capital stock of *The* Lakewood Trust Company at $15.62	$ 3,327.06
Deferred certificates of deposit	11,851.52
Certificates of Participation	15,178.57
	$30,357.15

The accountant is chargeable with gross negligence and mismanagement of the affairs of decedent's estate in that he failed and refused to make any distribution of the funds on deposit in Lakewood Trust Company when he was well aware of the precarious financial condition of the said banking institution long prior to the date of closing of said bank, to wit, January 13, 1932.

ELEVENTH EXCEPTION.

Exception is taken to the item of $1,309.07, cash on deposit, People's National Bank of Lakewood, N. J. People's National Bank of Lakewood, N. J., is in liquidation, which fact is well known to accountant. The alleged deposit of $1,309.07 is practically worthless.

TWELFTH EXCEPTION.

Exception is taken to the item of "cash on hand $2,723.78" on the ground that the cash should have been deposited in interest bearing securities and on the further ground that the administrator made no

application to the Orphans' Court to put the said money out at interest.

THIRTEENTH EXCEPTION.

Exception is taken to the sale of "Household furniture and Furnishings, and Undertaking Business, together with equipment and automobiles sold to Osborne W. Havens * * * " at the inventory value on the ground that the said inventory value was grossly inadequate. Exceptant had no independent advice of counsel at the time the contract of sale was executed, to wit, October 1, 1931. That the inventory price was represented as being fair and adequate when, as a matter of fact, the price offered and subsequently paid was grossly inadequate and was known to be inadequate by the administrator at the time the contract of sale was executed and at the time the administrator is alleged to have paid the consideration. Nothing was paid for the good will of decedent's business, although it was sold by the administrator to himself individually.

FOURTEENTH EXCEPTION.

Exception is taken to that item of accountant's report, page 15, wherein it states that the "bond and mortgage of George Matthews for $2,000.00 on premises located on Brook Road, Lakewood, N. J., was paid on the 11th day of October, 1932, by the said mortgagor and the proceeds deposited" on the ground that the said proceeds of $2,000.00 were never deposited by the administrator. Said accountant has

retained the aforesaid sum of $2,000.00 from August 11, 1932, to the present time. No interest has been accounted for or accrued on the said sum of $2,000.00.

FIFTEENTH EXCEPTION.

Exception is taken to the allowance of any commission and/or counsel fees because of the gross negligence of the accountant in that he has failed to file an inventory within three months after his appointment and in violation of the terms and conditions of the administrator's bond, and on the further ground that the business chattels were priced at a grossly inadequate figure and on the further ground that there is no evidence on file of the approval of the Surrogate of the appraiser appointed by said accountant, and on the further ground that accountant has failed to make any accounting of decedent's business which accountant carried on for the estate from August 13, 1931, to August 9, 1932, and on the further ground that no account was filed by accountant within one year from the date of his appointment.

SIXTEENTH EXCEPTION.

Exception is taken to the inclusion in the accountant's final report of "15 shares National Public Service Corporation of Virginia, 7% series 'A' preferred stock, par value $100.00, certificate No. NPO 1698, in the name of Beatrice E. Westhall, $1215.00;" and to the inclusion in the final report of "15 shares National Public Service Corporation of Virginia,

Class 'A' common stock, no par value, certificate No. NAO 1395, in the name of Beatrice E. Westhall, $270.00. The aforesaid stock has been retained by the administrator from August 25, 1931, up to the time of the filing of the final account, to wit, September 21, 1934. Accountant was negligent in retaining the aforesaid stock and not disposing of it within a reasonable time of his appointment. The stock is now worthless. National Public Service Corporation of Virginia having been adjudicated bankrupt July 8, 1932. Accountant should accordingly be surcharged with the loss aggregating $1285.00.

SEVENTEENTH EXCEPTION.

Exception is taken to the inclusion in the accountant's final report of 10 shares of Lakewood Trust Company, Lakewood, N. J., capital stock, par value $100.00, certificate No. A206, $1650.00. Accountant was negligent in retaining this stock and not disposing of it within a reasonable time of his appointment. The stock is now worthless, Lakewood Trust Company having been closed on January 13, 1932. The condition of the bank was well known to the accountant who took no steps to protect the interest of the estate.

EIGHTEENTH EXCEPTION.

Exception is taken to the administrator's management of the estate of Beatrice E. Westhall, deceased, in that the administrator was lax, dilatory

and negligent in collecting the accounts receivable of the said estate.

NINETEENTH EXCEPTION.

Exception is taken to that item of accountant's report, page 19, wherein it states, "Elizabeth Hannon $565.45 paid in full and proceeds deposited," on the ground that the said proceeds of the account receivable of Elizabeth Hannon in the amount of $565.45 were never deposited by the administrator. The said accountant has retained the aforesaid sum of $565.45 from the date of payment, which is not stated in the accountant's report, to the present time. No interest has been accounted for or accrued on the said sum of $565.45.

JNO. A. MATTHEWS,
Proctor for Exceptants.

SUPPLEMENTAL EXCEPTIONS.

(Filed December 14, 1934.)

OCEAN COUNTY ORPHANS' COURT.

In the matter of the ESTATE OF BEATRICE E. WESTHALL, deceased.	Supplemental Exceptions.

TWENTIETH EXCEPTION.

Exception is taken to the alleged sale of the undertaking business, together with the good will of

the said business, the merchandise, stock in trade, equipment and accessories, by the administrator, Osborne W. Havens, to himself individually, on the ground that the said alleged sale was fraudulent and against the best interest of the estate of Beatrice E. Westhall, deceased; that the price alleged to have been paid therefor was grossly inadequate; that the transfer of the business and its assets was fraudulently conceived by the administrator in that the administrator did not advertise the said business and its assets for sale; that the administrator did not obtain buyers or bidders for the said business and its assets, but attempted to sell the business to himself individually; that the administrator as such did not have any independent advice of counsel when he attempted to sell the said business and its assets; that the infant heirs of the estate of Beatrice E. Westhall, deceased, who have a one-half interest in the said business had no independent advice of counsel and were not represented by counsel at the time of the alleged sale.

TWENTY-FIRST EXCEPTION.

Exception is taken to the accountant's inventory on the ground that the accountant has failed to list thereon the unexpired insurance for property damage and public liability carried on the automobiles owned by Beatrice E. Westhall, deceased, at the time of her death, to wit, August 13, 1931.

TWENTY-SECOND EXCEPTION.

Exception is taken to the allowance of any commissions and/or counsel fees because of the gross

negligence of the accountant in that he subjected the estate to liability, in that he operated the automobiles of the estate subsequent to October 1, 1931, for his own use and benefit without having the license transferred from the name of Beatrice E. Westhall to Osborne W. Havens, individually, and Jessie Havens; and on the further ground that the accountant had insured the Rice property at twice the value of the property as shown on the New Jersey State Inheritance Tax return.

JOHN A. MATTHEWS,
Proctor for Exceptants.

CONCLUSIONS.

(Filed March 26, 1936.)

OCEAN COUNTY ORPHANS' COURT.

In the matter of the ESTATE OF BEATRICE E. WESTHALL, deceased.	On Exception to Inventory and Account. Conclusions.

APPEARANCES:

For the Accountant: MR. DEVOE TOMLINSON and MR. DURWARD MCCLOSKEY.

For the Exceptants: HONORABLE JOHN A. MATTHEWS.

Decided: March 24th, 1936.

To the inventory and account of Osborne W. Havens, administrator of the estate of Beatrice E. Westhall, deceased, the exceptants have filed twenty-two exceptions. Testimony was taken stenographically at seven hearings. As the record is complete, a review of it here will serve no useful purpose. The exceptions will be considered practically in their numerical order, as filed:

FIRST EXCEPTION.

This exception charges, in substance, that the assets of this estate were not appraised at their respective true values. Under this exception, two principal points were developed. First, the value of the personal property used in connection with the undertaking business, including usable supplies, stock in trade and equipment; and, secondly, the good will, if any, of the long-established undertaking business.

In general, I find the appraisal adequate and satisfactory. While it is true that the appraisers may have had little personal knowledge of the value of the paraphernalia of an undertaking business, the values set forth in the inventory are rather fully substantiated by the exceptants' witness, Mr. Brown, a licensed embalmer, employed in that same business for thirty years.

Excepting the item of "good will," there is no evidence sufficient to lead me to believe that the other assets were appraised at unfair or inadequate values. An item of insurance premiums is dealt with elsewhere.

Conclusions

As to the value of the "good will" of the Westhall undertaking business, the inventory is silent; neither is it in any manner accounted for. This particular business was established in 1868, by the father of Edmund J. Westhall and was, after his death, continued by the son, Edmund J. Westhall, until his death in September, 1928. Thereafter, the business was continued for the widow, Beatrice E. Westhall, until her death on August 13, 1931. From that time to the present, the business has been carried on by the accountant-administrator of the estate of Beatrice E. Westhall, but for his own account, he claiming to have purchased the business as of the date of the death of Mrs. Westhall. Still more pertinent that the sixty-six years of continuous existence of the business is the fact that the name "Westhall" is held out to the public until the time of this hearing, if not until today. Mr. Havens erected such a sign himself. (Testimony, p. 221, also p. 297.) The conclusion is inescapable that the name had value, and the worth of a trade name is only one of the elements of the value of "good will." Again, the contract (Exhibit E-1) set up as evidence of the terms of the alleged purchase of the business specifically indicated the good will.

The testimony does not indicate the value of the good will of this business. Hence, there must be a further appraisal or further testimony offered to establish the true value of the good will of the Westhall undertaking business as of August 13, 1931, and the accountant charged accordingly. To this extent, the first exception will be allowed.

SECOND EXCEPTION.

Exception is taken to the inventory in that the affidavit of the administrator and one of the appraisers was taken by the proctor of the estate. This is the fact.

Rule 48 of the Orphans' Court prescribes the taking of such an affidavit by the proctor or any member of his firm. However, P. L. 1915, Chapter 187, provides in substance that the oath of any administrator or appraiser upon any inventory may be taken before any person qualified to administer oaths in the State of New Jersey. As the Court cannot, by rule, invalidate the statute, Rule 48 must be directory in nature. These affidavits are valid in law. Possibly this Court could refuse to recognize these affidavits and order a correction of the defect. In this case, such procedure would accomplish nothing of benefit to this estate. The second exception is, therefore, dismissed.

FOURTH AND FIFTH EXCEPTIONS.

These exceptions, considered together, object to the payment of a fee of $150.00 to each of the appraisers, on the ground that they were not familiar with the values of the articles listed in the inventory.

Mr. Parmentier had appraised at least one undertaking business previously. He had acted as appraiser in several other estates. He had had banking experience and knew how to ascertain values of securities. Mr. Smock is also well qualified. The

test of the accuracy of the work of the appraisers appears in the testimony of Harry E. Brown, at least so far as concerns the undertaking business. True, the item of good will was omitted, but what these appraisers did, they did well.

The fourth and fifth exceptions are dismissed.

SIXTH AND SEVENTH EXCEPTIONS.

The charges contained in these exceptions are not substantiated by the testimony. It does appear that the payments were in fact made, and the administrator's explanations thereof are satisfactory.

The sixth and seventh exceptions are dismissed.

EIGHTH EXCEPTION.

The substance of this exception is an objection to the payment of $1000.00 to W. Durward McCloskey, proctor for the administrator, on account of legal services; charging (a) that no voucher was filed; (b) that it was excessive; and (c) that it was not authorized by the Court.

It has always been my opinion that no counsel fees should ever be paid to the proctor for an estate except upon application to and allowance by the Court. That at once determines the value of the services rendered and protects the fiduciary and counsel alike.

Sometimes circumstances might warrant a payment on account, substantiated by a proper voucher, and leaving a safe margin of balance to be awarded later. The former is certainly the usual and far better practice; the latter, questionable. However,

it has been held that a counsel fee, paid in full or in part, is not to be disallowed and the executor or administrator surcharged simply because the usual approved procedure was not followed.

In the recent case of "In re: Megargee," 117 N. J. Eq. 347, the Prerogative Court, reversing the decree of the Ocean County Orphans' Court, remitted the case with instruction to take proof and determine and allow the true value of legal services rendered. Such proof was taken at length in this case, and I cannot say that the amount paid to Mr. McCloskey was excessive.

This exception is dismissed.

NINTH, TENTH AND ELEVENTH EXCEPTIONS.

While I cannot entirely agree as to the accuracy of the statement of the ninth, tenth and eleventh exceptions, the evidence indicated that the account does not show the true cash position of the estate. The 213 shares of capital stock of The Lakewood Trust Company are not cash, and may not even have a cash value. The deferred certificates of deposit are not cash items, although they may be paid in cash eventually. The present worth of these deferred certificates of deposit is probably less than the value shown in the account. The value of the "Certificates of Participation"—certainly not cash—is problematical, depending upon many factors. They may have a present cash value, but they constitute neither cash on hand nor in the bank.

At the time of the closing of "Lakewood Trust Company," the time had not arrived when the ad-

ministrator was bound to—or could be called upon—to make distribution. In fact, on the preceding day, he could not have made more than a partial distribution. Again, the evidence fails to show that there was any fraud or negligence on the part of the administrator in not withdrawing the large sums of money on deposit. Hence, the administrator cannot be surcharged on the ninth, tenth and eleventh exceptions.

The account should, however, be restated to show the true cash position of the estate.

TWELFTH AND FOURTEENTH EXCEPTIONS.

In view of the condition of banks, the rates of interest paid on accounts and the uncertain position of securities in general, these exceptions should be dismissed.

SIXTEENTH AND SEVENTEENTH EXCEPTIONS.

In the absence of proof of fraud, gross neglect or action other than that of ordinary judgment, the administrator cannot be surcharged. The account should be restated to show the true values, if any, of these securities.

EIGHTEENTH EXCEPTION.

This exception will be dismissed. I find that the administrator used due diligence in collecting outstanding accounts, many of which are worthless.

NINETEENTH EXCEPTION.

This exception is dismissed.

TWENTY-FIRST EXCEPTION.

In view of the findings on the third, thirteenth, twentieth and twenty-second exceptions, this exception should be dismissed.

THIRD, THIRTEENTH, TWENTIETH AND TWENTY-SECOND EXCEPTIONS.

A consideration of the evidence as a whole, leads to certain inescapable conclusions:

1. With reference to the family conference on September 30, 1931, and the resultant agreement (dated October 1, 1931, and marked Exhibit E-1) and alleged sale, the heirs and next of kin of Beatrice E. Westhall acted without the advice of independent counsel.

2. The supposed sale of the undertaking business was upon the basis of a price determined by inventoried values of physical assets and business equipment. This alleged sale included "good will" and the use of the name "Westhall," but the value thereof formed no part of the consideration money to be paid. This "good will" had a substantial value. Hence, the purchase price of the business was grossly inadequate. The inadequacy of the purchase price of the business is very forcibly demonstrated by

the fact that the annual income from the business is approximately double the amount of the so-called agreed purchase price.

3. The fiduciary attempted to deal with himself as an individual to his own advantage and to the disadvantage of his trustants.

4. Two of the next of kin of the decedent were minors. It is questionable whether or not their guardian had the power to, or could with propriety, enter into the agreement of October 1, 1931 (Exhibit E-1).

It necessarily follows that the agreement of October 1, 1931 (Exhibit E-1), must be treated as an utter nullity so far as it relates to the sale of the undertaking business. The alleged sale of the Westhall undertaking business by this administrator to himself, individually, is absolutely void. The administrator must account for his administration of the business from the date of the death of Mrs. Westhall to the present time. Credit may be allowed for the amount paid into the funds of the estate on account of the attempted purchase.

I am of the opinion that no commissions should be allowed on the corpus of the estate, but that commissions may be allowed on the income, depending upon an accounting as to the business. I will hear the proctors further on this phase; also on the question of counsel fees and the form of the decree to be entered.

RUSSELL G. CONOVER,
Judge.

CONCLUSIONS.

(Filed Oct. 20, 1936.)

OCEAN COUNTY ORPHANS' COURT.

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In the Matter of the Estate of BEATRICE E. WESTHALL, Deceased. } Conclusions. Part II.

I am still of the opinion that the Westhall undertaking business had a substantial "good-will" value at the time of the death of Mrs. Westhall, September 13, 1931. The case of Mullin v. Mullin, 85 N. J. E. 531, even though it deals with an undertaking business cannot be applied to the present case for the reason pointed out by proctor for the exceptants, namely, that since 1927 it is possible to carry on such a business for the benefit of the estate of a deceased undertaker.

The general method of computing the value of the "good-will" of a business is indicated in re: Hall, 94 N. J. E. 398, and in re: Deutz, 105 N. J. E. 671. Admittedly, the value of a "good-will" is somewhat speculative in that it cannot be determined with the same exactitude that many other values may be determined. As applied to the case before me, and especially in consideration of the "personal service"

element which does exist in this type of business the factor which is termed "years of purchase" should be considered quite small or short. I think a factor of two years is sufficient. Here I find that the average net income of the business during the life of the decedent, Beatrice Westhall, after deducting interest on the capital investment and bad accounts chargeable to those years, is approximately $6,400.00, per year. Thus, I think that the business had a "good-will" value, as fairly and definitely as it can be ascertained, of $12,800.00. The administrator accountant will therefore be charged with that amount.

Since the administrator has purported to purchase the business and has, in fact, carried it on for his own account under the theory of a purchase for so long a time, it would perhaps be inequitable to regard the purchase as void. This is particularly true in view of the fact that the purchaser and administrator is the same person.

It clearly appears that both Mr. McCloskey and his associate, as well as Mr. Matthews and his associate, have done considerable work in this estate. I will, therefore, allow a counsel fee of $4,000.00 to Mr. McCloskey, as proctor for the administrator, and a fee of $4,000.00 to Mr. Matthews, as proctor for the exceptants.

I will sign an order drawn in accordance herewith, together with the conclusions heretofore filed.

RUSSELL G. CONOVER,
Judge.

DECREE.

(Filed Nov. 25, 1936.)

OCEAN COUNTY ORPHANS' COURT.

In the Matter of the Estate of BEATRICE E. WESTHALL, Deceased.	On Exception to Inventory and Account. Decree.

This matter being opened to the Court by W. Durward McCloskey, proctor for the accountant, and in the presence of John A. Matthews, proctor for the exceptants, and it appearing to the Court that Osborne W. Havens was appointed administrator of the Estate of Beatrice E. Westhall, deceased, and that Osborne W. Havens filed an inventory of the estate of the decedent and an account of his administration, and notice of settlement of the administrator's account was mailed to exceptants on September 12, 1934, stating that said account would be reported by the Surrogate of Ocean County for settlement by this Court on the 19th day of October, 1934.

And it further appearing to the Court that exceptions were filed to the inventory and account of the administrator and that testimony was taken in open court, and the Court having heard and read the testimony and having read the briefs submitted by

the proctors for all parties, and having heard the argument of proctors in open court, and good cause having been shown,

It Is, on this twenty-fifth day of November, 1936, Ordered, Adjudged and Decreed that that part of the first exception wherein the exceptants allege that the business assets of Beatrice E. Westhall, deceased, were not appraised at their true value is allowed in so far as it relates to the good-will of the business as not having been inventoried.

It Is Further Ordered, Adjudged and Decreed that the second, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, fourteenth sixteenth, seventeenth, eighteenth, nineteenth and twenty-first exceptions be and they are hereby dismissed.

It Is Further Ordered, Adjudged and Decreed that the third, thirteenth, twentieth and twenty-second exceptions be and they are hereby sustained, and the administrator is hereby Ordered, Adjudged and Decreed to pay forthwith to the Estate of Beatrice E. Westhall, the sum of Twelve Thousand Eight Hundred Dollars ($12,800.00) as and for the good-will of the Westhall Undertaking Business purchased by him, together with interest at six percent on the said sum of Twelve Thousand Eight Hundred Dollars from October 1, 1931, up to and including the date of payment; and

It Is Further Ordered, Adjudged and Decreed that the administrator be denied any commission on corpus of the said estate and that a commission of Two Hundred Seventy-nine and 30/100 Dollars ($279.30) be allowed the administrator on the income of the said estate.

RUSSELL G. CONOVER,
Judge.

Notice of Appeal of Carl K. Withers to Prerogative Court

NOTICE OF APPEAL.

(Filed Dec. 23, 1936.)

OCEAN COUNTY ORPHANS' COURT.

In the Matter of the Estate of BEATRICE E. WESTHALL, Deceased.	On Petition, &c. Notice of Appeal.

Carl K. Withers, successor to William H. Kelly, Commissioner of Banking and Insurance in charge of Lakewood Trust Company, in liquidation, pursuant to Chapter 171, Laws of 1913, as amended, guardian of property of Beatrice E. Westhall, a beneficiary of the Estate of Beatrice E. Westhall, deceased, Edmund J. Westhall, a beneficiary of the Estate of Beatrice E. Westhall, deceased, and James E. Westhall, a beneficiary of the Estate of Beatrice E. Westhall, deceased; the said beneficiaries, to wit, Beatrice E. Westhall, Edmund J. Westhall and James E. Westhall all being minors, and Jane Westhall, mother and guardian of James E. Westhall, a beneficiary of the Estate of Beatrice E. Westhall, deceased, and Elizabeth Westhall, mother and guardian of Beatrice E. Westhall and Edmund J. Westhall, beneficiaries of the Estate of Beatrice E. Westhall, deceased, hereby appeal from the decrees

of the Orphans' Court of Ocean County, made by the Honorable Russell G. Conover, Judge of the said Ocean County Orphans' Court, dated the 25th day of November, 1936, which decrees order

(1) That exception number one in so far as the exception relates to the personal property of the deceased is dismissed.

(2) Appellant's appeal from that part of the decrees in which it is ordered, adjudged and decreed that the second, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, fourteenth, sixteenth, seventeenth, eighteenth, nineteenth and twenty-first exceptions filed by the appellants were dismissed.

(3) Appellants appeal from that part of the decrees of November 25th, 1936, wherein the Court ordered, adjudged and decreed that a counsel fee of four thousand dollars ($4,000.00) be allowed to W. Durward McCloskey, proctor for the administrator-accountant for the work done in connection with the said exceptions, together with the sum of fifteen dollars ($15.00) subpoena charges and service fees.

(4) Appellants appeal from that part of the decrees of November 25th, 1936, wherein the Court ordered, adjudged and decreed that the sum of three hundred twenty-eight dollars and sixty cents ($328.60) be paid to Mary Elverson for stenographic charges.

(5) Appellants appeal from that part of the decrees of November 25th, 1936, wherein the Court

ordered, adjudged and decreed that W. Durward McCloskey, proctor for the administrator be allowed an additional counsel fee of twenty-five hundred dollars ($2500.00) less the sum of one thousand dollars ($1000.00) already paid to the said W. Durward McCloskey on the 20th day of March, 1934, for work done and services rendered to the said administrator prior to the filing of the exceptions to the inventory and account.

(6) Appellants appeal from the decrees of November 25th, 1936, on the further ground that the said decrees fail to direct the administrator-accountant to restate his account.

(7) Appellants appeal from the decrees of November 25th, 1936, on the further ground that the said decrees fail to charge the administrator- accountant with the unexpired insurance premiums as of the date of death of the deceased, to the Prerogative Court of the State of New Jersey.

JNO. A. MATTHEWS,
Proctor for Appellants.

Dated: December 23, 1936.

Notice of Appeal of Osborne W. Havens to Prerogative Court

NOTICE OF APPEAL.

(Filed Feb. 20, 1937.)

OCEAN COUNTY ORPHANS' COURT.

In the Matter of the Estate of BEATRICE E. WESTHALL, Deceased.

On Petition of Appeal from Decrees of the Ocean County Orphans' Court.
Notice of Appeal.

Osborne W. Havens, administrator of the Estate of Beatrice E. Westhall, deceased, hereby appeals to the New Jersey Prerogative Court from the whole of the two decrees made by the Ocean County Orphans' Court November 25, 1936, in this cause, one of which said decrees adjudicates upon exceptions to the administrator's Accounting, surcharges the administrator with $12,800 and interest and awards commissions to the administrator; and the other of which said decrees awards counsel fees, stenographic fees and Surrogate's fees.

EWART & BENNETT,
Proctors for Osborne W. Havens, Appellant.
HOWARD EWART,
Of Counsel.

PETITION OF APPEAL.

(Filed Jan. 13, 1937.)

NEW JERSEY PREROGATIVE COURT

In the matter of the appeal of CARL K. WITHERS, successor to WILLIAM H. KELLY, Commissioner of Banking and Insurance in charge of Lakewood Trust Company, in liquidation, pursuant to Chapter 171, Laws of 1913, as amended, guardian of property of BEATRICE E. WESTHALL, a beneficiary of the Estate of BEATRICE E. WESTHALL, deceased, EDMUND J. WESTHALL, a beneficiary of the Estate of BEATRICE E. WESTHALL, deceased, and JAMES E. WESTHALL, a beneficiary of the Estate of BEATRICE E. WESTHALL, deceased, the said beneficiaries, to wit, BEATRICE E. WESTHALL, EDMUND J. WESTHALL and

On Petition of Appeal.
Petition of Appeal.

Petition of Appeal of Carl K. Withers in Prerogative Court

JAMES E. WESTHALL all being minors, and JANE WESTHALL, mother and guardian of JAMES E. WESTHALL, a beneficiary of the Estate of BEATRICE E. WESTHALL, deceased, and ELIZABETH WESTHALL, mother and guardian of BEATRICE E. WESTHALL and EDMUND J. WESTHALL, beneficiaries of the Estate of BEATRICE E. WESTHALL, deceased, from the decrees of the Orphans' Court of the County of Ocean, allowing the account of Osborne W. Havens, administrator of the Estate of BEATRICE E. WESTHALL, deceased.

To the Ordinary of the State of New Jersey:

The petition of Carl K. Withers, successor to William H. Kelly, Commissioner of Banking and Insurance, in charge of Lakewood Trust Company, in liquidation, pursuant to Chapter 171, Laws of 1913 as amended, guardian of property of Beatrice E. Westhall, a beneficiary of the Estate of Beatrice E. Westhall, deceased, Edmund J. Westhall, a beneficiary of the Estate of Beatrice E. Westhall, de-

ceased, and James E. Westhall, a beneficiary of the Estate of Beatrice E. Westhall, deceased, the said beneficiaries, to wit, Beatrice E. Westhall, Edmund J. Westhall and James E. Westhall all being minors, and Jane Westhall, mother and guardian of James E. Westhall, a beneficiary of the Estate of Beatrice E. Westhall, deceased, and Elizabeth Westhall, mother and guardian of Beatrice E. Westhall and Edmund J. Westhall, beneficiaries of the estate of Beatrice E. Westhall, deceased, of the County of Ocean and State of New Jersey, respectfully show that:

1. That on the 12th day of September, 1934, Osborne W. Havens, the administrator of the Estate of Beatrice E. Westhall, deceased, presented his account and inventory as such administrator to the Orphans' Court for the County of Ocean, and exceptions having been filed thereto by your petitioners, the Orphans' Court of Ocean County on the 25th day of November, 1936, made its order overruling certain of the said exceptions and sustaining certain of the said exceptions.

2. Your petitioners hereby appeal from the following portions of the said orders:

(a) From that part of the said order of the said Orphans' Court overruling appellants' exception to the said account alleging that the said accountant did not charge himself with the true value of the business assets of the Estate of Beatrice E. Westhall, deceased, as part of the estate of the said Beatrice E. Westhall, deceased.

(b) From that part of the said order of the said Orphans' Court overruling appellant's ninth exceptions eighth to the said account alleging that the said accountant had paid to W. Durward McCloskey $1000.00 on March 20, 1934, on account of alleged legal services rendered the accountant. The exceptants charging that the accountant had filed no voucher explaining the nature of the alleged legal services, to whom said services were rendered and for what purpose the said services were rendered, and that the said payment was not authorized by the Orphans' Court and that the payment was excessive, and unwarranted in fact and law.

(c) From that part of the said order of the said Orphans' Court overruling appellants' ninth exception to the said account alleging that the cash in bank on page 11 of the said account was not a true statement of the cash account, and on the grounds that the only cash available for distribution at the date of the filing of the said account was the amount of $1,759.59 cash on deposit in the People's National Bank in Lakewood.

(d) From that part of the said order of the said Orphans' Court overruling appellant's tenth exception to the said accountant's report on cash on deposit in Lakewood Trust Company, Lakewood, New Jersey, in the aggregate sum of $30,357.15 on the ground that the aforesaid sum was not cash on deposit but was made up of the following:

213 shares capital stock of *The*

Lakewood Trust Company at $15.62	$ 3,327.06
Deferred certificates of deposit	11,851.52
Certificates of Participation	15,178.57
	$30,357.15

The exceptants allege that the accountant was chargeable with gross negligence and mismanagement of the affairs of the decedent's estate in that he failed and refused to make any distribution of the funds on deposit in Lakewood Trust Company when he was well aware of the precarious financial condition of Lakewood Trust Company long prior to the date of closing of said bank, to wit, January 13, 1932.

(e) From that part of the said order of the said Orphans' Court overruling appellants' eleventh exception to the said account, wherein the accountant stated that there was cash on deposit in People's National Bank of Lakewood in the amount of $1,309.07. People's National Bank of Lakewood was in liquidation at the date of the said account, which fact was well known to the accountant, and it is further alleged that the alleged deposit of $1,309.07 is practically worthless and should not have been included as part of the corpus of the said estate.

(f) From that part of the said order of the said Orphans' Court overruling appellants' twelfth exception to the said account wherein it was alleged that the "Cash on hand $2,723.78" set forth in the accountant's account should have been deposited in interest bearing securities, and on the further

ground that the administrator made no application to the Orphans' Court to put the said money out at interest and the failure to do so caused a loss to the said estate.

(g) From that part of the said order of the said Orphans' Court overruling appellants' fourteenth exception to the said account wherein said account was stated that the "bond and mortgage of George Matthews for $2,000.00 on premises located on Brook Road, Lakewood, New Jersey, was paid on the 11th day of October, 1932, by the said mortgagor and the proceeds deposited, when as a matter of fact the proceeds of the said mortgage were never deposited by the administrator and the said accountant has retained the aforesaid sum of $2,000.00 from August 11, 1932, to the date of the filing of the said exceptions and no interest had been accounted for nor accrued on the said sum of $2,000.00.

(h) From that part of the said order of the said Orphans' Court overruling appellants' sixteenth exception to the said account alleging that the retention of "15 shares National Public Service Corporation of Virginia, 7% series 'A' preferred stock, par value $100.00, certificate No. NPO 1698, in the name of Beatrice E. Westhall, $1,215.00;" and the retention of "15 shares National Public Service Corporation of Virginia, class 'A' common stock, no par value, certificate No. NAO 1395 in the name of Beatrice E. Westhall, $270.00" caused a loss to the estate in that the accountant was negligent in retaining the aforesaid stock, did not use due diligence and

reasonable prudence in disposing of the said stock within a reasonable time after accountant's appointment as administrator. The stock is worthless. The National Public Service Corporation of Virginia having been adjudicated bankrupt July 8, 1932, and the exceptants alleging that the accountant should accordingly be surcharged with the loss aggregating $1,485.00.

(i) From that part of the said order of the said Orphans' Court overruling appellants' seventeenth exception to the said account alleging that the accountant should be surcharged the sum of $1,650.00 representing the inventory value of ten shares of Lakewood Trust Company, Lakewood, New Jersey, capital stock, par value $100.00, certificate No. A206, exceptants alleging that the retention of the said stock caused a loss to the estate amounting to $1,650.00, that the accountant did not use due diligence and reasonable prudence in retaining the said stock and that the said stock should have been disposed of within a reasonable time after administrator's appointment. The stock is now worthless. The condition of the aforesaid Trust Company was well known to the accountant, who took no steps to protect the interest of the estate.

(j) From that part of the said order of the said Orphans' Court overruling appellants' eighteenth exception to the said account alleging that the said accountant did not manage the Estate of Beatrice E. Westhall in a proper and diligent manner, that the administrator was lax, dilatory and negligent in collecting the accounts receivable of the said estate.

(k) From that part of the said order of the said Orphans' Court overruling appellant's twenty-first exception to the said account alleging that the said accountant had failed to charge himself as administrator with the unexpired insurance for property damage, and public liability, carried on the automobiles owned by Beatrice E. Westhall, deceased, at the time of her death, to wit, August 13, 1931.

(l) Appellants further appeal from the said orders of November 25, 1936, because the said orders fail to direct that the accountant restate his account as directed under sixteenth and seventeenth exceptions, page 7 of the conclusions, filed by the Orphans' Court Judge, and as directed by the conclusions of March 24, 1936, last sentence, page 6.

(m) Appellants further appeal from the said orders of November 25, 1936, on the grounds that the Court directed the payment of commissions on income to the said accountant and at the same time sustained the twenty-second exception filed by the appellants wherein the appellants except to the allowance of any commission to the said accountant.

(n) Appellants further appeal from the said orders of November 25, 1936, in that the Court allowed a counsel fee of $4,000.00 to W. Durward McCloskey, proctor for the accountant for the work done in connection with the said exceptions, and the Court at the same time sustained the twenty-second exception wherein exception was taken to the allowance of any counsel fee because of the gross negligence of the

accountant, in that he subjected the estate to liability; and on the further ground that the fee, if any, allowed the proctor for the accountant should be paid by the accountant in his individual capacity and should not be charged to the estate; and on the further ground that if the proctor for the accountant shall be allowed a fee for the work done in the exceptions it should be charged against that interest in the estate for whom no exception had been filed and not against the infant exceptants.

(o) Appellants further appeal from the orders of November 25, 1936, wherein the Orphans' Court allowed a counsel fee to W. Durward McCloskey proctor for the administrator in the amount of $2,500.00 for work done and services rendered to the said administrator prior to the filing of the exceptions to the inventory and account. The Court sustained the twenty-second exception wherein it was charged that no allowance should be made for counsel fees because of the gross negligence of the accountant.

(p) Appellants further appeal from the orders of November 25, 1936, on the ground that the orders did not agree with the conclusions part 1 and part 2 of the Ocean County Orphans' Court, in that the conclusions of March 24, 1936, treats the alleged agreement of October 1, 1931 as absolutely void and the conclusions part 2 treats the sale as valid.

(q) Appellants further appeal from the said orders of November 25, 1936, in that it was ordered that $2500.00 be paid to W. Durward McCloskey and

no provision for such an order is contained in the conclusions or in the opinion of the Court, the Court having found in conclusions part 2 that a $4000.00 fee be allowed to W. Durward McCloskey. And the said counsel fee was allowed notwithstanding the fact that the Court sustained the twenty-second exception, which excepted to the allowance of any counsel fees and/or commissions.

3. Your petitioners complain and allege that the aforesaid orders of the Orphans' Court are erroneous, improper and illegal in the foregoing parts; and that your petitioners are aggrieved thereby.

JOHN A. MATTHEWS,
Proctor for and of Counsel with Petitioners.

Dated: Newark, New Jersey, January 8th, 1937.

[ENDORSED]

Service of a true copy of the petition of appeal filed in the above-named cause is hereby acknowledged this day of January, 1937.

Proctors for the

ANSWER.

(Filed Feb. 24, 1937.)

NEW JERSEY PREROGATIVE COURT.

In the matter of the appeal of CARL K. WITHERS, successor to WILLIAM H. KELLY, Commissioner of Banking and Insurance in charge of Lakewood Trust Company, in liquidation, pursuant to Chapter 171, Laws of 1913, as amended, guardian of property of BEATRICE E. WESTHALL, a beneficiary of the Estate of BEATRICE E. WESTHALL, deceased, EDMUND J. WESTHALL, a beneficiary of the Estate of BEATRICE E. WESTHALL, deceased, and JAMES E. WESTHALL, a beneficiary of the Estate of BEATRICE E. WESTHALL, deceased, the said beneficiaries, to wit, BEATRICE E. WESTHALL, EDMUND J. WESTHALL and

On Petition of Appeal. Answer.

JAMES E. WESTHALL all being minors, and JANE WESTHALL, mother and guardian of JAMES E. WESTHALL, a beneficiary of the Estate of BEATRICE E. WESTHALL, deceased, and ELIZABETH WESTHALL, mother and guardian of BEATRICE E. WESTHALL and EDMUND J. WESTHALL, beneficiaries of the Estate of BEATRICE E. WESTHALL, deceased, from the decrees of the Orphans' Court of the County of Ocean, allowing the account of Osborne W. Havens, administrator of the estate of BEATRICE E. WESTHALL, deceased.

The answer of Osborne W. Havens, administrator of the Estate of Beatrice E. Westhall, respondent, to the petition of appeal of Carl K. Withers, et als., appellants:

I.

This respondent is advised, believes and submits that the portions of said decrees complained of by the appellants, Carl K. Withers, et als., are just and

lawful and this respondent denies that the aforesaid portions of the said decrees are erroneous, improper and illegal, and alleges that said portions of the said decrees are legal, proper and correct.

He, therefore, prays that the said petition of appeal filed by Carl K. Withers, et als. be dismissed, with costs.

EWART & BENNETT,
Proctors for Respondent, Osborne W. Havens.

[ENDORSED]

Consent is hereby given to the filing of the within answer as of within time.
John A. Matthews,
Proctor for the Appellants,
Carl K. Withers, et als.

PETITION OF APPEAL.

(Filed March 10, 1937.)

NEW JERSEY PREROGATIVE COURT.

In the matter of the appeal of OSBORNE W. HAVENS from two certain decrees of the Ocean County Orphans' Court, both dated November 25, 1936, the one adjudicating upon exceptions filed to the account of OSBORNE W. HAVENS as administrator of the ESTATE OF BEATRICE E. WESTHALL, deceased, and allowing commissions to said administrator and the other allowing counsel fees and expenses, stenographic fees and Surrogate's fees.

On Appeal.
Petition of Appeal.

To the Ordinary of the State of New Jersey:

The petition of Osborne W. Havens, of the Township of Lakewood, in the County of Ocean and State of New Jersey, respectfully shows that:

Petition of Appeal of Osborne W. Havens in Prerogative Court

1. Beatrice E. Westhall died intestate, a resident of Lakewood, N. J., on August 31, 1931, and appellant, Osborne W. Havens, was by the Surrogate of Ocean County appointed administrator of the estate of Beatrice E. Westhall on August 25, 1931.

2. On September 21, 1934, petitioner, Osborne W. Havens, as administrator aforesaid, filed in the office of said Surrogate his account of said estate; exceptions were filed thereto; various hearings on said exceptions were thereupon had before the Ocean County Orphans' Court, and, by two certain decrees, both dated November 25, 1936, the Ocean County Orphans' Court overruled certain of said exceptions; sustained other of the exceptions; surcharged appellant Osborne W. Havens in the sum of $12,800.00, with interest thereon at the rate of six (6) per centum per annum from October 1, 1931; allowed commissions to the administrator on income but disallowed commissions as to corpus; and allowed counsel fees and expenses, stenographic fees, and Surrogate's fees.

3. Your petitioner, Osborne W. Havens, hereby appeals from the following portions of the said decrees:

(a) From that portion of one of said decrees which sustains the first exception, relative to the failure of the administrator to include as a part of the assets of the estate the good-will of the E. J. Westhall undertaking business.

(b) From that portion of one of said decrees which sustains the third, thirteenth, twentieth and twenty-second exceptions.

(c) From that portion of one of said decrees which directs the administrator, Osborne W. Havens " * * * to pay forthwith to the estate of Beatrice E. Westhall the sum of Twelve Thousand Eight Hundred Dollars ($12,800.00) as and for the good will of the Westhall Undertaking Business purchased by him, together with interest at six per cent on the said sum of Twelve Thousand Eight Hundred Dollars from October 1, 1931 up to and including the date of payment * * * ".

(d) From that portion of one of said decrees which denies to the administrator, Osborne W. Havens, commissions on the corpus of said estate.

(e) From that portion of one of said decrees which allows to John A. Matthews a counsel fee of $4,000.00 for services rendered upon the hearings on the aforesaid exceptions, and the sum of $328.10 for stenographic fees, and the further sum of $59.00 for subpoena charges and service fees.

(f) From that portion of one of said decrees which purports to direct that a counsel fee of $4,000.00, together with $328.10 for stenographic fees and $59.00 for subpoena charges and service fees, allowed to John A. Matthews, Esquire, be paid from the estate of Beatrice E. Westhall.

4. Your petitioner, Osborne W. Havens, complains and alleges that the aforesaid decrees of the Ocean County Orphans' Court are erroneous, improper, and illegal in the particulars above set forth; that your petitioner is aggrieved thereby; and therefore prays that the said decrees of the Ocean County Orphans' Court be reversed and set aside in the particulars complained of.

EWART & BENNETT,
Proctors for and of Counsel with Appellant, Osborne W. Havens.

Dated: March 9, 1937.

ANSWER TO APPEAL OF OSBORNE W. HAVENS.

(Filed March 18, 1937.)

NEW JERSEY PREROGATIVE COURT.

In the matter of the appeal of OSBORNE W. HAVENS from two certain decrees of the Ocean County Orphans' Court, both dated November 25, 1936, the one adjudicating upon exceptions filed to the account of OSBORNE W. HAVENS as administrator of the ESTATE OF BEATRICE E. WESTHALL, deceased, and allowing commissions to said administrator and the other allowing counsel fees and expenses, stenographic fees and Surrogate's fees.	On Appeal. Answer to Appeal of Osborne W. Havens.

Answer of Carl K. Withers, successor to William H. Kelly, Commissioner of Banking and Insurance, in charge of Lakewood Trust Company, *et als.*, respondents, to the petition of appeal of Osborne

W. Havens, administrator of the estate of Beatrice E. Westhall, deceased:

1. These respondents are advised, believe and respectfully submit that the portions of the said decrees complained of by the appellant, Osborne W. Havens, administrator of the estate of Beatrice E. Westhall, deceased, are just and lawful and these respondents deny that the aforesaid portions of the said decrees are erroneous, improper and illegal, and allege that said portions of the said decrees are legal, proper and correct.

2. Respondents further answering the petition of appeal, state that that portion of the petition of appeal set forth in paragraph 3 (a), (b) and (c) is not filed within the time limited by statute and that this Court has no jurisdiction to hear the appeal from those parts of the decrees as set forth in paragraph 3 (a), (b) and (c) of the petition of appeal.

3. Respondents further allege that the notice of appeal from that portion of the decrees set forth in the petition of appeal, paragraph 3 (a), (b) and (c) was not filed within the time limited by statute.

Respondents, therefore, pray that the petition of appeal filed by Osborne W. Havens, administrator of the estate of Beatrice E. Westhall, deceased, be dismissed with costs.

JNO. A. MATTHEWS,
Proctor for and of Counsel with Respondents.

OPINION.

(Filed July 13, 1938.)

NEW JERSEY PREROGATIVE COURT.

In the matter of the ESTATE OF BEATRICE E. WESTHALL, deceased.	On Appeal from Decrees of the Ocean County Orphans' Court. Opinion. Not for print in any report.

EWART & BENNETT, for Appellant-Respondent Osborne W. Havens, administrator.

JOHN A. MATTHEWS, ESQ., for Appellant Carl K. Withers, Commissioner of Banking and Insurance, in charge of Lakewood Trust Company, guardian Appellant-Respondent.

BERRY, V. O.:

This matter is before the Court on two appeals from two certain decrees of the Ocean County Orphans' Court, both dated November 25, 1938. One of these decrees disposed of exceptions to the account of the administrator and the other made cer-

tain allowances for counsel fees, etc. Both the exceptants in the Orphans' Court and the administrator appealed from both decrees but the appeals from the decree allowing counsel fees, etc., have been abandoned. There are cross-appeals from the decrees on the exceptions. The administrator appealed from a portion thereof and the exceptants in the Orphans' Court appealed from other portions thereof. The exceptions in the Orphans' Court were filed by the Commissioner of Banking and Insurance on behalf of Lakewood Trust Company, guardian of three minor beneficiaries of this estate. The present appeal of the trust company as guardian is prosecuted by Carl K. Withers, Commissioner of Banking and Insurance, who succeeded Commissioner Kelly.

The appeal of Havens, administrator, is from so much of the decree as sustains the 1st, 3d, 13th, 20th and 22d exceptions, surcharging the administrator with $12,800, and denying him commissions on the corpus of the estate.

The appeal of the trust company, as guardian of the minor beneficiaries was from practically every portion of the decree not appealed from by the administrator. It is unnecessary to discuss in detail the various particulars of the latter appeal, as I find no merit in any of them except those designated as sub-sections c, d, e and k of paragraph 2, which comprise an appeal from the decree of the Orphans' Court disallowing the 9th, 10th, 11th and 21st exceptions to the administrator's account. They will be dealt with in their proper order.

The decrees appealed from are based upon two separate conclusions filed by the Orphans' Court on

March 26, 1936, and marked "Conclusions" and "Conclusions, Part 2," respectively.

The pertinent facts relating to this controversy as disclosed by the voluminous transcript of testimony are as follows:

On August 13, 1931, Beatrice E. Westhall died at Lakewood, New Jersey, intestate. She was survived by two married daughters, Jessie Havens, wife of Osborne W. Havens (the administrator-appellant) and Virginia Hooper, and by three minor grandchildren, who were at that time, and as far as anything to the contrary appears, still are, the wards of Lakewood Trust Company of Lakewood, New Jersey. Both the exceptions and the appeal by the Commissioner of Banking and Insurance are joined in by "Jane Westhall, mother and guardian of James E. Westhall," and by "Elizabeth Westhall, mother and guardian of Beatrice E. Westhall and Edmund J. Westhall;" but there is no proof touching the mothers' guardianship. As "mothers" they have no standing on this appeal.

On August 25, 1931, the said Osborne W. Havens, now one of the appellants, was duly appointed administrator of the estate, but as such administrator he did not file his first account until September 12, 1934. There were twenty-two exceptions taken to his accounting by William H. Kelly, who was then Commissioner of Banking and Insurance in charge of Lakewood Trust Company in liquidation, and by the mothers of the said three minor grandchildren of decedent. Eight hearings were had on the exceptions between October 19, 1934, and April 15, 1936. The testimony taken covers 654 pages. This entire controversy grows out of the undisputed fact

that the administrator-appellant, in his individual capacity, purchased from himself as administrator, the lucrative undertaking business, including the good-will thereof, that had been conducted by his decedent, and by her husband before her for many years, at the appraised value of the business, excluding the good-will, and without making the slightest attempt to procure a better price from some other purchaser, indeed, without even offering it for sale privately or publicly, although he knew that a former employee of the business was anxious to buy.

On the night of September 30, 1931, a family conference was held in the office of the attorney for the administrator, at which the attorney, the administrator, all the heirs of the decedent, and the mothers of the three minor children, as well as the president of the trust company guardian, were present. At that meeting the administrator stated that he would like to buy the business at the inventory price, but would pay nothing for the goodwill. His proposition seems to have met with the approval of all present, for the next day, October 1, 1931, the agreement (E-1) was drawn, and thereafter signed by all the interested parties, including the trust company as guardian, and the mothers of the three minor children.

However, the undertaking business had not, at that time, been appraised, at least no inventory or appraisement had been signed or filed. Nor was it filed until September 21, 1934. Moreover, when it was filed no mention was made therein of the goodwill of the business. It merely showed an appraisal of $3942 for the physical assets of that business.

Yet the agreement (E-1) purports to sell not only the business, but the good-will thereof, for the appraised valuation of the physical assets; and the purchase price was not paid until nearly a year later although the agreement provided for payment "forthwith." Again, the testimony shows that between the date of purchase, October 1, 1931, and August 9, 1932, at which time the business was actually paid for, the *net income* was $11,777.26, nearly three times the purchase price.

The entire appeal of the administrator, except that portion relating to the disallowance of commissions on the corpus of the estate, is dependent entirely upon the question touching the validity of his purchase individually of the undertaking business owned by the estate. His motives in effecting this sale and purchase may have been the best; but with that question we need now have little concern, for the reason that when he accepted the duties of administrator he became a trustee of the estate in which minors were interested, and as such he should have kept in mind that trustees are appointed for the benefit of others, not of themselves. See *Arrowsmith v. Van Harlingen,* 1 N. J. Law 26, and *Pennsylvania Company v. Doughty,* 98 N. J. Eq. 578. In the latter case, at page 586, it is said:

> "The fundamental principle governing all dealings with property held in trust is that the cestui que trust is entitled to the best efforts of the trustee to further in all legitimate ways the interests of the cestui que trust. It is the duty of the trustee to use and exercise such care and diligence in dealing with the trust estate as a prudent, sagacious man would bestow upon

his own. The trustee is not permitted to have any interest in the subject of the trust antagonistic to, or in any degree inconsistent with, that of the cestui que trust. It follows from this that where there is a trust for sale, the trustee cannot become, either directly or indirectly, a purchaser at his own sale, even though the sale be at auction and so conducted as to insure the best price, and, in point of fact, the price actually paid appears to be a fair and full one. The principal reasons for extending the restrictions so far are—(1) that the trustee shall not be subjected to the least temptation to abate any reasonable efforts to procure the best price for the trust property; (2) the danger that the trustee may have become possessed, in the course of his dealing as trustee, of some secret information of fact and circumstances affecting the value of the trust property, of which he may take advantage for his own benefit, and (3) the difficulty of ascertaining whether, in fact, all proper efforts have been made by the trustee to procure the best price."

Because of the character of the business purchase and the fact that for many years the administrator had been active in it, the second reason mentioned in the foregoing quotation is peculiarly applicable here; and no effort having been made to sell to others, it is obvious that the third reason applies with full force.

Where parties bearing the relation of trustee and *cestui que* trust enter into contracts with each other, courts of equity will presume them to be voidable,

in the absence of equitable defenses, at the instance of the transferror, or those standing in his stead. Especially is this so where, as in this case, the transferrors lacked competent advice. (By the word "transferrors" I here refer to the beneficiaries of the estate and not to the administrator.) The rule seems to be that no matter how fair or how advantageous to the *cestui que* trust the purchase may be, the *cestui que* trust is at liberty to avoid the sale and retake the property. Or, if the price, terms and conditions of the sale are unfair, he may elect to affirm the sale upon fair terms to be approved by the Court. And one of the several principal reasons for this rule is, the trustee has had an opportunity of knowing, as it is his duty to know, all the circumstances affecting the value of the property. See *Maitland, Equity,* Lect. 7, pp. 96-97; *In Re. Fulper,* 99 N. J. Eq. 293; *Perry on Trusts,* Secs. 191, 204, 209; *Pennsylvania Company v. Doughty, supra; Marshall v. Carson,* 38 N. J. Eq. 250; *Staats v. Bergen,* 17 N. J. Eq. 297, affirmed 17 N. J. Eq. 554.

In *Staats v. Bergen,* Chief Justice Beasley, speaking for the Court of Errors and Appeals, said:

> " * * * The general rule applicable to sales is, that if a trustee, or a person standing in any similar capacity, sell a trust estate, and become himself interested, either directly or indirectly, in the purchase, *the cestui que trust is entitled, as of right, to have the property resold,* or, at his election, to acquiesce in the sale; and that it makes no difference, in the application of the rule, that the sale was at a public auction, bona fide, or for a fair price."

* * * * * * * *

"So jealous is the law upon this point, that a trustee may not put himself in a position, in which to be honest must be a strain upon him. The general rule, therefore, applies, not merely in those cases in which the confidence is absolutely betrayed, but when the circumstances are such that there was a temptation to violate it. * * * I think, upon correct principle, a trustee, in no case, nor in any crisis, can become the purchaser of property, when the fact of his making such purchase, has a tendency to promote his own interest, at the expense of his cestui que trust."

In view of the foregoing authorities, I am of the opinion that the decree of the Ocean County Orphans' Court, with respect to the items of appeal now under consideration, should be affirmed and mainly for the reasons stated by Judge Conover in his written conclusions. I agree in the main with the Judge's reasoning, but I do not concur in his finding that the sale of the business by the administrator was absolutely void. It was, however, under the authorities, voidable, and the infant beneficiaries having elected to rescind the sale the administrator should be required to fully account or be surcharged with the real value of the business less what he actually paid. The Orphans' Court adopted the latter expedient, which is approved, as is also the method of arriving at the value of the good-will.

The administrator-appellant further argues that his appeal should be sustained on the ground that the trust company, guardian, is estopped to deny the validity of the sale, and has cited numerous

well-recognized authorities to the effect that a guardian has authority, by virtue of his office, to sell his ward's personal property without an order of court; and it is argued that because the appellant-guardian signed the agreement of sale it is now estopped to assert the invalidity of the transaction; but it should be borne in mind that there are infants involved in this transaction whose rights cannot be lightly disregarded and that "it is to protect minors that guardians are appointed for them to conserve their assets, and to see to it that their property is not wasted. * * * A contract which the law would avoid for the infants' protection, if made by him, the Court will not allow a guardian to make for him." *In Re, Vieweger,* 93 N. J. Eq. 527, at page 531.

The fact that the guardian signed this agreement of sale, and to this extent "acquiesced" in the transaction is not denied; but it is plain that the guardian was remiss in its duty, and that the agreement was signed by the guardian as a mere matter of form without full knowledge of the facts, and without any consideration of the transaction by its board of directors, the president of the institution apparently acting upon his own individual volition, with little regard for the interests of infant beneficiaries. Its approval of this transaction and participation in it, in so far as those words are descriptive of its activities, was a breach of trust. The guardian acted upon no independent advice and without a full disclosure of the facts. Had the administrator disclosed to the guardian the fact that a former employee of the business was a possible purchaser—and if the inventory had then been made

and the value of the business fixed, the representative of the guardian might not have so readily acted. The facts thus concealed were material and might well have been controlling upon the action of the guardian. It is significant that promptly after the full facts became known to the guardian, the transaction was attacked through proper legal channels, albeit by individuals, representative of the guardian, other than those who originally acted. The only counsel which any of the parties to the transaction had at the time of the family conference was counsel who acted for the administrator both individually and as the representative of the estate. After the Commissioner of Banking and Insurance took over the trust company guardian, independent counsel saw that the interests of the minors had not been properly protected and took prompt action. That the wards might have recovered their loss from the guardian because of its breach of trust (had it remained solvent) is no answer to the liability of the administrator. I do not mean to suggest that there may not be circumstances under which a ward might not be bound by the consent of his guardian, and the guardian estopped to question the validity of a transaction assented to by it, and prejudicial to the interests of his ward; but this is not such a case. A breach of trust by the guardian cannot excuse or validate a similar breach of trust by a trustee, especially where the ward and the *cestui que* trust are one and the same person. The duty of the administrator-trustee to his *cestui que* trust was not less than that of the guardian to its ward. The administrator-appellant is not an innocent party to the condemned transaction.

Under the circumstances of this case the plea of estoppel cannot avail.

With respect to the appeal touching that portion of the decree disallowing commissions, no reasons for such disallowance were stated in the opinion of the Orphans' Court. Our Orphans' Court Act contemplates that commissions shall be allowed an administrator for his work, trouble, pains and risk in the administration and settlement of estates, the particular amount of compensation to be determined in the discretion of the Court where the estate exceeds $50,000, but at a rate not to exceed five per cent on the total estate. It is only in extreme cases of breach of trust evidencing fraud, bad faith, or wilful wrongdoing that commissions are disallowed. The statute provides for disallowance of commissions where an administrator is removed from office; but that is not the situation here. Although practically every act of the administrator was under attack in the Orphans' Court, it does not appear that there was anything warranting serious criticism aside from the transaction which resulted in the surcharge from which this appeal is taken. Upon the authority of *In Re. Megargee,* 117 N. J. Eq. 347; *People's National Bank and Trust Company v. Bichler,* 115 N. J. Eq. 617; *Babbitt v. Fidelity Trust Company,* 72 N. J. Eq. 745, and *Heath v. Mattock,* 81 N. J. Eq. 469, affirmed 82 N. J. Eq. 366, I am of the opinion that the Orphans' Court erred in disallowing commissions on the corpus of the estate, and the administrator will be allowed commissions at the rate of two per cent thereon.

With respect to the appeal of the trust company guardian, items c, d and e, relating to the 9th,

10th and 11th exceptions to the administrator's statement of cash in banks, cash on deposit in the Lakewood Trust Company; shares of capital stock, etc., aggregating in value $30,357.15; failure to make any distribution of funds on deposit, and an item of $1309.07 deposited in the People's National Bank of Lakewood which is declared worthless, the Orphans' Court held in its conclusions that the account should be restated to show the true cash position of the estate. In its decree, however, the Orphans' Court dismissed these three exceptions, hence the appeal. The account should be restated to show the actual and not the face value of the personal estate as of August 13th, 1931.

Item k relates to the dismissal of the 21st exception to the administrator's inventory and account. That exception challenged the omission from the inventory of the value of the unexpired insurance premium for personal property damage on automobiles owned by the decedent at the time of her death. The undisputed evidence is to the effect that on May 12, 1931, the Commercial Casualty Company issued its policy to the decedent and that the unearned premium on this policy as of August 13, 1931, was $146.00. It was not accounted for, nor was the policy sold to the administrator, yet on January 12, 1932, he caused the policy to be endorsed over to him, individually. The administrator should account for the unearned premium plus interest thereon. The Orphans' Court decree will be reversed in so far as it is affected by the conclusion touching this particular item.

The result is that the administrator's appeal, except that portion of it which is directed to the dis-

allowance of commissions on corpus, is dismissed and the appeal as to such commissions is sustained. The guardian's appeal is dismissed except as to items c, d, e and k of paragraph 2 of the petition of appeal, which are sustained to the extent above stated. July 13, 1938.

ADDENDUM.

(Filed October 7, 1938.)

On motion to fix the terms of the final decree to be entered pursuant to the foregoing conclusions, a question arose touching the right of Jessie Havens and Virginia Hooper, two of the children of the decedent, and each of whom is entitled to a one-fourth interest in the estate, to benefit from the surcharge against the administrator on account of the item of good-will in connection with the sale of the undertaking business by the administrator to himself as an individual. The amount of the surcharge as fixed by the Orphans' Court was $12,800 and this amount was approved by this Court. However, it is now pointed out to the Court that these two children of decedent had participated in the negotiations eventuating in that sale; had signed the contract of sale and had at no time since then dissented from their then action; that they had not filed any exceptions to the administrator's account and had not joined in the litigation challenging the correctness of that account, nor in this appeal; that they were apparently satisfied with the sale, and that, in any event, they were estopped to challenge

its validity because of their joinder in the transaction, they being of full age at the time. This point was neither mentioned nor argued in the Orphans' Court or in this court; but it is considered pertinent with reference to the amount to be paid by the administrator individually to himself as administrator to make good the loss to the infants through a sale which was voidable as to them and which their guardian in this suit sought to avoid for their benefit. It would seem that the point is well taken, and that while ordinarily the benefits of exceptions to an administrator's account would inure to the benefit of all parties in interest, those parties who had by their own conduct estopped themselves from avoiding the transaction should not be permitted to benefit from the avoidance on behalf of those who were incapable of consenting to the sale at the time. It is deemed that no injustice will result to these two beneficiaries if they are excluded from the benefits of the avoidance of the contract on behalf of the minor children, for as to the adults the contract was valid. It was voidable only at the suit of the infants. The adults have received what they bargained for and they were competent to deal with their own property interests at the time. Although in the foregoing conclusions I stated that the decree of the Orphans' Court should be affirmed, it now appears that that decree should be modified, rather than affirmed, to the extent that the administrator, as an individual, will be required to pay to himself, as administrator, the sum of $6,400, representing one-half of the sum of $12,800 fixed as the value of the good-will for which he was held accountable in the Orphans' Court, and that the administrator be

directed to segregate this sum, less costs properly chargeable against it, for the benefit of the infant defendants, to be paid to their guardian in due course. The decree may therefore be drawn accordingly.

October 7, 1938.

FINAL DECREE.

(Filed October 18, 1938.)

NEW JERSEY PREROGATIVE COURT.

In the matter of the ESTATE OF BEATRICE E. WESTHALL, deceased.	On Appeal from Decrees of the Ocean County Orphans' Court. Final Decree.

This matter being opened to the court by Andrew B. Crummy, appearing for John A. Matthews, proctor for and of counsel with appellant, Carl K. Withers, Commissioner of Banking and Insurance in charge of Lakewood Trust Company, Guardian, and in the presence of Howard Ewart of Ewart & Bennett, proctors for and of counsel with Osborne W. Havens, administrator, and the Court having read and considered the testimony taken in the Ocean County Orphans' Court, the petition and cross-peti-

tion of appeal filed in this cause, and the briefs filed by counsel for the respective parties, and it appearing to the Court that Osborne W. Havens, administrator, appealed from so much of the decree of the Orphans' Court as sustained the first, thirteenth, twentieth and twenty-second exceptions and surcharging the administrator with $12,800.00 and denying him commissions on the corpus of the estate; and it further appearing to the Court that the trust company, as guardian of the minor beneficiaries, appealed from practically every portion of the decree of the Orphans' Court not appealed from by the administrator, and that the Court has found that there was merit in the trust company appeal from the decree of the Orphans' Court disallowing the ninth, tenth, eleventh and twenty-first exceptions to the administrator's account, and the Court being satisfied that the sale by Osborne W. Havens, administrator to himself individually of the undertaking business of the Westhall estate did not include any consideration for the good-will of the said business and the method of arriving at the value of good-will by the Orphans' Court was correct and that with respect to the appeal of the trust company guardian, items c, d and e, relating to the ninth, tenth and eleventh exceptions to the administrator's statement of cash in banks, cash on deposit in the Lakewood Trust Company, shares of capital stock, etc., aggregating in value $30,357.15, failure to make any distribution of funds on deposit, and an item of $1,309.07 deposited in the People's National Bank of Lakewood which is declared worthless, the Orphans' Court held in its conclusions that the account should be restated to show the true

cash position of the estate; that in its decree, however, the Orphans' Court dismissed these three exceptions, hence the appeal; that the account should be restated to show the actual and not the face value of the personal estate as of August 13th, 1931; and that the inventory of the administrator, Osborne W. Havens, should include the unexpired insurance premium for personal property damage on automobiles owned by the decedent at the time of her death; and that the administrator should be allowed a commission of at the rate of two per centum on the corpus of the estate:

And it further appearing to the Court that the two individuals, Jessie Havens and Virginia Hooper, owning one-half of the estate, were parties to the transaction evidenced by the agreement of sale dated October 1, 1931, and actually signed the said agreement; that they took no exception to the account of the administrator and did not join in the exceptions as filed nor in the appeal as presented in this court and the Court being of the opinion that the two said individuals by their joining in the transaction of October 1, 1931, are now estopped to deny the validity of the said contract as to them and are precluded from the benefit of any surcharge on account of the item of good will.

It is, thereupon, on this 14th day of October, nineteen hundred and thirty-eight, Ordered, Adjudged and Decreed, that Osborne W. Havens individually pay to Osborne M. Havens, administrator of the Estate of Beatrice E. Westhall, deceased, the sum of $6,400.00, together with interest at six per centum from October 1, 1931 to the date of payment thereof, the said sum of $6,400.00, together with interest

thereon is to be set aside specially for the said infants mentioned in these proceedings and paid to their guardian or guardians in due course; and it is further

Ordered, Adjudged and Decreed, that the administrator, Osborne W. Havens, restate his account to show the actual and not the face value of personal estate as of the date of the said account, the account to be filed in the Ocean County Orphans' Court within twenty days from the date hereof; and it is further

Ordered, Adjudged and Decreed, that the guardian's appeal be and the same is hereby dismissed, except as to items c, d, e and k of paragraph two of the petition of appeal which items are hereby sustained to the extent above stated; and it is further

Ordered, Adjudged and Decreed, that the guardian's appeal as to paragraph two, sub-paragraphs (a), (b), (f), (g), (h), (i), (j), (m) and (p), of the petition of appeal, be and the same are hereby dismissed; and it is further

Ordered, Adjudged and Decreed, that Jane Westhall and Elizabeth Westhall, the mothers of the infants interested in the matter of the Estate of Beatrice E. Westhall have no interest in the matter as such, that the mothers are not proper parties to the said appeal and that the appeals of the mothers as such are hereby dismissed; and it is further

Ordered, Adjudged and Decreed, that the administrator, Osborne W. Havens, be and he is hereby allowed a commission of two per centum on the value of the corpus of the estate as of September 12, 1934, the date of the first accounting; and it is further

Ordered, Adjudged and Decreed, that the administrator's appeal, except as to the allowance of commissions, be and the same is hereby dismissed; and it is further

Ordered, Adjudged and Decreed, that the proctor for and of counsel with the guardian be allowed a counsel fee of $1,000.00, together with the taxed costs of this appeal; the said counsel fee and costs to be paid as follows: one-half thereof to be paid by Osborne W. Havens, individually, and the balance to be paid out of the fund of $6,400.00 and the interest accrued thereon specially set aside for the infants as in this decree hereinabove directed; and it is further

Ordered, Adjudged and Decreed, that a copy of this decree, certified to be true by the proctor for the exceptants, together with a copy of the taxed bill of costs be served on the proctor for the administrator and if the aforesaid taxed costs and counsel fees are not paid within twenty days from the date of service thereof and the terms of this decree complied with, then execution is to issue according to the practice of this Court.

LUTHER A. CAMPBELL,
O.

Respectfully advised,
MAJA LEON BERRY,
V. O.

(copy)

TESTIMONY.

OCEAN COUNTY ORPHANS' COURT.

In the matter of the Estate of Beatrice E. Westhall, deceased. } On Exceptions to Account.

Toms River, N. J., October 19, 1934.

Before Hon. Russell G. Conover, Judge.

Appearances:

For the exceptant: John A. Matthews, Esq., Andrew B. Crummy, Esq.

For the accountant: W. Durward McCloskey, Esq., J. Elmer Matthews, Esq.

Mary Elverson, stenographer, Toms River, N. J.

Mr. Matthews: Your Honor, there are some nineteen exceptions and these may be grouped, there is

testimony of about seven witnesses, but it ought not be lengthy, because counsel is prepared to go to the essence of the exceptions immediately, and we would like very much to have your Honor hear them rather than refer them. The matters involved involve law and ultimately will come back to your Honor anyway.

The Court: All right, you may proceed.

Mr. Matthews: I shall try to follow the exceptions in the order as they appear. Your Honor has them before you, and when I change the order I will note to your Honor that the witnesses are testifying to that exception. I will call as the first witness for the exceptants, Mr. Amory Parmentier.

Amory J. Parmentier, a witness called for the exceptant, being duly sworn upon his oath testified as follows:

Direct examination.

By Mr. Matthews:

Q. Mr. Parmentier, you were a director of the Lakewood Trust Company at the time of the death of Beatrice E. Westhall, in August, 1931?

A. I was.

Q. Did you have any official connection with the bank at that time?

A. I was assistant treasurer and assistant trust officer.

Q. Who were the bank's officers at that time?

A. Mr. Charles McQue, Mr. Charles J. Parmentier, since deceased, Mr. Jacob Prown, Mr. C. C. Pearce, Mr. Jasper Lynch, Harold J. Brinley, Frank W. Sutton, Jr., George C. VanHise, Wilfred H. Jayne, Jr., W. D. McCloskey, William H. Savage.

Q. Who was president of the Trust Company at that time?

A. Charles McQue.

Q. Just for the purpose of identifying the signature, I point to a paper and show you that signature on it and asked if that is the signature of Mr. McQue?

A. It is.

Q. The Lakewood Trust Company was the guardian of the property of the three children of Mrs. Jane Westhall and Mrs. Elizabeth Westhall, were they not?

A. Yes.

Q. Who acted on behalf of the Lakewood Trust Company as guardian, who was the man particularly deputed to act, or were the whole board acting in concert?

A. I would say the trust officer.

Q. And he was who?

A. Charles J. Parmentier.

Q. That is your good father, the gentleman who died?

A. Yes, sir.

Q. Were you the appraiser of the Beatrice E. Westhall estate?

A. Yes, sir.

Q. When were you appointed appraiser?

A. I don't know the date.

Q. What is your best recollection?

A. In early September or late August of 1931.

Q. By whom were you appointed?

A. By the Surrogate of Ocean County.

Q. Was there an order for your appointment signed by the Surrogate?

A. I presume so. I did not see it.

Q. Had you ever appraised the property of an undertaking business prior to this appraisal?

A. No, sir.

Q. Will you please describe to me how you appraised the undertaking business and its assets? Were you assisted by anybody in doing it?

A. Which particular part of the inventory do you refer to?

Q. I am referring to the physical assets—handles, caskets, embalming fluids, and so on.

A. Mr. Smock, the co-appraiser with me appraised the physical assets of that nature. I could not get off from the bank one afternoon and he took care of that. I appraised with him the other articles and a portion of the business equipment.

Q. What portion did you appraise?

A. I assisted in appraising the securities and the portion contained in the chapel, furniture primarily.

Q. I show you a paper and ask you if that is your signature, this I will show to Mr. McCloskey, if your Honor please.

(Paper shown to counsel.)

A. Yes.

Q. That is the affidavit you signed and which was witnessed by my brother attorney Mr. McCloskey?

A. Yes.

Q. In that affidavit you say, do you not, that you

were one of the appraisers in the foregoing inventory named and that the goods and chattels, rights and credits, and effects in said inventory specified were by you appraised at their just and true respective values according to the best of your judgment and that Arthur R. Smock, the other appraiser in said inventory named was present at the same time and consented to the said valuation and appraisement.

A. That is right.

Q. That would indicate that Mr. Smock consented to what you appraised?

A. We consented jointly. I was satisfied with the values in the entire inventory.

Q. How did you become satisfied with the value of the caskets in the undertaking business?

A. I took his judgment which was derived from values no doubt. I cannot speak for him, of course. No doubt derived from inventories or some other source. I was satisfied.

Q. You were satisfied when Mr. Smock said, for instance, that forty-five caskets were inventoried at $751.08. You took Mr. Smock's word that that was the value of those caskets?

A. I did.

Q. You didn't know whether they were trimmed or untrimmed?

A. They were usually untrimmed.

Q. Did you know at the time ——

A. No.

Q. You didn't know whether they were octagon shells or square ended caskets, did you?

A. No.

Q. Mr. Smock is a real estate man and a banker, is he not?

A. You would better ask him.

Q. Don't tell me what to do, I am an officer of this court, do you know what Mr. Smock's business is?

A. Yes, sir.

Q. What is it?

A. He is an appraiser for the Home Loan.

Q. And prior to that he was in the real estate business?

A. Yes, sir.

Q. And in the banking business?

A. Yes, sir.

Q. How long have you known Mr. Smock?

A. Twenty years.

Q. During that time has he ever to your knowledge been in the undertaking business?

A. No, sir.

Q. Did you appraise the good will of that business?

A. Yes, sir.

Q. Did you know when you were appraising this business that there were accounts receivable of $16,000 at the time of the appraisal?

A. The inventory contains the accounts as shown open on the books.

Q. If I represent to you that the inventory shows accounts receivable amounting to $16,000 at the time of the appraisal, you would have known that at the time of the appraisal?

A. I would, yes, sir.

Q. This business was sold by the administrator to himself under an agreement, was it not?

A. Yes, sir.

Q. And the sale price was $4,284.50, was it not?

A. I don't know.

Q. You had nothing to do with that?

A. I was present at the conference where the details were arranged.

Q. In what capacity were you present at that conference at which the details were agreed upon?

A. Not in any official capacity.

Q. When was that conference?

A. Late in September or early in October in 1931.

Q. Was it the night before the contract was signed?

A. I cannot say.

Q. The contract, according to its date, was signed on the first of October, 1931?

A. That is right.

Q. Do you recall that the conference was the night before at Mr. McCloskey's offices?

A. I cannot fix the date, but that was the place.

Q. And you say you were present in no official capacity?

A. That is right.

Q. Who else was there at that conference beside you?

A. As I recall, Mr. McQue, Mr. Charles J. Parmentier, Mr. Smock, Mr. McCloskey, Mrs. Jane Westhall, and Mrs. Bessie Westhall, and I believe Virginia C. Hooper, and Jessie Westhall and Mr. Havens.

Q. Virginia C. Hooper you know to be one of the Westhall girls, married to a man by the name of Hooper?

A. Very well.

Q. And Mrs. Jessie Havens is another of the Westhall girls?

A. Yes.

Q. Were you not at that time that this agree-

ment was entered into assistant trust officer of the Lakewood Trust Company?

A. I was.

Q. And your father, peace to his memory, was the trust officer.

A. Yes, sir.

Q. You say that at that conference the price was discussed for the business, is that so?

A. My recollection is that Mr. Havens offered to buy the business at inventory figures.

Q. And the inventory figures were those I quoted you, $4,284.50?

A. I would like to see the agreement, I think it is thirty-eight hundred and some dollars.

(Paper presented to witness.)

A. $3,842.00.

Q. Do you know whether later there were added to it the amounts shown you on this other paper, four hundred and twenty-seven dollars and some cents?

A. I do not.

Q. This conference we were speaking about was in Mr. Durward McCloskey's office.

A. It was Jayne and McCloskey at that time.

Q. Mr. Jayne was not there, Mr. McCloskey was the lawyer present at the conference, was he not?

A. Yes, sir.

Q. Mr. McCloskey, on behalf of his firm, represented the Lakewood Trust Company at that time as guardian for the children, did he not?

A. I don't know.

Q. Who did represent the Lakewood Trust Company at that time as guardian for the children?

A. I really could not say. Mr. McCloskey was the only attorney there.

Q. Mr. McCloskey was the only attorney present at the conference?

A. That's right, yes.

Q. Was there any discussion at that conference of the matter of the good will of the business by Mrs. Jane Westhall?

A. I cannot recall.

Q. Was there any discussion at that conference of the matter of the good will of the business by Mrs. Elizabeth Westhall?

A. I cannot recall.

Q. Had any notice been brought to you as appraiser or to that conference in your hearing of the objections of Mrs. Hooper because of the failure to include the good will in the sale of the property?

A. I don't recall.

Q. You don't recall whether any one discussed good will at that time?

A. I recall that when the sale offer was made it was made to include good will and certain business equipment. I recall that.

Q. But you did not appraise good will?

A. No, sir.

Q. And the sale price was just the equipment price, was it not, plus that $427 which is further equipment.

A. The agreement reads "together with good will" unless I am mistaken.

Mr. Matthews: I offer in evidence the agreement for the purchase of this business. If you have the

original, Mr. McCloskey, I would like to have it marked.

Mr. McCloskey: I have no objection to the offer of this agreement, but I do object to the characterization of it by Mr. Matthews, as an agreement for the purchase of the business.

The Court: It may be marked.

(Paper marked in evidence Exhibit E-1.)

Mr. Matthews: It embraces the sale of the business and also a real estate transaction.

Q. At this conference was this agreement presented to all at the conference?

A. I think the details were agreed upon at the conference.

Q. Were the details in writing or oral?

A. I think they were noted by a stenographer.

Q. Do you recall anything else that was said about good will beside that the agreement was to of the sale of the business and the good will?

A. Mr. Haven's offer as I recall included good will. He said he would give so much for the business and good will.

Q. And you recall no objection on the part of anybody there?

A. No, sir.

Q. Did anybody, Mr. McQue, or your good father, or yourself on behalf of the Lakewood Trust Company offer any objection to this sale price?

A. Not to my knowledge, no.

Q. Mr. McQue, you have identified his signature

on the copy I have shown you. Will you identify it on the original?

A. Yes, sir.

Q. Mr. McQue signed that as president of the Lakewood Trust Company?

A. Yes.

Q. And his signature was witnessed by ——

A. It was attested by my father.

Q. And the seal of the bank put on?

A. Yes.

Q. There follow the signatures of Elizabeth Westhall, Jane Westhall, Jessie M. Havens, Virginia W. Hooper, and the signatures of Elizabeth and Jane Westhall are witnessed by your father also?

A. No, by myself.

Q. And the signatures of Jessie Havens and Osborne Havens were witnessed by Beatrice Pendle, that is Mr. McCloskey's secretary?

A. His stenographer, yes.

Q. And Albert Hooper witnessed the signature of Virginia Hooper, and Osborne Havens is signing as administrator and individually, is his not?

A. That is correct.

Q. When did you sign your name as witness to the signatures of Elizabeth Westhall and Jane Westhall, that night or the next day?

A. I would say it was after, but I am not sure of the date.

Q. Do you know where you signed your name as witness?

A. I don't remember.

Q. Do you recall that it was at the bank the very morning after?

A. I could not recall.

Q. You did not go to the ladies' home and sign it?

A. No, sir.

Q. You did not sign at Mr. McCloskey's office?

A. I don't remember.

Q. Can you doubt your recollection a bit.

A. I cannot recall.

Q. The signatures were not all affixed in your presence, for instance, the signature of Mr. McQue as president.

A. No.

Q. Was the signature of Osborne Havens affixed in your presence?

A. Not to my knowledge.

Q. Nor the signature of Virginia Hooper?

A. No.

Q. Did you value the automobiles of the undertaking business?

A. Yes, with Mr. Smock.

Q. Looking at the inventory and appraisal and particularly at the item which refers to the personals, and particularly the item one motor hearse, Lorraine Car Company, engine number 11497, car number 4990, no blue book value, estimated value one hundred dollars. Had you had any experience in valuing hearses prior to this?

A. No, sir.

Q. And how did you proceed to value it?

A. The hearse was quite old. I would not say how many years, but it reached five to my recollection, and I would say one hundred dollars would be ample for it. It was one of two.

Q. Upon what did you predicate your valuation of one hundred dollars?

A. Estimated value, fair market value, estimated.

Q. As an automobile or as a hearse?

A. As a hearse.

Q. Do you know that they still use the same hearse in the business?

A. Possibly.

Q. Then there was a second automobile hearse, one Meteor Motor Car Company Hearse, 1929, engine number 15S2669, serial number 11269, no blue book value, estimated value one thousand dollars.

A. For that there was the same procedure, estimated, fair market value.

Q. At anytime during your estimating of these values was Mr. Osborne Havens present?

A. No, sir.

Q. Never?

A. Not to my knowledge.

Q. You were not there when the caskets were estimated by Mr. Smock?

A. No.

Q. When you were estimating the chapel contents, was Mr. Havens present?

A. Yes.

Q. Did he assist you?

A. Not in fixing values.

Q. In what way did he assist you?

A. He assisted us in identifying articles and showing us papers that we asked for.

Q. What papers do you refer to?

A. I think perhaps the mortgages were there.

Q. Did you know at the time you were appraising the business that Mr. Osborne Havens was going to buy it?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Didn't Mr. Osborne Havens tell you he was going to buy the business?

A. Not at that time.

Q. When did you first learn that Mr. Osborne Havens buying the business?

A. The night the agreement was entered into, when he offered to make the purchase.

Q. How did you come to be appointed appraiser?

Mr. McCloskey: Object as immaterial, he was appointed by the administrator with the consent of the Surrogate.

Mr. Matthews: I am trying to jog Mr. Parmentier's memory. I want to show that Mr. Havens had an interest in the appraisal and perhaps a dictatorial in it. I want to jog his memory to the effect that Mr. Havens had an interest.

Q. How did you come to be appointed appraiser?

A. By Mr. Havens with the further confirmation of the Surrogate.

Q. What did Mr. Havens say to you about the matter of your appointment?

A. He said that I was elected as an appraiser.

Q. When was that?

A. Subsequent to August thirteenth, 1931.

Q. Was it in August or September?

A. In late August or in September.

Q. Mr. Havens, according to the record, was appointed administrator August twenty-fifth, and therefore it would be subsequent to that.

A. Yes.

Q. And you made the appraisal immediately?

A. Soon thereafter, I cannot fix the date, but as of the date of ——

Q. I notice your affidavit is dated October fifth, which would be four days after the sale of the business by Osborne Havens, administrator, to Osborne Havens individually. The jurat is dated the fifth of October, taken by Mr. McCloskey?

A. Yes.

Q. Had you made your appraisal before the first of October?

A. Yes; I believe it was made in September.

Q. Had you any work sheets for it?

A. I did.

Q. Have you them now?

A. My co-appraiser has them, would you like to see them?

Q. I would.

A. (Sheets produced.)

Q. Do you mind if I look at these?

A. Help yourself.

Mr. Matthews: Thank you.

Q. Are the papers you showed written in ink in your handwriting?

A. It is Mr. Smock's handwriting.

Q. Do you recall on the night of the meeting prior to the entrance into the contract, and on nights specifically when notes were taken by the stenographer with reference to the proposed contract, do you recall whether anybody on behalf of the Lakewood Trust Company spoke for or against the justice of the agreement with reference to the children for whom they were guardian?

A. I have no recollection, no.

Q. You received one hundred and fifty dollars fee from the estate for your appraisal work, did you not?

A. Yes, sir.

Mr. Matthews: If your Honor please, I informed the Court at the beginning, when I went from one exception to the other I would call the attention of the Court. I am going to step to the thirteenth exception with this witness.

Q. You knew from your appraisal that there was approximately $21,000 of the Beatrice E. Westhall estate money in the Lakewood Trust Company at her death?

A. Yes.

Q. You would know that as treasurer?

A. I was assistant treasurer.

Q. And you were assistant treasurer until the bank closed in 1932?

A. Yes, sir.

Q. And Mr. Smock, was he a director when the bank closed?

A. No.

Q. Was Mr. McQue president until the bank closed in 1932?

A. He was.

Q. Did your father die before the bank closed or after?

A. Before, on December 4, 1931.

Q. You had knowledge, had you not, as assistant treasurer, long before January thirteenth, 1932, that the Lakewood Trust Company was in a precarious financial state?

A. No, sir.

Q. You did not?

A. I would say, no.

Q. When did you first learn that it was?

A. That is rather a delicate question to ask an officer of the bank. I would say just prior to the closing on January thirteenth, 1932.

Q. Were not you at a conference with the Banking Commissioners with reference to the condition of the bank as early as November of 1931?

A. No, sir.

Q. Do you recall such a conference?

A. No, sir.

Q. You tell me that the first information you had was very shortly prior to its closing?

A. In the immediate vicinity of that time, a few days prior to its actual closing.

Q. And prior to that time you had no information that the bank was in such condition that the commissioner might close it?

A. No, sir.

Q. Do you recall when the examiners made the last audit of the Lakewood Trust Company?

A. I believe it was September, 1931.

Q. As assistant treasurer you were familiar with what that audit showed?

A. I read portions of it subsequent to that date. I was only assistant treasurer, not an executive officer.

Q. Did you not act largely for your good dad, peace to his memory, taking some of the burden off his shoulders?

A. I acted as assistant, I did not take his place.

Q. Nobody could take his place, but as assistant

helping his chief who was also his dad, did you not have intimate knowledge of the bank's condition?

A. All banks were having some difficulties. I would not say the Trust Company was in a precarious condition. There was a general difficulty, all banks were having a withdrawal of deposits.

Q. And at this time there was on deposit in the bank $21,000 of the money of the Beatrice E. Westhall estate.

A. Yes, sir.

Q. One-half of that money was held by the bank as guardian for its wards, is that correct?

A. True.

Q. Do you know whether your father or yourself or any of the directors or Mr. McQue the president spoke to Mr. Havens about having one-half of that money transferred to the guardian account?

A. No, sir.

Mr. McCloskey: Object as immaterial. The administrator is charged with the administration of the estate and this happened about four months after his appointment.

The Court: It may or may not be, Mr. McCloskey, I am going to let that question be answered. I will overrule your objection.

Q. Didn't the audit of September 1931, comment that the bank's condition was serious?

A. I cannot answer that question. I was not sufficiently familiar with the examination.

Q. And when you saw that the Lakewood Trust Company was in the condition that all banks were

at that time, because of undue and heavy withdrawals, it would have been to the interest of the bank to keep as much cash as possible in it during those days.

A. Naturally.

Q. And you know of no attempt on the part of anybody to persuade Mr. Havens, or of any attempt to have the bank transfer to the guardian account the distributive interest in that twenty-one thousand dollars?

A. I do not.

Q. You know when a bank is guardian there are bonds deposited with the Prerogative Court to guarantee faithful performance of that duty?

A. Yes.

Q. There were such bonds on deposit with the Prerogative Court to guarantee faithful performance for the Lakewood Trust Company?

A. Yes.

Q. And they are still on deposit, are they not?

A. Yes.

Q. As a banker, Mr. Parmentier, you would know, would you not that if the banks were going to close what would be virtually a mere bookkeeping device would have protected the bank's wards' interest in that $21,000; by that I mean, had the bank as guardian requested Mr. Havens to transfer the children's share to a guardian account, they would have the protection at that time in the event of the failure of the bank, of the bonds that were up with the Prerogative Court.

A. That is rather an intricate question. Money on deposit, deposited by a bank in a fiduciary capacity which itself would have been protected, but not such

funds as were on deposit with the Prerogative Court. The Prerogative Court deposit insures safe performance primarily.

Q. Were there such bonds set aside to secure the interests of the wards of this estate in the Lakewood Trust Company?

A. The income or corpus of the trust fund deposited in our bank were protected by mortgages set aside to secure them, in equal or in excess of the amount of that sum.

Q. That, though, is a setting aside of mortgages and productive securities generally for all guardianships of the bank rather than allocated to a particular guardianship.

A. Generally, not in any particular case, a lump sum on deposit in the bank.

Q. With the closing of the Trust Company, however, would the children's interests have been any different from those of a general creditor in that $21,000, which had grown to over $30,000 at that time?

A. No, sir.

Q. Do you recall when the last meeting of the Board of Directors of the Lakewood Trust Company was prior to January thirteenth, 1932?

A. I do not.

Q. Your dad did?

A. Yes, but he was dead at that time. I could not answer that question.

Q. When you appraised the estate you appraised the Lakewood Trust Company's stock at one hundred and sixty-five dollars a share, that is correct is it?

A. Yes, sir.

Q. At any time prior to the closing of the bank, did you advise Mr. Havens that the stock should be sold?

A. No, sir.

Q. Was the market price one hundred and sixty-five dollars per share at the time of this appraisal?

A. Yes, sir.

Q. Was there a market?

A. That was the last sale price.

Q. Was there any market at any price at that time?

A. I do not know at that particular date, August thirteenth, 1931.

Q. Either on that date or after that date up to the end of the year was there any market?

A. I think the market for all bank's stock was shot at that time.

Q. And, of course, that stock is worthless today, is it not?

A. It will share as owner after all the creditors are paid.

Q. You also appraised fifteen shares of the National Public Service Corporation stock in the inventory, didn't you?

A. Yes, sir.

Q. At any time between the time of your appraisal do you know of your own knowledge whether the bank as guardian for the children or you notified Mr. Havens of the precarious condition of the National Public Service Corporation?

A. No, sir.

Q. Did you know that the National Public Service went bankrupt and were adjudicated so July eighth, 1932?

A. I did not know the date, I knew they were at some time, but I could not fix the time.

Q. Do you know of your own knowledge whether anybody from the bank as guardian advised Mr. Havens to sell that stock?

A. What is the date, Mr. Matthews?

Q. When did you learn that the National Public Service were?

A. It was just general, because of the slipping value or demand for its stock.

Q. Your investment department of the bank would know that, would it not?

A. We have no investment department in a small bank.

Q. You do buy and sell stock.

A. For customers, yes.

Q. Who was the man particularly in charge of that?

Mr. McCloskey: Object, there was no bank at the time he is talking about. The bank was closed.

Mr. Matthews: It is the contention of the exceptants that the administrator or executor, who would have knowledge coming to him of the condition of the stock would find it his duty to dispose of it. I thought to lay the foundation for Mr. Havens' testimony. That is the only purpose of the question.

The Court: It may stand.

Q. Will you tell us, Mr. Parmentier, who was the man particularly in charge of buying and selling stock?

A. Anyone in the office would be suited to buy or sell for a customer at his or her request. We would have to advise no particular issue, merely at the request of the depositor.

Q. Did you have a financial service?

A. No, sir.

Q. Did you ever confer with Mr. McCloskey, as counsel for the bank, or with Mr. Havens, concerning the children's equity in the moneys of the estate on deposit in the Lakewood Trust Company prior to the closing of the bank?

A. No, sir.

Mr. McCloskey: Object your Honor please, that calls for an unwarranted fact, I was not attorney for the Trust Company.

The Court: He has already answered it.

Mr. Matthews: I am interested in that statement of counsel. There cannot be any doubt that Halse Wainwright did not represent the bank, but you and Mr. Jayne represented it in all its transactions. I don't think at this time we ought to have a blank denial that you and his Honor prior to going on the bench did not represent the Lakewood Trust Company.

Mr. McCloskey: I still say I did not as counsel for the bank.

Q. On the tenth exception the accountant, Mr. Havens, in his report shows the cash on deposit in the Lakewood Trust Company of $30,357.15. There

was a plan worked out when the bank closed, was there not?

A. Yes, sir.

Q. I will ask you to look at this computation and tell me is that deposit of $30,357.15 represented in the following fashion,—213 shares of the capital stock of the Lakewood Trust Company ——

A. Pardon my breaking in, you will have to total these to get the figures you have. Mr. Crummy is familiar with this. This represents the division of these accounts as they are in fact, you might have grouped these here. I have brought a preferred deposit account and certificate of participation and stock certificate, being in the book. Here is the information.

The Court: Cannot we have some sort of summary of that? This may be very understandable to you, but it is brand new to me.

Q. On page 11 of the account of the administrator at the top of the page there are three items, "cash in bank and on hand, Lakewood Trust Company, Lakewood, New Jersey, saving account, $19,972.71; Lakewood Trust Company, Lakewood, New Jersey, checking account, $8,865.16, in the name of the estate; Lakewood Trust Company, Lakewood, New Jersey, checking account, $1,519.28, is that correct?

A. That combines evidently two items—one of $1,133.84, known as the Beatrice E. Westhall business account, representing the Beatrice E. Westhall personal account. They were combined no doubt, but the aggregate is correct.

Q. An aggregate of $30,357.15, and the 213 shares

of the Lakewood Trust Company, at fifteen dollars and sixty-two cents, would make a total of $3,327.06?

A. Yes. That is these three accounts together.

Q. Will you look at your aggregate there and see if it is $11,851.52?

A. Yes, you have grouped them.

Q. Then will you look at this amount of $15,158.57?

A. There are the three totals. You have them here.

Q. So as a matter of fact today, the children's interests, the wards of the bank during his time of guardianship, would be one-half of the items I have recited now that go to make up that total there of $30,000, is that correct?

A. Yes, sir.

Q. What are the prospects or reasonable prospects of the children receiving anything from the participation certificates amount?

A. I don't think I should answer that. I am merely a teller in the new bank and not an officer. I don't think it should come from me.

Q. You would not have any idea as to the chances of the children receiving anything from these preferred certificates of deposit, as to when that might be if ever?

A. I cannot fix a time or an amount.

Q. And what I have just said as to the $30,357.15 as recorded in the accountant's account as cash in bank, is not cash in bank today but what we have just described in the three items that go to make up that amount of $30,357.15?

A. Yes.

Cross-examination.

By Mr. McCloskey:

Q. Mr. Parmentier, will you examine this inventory that is on file and fix the amount of that inventory?

A. $92,726.65.

Q. That is the appraised value that you placed upon this estate of Beatrice E. Westhall?

A. Yes, sir, with Mr. Smock.

Q. I understood you to say that you had never had any experience in the appraisal of estates before.

Mr. Matthews: No, he said the undertaking business.

Q. Did I understand you to say that you had never had any experience in the appraisal of an undertaking business before?

A. I tripped on that one, I have had some. That was the appraisal of the estate of Edmund J. Westhall.

Q. In making the appraisement in this estate, was that the same business that was appraised in the estate of Edmund J. Westhall, deceased?

A. Yes, sir.

Q. And you have had some experience in appraising estates generally?

A. I have.

Q. Have you had considerable experience?

A. I would say I have appraised at least five estates including this one.

Q. Have you been executor in any estate?

A. I have been co-executor in rather a large estate.

Q. What estate was that?

A. The estate of J. Luther Bray, that estate amounted to nearly $250,000.

Q. Directing your attention to this inventory, will you tell the court the items to which Mr. Matthews refers and which you did not personally appraise and in which you took the value from Mr. Smock.

A. They are right here. The items I did not see are on page 6, counting from the back.

Q. Will you tell us what they were?

A. 20 yds. casket mattress, $15.00; 3 doz. grave markers, $10.80; 3 doz. grave vases, $6.00; 2 baskets artificial flowers, $8.00; 3 artificial door badges, $9.00; 1 casket bier, $25.00; 1 casket lamp, $2.00; 3 flower racks and stand, $20.00, 1 tarpaulin, $5.00; odd lot excelsior, $3.00; odd lot sheet cotton, $8.00; 6 ¾ gr. escutcheons and thumb screws, $33.00; 1 gr. bolts and sleeves for bx. handles, $2.50, 1 lb. 3 oz. tacks, $.20; 2 gr. No. 6 screws, $1.00; 8 gr. No. 9 screws, $6.00; 2 lb. escutcheon pins, $.50; babies carrying case, $4.00; I men's robe, $9.00; 1 sewing machine, 1 hair picker and mattress stuffing machine; miscellaneous assortment paint brushes, broken chairs, etc., $5.00; 4 old wooden supply cabinets, $5.00; 2 old work benches, $5.00; 6 ladies' robes, $26.00; broken bx. memo books, $15.00; broken bx. announcement cards, $5.00; 30½ doz. pr. gloves, $86.80; 5¾ cases embalming fluid, $136.00; 2 bottles San O Spray, $6.00; 45 caskets, $751.08; 22 outside boxes, $268.36; 14 doz. prs. casket handles, $170.94; 14 sets casket handles, $112.25; 4 casket pillows, $10.00; 33 yds. casket lining, $23.10; 37 sets casket

linings, $188.62; 7 1/3 doz. pr. bx. handles, $51.00; 3 sets grave lining, $80.50; lot of odd lumber, $10.00; 20 doz. camp chairs, $20.00; 6 doz. camp chairs, $12.00; 2 chest old tools, $7.00; miscellaneous small tools, nails, etc., $10.00; 4 box picture glass, $4.00; odd lot old picture molding, $5.00; 2 old Mahogany tables, $10.00; 2 ladders, $4.00; 5 embalming boards, $15.00; 1 child's embalming board, $3.00; 1 carrying basket, $5.00; 3 prs. casket pedestals (old), $3.00; 5 floor rugs, $20.00; 1 gray plush carriage robe, $1.50; 1 pr. black horse blankets, $2.00; 1 fur carriage robe, $3.00; 4 pr. bench pedestals, $4.00; 2 casket trucks, $6.00; 1 frigid lowering device $15.00, 10 lb. candles, $3.00.

Q. Approximately what does that amount to?

A. I think it was two thousand dollars and something as I remember.

Q. All the other items, and that means $90,000 of the inventory you actually appraised in person.

A. Yes, sir.

Q. Directing your attention to the time that you appraised the Edmund J. Westhall estate, did you examine those articles at that time?

A. I don't remember.

Q. Are you in a position to say whether the articles appraised in this estate are substantially the same as in the Edmund J. Westhall estate?

A. They are.

Q. You had some knowledge of those articles and the values of those articles from the appraisement you made in the Edmund J. Westhall estate?

A. Yes.

Q. And you furnished a bill to the administrator for your services in making this appraisement?

A. I did.

Q. Do you recall the amount?

A. One hundred and fifty dollars.

Q. Was that a reasonable charge for the services you performed?

A. I think so.

Q. Directing your attention to the conference that was held at my office in the latter part of September, 1931, do you recall the time that was consumed in that conference?

A. It was not less than three hours.

Q. When was the conference held?

A. In the evening.

Q. And lasted rather late?

A. Yes, sir.

Q. I think you mentioned the persons present?

A. Yes.

Q. Do you also recall that Miss Pendle was present and made notes?

A. Yes, sir, she was.

Q. During that conference which occupied that evening, what was the subject of discussion?

A. As I recall it started with speaking of the distribution of physical assets and wound up later into the details of the agreement for the sale and purchase of the business.

Q. What do you mean when you say the distribution of the physical assets?

A. That one of the girls would take jewelry in a certain proportion, and so forth.

Q. You refer to the household furniture and jewelry primarily?

A. Yes, and the automobiles, as I recall.

Q. What was the agreement arrived at in reference to those articles?

Mr. Matthews: Object, your Honor please. He can testify to conversations if he remembers them, but not to the agreement.

Mr. McCloskey: I will withdraw the question.

Q. What was the discussion in reference to those articles?

A. I cannot recall exactly.

Q. Let me ask you this question first. Had you prepared your inventory and appraisement prior to that night?

A. Yes.

Q. And was that inventory and appraisement there at the time of this discussion?

A. Yes, it must have been.

Mr. Matthews: I move that be stricken out, your Honor please—what must have been.

A. I will answer yes.

Q. Having that in mind what was the discussion with reference to the household furniture, the jewelry and automobiles?

A. As I rceall, certain pieces of jewelry were requested and set aside for Jesse Havens and Virginia Hooper, together with an automobile for Mrs. Havens.

Q. Was there any discussion as to the consideration or purchase price to be paid for the articles?

A. I would assume it would be deducted from their share of the estate.

Q. Was there any discussion as to the amount?
A. I don't remember.

The Court: As a matter of fact what was this? A partial distribution in kind from the inventory value set up in the account?

Mr. McCloskey: Yes, sir. At the inventory prices.

The Court: I suppose I will discover that when I read this over.

Mr. Matthews: Yes, your Honor, and I may say we have to look at this case from the infant children's standpoint.

Q. Do you recall the discussion that occurred at that time which resulted in the preparation of the agreement that has been offered and marked E-1?
A. Generally, the conference resulted in it.
Q. Do you recall the discussion?
A. Not in particular. There was, of course, discussion.
Q. Of all these people who were present, who discussed the matter?
A. It was rather an open forum, as I recall, interchange of ideas.
Q. And everybody present took part in the discussion, is that right?
A. Yes, the principals.
Q. Do you recall the real estate of the heirs being mentioned, and in particular the apartment building on Second Street, as to whether it should be disposed

of or retained, and if retained under what circumstances?

A. I don't recall. It must have been discussed.

Mr. Matthews: I move that be stricken, your Honor please.

The Court: Yes, that will be stricken.

Q. Do you recall that after this general discussion an offer was made by Mr. Havens?

A. I do.

Q. Which involved the undertaking business, the renting of a portion of the apartments and the care of the other real estate?

A. Yes.

Mr. Matthews: The contract speaks for itself, your Honor please, and the contract was not drawn until the next day.

The Court: Then this might be pure surplusage. I will let it stand for what it is worth.

Q. Do you recall what that offer was—the offer made by Mr. Havens for the care of the property? That is the offer made at that meeting.

A. He offered to purchase the business and good will at the inventory figure. He offered to purchase the business and good will at the inventory figure. He offered to lease a portion of the premises at a given figure and act as agent for the care of the real estate in general.

Q. Was there any discussion as to his compensation for acting as agent?

A. As I understand it the only consideration or compensation was to be the reduced rent of the premises to be occupied as a dwelling and business.

Q. Was he to be compensated for his services?

A. No other compensation than the reduced rent.

Q. Then he was to take care of the property without compensation?

A. Yes, sir.

Mr. Matthews: Object as a conclusion.

The Court: Objection sustained. It has been answered.

Mr. McCloskey: That was part of the offer.

Mr. Matthews: The testimony was that Mr. Havens was to receive a reduced rental, which is compensation.

Q. Do you recall whether that offer was accepted by those present?

A. It was.

Q. Do you recall any discussion in reference to the other securities owned by the estate?

A. I don't recall, no.

Q. The amount set forth in the account as deposited in the Lakewood Trust Company was on deposit in that bank on January 13, 1932?

A. It was.

Q. Do you know whether or not the administrator since that time entered into any agreement for the issuance of partition certificates or any other instruments evidencing this deposit or any part thereof?

A. I don't believe the proposed agreement was signed, but my recollection was that it was not.

Mr. Matthews: I don't think it would make any difference, since legislation has been passed in that regard.

Re-direct examination.

By Mr. Matthews:

Q. You said the articles in this estate of the undertaking business were the same as in the E. J. Westhall estate, that you also appraised.

A. Substantially the same; it was a year prior to this time.

Q. Were the caskets the same?

A. Perhaps not identically, but generally so.

Q. What kind of caskets were there in the Beatrice Westhall appraisal?

A. I did not see those.

Q. Why do you say they were the same?

A. I don't know.

Q. Were the casket handles the same?

A. I cannot say.

Q. Were the chairs the same, that were sold at nine cents a piece in this inventory?

A. Yes, sir.

Q. How do you know?

A. I believe them so to be.

Q. Belief might be founded upon looking at a thing or upon information from another. What did you predicate your belief upon that the chairs were the same?

A. Assumption.

Q. How about the outside boxes for the caskets?

A. They were changed, the caskets, and the boxes were changed, perhaps.

Q. How about the embalming fluid, there was a great deal of that?

A. As I recall five and three-quarter cases.

Q. That was different?

A. Very likely.

Q. Do you know whether the price had changed between Mr. Westhall's death and Mrs. Westhall's death?

A. I don't know.

Q. So when you figured it was the same estate you meant it was the same Westhall chapel?

A. Yes, and some of the articles were the same.

Q. What articles?

A. I did not specifically appraise the articles in the Edmund Westhall estate in that respect.

Q. Did you appraise the old hearse when the old gentleman died?

A. Yes.

Q. Do you recall what you appraised it at?

A. No.

Q. Did you appraise the other hearse? Was that in existence when Mr. Westhall died?

A. I think so.

Q. Do you recall the figure at which you appraised it?

A. No.

Q. How many hearses did Mr. Westhall own at the time of his death?

A. I cannot recall. I suppose two.

Q. You said the principals took part in that discussion; will you tell me who the principals were?

A. I excluded myself and Miss Pendle.

Q. Then the principals would have been the bank as guardian for the children, represented by your good father ——

A. And Mr. McCue.

Q. And the other principals would be Osborne Havens as administrator and Osborne Havens individually?

A. Yes.

Q. And the mothers of the children were there, were they not?

A. Yes.

Q. The mothers of the wards that the bank represented?

A. Yes.

Q. And the two Westhall daughters?

A. Yes.

Q. You said that the offer was accepted by all those present?

A. I did.

Q. What did Mrs. Jane Westhall say about the offer that you recall?

A. Nothing that I recall.

Q. Did she say anything for or against it?

A. Not to my knowledge.

Q. Did Mrs. Elizabeth Westhall say anything for or against it?

A. Not to my knowledge.

Re-cross examination.

By Mr. McCloskey:

Mr. McCloskey: May I ask one more question?

The Court: You may.

Q. Mr. Parmentier, were you, or were you not the financial adviser of Mrs. Jane Westhall at this time?

A. I would not say the financial adviser. I always tried to help.

Q. Didn't you advise her in many of her business transactions?

A. Yes, sir, when requested to do so.

Q. So Mr. Havens would not select you as one of the appraisers to benefit himself when you were representing Mrs. Jane Westhall and advising her on her affairs?

Mr. Matthews: Object.

The Court: Objection sustained.

By Mr. Matthews:

Q. Mr. Parmentier, at the death of your good father in December you immediately succeeded him as treasurer of the bank?

A. No, sir. The office was not filled at that time.

Q. Who acted as treasurer?

A. No one in particular.

Q. You were assistant treasurer?

A. Yes.

Q. When were you finally appointed treasurer by the board?

A. No one was appointed up to the time the bank closed.

Q. No treasurer was appointed officially before the bank closed?

A. I don't remember whether there was an annual meeting or not prior to the closing.

Q. Does the treasurer have any special function?

A. Whatever the by-laws prescribe.

Q. Who did whatever the by-laws prescribed after your father died?

A. The assistant could act in his absence.

Q. You were assistant?

A. I was one of the assistant treasurers. There were others.

OSBORNE W. HAVENS, a witness called by the exceptant, being duly sworn according to law, upon his oath testified as follows:

Direct examination.

By Mr. Matthews:

Q. You are the administrator of the estate of Beatrice E. Westhall, deceased?

A. I am.

Q. You were appointed as such administrator when?

A. August twenty-fifth, 1931.

Q. When Mr. Westhall died in 1928 you conducted the business for him, did you not, after his death and until the death of Mrs. Westhall?

A. I conducted the business for Mrs. Westhall after his death, not for him, up until the time Mrs. Westhall died.

Q. You were entirely familiar with the business and its assets?

A. Yes.

Q. And with its accounts receivable during all those years?

A. Yes.

Q. You knew, of course, what the income of that business was from the date of death of Mr. Westhall up to the death of Mrs. Westhall?

A. I made no particular note of it.

Q. Who was the bookkeeper?

A. I was.

Q. Who filed an income tax?

A. I did.

Q. Then you did know?

A. Yes, if I looked it up.

Q. You did run the business from August thirteenth, 1931, until you bought it?

A. I did.

Q. Your contract to buy the business, which is in evidence as E-1, was entered into on October first, 1931?

A. Yes.

Q. And Mrs. Westhall died when?

A. The thirteenth of August, 1931.

Q. And you were appointed administrator on the twenty-fifth of August, 1931?

A. Yes.

Q. Does your account contain anything at all which indicates what the proceeds of the business were from the death of Mrs. Westhall, or from your appointment as her administrator, until October first, 1931?

A. May I have that question again?

Q. Does your account, which you filed and ask the approval of this Court for, show the receipts from the undertaking business from the date of death of Mrs. Westhall, or your appointment, up to and not including October first, 1931, when you signed the contract to purchase the business?

A. (No answer.)

Q. I will show you the account. Have you anything in your account to indicate receipts from the undertaking business from the time Mrs. Westhall died, or your appointment as administrator, up to the time you bought it on October first, 1931?

A. No. There would be no reason to have.

Q. Why not?

A. Because I bought the business as of the date of her death.

Q. So that on October first, 1931, you bought the business as of August thirteenth, 1931?

A. That's right.

Q. There was nothing in the appraisal, was there, for the receipts of the business from August 13, 1931, until October first, 1931?

A. There was no reason to be.

Q. Why not?

A. Because all the bills receivable were in the appraisal as of the date of her death.

Q. And they total, as a matter of fact, sixteen thousand dollars, approximately?

A. You have the figures, $16,444.00, approximately.

Q. Have you the books of the business here with you?

A. Since my purchase?

Q. No, since Mrs. Westhall's death and your purchase, too.

A. Yes.

Q. I wonder if you could turn to that book which contains the business done between August thirteenth, 1931, and October first, 1931?

Mr. McCloskey: I am going to object to this on the ground that the administrator sold this undertaking business to himself, individually, in consequence of an offer which he made to all of the interested parties, that all of the interested parties consented in writing to the sale of this business from himself as administrator to himself individually, therefore any books of account since the date of the death of Mrs. Westhall are irrelevant, incompetent and immaterial.

Mr. Matthews: The exception goes to the price paid for the business, and so long as Mr. McCloskey has advanced the proposition of the exceptant's interest, I call the Court's attention to the fact that Mr. Parmentier said that everyone was represented at that conference by the same attorney—the sides purchasing and the sides selling, all those interested in the sale, were represented by the same attorney. Without casting any reflection upon my brother attorney it is contended that the price paid was a fair and reasonable one, but if we show that

a considerable business was done between those dates we think it would have a material and relevant bearing upon whether or not the purchase price was sufficient.

The Court: I am going to overrule the objection. It seems to me as I recall it the rule is that the Court ought to scrutinize pretty diligently transactions of a party in a fiduciary capacity with himself as an individual.

Mr. McCloskey: I agree with your Honor's conclusion in respect to that. The transaction itself should be scrutinized very carefully, and it is the contention of the accountant that this contract was scrutinized very carefully by all the parties in interest, and all the parties in interest subscribed their consent in writing to the sale of this business. I agree with your Honor as to scrutiny by the Court, but I do not see the materiality of the books of account prior to that, surely not until the time the contract is declared void. It has no materiality.

Mr. Matthews: If your Honor wishes to hear me further, I might say that the inventory before us in this case was made as of October or late September. It would be very important to the Court, in scrutinizing the fiduciary actions of this gentleman, to know what stock was in hand, how much was used. Is this inventory of forty-eight caskets, for instance, the inventory you would reasonably expect if in August there were one hundred and ten, which is more than we know. It does seem that the fiduciary himself should be ready and willing to open

all these transactions. We allege no dishonesty, but we allege negligent conduct.

The Court: There are two questions in my mind on this point. It appears from the inventory that there is no inventory value of the goodwill of that business. Under some circumstances, where the business consists of or is hinged upon the personal services of the person running the business, it might very well be that on his decease there was no goodwill, but on the other hand, if it was a going concern at the time of its former owner's death, and that identical business was carried on, it may very well be that there was such a thing as good will and some value ought to have been placed upon it. It seems to me that two things have a bearing on that—first, the amount of business done between the date of death of the decedent and the actual time of entering into this contract of sale and the payment of any consideration actually paid for it. It might possibly be pertinent to examine into the condition or amount of that income prior to the decedent's death for the purpose of determining that goodwill. I think it is material.

Mr. McCloskey: Let me say this so that your Honor will understand the situation. This conference was held at my office to determine the disposition of the business and of the real estate. We met there in the dual capacity of heirs and representatives of distributees of the estate. This sale was arrived at as a compromise, that is the contention of the accountant.

Mr. Matthews: That is rather testimony on the part of Mr. McCloskey.

The Court: He is stating his contention, and it may be after I have heard all the testimony I may agree with that.

Mr. Matthews: We are expecting to the contrary. His Honor allowed the production of that book—may we have it?

A. You mean to look at this without me being with you?
Q. We will look at it together.
A. May I go get it?
Q. Surely.
A. (Book produced.)
Q. You have produced a book which is what?
A. The record of cash receipts and disbursements.
Q. Is that the only book you kept for the business done between the death of Mrs. Westhall and the date of your purchase of the business?
A. It is the only book that would have any record of the amounts received and disbursed.
Q. What other books did you keep?
A. Merely a record of the death, which would give such information as the name and age of the deceased, father's and mother's name, and the kind of casket.
Q. Have you that book with you?
A. I have not.
Q. Can you produce that?
A. Yes, it is home.
Q. What other book beside that did you keep?

A. That's all.

Q. What book would show your purchase of materials and sale of materials?

A. It would show here the amounts paid out.

Q. Would it show for what?

A. No, but I would know for what from the company.

Q. Turn to August, 1931.

A. There is the first. Here is the cash receipts and disbursements.

Q. Let me glance at this.

A. All right.

Q. What I wish you to show me in that book is how much money was received by you from the death of Mrs. Westhall until October first, 1931?

Mr. McCloskey: For services performed during that period?

Mr. Matthews: For receipts for the business in that period.

Q. Will you tell us what was actually received in moneys, checks or cash or otherwise?

A. $43.00, $150.00, $150.00, $100.00, $269.00, $5.00, $15.00—that is your total of $732.00.

Q. What did you do with that money?

A. I appropriated it to the business, my own business.

Q. In other words, you deposited it to your own account?

A. I held it until it was decided. I held it for the time being.

Q. Didn't you deposit that money in your own bank account?

A. No, sir.

Q. Where did you deposit it?

A. I kept it in the safe.

Q. You did not account for that money in your final accounting that you ask this Court to approve?

A. No.

By the Court:

Q. During that same time what money was spent in conducting the business?

A. $472.06.

By Mr. Matthews:

Q. Will you turn to the page where the moneys paid out begin in this book?

A. (Witness complies.)

Q. Now, for instance, that item of 8-15-1931. "Davo cut grass," what does that mean?

A. That means labor on the property of the undertaking business.

Q. And "Rebecca Budd, labor." What kind of labor is that?

A. That was a lady who came in to take care of the house and so forth when we were busy there.

Q. Whose employee was she?

A. Mine, for the undertaking business.

Q. Did she dress bodies or fix hair?

A. No. She took care of the house. She had nothing to do with the undertaking business.

Q. "H. E. Brown."

A. That is an embalmer.

Q. "Mrs. Clayton."

A. That is in the same category as Mrs. Budd.

Q. "Foresters Lodge advertisement."

A. That is a business advertisement in a dance program or something.

Q. "O. M. Cochran"?

A. Florist. That is for the business.

Q. "J. Jeramore, papers."

A. That might be construed as a personal item.

Q. "Repairs to hearse" and "expenses to Brooklyn on account of funeral" were for the business?

A. Yes.

Q. "Mrs. McClay" is household services to your household?

A. That's right.

Q. What is "N. C. C."?

A. National Casket Company.

Q. What was that payment for, $31.77?

A. Funeral merchandise.

Q. You have not got your materials book here?

A. No. I did not have any materials book.

Q. How many funerals did you have between the thirteenth of August and the first of October?

A. I don't know, exactly. I will have to look that up at home. Apparently four, but I would rather look at my ledger on that to be accurate.

Q. This book shows how many you are definitely sure of?

A. (No answer.)

Q. What does this mean on page 169—$13,885.37 paid out by O. W. Havens?

A. I can let you know. That is for myself. That

is for various expenses in connection with the business.

Q. From when to when?

A. I have to trace this back to find that out. I would say that is for expenses in connection with the business up to that time.

Mr. McCloskey: Object to this. This is September, 1932.

Mr. Matthews: I don't want it if it is that.

A. You have the other.

Q. Look back at your funerals. You were looking through them and had come to the third one.

A. There are four there that I have a record of.

Q. Have you any record in that book of the gross business done from August 13, 1931, until October first, 1931?

A. Yes. You have it there, in that previous figure.

Q. What is the amount?

A. Seven hundred and something, and expenses of four hundred.

Q. I think, and I am prompted by my associate, that was only the amount collected, not the business done. Which was it? Were you paid for everything you did?

A. I kept my books on a cash receipts and disbursements basis.

Q. You have a book, have you not, showing the amount of business done from the death of Mrs. Westhall until October first, 1931?

A. Yes.

Q. And you will produce it?
A. Yes.

The Court: You run into this difficulty with this type of business. A person dies in January, 1934, and the undertaker's bill may not be paid for a year.

Mr. Matthews: That is true, but there should be an account of the amount of business done, and when persons have insurance they collect. If he has his funeral bill he can readily tell the price of each funeral, and from that, the gross business done.

Q. Can you show us the gross business done or the gross receipts from the business between the death of Mr. Westhall and the death of Mrs. Westhall?
A. Not from this book.
Q. Have you a book with those figures in it?
A. I could tell you by going over my ledgers at home. That would be quite a job. It was all turned over to Mrs. Westhall in her lifetime.
Q. What would you estimate the gross business to be in the year preceding Mrs. Westhall's death?
A. I have no idea.
Q. You kept the books and filed an income tax report?
A. Yes.
Q. You were formerly internal revenue collector?
A. Yes.
Q. Do you recall the income for last year?
A. No.
Q. Have you copies of the income tax reports?
A. Yes.

Q. Will you produce those for us?

Mr. McCloskey: Object as not material.

Mr. Matthews: The only purpose is to get whether there should be a good will to a business that did twenty-five thousand dollars' worth of business the year before. I am perfectly willing to take the figures from the books of the business or from the income tax reports. I do not wish to be inquisitive. We can get them, but we do not want to do it that way.

Mr. McCloskey: I do not think they are material in this proceeding.

The Court: If your objection was to inquiring into the income tax reports I have to sustain you.

Mr. Matthews: If he has other records I will waive the question as to income tax reports.

Mr. McCloskey: Even then I don't think it is material. This was a personal service business and it is the contention of the accountant there was no goodwill.

The Court: I said half an hour ago or more that I recognize it as true that where a business is based upon personal service or a personal confidential relationship, such as a doctor or lawyer, that it is questionable as to whether there could be any such thing as a goodwill from that business. It may be the same with an undertaker. On the other hand,

with an undertaking business, it may be that that business was carried on as a going concern, and there may have been goodwill as evidenced by the fact that that particular business continued, and that is the reason why, in this case, I am going to inquire into that.

Mr. McCloskey: I would like to express my objection that it is irrelevant, incompetent and immaterial because this contract was made between the administrator, Mr. Havens, and himself, individually, with the express consent in writing of all of the parties in interest, which included any goodwill, if there were any, for the cash consideration paid.

The Court: I understand your point, and because of the confidential or fiduciary relationship of this man, Osborne W. Havens, in his capacity as administrator, to these other heirs, whom you say consented, and also his actions as an individual in purchasing this business, there arises a situation I should look into. Of course, if I am in error then your objection is good.

Q. You started, however, immediately to put the receipts from the business into your own possession, immediately upon Mrs. Westhall's death, didn't you?

A. I did not. I kept it in the safe until after the contract was signed.

Q. The contract was not entered into until October and Mrs. Westhall died in August. Why did you start putting it in the safe in August? Did you intend then to buy the business?

A. Not necessarily. I did not know who would buy the business.

Q. Why didn't you put them in bank?

A. I was not appointed administrator until the twenty-fifth of August and I was probably waiting to see what the decision would be. I was not sure I would buy the business. I was willing to make a bid for it because of the fact that Mr. Westhall asked me to carry on the business before he died.

Q. But the fact is that all the receipts from the business you kept aside and did not deposit them in your administrator account, even after you were appointed?

A. But I did account for them afterward, when they were supposed to go to the estate.

Q. Did you account for any cash moneys received from the death of Mrs. Westhall in August until you purchased the business October first?

A. Not to the estate.

Q. Whom did you account to?

A. I kept a record, later to be accounted to the estate, in the event it became the property of the estate.

Q. If you didn't buy you were going to account for it to the estate, but if you did buy you were going to buy it with that money received as a part of what you bought?

A. No.

Q. But you did buy the business with that money you took in, didn't you?

A. No.

Q. The money you took in from the death of Mrs. Westhall until October first you kept separate and

apart, because you did not know whether at some time you would have to turn it in to the estate?

A. Yes.

Q. But you did not turn it in to the estate, and the reason why was because you bought the business as of the date of death?

A. Yes.

Q. You must have envisioned what was going to be done when you kept it separate and apart?

A. What should I have done?

Q. Put it in the bank.

A. I might have done that.

Q. Where did you keep that money?

A. In the safe in the office.

Q. The receipts of the business from October first, 1931, until August 9, 1932, are they in that book?

A. Either in this book or another book I have over there.

Q. Have you struck a figure, $6,537.75, which would show the receipts from October first until December thirty-first, 1931?

A. Yes.

Mr. McCloskey: Object to that on the same ground, that it is incompetent, irrelevant and immaterial.

The Court: The same line of reasoning behind that?

Mr. Matthews: Yes, your Honor.

The Court: The objection will be overruled.

Q. That is from October first to December thirty-first. Now, turn to from December thirty-first to August ninth, 1932.

Mr. Matthews: May I say to your Honor that this is very important, because the administrator, though his contract called for payment forthwith, did not pay the purchase price until ten months after August 9, 1932.

The Court: I have some other matters to hear and perhaps we can save time by recessing until two o'clock. Meantime, you can look over this book.

(Recess until 2 P. M.)

Osborne Havens, recalled.

Re-direct examination (continued).

By Mr. Matthews:

Mr. Matthews: Before I proceed with my questions on these books I want to ask another question.

Q. You told me that seven hundred dollars in receipts taken in between Mrs. Westhall's death and your purchase of the business you kept that in the safe?

A. Yes.

Q. Was this money all received in cash or was some of it in checks?

A. I have no way of telling that now.

Q. How do you recall that you kept it all in the safe?

A. I probably converted it if it was in cash, my records do not disclose whether it was cash or what.

Q. Your disbursements during that period were $472.00. They were by check?

A. Practically all.

Q. Against what were they checked?

A. Bills received.

Q. As I understood you before, you did not deposit the moneys you received between Mrs. Westhall's death and your purchase of the business, but you did put it in the safe. When you drew checks, did you draw your own personal checks against your own personal funds?

A. It is probable I did, with the idea of adjusting it later. It is probable I did.

Q. With the idea of adjusting it later, not with the idea of buying the business?

A. No. I did not know who would buy the business.

Q. Will you tell me what record you have to indicate your disbursements during that period, either by check or cash?

A. It would be in this book.

Q. Will you turn to your page of disbursements?

A. These small items were cash.

Q. Take the large items.

A. These were probably paid by check. This would probably be a check. (Pointing to two fifteen-dollar items.)

Q. Where did you keep your record and separate what you checked out for this business you did not know you were going to buy and separate it from your own funds?

A. Right here. This applied to the business and was later appropriated to it.

Q. That is the only record you have, in that book before you?

A. Yes, that I think of now.

Q. This business was established in 1868, was it not?

A. According to my information.

Q. And was carried on by Mr. E. J. Westhall until his death in 1928?

A. Yes, he was the last up to that time. I think his father was his predecessor.

Q. The Westhall business was founded by whom?

A. I imagine by his father.

Q. And Mr. E. J. Westhall was your father-in-law?

A. That is right.

Q. At noon time, by the Court's kind indulgence, we adjourned early, and you looked at your record books with me.

A. Yes.

Q. And you found, did you not, that between the first of October, 1931, and the thirty-first of December, 1931, that your total of cash received from the business was $5,820.75?

A. You have the figures there.

Q. The figures you put down are correct?

A. Yes.

Q. And Mr. Matthews, my namesake and opponent, checked with me during the recess?

A. Yes.

Q. Your cash disbursements during that period were $1,521.74?

A. You have the records there, you went over them. I have no record of that here.

Mr. Elmer Matthews: I assume these figures are correct.

Mr. Matthews: Will you stipulate if they are the figures taken in your presence they are correct?

Mr. Elmer Matthews: Yes.

Q. From the ninth of January to the ninth of August, 1932, at page fifty-three in your record book, you will find that your total receipts are $16,355.73, against which there were several items of credit of $71.63, so that would make a total of $16,284.10, which would be your cash receipts from the business from the first of January, 1932, till the ninth of August, 1932?

A. Apparently.

Q. Against that and on another page your disbursements show during that time a total of $8,905.85, except that you find under that total of $8,905.85 three items, one, house furnishings $427.50, two, stock and fixtures $3,232.00, and automobiles $1,525.00, making a total of $4,284.50 which was the sale price of the business and fixtures.

A. And stock, yes.

Q. But your expenditures from the first of January, 1932, to the ninth of August, excluding this

stock and fixture and auto item I have just recited, were $8,905.85. That is correct, is it?

A. That seems to me the proper amount. You tallied it.

Q. Will you tell me from your record your accounts receivable accruing between the thirteenth of August, 1931, and the first of October, 1931?

A. I am afraid I can not give you that. I have not here accounts receivable. As I told you, we were working on a cash basis.

Q. You told me coming upstairs ——

A. You had reference to the accounts receivable of the Beatrice E. Westhall estate, not my own.

Q. I misunderstood you. Where will I find the accounts receivable accruing between the thirteenth of August, 1931, and the first of October, 1931?

A. I have not that book with me.

Q. Will you produce that without further subpoena?

A. Yes, sure.

Q. A second question, what were your accounts receivable between the first of October, 1931, and the ninth day of August, 1932, that accrued during that period?

A. That would be the same answer as the previous question. I would only have a record of my cash receipts, but I can produce the other record.

Q. Have you any reasonable estimate of how much that is?

A. Not the slightest.

Q. When did you first talk about buying this business, and with whom?

A. As I recall it was first spoken of the night of the meeting prior to the closing of the proposition.

Q. The night of September thirtieth?

A. If that was the date.

Q. That meeting was the night before the contract was signed?

A. I imagine it was. I don't know.

Q. Who first broached the proposition,—you to somebody or somebody to you?

A. I have no recollection of that. I don't know.

Q. After Mrs. Westhall's funeral don't you recall a conversation in the home of the deceased Mrs. Westhall, while the family were gathered, at which conversation you said you would like to take over the business?

A. Not unless you can refresh my memory by something else.

Q. At that time didn't the girls say to you, "Take it over? That is an asset of the estate," or "That will have to go into the estate"?

A. I have no recollection of any such conversation.

Q. You have no recollection of having spoken to anybody about purchasing the business until the night you were in Mr. McCloskey's office with the gentlemen and ladies mentioned?

A. Not unless you can refresh my memory with something else said.

Q. Don't you recall that Mr. Harry Brown wanted to buy the business?

A. I don't know that I do. Tell me what was said. I may remember.

Q. I am telling you nothing. I am asking for your recollection as a witness. Have you any recollection that at the meeting in Mr. McCloskey's office, during the discussion you have told us about, that Harry

Brown was mentioned as wishing to buy the business?

A. I have no recollection of that.

Q. Have you any recollection between the time of the meeting in Mr. McCloskey's office, September thirtieth, and the death of Mrs. Westhall, have you any recollection at any time of Harry Brown's name being mentioned as desiring to purchase the business?

A. No.

Q. Who called the meeting for September thirtieth, 1931, at Mr. McCloskey's office?

A. I have no recollection as to that.

Q. So that when you got to Mr. McCloskey's office that night, as far as you can recall, you did not know why you went or who sent you or whether you went of your own initiative?

A. I probably went there at the request of Mr. McCloskey, but I am not sure about it.

Q. Did you know the directors of the bank and that the Westhall ladies were coming?

A. Yes. I assumed they would be there, because they were interested.

Q. How did you know they were interested. You must have known what it would be about.

A. That would be a natural assumption.

Q. Was your own wife at that conference?

A. Yes.

Q. Did she go with you?

A. I don't recall.

Q. What time did you get to that conference that night?

A. I could not say now.

Q. Who opened up the conference and mentioned its purpose?

A. I don't know. I have an assumption, but I don't know.

Q. What is your recollection. You don't have to assume.

A. I cannot say definitely who opened it.

Q. Who was your lawyer at the conference?

A. Mr. McCloskey.

Q. Who was your lawyer as an individual?

A. Mr. McCloskey.

Q. Was there any other lawyer representing the children's interest in the estate of which you were administrator beside Mr. McCloskey?

A. Not that I know of.

Q. What was the first matter discussed at that conference according to the best of your recollection?

A. The discussion I think was as to the inventory. The value of the assets of the estate.

Q. Was there a copy of the inventory handed to each one at the conference?

A. As far as I know there was.

Q. Don't you remember, as a matter of fact, there was only one copy of the inventory there that night?

A. I would not recall that, no.

Q. Who first mentioned the fact that you wanted to buy the business?

A. I don't remember that.

Q. What is the first thing you do remember about the sale of the business being discussed; what was said by anybody?

A. The first thing I remember after the inventory being approved ——

Q. What do you mean, approved?

A. Agreed to by those present.

Q. What did Mrs. Jane Westhall say about the inventory?

A. I don't recall.

Q. Do you recall her saying, "What, $4,284.50 for the business! How about good-will?"

A. I have no recollection about that.

Q. What did Mrs. Elizabeth Westhall say about the inventory?

A. I have no recollection at this time.

Q. What did anybody say about the inventory?

A. I have no definite recollection of what anybody said about it.

Q. What did Mrs. Elizabeth Westhall say about the undertaking business inventoried at $4,284.50?

A. I don't recall.

Q. Do you recall what anybody said about the undertaking business inventoried at $4,284.50?

A. I do not.

Q. What is the first thing you remember about your going to buy this business at that conference?

A. The fact that the inventory was presented and the amount disclosed, and there was some discussion as to good-will.

Q. There was a discussion as to good-will?

A. Yes, a general discussion.

Q. Did Mrs. Jane Westhall speak of it?

A. I think she did.

Q. Did Mrs. Elizabeth Westhall speak of it?

A. I have no recollection of that.

Q. What do you remember of that discussion? Did you participate in that discussion?

A. Yes.

Q. What did you say?

A. As I recall after twelve o'clock.

Q. Do you recall at what time you signed this agreement next morning?

A. I do not.

Q. Or where you signed it?

A. No.

Q. Your signature as far as E-1 shows is not witnessed, is it?

A. Yes, "Beatrice Pendle, as to Osborne Havens and Jessie M. Havens."

Q. So Beatrice Pendle witnessed your signature?

A. Apparently.

Q. She is Mr. McCloskey's secretary?

A. I believe so.

Q. Do you recall now whether you signed it in Mr. McCloskey's office?

A. I do not.

Q. Do you recall whether you signed it in your home?

A. No, I don't recall whether I signed it in my home or in his office.

Q. Do you recall whether you signed it in the bank?

A. I am sure I did not.

Q. Then you must have signed it at Mr. McCloskey's office or in your home?

A. Presumably.

Q. Do you recall when your wife signed it?

A. I have no recollection as to that.

Q. Did you see anybody else sign it beside yourself?

A. If I could see the signature ——

Q. (Paper shown to witness.)

A. Apparently not.

Q. So you do not recall having seen anyone else sign? You don't know where anybody else signed. You don't know when anybody else signed, except you conclude from the date October first that was the date you all signed it. Is that correct?

A. I conclude that, yes.

Q. You knew at that time, did you not, that the Lakewood Trust Company was the guardian of the property of the three minor children, two belonging to Mrs. Elizabeth Westhall and one belonging to Mrs. Jane Westhall?

A. I had been so informed.

Q. You knew it at the time you signed this agreement, didn't you?

A. I had been informed of that.

Q. Well, if you had been informed of it you knew it.

A. I don't see that that is necessarily so. I knew I had been informed.

Q. Who informed you?

A. Probably Mr. McCue or Mr. McCloskey. I don't recall.

Q. You knew that the Lakewood Trust Company was guardian of those children for three years back, or of their property?

A. I had no reason to know that. I did not know it three years back.

Q. When did you first learn it?

A. I don't remember that.

Q. Did you know it when Mrs. Beatrice Westhall died?

A. No.

Q. You did not know that the Lakewood Trust Company was the guardian of the property of the

three infant children we have mentioned when Mrs. Westhall died?

A. I have only heard it. I had not been told by any officer of the bank. I had no reason to inquire.

Q. Whom had you heard it from?

A. It was just general knowledge.

Q. When you became administrator of this estate on August twenty-fifth, 1931, the only knowledge you had that there were wards of this estate for which the bank was guardian was general rumor?

A. I may probably have been informed of that by Mr. McCloskey.

Q. Isn't Mrs. Elizabeth Westhall an intimate friend of yourself and your good wife?

A. I always figured so.

Q. In this agreement marked in evidence as Exhibit E-1, the consideration for the sale of the business, exclusive of the furnishings—I show you the agreement at what would be page eight if the pages were numbered, and ask you to read paragraph two.

A. "The consideration of sale of said undertaking business, merchandise, stock in trade, equipment and accessories by Osborne W. Havens, administrator, to Osborne W. Havens individually, the said Osborne W. Havens shall pay forthwith to the estate of Beatrice E. Westhall, deceased, the sum of $3,842.00 and shall lease that part of the premises set forth in A in the recital to this agreement which has heretofore been employed in the undertaking business, consisting of dwelling house, barn, and chapel, from the heirs-at-law of the said Beatrice E. Westhall, deceased, for the term of one year from October first, 1931, at a yearly rental of nine

hundred dollars, payable in equal monthly installments in advance, and as a further consideration the said Osborne W. Havens shall supervise and manage all of the real estate of which the said Beatrice E. Westhall died seized, and which is particularly set forth in the recital to this agreement."

Q. Will you read paragraph three on the second page, the next page to that agreement?

A. "It is understood and agreed, and the said Osborne W. Havens does hereby acknowledge, that he is obligated to continue this agreement under the same terms and conditions as herein contained for an additional year, beginning October first, 1932, if the heirs-at-law or their representatives so elect."

Q. Will you read number four?

A. "It is further understood and agreed that the said Osborne W. Havens shall receive no other consideration nor compensation for the performance of his services as herein required, it being distinctly and expressly understood that such services are to be performed in consideration of the sale of the undertaking business to him and in the further consideration of the reduced rent of the premises that he is to occupy and use in the undertaking business."

Q. This is the same one, only it is easier because the pages are apart. Will you read paragraph two on that page?

A. "In consideration of the sale of said undertaking business, merchandise, stock in trade, equipment and accessories by Osborne W. Havens, administrator to Osborne W. Havens individually, the said Osborne W. Havens shall pay forthwith to the

estate of Beatrice E. Westhall, deceased, the sum of $3,842.00.''

Q. That agreement recites as you have just read it that you shall pay forthwith the sum of $3,842.00, and that agreement is dated October first, 1931, is it not?

A. Yes.

Q. When did you pay for the business?

A. You have a record of that. I think it was August ninth.

Q. Answer my question, please. When did you pay for the business?

A. I cannot tell without my record.

Q. Don't you recall?

A. No.

Q. You may look at your record, if you don't recall.

A. August 9, 1932.

Q. I show you what purports to be a copy of your account, furnished me by Mr. McCloskey, and I represent it to you as correct, and particularly call your attention to what I have marked page fifteen, and ask you to look at the item under household, which reads as follows: ''Household furniture and furnishings and undertaking business, together with equipment and automobiles, sold to Osborne W. Havens, and the proceeds deposited, inventory value, $4,284.50.'' You have no date on that in your account, have you?

A. I would have to see the account.

Q. Here is the original account on file in the Office of the Surrogate.

A. There is no date there.

Q. Then the answer is there is not?

A. There is not.

Q. Why didn't you pay for this business, when it called for a payment forthwith, why didn't you pay for it until August 9, 1932, ten months thereafter?

A. I did not understand it was to be paid for immediately.

Q. You read English, don't you?

A. Occasionally.

Q. And when don't you read English?

A. When I read some other language.

Q. What other language do you read?

A. Spanish.

Q. When you don't read Spanish you read English?

A. Yes.

Q. When you were reading this agreement you were reading English?

A. Yes.

Q. You saw the word "forthwith"?

A. Yes, I probably read forthwith, but I did not realize it meant immediately.

Q. As a matter of fact, didn't your counsel tell you that you should have paid it long before you did?

A. I don't recall that he did so.

Q. Is that the only reason you want to give me from that witness chair why you did not pay for this business until ten months after you agreed to pay for it forthwith?

A. I may not have had the money at that time, that is the full amount, but I don't recall that.

Q. The records of your business you have disclosed from your books during the noon recess show

that between the first of October, 1931, and the thirty-first of December, 1931, your cash receipts over your cash disbursements from the business, that you had not paid for until October, were $4,299.01. Do you mean to tell me yet that you did not have enough money to pay for the business until August ninth?

A. Yes.

Q. What happened August ninth that you got enough money to pay for the business?

A. I had some building loan mature.

Q. What building loan?

A. Asbury Park and Lakewood.

Q. How many shares?

A. Fifteen in Asbury Park and five in Lakewood.

Q. Did you receive these moneys by check from the building loan?

A. I imagine I did.

Q. How much did you receive from the Asbury Park Building Loan?

A. Three thousand dollars.

Q. Where did you deposit that money?

A. In the People's National Bank.

Q. Have you now the deposit slip ——

Mr. McCloskey: Object as having no materiality.

Mr. Matthews: It is the only point in this whole case where we suspect the good faith of this accountant. Your Honor will notice there was no payment until ten months thereafter. At or about this time there was paid off a mortgage known as the Matthews mortgage, and we can show there was a pressure for this money, and we want to find out

what money was used by this gentleman. We want to show, as a matter of law, that the business was not his until he paid for it.

The Court: After all, all you have to show is when he paid for it.

Mr. Matthews: We have that. We have his deposit slip, but that does not mean a thing. Was estate money used to pay for this business, is what we are searching for. Now, the gentleman tells me he had a building loan come due of three thousand dollars from the Asbury Park and one thousand dollars from the Lakewood Building Loan, and I have his bank account transcripts here, and I want to know whether that was the money he used or not. We searched the bank deposits and we do not find that money. It goes to the essence of where this money was paid from. While I want to find out about it, it may have been a perfectly honest transaction, but he owes it to himself to show us.

Mr. McCloskey: We have no objection to his telling it but our theory is that he handled this business as his own from August thirteenth right on down and did not account to the estate for them, but if they are delving into his personal affairs I object.

The Court: The thought I had was that this contract called for the payment of that purchase price forthwith. That was October first, and it was not paid until some ten months later. He might be chargeable with interest on that amount.

Mr. Matthews: He was chargeable with the business done, your Honor.

The Court: I have not looked at the contract. It may be that contract is so drawn that title to that business did not pass until there was a payment. On the other hand, it may be, like a great many sales that title would pass immediately.

Mr. McCloskey: May it be understood that my objection applies to all this examination. When the examination started this morning I objected and stated my grounds, and I want my objection to apply to all this examination.

The Court: Your objection to the present question would have to be on slightly different grounds, but for the record you may have an exception. It may be that I will so construe that contract that a lot of this testimony will be absolutely irrelevant. If that is the case I will not consider it.

Mr. Matthews: Your Honor realizes, no matter what way your Honor construes it, if I think your Honor is mistaken I must have my record for the Court above.

The Court: Oh, yes.

Q. I show you this statement from the People's National Bank, which purports to show your account. I find one item of July nineteenth ——

A. You will find this deposit May 31, 1932.

Q. Three thousand dollars. That is where you got it.

A. And the next one is August fifth, 1932. One thousand. There it is.

Mr. Matthews: The witness has identified the bank sheets and showed two deposits, one May first, 1932, of three thousand dollars, and the other August fifth, 1932, of one thousand dollars.

Q. And these are deposits in the account of O. W. Havens in the People's National Bank, of Lakewood, N. J.?

A. Correct.

Q. Why did you wait until August ninth, when you had that money in May?

A. I had in mind paying an obligation of the estate for Elizabeth C. Westhall.

Q. That obligation was a mortgage on Elizabeth Westhall's home, which Mr. E. J. Westhall, in consideration of affection for his daughter-in-law agreed to assume?

A. He had signed with Mrs. Elizabeth Westhall an agreement obligating his estate.

Q. And upon his death it became an obligation of the estate and upon Mrs. Beatrice Westhall's death you recognized it as an obligation of her estate?

A. Correct.

Q. The amount of that was what?

A. $3,246.99.

Q. When did you pay that mortgage off?

A. August 18, 1932.

Q. You paid that off after you paid your business obligation off?

A. Yes, I used part of that money.

Q. I ask you again, why didn't you pay the business obligation in May and June, when you had four thousand dollars out of the building and loan?

A. As I recall, the building and loan, I was unable to get the amount from the building and loan at the time.

Q. But your deposit slips show you deposited three thousand dollars in May and a thousand in August.

A. Yes.

Q. Why didn't you use that money and the current money that had already come in from the business which you were treating as your own?

A. I assumed I had time to pay off the business and there was no hurry.

Q. So if you felt that way up to now you would not have paid until now.

A. No, I would have paid within the year.

Q. Under date of May thirty-first, 1932, I show you on your bank account a figure representing a balance as $917.33. Was that your balance?

A. Yes.

Q. I ask you to look under "balance," in that column all the way down, and ask if your balance at any time ran under thirty-seven hundred dollars from May until June fifth?

A. No.

Q. You have pointed now to another sheet and I ask you to look at your balance on that sheet from June until August eighth, and is there any balance on that sheet under four thousand?

A. Yes. Several of these here.
Q. There are four consecutively. One is $3,942.00?
A. Yes.
Q. One is $3,892.00?
A. Yes.
Q. One is $3,880.00?
A. Yes.
Q. One is $3,250.00?
A. Yes.
Q. And another is $3,896.00?
A. Yes.
Q. And there are many over five thousand in June?
A. Yes.
Q. And there are all over four thousand in July and August except what I read off?
A. Yes.

Mr. Matthews: I want to introduce the sheets in evidence that refer only to the balances, and I will have the banking man make a mark to indicate so that the stenographer will be able to identify them for herself. I will let Durward see them.

Mr. McCloskey: I object to the submission of his personal account in evidence. There is no connection shown between his personal account and the account of the estate.

The Court: You have already on the record the figures that are pertinent.

Mr. Matthews: With respect to your Honor, I could not use that record above.

(Bank sheets marked Exhibit E-2 in evidence, consisting of three pages.)

Q. This morning you told me you had been a deputy internal revenue collector in your early years.

A. Yes.

Q. And you have been deputy internal revenue collector since we have had income tax?

A. I have.

Q. Did you, as the administrator of the Beatrice E. Westhall Estate, file an individual income tax for Beatrice E. Westhall from January 1, 1931, up to the date of her death?

A. As I recall it, I did.

Q. Do you have a copy here?

A. No, it is at home.

Q. Will you produce it?

A. I will.

Q. Did you file a fiduciary return for the estate from November to December, 1931, or for the year 1932?

A. No fiduciary returns have been filed for the Estate of Beatrice E. Westhall by me.

Q. Why not?

A. There was nothing to be distributed for the estate.

Q. Do you construe your fiduciary return to be filed only for distribution?

A. Yes.

Q. And not income?

A. For the estate, yes. There was no income as far as the estate was concerned except a few divi-

dends which would not require a fiduciary return as I recall the figures.

Q. Let me jog your memory a bit. Isn't it for the information of the Bureau of Taxation that a fiduciary return is filed?

A. I believe so.

Q. And must not you file one each year?

A. I do not think it is mandatory.

Q. Have you a copy of your New Jersey Inheritance Tax report with you?

A. I will ask Mr. Elmer Matthews to look in my files. I doubt it.

Q. You were in full knowledge on the first of October, 1931, that there was at least twenty-one thousand dollars in the Lakewood Trust Company?

A. Yes.

Q. In fact, that was there from August thirteenth, from the date of Mrs. Westhall's death?

A. Yes, that was there when she died.

Q. You also knew there was fifteen thousand dollars of accounts receivable in the undertaking business at the death of Mrs. Westhall?

A. Yes.

Q. You also knew there was considerable United Shoe Machinery stock, and you knew its value?

A. Yes, four hundred and twenty-seven shares.

Q. And the value of that was approximately what in your inventory?

A. Around twenty thousand dollars.

Q. So that you knew at that time that there were assets, realizable assets of more than fifty thousand dollars, didn't you?

A. Out of the personal property, I was not sure.

Mr. Matthews: I think your Honor, that the Surrogate's records do not have to be offered specifically in evidence. Will your Honor please advise me? This is a certified copy.

The Court: I think they are all records of the Court.

Q. Where did you deposit the receipts from the undertaking business from the first of October, 1931, to the ninth of August, 1932? That is when you signed the contract of sale.

A. Is that subsequent to the closing of the Trust Company?

Q. I will ask you again. Where did you deposit the receipts from the business from October first, 1931, when you signed the contract to buy it, until August ninth, 1932, when you paid the money for it?

A. Could you tell me when the Lakewood Trust Company closed?

Q. I am advised it was the third of January, 1932.

A. Prior to the closing of the Lakewood Trust Company deposits were made there. Subsequently they were made in the People's Bank in Lakewood.

Q. When did you deposit the receipts that came from the business between the death of Mrs. Westhall on the thirteenth of August, 1931, and the first of October, 1931?

A. At various times.

Q. I understood you to tell me that these moneys as you received them you put in your safe, but that after you bought the business, since you bought the business as of the date of the death of Mrs. Westhall, that you then concluded that these moneys were your

own. Up until the time you actually bought the business, you left me with the idea that you kept these moneys separate and apart, not knowing whether or not you were going to buy the business. When and where did you deposit these moneys?

A. As I previously stated, in the Lakewood Trust Company up to the time of closing, and subsequent to that in the People's National Bank in Lakewood.

Q. I want you to understand my question. When Mrs. Westhall died, you having been manager of the business, continued on as manager and continued to manage it until the first of October, when you bought it. Between the thirteenth of August and the first of October you received moneys in that business and you said you put them in the safe. When you bought the business on the first of October, considering you had bought it as of the date of Mrs. Westhall's death, you then decided and concluded "these moneys I now have in the safe I can put in the bank." What bank did you put them in?

A. I don't recall that.

Q. Did you have any other bank accounts beside those in the Lakewood Trust Company and the People's Bank?

A. Not to my knowledge.

Q. Between the death of Mr. E. J. Westhall in 1928, and the death of Mrs. Westhall, you managed the business for Mrs. Westhall, did you not?

A. I did.

Q. And during that time did you have any bank account in your own name or in your name as trustee, or in any capacity whatsoever in any other bank beside the Lakewood Trust Company or the People's Bank of Lakewood?

A. I cannot say for certain, but I probably had an account with the Seacoast Trust Company of Asbury Park.

Q. Well, the Seacoast has gone to the sea, hasn't it?

A. As I know.

Q. Between the time of the death of Mrs. Westhall and the present time have you had or have you any account in any other bank beside the Lakewood Trust Company or the People's Bank of Lakewood?

A. Not other than one probably in the Seacoast.

Q. What has become of the Seacoast National Bank account?

A. Still there, in the hands of the receiver.

Q. Do you recall when you last actively used that account?

A. Probably in September of 1931.

By the Court:

Q. Before I forget it, I would like to find out, if the information is available, whether that seven hundred and seventeen dollars which was received between the time of the death of this decedent and the day of the execution of that contract, October first, represented money that was taken in for services rendered during that time, or stock in trade sold during that time, or was that for services and sales prior to the time of Mrs. Westhall's death?

A. I could not tell you off-hand, your Honor.

Mr. Matthews: I asked him the business he did between her death and his buying the business.

The Court: I remember that. I am asking that question in view of his further statement he was modeling all of his books on a cash basis.

Mr. Matthews: Then I asked him for his accounts receivable for that period, then for the next, and then for the next, for business done during that time, and he has promised us that.

By Mr. Matthews:

Q. Will you turn to the business done between August thirteenth, 1931, and October first, 1931?

The Court: He remembered that amount was seven hundred and seventeen dollars, roughly.

By the Court:

Q. That is correct, isn't it?
A. Yes.

By Mr. Matthews:

Q. Was not that money taken in for business done at that time? It was not for accounts receivable for business done prior to that time. You told me you had no accounts receivable, that it was a cash basis book.
A. Yes.
Q. We are now at the twelfth exception. Your final accounting shows on page two of the original account under date of August eleventh, to interest on mortgage George Matthews, $158.33, and $38.33,

carried out on the side as $120.00. Look at page fifteen on your account now ——

A. Yes.

Q. You will find an item, August eleventh, 1932, $2000.00, paid, George Matthews mortgage, and proceeds deposited, $2000.00.

A. Yes.

Q. That is marked deposited in your account, is it not?

A. Yes.

Q. Was that money actually deposited in your account?

A. Not in the account, no.

Q. What was done with that $2000.00?

A. It was deposited in a safe deposit box in the People's National Bank of Lakewood.

Q. On what day?

A. Presumably the same day.

Q. We want definitely what you remember.

A. I know I put it in there right away. I didn't haul it around.

Mr. Matthews: I have ordered the production of a receipt by a daughter of George Matthews, now deceased.

Q. I show you a paper and ask if that is your writing?

A. It is.

Q. And what is that paper?

A. It is a receipt given to Elwood and Mabel Kingsley, Lakewood, New Jersey, August eleventh, 1932. Received from Elwood and Mabel Kingsley $2160.00, to be used to cancel mortgage, George

Matthews to Edmund J. Westhall, dated April 18, 1928. O. W. Havens, administrator estate of Beatrice E. Westhall.

Mr. Matthews: We offer this in evidence, and he wants the receipt back, because his mortgage is not canceled of record.

The Court: It may be marked.

(Receipts marked in evidence Exhibit E-3.)

Q. Your account says that on that date you got $2000.00 and it says you deposited, the receipt marked in evidence says you got $2160 from the Matthews people, what did you do with the other $160?

A. On page two of that account I charged myself with interest of $153.88. On page fifteen you find the difference, making $2158.00 the amount of the debt.

Q. What did you do with the interest on that amount?

A. I put it in a lock box in the People's National Bank in Lakewood.

Q. What number was that box?

A. 105.

Q. In whose name was the box?

A. In my name.

Q. As administrator or individually?

A. Individually. It was either 105 or 113, I have two boxes.

Q. Did you ever remove that money from that box from the day you put it in until the present?

A. I took it out probably a week or two ago to make sure it was there after I heard of exceptions to the account. Until then, not.

Q. What did you do with it a week or so ago?

A. I put it back where I had it previously.

Q. How was it in the box, in an envelope?

A. Yes.

Q. What was on the envelope?

A. I don't remember exactly. I probably said, "property of the estate of Beatrice E. Westhall, George Matthews mortgage, total."

Q. Did you tell Mrs. Elizabeth Westhall that you called the Matthews' mortgage in order to get money to pay for her mortgage?

A. I don't recall, but I may have.

Q. But, as a matter of fact, you have told me that you paid for her mortgage out of other funds, did you not?

A. Understand this was three years ago.

Q. Will you tell the Court and us why you put that money in that box and kept it there all this time?

A. For safety sake.

Q. You are the president of a bank, are you not?

A. At the present time, but not of that bank.

Q. How long have you been a president of a bank?

A. Since March 31, 1934.

Q. Do you carry deposit insurance in that bank?

A. Yes.

Q. That deposit insurance in your bank guarantees deposits up to five thousand dollars?

A. Not at the time of opening, until July 1st.

Q. You did not consider it your duty at all to

put that money on interest in a savings bank where they had deposit insurance?

A. There would have been no interest paid on it by our bank. We would not be able to leave it in any bank for a sufficient time.

Q. Did you or did your counsel apply to the Court for instructions about this or did you do it on your own initiative?

A. Probably on my own initiative.

Q. You pressed these Matthews' people for their mortgage?

A. Yes.

Q. And after pressing them you took the money and put it in a tin box in the bank?

A. Yes.

Q. You didn't need that money for any purpose when you put it in a tin box in the bank?

A. I used my judgment. Mr. Matthews was not in a position to pay the mortgage and the interest was over a year behind.

Q. It was a good security, wasn't it?

A. To my mind not exceptionally.

Q. I did not ask you whether it was exceptional, I asked you if it was good?

A. I would say it was not good.

Q. What would you consider the value of the Matthews' property, on which you demanded the mortgage?

A. Do you mean tangible or value?

Q. I mean the mortgage value that you loaned on, what value do you consider would have supported that $2000.00 mortgage?

A. That would depend on who was occupying the house.

Q. Who did occupy the house?

A. Mr. Matthews at the time.

Q. Did you call it before or after his death?

A. Before.

Q. It was occupied by the owner which is the best occupancy, what value do you think the house had that you had that $2000.00 mortgage on?

A. That would refer to the same question you asked before, depending on whether it was a tangible valuation or not.

Q. Just label them.

A. The tangible value would be not in excess of $1000.00, and otherwise probably $3000.00.

Q. Is the property still in the hands of the Matthews' people?

A. It is now in the hands of the daughter and son-in-law.

Q. And your best estimate of value would be $2000.00?

A. I would not want to give that for it.

Q. You were not afraid of your security in that property when you called that mortgage, were you?

A. Yes, I was.

Q. In what way were you afraid of your security?

A. Because of the fact that Mr. Matthews deeded that property to his daughter upon an agreement, as I understood it from her, that she would take care of him the rest of his natural life.

Q. And that worried you?

A. She wanted to pay it off.

Q. Mrs. Kingsley wanted to pay it off?

A. No, wait a minute. I had asked for it because of the delinquency in interest is the way I recall it. Mrs. Kingsley told me she would like to buy the

place. I said I cannot leave the mortgage on for the estate people and she got some money and paid it off.

Q. As a matter of fact, Mr. Havens, didn't you press them so that they, who had known you a long time, were so angry that you lost the funeral of the old gentleman at the time?

A. Yes, but that was the understanding. Mr. Matthews concluded that Mrs. Kingsley and I were trying to do him out of his place which he thought was worth eight or nine thousand dollars.

Q. And you thought it was only worth three thousand?

A. Yes, that is all it would be worth to me.

Q. But did you not need that money when you called that mortgage?

A. I considered it was to the advantage of the estate to call that mortgage. Mr. Matthews had no money to take care of the property and I had loaned Mr. Matthews money to buy something to eat for it.

Q. And Mr. Matthews gave you a deed to the property for it?

A. Yes, he had nothing else to give. I have still that deed to the property which I would be very glad to get rid of for less than I loaned him.

The Court: Aren't we going far afield? I understand it is the duty of any administrator to liquidate the assets of the estate.

Mr. Matthews: This estate was perfectly liquid on the dates ascertainable and one property went bankrupt and we lost stock in another instance. This

deposit box deposit of money was at a time when the estate did not need money and it certainly deserves scrutiny.

Q. $2158.33 had been in that box until a week ago, when you took it out and looked at it and put it back again.

A. Yes.

Q. And it had been there since August eleventh, 1932?

A. Yes.

Q. And you say you kept it there for safe keeping?

A. At the time it was put in it was put in there for safe keeping.

Q. And during all that time you were taking in moneys from the business and depositing them in the bank, were you not?

A. Small amounts as I recall.

Q. What bank was open and solvent in Lakewood when you put this Matthews money in a safe deposit box? That was August eleventh, 1932?

A. If I remember correctly, the Trust Company was closed, but the People's National Bank was open.

Q. Were you an officer or director of that bank at that time?

A. No.

Q. Did you have an account in that bank at that time?

A. Yes, I think so.

Q. Do you recall what your deposits were in the People's National Bank at that time?

A. I do not.

Q. When you told Mrs. Elizabeth Westhall that

you called this Matthews mortgage to pay for her mortgage, you were quite mistaken about that, weren't you? You did not call it for that purpose, did you?

A. My memory is a little hazy on that, but I am inclined to think that at the time I had it in mind to use it for the payment for her mortgage which was a liability of the estate of Beatrice E. Westhall, and I placed it in the box for safe keeping until such time as I could pay this mortgage, and subsequently I had these building and loan shares mature and it was not necessary.

Q. You paid Mrs. Elizabeth Westhall's mortgage August 18, a few days after you put this in the box and you collected this building loan, $3000.00 in May, and put that in the bank, and collected $1000.00 in August, and put that in the bank.

A. Yes.

Q. What was terribly sacrosanct about this $2183.00, that it had to go into a box?

A. I considered it was safer there than in the bank. I said that.

Q. The People's Bank closed on the bank holiday, the fourth of March, 1933, and at that time you had $1870.09, in the bank. Why didn't you keep it all in the box?

A. That was an accumulation of dividends from the United Shoe Machinery stock and that dividend came in the form of a check that was to clear that check.

Q. Why didn't you keep it all in the safe like you did the money while you were thinking of buying the business?

A. That was in my own safe, this other was in the bank.

Q. Why didn't you convert those checks into cash like you did those checks in the instance between Mrs. Westhall's death and the date when you purchased the business?

A. I didn't think it was necessary.

Q. You only thought it was necessary to keep the Matthews' money there?

A. (No answer.)

Q. They both were estate money, the $1870 that was lost when that bank closed was estate money too, was it not?

A. Thirty per cent of that has been re-appropriated to the estate.

Q. I am not asking you about that, I am asking you whether that $1870 that was lost when the bank closed was estate money or not?

A. Yes, it was.

Q. Isn't it also true that between August 18, 1932, and January 24, 1933, there were only $190.30 withdrawn from the bank for estate purposes?

A. I cannot verify that unless I see the records.

Q. Just before the adjournment I said I would produce a record to show withdrawals of money after you received the Matthews money August eleventh, 1932. On the same day that you got the Matthews' money you put your thousand dollars from your building and loan in the bank?

A. No. This is the estate's.

Q. What is that thousand dollars you deposited?

A. This is a withdrawal, not a deposit. Here are the deposits.

Q. On the right-hand side there is a deposit

August ninth of $4,284.50. That is your deposit you paid for the business.

A. Yes.

Q. Your withdrawal August eleventh was $1000.00.

A. That is the date the check was presented to the bank for payment, it was not necessarily written that day.

Q. What was that for, do you recall?

A. It runs in my mind that was State Inheritance Tax.

Q. The next withdrawal is August eighteenth, for Mrs. Elizabeth Westhall's mortgage?

A. That's right.

Q. After August eighteenth, you deposited in the bank, October 10, $296.88, October 17, $128.91, November 30, $129.38, January 11, $290.98. Your balance at closing time January 24, 1933, was $1,870.09, was it not?

A. That is right.

Q. After the eighteenth of August, when you paid the Beatrice Westhall mortgage the only withdrawals you had were two ten dollars items, one $110.30 item, and one $60.00 item, isn't that correct?

A. Yes.

Mr. Matthews: I will offer this bank sheet.

The Court: It may be marked in evidence.

(Sheet marked in evidence Exhibit E-4.)

Q. On page nineteen of the account you have in front of you, Mr. Havens ——

A. Yes.

Q. There is an item there which I am referring to as the Elizabeth Hannon item for $565.45.

A. That's right.

Q. Does that indicate in your account that the proceeds were deposited?

A. It does in this account, which is incorrect.

Q. Were the proceeds deposited?

A. They were put in the safe deposit box.

Q. Then this money was not put in the account, but in the safe deposit box?

A. That is right.

Q. When was that put in the safe deposit box?

A. Probably shortly after.

Q. When did you collect it?

A. That will show in your record, I don't recall.

Q. We have no record for that.

A. Here it is, December thirty-first, 1932.

Q. Now, in what safe deposit box in what bank was that placed?

A. In the People's National, in either box 113 or 105.

Q. Why was that placed in the box instead of in the bank?

A. It was a good sized amount $565.00, and I thought it would be as well to place that in there.

Q. Was it cash or a check that you received?

A. I paid that myself to the estate.

Q. Will you explain that to the Court?

A. It was a bill for funeral expenses of a sister which I considered uncollectable. I had asked them for the bill and the fellow lives in Bayonne, he is a carpenter out of work, he said "I cannot pay it," and I said "I am trying to settle an estate, and I

would be glad to have the money.'' I have asked him two or three times, and finally he agreed to give a second mortgage on this home of the decedent.

Q. What was the amount of that mortgage you took?

A. I think it was some where around $570.00. It was in excess of this amount a few dollars, which was represented by some bills I paid for him and some cash I gave him to make it even money.

Q. He gave you a second mortgage on his home in Lakewood?

A. He gave it to me personally and I paid the estate in cash.

Q. Where did you get that cash?

A. From various cash collections. I don't know where I got it now.

Q. This was in December, 1932?

A. Yes.

Q. And you took cash money at that time and put it in a safe deposit box?

A. Yes.

Q. Why did you think that Hannon money was so sacrosanct it had to be placed separate and apart?

A. I concluded it was a bill for the estate in an amount like that. The only other deposits were dividends to the estate.

Q. You made a deposit the following month of $290.98 in bank?

A. Which consisted of some small bills, some small collections, there was one big item.

Q. That one big item was money due from Hannon, which she could not pay for an undertaking bill.

A. Yes, to the estate of Beatrice E. Westhall.

Q. You had $16,000 worth of accounts receivable in the estate when you took it over.

A. Yes.

Q. You have collected how much?

A. About five thousand dollars.

Q. And there are eleven thousand dollars yet to be collected?

A. Yes.

Q. Why was the Hannon collection so urgent?

A. I saw there was a chance to get that for the estate and I figured the estate should have it. This fellow was willing to do that and in that way I could relieve the estate of that.

Q. Is that mortgage recorded?

A. I would think so, I imagine it is.

Q. I have searched the records and cannot find it in your name, does the mortgage run to you?

A. Yes.

Q. Do you know whether you recorded it?

A. I know I have the mortgage. My opinion is that it is recorded.

Q. The last book in the office downstairs does not show it in your name as mortgagee.

A. I would be glad to show you the original mortgage if you want to see it.

Q. You got that mortgage in the month of December, 1932?

A. Yes.

Q. Did you get the mortgage before you put the money in the safe deposit box?

A. I got the mortgage when the deal was consummated.

Q. How long after that did you put the money in the safe deposit box?

A. I don't recall.

Q. In what way was that put in the box?

A. In a separate envelope.

Q. And that was shortly after the transaction?

A. Yes.

Q. Has that money been in the safe deposit box from that day until this without any interruption?

A. Other than as I told you about. I took it out the other day to make sure it was there.

Q. You took it out the other day to make sure it was there?

A. I figured it was there, but I wanted to make sure.

Q. Who else had access to that box besides you?

A. No one.

Q. So you could not have been very doubtful about its being there.

A. I wanted to make sure as long as I was going to be checked on the account.

Q. I show you the estate account in the People's National Bank, again and ask you if you do not see the deposit of $266.88 on April eighth, and on July fifth ——

A. Yes, but these are all dividend checks from United Shoe Machinery Company.

Q. These two April sixth, and July fifth, were $266.88 each weren't they?

A. Yes.

Q. You did not cash those and put them in?

A. I did not cash any dividend checks.

Q. You did not consider they should be put in a deposit box, you put them in the bank.

A. That's right.

Mr. Matthews: I offer this bank statement.

The Court: It may be marked in evidence.

(Sheet marked in evidence Exhibit E-5.)

Q. Who drew the second mortgage?
A. Probably Mr. McCloskey.
Q. Did you tell Mr. McCloskey what you were doing?
A. I don't recall.
Q. Did you tell Mr. McCloskey you deposited the Matthews' money in a deposit box?
A. I have no recollection of doing that.
Q. Did you tell Mr. McCloskey you deposited the Hannon money in a deposit box?
A. I don't think so.
Q. Did you tell Mr. McCloskey you were getting a second mortgage to protect you because you were paying the amount due from Hannon out of your own money?
A. I have no recollection.
Q. Did Mr. McCloskey draw that mortgage for you, that mortgage was drawn less than two years ago?
A. Yes.
Q. Have you had any other mortgages drawn for you within that two years?
A. Probably.
Q. Don't you remember?
A. No.
Q. Are you a large property owner?
A. I own my home.
Q. Have you had any mortgage on your home?
A. No.
Q. Have you owned any other property since 1932?

A. Yes.

Q. Have you put any mortgages on any other property since 1932?

A. No.

Q. Wouldn't you remember whether Mr. McCloskey drew this mortgage or not?

A. I would not. I offer to show you the mortgage but I don't remember who drew it.

Q. I am looking at the inventory and appraisement on the items called Ethel May Reed $466.50, has that been collected?

A. No.

Q. Is the family of that lady still living in Lakewood?

A. Her husband lives in Toms River.

Q. Have they any property?

A. Not to my knowledge.

Q. Is there any reason why that bill has not been collected, if you know?

A. Yes.

Q. What is it?

A. I could not get it. I have asked for it.

Q. And they have no property, the Reeds?

A. Her husband has an undivided profit in some lots in the heart of Lakewood which today could not be sold for any money.

Q. You did not get any mortgage on that to pay the money into the estate?

A. I don't consider the property worth it and there are too many heirs, it is too tangled.

Q. You did consider the Hannon mortgage worth it?

A. Yes.

(Adjourned until Friday, November 2nd, at ten A. M.)

TESTIMONY.

Toms River, N. J., November 9, 1934.

Before Hon. Russell G. Conover, Judge.

Appearances:

For the exceptant, John A. Matthews, Esq., Andrew B. Crummy, Esq.

For the accountant, W. Durward McCloskey, Esq., DeVoe Tomlinson, Esq., J. Elmer Matthews, Esq.

Mr. Matthews: If Mr. McCloskey and Mr. Tomlinson have no objection I would like to interrupt the examination of Mr. Havens in order to put his associate, Mr. Brown, on the stand.

Mr. Tomlinson: Will his testimony be very long?

Mr. Matthews: I don't know. He asked me to do that in order that he might get back to business.

Mr. Tomlinson: Very well.

The Court: Go ahead.

HARRY E. BROWN, a witness called by the exceptant, being duly sworn according to law upon his oath testified as follows:

Direct examination.

By Mr. Matthews:

Q. Mr. Brown, you are a licensed embalmer of the State of New Jersey?

A. Yes, sir.

Q. And you work presently for whom?

A. Up until two weeks ago I was under the impression I worked for the estate of E. J. Westhall.

Q. What changed your impression?

Mr. Tomlinson: Just a minute. I move to strike that answer out as embracing a conclusion.

The Court: I will let it stand for what it is worth.

Q. Will you tell us, Mr. Brown, what caused you to change your impression?

Mr. Tomlinson: Object to that, your Honor please.

The Court: That apparently calls for an answer on some event or some fact. I will overrule your objection, and you may have an exception.

Q. Will you answer that question, Mr. Brown?

A. A notice in the Asbury Park Press, published

two weeks ago Saturday night, that Mr. Osborne Havens had bought the business.

Mr. Tomlinson: Certainly that is not evidential, your Honor please. I move to strike.

The Court: I don't know about that, either.

Mr. Matthews: If your Honor please, this answer surprises counsel, to tell your Honor the truth.

The Court: I will let it stand.

Mr. Tomlinson: And your Honor will allow me an exception?

The Court: Yes.

Q. For how long have you been working for the E. J. Westhall estate?

A. About thirty years.

Q. You have received your salary from Mr. Havens, haven't you?

A. Yes.

Q. Since August 13, 1931, what salary have you received?

A. Thirty-five dollars a week.

Q. Is that the same salary you received prior to the death of Mrs. Beatrice Westhall?

A. Yes, sir.

Q. You are familiar with the caskets that were on hand at the time Mrs. Westhall died?

A. I have a general idea, yes, sir.

Q. Did you participate in the making of the inventory in any way?

A. No, sir.

Q. Have you a general idea of the value of the various caskets that were on hand at the death of Mrs. Westhall?

A. In reference to the matter of the caskets I would like to say this—they represented a number of caskets we had on hand a number of years. Among those caskets there was a number of orthodox Jewish caskets, cheap pine varnished caskets, and inexpensive cloth covered and inexpensive chestnut caskets. We did not carry expensive cases but ordered them as occasion demanded.

Q. Do you remember the funeral of Mr. Gleason, Jr.?

A. Yes, sir.

Q. Was the casket used in that funeral from stock?

A. No, sir. It was ordered.

Q. Were there any caskets on hand at the death of Mrs. Westhall of a value of sixteen dollars?

A. As I said, the majority of those caskets represented a miscellaneous assortment, running from a Jewish coffin to the varnished cases or cheaper cases, but they did not represent an expensive line of caskets.

Q. Were there any of them as cheap as sixteen dollars?

A. Yes, sir. A good many of them were cheaper.

Q. How many, would you say?

A. I have no recollection at this time.

Q. What was the lowest price casket you had on hand at that time?

A. A casket selling for seven or eight dollars.

Q. You don't know how many?

A. No, sir, I do not.

Q. What was the highest price casket you had at that time?

A. I cannot tell you that from memory. The record would show, which Mr. Havens can give you from his books.

Q. Didn't you tell Mrs. Jane Westhall and Mrs. Elizabeth Westhall, that of the caskets on hand, the most expensive ran from eighty to ninety dollars?

A. No, sir.

Q. The mahogany caskets?

A. No, sir. At that time we did not have mahogany and oak caskets. We have had mahogany and oak caskets, but not at that time.

Q. You do not know the value of the more expensive caskets?

A. For the reason that we had a number of different caskets at that time which did not cost much money.

Q. How much did they cost?

A. Perhaps thirty-five, forty, forty-five or perhaps as high as fifty dollars. We carried a few caskets in stock so that people could make a selection, but if there was anything special it was ordered.

Q. Didn't you tell Mrs. Jane Westhall there were thirty-five caskets at that time in stock that were oak or mahogany and that there were ten cheap caskets in stock?

Mr. Tomlinson: Object to that on the ground that it is an attempt to discredit Mr. Matthews' own witness, unless it is for the purpose of neutralizing his testimony.

Mr. Matthews: I think this man would not tell

anything but the truth. I do not wish to discredit his testimony but I wish to jog his memory.

The Court: Objection overruled.

Mr. Tomlinson: Your Honor will allow me an exception?

The Court: Exception.

Q. Did you tell Mrs. Jane Westhall and Mrs. Elizabeth Westhall there were at that time thirty-five caskets that were oak or mahogany and ten cheap caskets in stock?

A. No, sir. I had no recollection of the number of caskets we had on hand at that time.

Q. Didn't you say there were some mahogany caskets there that were worth eighty dollars?

A. No, sir. That was after Mrs. Westhall's death.

Q. How many did you have on hand when she died?

A. We had none on hand at her death, but after she died and Mr. Havens took over the business we did have oaks and mahoganys because I thought up until two weeks ago that the business had not undergone any change.

Q. At the time of the death of Mrs. Westhall did you want to buy that business?

A. If the Court has no objection I will explain. A few days prior to Mr. Westhall's death, in conjunction with what Mr. Westhall had told me he planned to do for me in his will I asked him if he would sell me an interest in the business or allow me to be known as his successor. Both propositions

he declined. He said whatever was done in that matter would rest entirely with Mrs. Westhall. I told him afterwards what I thought I might do and he said "Before you do anything consult my executors, the Lakewood Trust Company." Nothing further was said about that matter until casually, in the yard, one day after Mr. Westhall's death, I said to Mr. Havens, "When the business is sold I think in view of the years of service I have put in, I think I should be entitled to a preference," and Mr. Havens said, "I consider that Jessie being a daughter should be given preference over you." That was all that was ever said about my buying the business.

Q. After the death of Mrs. Westhall you had no conversation with him about buying the business?

A. I did not. I will say this—I said nothing to Mr. Havens nor to any of the executors of the estate, as everything had gone along in a normal manner, Mr. Havens taking care of the business matters, I being responsible for the undertaking work. I supposed when a change was made I would be notified, or given an opportunity, or asked did I care to put in a bid. Outside of that there was no discussion.

Q. You were not asked to put in a bid?

A. No.

Q. You were ready and willing to bid?

A. I had the cash to cover whatever bid I might put up.

Q. The invoices you get now, do they come in the name of Mr. Havens?

A. All goods and supplies are marked "Estate of E. J. Westhall."

Cross-examination.

By Mr. Tomlinson:

Q. You worked for Mr. Westhall for some years before his death?

A. Yes, sir.

Q. And during your services for him he paid you?

A. Yes, sir.

Q. After his death and before Mrs. Westhall's death Mr. Havens paid you, did he not?

A. Yes, sir.

Q. Mr. Havens had worked along with you for Mr. Westhall during his lifetime?

A. Yes.

Q. And after Mr. Westhall's death and before Mrs. Westhall's death Mr. Havens paid you?

A. Yes.

Q. And he has been paying you right up to the present time?

A. That is correct.

Q. You spoke about this conversation you had with Mr. Havens with reference to a preference—was that the word you used?

A. Correct.

Q. When was that conversation held?

A. It was after Mr. Westhall's death but the date I cannot fix.

Q. Before Mrs. Westhall died?

A. Before Mrs. Westhall died.

Q. After Mrs. Westhall's death you had no conversation with anybody at all, with no person at all, with reference to buying in the business?

A. The matter was not discussed.

Q. And you never at any time went to Mr. Havens or to anybody else and told them that you wanted to bid for the business?

A. Not except that one conversation I had with Mr. Havens.

Q. Which was had before Mrs. Westhall's death?

A. Yes, before Mrs. Westhall's death.

Q. A great many of the caskets that were on hand at the time of Mrs. Westhall's death were caskets that you had had on hand during Mr. Westhall's lifetime, were they not?

A. That is partially correct; many of them were.

Q. And generally speaking I think you said that the caskets you had on hand were mostly of a cheap grade?

A. I would say from a cheap to a medium price casket.

Q. And when you told Mr. Matthews about caskets of which the price might range from thirty-five dollars to fifty dollars, you meant that was the price they would cost new?

A. Wholesale.

Q. But new?

A. Yes, sir.

Re-direct examination.

By Mr. Matthews:

Q. Was the undertaking business ever offered to you after the death of Mrs. Westhall?

A. It was never offered to me. I took it for granted, sir—pardon me, that is a repetition of my testimony.

Q. Go ahead and finish your answer.

A. I took it for granted that in view of my years of service it would not be necessary for me to say anything, that when the business was sold I would be asked did I care to put in a bid.

Re-cross examination.

By Mr. Tomlinson:

Q. Some of these caskets were small baby caskets, were they not?

A. Yes, sir.

Q. And I think you have already answered this, but I would like to be certain. As I understand it you and Osborne Havens worked for Mr. Westhall at the same time.

A. Yes, sir.

Osborne Havens, recalled by the exceptants.

Direct examination.

By Mr. Matthews:

Q. Mr. Havens, have you produced the record book which will show accounts receivable of the Westhall undertaking business at the death of Mrs. Westhall and subsequent thereto, and will you bring your three small black books with you to the stand?

A. (Produced.)

Q. Will you produce the book that contains the accounts receivable from the death of Mrs. Westhall, August 13, 1931?

A. (Produced) There it is.

Mr. Matthews: I ask that this book be marked for identification.

The Court: It may be so marked.

(Book marked for identification Ident. H.)

Mr. Matthews: Because of the fact that I have not had an opportunity to see these books your Honor will bear with me if I am a little slow in examination.

Q. You have produced a book marked H for identification, and at the top of the page it is dated 8/18/31. Does that book show the accounts receivable which became receivable after August thirteenth, 1931?

A. Yes.

Q. Does this book continue on page after page of accounts receivable from August 13, 1931, up to August 9, 1932?

A. This book runs to November 9, 1931, inclusive. I will change that—November 11, 1931.

Q. Where is the book from that on, until August, 1932?

A. It starts right here. That is the seventeenth to August eighth, 1932, inclusive.

Mr. Matthews: I ask to have this book marked for identification.

The Court: It may be marked.

(Book marked for identification Ident. I.)

Q. Will you tell me what was the amount of accounts receivable accruing from August 13, 1931, until October 1, 1931, and as you call them off may I check them on H?

A. Yes, just a minute. $315.70.

Q. That is the Ryno case?

A. Yes. Forty-three dollars.

Q. That is the Smith case?

A. Yes. No. That is the Reppen case. The Smith case is $419.00.

Q. What is the next?

A. One hundred fifty dollars. That is the Tambouro case. Lawlor, $482.85. Rose one hundred dollars, you see that was paid in full. Cole, $271.70; Randall, $15.00; Bryan, $71.35; Gall, $305.00; Stanger, $68.85. That is all up to that time.

Q. Now, going back to each one of those cases, have you produced the book which at pages 49-50 of your testimony you said you would produce, showing the record of the death and the kind of casket?

A. (No answer.)

Q. I read from page forty-nine of your testimony. "Q. What other books did you keep,"—that is at the bottom of the page, "what other books did you keep?" and "A. Merely a record of the death, which would give such information as the date of death, the name and age of the deceased, father's and mother's name and the kind of casket." Will you produce that?

A. Yes, I have that home, sir.

Mr. Tomlinson: I think that is my fault. We received a request from Mr. Crummy about that, but I overlooked it. We will get it this afternoon.

Mr. Matthews: Maybe he will remember without the book.

Q. The Ryno funeral is the first, and that is $175.00 as the price of the casket.

A. Yes.

Q. And the next funeral the casket was $160.00.

A. Yes.

Q. No casket in the next funeral, and in the next the casket was fifty dollars. That is Tambouro?

A. Yes.

Q. And the next one the casket and plate, $275.00. That is Lawlor. The Rose ——

A. No casket.

Q. And the Cole?

A. Casket, $125.00. No casket on the next one. No casket on the next one. Casket one hundred dollars on the Gall funeral. Stanger, no casket.

Q. These caskets in the funerals between the 13th of August and the tenth of October, were any of them taken from stock?

A. I have to look that up. I cannot tell that at this time.

Q. You then were managing the business and at that time you had not yet bought the business, and at that time you did not, according to your testimony, know whether you were going to buy the business. In that interim did you buy any caskets at all? That is from August thirteenth to October first?

A. That was three years ago. I don't remember for certain, but if you want my best recollection, I think I did buy some caskets.

Q. Are you sure, or is that just your recollection?

A. That is all it could be, is a recollection.

Q. That book you have at home will show it?

A. Yes.

Q. You bought your caskets from the National Casket Company?

A. Many of them.

Q. Who else did you buy from between August 13, 1931 and October 1, 1931, if anybody?

A. I don't remember that now.

Q. Do you know Mr. Wasserman of the National Casket Company of Newark?

A. Yes.

Q. Did you have any dealings with them between August 9, 1931 and October 10, 1931?

A. I cannot remember that.

Q. As a matter of fact, don't you know that all of those caskets which you used, with the exception of one, were taken from stock?

A. I do not know that, not now.

Q. But the book you will produce will show?

A. Yes. I can tell from that book what kind of casket was used, and probably by checking back I can determine whether or not it was from the inventory.

Q. Of course, you can tell from the records of the National Casket Company. If we produce them for you to show that you made no purchases from them between August 9, 1931 and October first, 1931, that will convince you that you did not buy

any caskets from the National Casket Company during that period, will it not?

A. If those records are produced, yes.

Q. What other casket companies did you deal with at that time?

A. I don't recall.

Q. What other casket companies did you ever deal with beside the National Casket Company?

A. What time do you mean?

Q. At any time.

A. I have bought since from other casket companies but up to that time I cannot recall from whom I bought other than the National Casket Company. It may be I did.

Q. As a matter of fact, did Mr. E. J. Westhall deal with any other company beside the National Casket Company in your service with him?

A. That would be hard to say now, Mr. Matthews.

Q. May we add up, please, for the record, the accounts we have taken off? That is, accrued business?

A. $2,242.45.

Q. In your other book that you produced here you told us you did a cash business between August 13, 1931 and October first, 1931, totalling $700.00 approximately?

A. Seven hundred and some odd dollars.

Q. Is that seven hundred and some odd dollars included in that $2,242.45?

A. Yes, it is. These are accounts accrued. The others were cash received.

Q. Is there any other record you have of any accounts receivable accruing between August 9, 1931 and October first, 1931?

A. No.

Q. You testify now, do you not, that the gross business which you did between August 13, 1931 and October first, 1931, was $2,242.45?

A. That seems to be right.

Q. Have you any of that money, $2,242.45, included as of today?

A. $66.40, according to running it over hurriedly.

Q. Would you mind producing again today the black book from which you took the seven hundred and some odd dollars of business done?

A. (Produced.)

Q. What book are you using now? The identification mark is what?

A. "I." What is it you want to know?

Q. Is that the same book you used last time to show me the business done?

A. Right.

Q. Why did you tell me the last time your accounts receivable were in another book?

A. I thought they were.

Q. You had that book in court and upstairs?

A. Yes.

Q. We looked all through it?

A. Yes, didn't you see them?

Q. Didn't you?

A. I overlooked them.

Q. Will you tell me how many pages of the book those accounts take up?

A. I cannot tell without counting them.

Q. Will you turn to the first page?

A. (Witness complies) You are talking about accounts receivable rather than cash?

Q. Yes.

A. It starts here.

Q. Starts at page sixty?

A. Yes and goes to 142.

Q. The book you had last time you gave us cash receipts out of, eighty pages was consumed with accounts receivable, is that correct?

A. It seems to be.

Q. And when I asked you last time about that book you held on to it and asked me whether I wanted it—do you remember that?

A. No.

Q. Turn, please, to what you turned to last time, where the cash taken in between August 13, 1931 and October 1, 1931, is recorded.

A. (Witness complies.) Page ten.

Q. Let me look at the book, please.

A. (Witness complies.)

Q. This book is already marked for identification as Ident. I. Your first item under date of 8/29 —

A. That is the date of receipt.

Q. Where is your first entry of the business after the thirteenth of August in any book?

A. I just showed it to you here.

Q. That is H for identification, and the first entry in any book is this page headed 8/18/31?

A. Yes.

Q. So this book I am looking at now, I for identification, shows cash moneys received, is that all?

A. That's right.

Q. Will you check back, please. Have you an item of forty-three dollars?

A. Yes.

Q. That's the Reppen case?

A. That is right.

Q. That was received on the 29th of August, was it not?

A. Yes.

Q. The Tambouro account, $150.00, was received on the 8th of September, was it not?

A. Right.

Q. The K. of P. A. I. C. account of A. S. Smith was received on the same day?

A. That is $150.00. Yes, the eighth of September.

Q. The account of I. Wyle and Son for Sarah Rose was received on the 12th of September, one hundred dollars, is that right?

A. That is right.

Q. And on the seventeenth of September Annie L. Smith, account of A. L. Smith, $269.00?

A. Correct.

Q. On the 18th of September, Veterans of Foreign Wars paid you five dollars for the rental of five dozen chairs?

A. That's right.

Q. How many dozen chairs did you buy?

A. Twenty.

Q. And for those you paid twenty dollars?

A. You have the record there.

Q. Mrs. Hoff, account of male still birth Randall, was received on the 24th of September and was fifteen dollars?

A. That is correct.

Q. That gave us the total that we added the last time, of $717.00 plus fifteen, $732.00?

A. Yes. That was omitted before.

Q. This I for identification is actually a receipts and disbursements book?

A. Yes.

A. It starts here.

Q. Starts at page sixty?

A. Yes and goes to 142.

Q. The book you had last time you gave us cash receipts out of, eighty pages was consumed with accounts receivable, is that correct?

A. It seems to be.

Q. And when I asked you last time about that book you held on to it and asked me whether I wanted it—do you remember that?

A. No.

Q. Turn, please, to what you turned to last time, where the cash taken in between August 13, 1931 and October 1, 1931, is recorded.

A. (Witness complies.) Page ten.

Q. Let me look at the book, please.

A. (Witness complies.)

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A. That is the date of receipt.

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A. That is correct.

Q. That gave us the total that we added the last time, of $717.00 plus fifteen, $732.00?

A. Yes. That was omitted before.

Q. This I for identification is actually a receipts and disbursements book?

A. Yes.

Q. And H for identification is the gross business done book?

A. That's right.

Q. Now, will you turn to your expenses pages?

A. (Witness refers to page 3 in I for Ident.) It follows over there.

Q. On the first item, 9/7/31 "Davo," what does that mean?

A. That is a man's name, Davo.

Q. What is that two-dollar expense for?

A. Labor.

Q. Labor where?

A. Help in connection with the business.

Q. In what connection with the business?

A. Probably washing cars, or something like that.

Q. Was he the man who cut the lawn?

A. No, washing cars and assisting Mr. Brown in various ways.

Q. Here is 9/11, Davo, two dollars.

A. That is the same.

Q. Repairs to hearse on 9/12 was three dollars?

A. Right.

Q. What is the next item?

A. Expenses to Brooklyn on account of a funeral.

Q. 9/15, envelopes and stationery?

A. For the business.

Q. For the undertaking business?

A. Yes.

Q. Two twenty-six, correct?

A. Right.

Q. Grave for William H. Lawler.

A. You missed this fifteen dollars, if you are calling them all.

Q. Where I think your expense is legitimate I am not asking about that. Grave for ——

Mr. Tomlinson: I don't think that is a proper remark to go on the record, your Honor please.

The Court: That does not have any effect on me one way or the other; I have to go over all these figures and analyze them eventually. If you set up the total receipts why not set up against that the total expenditures, without omitting any items?

Mr. Matthews: We have that already in the record, your Honor, but we think we will find lots of expenses here that were not for the undertaking business, and we will take those out and give you the total.

The Court: The total is already in the record from the last hearing.

Mr. Matthews: Yes, your Honor.

Q. Grave for William Lawler is an expense you paid and which you got back from the Lawlers when you got their check?

A. That is right.

Q. What is that item under 9/15?

A. Gasoline used in the cars for the undertaking business.

Q. From August 15 to August 20?

A. No, that is September.

Q. Here is your first date.

A. That is the date of delivery.

Q. And those items total $27.99, is that correct?

A. That is correct.

Q. That is the Whitesville Fire Company—what is that?

A. For advertising.

Q. "Mrs. Clayton, eleven dollars," what is that?

A. That is the expense for a lady who helps around there.

Q. She is the housekeeper in your house and does the laundry?

A. Not necessarily.

Q. Does she—whether necessarily or not?

A. She does the laundry as part of her duty.

Q. She sweeps the house and cleans it?

A. Yes, and answers the telephone.

Q. What else does she do for the business?

A. Answers the door for people who call.

Q. Is there anything else she does for the undertaking business?

A. The same as my wife would do if she were there that day.

Q. I have not brought Mrs. Havens into this at all—I asked you if there was anything else Mrs. Clayton did for the undertaking business?

A. I cannot think, off-handed, anything else she did.

Q. How often did she work?

A. Sometimes one day a week, sometimes two or three.

Q. What was her wage per day?

A. Usually three dollars, I think.

Q. On the 17th of August she received $11.00, is that correct?

A. That is correct.

Q. What is that item 9/21, Leon Harris account of Cole?

A. That is money paid Leon Harris, an undertaker in Asbury Park, for work done by him on that case.

Q. And this 9/21 is what?

A. Twenty-five feet of hose, used in washing cars. You are wrong here, page 20, next.

Q. What do I find on page four in this book?

A. What does it say?

Q. You answer me, you are my witness. What do I find on page four?

A. Cost of the Ryno funeral, it says.

Q. Cost to O. W. Havens of William Ryno funeral, 8/18/31 and 8/20/31. That is what it says.

A. Yes.

Q. What does that mean, "cost to O. W. Havens"?

Mr. Tomlinson: May I inquire the amount?

Mr. Matthews: Not yet. I have not asked that yet. I am just asking what it means.

A. As I recall that was a record kept in the event that the business was bought by me and that not as of the date of Mrs. Westhall's death. That is my recollection now.

Q. Let me get that again. Will you repeat it?

A. In case the business was bought by me but not as of the date of Mrs. Westhall's death, I made a notation like that, as I recall.

Q. So as early as the 18th of August, five days after the death of Mrs. Westhall, you were considering buying that business, were you not?

A. Not necessarily.

Q. Why did you put "cost to O. W. Havens of William Ryno funeral"?

A. I didn't know of any better way to put it at the time.

Q. Will you add the items on that page and give them to me?

A. You want the total?

Q. Yes.

A. It looks like $74.50.

Q. I will check you. I check you correct.

A. (No answer.)

Q. What do you mean by cost to you—do you mean that the rest was profit to you?

A. Not necessarily.

Q. What does it mean?

A. That apparently means the cost of, or the expenses incidental to that, that were easily determined.

Q. All right. The casket is there, is it not?

A. Yes.

Q. The handles are there?

A. Yes.

Q. The casket is $28.00 and the handles $7.75. Does that mean the long handles on that casket?

A. I have no recollection of that now.

Q. And the lining, $3.57, embalming fluid, $2.50, and Charles White, credit on note—what does that mean?

A. I probably gave him credit for that.

Q. Who is Charles White?

A. A man that worked for me.

Q. Case $2.15, plates $2.00, hyacinths $2.50, expressage on plate $.38, pine box $5.00, grave marker

$.35, door spray $6.50, casket spray $10.00. There is not anything else but the blessing of the minister that you have not charged, is there?

A. Oh, yes.

Q. What else?

A. Personal services.

Q. Your personal services?

A. My personal services and Mr. Brown's personal services.

Q. What else?

A. General overhead.

Q. General overhead on what?

A. The cost of running the business.

Q. What was the overhead at that time, do you know?

A. I cannot tell you now.

Q. The cash outlay was thirty-five dollars a week for Harry Brown plus the material you used and your salary?

A. That was part of it.

Q. What else?

A. If I had someone else work for me it was a cash outlay.

Q. The Ryno funeral you collected $315.70, less $65.70 that was still due, and the cost to you is $74.50 as laid out in your book?

A. That would seem so from the way you are going at it.

Q. The notation in your book is "Cost to O. W. Havens of funeral of William Ryno," is it not?

A. That is not the complete cost.

Q. What else could be included?

A. I just told you.

Q. Your salary, the business overhead and Mr. Brown's salary?

A. That's part of it.

Q. What else?

A. There might have been many other things in connection with that.

Q. Mention one?

A. Others employed to assist in that funeral.

Q. Have you got any record in that book of anybody else employed at that funeral?

A. I may have in another book.

Q. What other book have you; I want it.

A. I have that home.

Q. What would you call that book?

A. A memorandum book I guess you would call it.

Q. Look at page five, "cost to O. W. Havens of Albert Smith funeral, 8/26/1931, 8/29/1931." Will you total that for me, please? Supposing you put your totals on the bottom of the page, it will help us when we are looking at it later.

A. $92.65.

Q. That is the addition on page five?

A. Yes.

Q. Look at your Albert Smith bill, how much is it?

A. $419.00.

Q. And exclusive of your services and Mr. Brown's services and anybody else's services, if there was anybody else, the profit on that funeral and the overhead was the difference between $92.65 and $419.00, wasn't it?

A. No. I have no cemetery charge, and I paid the cemetery $44.00.

Q. Did you get that back?

A. Yes, in the $419.00.

Q. Then your bill would be $136.65, is that right?
A. Yes.
Q. Let's turn to the next one. On page six of your book "cost to O. W. H. of embalming Charles Reppen 8/29. O. H. three bottles of fluid, three dollars." The Reppen bill is $43.00. Is there any other expense to that except Mr. Brown's embalming salary?
A. Yes.
Q. What is it?
A. Use of the hearse, Mr. Brown's services, my services, and the use of the chapel.
Q. But that is all?
A. It would appear that way now.
Q. You have on page six from page 169, "paid out by O. W. Havens, $13,835.37." When was that put in there?
A. When was it put there?
Q. Yes.
A. I have to look. It would seem it was put here after this book was filled. I found I had this space and rather than waste the space I put it here.
Q. You have a half page on this side and only four lines on that side.
A. It gave me all this page to use for that purpose, didn't it?
Q. This page is in entirely different ink from this, so it was made on an entirely different date.
A. Yes, as I told you, after this page was filled over here. This is all in 1932, you notice.
Q. In September, 1932, is it not?
A. Yes, September, 1932.
Q. Will you go to the Tambouro funeral and add that, please?

A. That is $38.26.

Q. And your Tambouro receipt was $150.00?

A. That is right.

Q. And that is headed "cost to O. W. H. of Carmela Tambouro funeral, 9/1/1 and 9/2/1" on page 8 of this book?

A. Yes.

Q. Then here is the entry, "Cost to O. W. H. of William H. Lawler funeral, 9/10/1 and 9/13/1," what is the amount?

A. $186.34.

Q. What is the amount on your book there?

A. $482.85.

Q. The Sarah Rose funeral was how much?

A. One hundred dollars.

Q. On your cost to O. W. H. Sarah Rose embalming, page 9, your total is what?

A. $8.35.

Q. On page ten—that is where we were before, we have been over that. In going from page 4 to page 9, the Sarah Rose embalming, we did not cover all of those funerals, did we?

A. We have not got the Norbert Gall funeral, that is $305.00.

Q. Where is your cost for that?

A. Apparently I have not got it there. Apparently I discontinued the costs there.

Q. No, you have still the costs there.

A. But we went over that.

Q. Let me look at your book a minute, will you?

A. Yes.

Q. On page 14 of the book—"Cost to O. W. H. James Cole funeral 9/13/31, 9/21/31." There the amounts are what?

A. $94.88.
Q. What is the Cole receipt?
A. $271.70.
Q. Then on page 15, "cost to O. W. H. for male still birth of Mr. and Mrs. Randall, $2.00," what is the charge?
A. Fifteen dollars.
Q. And "cost to O. W. H. for O'Brien," what is that?
A. $15.35.
Q. What is your receipt?
A. $71.35.
Q. Now for Norbert Gall, on page 17.
A. $89.88.
Q. And your receipts show what?
A. $305.00.
Q. And finally, the Stanger funeral on page 18, that is what?
A. $8.35.
Q. And your receipts are $68.85, is that correct?
A. That is correct.
Q. Mr. Witness, would you be willing to have my namesake, Mr. Matthews, and Mr. Crummy assist the Court and the lawyers here by having those totals made up from that book so that we would not need to examine you on each one?

Mr. Matthews: Your Honor, it will save a lot of time. Would you be willing to do that, Mac and Tom?

Mr. Tomlinson: That is agreeable to us.

Mr. Matthews: Then we will leave this line of

testimony at this time with the promise to the Court that we will put in the record, after the conference between attorneys and witnesses, the totals of moneys received and cost to O. W. Havens, as the record will show, between August 13, 1931, and August 9, 1932.

Mr. Tomlinson: I suppose there also goes in the record with reference to all these bills his explanation as to any additional cost?

Mr. Matthews: Exactly so. I want that on the record in fairness to him, and moreover, he may always say after each bill, "my salary, Brown's salary" and anybody else hired, and also the overhead of the business.

Mr. Tomlinson: That is agreeable to me.

The Court: I assume in addition to this you will both have additional testimony as to items you dispute and as to items you want to explain.

Mr. Matthews: Yes, your Honor, but I think this will greatly hasten this examination.

Mr. Matthews: I now offer in evidence these two books which have been marked for identification.

The Court: They may be marked in evidence.

(Ident. H. and Ident. I marked in evidence Ex. E-7 and Ex. E-8.)

Mr. Matthews: It was just suggested to me by my able associate, who is also able in accountancy that if the other side and my side will agree we might have made up an account between those two dates, from these books of the business.

Mr. Tomlinson: I have this suggestion to make, your Honor, that we agree upon a public accountant and have him make it.

Mr. Matthews: I am interested in the legal aspect. My public accountant is right here. Mr. Crummy is a member of the bar as well as an able accountant. You may have whom you prefer.

Q. Just let me ask you this. Will you tell me what was the total amount of accounts receivable from October first, 1931, until December 31, 1931?

A. You did not ask for that the other day. I only have it to August, 1932.

Q. I am only asking from October first, 1931, to December 31, 1931.

A. I think that had better be done on an adding machine.

Q. Will you let your counsel and my associate total that?

A. Yes.

(Books handed to counsel.)

Q. Your book will contain, will it not, the cost of each funeral as set off against the receipts of the funeral up to August ninth, 1932. That is the time you paid for the business.

A. My book will disclose the cost to me on a cash receipts and disbursements basis, but not on an accrual basis. That is accounts accrued but not paid.

Q. Have I all the books marked in evidence?

A. (No answer.)

Q. What are these two books—one says "Journal" on the outside?

A. They both do. So does that one. This is current, this starts in 1934, and this is September, 1932—both subsequent to August ninth, 1932.

Q. But does that book contain any accruals for business or any accounts paid for business done prior to August 9, 1932?

A. No.

Q. But that shows the business you have done from September twenty-ninth, 1932, up to the present time, does it?

A. On a cash receipts and disbursements basis, yes.

Mr. Matthews: I will offer this book in evidence.

The Court: It may be marked.

(Book marked in evidence Ex. E-9.)

Mr. Tomlinson: We feel we should object to this book in so far as anything shown therein after August nine, 1932, is concerned. I don't see how those receipts could be at all relevant or material to the issue at this point.

The Court: The only theory upon which I can see that it might be of assistance is on determining the

amount of business done not on a cash receipts basis but on the basis of the business accrued. You might, for instance, have an account for a funeral that occurred prior to the time you have in mind, but as a matter of fact paid over after August nine, 1932. It would appear in this particular book because of keeping books on a cash basis.

Mr. Tomlinson: This one shows receipts and disbursements, not business done.

The Court: There may be some items of cash received in that book which probably should be credited against charges made before August nine, 1932. I will admit it for that purpose.

Mr. Tomlinson: May I have the benefit of an exception?

The Court: Yes.

Mr. Matthews: And for this further purpose, your Honor please. The exceptants charge the administrator with what would amount to legal fraud and if we prove that we shall hope for legally a decision which would take that business back into the estate, and therefore every transaction should be opened to the Court, particularly if tinged with fraud, moreover the manner in which this gentleman kept his books makes it absolutely imperative that every one of his records be before this Court.

The Court: We had that all out the last time, and as I think I stated at that time I am allowing all of

this kind of testimony in on the possibility that I may agree with your theory. If I do not, it will not be considered.

Mr. Matthews: I realize that, and realize your Honor is the judge, but as I said last time I must have the record and have your Honor's ruling which has been generous to me all along.

Mr. Matthews: I offer the other journal which shows the accounts receivable.

The Court: It may be marked.

(Book marked in evidence Ex. E-10.)

(Recess until two P. M.)

Osborne W. Havens, recalled.

Direct examination.

By Mr. Matthews (continued):

Q. Did you file an income tax as alleged owner of the business from the time you allegedly bought it until the end of the year 1931?

A. I don't recall whether I did or not.

Q. You would have to do such a thing, wouldn't you?

A. If your income warrants it.

Q. Your income did warrant it from this business as it is shown, didn't it?

A. (No answer.)

Q. Don't you have to file if you do over five thousand dollars worth of gross business regardless of the net income?

A. I am not sure.

Q. How long were you deputy revenue collector?

A. About four years.

Q. I ask you again, did you or did you not file an income tax for the business either from the thirteenth of August, 1931, or from the first of October, 1931, until the end of the year.

A. I say again I don't recall.

Q. You don't recall?

A. No.

Q. Did you file an income tax as owner of the business from the first of January, 1932 until the end of 1932?

A. Yes, I think I did.

Q. Did you have personally both safety deposit boxes, number 105 and number 113 in the People's National Bank?

A. They were both in my name, but 105 was used for the estate.

Q. Where did you keep these securities of the estate?

A. In number 105.

Q. You originally purchased or rented that box in your own name, didn't you?

A. No, not until I had the estate work to take care of.

Q. Why did you have the box in your individual name?

A. I felt it was no different whether it was my name or the estate's in as much as I was the only one who had access to it.

Q. You knew you were the fiduciary of the estate, did you not?

A. I knew I was administrator.

Q. In which of the boxes did you have the Matthews mortgage money?

A. In 105.

Q. In the same one with the securities?

A. Yes.

Q. Do you recall the denominations of the bills you put in that envelope in that box, as you say?

A. I don't recall. There were several one hundreds as I recall.

Q. You looked at it recently, you told me at the last hearing?

A. Yes, but I made no particular note of the denominations. I counted it to see if it was there.

Q. How much was there?

A. $2,858.33.

Q. Was it the exact physical money that the Matthews people handed you that you put in the envelope and put in the box?

A. Originally, yes.

Q. What happened after that?

A. I went to the box to count it to see if it were there, and I took out $1.67 which belonged to me.

Q. The bills in that envelope today are the same denominations and the same physical bills handed to you when the Matthews mortgage was paid off?

A. Except two tens—or twenty-dollar bills. The money originally was $2,160.00, as I recall, and I knew that did not all belong to the estate, but I left it there with the idea of taking the change out when I came to distribute it.

Q. How much change was to be taken out?

A. The difference between $2,160.00 and $2,158.33.

Q. And you did take out that change when you went to look at the money some days ago?

A. I did.

Q. I show you Exhibit E-3 and ask you to read it aloud.

A. "Lakewood, New Jersey, 8/11/1932. Received from Elwood and Mabel Kingsley, $2,160.00 to be used to cancel a mortgage, George Matthews to Edwin J. Westhall, dated April 18, 1928, O. W. Havens, administrator, Estate of B. W. J. Westhall."

Q. The money you received was $2,160.00 and you took that money, about that time you received it, and put it in safety deposit box number 105 in the People's National Bank.

A. I think it was 105.

Q. What did you keep in 113?

A. My personal effects.

Q. If 113 is your personal box you kept this money in this envelope in 105, is that right?

A. Yes.

Q. When you first got the money you placed all of the money in the envelope?

A. That is right.

Q. And you left it there according to your statement, from on or about the eleventh day of August, 1932, until the exceptions were filed in this case, at which time you went to see if it was there, you said the last time, and you took it out?

A. Yes.

Q. Did you break the seal on the envelope?

A. I don't think the envelope was sealed, but it had elastic bands around it.

Q. You counted it?

A. Yes.

Q. And deducted what?

A. One dollar and sixty-seven cents.

Q. By changing one of the bills?

A. One or two of them.

Q. Outside of that alteration, taking out that one dollar and sixty-seven cents, the bills in that envelope today are identically the same bills handed to you by the people who paid off the Matthews mortgage?

A. Exactly the same.

Q. Will you produce those bills at the next hearing of this court?

A. Yes.

Q. You bought the Meteor hearse for the business, didn't you?

A. Yes.

Q. When did you buy it?

A. I bought it on October first as of August thirteenth.

Q. I don't mean that. I mean, you purchased it originally for the Westhall business.

A. Yes.

Q. When?

A. I don't remember that. It was bought during Mrs. Westhall's time. The only way I could tell was from the accounting as to what year the hearse is.

Q. 1929.

A. If it is 1929 it was probably delivered in December 1928 or '29.

Q. It is a 1929 model according to your account, is it not?

A. I think so.

Q. How much did you pay for it?

A. $2250.

Q. And from whom did you buy it?

A. From the Meteor Motor Company of Piqua, Ohio.

Q. Who was the salesman?

A. I bought direct from the factory.

Q. When the Meteor hearse was bought were there any additions or extra facilities added to it?

A. Not that I recall.

Q. Isn't it true that the Meteor hearse cost the business $2900.00?

A. It is not.

Q. It is true and certain that the hearse only cost Mrs. Westhall's business $2,250.00?

A. Yes, sir.

Q. Did you pay cash for it?

A. I am inclined to believe I did. I cannot recall right now.

Q. Have you that check in your books here?

A. Do you want me to look?

Q. Yes, please. And while you are looking for it will you also get that bill of sale of the hearse to you as an individual and the other cars of the estate?

A. This is December 19, 1929.

Q. That is the purchase date of the Meteor hearse?

A. Yes.

Q. Is the consideration mentioned there?

A. No, I don't see it. This is the assignment.

Q. Attached to this paper is an assignment by you as administrator to yourself individually of this Meteor hearse, is that right?

A. Yes.

Q. And that was made on the sixteenth of December, 1931, is that correct?

A. Right.

Q. Have you got the other cars there now?

A. Yes, that is a duplicate of this. Here is the

Oakland, that seems to be the original, June, 1929, for the Oakland.

Q. That is for the Oakland sedan, is that correct?

A. Correct.

Q. Attached to that is the assignment of that to you under date of the sixteenth of December, 1931, is that correct?

A. That's right. Here is the Chevrolet delivery, August thirty-first, 1927.

Q. That is the purchase date?

A. Yes, to E. J. Westhall.

Q. The assignment of that is attached to this and is marked what?

A. December sixteenth, 1931.

Mr. Matthews: I offer in evidence, first a bill of sale for the Meteor hearse and its assignment, second a bill of sale for the Oakland sedan and its assignment, and third a bill of sale for the funeral commercial wagon and its assignment.

A. Here is the Lorraine Motor hearse purchased the thirtieth day of November, 1930, and assignment December sixteenth, 1931.

Mr. Matthews: I offer that in evidence also.

The Court: The Exhibit offered may be marked in evidence.

(Bills of sale and attached assignments marked in evidence respectively Ex. E-11, Ex. E-12, Ex. E-13, and Ex. E-14.)

Q. Is the Buick transferred, the one that Mrs. Jessie Havens bought?

A. Yes.

Q. That was purchased the sixteenth of October, 1930?

A. That is right.

Q. And the transfer made?

A. December sixteenth, 1931, the same date as the others.

Q. When was the insurance transferred on the Buick?

A. I don't recall.

Q. When was the insurance transferred on the Meteor hearse and the Oakland?

A. I don't recall.

Q. Was it transferred or allowed to run out on the original policy as against the estate, at least until the sixteenth of December?

A. I cannot answer that offhanded.

Q. Did you take out any new insurance in your own name on each car from October one, 1931, to December 31, 1931?

A. I could not say as to that now.

Q. Do you recall cancelling the policy and getting the unearned premium for the estate on these cars?

A. I cannot answer that.

Q. Is there anything in your record that will jog your memory?

A. I can only tell that from the people who insured them.

Q. Is it not your best recollection that there was no transfer of the insurance but that the insurance was allowed to run until that date.

A. My best recollection as I have told you is that I do not recall without referring to the broker who handled the insurance?

Q. Who was it?

A. Matthews and Muller, as I recall, of Lakewood.

Q. Maybe you can tell me why you waited until December 16 to transfer those cars?

A. I cannot think of any advantage in transferring before that.

Q. You would have had half a year license plates to pay for if you took them out in September or October. Did you change the license plates?

A. I don't recall having done it, that is three or four years ago.

Q. It was the first year of your administration of this estate?

A. Yes.

Q. Did the car transferred to Mrs. Jessie Havens have its license plates changed?

A. I think that would be in the same category as the others.

Q. Your answer is that your best recollection is no recollection?

A. I don't say that, I said I cannot remember.

Q. Don't you know as a matter of fact that you waited until December so that the insurance and everything else would not have to be paid for the full year?

A. I don't know.

Q. Did you have insurance on the cars?

A. I have now.

Q. At the time of Mrs. Westhall's death, did you have insurance on those cars we are speaking about?

A. I think there was.

Q. I find nothing in your account for any unexpired premiums for these insurance policies, does that jog your recollection that you did not cancel them?

A. No.

Q. There is nothing in your account for an unexpired premium on any or all of these cars?

A. (No answer.)

Q. Did Mr. Smock and Mr. Parmentier have the policies when they made the inventory of this estate?

A. Whether they had the policies, I don't recall. They did have the bills of sale.

Q. Did you give them the bills of sale?

A. I imagine I did.

Mr. Matthews: Your Honor, I am on the sixth exception now. I want to offer the bill of sale for the Buick in evidence also. The date of the original purchase was October 16, 1930. It was assigned December 16, 1931.

The Court: It may be marked in evidence.

(Bill of sale marked in evidence as Ex. E-15.)

Q. I show you a paper and ask if you recognize the handwriting on that paper?

A. I recognize this.

Q. Pointing to the top handwriting?

A. Yes.

Q. You don't recognize the handwriting below?

A. Unless it is that of Mr. Rice.

Q. You didn't sign it?

A. No, that is not my handwriting.

Q. I show you a paper immediately after that and ask if you recognize the handwriting on that?

A. That is mine.

Q. But the signature of Robert Rice, you don't recognize as yours?

A. No.

Q. I show you another document and ask if you recognize that handwriting?

A. That is mine, and this Robert Rice is not mine.

Q. I show you another behind that ——

A. This is mine.

Q. In other words the signature of Robert Rice is not in your handwriting?

A. That is right.

Q. I show you another paper immediately behind that and ask if you recognize that signature, Robert Rice?

A. Yes, that is Robert Rice's signature I believe at that time.

Q. What is the date on that receipt?

A. October 10, 1931.

Q. And what is the date on the others that you do not recognize?

A. October 10, 1931.

Q. It is the same date?

A. Yes.

Q. And you don't recognize the signature on this I am showing you now?

A. Other than it might have been the signature of Mrs. Rice who signed for him in many instances.

Q. In whose handwriting is this document I show you now?

A. Mine.

Q. This money represented by this receipt for $390.00 is money, according to the receipt, due from the twenty-fourth of the ninth month, 1924, to the thirteenth of the eighth month, 1931, in the amount of $390.00, is that correct?

A. Yes.

Q. A great deal of that money accrued during the lifetime of Mr. E. J. Westhall, did it not?

A. It seems so there.
Q. When did Mr. E. J. Westhall die?
A. September 18, 1928, as I recall.
Q. And 1924 is four years before he died?
A. Yes.
Q. Were you one of the executors of Mr. E. J. Westhall's estate?
A. I was.
Q. Did you take a decree to bar creditors in that estate?
A. I imagine so.

Mr. Matthews: May I ask the Surrogate for the decree to bar.

(Surrogate produces paper.)

Q. I take a paper from the Surrogate and show it to you and ask if you recognize it as a decree to bar creditors?
A. Yes.
Q. What is it dated?
A. March 25, 1929.
Q. Maybe you can explain to us why you paid this $390.00 to these people?
A. Yes, because of an indebtedness of the estate for interest on the mortgage which Mr. Westhall had during his time.
Q. I show you a list here and ask you whether or not the list totals $390.00, balance due on Woodson, guaranteed by Rice, $329.28?
A. Yes.
Q. What do the names mean?
A. This is the name of the deceased, this is due

Rice for opening the graves, this indicates due the cemetery for the cost of the grave which was opened.

Q. And that was due on the fifth of December, 1926?

A. That is the date of death. It would be within a few days of that.

Q. And Mr. Westhall died two years after that, and you as executor barred creditors, and now you tell me this money is for what?

A. For money due Rice and the cemetery.

Q. Way back in 1926?

A. Apparently.

Q. Why did you pay that out of Mrs. Westhall's estate?

A. It was due him.

Q. You were executor of Mr. Westhall's estate?

A. I was one of them.

Q. Why didn't you pay it then?

A. No bill was probably submitted. Evidently it was not.

Q. Did you set it up as a liability in the E. J. Westhall account?

A. I am quite sure I did not.

Q. Can you point to any records in any of your books to show that Robert Rice was owed ten cents by E. J. Westhall?

A. I don't know that I can.

Q. Did Mr. Rice submit a bill to you for these amounts?

A. He came up there as I recall with his so-called record and I helped him make that record by going over some records that I had at that time.

Q. What were the records you had?

A. If I remember correctly, I went over the vari-

ous funerals. He kept a list of the various interments in the colored cemetery, and I checked those with him.

Q. What did you do with the $390.00 he paid?

A. Credited it to the estate of Beatrice E. Westhall, $320.00 was the principal bill, $77.00 was due on Woodson's bill which Robert Rice had guaranteed. Woodson was an employee of his.

Q. I show you a check on the Lakewood Trust Company dated 10/10/1931, check number 16, pay to the order of Robert Rice $390.00, estate of Beatrice E. Westhall, O. W. Havens, administrator. I show you the endorsement on that check, whose writing is that on the endorsement?

A. To the best of my recollection Mrs. Robert Rice who was signing checks for Mr. Rice who had the palsy at the time.

Q. Whose writing is that under there, deposit to the estate of B. W. Westhall?

A. That is mine.

Mr. Matthews: I want to call your Honor's attention to the two signatures.

(Presented to the Court.)

The Court: Yes.

Q. I show you another check dated the same date, October 10, 1931, for sixty-eight dollars, made out to Robert Rice, President Greenwood Cemetery Association, sixty-eight dollars and no cents, estate of Beatrice Westhall, O. W. Havens, administrator, and ask whose writing is that on the back of that check?

A. Mrs. Rice's. You notice the check has been cashed.

Q. Did you cash that check?

A. I did not.

Q. You cannot be mistaken about that?

A. I could not.

Q. And you cannot be mistaken as to the endorsement Robert Rice on the other check?

A. I can be sure it is not my writing.

Q. How much was Rice in debt to the estate for interest at the time that check was drawn?

A. I would like to consult my records to see if I have that. According to the inventory there was $970.53 due at that time. As I recall there was a one hundred dollar payment made subsequent to this inventory and prior to that $313.00 having been credited.

Q. Where is that in your account?

A. It is there.

Q. In other words you think there was $413 paid on account of that interest?

A. I do.

Q. That would have left a balance of $553.00, wouldn't it?

A. (No answer.)

Q. Will you point to that $500 in the account in 1931?

A. (No answer.)

(Conference between attorneys.)

Mr. Matthews: All right, Mac has fixed that up.

Q. Did you personally turn over these checks to Mrs. Rice?

A. No, to Mr. Rice. I am not sure whether she was with him at the time or not.

Q. Will you look at the affidavits that the goods and services itemized in annexed bill have been delivered or rendered and so forth. The first one attached to the $390.00 bill I show you, you say is signed by the hand that you think might be that of Mrs. Rice?

A. Yes.

Q. And that affidavit was taken by you as notary public?

A. Yes.

Q. Don't you remember whether she did or not?

A. No, I don't. Robert Rice before he was taken sick had a fairly good hand.

Q. Do you think it might be his?

A. I don't know whether it was his or his wife's now.

Q. The second one the affidavit was taken by you the same day?

A. Yes.

Q. And that is for president of the Greenwood Cemetery Association?

A. Yes.

Q. I also show you another one taken on the tenth of October, signed Robert Rice. There is no affidavit to it at all—what was that for?

A. It is probably superfluous, probably meant for one of those over here.

Q. But that superfluous one is signed by Robert Rice in that shaky signature, and on the same day the other two were signed by what you call Mrs. Rice's signature?

A. Yes.

Q. As a matter of fact isn't that your handwriting in the signatures to the receipts for all this money?

A. They are not.

Q. Before I leave that, are those words "received payment" in your handwriting?

A. They are not.

Q. And on the other bill "received payment" is not in your handwriting either?

A. No, sir.

Q. Everything on the bill except "received payment" and "Robert Rice" is in your handwriting, is that correct?

A. Yes.

Q. Everything on the copy of the settlement with Robert Rice for opening graves and cemetery plots, B. E. Westhall, to Robert Rice and the Cemetery Association debtor, as of 8/13/31, and all the subsequent handwriting is in your handwriting, isn't it?

A. This handwriting on this sheet (indicating) is my handwriting.

Mr. Matthews: I want to have marked in evidence, if your Honor please, voucher number sixteen of the Lakewood Trust Company, dated October 10, 1931, and voucher number seventeen, dated October 10, 1931, for sixty-eight dollars and a bill to the estate of Beatrice E. Westhall, dated October 10, 1931, in the sum of $390.00,

and affidavit taken by O. W. Havens attached to said bills dated October 10, 1931, and affidavit of Robert Rice, president Greenwood Cemetery Association, taken by Mr. Havens October 10, 1931,

and bill, estate of B. E. Westhall to Robert Rice, president Greenwood Cemetery Association, sixty-

eight dollars, dated October 10, 1931,

and executed affidavit, but with no jurat although the date of the jurat is made out as of October 10, 1931, and a palsy like signature of Robert Rice is on the affidavit,

and also a sheet of yellow paper attached to the papers aforesaid and immediately after them, purporting to be a copy of the settlement with Robert Rice for opening graves and cemetery plots, B. E. Westhall to Robert Rice and Greenwood Cemetery Association.

Those are all part of the Surrogate's record and I assume need not be specifically marked at this time.

The Court: The Surrogate's records are of course part of the records of this court.

Q. Who started this business about the indebtedness of the Westhall people to Robert Rice for opening graves?

A. Robert Rice, as I recall.

Q. When?

A. I should imagine just prior to that settlement.

Q. Didn't you tell Robert you were the administrator of the estate of Mrs. Westhall and much of this money had accrued under the estate of Mr. Westhall and that you could not pay out of the estate of Mrs. Westhall for what had been barred by a decree to bar creditors under the estate of Mr. Westhall?

A. I probably did not tell him that, because I knew Mr. and Mrs. Westhall would want their honest bills paid.

Q. Why didn't you, honest man, insisting upon the honesty of those who have gone to the home

which we believe in—why didn't you, Mr. Honest Executor, pay them then, when Mr. Westhall died? You kept the books for Mr. Westhall?

A. Yes.

Q. You knew whether he owed Robert Rice, the colored cemetery superintendent or grave digger, money, didn't you?

A. I probably had an idea he owed him something, but not how much.

Q. If you had an idea that this honest man who wanted his honest debts paid owed another honest man money, why didn't you pay them as executor and set it up in your account?

A. The only reason I know is that the bill was never presented and probably was overlooked.

Q. How long did Mrs. Westhall survive Mr. Westhall?

A. From September 8, 1928, until August 13, 1931.

Q. Approximately three years?

A. Approximately.

Q. There is one of these in '26—two in '26—one in '27 is three, one January '28 is four, another —

A. That is during her time.

Q. I am talking about this one. That is five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen. There are fifteen of those bills due during the lifetime of Mr. E. J. Westhall?

A. Mr. E. J. Westhall.

Q. And the other bills were due, you claim, after the death of Mr. Westhall?

A. Yes.

Q. Do you know of your own knowledge whether Mr. Rice ever got a cent of that sixty-eight dollars?

A. I don't know, no.

Mr. Matthews: Coming to the eighth exception, your Honor.

Q. On the twentieth of March, 1934, you paid one thousand dollars to Mr. McCloskey. Did you have any order of the Court to pay it?

A. I don't think I did.

Q. Did you make any application to the Court for its payment?

A. Not that I recall.

Q. Did you present any voucher for services to the Court?

A. Not that I recall.

Q. You never have presented any voucher, you simply paid the money, isn't that right?

A. Yes.

Q. You never received any voucher for Mr. McCloskey, you just paid him the money on account?

A. Right.

Q. And you did that on the twentieth of March, 1934?

A. I would not want to be sure of that date without seeing it.

Q. I show you this check.

A. March 20, 1934 is correct.

Q. Do you recall Mrs. Elizabeth Westhall making a request of you in February and March for some money on account of the needs of her minor children who are the heirs of this estate?

A. I cannot say that I do.

Q. Will I jog your recollection any if I ask you further, do you recall saying to her "We will have a special dividend from the Shoe Machinery stock and I will give you some of that"?

Mr. Tomlinson: Object on the ground that it is irrelevant, incompetent and immaterial. What Mrs. Westhall said to Mr. Havens, I contend, is clearly beyond the issue we are called upon to decide. She was not the guardian of these children, the administrator would have had no right to pay her any money, therefore any request she may have made of him for money is wholly immaterial as I contend.

The Court: I will sustain the objection.

Mr. Matthews: May I be heard?

The Court: I think I know what is coming. Go ahead.

Mr. Matthews: The purpose of eliciting this conversation between this gentleman and Mrs. Westhall, your Honor please, is to lay a foundation for the next question as to how much money was in the bank, and if so much was in the bank, why was it necessary to wait for this dividend and if so little was in the bank why pay these attorneys?

The Court: I will sustain the objection.

Mr. Matthews: Your Honor will allow me an exception.

The Court: Yes.

Q. As a matter of fact, Mr. Havens, you did receive at about that time a special dividend of $1,267.66, on January 5, 1934, from the Shoe Machinery stock—isn't that correct?

A. May I look at the account?

Mr. Matthews: Yes, look at it.

Mr. Tomlinson: I don't think there is any question about that. It is right here on this record.

Q. Here is the deposit slip, maybe that will help you.

A. Yes.

Q. At that time your records show that your balance in the estate of B. E. Westhall in the People's National Bank was $187.12. If your account shows that, that is true as of January first, 1933?

A. You have the record there. Should not that be 1934?

Q. Yes. If the record shows it, it is true?

A. I would assume so.

Q. So when you paid your attorney the only money you had in bank were this dividend check and this balance of $187.06, isn't that true?

A. Apparently, yes.

Q. And the total of those was $1,454.72, was it?

A. Yes, that would be right.

Q. And when Mac's check was paid that left you a balance in the bank as of March 22, 1934, to the estate of Mrs. Westhall, in your administrator's account, of how much?

A. $454.70.

Q. Will you turn here in the Surrogate's file to this check paid to your attorney? I show you this check to Mr. McCloskey, which we have been talking about, and ask you is there any voucher or any of the required Orphans' Court forms attached to it, any affidavit or voucher of any kind?

A. I see none.

Q. I notice here Matthews and Muller's bill for insurance premiums on what buildings?

A. The Rice property on Sixth Street.

Q. You paid this out of your administrator's account?

A. It was part of the estate, part of the assets of the estate.

Q. I show you another Matthews and Muller bill dated September 20, 1934, for $110.30. What is that for?

A. It looks like—as I recall I had mislaid or could not locate the bill for this insurance back in 1932, and I asked Matthews and Muller to give me another bill, and apparently they have dated it September 20, 1934.

Q. But this calls for insurance from October 4, 1932, to October 4, 1933. This is the period the insurance covers and not this period here.

A. I would say that was the Rice property.

Mr. Tomlinson: May I ask the amount of that bill?

Mr. Matthews: $110.30.

Q. Let me understand you. The check to which this voucher is attached is dated 11/18/32. It is your check as administrator to Matthews and Muller for $110.30.

A. Right.

Q. The only thing attached to that is a voucher of Matthews and Muller, and it has Lucy J. Rice to Matthews and Muller, incorporated, debtor, dated September 20, 1934, and it says 10/4/32, 5060 New Brunswick Company, the property a building, the

amount of insurance $3,500.00, the rate $175.68, the term one year, the premium $64.05, policy number 533, in the New Brunswick Company, on a building, and the amount $2,500.00. Does that mean there is six thousand on the Rice property?

A. It would seem so.

Q. And the insurance for that one year was $110.30?

A. That seems to be correct.

Q. Will you turn to that other Rice bill a minute?

A. (Witness complies.)

Q. Will you look at the date on that?

A. December 6, 1933, is the date on the bill.

Q. When was the check made out?

A. April 9, 1934.

Q. And it is for $51.90?

A. That is correct.

Q. What building is that on?

A. Apparently that is the garage building in the rear of 28 Sixth Street.

Q. The garage of your undertaking business?

A. No, the Rice property. This is still the Rice property.

Q. The date of that is 12/4/1933, the serial number 662, the World F. and M. Company, the building rear of 28 6th Street, the amount of insurance two thousand dollars and the rate 175 and .08, and for one year, $3,600.00, and the next policy is for a dwelling, three thousand dollars, $5.75 rate; term three years, amount $17.25—is that the same dwelling you have in the other bill? There was only one Rice dwelling, wasn't there?

A. Yes, one dwelling.

Q. It would seem that was the same dwelling as

was insured over here. In other words, for the insurance in 1932 you paid $110.30; in the bill submitted to you in 1934 for the insurance in 1933 ——

A. That bill submitted in 1934 and is a copy of the one submitted originally and paid in 1932.

Q. Then the next bill indicates that for the year 1933 the insurance ——

A. December 4, 1933, to December 4, 1934, on the dwelling alone for a three-year period.

Q. Will you look at this—Department of Comptroller of the Treasury, transfer inheritance tax bureau. Will you find the Rice property there? And also see what you set it down in your inventory?

A. Thirty-five hundred.

Q. That is land and buildings?

A. Yes.

Q. You had the house, exclusive of the garage or barn in the rear, insured for three thousand dollars?

A. That's right.

Q. In 1933?

A. That's right.

Q. The bill paid 4/9/1934?

A. That is correct.

Q. And in 1932 during your administratorship you had the building insured for six thousand and your premium was $110.30, is that correct?

A. Yes.

Q. I am prompted by my associate to ask you, why did you swear the value of the land and buildings to be $3,500.00 and you based your oath upon appraisals by the Real Estate Board of Lakewood, when you insured the property for six thousand dollars?

Mr. Tomlinson: Object on the ground that it is utterly immaterial. If we go into every possible

document that this man may have prepared or submitted we are going far afield. I do not see what his actions in connection with the inheritance tax have to do with his administratorship, as is here attested.

Mr. Matthews: The question goes to his action as fiduciary in insuring this property for one amount and in his fiduciary fund there appears for the same property another amount.

The Court: In other words your question is why there was twice as much insurance paid as the place was worth.

Mr. Tomlinson: No exception whatsoever has been filed in that respect.

Mr. Matthews: We charge him with having maladministered the estate, in the fifteenth exception. When an exceptant goes into an accounting of this kind things arise which could not have been foreseen, and therefore I would have to move to include the exception, if your Honor is of the opinion that I have not included it in my omnibus exception to which I have alluded. Looking at it broadly, your Honor is sitting here with equity powers dealing with infants. Here is an exception charging maladministration, if it be true, and it seems to me to be very competent under our exceptions as filed. If not, I move your Honor to amend and allow an exception that the accountant has unlawfully charged himself with the amount of these two policies as I have mentioned.

Mr. Tomlinson: We object to that, your Honor please.

The Court: Objection sustained.

Mr. Matthews: I now move to add as a further exception to this administrator's account, that he maladministered and misspent moneys for insurance as shown by his account. The proofs in this case clearly demonstrate that he insured property which he swore was worth thirty-five hundred dollars for double its value, the insurance covering only the building when the value covered both land and building.

Mr. Tomlinson: We object to that amendment, your Honor please.

Mr. Matthews: With submission to your Honor, my opponent Mr. Tomlinson should know better —

Mr. Tomlinson: I do not propose to be shown my duty by Mr. Matthews, your Honor please. On behalf of the administrator I desire to object to the amendment that Mr. Matthews proposes to make.

Mr. Matthews: Mr. Tomlinson knows so little about the case that in all charity I will not reply to it, but this is an administrator dealing with the funds of infants, and I make that motion for that purpose. I am perfectly willing to abide your Honor's ruling, for I feel your Honor wants to give the matter full airing.

The Court: Regardless of the value turned in on the transfer inheritance tax report, even though sworn to by the administrator, that value is one

thing, what the estate would be able to collect in the case of loss by fire is something else, and I doubt very much whether one would have much bearing on the other.

Mr. Matthews: I think that point of value is the soundest point of view in the whole business. I don't know that I will fuss for an exception on that.

The Court: I think I will let it stand as it is.

Q. Did Mr. or Mrs. Shinn owe the estate any money for rent?

A. Yes.

Q. Is that in your account?

A. Wait a minute, I don't think the Shinns owed the estate any money for rent.

Q. Didn't you take the assignment of a mortgage individually to yourself and tell Shinn you were paying the estate in cash?

A. Not the estate, the rent account, which is separate and apart from the estate.

Q. Did you record this assignment?

Mr. Tomlinson: Object as immaterial.

The Court: Is this the same matter you were talking about at the last hearing?

Mr. Matthews: No. This is moneys that do not appear in the account which we believe should be in the account and which were not accounted for.

The Court: Where a second mortgage was taken for a funeral bill?

Mr. Matthews: That was the Hannon matter, your Honor please.

Mr. McCloskey: I think there is some confusion about this. This agreement was entered into October first, appointing Mr. Havens agent for the heirs at law for the collection of rent and the care of the property. This rent collected belonged to the heirs and not to the estate of Beatrice E. Westhall. That agreement bears date October first, 1931, and it had nothing at all to do with the estate.

The Court: Unless it covered rent accruing back prior to the date of Mrs. Westhall's death.

Mr. Matthews: This agreement, if your Honor please, calls for him to account to these infant heirs for these rents, issues and profits, and it is an omnibus agreement dealing with personalty and realty. They say his taking over this agency was part of the consideration for getting the business cheap. It seems to me we should not be foreclosed from inquiring into this. It has to do with the integrity of the administrator.

The Court: You may inquire into the integrity of the administrator, but stick within the limits germane to this particular issue. Was that agreement put in evidence?

Mr. Matthews: Yes, your Honor. Exhibit E-1.

The Court: As I recall there was some testimony that the consideration for the use of the business

premises was so many dollars per month rent—I have forgotten the exact amount, and services to be performed in taking care of the real estate and collecting rents. I suppose whether or not this line now is properly admissible depends upon the construction of that agreement.

Mr. Tomlinson: Our position is this, that Mr. Havens under that agreement would be liable to account for the rents and for his collections, but we say this is not the proper proceeding to inquire into that phase nor the proper court.

Mr. Matthews: If Mr. Havens' care of that real estate was part of that agreement then every bit of Mr. Havens' conduct should be scrutinized and your Honor would be bound to consider what he had done under this agreement with respect to the real estate, because it would have a bearing upon his conduct as administrator. He cannot acquit himself by saying, "I will account for this when I account for the real estate" and on the other hand say, "The care of the real estate was part of the consideration for the business."

Mr. McCloskey: When he agreed in this agreement to take care of the realty he acted as an individual and not as an executor. The executory part of the contract provides for his management of the real estate as an agent individually, and not in any way connected with the estate of Beatrice E. Westhall as administrator of that estate.

Mr. Matthews: The administrator sold to himself individually. The administrator said to the indi-

vidual, "I will charge you myself less for this business if you myself render me administrator service with reference to the real estate" so that whether we seek to get behind the door of Osborne Havens individually, or Osborne Havens, administrator we are hoist by our own petard. Whether the contract is going to be construed one way or another is your Honor's job, but you must consider the evidence as having a bearing particularly on the conduct of this man in his fiduciary capacity, it seems to me.

The Court: I think, Mr. McCloskey, I will let it in. When I go over this matter I will give that particular point further consideration. You may have an exception in case I decide to consider this phase of it, if I do not I will so state when I write my conclusions.

Q. What was the amount of the Shinn mortgage, the assignment?

A. I think it was fifteen hundred dollars. I am not sure.

Q. Didn't Shinn agree to pay $75.00 a month to the estate? Did he pay it?

A. This was money I loaned to Mr. Shinn in order to pay his back rent, in order that the rent account might be credited with that amount.

Q. Did you draw a check for Mr. Shinn?

A. I don't remember.

Q. Or pay him cash?

A. I have no mental record of that.

Q. Didn't you tell Mr. Shinn you would pay $75.00 a month to the estate for the assignment?

A. I did not. I told him I would pay the back rent

to the estate, and I can show you where I paid it into the rent account.

Q. Which exhibit have you?

A. Exhibit E-9.

Q. You were going to get that book to show us when you paid that money to the estate. What page is that?

A. Page 151. November 17, 1933, $1,385.95.

Q. Your entry is what?

A. November 17, 1933, F. S. Shinn, rent, $1,385.95.

Q. What do these mean?

A. These are dates on which I made deposits.

Q. What are they?

A. 12/1/1933, $700.00; 12/14/1933, $150.00; 2/2/1934, $300.00; 4/26/1934, $120.00; 8/14/1934, $115.95, making that total. This was deposited to the rent account and not to the estate account.

Q. When did you take the Shinn mortgage?

A. I have no record of that other than probably about that time.

Q. Is there any record in there at all?

A. No.

Q. Has it ever been recorded, that assignment?

A. I would imagine so.

Q. If I told you the records do not show it would you say it was recorded?

A. I would think it had been.

Q. Who drew it?

A. As I recall some friend of Mr. Shinn's in Toms River.

Q. Were you there?

A. No, there was no need.

Q. Did you pay for recording it and having the assignment drawn?

A. I think he did.

Q. How much cash is available today for distribution to the heirs of this estate, Mr. Havens?

A. That is in the accounting. I have given it to you.

Q. No you have not.

A. The amount in the People's National Bank on deposit plus the amount in the safe deposit box, whatever that totals.

Q. I show you a copy of your account and point to the eleventh page. At the heading you will see "Cash in banks and on hand." I am not talking about the money in the Lakewood Trust Company. That perhaps the grace of God and the new deal may bring something out of. Cash on hand, how much?

A. People's National Bank, checking account, $1,759.59.

Q. And by cash on hand you mean cash in the box in the bank?

A. Yes.

Q. And that is the entire amount of cash on hand available for distribution to the estate?

A. Yes.

Mr. Matthews: In the tenth exception, your Honor please, in order that we may not seem to be devoid of truth, we take exception to that $30,357.00, and that is adding those two amounts together, because it is not cash on deposit. We have explained that, however, in the testimony already, and the same would apply for the item in the People's National Bank of Lakewood, in the sum of $1,309.00, because it is already in evidence there was a thirty per cent recovery from that.

Q. Why did you set it up in that fashion, $19,907.72 in the Lakewood Trust Company, Lakewood, N. J., savings account?

A. Why did I set it up that way?

Q. Yes.

A. Because that is a fact.

Q. The money is not there, we wish it were. You are a banker, you would not set it up that way to the banking commissioner.

A. The deposits have been made there.

Q. But you would not call it cash on hand at the present time and under present conditions, would you?

A. That does not say "cash on hand," it says "cash in banks and on hand." This represents cash in banks.

Q. Is the thirty thousand dollars in the bank in Lakewood?

A. It was put in there.

Q. But that thirty thousand dollars which was put in the bank in Lakewood is not there for distribution?

A. None of it has been distributed.

Q. There is not any of it there for distribution, is there?

A. I am not sure.

The Court: This last item represents cash in the box, the Hannon mortgage and the Matthews mortgage, this other mortgage?

Mr. Matthews: Yes, sir.

The Court: The People's National Bank in Lake-

wood is the account that has been set up since the so-called bank holiday, is it?

Mr. Matthews: Yes, your Honor.

A. Now available.

The Court: The preceding item, People's National Bank of Lakewood, checking account, $1,309.07, that is the balance that was on hand when the bank was temporarily closed.

Mr. Crummy: No, your Honor that represents seventy per cent. There was a thirty per cent dividend paid since that time.

The Court: That is the amount still frozen there.

Mr. Crummy: Yes, sir, and not available today.

Mr. Tomlinson: We would like to call your Honor's attention to that part of the inventory under changes in investments in the accounting.

Mr. Matthews: What page is that?

Mr. Tomlinson: Page sixteen. Down toward the bottom.

Q. Mr. Havens, you were one of the executors of Mr. E. J. Westhall's estate, you have told me that?

A. Yes.

Q. You filed an account with the co-fiduciary and executrix for that?

A. Yes.

Q. I show you an account given to me by the Surrogate from the file in the matter of the estate of Edmund J. Westhall, deceased, and ask if that is your signature?

A. Yes, it is.

Q. Your signature as executor?

A. Yes.

Q. I show you on page seven of that account, and ask you do you show in that the depreciation of the different securities?

A. Up here, that shows depreciation.

Q. In other words you have shown in the E. J. Westhall accounting, which you filed with Mrs. Westhall and the Lakewood Trust Company, depreciation of shares of the Lakewood Coal Company and on fifteen shares National Public Service Company of Virginia, didn't you?

A. Yes.

Q. And also several other depreciations in securities?

A. Yes.

Q. Ocean Holding Company, New Jersey Dairy, Thomas G. Plant Corporation and United Shoe Machinery?

A. Yes.

Q. I show you your appraisal in the account for the Beatrice Westhall estate. Your appraisal shows ten shares Lakewood Trust Company $1,650.00. I show you your account, the final accounting, ten shares Lakewood Trust Company $1,650.00. Why did you show that in your final accounting. This is your inventory and appraisement.

A. This is the same thing.

Q. No, that is your account. This is the inventory and appraisement. In other words you inventoried and appraised your ten shares of Lakewood Trust Company on the fifth of October, 1931, at $1,650.00, and in this, the year of our Lord, the day of the now you inventoried it at the same value, $1,650.00. Why didn't you show depreciation there, like you did in Mr. Westhall's estate?

A. This I take it is the value as of the estate of Beatrice E. Westhall as appraised by the appraisers.

Q. You filed your account just as the appraisers appraised it?

A. Yes.

Q. But you did not do that in the estate of Mr. Westhall. You accounted for all the depreciation in his securities as between your inventory and the final accounting. Why didn't you do it in this one, where you had many heirs, whereas in the other one you only had Mrs. Westhall as sole legatee?

A. (No answer.)

Q. Who made out your account?

A. Mr. McCloskey tabulated this.

Q. Who made out your inventory?

A. That was also made in Mr. McCloskey's office.

Q. Who made it?

A. Mr. McCloskey, I assume.

Q. Did you know that the National Public Service Company went the way many other corporations have gone between the time Mrs. Westhall died and the present time?

A. When do you mean I knew it.

Q. At any time.

A. After they had closed, yes.

Q. When?
A. Probably July or August.
Q. I show you a certified copy of the adjudication of bankruptcy of the National Public Service Corporation of the southern district of New York, file 54710, of the United States District Court for the Southern District. Will you look at the date on that paper?
A. July 8, 1932.

Mr. Matthews: I will offer this copy in evidence, your Honor please.

The Court: Mark it in evidence.

(Paper marked in evidence Exhibit E-16.)

Q. In your final accounting do you set up the National Public Service stock?
A. Yes, two items of it.
Q. That is in your account?
A. Yes.
Q. Do you set up the National Public Service stock in your inventory at the same amounts?
A. Apparently it is.
Q. Except that in your inventory and appraisement you have added accrued interest $12.54, is that right?
A. Yes.
Q. Had you received that?
A. No. It is accrued but not paid.
Q. And that inventory account was sworn to on the fifth of October, 1931?
A. Correct.

Q. The corporation went bankrupt in July 1932, you are filing your account, or asking to have it filed, as of September twenty-first, and you still set it up at the same value in your account.

A. It would seem so there.

Q. Why with your experience of these very securities as executor of the estate of Mr. Westhall, did you not put the changes in value of the securities in the estate of Mrs. Beatrice Westhall?

A. I was governed by counsel on that.

Q. Did you have the same counsel when you filed for Mr. E. J. Westhall?

A. Yes.

Q. Am I to suppose that my brother of the bar advised you in one instance to put the depreciation when there was a sole legatee and in another instance where there were several heirs did not advise you to put the depreciation or advised you not to put it? Is that the way I understand you to say my brother advised you?

A. My answer to that is that I consulted with my counsel and that is the result of it.

Q. Did you consult with Mr. McCloskey about taking the Shinn mortgage?

A. No, sir.

Q. Did you consult with Mr. McCloskey about putting the money in the safe deposit box in the bank?

A. No, sir.

Q. Did you consult with Mr. McCloskey about the Hannon mortgage, about putting that in the box?

A. No.

Q. Did Mr. McCloskey foreclose the Rice mortgage?

A. I believe he did.

Q. Did Mr. McCloskey know you had this money in the box?

A. I don't know. I don't think he did. I don't recall having told him.

Q. Of course when Mr. McCloskey prepared your accounting he must have known it.

A. He did.

Q. What did he say to you?

Mr. Tomlinson: I submit, your Honor please, that is immaterial.

Mr. Matthews: I will withdraw it.

Q. Did he advise you to take it out of the box?

A. At the time of filing the accounting, do you mean?

Q. When he found out about it.

Mr. Tomlinson: If the Court please I submit ——

The Court: What difference does it make?

Mr. Matthews: It goes to Mac's fee. You have got to know those things. It is not a pleasant task, your Honor.

Mr. Tomlinson: I submit, if the Court please, it is a privileged communication.

Mr. Matthews: There is nothing privileged between an administrator and his counsel when the heirs' interests are at stake.

The Court: I will sustain the objection.

Mr. Matthews: Your Honor will allow me an exception. The purpose of this question is to find out whether counsel advised this man to allow this money to remain in that box when counsel knew it for the first time, or not.

The Court: If you can show me where it makes any difference that may throw a different light on it.

Mr. Matthews: We have an exception to the payment of one thousand dollars to Mr. McCloskey, my brother lawyer. We have shown there was no voucher for his services, nor did he get a bill, but he said Mac told him it was due. Then it became necessary for us to ask this witness about several things he has done and whether or not they were done by advice of counsel. He has shifted some of these things on to Mac's shoulders and now it is my duty to make the load as heavy as possible for poor Mac. He was counsel for this man as administrator and also individually. He acted or was present when the bank was supposed to be representing these children, and in everything we have to ask about Mac. It is not that I love my case more nor Mac less. I don't like to do it. It is not so nice a job, but I have to have my record.

Mr. Tomlinson: It seems to me it does not make any difference. The money is on hand. Nothing has been lost. What possible difference does it make whether Mr. McCloskey told him to leave the money in the box or not.

The Court: Mr. Matthews says it goes to the exception that has been taken to the thousand dollar counsel fee. I suppose what he seeks to go into is the question of whether or not the sum total of the services rendered by Mr. McCloskey as counsel for the executors was worth one thousand dollars.

Mr. Matthews: Yes. Your Honor.

The Court: I think I will change my ruling and allow it to go in.

Mr. Tomlinson: Your Honor will allow me an exception.

The Court: Yes, but I think we will take that up next time.

Mr. Matthews: I wonder if my brother attorneys and I are in accord regarding what we are going to do before next time. We have agreed to go through the accounts and have the accounts receivable and the expenses taken off.

Mr. Tomlinson: I said I would consider it at noon time. At that time I said to you that the proper course to pursue was to have a certified public accountant appointed by the Court go through this account, and you said something about the legality of such procedure, and I then consulted with Mr. McCloskey and the result of the conference was this—we are perfectly willing to have a certified public accountant appointed by the Court make up a

statement from this account, otherwise we think Mr. Matthews should prove his case in the regular way.

Mr. Matthews: May we have access to the exhibits in this case in the meantime?

Mr. Tomlinson: Yes.

Mr. Matthews: We don't want to infringe on your hospitality, Mac, but may we come to your office?

Mr. McCloskey: You may come to my office; it would probably be more convenient.

(Recess to Thursday or Friday, November 15th or 16th.)

TESTIMONY.

Toms River, N. J., November 16, 1934.

Before Hon. Russell G. Conover, Judge.

Appearances:

For the exceptant, John A. Matthews, Esq., Andrew B. Crummy, Esq.

For the accountant, W. Durward McCloskey, Esq., DeVoe Tomlinson, Esq.

Osborne W. Havens, recalled.

Direct examination.

By Mr. Matthews: (Continued.)

Q. Mr. Havens, you are not a licensed embalmer, are you?

A. No, sir.

Q. Nor a licensed funeral director?

A. No.

Q. Did you ever take an examination for either?

A. No.

Q. What salary did you receive from the B. E. Westhall estate?

A. Seventy-five dollars a week.

Q. And Mr. Brown testified last time his salary was thirty-five dollars a week?

A. Yes.

Q. You heard Mr. Brown testify last week that he did not know until two weeks ago that you had bought the business, and that he was under the impression that he was working for the estate of E. J. Westhall?

A. I heard part of his testimony.

Q. Did you hear him say that?

A. Yes, I think that was said before I went downstairs to answer the telephone.

Q. You never told Mr. Brown you had bought the business, did you?

A. Not that I recall.

Q. Why didn't you?

A. I knew of no reason why I should.

Q. You were registered by the State Board of Undertakers and Embalmers as an apprentice, weren't you?

A. Yes.

Q. Who registered you?

A. Mr. Brown.

Q. So far as the State Board of Undertakers and Embalmers was concerned you were an employee of Mr. Brown's.

Mr. Tomlinson: Object as calling for a conclusion.

The Court: What difference does it make?

Mr. Matthews: I am going to present to your Honor this afternoon definitive conclusion evidence as well as decisions from the Court of Errors and Appeals and citations from the statutes of this State to the effect that this man could not be the owner of this business and of that fact I am going to present the proofs to your Honor in foundation as well as in fact.

The Court: Your objection goes to the testimony as to whether this man is a licensed embalmer?

Mr. Tomlinson: No, as to whether this man is an employee of Mr. Brown as far as the State Board is concerned definitely calls for a conclusion and therefore is improper.

Mr. Matthews: May I ask the stenographer to read my question and the answer?

Mr. Tomlinson: The witness answered, if he did answer, before I had a chance to object, and if he did answer I move to strike.

Mr. Matthews: He cannot be the owner under the laws of our State, and I am going to show that he is an employee. We are entitled to know that if he sold to himself this business as administrator. The Laws of 1927 very explicitly show that this man has no more right to be an undertaker than myself or your Honor, if I may say so.

I cite to your Honor Chapter 156 of the Laws of 1927 on page 295, Section 7.

"No person shall engage in the business of em-

balming, or preserving in any manner dead human bodies, unless he shall have a license as embalmer granted by the Board of Embalmers and Funeral Directors of the State of New Jersey in full force and effect and shall otherwise have complied with the provisions of this act, and no person shall engage in the business of funeral directing or of preparing or disposing of dead human bodies by any means whatever unless he shall be the holder of a license as a funeral director granted by the Board of Embalmers and Funeral Directors of the State of New Jersey in full force and effect, and shall otherwise have complied with the provisions of this act. Any person shall be regarded as transacting the business of embalming within the meaning of this act who shall hold himself out as an embalmer, or engaged in the business of preserving the dead human body, or who shall use, in connection with his name, the word "embalmer" or any other title intending to imply or designate him as an embalmer, or as one engaged in the business of embalming or otherwise preserving the dead human body, and any person shall be regarded as transacting the business of funeral directing who shall hold himself out as engaged in the business of directing or supervising funerals or the preparation or disposal of the dead human body, or who shall, in connection with his name or business use the words "funeral director," "undertaker" or any other title intending to imply or designate him as a funeral director, undertaker or one engaged in the business of preparing or disposing of the dead human body in any manner whatever.

Page 300, Section 9.

"Any person who desires to transact the business of embalming or funeral directing or both shall submit an application for a license to the board and shall, with such application, submit proof that he is at least twenty-one years of age, and of good moral character and said application shall be accompanied by a fee, the amount of which shall be fixed by the board by rule and shall not exceed twenty-five dollars.

Said applicant shall then submit to such examination as the board may determine proper to ascertain his efficiency and qualification to transact the business for which the license is applied, and so forth."

Page 302, Section 11.

"No name shall appear in connection with, or the advertising of any establishment of embalming or funeral directing in any manner whatsoever unless the person so named is the holder of a license to carry on such a business."

Page 302, Section 12.

"No corporation shall carry on, or continue to carry on, or be hereafter authorized to carry on or continue to carry on or hold itself out, or continue to hold itself out, as carrying on, the business of embalming or funeral directing, and no person shall carry on the business of embalming or funeral directing as an officer, agent or employee of any corporation or under the name of any corporation or otherwise than under his own name, provided that nothing herein contained shall prohibit the carrying on of the business by a partnership under the firm name or the name of any member of said partnership;

provided, each member of said partnership is licensed; and provided, further, that nothing herein contained shall prohibit a licensed embalmer or funeral director from acting as an employee of a licensed embalmer or funeral director carrying on his business under his own name or under a firm name containing only the surnames of each member of said firm; and provided, further, that if any corporation is now authorized, under the laws of this State, to carry on the business of embalming or funeral directing in such a way as that, under the law, its right to do so cannot be entirely forbidden, then such business may be continued, but if continued, shall be continued under such reasonable rules and regulations as the board may determine with respect to management and control of the actual operation of embalming or funeral directing by persons holding licenses granted by the board and with respect to such other matters as the board may determine; and provided, further, that the board may, by rule or regulation, permit the continuance of the business of a deceased embalmer, or funeral director to whom a license shall have been issued under the provisions of this act, under the supervision of a person duly licensed by the board for the benefit of the widow or of the estate or of persons interested in the estate of decedent for such time and in such manner as the board shall determine."

Now the statute is clear. Today we are going to prove to your Honor this man cannot even conduct an undertaking business. His status must, therefore, be apparent to this Court. We have here a copy from the State Board of Undertakers and Embalmers of the permit under which he is operat-

ing, which was issued, not to this man but to the Westhall estate. We are going to picture his status. If he was employed by Mr. Brown, your Honor must take that into consideration when you consider that he was allowed seventy-five dollars a week, and Brown who was the licensed undertaker and who was conducting the business was receiving only thirty-five dollars a week.

The Court: In other words you purpose to show that the State Board issued a certificate permitting the continuance of this business for this estate.

Mr. Matthews: Yes, we have a copy here and if my opponents will consent I will produce this certificate to Mr. Havens and ask him to identify it as an exact copy of what is hanging in his establishment and must hang there under the law. There is an exact duplicate under Section 12 of the Act that I have just read. I show it to your Honor and to DeVoe if he will come up. I didn't want to bring a man from the State Board down here if I could avoid it.

The Court: This is a certificate giving permission to Beatrice Westhall, is this the certificate under which the business is operating today?

Mr. Matthews: Yes, sir, with the signature of Mr. Westhall on the back of it. Mr. Havens cannot conduct such a business because he is not a licensed man and I have Mr. Brown subpoenaed here to demonstrate that to your Honor. Under the law Mr. Havens cannot even buy caskets or supplies for the

business. It is contrary to the State Law and the regulations pursuant thereto.

The Court: I suppose Mr. Tomlinson's answer is that the act provides a penalty for violation.

Mr. Matthews: I don't care what his answer is. Your Honor is sitting here dealing with three infants of this estate and the integrity of this administrator is a factor that must enter into your Honor's deliberations. We are demonstrating to your Honor that this administrator sold to himself this business, that in no year has his net profit been any less than $8000.00, and we are trying to prove to your Honor that this business was not only sold improvidently but with a real detriment to the estate. This business has been running since the death of Mr. Westhall and had this man not bought it in it could have continued to operate under this statute that I cited to your Honor for the benefit of the heirs.

The Court: Is it your contention that the effects of this statute is that a transfer of a business to an unlicensed funeral director or embalmer would merely subject that man to a penalty or do you contend that the effects of that statute is such that it would make void any attempts to transfer the title.

Mr. Matthews: That statute specifically says that no man who is not a licensed funeral director or embalmer could operate such a business and therefore all this man could buy would be the physical assets. The only way he is conducting the business now is by buying what he attempted to buy, the good will.

He says there was none. But good will is represented by Section 12 of the statute which gives the estate of a licensed undertaker and embalmer the right to carry on such a business.

The Court: What have you to say about that, Mr. Tomlinson?

Mr. Tomlinson: In the first place, I have this to say with reference to the pending question, whether this man, Mr. Havens, considered himself an employee of Mr. Brown. I say that question is certainly incompetent, calling for a conclusion. The construction of the law is certainly up to your Honor and not to Mr. Havens.

With reference to this statute I have this to say, this is a penal statute providing a penalty.

Mr. Matthews: For the violation of Section 11 there is a penalty of one hundred dollars for the first offense and one hundred dollars thereafter.

Mr. Tomlinson: I like to hear Mr. Matthews talk, but I think I have a right to state my objection and state my ground here in this court without constant interruption.

Mr. Matthews: I am very sorry, I thought I was helping by stating the penalty.

Mr. Tomlinson: This is a penal statute and the penalty that a man incurs for violating that statute is a fine as Mr. Matthews has pointed out and on that ground I say that this statute has no application to the present situation.

In the second place, reference is made by counsel to the man who is running the business. That means more than holding a license. It has been shown here and I think it is unquestioned that the man who financed this business, the man who supervised the operation of this business, and did everything in the shop except hold the license and did some of the undertaking work was Mr. Havens, and therefore I say he had a right to own that business and he did not violate the law by reason of the fact that he did not hold this license. Nothing is said in the exceptions filed here with reference to the sale of the business being void because of the fact that this man did not have a license. It seems to me all of these things are irrelevant to the issue before your Honor and that is whether Mr. Havens has been grossly negligent in his administration of this estate. The statute is simply a penal statute and has no application to the present situation. If the pending question were answered, as I don't think it was, I move to strike the answer out and I maintain that all reference to this statute is irrelevant and immaterial.

Mr. Matthews: When counsel offers the objection to the question that Mr. Havens is asked to give a conclusion when he is asked if he is an employee of Mr. Brown's, I don't understand either the law or the English of that. Certainly the man knows whether he is an employee or not. I asked him after some preliminary question whether so far as the State Board of Embalmers and Undertakers was concerned he was an employee of Mr. Brown's and he said, "Yes;" whether answered or not it is perfectly competent. To come to the main issue I do not

understand under what theory Mr. Tomlinson says this is a penal statute and therefore has no application to this case. One of our exceptions relates to the sale of this business without any allowance for good will. Here is a situation under this so-called penal statute. No man could run that business today except a licensed undertaker unless he used the name Westhall or used the name of some other licensed undertaker. As a matter of fact it is already in this case that the consignments of goods come in the name of Westhall and the bill sent out are sent out in the name of Westhall and also that this man Brown did not know until two weeks ago that he was not working for Westhall, so the absolutely compelling conclusion is that the name Westhall is his only right to be investing in the business. Mr. Tomlinson says that this man has financed the business and has done most of the work, that statement is only repeating the violation of this statute. He financed the business? No. He agreed to buy the assets of the business at their inventoried value, he agreed to pay for them forthwith and as a matter of fact did not pay for them for ten months, but aside from that what would be the difference if he had invested money in the business, his investment is still there but the business has values to him and values to this estate only when operated under the name of Westhall, and in the act your Honor will see that it is for the benefit of the next of kin and particularly for those interested in the estate that such a license is granted. That permit never can be issued to this man under that statute. That permit was uttered to Mr. Westhall who was a licensed embalmer and that business can be carried on under that name and un-

der these conditions provided the permit is issued to the estate of this licensed embalmer.

The Court: Let me see the act you refer to.

(Book shown to Court.)

Mr. Matthews: Your Honor will disregard my marks. Here is the whole Act and this is the section referring to the estate.

The Court: The objection will be sustained.

Mr. Matthews: I must insist with your Honor that that matter be put on the record. I don't understand your Honor's ruling in that regard. Can there be a good will to a business that a man has no right to carry on unless he uses the name of the estate? I have showed your Honor the law, why should your Honor take this attitude today when on other days you heard me on good will. I want to be heard very vigorously. I want to have the advantage of every objection and every exception.

I am in this County to see to it that there is no stone left unturned to prove and vindicate not only the dignity of this Court but the lack of attention on the part of this man to a trust.

The Court: That may be all very true and I certainly do not want to foreclose you or anybody else from getting anything in evidence that properly belongs there.

Mr. Matthews: That is what I believe and that is why I am so insistent with your Honor that it goes

to the very essence of the business. The law itself forbids this man to conduct this business.

The Court: The difficulty is that I do not agree with you.

Mr. Matthews: I don't understand why your Honor should disagree with me now and I am moved to inquire how was it that your Honor asked me is this a penal statute before my opponent had even mentioned that?

The Court: Maybe he did buy this business; and if he did, he bought it in violation of this statute.

Mr. Matthews: I want to show that he cannot conduct this business, he is not an undertaker, he is an employee of an embalmer.

The Court: How can you show that by this statute?

Mr. Matthews: I read the pertinent parts of this statute, your Honor and have shown it to you and the Westhall license which you have before you requires that the business be operated for the benefit of the next of kin.

The Court: This is the license issued to Beatrice Westhall to carry on the business of E. J. Westhall and both of those people are dead. This does not mean a thing.

Mr. Matthews: That means everything, that is the license under which Mr. Havens is operating.

The State Board of Undertakers and Embalmers has renewed it from year to year, and get this, your Honor, it is a permit and not a license and it may continue ad infinitum so long as it inures to the heirs of the estate.

The Court: So long as Beatrice Westhall is alive.

Mr. Matthews: No, your Honor, it is renewed every year, it was renewed in 1934, and that is what is hanging in his shop now and he is operating under this permit. If, according to this statute, that permit was issued that he might operate it for the benefit of these children they would be receiving that profit of eight thousand a year. If Mr. Havens has invested twenty-eight hundred dollars in this business through ignorance, his investment may be returned to him but the business belongs to the children; that evidence is so pertinent to the theory and facts of the case that I cannot understand why, with no legal arguments from my opponents, your Honor will not allow that evidence to prove that there is a good will to this business and it has not been paid for as we maintain. Why, Judge Conover, excuse my enthusiasm, but he cannot conduct that business. If Harry Brown were to die tomorrow he could not go on with that business. He could not get a license for himself.

The Court: Suppose he did. He would be liable to a penalty.

Mr. Matthews: No, leaving the penalty out, we are trying to show how he, who was going to buy the

business for the benefit of the next of kin, did take away from those next of kin nearly nine thousand dollars a year for the twenty-eight hundred dollars that he invested himself.

That is perfectly material and relevant and competent to the issue.

The Court: No, Mr. Matthews, I don't agree with you. You have your objection on the record.

Mr. Matthews: I want all my objections on the record and an exception to your Honor's present ruling.

The Court: Yes.

Q. I show you a paper and ask if that is a copy of the certificate under which you are operating your undertaking business?

A. I have no knowledge of this certificate being forwarded to me.

Q. I am not asking you that. Is that a copy of what is hanging in the office of your undertaking business?

A. It is not.

Q. What paper is hanging in your undertaking business?

A. A certificate signed H. E. Brown, manager.

Q. Is that all? Are you familiar with the laws of 1927 with reference to undertakers and funeral directors?

Mr. Tomlinson: Object as irrelevant and immaterial. It does not make any difference whether this

man is familiar with the law or not, he is presumed to know the law.

Mr. Matthews: That question is perfectly competent. Here is a man operating this business which he says he bought for the benefit of this estate, and he has a right to tell us whether he knew the law of 1927 when he bought this business.

The Court: What difference does it make?

(Objection sustained.)

Mr. Matthews: Your Honor will allow me an exception, please.

The Court: Exception.

Q. What license have you that you are operating under?

A. At the present time, you mean?

Q. Yes.

A. Mr. Brown's license number 461, the license number on this certificate, which says on the back that it should be hanging in the office, has never even been sent to Mr. Brown or myself to be displayed in the office; registered license 563, which was Mr. E. J. Westhall's license number as I recall.

Q. Is Mr. Brown's license as a funeral director hanging in your office or as an embalmer?

A. Neither of them.

Q. Has Mr. Brown a license as a funeral director?

A. Yes, and embalmer all in one.

Q. Is that hanging in your office?

A. No.
Q. Where is it?
A. He probably has it in the safe or some place. Just where I am not sure.
Q. Don't you know that under the law you have to have it displayed in your office?

Mr. Tomlinson: Object. Irrelevant and immaterial.

The Court: I don't see what difference it makes so far as this matter we are now interested in is concerned.

Mr. Matthews: Your Honor has disallowed the question?

The Court: Yes. You may have an exception.

Q. When Mr. Westhall died you were working for the Westhall undertaking business?
A. Yes.
Q. As what?
A. As apprentice to Mr. E. J. Westhall.
Q. After Mr. Westhall's death you continued to work as an apprentice?
A. Yes.
Q. Under whose license?
A. Mr. Brown's.
Q. And today you work under the same license, do you?
A. Yes.

Mr. Matthews: All these questions are allowed, I assume, your Honor?

The Court: They may be allowed.

Q. Did you consult with Mr. McCloskey at the time you were going to buy this business?

A. In what respect?

Q. In any respect about buying the business?

A. I probably asked him if it would be all right. I don't recall off hand just what I said to him or when I said it.

Q. Did Mr. McCloskey say anything to you about the Laws of 1927 with reference to buying an undertaking business, you not being licensed?

Mr. Tomlinson: Your Honor I certainly object as not material.

The Court: Objection sustained.

Mr. Matthews: And your Honor will allow me an exception.

The Court: Exception.

Q. At any time between the time you said you consulted Mr. McCloskey up to the present time have you ever had a license as an embalmer or as an undertaker or as both?

A. No. Only that of an apprentice.

Q. You know, don't you, that you cannot run an undertaking business or direct a funeral business under your own name when you are not licensed?

Mr. Tomlinson: Object.

Mr. Matthews: That goes to the very essence of good will, apart from the license at all.

Mr. Tomlinson: Your Honor please, I object on the ground that it is absolutely immaterial and on the further ground that it does not make any difference whether he knows the law or not, the law speaks for itself.

The Court: Now, Mr. Matthews, just how is that competent to show the point you have in mind? I know what you are driving at?

Mr. Matthews: I am not driving at anything, your Honor please. After twenty-five years at the bar I am satisfied I am driving at nothing. I am simply putting in proof in the interests of these children, on the good will of the business.

The Court: If you can show me how that question or any answer that question would call for is competent to prove that point I will let it be answered.

Mr. Matthews: I inquired of this witness whether he knew that he could not run an undertaking business nor direct a funeral business under his own name, he not having a license so to do. What good would it be for him to buy such a business if it had no good will, or no name under which it could be operated? What good would it be for this man to invest in this business without this good will? Good will is intimately involved in this question.

Mr. Tomlinson: A man may buy a business and

not run it, and that, legally, is just what this man has done. He ran the business, took the profit if any, took the loss if any, and complied with the law by having a man there who had a license.

Mr. Matthews: That would be all right if that very man had not stated that until two weeks ago he thought he was working for the estate.

The Court: I will sustain the objection.

Mr. Matthews: Your Honor will allow me an exception.

The Court: Yes, if you need it.

Mr. Matthews: I certainly do need it, your Honor. This evidence is so essential to the case that I am absolutely in consternation because no reason is given to me, after a quarter of a century at the bar, why it is not competent. It just is not competent.

The Court: I have ruled on it.

Mr. Matthews: And I have taken an exception. That is why I need it.

Q. You bought the name of Westhall, didn't you, when you bought that business?

A. I don't figure I did. I kept the name of Westhall because E. J. Westhall asked me to keep his name before the public.

Q. Could you have put your name up there?

A. No.

Q. You never told Mr. Brown you bought the business and you would have had to tell him if you wanted to put his name up there?

A. Yes.

Q. You put an electric sign up there over a year ago with the name of Westhall on it?

A. Yes.

Q. You know that you could not run it under your name, don't you?

Mr. Tomlinson: Object as perfectly immaterial and irrelevant, your Honor please, as to whether he knew or did not know what the law was.

Mr. Matthews: He was asked whether he bought the name of Westhall. The law is before your Honor, but I am going to prove it technically by putting my associate on. Under that law it is palpable that this man could not run the business in his own name, and I have a right to know whether when this man bought this business for thirty-two hundred dollars he did not know that he could not run it under his own name.

The Court: I will allow that to be answered.

Q. Mr. Havens, will you answer that question?

A. I would say yes, under my own name, but I also knew that I could run it under Mr. Brown's name.

Mr. Matthews: I ask that the latter part of his answer be stricken out.

The Court: Yes, strike it.

Q. You are familiar with Exhibit E-1 in this case, the contract to purchase this business?

A. I have read it.

Q. And in that contract, at page six, you say that you buy the business together with the good will of said business, do you not?

A. Yes.

Q. I show you a paper and ask if you recognize that paper?

A. Yes.

Q. That is a bill sent by you in 1934, is it not?

A. Yes.

Q. How are customers of the undertaking establishment billed today?

A. In their name.

Q. And who is billed as creditor if they are billed as debtor?

A. E. J. Westhall.

Q. There are no bills go out in your name?

A. No.

Q. How are goods bought from the National Casket Company and from the merchandisers today, in whose name?

A. In the name of E. J. Westhall.

Q. None of them in your name?

A. No.

Mr. Matthews: I now represent to the Court that I have in my hand a permit to continue the business of a deceased licensee, which I represent to the Court I obtained through Russell A. Riley, Esq., one of the

associate counsel of my office, from Mr. Bert A. Waters ——

Mr. Tomlinson: We do not question that it is a true copy.

Mr. Matthews (continuing): President of the State Board of Funeral Directors and Embalmers, purporting to be, as the typewritten legend on the back says, "This is a copy of the original certificate" that should be on file in the office of E. J. Westhall. That certificate would not be admissible in evidence by reason of the form of the proof, but I now ask counsel if he would waive the form and make his objection to the essence of the exhibit—in other words that if the exhibit were competent, relevant and material, which I represent it to the Court to be, that you admit it. It was obtained yesterday at the office of the State Board of Funeral Directors and Embalmers, and I ask to have it marked for identification.

The Court: It may be so marked.

(Paper marked for identification, Ident. J.)

Mr. Matthews: I now offer this certificate in evidence for the purpose of showing that at the present day the business purported to be sold by this administrator to himself is as a matter of fact being run under the guise of being run for the benefit of the next of kin of E. J. Westhall, that the certificate is granted as a permit to run the business under Section 12 of the Laws of 1927, and more particularly

that part of Section 12 of Chapter 156 of the Laws of 1927 which reads as follows:

"And provided further that the board may by rule or regulation permit the continuance of the business of a deceased embalmer or funeral director to whom a license shall have been issued under the provisions of this act, under the supervision of a person duly licensed by the board for the benefit of the widow or of the estate or of persons interested in the estate of the decedent, for such time and in such manner as the board shall determine."

I further represent to the Court in offering this that it is competent, because this is the permit under which this business is now being run.

Mr. Tomlinson: May I see it?

(Permit shown to counsel.)

Mr. Tomlinson: If the Court please, we object. The certificate is dated this blank day of 1929, issued to Beatrice Westhall. There is not a scrap of proof to show that this was ever issued or any renewal was ever issued after the death of Beatrice Westhall, and we contend it has no application to the estate of Beatrice Westhall or any business which her estate sold.

Mr. Matthews: I am representing to the Court and to my brothers that this is a copy of the certificate which is the permit under which this business is presently operated. That is the business allegedly owned by this administrator.

Mr. Tomlinson: I think that states a conclusion on Mr. Matthews' part. That certificate is dated 1929 and issued to Beatrice Westhall, not to the estate of Beatrice Westhall.

The Court: It may be the only color of authority under which this man is still operating.

Mr. Matthews: He cannot operate it under that statute, your Honor please.

Mr. Tomlinson: I simply wish to state the further ground that I don't think that has any relevancy in this present issue.

The Court: I will allow it. I agree with the theory under which you now offer it, but I did not agree with the former one.

Mr. Matthews: I tried to say the same thing before. I am sorry if I did not succeed.

Q. You are not a person interested in the estate of Beatrice E. Westhall, are you—not an heir of the estate?

A. Not directly.

Q. How are you indirectly?

A. Through my wife.

Q. But you are not personally interested?

A. No.

Q. And you were only a legatee of a sum of money under the E. J. Westhall estate; you were not a residuary legatee.

A. I do not recall being a legatee to a sum of money.

Q. Under the codicil you got a boat and ring?

A. Yes, under the estate of E. J. Westhall.

Q. That was the extent of your interest?

A. Yes.

Q. Your license as apprentice to Harry E. Brown has been renewed every year, has it not?

A. It has.

Q. Do you recall that it was renewed on the 26th of June, 1934?

A. I don't recall the date. I remember sending the money in for it, with Mr. Brown's application.

Q. What do you get in return, a receipt or what?

A. Yes. I got an apprenticeship license.

Q. Is it a card?

A. No, it is a slip of paper.

Q. I show you a card which purports to be an apprentice record, taken from the records of the State Board of Undertakers and Embalmers, on the back of which is printed State Board records, and it has been shown to both your counsel, and on the front of the card is printed apprenticeship record. Does that card contain your name?

A. Yes.

Mr. Matthews: I offer that card and the second card of the apprenticeship record in evidence.

The Court: They may be marked.

(Cards marked in evidence Exhibit E-18, Exhibit E-19.)

Mr. Matthews: Does your Honor wish me to prove the law of 1927 before I make my offer, be-

cause I remember from my long ago days if my opposing counsel objects I have to prove it.

The Court: I suppose I can take notice of the laws of the State of New Jersey. It is not necessary.

Mr. Matthews: I offer Chapter 156 of the Laws of 1927 in evidence.

The Court: Yes.

Mr. Matthews: I now offer in evidence paper which has been shown to the witness already, which purports to be a bill sent out in the year 1934 to one of his patrons.

The Court: It may be marked in evidence.

(Paper marked in evidence Exhibit E-21.)

Mr. Matthews: Is Mr. Shinn in court?

(Man rises in audience.)

Mr. Matthews: Will you hand me those exhibits I subpoenaed you to bring today?

(Man presents papers.)

Q. At the last hearing, Mr. Havens, when we spoke about the Shinn assignment, you told me you did not consult Mr. McCloskey about it, and your best recollection was that it was drawn by an attorney in Toms River.

A. That was my recollection at the time, due to the fact that Mr. Shinn had mentioned to me that he would like to have it drawn in Toms River.

Q. Was there an agreement entered into between you and Mr. Shinn besides the assignment of mortgage?

A. I think so.

Q. Isn't it true that the agreement and the assignment were all in the one paper?

A. I could not say unless I saw it.

Q. I show you a paper on the back of which is the office name and number of Mr. McCloskey, and ask if you know what that paper is.

A. Memorandum of agreement between Frank S. Shinn and Elizabeth B. Shinn, and Osborne W. Havens.

Q. Does that refresh your recollection that Mr. McCloskey drew the agreement?

A. Yes. After I looked up that assignment you told me you could not find I then refreshed my mind to the fact that Mr. McCloskey did draw it. I remember the details in connection with it now, but I did not remember at the time. I think Mr. Shinn will verify the fact that he wanted it drawn in Toms River or that he did at the time.

Q. I show you a paper and ask if that paper is in your handwriting?

A. Yes.

Q. All of it, all of the handwriting yours?

A. Yes.

Q. What is that paper?

A. It is an itemization of the indebtedness of F. S. Shinn and also a settlement, apparently.

Q. The settlement concerning which you testified the last time?

A. Yes.

Q. For back rent?

A. For rent.

Q. What date is on it?

A. November 17, 1937.

Mr. Matthews: I offer this paper in evidence.

The Court: It may be marked.

(Paper marked in evidence Exhibit E-22.)

Mr. Tomlinson: No objection.

Q. I show you another paper, Mr. Havens, and ask if that is in your handwriting?

A. It is.

Q. What is that paper?

A. That goes with this. That would seem to be a receipt for the amount of rent due by Mr. Shinn as of that time.

Q. Meaning November 17, 1933?

A. It covers November, 1933, apparently. It covers the November rent period.

Q. That receipt is dated November 17, 1933.

A. Yes.

Q. On that receipt I notice merchandise $254.05. What does that mean?

A. That was some coal purchased by Mr. Shinn from someone who was indebted to him and allowed by me to him as against his indebtedness to the rent account.

Q. And the coal was received by whom?

A. By me as agent for the building.

Q. And that coal was delivered to the building and was used to heat the building?

A. Ordered by Mr. Shinn and used to heat the building.

Q. In your capacity to janitorize the building under the agreement E-1?

A. That is right, whatever the number is.

Mr. Matthews: I offer that receipt in evidence.

Mr. Tomlinson: Our objection to this particular line of testimony is that it is dealing with the rent account and not with the administration of the personal estate. It is dealing with Mr. Havens' action as an agent for the heirs, not in his capacity as administrator. Mr. McCloskey explained that last week, and for that reason we are of the opinion this is irrelevant and immaterial.

The Court: We had that thrashed out last week, and as I recall that depends upon the construction of the agreement. It may be relevant and it may not. I will allow it in for the time being.

Mr. McCloskey: We may have an exception?

The Court: An exception will be noted. The exhibit may be marked in evidence.

(Receipt marked in evidence Exhibit E-23.)

Q. So under this transaction with Mr. Shinn you

advanced him $1,640.00 less $254.05 worth of coal, is that right?

A. That seems to be correct. I gave him credit for these on the record.

Q. In other words, no cash passed?

A. Yes, here I gave him $69.05.

Q. The actual cash that passed between you and Mr. Shinn was $69.05?

A. It was a check.

Q. As security for that you got his note?

A. Yes.

Q. For how much?

A. Fifteen hundred was the amount of the note and the assignment of the mortgage, which was seventy-five hundred as I recall. You have it there.

Mr. Tomlinson: That is correct.

Q. What is the difference between $1365.00 and the fifteen hundred dollar note?

A. Here, it is explained here. Mr. Shinn was indebted to the extent of $1640.00. He had furnished $254.05 worth of coal—apparently it was coal, and curtains for the windows, leaving a balance due the rent account of $1365.95. I loaned Mr. Shinn fifteen hundred dollars less the amount due $1,385.95, leaving a balance of $114.05 due Mr. Shinn. I then deducted, at Mr. Shinn's suggestion, $45.00 for six months' interest on the $1500.00 note, payable in advance as per Mr. Shinn's suggestion. That leaves a balance of $69.05 still due Mr. Shinn, which I gave him my personal check for.

Q. This fifteen hundred dollar note, was that given at the same time that the assignment of mortgage was given?

A. I imagine it was, but I would have to see. October second, 1933. Yes.

Q. This receipt, marked in evidence as E-23, is dated November 17, 1933, isn't it?

A. Yes.

Q. Why is that?

A. That was due, as I recall, to the fact that I did not have time at the time to make it up, and Mr. Shinn said that any time I had time to do it would be all right.

Q. On October 17, 1933, you became indebted to the estate in the amount of fifteen hundred dollars instead of Mr. Shinn.

A. No, I did not become indebted. I transferred it to the rent account.

Q. On October second, 1933, when you received this note and six months interest on it from Mr. Shinn, you became indebted to the estate instead of Mr. Shinn, for the sum of fifteen hundred less the merchandise—that is correct isn't it?

A. (No answer.)

Q. If a man gives you a note for fifteen hundred dollars for his indebtedness to the estate and you tell him you were making good the indebtedness, from that minute ——

A. Unless there might have been some personal arrangement because he asked me for the money at that time.

Q. You did not give him any money, did you?

A. My point is that I may not have given it to the estate until November seventeenth, but Mr. Shinn and I may have had a personal agreement that in as much as I held this money for him I would not enter it until later.

Q. Your explanation is that Mr. Shinn gave you a note dated October second on which he was liable for interest from October second, but perhaps there was some agreement that it might not have been entered in the estate until later?

A. Because I was holding it.

Q. Last time you told me that on November 7, 1933, which is the date of E-22 and E-23 you gave seven hundred dollars into the estate—no, I am wrong, it was not until the first of December.

A. Let me look at this, yes, I have it now. November 17 was the date, and I think if you ask Mr. Shinn ——

Q. I will ask you this first—when did you first make a deposit to the estate on your obligation which you say occurred on the second of November, 1933, in the sum of $1,385.95?

A. I deposited on the seventeenth the envelope in which I kept money at that time for this amount.

Q. Where?

A. That is the date of this receipt, see? This indicates when this money was deposited, and I think my record will verify it was deposited in the bank as needed in order to pay bills, but this money was in my possession for the rent account.

Q. Where?

A. Possibly in an envelope in my safe.

Q. If you had it in an envelope all at once in your safe why did you deposit it piecemeal in this fashion —first of December, 1933, $700.00; December 14, 1933, $150.00; second of February, 1934, $300.00; 26th of April, 1934, $120.00; 14th of August, 1934, $115.95. Did you take each one of those separate allotments of money out of this envelope and put it in on these different dates?

A. I did. This money was all deposited in this envelope at one time, November seventeenth.

Q. Will you tell me why you took it out piecemeal and deposited it in that fashion?

A. I deposited it in the bank as it was needed to pay bills.

Q. Why did you keep it in an envelope? Why didn't you put it in the bank?

A. Well, I thought that would be just as well.

Q. You are the president of a bank?

A. Not of that bank of which you speak.

Q. But of a bank?

A. Yes.

Q. Do you believe it was just as sensible to keep it in the safe in your home as it would be to put it in the bank, in view of the fact that it was part of your fiduciary funds?

A. That was my judgment at the time.

Q. It was on the first of November, 1933, that you put this in the envelope and Mr. Roosevelt had made us sure that the banks were all right.

A. I am not sure. The moratorium was right after that, wasn't it?

Mr. Matthews: The moratorium was declared on the fourth of March, when Roosevelt was inaugurated.

Q. What bank did you put this money in?

A. In the People's National Bank of Lakewood.

Q. What bank are you president of?

A. The People's National Bank in Lakewood, a different institution.

Q. When did the People's National Bank in Lakewood begin business?

A. March 13, 1934.

Q. On the 26th of April, 1934, you put $120.00 out of this envelope in the bank?

A. Yes.

Q. Where did you put the three hundred dollars you put in on the second of February?

A. In a special trust fund in the old People's Bank.

Q. What do you mean by a special trust fund?

A. Special deposits made after the moratorium.

Q. After the moratorium you could deposit in banks and those deposits would be protected?

A. That was the understanding by some but others disagreed with it.

Q. You agreed with it on the second of February, 1934?

A. Yes.

Q. On the fourteenth of December, 1933, was that regulation in effect in the old People's Bank?

A. Yes.

Q. On the first of December, 1933, thirteen days before, is that where you put the seven hundred?

A. I think so.

Q. Why didn't you put, for instance, $850.00 there instead of $700.00 if it was protected?

A. I just told you the seven hundred I needed for some expenses on the rent account and that is why I deposited it.

Q. So that I thoroughly understand you—this Shinn money you took and put in an envelope, and you kept that envelope with the money in it, where? In the safe in your home?

A. Yes, or in my desk.

Q. You put it in there, you think, on the seven-

teenth of November, 1933, because that is when you say that your indebtedness to the estate occurred in return for your assuming the note and mortgage given a month and fifteen days before?

A. Not given, but dated. I think you will find that mortgage recorded in December, if I am not mistaken.

Q. October twenty-ninth is the date of the assignment.

A. There are two or three assignments. October 28, 1933, was an assignment from Elizabeth V. Shinn to Osborne W. Havens.

Q. You put the Mathis mortgage money in a deposit box, on the eleventh of August, 1932. Why didn't you put this Shinn money in a safe deposit box when you got it in November, 1933?

A. They were two different accounts. I needed seven hundred of that $1,385.95 as you will find by the bank statements from the Peoples National Bank of Lakewood, if you examine them. That was checked out about the same time that deposit was made. You will find I deposited on December first, 1933, this first seven hundred, and on the same day I issued seven hundred in two tax checks, possibly a few cents less, leaving a balance on the second day of $4.95 in the account.

Q. Will you tender the one that was put in on the fourteenth of December?

A. Yes, here, $150.00. On the thirteenth I wrote it and gave it to them on the fourteenth, I imagine.

Q. Why do you imagine the fourteenth when your check was dated the thirteenth?

A. Because I had no opportunity to make a deposit. I don't give checks out until the money is safely in the bank.

Q. What is that check for?
A. Coal.
Q. Didn't you get coal $254.05, as merchandise, in part payment of this bill?
A. That was used prior to that, I imagine.
Q. You got that coal?
A. Yes.
Q. Here are the dates it was received—10-11-33, 10-26-33, 10-27-33, 11-10-33, 11-28-33, 11-29-33.
A. Six checks.
Q. Those were checks to the C. P. LeCompte Coal Company?
A. Right.
Q. Does that mean the date of the purchase of the coal?
A. The date of delivery.
Q. When did you get the $457.00 worth of coal and merchandise from Mr. Shinn?
A. It was $254.00 worth, I think.
Q. $254.00 is right. When did you get that?
A. I don't know offhand. I have a record of that but not here. I did not think you would want that because it is apart from the estate.
Q. But you did get it at the time you had the transaction with Mr. Shinn.
A. No, this had been consumed by that time.
Q. By whom?
A. By the building.
Q. I think you said that a coal man owed Mr. Shinn some money and Mr. Shinn got some coal on account of that bill and he gave the coal and merchandise to you.
A. How could he give it to me? This was prior to the date of settlement.

Q. Didn't you tell me that the way this settlement was arranged was in this fashion, that Mr. Shinn was owed money by a coal man, that Mr. Shinn got some coal from the coal man for you and was credited by the man who owed him money?

A. Yes, I guess I did tell you that.

Q. Your transaction with Mr. Shinn, as far as the note goes is dated October 2, 1933, and according to Exhibit E-22 was dated November 17, 1933.

A. Yes.

Q. Surely you did not get the coal before October 2, 1933.

A. Why surely? I could have.

Q. How could you have?

A. Mr. Shinn does not settle with his people every day or every week. This coal was consumed prior to the date of settlement.

Q. Had the coal been delivered to you?

A. It had been placed in the building and probably consumed. I have no doubt it was, but I cannot tell you.

Q. The coal was placed in the building before you had any transaction with Mr. Shinn at all?

A. Yes, because it was arranged before we made settlement.

Q. Before October 2, 1933, the day Mr. Shinn gave you a note?

A. Yes, I would say that was correct.

Q. When did you first have any transaction with Mr. Shinn about this settlement including this coal?

A. Probably some time after he became delinquent here. It was probably spoken of by Mr. Shinn back in 1932 some time.

Q. You are looking at the book that has no indication at all that it was spoken of in 1932.

A. These figures will refresh my memory. I don't remember just the day. This is the date of the starting of Mr. Shinn's delinquency.

Q. That was when he was behind with his first month's rent?

A. Yes.

Q. Will you look at this book—November 17, 1933, credit by coal and curtains purchased from Shinn

A. That is my way of putting it, nevertheless they got the coal.

Q. (Continued) cash 185.95, total $1640.00, see page 27.

A. Nevertheless the coal was gotten by Mr. Shinn from somebody who owed him money.

A. Yes, to be applied against his indebtedness.

Q. And you now think that was gotten even prior to October first, 1933?

A. I would be inclined to think so. I don't know off hand.

Q. Suppose you turn to February second 1934 deposit.

A. Three hundred dollars. There it is.

Q. That was deposited on the second of February.

A. That is right, yes.

Q. When was that check made out?

A. Practically the same day.

Q. No, your check is dated the first of February, 1934.

A. Yes, it is, but the check was not issued until this deposit was made. That was $286.00 to the Collector of Taxes, which practically ate up that three hundred dollars.

Q. So your records show that you issued a check to the Collector of Taxes on the second of February?

A. Yes, dated the first.

Q. And your record shows on the second of February you deposited the three hundred, is that correct?

A. Yes.

Q. All of this out of the envelope?

A. Yes.

Q. Why didn't you put it in the bank and check it out?

A. The bank was under a conservator at that time.

Q. But your deposits were protected?

A. Some said they were and some said they were not.

Q. You thought it would be safer in your desk at home.

A. Yes.

Q. Did you speak to counsel about that?

A. No.

Q. Did you ever tell him you had this money collected?

A. No.

Q. So the first he knows is today?

A. No, that came up the other day.

Q. You were running the undertaking business?

A. Yes.

Q. Where would you deposit the moneys that came in?

A. People's Bank.

Q. And through February, March, April to August, 1934, would you deposit the estate's moneys in the People's Bank?

A. Yes.

Q. Did you keep any other moneys besides the Matthews money, the Hannon money, and this Shinn money in the envelopes in boxes or desks?

A. You mean concerning the estate?

Q. Yes.

A. No.

Q. Do you recall any of your own there?

A. I may have had a few dollars but not any of any account. I may not have had a chance to deposit it due to being busy with something else.

Q. I show you the inventory and appraisal, the original of which is in evidence, and turn particularly to the page containing your affidavit sworn before Mr. McCloskey, which says that you have sworn according to oath that you are the administrator of the estate in the foregoing inventory named and that the foregoing is a true and perfect inventory of all and singular the goods and chattels, rights and credits, moneys and effects of the said Beatrice E. Westhall, deceased, as far as the same have come to his possession or knowledge. I represent to you that is a true copy. Is that correct?

A. Yes.

Q. When did you swear to that?

A. October fifth, 1931.

Q. Have you your income tax return for Beatrice E. Westhall from the first of January, 1931, to the thirteenth of August, 1931?

A. Yes, I have it here somewhere.

Q. Will you turn to schedule A on the second page of that return before you; have you written off debts of $5,837.25 as of August 13, 1931?

A. Correct.

Q. Were they fifty-eight hundred dollars of the sixteen thousand we have just mentioned in your inventory?

A. I cannot be sure of that without checking it.

Q. Didn't you check it yesterday with Mr. Crummy?

A. I don't think I did. Not the individual items.

Q. Didn't Mr. Crummy show you those items with Mr. Irons present?

A. Collectively but not individually. There may be some that are not the same.

Q. Was the total shown you?

A. Yes.

Q. Was the total as shown in your income tax?

A. Yes.

Q. And that was written off as bad as of August 13, 1931?

A. Yes, for the purpose of income tax.

Q. Of course as a former revenue man you know they have to be worthless to be written off?

A. Yes, they have to be assumed to be worthless.

Q. Have you your inheritance tax return for May second, 1932?

A. I have not it here, no.

Q. I show you your inheritance tax return and ask if you will turn to the page that has accounts receivable.

A. (Witness complies.)

Q. How much was that?

A. $9,731.64.

Q. They were written off as of the date of death of the decedent, were they not?

A. Apparently not, according to this.

Q. It was the difference between nine thousand

and fourteen thousand that was written off, wasn't it? Those are accounts receivable, where is the write off. Does the write off appear?

A. I don't know.

Q. But that is what the accounts receivable show, isn't it?

A. Yes.

Q. $9,731.64?

A. Yes.

Q. Your appraisal shows a value of sixteen thousand, does it not?

A. Where is the appraisal?

Q. You looked at it a moment ago.

A. Yes, but I don't remember that.

(Paper handed witness.)

A. That is probably right, I have not checked it. It is a running total, as you say, and I have it bulked.

Q. Is that the correct figure you see there?

A. I understand that is a running total; Mr. Crummy has taken it off and I assume it is.

Q. Now those accounts receivable are carried in your appraisal as sixteen thousand and you wrote fifty-eight hundred of them off in your income tax return, did you not?

A. Yes

Q. And in your inheritance tax return what did you do?

A. Apparently listed them as $9,371.64.

Q. In your final accounting you did not charge them off as depreciation, did you? You still list them as sixteen thousand dollars.

A. Where is that.

Q. I show you this copy of the accounting.

A. This was also a running total. I will have to be governed by Mr. Crummy in that.

Q. If we represent sixteen thousand dollars as a running total then sixteen thousand dollars shows in your final accounting and you show no depreciation, is that correct?

A. There is apparently no depreciation.

Q. On page ten of your final accounting will you look at the Lakewood Trust Company stock which you carried as worth $1,650.00 in your final account?

A. Yes.

Q. Didn't you write off your Lakewood Trust Company as totally worthless in your income tax report for 1932?

A. I think I did.

Q. Why did you include it in your account as worth $1650? That is your account for this administration?

A. I was assisted by Mr. McCloskey on that, as I recall.

Q. For the sake of my brother, did you tell him you had written off your stock in your own income tax return?

A. No, I did not.

Q. Have you got the inventory of the business right there before you?

A. Yes.

Q. Did you include in that inventory the tools in the garage, the air compressor, the greasing machine, the tires and tire changing machine and the other accessories that were there?

A. Did I include it?

Q. Did the appraisers include it? You swore to it.

Mr. Tomlinson: I suppose the appraisal will speak for itself, if the Court please.

Q. You had such things, did you not, in the garage of the undertaking business?
A. I had one tire compressor or a pump.
Q. Did you have a greasing machine?
A. Not that I have ever seen.
Q. Did you have any garage tools?
A. Not of any account.
Q. What do you mean, not of any account?
A. Except what belonged in the cars. At one time there were quite a number around there, but there have not been for a long time.
Q. When did they go?
A. Part of them in Mr. Westhall's time. The last time I recall seeing them was when James, the son, was alive. He used to take care of them.
Q. They were just missing from time to time?
A. Yes.
Q. You knew what the debts were after Mrs. Westhall's death, did you not?
A. Approximately.
Q. You were the bookkeeper, weren't you?
A. Yes.
Q. You also knew that the estate had cash on hand of $25,952.40 in the Lakewood Trust Company at the time of Mrs. Westhall's death?
A. About that sum.
Q. You knew of the securities she had at that time?
A. Yes.
Q. Why didn't you distribute this twenty-five thousand as soon as you qualified, or shortly thereafter?

A. First I would have had to pay the bills.

Q. How much did they amount to?

A. You have it there.

Q. Tell us how much?

A. I have to look that up on the inheritance tax return.

Q. That is on the last page.

A. $12,184.00, I guess this should be deducted. It would be about $4,184.00. That is an approximation.

Q. Was Mrs. Elizabeth Westhall's mortgage money included in that?

A. Yes.

Q. So, exclusive of Mrs. Elizabeth Westhall's mortgage money there was less than a thousand dollars in debts in that estate?

A. About eleven hundred; a little over a thousand.

Q. If you had paid the forty-two hundred you owed it on the first of October for the business there would have been more than enough money to pay off the debts and pay the Elizabeth Westhall mortgage?

A. Yes.

Q. Why didn't you distribute that twenty-five thousand dollars that was in the Lakewood Trust Company?

A. I am not so sure I could have distributed it.

Q. Did you consult with counsel as to whether or not you should?

A. I don't recall that.

Q. Did counsel advise you that you should?

A. I don't recall having discussed it with him at that time prior to the closing of the bank.

Q. You did distribute considerable, though, didn't you?

A. Which?
Q. How much did you distribute to your good wife?
A. Under the Beatrice E. Westhall estate?
Q. Yes.
A. The car and some jewelry.
Q. And the value of that was $1,825.00?
A. That seems to be correct. And to Mrs. Virginia Hooper jewelry and property on October first.
Q. That is the day you bought the business?
A. Yes, and I also distributed to Mrs. Jane and Mrs. Elizabeth Westhall some items of jewelry.
Q. And they paid for it?
A. Yes.
Q. How much did Mrs. Jane and Mrs. Elizabeth Westhall get in that distribution?

Mr. Crummy: You will find it in the account under change of investments.

A. $41.34 to Mrs. Elizabeth and $69.58 to Mrs. Jane.
Q. And both of those ladies paid cash to you when the property was turned over to them?
A. Either cash or check.
Q. But in the case of Mrs. Havens and Mrs. Hooper they were given that property and it was charged against their distributive share?
A. That is correct, as I recall.
Q. And this was all done on October 1, 1931, when you became obligated to pay for the business?
A. As of that date.
Q. When the debts of the estate exclusive of Mrs. Elizabeth Westhall's mortgage were approximately eleven hundred dollars?

A. That is correct.

Q. Didn't your counsel ever tell you that you should distribute the money in the Lakewood Trust Company?

A. I can say I have no recollection of having discussed it with him.

Q. Didn't he ever advise you to put the children's share in a guardian's account?

A. The same answer applies to that.

Q. You knew as early as October that the Lakewood Trust Company was in a shaky financial condition.

A. I did not.

Q. Were you the only one in Lakewood who did not?

Mr. Tomlinson: Object to that.

A. I was not the only depositor, so apparently the others did not.

Q. Why did you leave that money in the Lakewood Trust Company after you heard it was shaky?

A. As I recall there were very few banks that were not shaky at that time.

Q. Why didn't you take it out and put it in a box?

A. Why didn't I?

Q. Yes.

A. As I recall, the Lakewood Trust Company were requiring ninety days' notice at that time.

Q. On what kind of account?

A. On a savings account. The others, they could not control to that time, and the majority of this was in the savings account as I recall, about twenty thousand dollars.

Q. Do you know when that went into effect in the Lakewood Trust Company?

A. I cannot say exactly. Not having been an officer I would not be in a position to know.

Q. Had you had any banking experience up to this time?

A. Years ago, but not in that particular capacity.

Q. But you know that either in October or November you would have to give ninety days' notice to the Lakewood Trust Company to draw out that money to put it in a box or in a safe, is that correct?

A. Yes.

Q. Did you go to your counsel and tell him that?

A. No.

Q. You did not tell your counsel that at all?

A. Not about the ninety days, as far as I recall.

Q. Your counsel was a director of that bank at that time, wasn't he?

A. I am not certain. He can best speak for himself on that.

Q. I show you a minute book of the Lakewood Trust Company and point to page 163, and more particularly to the minutes of the Board of Directors of an adjourned special meeting attested January 5, 1932, at 10 A. M., and to the resolution.

"Be it resolved by the Board of Directors of the Lakewood Trust Company of Lakewood, N. J., that section ten of the rules and regulations affecting the deposit and withdrawal of moneys in the savings department of this bank, heretofore promulgated and adopted be and the same is hereby changed and amended to read as follows:"

On page 165—"The bank shall not be bound to pay the whole or any portion of a deposit except on

ninety days' notice from the depositor in writing, stating the amount purposed to be drawn, but as a matter of accommodation it may repay such depositors on demand, without thereby waiving the right to require such notice. No interest will be allowed on an account after ten years from the time of the last deposit.''

You looked at the date of that adjourned meeting, January fifth, 1932. Is that correct?

A. Yes.

Q. When did the bank close?

A. January 13, 1932, as I recall, was the last day of business.

Q. But you knew all the way from October, didn't you, that you could not draw that money out of the Lakewood Trust Company except on ninety days' notice?

A. I cannot say I knew it from October.

Q. When did you first know?

A. I understand they were requiring thirty days prior to that, and at the expiration of thirty days they asked additional time.

Q. When was that?

A. I don't recall, but it was between October and January, the date of that final resolution.

Q. Did you ever go to the bank and give them thirty days' notice?

A. I don't recall that, but I do recall asking Mr. C. J. Parmentier, and I am not saying that because he is dead ——

Q. Do not protest too much. I cannot rebut that testimony of Mr. Parmentier.

A. I did speak to Mr. Parmentier about the condition of the bank, and he assured me that no one

would ever lose a nickel in the Lakewood Trust Company, and he was highly respected in town.

Q. And because he told you that no one would ever lose a nickel in the Lakewood Trust Company you did not give notice for the withdrawal of this money, is that correct?

A. I imagine that had some bearing.

Q. Did the Lakewood Trust Company as guardian of the children ever consult with you concerning putting some of this money in a guardianship account?

A. Not to my knowledge.

Q. You know that would only mean a transfer on the books and not a withdrawal of the moneys?

A. It would mean a transfer on the books and some assignment of collateral, and securities would have to be placed to cover, according to the Prerogative Court.

Q. But money would not have had to be withdrawn?

A. No.

Q. And the Lakewood Trust Company had moneys up for the amount of its trusts with the Prerogative Court at that time?

A. I would imagine so, but I do not know that.

Q. Did Mr. McCloskey ever tell you that the Lakewood Trust Company was shaky?

A. No.

Q. Did he ever discuss its condition with you?

A. Not that I recall.

Q. Did he ever advise you as administrator to speak to the Lakewood Trust Company as guardian about transferring the children's accounts to guardian's accounts?

A. I don't recall that he did.

Q. Isn't it true that you did not distribute this money because you were one of those who were trying to save the Lakewood Trust Company from going bust?

A. I would not say that. I had a lot of confidence in the Lakewood Trust Company.

Q. And because of that confidence and in spite of rumor you left the money there to try to save the bank?

A. (No answer.)

Q. Didn't you tell Mr. George Huss, in a conversation after the bank closed, that the reason you did not take the money out was because you were trying to help save the bank?

A. I don't recall saying that to Mr. Huss, but if Mr. Huss says so it is probably true.

Q. You knew under the rules of this Court and under the terms of your bond you should have filed an inventory within three months of your appointment and an account within one year?

A. I am not sure of the three months' period, but I did know the account should be filed within a year.

Q. That is in your affidavit of appointment, is it not?

A. It may be.

Q. Why didn't you file an inventory within three months of your appointment as administrator?

A. I don't think the rule to bar creditors had been filed at that time. Would not that have some bearing on it?

Q. When was it filed?

A. Counsel has a record of that.

Q. Why didn't you file an account within one year of your appointment?

A. Within one year of my appointment the Trust Company had closed and there was nothing to distribute.

Q. What have you to distribute today that you did not have a year from your appointment?

A. I have an appreciation in United Shoe Machinery stock of around nine thousand dollars.

Q. An appreciation in United Shoe Machinery stock?

A. Yes.

Q. What else?

A. I have an accumulation of dividends from United Shoe Machinery stock.

Q. Where are they?

A. They are reflected in the account.

Q. Will you point to them?

A. As they came in they are all there.

Q. You gave a thousand dollars of those dividends to Mr. McCloskey in March, right after you got them?

A. That is true.

Q. What other moneys have you to distribute now that you did not have a year from your appointment?

A. As I recall, the Matthews money. That was collected a year after.

Q. That was collected on the eleventh of August, 1932. You were appointed on ——

A. August 25, 1931.

Q. Will you please tell me why you did not account, other than what you have attempted to tell me now, namely, that you have an appreciation of United Shoe Machinery stock of some nine thousand dollars, which, of course, would have appreciated in the heirs' hands just the same as in yours.

What else have you to distribute now that you did not have a year after your appointment?

A. I will have to look. I would have to check back over these records. I would need more time.

Q. I will help you. How much cash have you today for distribution?

A. $2,723.68.

Q. You had that cash since the eleventh of August, 1932?

A. No, I have had the Matthews mortgage but not the other.

Q. When did you get the Hannon mortgage?

A. December, 1931.

Q. How much was that?

A. $565.45.

Q. What else have you?

A. Making a total of $2,723.78. That is of December, 1932.

Q. What else?

A. I have this balance in the People's National Bank, which is $1,759.59.

Q. How long have you had that?

A. You can get that better from my bank statement.

Mr. Crummy: This is a transcript I took off in your presence in the bank.

A. My answer was I could not tell you without seeing the ledger statement.

Q. Here is a transcript which contains deposits and dates. They start in 1934.

A. You ask how long I had had that?

Q. Yes.

A. This $454.00 which represents thirty per cent of the original balance at the time of the moratorium.

Q. Whatever your balance is now in the People's National Bank in Lakewood $1,759.59 comes from dividends from securities, does it not?

A. The greater portion of it, yes.

Q. So that you have nothing more to distribute three years after your appointment that you did a year after your appointment except the Hannon mortgage which is five hundred odd dollars and is nothing more than a change of capital. It is not for distribution, is it?

A. Yes, it is in liquid form now, where it was not before.

Q. So that today, three years and more since your appointment, you have no more to distribute as administrator than you did have a year after your appointment, except the five hundred odd dollars which represents a change of capital, called the Hannon transaction, and seventeen hundred some odd dollars which represents an account in the People's Bank in Lakewood, mostly coming from dividends on securities, is that correct?

A. Yes.

Q. Did you speak to Mr. McCloskey about distributing the jewelry to Mrs. Havens and Mrs. Hooper?

A. Yes.

Q. And at that time you did not speak about distributing anything else?

A. That was arranged on the night of that meeting.

Q. Was not that spoken of, as a matter of fact, at the home of Mrs. Westhall after the funeral?

A. I don't recall.

Q. Do you recall at the night of that meeting Mrs. Jane Westhall and Mrs. Elizabeth Westhall expressing a desire to have some bedroom furniture?

A. Not bedroom furniture, as I recall. I recall Mr. McCloskey saying that they might have something of the household at inventory value.

Q. And at that time didn't you say, "Mac, cannot Jessie have that?" and didn't you say that the girls had been fair, and didn't you say you would buy it all?

A. As I recall, I said I would buy it all or none, and I think I further said I was not buying it because I really needed it, I was buying it to avoid a public sale.

Q. But you did not pay for what you bought, agreeing to pay forthwith, until August of the next year, ten months later?

A. I did not understand the word "forthwith."

Q. Did you think it was fifthwith?

A. No, I did not think about it.

Q. Did you get a bill of sale for that furniture?

A. I imagine I did.

Q. You know you have not, don't you?

A. I don't really know. Mr. McCloskey probably could tell you.

Q. And you know it, too.

A. Not necessarily.

Q. Would you have had to sign it?

A. Yes, I guess I would.

Q. Do you recall signing one?

A. Not offhand.

Q. That furniture was not included in that agreement that night, Exhibit E-1, was it?

A. I would not attempt to answer that. I don't know.

Q. There was no mention made in that agreement about that furniture, is there?

A. I would rather you would ask Mr. McCloskey on that. I don't recall.

Q. What is the consideration price in that agreement?

A. You are still speaking of the furniture?

Q. No, of the agreement.

Mr. Tomlinson: I submit that the agreement speaks for itself.

Q. For the agreement or the furniture, Mr. Tomlinson prompts me.

Mr. Tomlinson: It is a written instrument and speaks for itself.

Mr. Matthews: I want to know if there is any mention of the furniture in it.

Mr. Tomlinson: Again I submit that it is a written agreement.

Q. I show you the agreement. Is there anything in there about furniture?

The Court: Is there, or isn't there? Just for my information.

Mr. Matthews: There is not, your Honor.

Q. If I represent to you, Osborne, that there is nothing in there ——

A. If you say there is not anything in there, there is not.

The Court: I will have to read it for myself.

Mr. Tomlinson: That is exactly what I have been driving at.

Q. There is no money or any consideration price in that agreement except this $3,842.00, is that right?

A. $3,842.00.

Q. What did you pay on the eleventh of August, 1932, for the business and the furniture?

A. $4,284.50, I think.

Q. And the difference between that and the consideration mentioned in this agreement is the price you paid for the furniture, isn't that correct?

A. The furniture was listed as $484.50. If that is the difference that is right.

Q. By your agreement E-1, at page 10, under letter L, you agree to account to the heirs at law semi-annually, on the first days of April and October of each year during the term of this agreement or its renewal, and to distribute such rents as may be on hand at such time in accordance with their respective interests. That is part of your agreement?

A. Yes, it seems to be.

Q. Have you ever accounted to these heirs at law within three months or at any time?

Mr. Tomlinson: Object. We come back to the same thing. In this agreement he agreed as an

individual to account to the heirs at law and not as administrator, and, therefore, we say it has no relevancy in this proceeding.

Mr. Matthews: This was part of the consideration, your Honor please.

The Court: I understand the two contentions. It all depends upon the construction of this agreement. I will let it in but you may have your exception noted if you want to.

Mr. Tomlinson: Yes, your Honor.

Q. Have you, according to that paragraph, accounted to these heirs at law for these rents, issues and profits?

A. I have not.

Q. Why not?

A. I had nothing to distribute until quite recently. I have talked with them about it.

Q. Did you ever apply to the Orphans' Court for instructions as to the investment of any of the funds you had in the safe deposit box?

A. No.

Q. You told me at a previous day's hearing that the only bank accounts you recalled having were the account in the Lakewood Trust Company, which failed, the account in the People's Bank of Lakewood, the predecessor of your own bank now, and the account in the Seacoast Bank in Asbury Park?

A. You are confusing my personal accounts with the estate.

Q. I mean any account—personal or estate, or any

kind. Did you have any bank account in your individual capacity or any other capacity, in any other bank than the Lakewood Trust Company, the People's Bank, and the account you told me you had in the Seacoast Trust Company in Asbury Park?

A. Which was a personal account.

Q. Have you, since the death of Mrs. Beatrice Westhall, had in your own name, individually, or in any capacity, or in the name of another in trust in any manner, have you had any account in any bank, in or out of the State of New Jersey, except the accounts I have mentioned in the Lakewood Trust Company, the People's Bank of Lakewood, the People's Bank in Lakewood, the Seacoast Trust Company in Asbury Park?

A. Not to my knowledge.

Q. Did you ever have an account in Red Bank?

A. Personally?

Q. In any manner, shape or form?

A. No.

Q. Did anyone for your benefit have any account?

A. The last account in Red Bank of which I knew anything was there by E. J. Westhall during his lifetime.

Q. You have had no account on behalf of the estate or his widow or yourself as trustee?

A. No. That account was closed after his death and never reopened.

Q. There is no account anywhere you have either had in any capacity or personally, and no one has had one on behalf of you except those I have mentioned?

A. How far back are you going?

Q. To the death of Mrs. Westhall.

A. As I recall, at the death of Mrs. Westhall there was no account in Red Bank, and if anyone has an account for me in trust I am not aware of it. I hope they have, but I don't think it is true.

Q. Did you ask instructions from the Court as to whether or not you should hold all the stock which came into your hands as administrator and all the securities which came into your hands as administrator in the form in which you received them or whether you should sell them?

A. I did not ask the Court.

Q. Did you ask counsel whether you should hold all of the stock and securities which came into your hands as administrator in the form in which you received them or whether you should sell them?

A. I would say that was discussed.

Q. When?

A. As I recall, the night of the agreement.

Q. Did counsel tell you to sell them or not?

A. Counsel told me to hold them. That is my best recollection on that. It is three years ago.

Q. Did you, at any time from the time the Lakewood Trust Company stock came into your hands, attempt to sell it as administrator?

A. No, I had no right to.

Q. Did you at any time attempt to sell the National Public Service stock after it came into your hands as administrator?

A. No.

Q. Just a few questions in conclusion. You told me you had no idea of buying the business until the night of the conference in Mr. McCloskey's office. Is that correct?

A. I said I had no idea of it?

Q. Yes.

A. I am not sure of my testimony.

Q. It is page 64, I will read it to you.

A. I may have been confused at the time. I am not used to being a witness on the stand.

"Q. When did you first talk about buying this business and with whom?

"A. As I recall it, it was first spoken of the night of the meeting prior to the closing of the proposition.

"Q. September 30th?

"A. If that was the date.

"Q. That meeting was the night before the contract was signed?

"A. I imagine it was. I don't know.

"Q. Who first broached the proposition, you to somebody or somebody to you?

"A. I have no recollection of that. I don't know.

"Q. After Mrs. Westhall's funeral, don't you recall a conversation in the home of the deceased Mrs. Westhall, while the family were gathered, at which conversation you said you would like to take over the business?

"A. Not unless you can refresh my memory by something else.

"Q. At that time did not the girls say to you, 'Take it over? That is an asset of the estate,' or 'That will have to go into the estate?'

"A. I have no recollection of any such conversation.

"Q. You have no recollection of having spoken to anyone about purchasing the business until the night you were in Mr. McCloskey's office with the gentlemen and ladies mentioned?

"A. Not unless you can refresh my memory with something else said."

Q. You did so testify?

A. Yes.

Q. I show you a paper and ask if you recognize the handwriting in that paper?

A. Yes.

Q. Whose is it?

A. Virginia Hooper's.

Q. And who is Virginia Hooper?

A. My wife's sister.

Q. Here is the date on the envelope; there is none on the letter, and I represent that is the envelope the letter was in.

A. Yes.

Mr. Havens: I offer this letter for identification.

The Court: Mark it.

(Letter marked for identification, Iden. K.)

The Court: Mark the envelope that goes with it.

(Envelope marked same as letter, Ident. K.)

Q. Now, to refresh your recollection, may I ask ——

Mr. Tomlinson: To whom was that letter addressed?

A. To Jane Westhall.

Mr. Matthews: I am just going to use a statement in the letter to refresh his recollection.

Q. I showed you this letter before you were on the stand today?

A. Yes.

Q. But at that conversation everything was without prejudice, so whatever I am going to ask you now carries without prejudice the discussion before.

A. Let me understand that.

Q. If there is anything I ask you that you consider privileged by reason of the conversation between Mr. McCloskey and myself I want you to refuse to answer.

A. (No answer.)

Q. Do you remember a statement from the letter I showed you a moment ago to the effect "The more I think of Osborne expecting that business as a gift the more I think he must consider Bessie and I awful dumb. I think it would be a good idea for you to keep your ears open and find out if any offers will be made for it, because I am afraid, if they are made to him, you, Bess, and I will never hear anything about it." Does that refresh your recollection?

Mr. Tomlinson: May it go in the record that that is a letter from Mrs. Hooper to Mrs. Jane Westhall?

Mr. Matthews: Yes. It is not offered as a letter, but I read it to refresh his recollection.

Q. Does that letter refresh your recollection of the fact that Mrs. Virginia Hooper and Mrs. Jane

Westhall spoke to you on the night or the afternoon or the day that Mrs. Westhall was buried about your buying the business?

A. No. I am telling you the truth, I don't recall that.

Q. That letter I read you was written in August, 1931?

A. August twentieth.

Q. And Mrs. Westhall was buried when?

A. She died on the thirteenth and was buried on the sixteenth or seventeenth.

Q. And that letter, do you remember from having seen it before, was mailed from Washington, D. C.?

A. I assume that. That is where she lived at that time.

Q. She was present at the funeral?

A. Yes.

Q. And had gone home?

A. Yes.

Q. Do not those circumstances refresh your recollection that Jane and Virginia spoke to you about your wanting to buy the business and insisting that the business should be advertised or others be given a chance to bid on it?

A. It still does not refresh my memory.

Q. Then your memory today is the same as it was the first day of the testimony, that you don't remember anything about deciding to buy this business until you went to Mr. McCloskey's office on the evening of September thirtieth?

A. Yes, I guess that is correct.

Q. Did you ever advertise the business for sale?

A. No.

Q. Looking at E-1 again, and looking at the page

that has the first whereas on it, turn now to the last paragraph on page five. It reads, does it not, "Whereas it is deemed for the best interests of the heirs and next of kin of the said Beatrice E. Westhall, deceased, that the said undertaking business should be sold by the said Osborne W. Havens as administrator to himself individually"—who determined that?

A. I would say that was the decision of counsel. I don't recall offhand.

Q. In your final account you made application for commissions in this case, did you not?

A. Not as yet. No.

Q. Doesn't your final account ask for commissions?

A. It may ask for commissions, but no amount.

Q. But it does ask for commissions?

A. I think so. It is regular.

Q. It is regular if they are allowed and if they are not allowed it is regular too, but it is also regular that you file an affidavit according to the Orphans' Court rules, subdivision 5, section 25.

A. I would imagine. I don't know, but my counsel could answer that.

Q. In other words, you relied upon counsel to do that for you?

A. That would be the natural thing to do.

Mr. Matthews: Cross-examine.

Mr. Tomlinson: In view of the hour, may we go over to the next hearing, your Honor please?

(Adjournment until November 23, 1932.)

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Volume II

Toms River, N. J., November 23, 1934.

TESTIMONY

Before Hon. Russell G. Conover, Judge.

Appearances:

For the exceptants, John A. Matthews, Esq., Andrew W. Crummy, Esq.

For the accountants, W. Durward McCloskey, Esq., De Voe Tomlinson, Esq.

Mary Elverson, Stenographer, Toms River, N. J.

Mr. Tomlinson: Mr. Matthews, have you anything further before I proceed to cross-examine him?

Mr. Matthews: I have something further. I want to have Mr. Havens produce, for evidence, the statements prepared by Mr. Crummy and Mr. Elmer Matthews on the profits of the business in the presence of Mr. Havens. Last Friday I gave it to you to look at and we wondered if it was mixed up in your papers.

Mr. Tomlinson: We would like to have a chance to go over the statement. I have not seen it as I recall.

Mr. Crummy: I attended at the office of Mr. McCloskey and prepared the statement in the presence of Mr. Elmer Matthews in the library, and Mr. Havens rechecked the figures and found them correct, but he wanted to put an additional figure in to reduce the amount of his profit. He wished to write off approximately seventy-five per cent of his profits in addition to his reducing from eleven thousand seven hundred dollars as I found it to around eighty-eight or eighty-nine hundred dollars, and that is the paper I gave Mr. Havens, but if we had the paper we could readily check against his figures.

Mr. Tomlinson: On a number of occasions Mr. Crummy has asked Mr. Havens for his various account books and on the strength of those books Mr. Crummy prepared a statement. On last Friday afternoon Mr. Crummy came to Mr. McCloskey's office for the purpose of getting additional data from Mr. Havens and he did take that data in the presence of Mr. Irons, I think. The next morning Mr. Havens came to Mr. Matthews and told Mr. Matthews he found he had not given Mr. Crummy all of the figures. Mr. Matthews advised Mr. Crummy of that and thereupon they went into the lawyer's room and Mr. Havens gave these additional figures to Mr. Crummy. We think it is only fair that before we consent to the introduction of any such statement in evidence, that Mr. McCloskey

and I have a chance to check whatever accounts we desire, since we took no part in the preparation of this statement excepting to allow Mr. Crummy to use Mr. Havens' books and furnishing him with data.

Mr. Matthews: You may have all the time, with the Court's permission, in the world to do that. I understand that I may introduce them in evidence.

The Court: Yes.

Mr. Matthews: We ask for the income tax return for 1930 and 1931 of Mrs. Beatrice E. Westhall Estate, and 1926, 1927, 1928 of E. J. Westhall, and for Osborne Havens, 1932, 1933. We have had those and gone over them with Mr. Havens, and having those saves a whole lot of accounting. We would like to have those in evidence, subject to any objection.

Mr. Tomlinson: No objection.

The Court: All right.

Mr. Matthews: We just don't want to be out of time, your Honor please.

The Court: Very well, you may introduce them.

OSBORNE HAVENS, recalled.

Cross-examination.

By Mr. Tomlinson: (Continued.)

Mr. Matthews: May I have permission to get another exhibit which I will present to you when I find it?

Mr. Tomlinson: When you find it we will interrupt Mr. Havens' testimony.

Mr. Matthews: That's fine.

Q. You live in Lakewood?
A. I do.
Q. You have lived there how long?
A. About forty years.
Q. That is approximately your lifetime?
A. Yes.
Q. I understand you married the daughter of E. J. Westhall?
A. I did.
Q. And during the lifetime of E. J. Westhall, while he conducted his undertaking business in Lakewood, you were employed by him and connected with him in the conduction of that business?
A. Yes.
Q. When did you start your connection with the E. J. Westhall funeral business? When I say the E. J. Westhall business I mean Edmund J. Westhall personally while he was alive?

A. It was either January 21, 1927, or January 24, 1927.

Q. The early part of 1927?

A. Yes, January, 1927.

Q. And he died when?

A. September eighth, 1928.

Q. As I understand it you were the executor of the estate?

A. One of them.

Q. Who was your co-executor?

A. The Lakewood Trust Company and Beatrice E. Westhall his widow.

Q. After his death you continued, as I understand it, to conduct the business for his widow, Beatrice E. Westhall, until the time of her death?

A. That is correct.

Q. And when was it that she died?

A. August thirteenth, 1931.

Q. Now, will you tell us whether or not at the time of her death the securities which formed a part of her estate were substantially the same as those which had formed a part of the E. J. Westhall Estate?

A. They were.

Q. In other words, what I am getting at is this, whether or not any of the securities that E. J. Westhall left were sold or converted during the interval between the time of his death and the time of Beatrice E. Westhall's death?

A. As I remember they were practically the same.

Q. In what bank or banks had E. J. Westhall kept his accounts?

A. The Lakewood Trust Company, The People's National Bank, both in Lakewood, and an inactive

account in a bank in Red Bank, I think it was the Broad Street National Bank, I am not sure of the name.

Q. Was there any one bank in which he kept the major portion of it?

A. The Lakewood Trust Company.

Q. And in what bank or financial institution did Beatrice E. Westhall keep her account?

A. The Lakewood Trust Company.

Q. And that was the bank in which you kept your individual and personal accounts up to the day of the bank's closing?

A. As a matter of fact, I deposited to my personal account the day the bank closed.

Q. What day was that?

A. The thirteenth of January, 1932, about twenty minutes before they closed, as I remember.

Q. Of course, after Beatrice E. Westhall died you continued to run the business?

A. I did.

Q. Do you remember a meeting which was held in Mr. McCloskey's office in the latter part of September, 1931?

A. I do.

Q. And do you remember who was present at that conference?

A. Shall I name them?

Q. Yes, sir, please.

A. Mr. Charles McCue, Mr. Amory Parmentier, Mrs. Jane Westhall, Mrs. Elizabeth Westhall, Mrs. Virginia Hooper, Mr. Charles Parmentier, Mr. Arthur Smock, Mrs. Jessie Havens, Mr. McCloskey, Miss Beatrice Pendle, and myself. I think that covers it.

Q. And what is your best recollection as to the date on which that conference was held?

A. Probably September twenty-seventh or twenty-ninth, it was the latter part of September, I do not recall the exact date.

Q. Do you recall what time that conference began?

A. As I recall, around 8 o'clock in the evening.

Q. And approximately what time was it concluded?

A. About twelve-thirty A. M.

Q. What, if anything, was said at that conference with reference to the question of whether or not the securities left by E. J. Westhall and which had passed on to Beatrice E. Westhall and which had passed from her at the time of her death, as to whether or not those securities should be sold or whether or not they should be maintained in specie, that is, whether the securities were to be kept?

A. They were to be held for later distribution because of the poor market at the time. Especially the United Shoe Machinery had a very low market at the time.

Q. What was said about keeping the rest of these securities?

A. They were all to be held and distributed at a later date.

Q. Does that include the stock in the Lakewood Trust Company?

A. Everything.

Q. That was in the latter part of September, 1931?

A. That was in the latter part of September, 1931.

Q. And you say that the Lakewood Trust Company closed ——

A. January thirteenth, 1932.

Q. At the time of this conference, will you tell us whether or not there was produced the inventory which had been made?

A. Yes, it was.

Q. And was that inventory passed around among the various participants in this conference?

A. It was.

Q. Will you tell us whether or not at any time during this conference any of the persons who were attending the conference made any criticism of that inventory or any part thereof?

A. No criticism was offered that I recall.

Q. As the result of that conference an agreement was prepared, was it not?

A. It was.

Q. And do you know when it was that that agreement was signed?

A. Shortly after that. I think it was the next day.

Q. It was signed by whom the next day?

A. I think first by the Lakewood Trust Company.

Q. And then it had to be sent to Washington for Mrs. Hooper's signature, did it not?

A. It did.

Q. Do you know whether or not it was sent to Washington for Mrs. Hooper's signature?

A. Offhand I don't remember, but my best recollection is that it was sent to Washington for Mrs. Hooper's signature.

Q. Did you take care of having that agreement executed?

A. No, Mr. McCloskey took care of that.

Q. Now, the receipts that you took in from this business between the date of Mrs. Beatrice E. Westhall's death and the first of October, 1931, you did what with?

A. I kept them in the safe there until the selling of the business.

Q. And that was a sum aggregating somewhere around seven hundred dollars as you described the other day?

A. Yes.

Q. From and after the first of October, 1931, as I understand it, the receipts you handled individually?

A. Yes.

Q. Approximately how many funerals a year did you handle? When I say you, I mean Edmund J. Westhall, the business, between the date of his death and Mrs. Westhall's death and after you took it?

A. I would say around one hundred a year. I don't know exactly.

Q. In estimating or computing your bills for these funerals, can you tell us approximately the profit that you allowed yourself in allowing for the overhead ——

Mr. Matthews: Your Honor, I object. The books are the best evidence. We have them in evidence and they are in evidence on direct examination. We have a paradigm of profit. We have at least twelve or thirteen in which the cost to O. W. H. is indicated. I object as incompetent.

Mr. Tomlinson: We think, your Honor please, that it is highly competent. This is a somewhat unusual business, and he has got to allow himself a certain overhead to get along. He did not have a funeral every day or every few days. He gave to Mr. Matthews on the other days the specific items

of expenditure, and in figuring this overhead he has got to allow for a certain margin of profit, and I am asking him what that is.

Mr. Matthews: I must contradict the witness's testimony in that he testified previously that he did have a funeral every two or three days. But we have in evidence his own income tax and his books of account which show everything, and for him to put on the record this testimony when the books speak for themselves is incompetent evidence. I object on that ground.

The Court: I will allow it, and we will see what he has.

Mr. Matthews: Your Honor will allow me an exception?

The Court: Exception.

Q. Mr. Havens, in computing your bills for these funerals can you tell us approximately the profits you allowed yourself and the various items which made up your expenses? In other words, how much profit did you allow yourself or how much of a margin of profit did you allow in figuring the expenses of these funerals?

Mr. Matthews: I renew my objection.

The Court: Same ruling.

Mr. Matthews: And I may have an exception?

The Court: And you may have an exception.

A. About 30%.

Q. You told Mr. Matthews the other day that you had an apprentice license?

A. I did.

Q. And you have with you and always have had with you Mr. Brown?

A. I have.

Q. Who is a licensed embalmer and undertaker?

A. He is.

Q. I think you also told Mr. Matthews that you had been conducting this business under Brown's license, is that correct?

A. Correct.

Q. And that is the fact?

A. It is.

Q. And who has been bearing the financial burden of this business, who has been actually putting up the money and financing it?

A. I have.

Mr. Matthews: I wanted to rise in time but the witness answered too quickly. That is entirely objectionable, but the record already indicates that there was no need to put up any money. In fact, there was no money put up until the profits furnished him the money to buy the business and I take it this is totally irrelevant.

The Court: No, Mr. Matthews, I interpret this as a more general statement which must be interpreted in the light of more specific figures as they appear.

Mr. Matthews: From that standpoint, I withdraw my objection.

Q. You have been actually running the business so far as paying the bills and that sort of work is concerned?

A. I have.

Q. Mr. Matthews has interrogated you at length with regard to two safe deposit boxes, in what bank did you maintain these boxes?

A. The People's National Bank.

Q. And you have spoken about keeping in those boxes two specific items, will you describe again, if you please, what those two specific amounts represent?

A. One represented the collection of a mortgage or the principal and interest due of the George Matthews mortgage, the so-called Matthews' money, and the other was the Elizabeth Hannon money, which was paid by me to the estate for a funeral bill owing the estate.

Q. You told Mr. Matthews that you had kept those moneys in two separate envelopes?

A. Yes.

Q. In one of those boxes?

A. Yes.

Q. Which box?

A. I would say 105 was the box.

Q. Have you brought with you this morning the two envelopes containing these moneys?

A. I have.

Q. And at a previous time have you exhibited those envelopes to Mr. Crummy?

A. I have.

Mr. Matthews: Yes, we saw them and took all the numbers off the bills.

Q. Will you produce those envelopes, if you please?

A. (Envelopes produced.) There is one and there is the other.

Mr. Tomlinson: I do not know that this is a proper time, on cross-examination, to offer these.

Mr. Matthews: There is no objection at all.

The Court: They may be marked.

(Envelopes marked in evidence Exhibit A-1, and Exhibit A-2.)

The Court: Suppose we mark them and put on the record a description of the envelope and whatever marking appears on it.

Mr. Matthews: I would suggest that you put on the bill numbers, we are identifying them later from Washington.

Mr. Tomlinson: Could we have a few minutes' recess and have Mr. Crummy and Mr. Elmer Matthews check these over?

The Court: Yes.

Mr. Tomlinson: May we have on the record that this envelope was sealed and that the seal was broken by permission of your Honor?

The Court: Yes. I will dictate the description of the envelope.

This envelope measures about three inches wide by five and a half inches long and bears on the face of it the legend, "Property of the estate of B. E. Westhall, O. W. Havens, admr.," and then "Hannon, $565.45," underlined. In the upper left-hand corner of the front of the envelope there appears the following printing: "The Jeunesse Company, makers of fine toilet articles, Lakewood, New Jersey." That is Exhibit A-1.

The second envelope, Exhibit A-2 is an envelope of approximately three by five inches, in the upper left-hand corner of the front or face appears: "O. W. Havens, 225 — 2nd Street, Lakewood, New Jersey," in ink, then in pencil, diagonally across the face of the envelope, "George" and underneath the word "George" the word "Matthews," and underneath the word "Matthews" "mtge.," underneath that are the figures, "$2158.33" underscored. Alongside of those figures are the words, "property of estate of B. E. Westhall, O. W. Havens, admr." In the lower right-hand quarter of the face of the envelope appears "Mr. Wm. E. Fuchs, Cross Street, Lakewood, N. J.," and also the letters "R. D." This envelope is open, and it contains some bills which bear the following numbers and also some change wrapped in a small piece of yellow paper.

Let Mr. Crummy and Mr. Matthews list those on the record. They may also open the envelope Exhibit A-1.

GEORGE MATTHEWS MORTGAGE BILLS

Denominations	Serial Number	Denominations	Serial Number
20	B09024612A	20	B07890676A
20	C04052518A	20	C04113355A
20	A000205A	20	B09043065A
20	C05089397A	20	D000815A
20	B12592408A	20	C03628945A
20	C05365438A	20	B04734116A
50	B01112768A	100	C00162915A
100	C00250813A	100	C00227658A
100	C00365683A	100	C00218666A
100	C00345811A	100	C00364834A
100	C00425109A	100	C00140573A
100	C00307186A	100	C00068676A
100	C00440670A	100	C00334279A
100	C00519978A	100	B00530074A
1	E13853480B	1	F06102020B
1	E17319401B	5	C32580232A
10	B06765949A	10	B33962171A
10	D009895A	10	E006280A
10	B23589221A	10	B22639216A
10	B28811433A	10	B24359725A
10	B011809A	10	C126923A
20	C05548057A	20	A05131272A
20	B06383132A	20	C05398131A
20	B02887689A	20	B07337273A
20	C03503524A	20	C04760701A
20	C05051047A	20	B02755598A
20	B07139868A	20	B001055A
20	B04122381A		

ELIZABETH HANNON MORTGAGE BILLS

Denominations	Serial Number	Denominations	Serial Number
5	D2258373A	5	C31777416A
5	B06463078A	5	C33724569A
5	C63368571A	5	C53347456A
5	A212711	5	B00369305A
5	C70473913A	10	A019490
10	C21149031A	100	B00546917A
100	C00308601A	100	C00496830A
100	C00439970A	100	B02042900A

SUMMATION, George Matthews.

Denomination	Amount
15—100's	$1500
1— 50	50
25— 20's	500
10— 10's	100
1— 5	5
3— 1's	3
	$2158

By Mr. Tomlinson:

Q. Mr. Havens, subsequently to the agreement, Exhibit E-1, bearing date of October first, 1931, did you secure a bill of sale for the articles and property comprising the things that were in the business of E. J. Westhall and Beatrice Westhall?

A. I did.

Q. And that was a bill of sale by yourself as administrator of the Estate of Beatrice E. Westhall to yourself individually, was it not?

A. Yes.

Mr. Tomlinson: Have you any objection to my offering this or shall we wait until we put on our case?

Mr. Matthews: That would not be my objection. The witness has said he did not get a bill of sale. As I look at that casually, it looked as though he got it very recently. I would rather have you examine him and show when he did get it. I would suggest that you have the instrument marked for identification and ask if that is the bill of sale procured.

A. It is.

Mr. Matthews: Ask him when he procured it.

Q. All right, when did you procure it?

A. July first, 1932.

Mr. Tomlinson: If the Court please, I offer this instrument in evidence, a bill of sale, bearing date, blank day of July, 1932, acknowledged on July 12. 1932, before Beatrice G. Pendle, notary public of New Jersey.

Mr. Matthews: I will withdraw any objection, with the understanding that while I called this wit-

ness I shall have the right to cross-examine as if he were not my witness on that exhibit.

Mr. Tomlinson: Certainly.

The Court: The bill of sale may be marked in evidence.

(Bill of sale marked in evidence, Exhibit A-3.)

Q. Now, Mr. Havens, did you also procure a bill of sale from yourself as administrator of the Estate of Beatrice E. Westhall to yourself individually of the furniture of the estate or which comprised a portion of the Estate of Beatrice E. Westhall?

A. Yes.

Q. I show you an instrument which I will ask to have marked for identification A-4, and ask you if that is the bill of sale for the furniture?

A. It is.

Q. And approximately when was it that you secured that bill of sale?

A. About July first.

By the Court:

Q. Of what year?

A. 1932, the same time as the other.

Mr. Tomlinson: If the Court please, we offer in evidence bill of sale from Osborne W. Havens, administrator of the estate of Beatrice E. Westhall, deceased, to Osborne W. Havens, individually, of certain furniture and articles mentioned therein,

said bill of sale being dated the blank day of July, 1932, and bearing an acknowledgment before Beatrice G. Pendle, notary public of New Jersey, dated July 12, 1932.

Mr. Matthews: No objection to that offer.

The Court: That may be marked in evidence.

(Bill of sale marked in evidence Ex. A-4.)

Q. Now Mr. Havens, at one of the prior hearings Mr. Matthews asked you whether or not the so-called Hannon mortgage had ever been recorded. That was a mortgage, was it not from John Hannon and Elizabeth Hannon, his wife, and Will Hannon to yourself?

A. Correct.

Q. I show you two instruments which I will ask to have marked together, they being a bond and mortgage, for identification A-5, and ask you whether or not these are the bond and mortgage which have been termed as the Hannon mortgage?

A. They are.

Mr. Tomlinson: I offer in evidence, if the Court please, a bond bearing date November twenty-six, 1932, between John Hannon, and Elizabeth Hannon, his wife, and Will Hannon, unmarried, and Osborne W. Havens, said instrument being a mortgage, and also another instrument marked A-5 for identification, being a bond executed by John Hannon and Elizabeth Hannon, his wife, and Will Hannon, unmarried, to Osborne W. Havens. These instruments bear date November 26, 1932.

Mr. Matthews: No objection.

The Court: They may be marked.

(Bond and mortgage marked in evidence together as Exhibit A-5.)

Mr. Tomlinson: In this connection, if the Court please, I desire to invite your Honor's attention to the Clerk's endorsement on the mortgage, showing that it was recorded in the Ocean County Clerk's office on December 14, 1932, at 11.24 A. M., in Book 261 of Mortgages, page 38.

The Court: Is that mortgage cancelled or still open?

Mr. Matthews: No, it is open.

The Court: What is the principal sum mentioned in that mortgage?

(Papers shown to Court by Mr. Matthews.)

The Court: Suppose we put on the record that the mortgage is for the sum of $662.00, payable in one year, with interest at 6% to be paid semi-annually, with the privilege given to the party of the first part, that is to say John Hannon et als to renew the mortgage for a further period of one year.

Q. Now Mr. Havens, Mr. Matthews also inquired of you with reference to the so-called Shinn assignment, will you be good enough to explain that transaction again to us, please?

A. Mr. Shinn was indebted to the rent account in the amount, I think, $1640.00. He did not have the money to pay his rent. He told me some time before that that he could get some coal from someone who was indebted to him, thereby collecting his bill from them. I told him I would allow him that the same as having paid cash, and that and repairing the shades in the apartment amounted to $254.00 or something like that. I do not have the exact figures in front of me now. The balance I credited him in cash, and gave the estate credit for it or the rent account. I think it was $1500.00 that was needed, and I loaned him that and that difference I deposited in an envelope in my safe or desk, and deposited from time to time to pay for coal or rent, and I took an assignment of mortgage for the $1500.00 I had loaned him.

Q. And in connection with that assignment did you enter into a written agreement with him?

A. Yes.

Q. I show you a paper entitled memorandum of agreement, which I will ask to have marked for identification A-6 ——

A. I would like to add if it is permissible that had I not loaned the money to Mr. Shinn at that time he would not have been able to pay his rent because he tried to borrow elsewhere and could not.

Q. You say this is the agreement?

A. Yes.

Mr. Tomlinson: I will offer it in evidence. I offer in evidence, if the Court please, instrument entitled memorandum of agreement dated October 2, 1933, purporting to have been executed by Frank S. Shinn, Elizabeth B. Shinn and Osborne W. Havens.

Mr. Matthews: I have no objection to that, we have already a copy in evidence.

The Court: It may be marked.

(Paper marked in evidence Ex. A-6.)

Q. Now, Mr. Havens, I show you an instrument entitled assignment of mortgage, Elizabeth B. Shinn to Osborne W. Havens, which I will ask to have marked for identification A-7, and ask you if that is the assignment of mortgage which you secured from Mr. Shinn?

A. Yes.

Q. I show you an instrument entitled mortgage Pauline S. Corrigan and John G. Corrigan her husband, to Frank S. Shinn and Elizabeth B. Shinn, his wife, marked for identification A-8, and ask you if that is the mortgage which was assigned?

A. Yes.

Q. I show you an instrument entitled bond and warrant from Pauline S. Corrigan and John G. Corrigan, her husband, to Frank S. Shinn and Elizabeth B. Shinn, his wife, which I will ask to have marked for identification A-9, and ask if that is the bond and warrant which accompanied said mortgage?

A. It is.

Q. I show you an instrument marked "assignment of mortgage, Frank S. Shinn and Elizabeth B. Shinn," and ask if that is the assignment of mortgage which you secured along with the other papers?

A. Yes.

Mr. Tomlinson: I'll ask to have this marked for identification 10. I offer in evidence, if the Court

please, bond and warrant marked for identification A-9 from Pauline S. Corrigan and John G. Corrigan, her husband, to Frank S. Shinn and Elizabeth B. Shinn in the amount of $1500.00, dated August ninth, 1933, and mortgage accompanying said bond, being exhibit for identification A-8, and mortgage from Pauline S. Corrigan and John G. Corrigan, her husband, to Frank S. Shinn and Elizabeth B. Shinn in the amount of $1500.00 bearing date August ninth, 1933, and also assignment from Frank S. Shinn to Elizabeth B. Shinn, Exhibit for identification A-10, bearing date of October 2nd, 1933, and also exhibit for identification A-7, being assignment of mortgage from Elizabeth B. Shinn to Osborne W. Havens, dated October 24th, 1933, and acknowledged October 27th, 1933.

Mr. Matthews: We would like to join you in offering those.

The Court: They may be marked. Will you in addition to the information put on the record put on the book and page of the recording of the mortgage and of the assignment if it appears to have been recorded.

Mr. Tomlinson: The mortgage is recorded in Book 265 of Mortgages, page 334, on September twenty-ninth, 1933, at 2.22 P. M. The assignment of mortgage from Frank S. Shinn to Elizabeth B. Shinn was recorded on October 3rd, 1933, at 10.24 A. M. in Book 29 of Assignments of Mortgages, page 111. The assignment of mortgage from Elizabeth B. Shinn to Osborne W. Havens was recorded on Oc-

tober 28, 1933, at 9.07 A. M., in Book 29 of Assignments of Mortgages, page 131.

Mr. Matthews: No objection.

The Court: They may be marked in evidence.

(Mortgages and assignments marked in evidence Ex. A-7, Ex. A-8, Ex. A-9, Ex. A-10.)

Q. Mr. Havens, you recall, do you not, that last Friday Mr. Matthews showed you a paper which he represented was a true copy of a paper on file with the Board of Embalmers and Funeral Directors and purporting to be a permit issued to Beatrice E. Westhall to continue the business of embalming and funeral directing or both, of the late Edmund Westhall?

A. Yes.

Q. Do you remember he showed you that certificate?

A. I do.

Q. And is this a copy of the paper that he showed you so far as recollection serves you?

A. Yes.

Q. And do you remember his asking you whether a copy of this certificate or permit or paper was not hung up in your offices or your place of business in Lakewood?

A. I remember him asking that question, yes.

Q. Prior to last Friday, had you ever seen such a certificate, or permit, or paper?

A. I never had.

Q. And so long as you have been associated with

the undertaking business in the premises wherein you now carry on business, have you at any time ever seen this certificate or a copy thereof?

A. No.

Q. Issued to Beatrice Westhall?

A. No.

Q. Now if my recollection is correct, Mr. Matthews at some stage of these proceedings has asked you why you used the name of Westhall in connection with your present business, calling your attention specifically to the fact that at some time in the past year or so you have put up a sign with the name Westhall on it. Do you remember his questions along that line?

A. Yes, I think I do.

Q. Is it a fact that within the past year or two you have put up a glass sign with the name Westhall?

A. Yes.

Q. Why is it that you have used the name Westhall?

Mr. Matthews: He said the old gentleman asked him to.

Mr. Tomlinson: I can ask him again, can't I?

Mr. Matthews: It is already in evidence.

A. Because Mr. Westhall during his lifetime asked me specifically to keep his name before the public which I promised him to do.

Q. You have referred in your direct testimony to paying off some mortgage of Elizabeth Westhall.

My memory is not as sharp perhaps as Mr. Matthews, and I ask you to tell us about that again?

A. That was an obligation incurred by Mr. Westhall during his lifetime which Mrs. Westhall inherited in view of the terms of an agreement and which I paid off after Mrs. Westhall's death, a mortgage on Mrs. Elizabeth Westhall's home held by the Lakewood Building and Loan Association, and which I paid off after Mrs. Westhall's death.

Q. Now some mention was made by you in your direct testimony of an amount of $390.00 that you received from Robert Rice, do you remember that item?

A. I do.

Q. Have you any books here to show what you did with that money?

A. Yes.

Q. What is this book you refer to?

A. This is a check book of the Lakewood Trust Company.

Q. Your check book?

A. No, the estate's check book.

Q. Has this been marked in evidence as yet?

A. No, I don't think so. This is $390.00, and is part of a deposit made October 13th, 1931.

Q. In what bank?

A. The Lakewood Trust Company.

Q. Was that deposit of $390.00 made in one item or more than one?

A. The $390.00 interest on the mortgage, 313 and 77 of that was credited to Cleveland Woodson's funeral bill, which Robert Rice had guaranteed, making a total of $390.00.

Mr. Tomlinson: May I have this marked for identification?

(Check book marked for identification Ident. A-11.)

Q. This is the three hundred and ninety dollars you say you collected from Robert Rice?
A. Yes.
Q. And I invite your attention to another item, $100 cash as you have marked it, with the following words "Robert Rice, interest on mortgage" and ask you what that was?
A. I have to look at my other book.
Q. Will you look at your other book?
A. Yes, that was a part of that same deposit.

By Mr. Matthews:

Q. You are looking at exhibit what?
A. Exhibit E-7.
Q. And looking at what page?
A. Page 23.
Q. And at the item entitled what?
A. Robert Rice, interest on mortgage.

By Mr. Tomlinson:

Q. What date does that show in your book Ex. E-7?
A. That deposit was made October 13th, 1931.

By Mr. Matthews:

Q. What is the date in front of it?
A. The date of receipt by me, October 3rd.

By Mr. Tomlinson:

Q. In other words, am I correct in my understanding that the date in front of the entry is the date of its receipt by you and the date after the entry is the date of its deposit by you?

A. That is correct.

Q. Referring to your check book which has been marked for identification A-11, what date does that show the one hundred dollar item as having been deposited?

A. October 13th, 1931, the same as this book.

Q. You have an item here in your check book of $390.00 made up of $313 in one item and $77 in another item. That is Robert Rice interest on mortgage $313.00 and Robert Rice account of Cleveland Woodson's funeral $77.00, and below that you have another entry, Robert Rice interest on mortgage $100 cash. I want to know whether in this Robert Rice account you deposited $390.00 all together or $490.00 all together.

A. $490.00.

By Mr. Matthews:

Q. Which book shows it?

A. This one.

Mr. Tomlinson: This check book, identification A-11.

Mr. Matthews: I will offer it now if you want and accept it as my exhibit.

Mr. Tomlinson: No objection.

Mr. Matthews: I offer that check book in evidence.

The Court: It may be marked in evidence.

(Check book marked in evidence Exhibit E-24.)

By Mr. Tomlinson:

Q. So under date of October 13th, you deposited in connection with Robert Rice a total of $490.00?
A. Correct.

By Mr. Matthews:

Q. And that is shown by Exhibit E-24?
A. By a check book bearing exhibit number E-24.

By Mr. Tomlinson:

Q. Now Mr. Havens, since the death of E. J. Westhall, in whose name have death certificates been signed in connection with the business?
A. H. E. Brown.
Q. Mr. Brown is still employed there, is he not?
A. Yes.

Mr. Tomlinson: I think that is all.

Mr. Matthews: May I have the envelope that the money was in?

(Witness produces two envelopes.)

Re-direct examination.

By Mr. Matthews:

Q. Will you take the money out Osborne?

A. (Witness complies.)

Q. Who is Mrs. William A. Fuchs? I am looking at Exhibit A-2?

A. As I recall she is the lady who lives at Mount's Crossing.

Q. I notice on Exhibit A-2 her name and her address and R. D. are written on the envelope?

A. Yes.

Q. Why is that written on that envelope in which you put $2,153.83?

A. As I recall that is an envelope I addressed to her and decided not to use because I saw her personally and I decided rather than waste the envelope I would use it for that purpose.

Q. In other words because you did not send this stamped envelope containing a bill or some other communication whatever it may have been to Mrs. Fuchs you decided instead of wasting it you would use it to hold $2,153.83 of the estate's money, instead of putting that money in the bank.

A. Yes, I thought I would use that rather than waste it.

Q. Was Mrs. William E. Fuchs a patron of your business?

A. I had some business with her.

Q. Had you written a letter to her?

A. I don't recall what I had written to her.

Q. Had you written to her?

A. I apparently did. I addressed an envelope to her.

Q. I notice on Exhibit A-2 there is no date, is there?

A. No, I don't see any.

Q. Look closely.

A. No, sir.

Q. May I have an answer yes or no whether there is a date there?

A. There is no date there.

Q. On the upper left-hand corner of the envelope Exhibit A-2 is written O. W. Havens, 225 Second Street, Lakewood, N. J.?

A. That is correct.

Q. That is the address of your business?

A. Yes, and it is also my home.

Q. Was the writing "George Matthews mortgage, $2158.33" in lead pencil on that envelope written the same day that the words "property of estate of B. E. Westhall, O. W. Havens, admr." was written?

A. I don't remember that. That is asking too much, I don't remember that.

Q. When did you put that money in the envelope?

A. When was it?

Q. Was it the date you got it?

A. Yes.

Q. I show you our Exhibit E-3 and calling your attention to the fact that that exhibit shows at the top the date 8-11-32, and the date at the lower left-hand corner April 18th, 1928, as indicating what, the mortgage date?

A. Yes, that is the date of the mortgage.

Q. Is the upper date 8-11-32, the date you received the $2160.00?

A. I would say it was.

Q. And it was on that date, the eleventh of Au-

gust, 1932, that you put money in this envelope, is that correct?

A. I would think it were.

Q. Surely you can recollect that, can't you?

A. No, I cannot.

Q. What is your best recollection?

A. That it was the same day.

Q. Is it your recollection that after you put it in that envelope you took it to the bank that day and put it in the strong box?

A. Unless it was after banking hours and then I would put it there the next day.

Q. You can be certain, can you, that the money you deposited, $2160.00, in the envelope marked A-2, you either received and deposited on the eleventh or twelfth of August, 1932, in the envelope in the safe deposit box?

A. Yes, I received the deposit about that time.

Q. You received $2160.00 but on this envelope you have written $2158.33?

A. Yes.

Q. Why did you put $2158.33 on the envelope if you deposited the money you got, $2160.00?

A. You will notice that this receipt reads "to be used to cancel George Matthews mortgage" it does not read in payment of it.

Q. That is your explanation?

A. I did not have the mortgage there at the time, as I recall it had been cancelled and I returned the cancelled mortgage and the change to Mrs. Kingsley later.

Q. But you did receive $2160.00 from Mrs. Kingsley?

A. Yes.

Q. And you did deposit that money in the envelope, Exhibit A-2, on the day you received it or the day after?

A. Yes.

Q. Why did you put on the envelope $2158.33, though you deposited in the envelope $2160.00?

A. Because I knew there was a $1.67 belonging to me there.

Q. Can you tell me why you put on the envelope $2158.33 when there was $2160.00 in it?

A. I have just told you.

Q. Why didn't you take the change out then before you put it in the envelope at home?

A. I could see no advantage in taking out the change then.

Q. But you did see an advantage when I filed these exceptions to go to the bank and see if the money was there.

A. I went to count it and make sure it was there.

Q. And on that day you took the change, reimbursed yourself for the difference between $2160 and $2158?

A. Yes, I took one or two bills.

The Court: We will adjourn at this point for one hour.

Mr. Matthews: May I have physical possession of these two envelopes during the noon hour?

The Court: You may.

(Recess to 2.05 P. M.)

OSBORNE HAVENS, recalled.

Re-direct examination.

By Mr. Matthews (continued):

Q. You told us before recess you gave the lady change when she gave you the money, didn't you?

A. If I said that, I meant to say I gave her the change when I gave her back her cancelled mortgage.

Q. When was that?

A. I don't recall.

Q. How long after?

A. As soon as I could conveniently get it cancelled.

Q. Was it the same day?

A. I couldn't tell you.

Q. Was it the same week?

A. I don't recall. She had this receipt and I gave her the mortgage as soon as I could.

Q. You have that money in your pocket?

A. Yes.

Q. What is the smallest denomination you have in the Matthews's money?

A. One dollar.

Q. How many are there?

A. I don't know, Mr. Crummy has them listed there.

Q. These bills on the list, that are in exhibit in this case are the original bills you received from Mrs. Kingsley, is that correct?

A. Not the small amounts.

Q. What are the bills on that list that are not the bills of the Kingsley mortgage?

A. I probably changed two tens or something like that, but I made no note of that.

Q. How did the eight come, the five dollars and the three dollars?

A. Because of the fact that the amount was $2158.00 thereby necessitating the eight there, I would say.

Q. You changed a ten dollar bill and you could have given her $1.53, couldn't you?

A. Are you talking about the envelope?

Q. I am talking about the bills in the envelope, I asked why you had to change two bills to give the woman $1.53 change.

A. I think I said before that I changed one or two bills but I was not clear.

Q. So all the other bills of the denominations of ten dollars and over on this list in evidence are the same bills that were put in the envelope by you, that is the envelope marked Exhibit A-2. They are the identical bills with the exception of one or two which you received from Mrs. Kingsley as evidenced by the receipt, Exhibit E-3.

A. They are the exact bills as handed me by Mrs. Elwood Kingsley.

Q. Where we have a five-dollar bill and three ones, that is change from the bill or bills that you changed to give yourself the balance due?

A. That's right, the balance due me.

Q. Will you tell me again, why didn't you give the woman change for ten dollars when you got this receipt from her?

A. As I remember I did not figure out at that time just how much money was due, that is the exact amount. She would not pay for the full period when

she paid the money on a certain day. Interest would accrue to the date of payment.

Q. And to be on the safe side you took $2160.00 and gave her a receipt for $2160.00.

A. Not to be on the safe side, she offered me that amount to give her change when I figured it out.

Q. And you figured it out some time after out of your own pocket?

A. Yes.

Q. And when these exceptions were filed and you went to the box to look at the money and count it and verify its presence in the bank and the exact amount, you took out of the envelope the amount of change which you had given to Mrs. Kingsley?

A. Yes, I took out the one dollar and sixty-seven cents which had been advanced by me to her. You will see that by the envelope, that it has been there a long time.

Q. This Mrs. William Fuchs is a lady whose husband died and whom you buried.

A. I remember there was some death in the family, but who it was I don't remember offhand.

Q. Do you remember when her husband died?

A. Yes.

Q. Do you remember having the funeral?

A. I do remember having the funeral.

Q. This envelope, Exhibit A-2, was the envelope that was addressed and is addressed to this Mrs. Fuchs whose husband you buried, isn't that correct?

A. If it was her husband. It is an envelope addressed to her.

Q. But you know it was her husband?

A. I do not, offhand.

Q. You don't know Mrs. William E. Fuchs?

A. Not that well to remember whether it was her husband or not.

Q. Do you remember when you last spoke to Mrs. William E. Fuchs?

A. No.

Q. Have you any recollection of having spoken to her since you have been in court in this case?

A. I do not offhand.

Q. Why did you write "George Matthews mortgage, $2158.33" and the other writing, "property of estate of B. E. Westhall, O. W. Havens, administrator," in lead pencil rather than in ink?

A. Because that was most accessible at the time.

Q. I call your attention to the fact that as administrator of this estate you wrote that legend on the envelope, Mrs. William E. Fuchs, Cross Street, Lakewood, New Jersey, and you deposited it in a box you had in your own name and not in the name of the estate.

A. Yes.

Q. In the event of your death, didn't you consider there might be a contest as to whom that money belonged to?

Mr. Tomlinson: Object to that.

Mr. Matthews: I will withdraw it.

Q. I show you the second envelope you have introduced in evidence here today, Exhibit A-1. That envelope is an envelope on the stationery of the Jeunesse Company, makers of fine toilet articles. Is that company in business today?

A. I think not.

Q. When did they go out of existence, if you know?

A. I don't know.

Q. Did you deal with that company?

A. No.

Q. Where did you get the envelope?

A. It was in some merchandise that I bought from the estate of a former Miss Poydene back in 1921.

Q. Were you administrator of that estate?

A. I was not.

Q. And you got this envelope Exhibit A-1 among some merchandise you got from the estate of Miss Poydene?

A. Poydene was her maiden name, her married name I don't remember. I am not sure I got it from an estate, it may have been an individual.

Q. Where did you have these envelopes?

A. I had some at my home and some at my mother's home. I still have several of them.

Q. And your recollection is that you got the envelopes there at your own home or your mother's?

A. Originally, yes. I have had them some time.

Q. When you got the Hannon money what date was that? Do I need to refresh your recollection on that?

A. It was December, 1931, I think, but I would not be sure unless I saw it.

Q. Will you look that up?

A. (Witness complies.) December 31, 1932.

Q. You are looking at what exhibit?

A. Exhibit E-7.

Q. And particularly what page?

A. Page 56.

Q. Point, will you please, to the receipt of the Hannon money?

A. It is here. (Indicating.)

Mr. Matthews: The witness points to a line under date of December 31, O. W. H., account of Elizabeth Hannon, $565.45.

Q. Is that correct?

A. Right.

Q. Did you deposit that money in this envelope on that day?

A. Either that day or the next day.

Q. I call your attention to the writing on the envelope, the word "Hannon, $500.00" with the line under it is not written in the same pencil as the words "property of the estate of B. E. Westhall," is it?

A. One seems to be heavier than the other. I would not say it was not the same pencil.

Q. Was it written at the same time?

A. I could not say that from the writing.

Q. What is your best impression? You look at the writing and tell me whether it was or was not written at the same time?

A. That would be hard to say.

Q. What is your best impression?

Mr. Tomlinson: Object. It is all right to call for a recollection, but to call for an impression is to call for a conclusion, your Honor please.

The Court: It is virtually the same thing.

Q. What is your best recollection?

A. It would look at though it might have been written—my recollection is not clear as to that.

Q. What is your reasonably best recollection you were going to say ——

A. I was going to say it looked as if it were written with two different pencils. That is the best I can answer on that.

Q. Why did you use the envelope of the Jeunesse Company, makers of fine toilet articles instead of an envelope of yourself or the estate?

A. Because I happened to have it on hand, it was quite readily available. I kept those envelopes for anything that might come up rather than to buy new ones.

Q. Why did you use this envelope for the Matthews' mortgage?

A. It happened to be there at the time.

Q. You wanted to save a stamp you told me this morning.

A. Yes.

Q. You didn't save it, did you?

A. No, but I did not throw it away either.

Q. You said you put the Hannon money in the safe deposit box because it was a big amount, didn't you on your examination by me?

A. I think I said a sizable amount.

Q. You said, "it was a good sized amount," on page 105, you said, "it was a good sized amount, $565.00 and I thought it would be as well to place it in there."

A. Yes, if that was my testimony.

Q. I show you the Josiah B. Kinsey account $523.10, paid in full in your account, do you know when you collected that?

A. Not offhand.

Q. Will you get your book and look?

A. (Witness complies.)

Q. I show you your check book marked Exhibit E-24. Anna B. Kinsey, account of J. B. Kinsey, when was that deposited?

A. October 13th, 1931.

Q. While you have your book there can you find the Charles A. Bye funeral?

A. If you can give me an idea about when it was, I can find it much more quickly.

Q. That was contained in A-11 so that would be a deposit of 10-13-31 in this book.

A. If it is there, yes.

Q. All of those moneys were deposited in the bank, were they not?

A. All those you have just mentioned indicated by that deposit in the check book.

Q. How much money did you deposit in the Lakewood Trust Company the day before the bank closed and twenty minutes before it closed?

A. (Witness consults book.)

Q. You are looking at what exhibit?

A. E-24. $29.75 apparently.

Q. I notice underneath that deposit of $113.32 there is an entry of 12-31-31 interest $19.65.

A. Yes.

Q. When was that put on your books?

A. You mean on the bank book?

Q. Yes.

A. It was deposited as of that date as I recall but I was not aware of it until later and I put it after that deposit.

Q. But you found that interest had been credited to your account before?

A. Yes, as of that date, which was the interest period of the Lakewood Trust Company.

Q. So the deposit twenty minutes before the bank closed on the thirteenth of January, 1932, was $29.75?

A. Yes.

Q. On the sixth, a week before that, you deposited $307.88. Can you tell us what that was from?

A. I think I can. Here is an item deposited 1-6-32, dividend number 27, class A common stock, National Public Service, $6.00. Molly Wilson $5.00. C. Cleckner account of C. M. Cleckner $20.00. Dorothy Wilson $40.00, United Shoe Machinery dividend number 106, $266.88, which makes a total of $337.88 the amount of deposit on that day.

Q. Those are all deposits accruing to the estate of Beatrice Westhall?

A. Yes.

Q. So seven days before the bank closed you deposited $337.88 of the Beatrice Westhall estate money in the bank?

A. Yes.

Q. And the day the bank closed it was not your money you deposited there it was the estate's money?

A. Yes.

Q. Did you deposit any money of yours in the bank twenty minutes before the bank closed?

A. Yes.

Q. Will you tell us how much you deposited twenty minutes before the bank closed?

A. As I recall around $94.00, that was all I had.

Q. Have you got your account here?

A. I may have. Yes, the amount deposited on the last day was $96.77 rather than $94.00.

Q. That is your personal deposit?

A. Yes.

Q. Where is it indicated?

A. Here, January 13th.

Q. Did you draw a check on that date of $200.00?

A. Yes.

Q. And your balance before you made your deposit of $96.00 was $257.79, is that right?

A. Right.

Q. And on the same day that you deposited $96.77 you drew a check for $200.00, and it is called a loan check.

A. Yes, and the check was never used.

Q. It was never honored you mean?

A. It was not paid. It was not presented before the bank closed.

Q. You told Mr. Tomlinson that your best recollection was that the agreement E-1 was sent to Washington for Mrs. Hooper's signature?

A. Yes.

Q. Were Mr. and Mrs. Hooper in Lakewood on the first of October, 1931?

A. I don't recall. I recall Mrs. Hooper being at the meeting but whether her husband was with her I don't remember.

Q. Don't you recall that Mr. Hooper witnessed Mrs. Hooper's signature on the agreement E-1?

A. I could not say as to whether he did or not.

Q. I represent to you that it was so acknowledged. Does that refresh your recollection as to whether Mr. Hooper was in Lakewood on October first, 1931?

A. It does not.

Q. Don't you know as a matter of fact that Mr. Hooper was in Lakewood when this agreement was signed by Mrs. Hooper?

A. I do not.

Q. Where did Virginia Hooper stay while she was in Lakewood in October?

A. With her sister my wife.

Q. Was Mr. Albert Hooper, her husband, there with her?

A. I don't know. Mrs. Hooper came to my house at times when her husband was not with her.

Q. I am not talking about that, I am talking about this particular occasion around the latter part of September or the first of October, 1931?

A. I don't recall.

Q. But you do know on the night of October first, and before October first, Mrs. Hooper stayed at your home?

A. She was there the night the agreement was reached or the night of the meeting.

Q. Did she go back the next day to Washington?

A. That I don't recall.

Q. Where did she sign the agreement, in your home or in the bank?

A. That I don't recall. It was handled by Mr. McCloskey.

Q. Where did your wife sign the agreement, in your home or in the bank?

A. That I do not recall.

Q. Where did you sign the agreement?

A. I don't recall that either.

Q. Do you mean to tell me you don't recall where you signed this agreement to buy this undertaking business?

A. I mean to say I do not recall where that agreement was signed by my wife and myself.

Q. Did you both sign it together?

A. I don't remember.

Q. Did you see anybody sign the agreement that you recall?

A. Not that I recall.

Q. Did you and your wife sign it together?

A. I just told you I don't remember whether we did or not.

Q. I show you the agreement and ask if that is your wife's signature?

A. It is.

Q. Where is your signature?

A. Right here.

Q. I show you as to Jessie M. Havens and Osborne W. Havens the signature of Beatrice Pendle, notary public of New Jersey.

A. That is right.

Q. Does that recall whether you and your wife signed together?

A. That does not indicate to me that it would be necessary for us to have signed together.

Q. I am not asking you that, I am asking whether that refreshes your recollection that you and your wife were present together when you signed this agreement?

A. It does not.

Q. You haven't got a very good memory, have you?

A. As to things like that I see no particular reason for charging my mind with.

Q. In other words the signatures to this agreement whereby you sold this undertaking business to

yourself, you did not consider of sufficient importance to remember whether the signatures were properly witnessed or whether your wife and yourself were together at the time.

A. That part is up to my counsel.

Q. You left everything to him?

A. Not everything.

Q. What didn't you leave to him?

A. As to getting the signatures on that agreement, I considered was Mr. McCloskey's business and not mine.

Q. So all the signatures to this agreement were gotten by Mr. McCloskey or by someone in his behalf.

A. By his direction, yes.

Q. You did not present the paper to anyone to have it signed?

A. Not that I recall.

Q. Now the receipts from the undertaking business from the date of Mrs. Westhall's death to October first, 1931, you told Mr. Tomlinson as you told me, you kept in the safe until the business was sold, is that correct?

A. As I recall that is what was done.

Q. And where you had received checks in that interim between the death of Mrs. Westhall and October first, 1931, you cashed the checks and put the money in the safe in your home, is that right?

A. That is my recollection.

Q. Will you turn to your check book that you kept in those days and point to the entry of those moneys and the disbursements, if any, of them?

A. I will have to get it.

The Court: Will you let me have those two envelopes, Mr. Matthews.

Mr. Matthews: Yes, your Honor, these smears are not our fault, the ink was wet.

Q. While you are there, Mr. Havens, will you get me the envelope you had in your desk with the Shinn money in it?

A. I don't have that now.

Q. I want you to show me any indication of money received by check or paid out by check from the 13th of August, 1931, the date of Mrs. Westhall's death, until the first of October.

Mr. Tomlinson: What book are you referring to?

A. My personal check book.

Mr. Matthews: I don't think I ought to offer it, and it is not in evidence.

A. There is one ——

Mr. Matthews: The witness is pointing to one under date of 8-29-30, O. J. Hamill Company cemetery charges for Albert S. Smith, $43.00.

Q. Did you take that money out of your own personal money?

A. Apparently.

Q. And what entry have you to show that there was any deposit that you received from the business in that book?

A. There is no entry apparently.

Q. What are those checks in pencil?

A. Checks outstanding when my statement was returned from the bank. That is a little bookkeeping system of my own.

Q. That is not a transaction ——

A. No, that is a personal loan.

Q. You made a personal loan of $1000.00 on the thirty-first of August, 1931?

Mr. Tomlinson: Object, your Honor please, it is utterly irrelevant.

Mr. Matthews: The significant fact is that he mixed these transactions, with his personal transactions; we have shown his one source of income was this undertaking business and we are searching into the use of these moneys, and if we find at that time a personal loan in the amount of $1000.00, we properly ask him what that is for, so long as it goes in a book concerned with accounts that we claim are estate concerns.

Mr. Tomlinson: We object as too remote and having nothing to do with this estate.

Mr. Matthews: He admits that the Hamill money was payment for a funeral of one Smith and during the time when according to his testimony he had no thought of buying the business.

The Court: The objection will be overruled.

Mr. Tomlinson: And your Honor will allow me an exception?

The Court: Yes.

Q. You did make this loan?
A. Yes.
Q. To whom?
A. William E. Tibbets.
Q. And it says to purchase business of what?
A. The Lakewood Transportation Company.
Q. What does the word "four hundred" mean after that.
A. That is their telephone number, they are known as Lakewood four hundred.
Q. Have you an interest in that business?
A. I have not.
Q. Has that loan been repaid?
A. It has not.
Q. Will you turn to any other transaction in that book that is an estate transaction other than that Hamill one.
A. (Witness complies.)
Q. Is the telephone bill an estate bill?
A. I don't think so. That is my own home.
Q. There is one, isn't it?
A. Yes, salary.
Q. 9-5-31 H. E. Brown, salary to 9-5-23, is that correct?
A. Inclusive. That is what that is supposed to indicate. Here is one $15.00 to Gilday Freeman, assistants on Lawler funeral.
Q. At that time was Mr. Gilday Freeman manager for the Westhall estate?
A. Not that I know of.
Q. He had been manager, hadn't he?
A. Not that I know of.

Q. Don't you remember that he was manager while Mr. Brown was in the hospital with an infected hand?

A. Yes, but I don't know when that was.

Q. This one, 9-15-31 was another business expense which you checked out.

A. Yes, this is another.

Q. 9-15-31 Standard Oil Company, that was a business expense?

A. Yes.

Q. Robert White 9-15-31 opening grave, $15.00, that is an expense of the business?

A. Yes.

Q. Is this one a business expense, Reverend Darling for services at the Lawler funeral?

A. Yes, that was a business expense.

Q. Is that a personal transaction with Miss Virginia on the nineteenth of August, 1931?

A. Yes.

Q. Was she in Lakewood on that day?

A. Not that I recall.

Q. Isn't it marked in such a way as to refresh your recollection without giving it to the record?

A. That would not be indicative of the fact that she was there.

Q. 9-19-31 cash H. E. Brown salary, 9-6 to 9-19, inclusive, $70.00.

A. That is a business expense.

Q. 9-21-31 F. Leon Harris, care of body of James E. Cole, $51.70, that is a business expense.

A. Yes.

Q. And what is this one here?

A. That is also personal.

Q. Here we are 9-24-31 National Casket Company $31.77. That is an estate account, isn't it?

A. Yes, I would imagine it were.

Q. Is this your personal check book?

A. Yes.

Q. Did you make out a personal check to the National Casket Company on that day?

A. Yes.

Q. And they accepted it?

A. Yes.

Q. Here is another loan for one hundred dollars on the twenty-eighth of September?

A. Yes.

Q. Is that the Clayton mentioned in the account as working for you?

A. No, that had nothing to do with the business at all.

Q. You drew checks on your personal account for all of these moneys we have put on this record?

A. Yes, during that period.

Q. And when you got checks for a payment in the business during that period you cashed the check and put the proceeds of the cashed checks as well as all the cash proceeds from the business in a safe in your house, is that correct?

A. As far as I recall.

Q. It is not merely a recollection but it is so.

A. It is a recollection because that is three years ago.

Q. You cannot have any doubt but that you did not deposit these moneys between August thirteenth and October first, that you received in the business.

A. I still think I kept them in my safe unless it were necessary to deposit some to take care of insufficiency.

Q. To take care of any insufficiency of what?

A. Balances in the checking account.

Q. I was interested in looking at that balance. I could not see that there was any check you drew that would ever suffer from insufficiency of balance.

A. I said it was a possibility, I didn't say it was a fact.

Q. When you testified on direct at page 51 I said, "Didn't you deposit that money in your own bank account?", and your answer was "No, sir." Q. "And where did you deposit it?" A. "I kept it in the safe." Q. "You did not account for that money in your final accounting that you ask this Court to approve?" A. "No." By the Court: Q. "During that same time what money was spent in conducting the business?" A. "472.06."

Q. It is true, isn't it, that you put all the receipts from the business whether in cash or checks converted into cash in your safe between August 13th, and October 1st, 1931.

A. I still cannot recall whether I put them all there or not. My recollection is that I did.

Q. You told me very positively that you did not deposit that money in your bank account, isn't that correct? Your answer to my question at page 51 "didn't you deposit that money in your own bank account" was "No, sir."

A. That was my recollection at the time. You must realize I did not keep any particular record or make a mental note of these on there. I didn't see any particular reason for it.

Q. This is not mental, $700.00 in 1931 is actual. I want to know if what you said at page 50 is correct. I asked you "What did you do with that

money," and you answered "I appropriated it to the business, my own business." "Q. In other words you deposited it to your own account," A. I held it until it was decided. I held it for the time being. Q. Didn't you deposit that money in your own bank account? A. No, sir. Q. Where did you deposit it? A. I kept it in the safe," isn't that what you testified directly. I am reading right from the record.

A. Yes.

Q. Why do you say now that your best recollection is that you converted these checks into cash and put that and the other cash in an envelope in your safe rather than make the positive statement "I did not deposit it, I kept it in the safe."

A. Because my recollection is that way. That is the best way I can answer and be truthful.

Q. You have looked at every book you have kept since we started these proceedings against you, have you not?

A. Only the ones you asked for.

Q. You have a whole bag full of books there and you have gone through everyone of them.

A. I have not.

Q. Is there any book that has any indication that you ever deposited any of the money received between August 13th and October first, 1931?

A. I cannot say there was.

Q. Didn't you go over the receipts with Mr. Crummy?

A. Yes.

Q. And did you notice any receipt that would indicate the deposit of that money?

Mr. Tomlinson: In so far as the witness can tell.

Q. As far as you can tell did the books show you deposited any money?

A. In so far as the record that we went over with Mr. Crummy is concerned, it did not indicate that I had deposited the money.

Q. But your own record that you went over with Mr. Crummy indicates that you had deposited the money?

A. Not in particular.

Q. But in general?

A. No, I don't think they did.

Q. You have before you your check book which covers a period including the period August 13th, to October 1st, 1931, inclusive?

A. Yes.

Q. Is there anything in that record to show your deposit of any moneys received from the undertaking business between August 13th and October 1st, inclusive?

A. Nothing that would indicate a specific deposit.

Q. Is there anything that would indicate any kind of deposit?

A. Not as having come from the business.

Q. Is there anything to indicate that you put any of the money received from the business in the bank and entered it in your books?

A. I cannot say there is.

Q. Where else would you have kept it beside in that book?

A. That would probably be the only record.

Q. That book does show all of your deposits during that time August 13th to October first?

A. Yes, sir.

Q. Have you any book of your own personally or

of the business which indicates deposits during that period?

A. No.

Q. I ask you again, did you put the money that you got from the business there in cash or in checks converted into cash in a safe in your home?

A. As I recall, I did.

Q. Then will you tell me why you drew checks from your personal account for the amounts I have indicated on the record by going over your personal account books, which checks were for business expenses between August 13th, 1931 and October first, 1931?

A. I knew of no other way at that time to pay those bills, no other account to draw them from.

Q. Why didn't you do as you did with the Shinn money, take a little out of the safe and put it in the bank and draw checks against it?

A. That was done later. This was a rent account and this was a personal account. My own personal account I felt differently about.

Q. You still maintain that you knew nothing about purchasing this business until you went to Mac's office on the evening before this agreement was signed?

A. Yes.

Q. Where do you get the 30% margin of profit business that you gave Mr. Tomlinson this morning?

A. From previous records.

Q. What previous records?

A. Income tax returns.

Q. By your 30% margin of profit you mean, of course, profit that you pay income tax on, don't you?

A. Yes, that is an approximate figure however.

Q. How approximate is it, does it run within one per cent or two per cent?

A. I never figured it that closely.

Q. It is a margin of profit you have given as 30%—might it be thirty-five or twenty-five?

A. No, it might possibly be twenty-eight or twenty-seven.

Q. It could not be thirty-one or thirty-two?

A. No, I would not imagine so.

Q. On what do you compute that margin of profit, 30% on the gross business done, or what?

A. Yes.

Q. I show you a writing which I am informed by my associate, Mr. Crummy, has been checked by yourself.

A. No, this has not been checked. I have not verified it.

Mr. Tomlinson: I object to this statement being used unless Mr. Havens is familiar with it.

Mr. Matthews: I will withdraw the proposition, but he will accept it. It is his figures and his book.

Q. Let me ask you this: If the business between August 13th, 1931, and August 9th, 1932, showed a gross business of $28,331.74, you figure that your profit was 30% on that, would you?

A. I would estimate it to be that.

Q. And roughly, 30% of twenty-eight thousand would be about eighty-four or eighty-five hundred, wouldn't it?

A. Around there.

Q. So that if in the year immediately following Mrs. Westhall's death, to wit, from August 13th, 1931, to August 9th, 1932, you had done a gross business in the undertaking business you had bought of twenty-eight thousand dollars, figuring your margin of profit at 30%, you would have realized a net profit of approximately eighty-four hundred dollars, that is correct, isn't it?

A. I think you have there the bills that might have subsequently been lost.

Q. If you had done that business that would have been your profit, would it not?

A. Not unless I collected some of those bills.

Q. If you had done a gross business during that year of twenty-eight thousand, would that have been your profit on the gross business done?

A. Not necessarily. There may have been bad debts.

Q. Are there any bad debts in that first year's business of twenty-eight thousand dollars?

A. Mr. Crummy has the figures.

Q. If there were no bad debts and the gross business was $28,331.74 for the year, I have stated your profit at 30% would have been eighty-four hundred dollars, is that right?

A. Approximately.

Q. You paid for this business on August 9th, 1932?

A. I think that is the date.

Q. And on that day you paid the sum of $3,842.00 for the business.

Mr. Tomlinson: Object. That does not include the other elements that entered into this sale.

The Court: What other elements?

Mr. Tomlinson: The contract of the agreement shows that he was to render services.

Mr. Matthews: That was in consideration of reduced rent.

Mr. Tomlinson: The contract speaks for itself.

Mr. Matthews: In consideration of the sale of said undertaking business the agreement, E-1, states that in consideration of the sale of this business from Osborne Havens, administrator, to Osborne Havens, individually, the said Osborne Havens shall pay forthwith to the Estate of Beatrice E. Westhall, deceased, the sum of $3,842.00 and shall lease such part of the premises set forth in Schedule A in the recital of this agreement which has heretofore been employed in the undertaking business, consisting of dwelling-house, barn and chapel, from the heirs-at-law of the said Beatrice E. Westhall, deceased, for the term of one year from October 1st, 1931, at a rental of nine hundred dollars payable in equal monthly installments in advance, and as a further consideration said Osborne W. Havens, and so on, of which the said Beatrice E. Westhall died seized and which is particularly set forth in the recital to this agreement.

That is the consideration paragraph of that agreement and the amount mentioned is $3,842.00.

Q. Is that correct?

A. That is the amount mentioned.

Mr. Matthews: May I have the bill of sale that was used this morning?

A. (Bill of sale produced.)

Q. I show you Exhibit A-3 and ask you is that the bill of sale which you said this morning you received when you bought the funeral business?

A. That is the bill of sale for part of the funeral business.

Q. What is left out of it?

Mr. Tomlinson: He did not say he received it when he bought the business.

A. Since I have bought the business. This is apparently for equipment.

Q. That is referring to Exhibit A-3?

A. This is apparently for equipment. It does not include the automobiles.

Q. The bill of sale for the automobiles is dated when?

A. In December I think, December 16th, 1931.

Q. What is the bill of sale dated, that is the assignment, where is the bill of sale?

A. Right here. (Produced.)

Q. That is the bill of sale for the original purchaser which you had assigned to you?

A. Yes.

By Mr. Tomlinson:

Q. Which automobile is that?

A. The business automobiles.

By Mr. Matthews:

Q. And the total consideration for the business automobiles was $1,525.00, was it not?

A. I think that was it.

Q. I represent to you that was it.

A. I guess that was right.

Q. Looking again at Exhibit A-3, which you call a bill of sale given by you as administrator to yourself individually dated on the back July 7th, 1932, the consideration mentioned in that is $2,332.00, and it says, "for all goods and chattels particularly described and mentioned in the schedule hereto annexed," and looking at that schedule, that is all the goods and chattels of the undertaking business with the exception of the automobiles, is it not?

A. It seems to be.

Q. You will notice in that bill of sale the words "for and in consideration of the sum of $2,332.00 lawful money of the United States to me in hand paid at or before the ensealing and delivery of these presents by Osborne W. Havens." That money was not paid at or before the ensealing of those presents, was it?

A. No.

Q. That money was not paid until August 9th, 1932?

A. Yes, the following month.

Q. And you paid therefore with the undertaking business and chattels $2,322.00 plus $1,525.00 for the automobiles, making a total of $3,857.00, isn't that correct?

A. Yes.

Q. And you paid that money on the ninth of August, 1932?

A. Yes.

Q. And if during that year you had done a gross business of twenty-eight thousand dollars on a 30% margin of profit, you had made a profit of eighty-four hundred dollars during that year, is that correct?

A. Yes.

Q. So that you made twice and a half and more the first year out of the business than what you paid for it, isn't that correct?

A. Not twice and a half, I would not say.

Q. It was a little over twice?

A. Yes.

Q. I show you Exhibit A-4, which is a bill of sale for the furniture sold to you?

A. Yes.

Q. Did you get that bill of sale on the seventh of July, 1932?

A. I don't remember whether I got it then or not, now.

Q. It is acknowledged on the twelfth of July, 1932.

A. Which would seem to indicate to me that I got it then.

Q. When I asked you, on direct examination, whether you had received bills of sale you told me you didn't remember, that Mr. McCloskey might be able to say. Where were those bills of sale, Exhibit A-4 and Exhibit A-3, since you got them?

A. In my possession.

Q. Do you mean to tell me then, sir, that when I examined you in this court on direct examination on the sixteenth day of November last, that you did

not know whether you had gotten the bill of sale for the furniture and the bill of sale for the business?

A. I do.

Q. Hadn't you been subpoenaed to bring everything with reference to the sale of the undertaking business with you?

A. I imagine that was all included. I thought, however, my attorney was talking with your office something about that.

Q. Not with my office about that.

A. That is as I recall it.

Q. Do you mean to tell me that on the sixteenth of November when I directly examined you, you were doubtful whether you had gotten the bill of sale for this business and this furniture?

Mr. Tomlinson: Do you happen to know the page?

Mr. Matthews: Page 258.

Q. November sixteenth was last Friday, was it not?

A. Yes.

Q. And you had that bill of sale in your hands prior to last Friday since the time you got it first and since this case began?

A. I don't remember having looked it over or anything.

Q. That is not what I ask you. Did you have it in your hands since this case began prior to November sixteenth?

A. I don't remember that.

Q. When did you bring it to Mr. McCloskey?

A. I brought all my records to Mr. McCloskey some time after the exceptions were filed. Just when I don't know.

Q. Did you bring this bill of sale, too?

A. It very likely was among the other papers.

Q. And do you still mean to tell me that since the sixteenth of November, last Friday, when I asked you did you get a bill of sale for that furniture and for that business and you told me you had not, do you mean to say you have not had these bills of sale in your hands since?

A. Mr. McCloskey probably could tell where they have been, if that is what you want to know.

Q. Yes, and you know it, too.

A. (No answer.)

Q. Would you have had to sign that bill of sale on the same date that you received it?

A. I could not tell you, not offhand.

Q. That furniture was not included in that agreement in that agreement that night, Exhibit E-1?

A. No.

Q. You did not know last Friday, did you, that there was an agreement of sale which was in your possession or rather a bill of sale which was in your possession for the undertaking chattels?

A. I did not know it.

Q. As a matter of fact, there was not either, was there?

A. I am not sure, it is there now.

Q. When did you have it drawn up?

A. On the date indicated there.

Q. Is that so?

A. Yes, sir.

Q. Let me show it to you again. There is your signature on that agreement at the bottom?

A. Yes.

Q. It is witnessed by Miss Pendle who will be a witness later in this case?

A. Yes.

Q. What date is in the body of that?

A. The blank day of July.

Q. Did you know that was blank when you signed it?

A. No.

Q. Did you sign that bill of sale on the bottom there the same day that you made your acknowledgment?

A. I would imagine so.

Q. In other words, you signed your name at the bottom of that paper the same day you made your acknowledgment before Miss Pendle?

A. That is my best recollection.

Q. There is no date in July, however, for when the bill of sale was signed by you, is there?

A. Not here.

Q. In witness whereof I have hereunto set my hand and seal the blank day of July in the year of our Lord one thousand nine hundred and thirty-two.

A. That's correct.

Q. And the date in the acknowledgment is that on the twelfth of July, 1932, you, the administrator of the estate, acknowledged and signed the instrument?

A. Correct.

Q. I ask you to look at E-4 and look at "in witness whereof."

A. On the blank day of July.

Q. Look at the acknowledgment.

A. It is the same as the other.
Q. On the twelfth day of July?
A. Yes.
Q. And it is your best recollection, is it not, that you signed the bill of sale, A-4, on the same day you acknowledged before Miss Pendle as a notary public?
A. That is my assumption.
Q. You don't consider it anything strange that that date is missing there?

Mr. Tomlinson: Object as calling for a conclusion.

Mr. Matthews: I have a perfect right to ask him because it is our belief that there was no bill of sale until this case started.

Mr. Tomlinson: I object to that statement of counsel and also object to his question on the ground that it is perfectly incompetent and perfectly irrelevant, as to whether he considered it strange or whether he does not consider it strange.

Mr. Matthews: I submit to your Honor that when these exhibits were offered I desired to cross-examine and I am now cross-examining on the validity of these instruments and I have a perfect right to connect his testimony today with that given only one week ago at which time he was searchingly questioned as to the bill of sale. There is not a man on earth that would not remember whether he got a bill of sale for these chattels and this business at the time, and it is my contention that this is a

self-serving instrument and I have a right to question him regarding every phase of it.

Q. Mr. Havens, did you not consider it strange that that date is missing?

Mr. Tomlinson: To that I object.

The Court: I will sustain the objection, what difference does it make?

Mr. Matthews: It makes this difference, your Honor please. May I put it on the record in taking my exception?

A week ago he expressly stated that he did not have bills of sale for the business and for the chattels. Today he produces the bills of sale allegedly given in the year 1932, a bill of sale for the business. The agreement to buy was dated October, 1931. This bill of sale is dated the blank day of July. In the paragraph "in witness whereof" on the back of the bill of sale there is the date July 7th. In the acknowledgment on the bill of sale in ink is the date twelfth of July, and I am asking this witness, because it is the belief of counsel by reason of the testimony which was elicited last week that these papers have been prepared since this case started and this question is asked for the purpose of inquiring into that.

The Court: No, Mr. Matthews, the objection is sustained.

Mr. Matthews: Your Honor will allow me an exception?

The Court: You may have it.

Mr. Tomlinson: I move to strike out Mr. Matthews' statement as to the belief of counsel that these papers have been prepared since the case started. He is constantly trying to introduce into this case matters that are not proper.

The Court: I suppose the Prerogative Court can get it.

Q. Why didn't you pay for the business when you got your bill of sale on the twelfth of July, 1932? Why did you wait another month?
A. For the same reason that I did not pay for the other on October 1st.
Q. What other?
A. On October 1st.
Q. What was the reason, didn't you have the money?
A. I felt I had a year in which to do it.
Q. Why did you feel you had a year in which to do it?
A. I misunderstood the word forthwith.
Q. Did you think it meant a year?
A. No.
Q. What did you think?
A. I didn't give it a thought.

Mr. Matthews: Nor a care, either.

Mr. Tomlinson: I object to that comment of counsel and ask to have it stricken from the record.

Mr. Matthews: I will consent to have it stru out.

Q. You told Mr. Tomlinson this morning that yo have had Mr. Brown, a licensed embalmer an undertaker, conducting the business under Mr Brown's license for you. Do you wish that to b your testimony with reference to the conduct o that business?

Mr. Tomlinson: If the Court please, that wa not what he told me. I asked him whether he wa conducting the business under Brown's license.

Mr. Matthews: I will repeat my question.

Q. You told Mr. Tomlinson this morning that yo have had Mr. Brown, a licensed embalmer and undertaker, conducting the business under Mr. Brown's license for you. Do you wish that to be your testimony with reference to the conduct of that business?

A. I would rather say that Mr. Brown was working for me as a licensed man.

Q. What is your status? What are you?

A. The owner of the business.

Q. What business?

A. The former Beatrice E. Westhall undertaking business.

Q. What present undertaking business?

A. The business which is worked under Mr. Brown's license.

Q. Which business is presently now working under Mr. Brown's license—the E. J. Westhall under-

taking business, or the Osborne W. Havens undertaking business?

A. I assumed I was the owner.

Q. Will you answer my question, is it the E. J. Westhall undertaking business that is operated by Mr. Brown or the Osborne Havens undertaking business?

A. It is the business that used to belong to Mr. Westhall that is the best answer I can make.

Q. Is it the Osborne Havens undertaking business that is being operated today by Mr. Brown?

A. I would assume it were.

Q. Will you answer yes or no?

Mr. Tomlinson: He said Mr. Brown was not operating it and therefore I object to the question.

The Court: Operated under Mr. Brown's license, I suppose.

Mr. Matthews: Yes.

A. It is operated under Mr. Brown's license.

Q. Is it the Osborne W. Havens undertaking business?

A. I am not sure at the present time. I originally thought it was.

Q. I ask you to look at the State's record card, the apprentice card of your business, and I represent to you that is the signature of Mr. Waters, the secretary. Does that show any ownership in you?

A. Apparently not.

Q. Who does it show the ownership in?

A. This is the same one that was offered in evidence the last time. I see no owner's name there.

Q. Whom do you see as employer?

A. Harry E. Brown.

Q. I show you an apprenticeship record for the period preceding the one I have just shown you and ask you who is indicated there as the employer?

A. E. J. Westhall, deceased, W. H. Freeman, manager.

Q. What is the last date on the first card for the renewal of your apprenticeship?

A. I would say June 26th, 1934, but it is blurred.

Q. I represent to you that it is June. You don't know Mr. Waters' signature, the secretary of the State Board?

A. I have seen it.

Q. Do you think that is it?

Mr. Matthews: I don't want to bring Mr. Waters down here if I can avoid it.

Mr. Tomlinson: We have consented to it.

Mr. Matthews: Mr. Waters signed there that the above is an exact copy of apprenticeship record of O. W. Havens in the employ of Harry E. Brown on file in the office of the Board of Embalmers and Funeral Directors in the State of New Jersey and it is signed Bert Waters, Secretary. May I offer this proof now instead of the informal proof I offered the last time.

Mr. Tomlinson: I think you put the other in evidence.

Mr. Matthews: I did but this is signed by Mr. Waters' name.

Mr. Tomlinson: We made no objection to the method of proof.

Mr. Matthews: May we have both of them in evidence? Your Honor please, this is a certification.

Mr. Tomlinson: I do not think a certification is evidential. I consent that these are certified records here. I say that the certification is not evidential and the statements contained in the certification by Mr. Waters are mere hearsay.

The Court: These are in, let it stand.

Mr. Matthews: I will have to bring Mr. Waters here, apparently.

Mr. Tomlinson: We concede that the records you put in are correct copies of the records on file and are the same as Mr. Waters would testify to if he were brought here.

Mr. Matthews: Do you concede that the above is an exact copy of apprenticeship record of O. W. Havens in the employ of Harry E. Brown on file in the office of the Board of Embalmers and Funeral Directors in the State of New Jersey, do you concede that that statement is correct?

Mr. Tomlinson: You are reading something not in evidence. I object to that certification.

Mr. Matthews: Then we have to bring Mr. Waters.

Mr. Tomlinson: We have agreed that you may put in the first part.

Mr. Matthews: Here is a sale ——

Mr. Tomlinson: Our point is this. We object to that statement by Mr. Waters as being mere hearsay.

The Court: I will sustain the objection. Now we come to the question of bringing Mr. Waters here. To prove what? As a matter of fact, Mr. Matthews, Mr. Tomlinson is trying to consent to what you want.

Mr. Matthews: Here is the difficulty. He is called employer. I think your Honor got it. Suppose we had to argue it elsewhere, certainly the Court would want such a thing before it. That is all I want.

Mr. Tomlinson: The Court would not want anything before it that is not properly in evidence. What Mr. Matthews wanted to prove, as I gather it, were the records on file with the State Board. He produced these records the last session and said, "We cannot make formal proof today but can later on if you desire it," and Mr. McCloskey and I said, "No, we do not require formal proof, those cards can go in."

The Court: What more do you want to prove by these cards, Mr. Matthews?

Mr. Matthews: I want to comply with the statute. (Citation.) We say it is evidential under the stat-

ute, but it is really not helpful either way except that it saves a lot of testimony on the record.

The Court: Yes, I think it is evidential; if you are offering that I will have to admit it.

Mr. Tomlinson: The cards themselves have gone in. The reason I am objecting to these latter cards is because of the recital here by Mr. Waters. I say since we have admitted the former cards certification is not necessary.

The Court: After reading that section of the statute, I have got to change my ruling.

Mr. Tomlinson: Your Honor will allow me an exception?

The Court: Yes. The cards may be marked in evidence.

(Card marked in evidence Exhibit E-25.)

Q. Now, I ask you to look at E-25 and I ask you to look at the certification which says "that is an exact copy of your apprenticeship record on file in the office of the State Board of Undertakers and Embalmers." Does that copy show Harry E. Brown as your employer between the dates of 6-26-34 and the present time?

A. Yes.

Q. And back of that 1-17-33 is the date. That is the renewal for the year 1933?

A. Yes.

Q. And the renewal for 1932 is 1-1-32?

A. Yes.

Q. I ask you to turn to the back card and ask you whom your employer is shown to be on January 17th, 1931?

A. According to this card, W. H. Freeman, manager.

Q. And 12-1-30?

A. The same employer.

Q. And 7-30-29 is the same employer also?

A. Yes.

Q. You told Mr. Tomlinson this morning that you were putting up the money to finance this business, paying its bills and so forth, will you tell me how much of your money you put up to finance this business between August 13th, 1931, and this very day?

A. How much of my money?

Q. Yes.

A. I cannot tell you offhand.

Q. Can you tell me approximately?

A. I recall having used the $4000.00 I got from the two building loans of which you have a record.

Q. And that $4000.00 you used August 9th, 1932, to pay for the business?

A. Yes.

Q. And during that period your profit was double that from the business, wasn't it? Your net profit.

A. According to that record you submitted.

Q. That is correct, isn't it?

A. According to that you submitted.

Q. Do you still say that you used your own money if you got four thousand dollars back out of the business?

A. My best recollection is that I did, yes.

Q. Can you think of any other money except the money you put up to purchase the business and the furniture in 1932 in August, any other money you have advanced to finance this business?

A. I kept no separate record of that.

Q. Did you ever run at a loss since you got the business?

A. I think not.

Q. Have you the book in which you drew the check for the payment of the chattels of the business?

A. I think I have.

Q. Which check book are you looking at?

A. I have to see first. I find I do not have that book with me, sir.

Q. You have the book?

A. Yes.

Q. That was for 1932?

A. Yes.

Q. Do you recall what bank the checks were drawn on?

A. As I recall, the People's National Bank.

Q. I show you a clipping from a local paper dated Friday, November 16th, 1934, and ask if you had it inserted or caused it to be inserted in that paper?

A. That advertisement has been carried before Mr. Westhall's death.

By Mr. Tomlinson:

Q. You pay for the advertisement?

A. Yes.

Mr. Matthews: I offer it in evidence.

The Court: It may be marked.

(Newspaper clipping marked in evidence Exhibit E-26.)

Q. You have income tax statements and I offered them in evidence for 1932 or '33. Have you them handy or do you want to take our figures? Do they show a net profit for 1932 of $6,456.50, and for 1933 of $6,422.23?

A. That is correct.

Q. That is the income from the business?

A. Yes, taking Mr. Crummy's figures which I think are correct.

Q. And that, of course, is on a cash basis?

A. Yes.

Q. And has nothing to do with accounts receivable?

A. No, that is on a cash receipts and disbursements basis.

Q. May I have the Shinn assignment?

A. (Paper produced.)

Mr. Matthews: My associate gave back to Mr. Shinn the papers he presented and which were marked in evidence. I have to wait until next time before I can ask those questions.

(Adjournment to December 14th, 10 A. M.)

Toms River, N. J., December 14, 1934.

TESTIMONY.

Before Hon. Russell G. Conover, Judge.

Appearances:

For the Exceptant, John A. Matthews, Esq., Andrew B. Crummy, Esq.

For the Accountant, W. Durward McCloskey, Esq., J. Elmer Matthews, Esq.

W. Durward McCloskey, a witness called by the exceptant, being duly sworn according to law, upon his oath testified as follows:

Direct examination.

By Mr. Matthews:

Q. Mr. McCloskey, you are a counsellor-at-law of the State of New Jersey?

A. I am.

Q. And proctor in the estate that is the subject of these exceptions?

A. I am.

Q. You were also personal counsel for Osborne Havens at the time the undertaking business was bought by him as administrator?

A. No, sir.

Q. Who was his lawyer?

A. He did not have any that I know of.

Q. In other words do I understand that he had not consulted with you about purchasing this business prior to its purchase?

A. Only in connection with the interest of the estate. He never consulted me about his end of it.

Q. Will you tell us when he first consulted you about it and how?

A. You mean about the sale of the business?

Q. Yes.

A. I think it was some time in the middle of September, 1931.

Q. And at that time did he tell you he wanted to buy the business?

A. No, sir.

Q. When did he first tell you he wanted to buy the business?

A. There was no conversation about his interest in the business. It was only a question of what disposition should be made of the business by the estate.

Q. When did he first tell you he wanted to buy the business?

A. I don't think he ever told me he wanted to buy the business.

Q. How did you know he wanted to buy the business?

A. I didn't.

Q. How did you come to draw a contract selling the business from Osborne W. Havens, administrator, to himself individually?

A. That was the result of a conference in my office on September 29th, 1931.

Q. You mean to tell us prior to September 29, 1931, and prior to all these people coming to your office, you had no knowledge that Havens wanted to buy the business?

A. No, sir.

Q. Do you recall being at the Westhall home the day after Mrs. Westhall was buried?

A. I recall being at the Westhall home. I don't recall the time.

Q. Don't you recall being there on the very evening after the old lady was buried?

A. The same answer, sir, to that.

Q. Don't you recall a discussion at that time by Mr. Havens about the business being carried on by the estate?

A. I know it was the understanding that he would carry on the business for the time being for the estate, yes.

Q. At that time, shortly after the death of Mrs. Westhall, the understanding was that he should carry on the business for the time being for the estate?

A. Yes, sir. At least that was my understanding of it.

Q. You were his adviser as administrator?

A. Yes, sir.

Q. And I imagine, in the wisdom you have always manifested toward your clients, you would have been

wise enough to find out what his attitude was. Therefore from the death of Mrs. Westhall to the time it was finally decided he was going to buy the business you understood he was managing the business for the estate.

A. Yes, sir.

Q. That was from the fourteenth of August to the first of October, 1931?

A. I would say to the evening of September twenty-ninth, 1931.

Q. Did you have any conferences with Mr. Havens about the estate between the thirteenth of August, 1931 and the thirtieth of September, when the conference about the sale of the business was had?

A. Yes, sir.

Q. But at none of those conferences did Mr. Havens discuss his purchase of the business?

A. No, sir.

Q. Did you know that during that time Mr. Havens was keeping the money that came in to the business in the safe at his own home and not depositing it to a trust account or administrator's account?

A. No, sir.

Q. Now on the thirtieth of September there was a conference at your office. Upon whose notification was that conference held?

A. I recall no conference on that date.

Q. What was the date of the conference?

A. September twenty-ninth.

Q. On what day of the week was that?

A. Thursday, I think. I am not sure.

Q. You think the agreement was signed two days after the conference in your office?

A. I know it was not.
Q. Was it signed the next day?
A. By whom?

Mr. Tomlinson: This is an agreement executed by a number of parties. I think counsel should indicate by whom he wants to know it was signed. It has not been indicated it was signed by anybody the next day.

The Court: As the question and answer stand they don't mean much.

Q. Mac, was not the agreement signed the next day after the conference?
A. You are referring to this agreement Exhibit E-1?
Q. Yes.
A. No, sir, it was not.
Q. You cannot be mistaken about that?
A. No, sir, I dictated it the following day.

Mr. Matthews: Of course that becomes necessary at this stage of the case that it would be dictated the following day.

Mr. Tomlinson: I move that that comment of counsel be stricken out.

Mr. Matthews: If I offend Mr. Tomlinson it is because of my absolute friendliness for Mac in this examination. It is not at all pleasant, and I want to make it as pleasant as I can.

The Court: Well, proceed Mr. Matthews.

Q. Let's get back to the conference. Were those present all there by your notification?

A. I notified some of them and Mr. Havens and Miss Pendle notified some of them.

Q. What was the conference for?

A. I suggested the conference of all the parties in interest because of several questions involved in the estate. There was a large apartment building on Second Street that was owned by Mrs. Westhall, and I think there were two stores and four apartments. The apartment building required constant attention and it required somebody to collect the rents, and there was no one that could take care of the building, because the real estate went to the heirs, and the Lakewood Trust Company was guardian for three of the minors, representing a half interest, and Mrs. Havens and Mrs. Hooper had each a quarter interest, and there was no one to take care of the property. That was one question that needed to be settled.

Q. This was on the twenty-ninth of September, 1931, and Mrs. Westhall had died on the thirteenth of August, 1931. Had not that been apparent sooner than the twenty-ninth of September, 1931, that this building needed the attention you speak of?

A. I don't know. I was only counsel in the matter. When it came to my attention I suggested a conference of all the parties in interest.

Q. You live in Lakewood?

A. Yes.

Q. And your office is in Lakewood?

A. Yes.

Q. How far is your office from this apartment building?

A. My judgment of distance is rather poor, but it is in the same block.

Q. You pass that place very frequently?

A. No, I go the other way mostly, but I am familiar with it.

Q. You were also counsel for the Lakewood Trust Company, weren't you?

A. No, sir.

Q. You were not?

A. I did not complete my other answer.

Mr. Matthews: I ask you to hold your thread of thought for the moment.

Q. I have in my possession here the minutes of the Lakewood Trust Company, dated September second, 1931, and I point out to you the second last paragraph, "Moved and seconded ye notify Messrs. Jayne and McCloskey that unless notes of Vincenzo Marino, now past due, are paid on or before October first, 1931, suit will be brought to collect same."

A. That has no connection with counsel for the bank. We represented the estate of Vincenzo Marino.

Q. Who was counsel for the bank?

A. Halstead Wainright.

Q. He didn't do the work, did he?

A. He did.

Q. Isn't it true that you and Will represented that bank in most of its transactions?

A. No, sir.

Q. Are there any transactions you represented them in?

A. Yes.

Q. What was the last one prior to September second, 1931?

A. At the time the Lakewood Trust Company closed I was foreclosing two mortgages, and that was all. I never did any trust work; I did title work. Mr. Wainright had to have someone else do that, and he permitted me to do the title work.

Q. You were a director of the Lakewood Trust Company?

A. Up to the time of its closing, yes, sir.

Q. You have given me the first purpose of the conference, namely attending to the apartment building, and you were about to give me the second.

A. The second was the disposition of the business.

Q. When had that been spoken to you about?

A. I don't recall any definite instructions or conversation about it.

Q. When?

A. I said I did not know. I knew Mr. Havens was conducting it temporarily for the estate, and some disposition had to be made of the business.

Q. Had Mr. Havens told you before you called this conference that he wanted to buy the business?

A. No, sir.

Q. So when you met on September 29, 1931, that was the first intimation you had that Havens wanted to buy the business?

A. I don't know that he ever wanted to buy it. He took it as a result of a compromise.

Q. As a result of a compromise?

A. Yes.

Q. A compromise is a co-promising on the part of both, a mutual arrangement back and forth—that is as we have always known the definition.

A. (No answer.)

Q. You have been present during the taking of all this testimony on exceptions to account?

A. Yes.

Q. Did you hear Mr. Havens testify at the first hearing that he made a profit the first year of $8,000.00, and that he only paid $3,800.00 for the business?

Mr. Tomlinson: Object as calling for a conclusion. I think we are going away from the issues and it is not illuminating. It seems to me to make no difference whether Mr. McCloskey knew Mr. Havens wanted to buy the business or not.

Mr. Matthews: I am not supposed to illuminate Tom ——

A. I would like to answer. The profit derived that year from the business was not from the Westhall estate, it was the personal service of Mr. Havens.

Q. Did you know that the law at that time precluded Mr. Havens giving any personal service except as an employee of Mr. Brown?

A. I beg to differ with you on the interpretation of the law.

Q. How do we differ? What is your interpretation of that law?

Mr. Tomlinson: I object to that as immaterial.

The Court: Is that the end of your objection?

Mr. Tomlinson: Yes.

The Court: Now, Mr. Matthews.

Mr. Matthews: Mr. McCloskey has said Mr. Havens bought the business and the profit in the first year was not from the business but from his personal services. I asked him whether he did know that the law at that time precluded Mr. Havens giving any personal services except as the employee of Mr. Brown and he said he differed in his interpretation of the Statute of 1927 which I have offered in this case. I think it is pertinent, since his actions as adviser of this administrator are in question, that he give his interpretation. I think it will serve Durward as well as the case.

Mr. Tomlinson: It seems to me your Honor is the person to interpret that law and not Mr. Matthews or Mr. McCloskey.

The Court: Mr. Matthews says after all what we are getting into is the action of the counsel or proctor for the estate, and his interpretation of that act has some bearing on it. In other words, it may be right or it may be wrong, but it might explain some of the actions of both proctor and administrator. I think it is material, particularly where the charge of fraud is involved.

Mr. Matthews: In justice to my brother attorney I think he should give that interpretation. His may be correct.

Mr. McCloskey: I want to interpose the further objection that it is immaterial as far as the estate is concerned. It may be material as far as Mr. Havens is concerned. I did not represent Mr. Havens.

The Court: I will let it stand and an exception may be noted.

Q. How do you interpret that law with reference to Mr. Havens owning and operating this business?

A. He may own an undertaking business provided he has a licensed embalmer.

Q. Is that your interpretation of the law?

A. Yes, and of the State Board which has charge of the administration of the law.

Q. You think then that it was Mr. Havens' personal services that made the profit?

A. Absolutely. Mr. Havens had run that business from the death of Mr. Westhall and from a year before.

Q. Mr. Havens had never been a licensed embalmer, you know that from the testimony produced here, and you knew too that he was not a licensed undertaker.

A. That was my understanding. I had no proof of it.

Q. So Mr. Havens who had served this business for some years as its manager, unrepresented and unknown to you as the prospective purchaser of the business, was summoned to the conference on September 29th, is that correct?

A. I don't know that he was summoned, we arranged the conference together and notified the people to be there.

Q. And at the arrangement there was no discussion with you about his buying the business?

A. No, sir.

Q. What time did the conference congregate?

A. About seven-thirty.

Q. In your office?

A. That's right.

Q. Who were present at that conference?

A. Mr. Charles McCue, president of the Lakewood Trust Company; Mr. Charles J. Parmentier, trust officer representing the Lakewood Trust Company; Mr. Amory Parmentier and Arthur R. Smock, the two appraisers; Mr. Havens, the administrator; Mrs. Havens, who owned a one-quarter interest in the estate; Mrs. Hooper, who owned a one-quarter interest in the estate; Mrs. Jane Westhall, the mother of one of the infant parties in interest; and Mrs. Bessie Westhall, the mother of two of the minors in interest.

Q. You knew did you not that the Lakewood Trust Company were the guardians of the infant children of Mrs. Jane and Mrs. Bess Westhall?

A. Yes.

Q. At whose suggestion were Mrs. Jane and Mrs. Bess Westhall invited to the conference?

A. At mine.

Q. Did you know that an appraisal of the physical assets of the undertaking business had been made prior to this conference?

A. Yes, sir.

Q. Did you suggest the appraisers?

A. I discussed the matter with Mr. Havens, yes. I would not say I suggested the appraisers.

Q. Who suggested them?

A. I do not know. I discussed it with Mr. Havens and we agreed upon those two as suitable appraisers, Mr. Parmentier having served as appraiser in the E. J. Westhall estate, and the other one, Mr. Nolan, being out of town, we agreed as to Mr. Smock.

Q. You heard Mr. Havens' testimony about the appraisers?

A. Yes, sir.

Q. When was that appraisal agreed upon?

A. I think it was the 24th of August, around the time of the application for letters of administration.

Q. You were proctor for the estate all this time?

A. I assume so. I acted as such and have continued to do so.

Q. You made no inquiry of Mr. Havens about the business nor he from you?

A. I don't understand the question.

Q. Did he make any inquiry from you as your proctor client about the undertaking business or did he make any inquiry from you prior to September 29th, 1931?

A. I still don't understand the question. In what respect?

Q. In any respect?

A. If you mean as to the disposition of it, no. As to the administration of it, yes.

Q. What inquiry did he make about the administration?

A. He was conducting the business, that was my understanding, during this period.

Q. Did you tell him anything about how or where to deposit the receipts from the business?

A. No.

Q. You knew, good lawyer that you are, that it

was his duty to deposit those funds to an administrator's account?

A. Yes.

Q. And you didn't know that he didn't do that?

A. No, sir.

Q. When did you find out that he had not deposited those funds to an administrator's account?

A. In court on the first day of the hearing. That is the first time I knew it was not deposited.

Q. When did you make up the account filed for Osborne?

A. I think it was in July, 1934.

Q. Didn't you find it out then?

A. No, sir.

Q. Didn't you ask him, "for pity's sake where is the money you took in in that business between August 13, 1931 and October 1st, 1931?"

A. No, because that was disposed of in the conference of September 29th, 1931.

Q. Disposed of. How do you mean that it was disposed of?

A. He bought the business as of August 13th, 1931, and any receipts that had been turned in between August 13, and the time he took it over belonged to him.

Q. Mac, you knew didn't you, that from August 13th to September 29th, 1931, he had been running the business for the estate?

A. Yes, sir.

Q. Didn't you know, good lawyer that you are, and I mean that literally, that that money belonged to the estate?

A. No, sir.

Mr. Matthews: I will have to take back what I said about your being a good lawyer.

Mr. Tomlinson: I object to that as scurrilous.

Mr. Matthews: No, certainly not scurrilous, not that, Mac.

Q. You did believe he was running the business for the estate until the 29th of September, 1931?

A. That is correct.

Q. But now you tell me that on the night of the 29th of September, when the discussion of the sale of the business was had, you agreed as proctor for this estate that he might keep it, the administrator who had been running the business for the estate, might keep the profits he had made while running the business for the estate and make it a part of his consideration for the business.

A. I did not agree, the parties in interest agreed.

Q. You were proctor.

A. Individually all of them agreed he should take over the business.

Q. They will testify later but you represented him as proctor for the administrator?

A. Yes.

Q. And as proctor for the administrator you allowed that situation with the knowledge I have referred to?

A. Yes.

Q. Were you Osborne W. Havens' personal counsel prior to the death of Mrs. Westhall?

A. That depends on what you mean by personal counsel. I had done some work for him, I was not

under retainer and received absolutely no compensation for work done for him in connection with this business.

Q. Mac, you drew the Shinn assignment for him.

A. Yes, sir.

Q. Did you draw that for him individually?

A. Yes, sir.

Q. When you drew that contract on the 29th of September, or were present at the terms of it being agreed upon, was it agreed that the consideration was to be paid forthwith for the purchase of the business?

A. That was my understanding and that is what I put in the contract.

Q. You know what forthwith means.

A. Yes.

Q. Did you know Mr. Havens did not pay for that business for a whole year?

A. I found it out subsequently; when I drew the bill of sale in July, 1932, I knew it.

Q. Did you know before you drew the bill of sale that he had not paid for it?

A. I knew I had never drawn a bill of sale for him before that. I did not inquire into the money transactions; I took care of the legal end.

Q. Did you know whether or not he paid for the business prior to that?

A. No.

Q. You did know in July, 1932, that he had not paid for the business?

A. Yes.

Q. And did you know that he did not pay for it then?

A. I don't know what he paid for it except what I

heard, and in the preparation of the account he gave me an entry.

Q. In July, 1932, when this bill of sale was drawn, it recited the consideration of the business, didn't it?

A. I don't understand.

Q. Didn't the bill of sale recite the consideration?

A. I think it set forth twenty-eight hundred dollars or something like that. It was the purchase price of the inventoried articles less the automobiles.

Q. I show you Exhibit A-3 and ask if you will look at the consideration clause in that agreement and see whether or not there is any consideration expressed in it.

A. $2,332.00.

Q. And that $2,332.00 represents the assets of the undertaking business exclusive of the automobiles.

A. Appraised value, yes.

Q. And in that bill of sale it says that twenty-three hundred dollars lawful money of the United States to me in hand paid at or before the ensealing of these presents.

A. That is correct.

Q. That is dated on the back July 7th and the acknowledgment is dated July 12th, is that correct?

A. No, sir.

Q. Is there any date on the front?

A. Blank day of July.

Q. No date in July on the face of the instrument, July 7th on the back, and July 12th on the acknowledgment 1932, is that correct?

A. Yes.

Q. You drew that bill of sale, did you not?

A. I directed its preparation.

Q. And at that time you knew, didn't you, that the money for the business was not paid?

A. I assumed it had not been paid. I was only proctor, I was not administrator.

Q. You heard Mr. Havens testify in this cause that you represented him personally at that conference?

A. No, I don't know that he did. I did not represent him, anyway.

Q. When did you first learn that Mr. Havens did not pay for this business until August 9th, 1932?

A. I cannot answer that.

Q. I show you a copy of the account filed by Mr. Havens with this Court and ask you does the date on the lower left-hand corner refresh your recollection as to when that account was drawn up?

A. I don't need the account, it was started in July, 1934, and finished in September and filed the end of September.

Q. What took from July until September to draw this account?

A. No special reason. We started to prepare the account immediately after the Trust Company reopened.

Q. Why did you wait until then?

A. To find out what disposition would be made of the account in the Lakewood Trust Company.

Q. Why did you wait that long to file an account?

A. To find out what would become of the Lakewood Trust Company.

Q. Did you know that Mr. Havens was bound to his bondsmen to account earlier than that?

A. Yes.

Q. Why didn't you have him account as proctor?

A. I explained that.

Q. When was the account due under the terms of his bond?

A. In one year.

Q. And that would be August, 1932?

A. Yes, sir.

Q. But he did not pay for the business until the 9th of August, 1932, according to the record, so you could not have accounted for it prior to his paying for the business, could you?

A. I assume that the date would be August 24th, 1932.

Q. So you could have, fifteen days after he paid for the business, have accounted as far as the payment for the business is concerned?

A. Yes.

Q. You did not account for it until July, 1934. I want to know why that delay?

A. I explained to you that the estate had not been administered, the money was tied up in the Lakewood Trust Company, a substantial part of it, and I felt that he should not file a final accounting until we knew what would become of that money.

Q. Why didn't you file an intermediate account?

A. I didn't, that's all.

Q. When did you find out what disposition was going to be made of the moneys in the Lakewood Trust Company?

A. When the Lakewood Trust Company reopened in 1934.

Q. You told me that you waited to have this account filed because you wanted to find out the disposition of the estate, and particularly the moneys in the Lakewood Trust Company?

A. Yes, I wanted to find out what the Lakewood Trust Company was going to do.

Q. When did you find that out?

A. In the spring of 1934, I don't recall the exact date.

Q. When you filed the account, despite the fact that you knew then that the money was not in the Lakewood Trust Company as a deposit, you have these entries, cash in bank and on hand Lakewood Trust Company savings account $19,972.71; Lakewood Trust Company checking account, $8,865.16; Lakewood Trust Company checking account, $1,519.28.

A. That was my position.

Q. What do you mean?

A. That that money was in the Lakewood Trust Company.

Q. On the day you filed the account?

A. Yes, sir.

Q. Available for distribution to the heirs?

A. No, sir.

Q. Could not you have filed that account with the same statement of money in the bank a year after the estate came into the hands of the administrator?

A. I think the estate was substantially administered within a year, yes.

Q. And you could have filed an account?

A. Except for these—yes, sir; except we would not have the appreciation of ten thousand dollars of the United Shoe Machinery stock.

Q. You would not have had it, but if the heirs had had it they would have been able to use it.

A. Yes, but if we had sold it they would not.

Q. If you had administered within the year, you would not have lost the money in the People's National Bank either.

A. I think there were dividends that accumulated after that time.

Q. On the night in question, the 29th of September, 1931, you told me you knew that the Lakewood Trust Company were guardians of the infant children, the heirs to one-half of this estate.

A. That is correct.

Q. Was there any lawyer representing the Lakewood Trust Company as guardians at that meeting?

A. No, sir.

Q. Was there any lawyer representing the two Westhall girls?

A. No, sir.

Q. Was there any lawyer there representing Mr. Havens?

A. No, sir.

Q. Was there any lawyer except yourself at that meeting?

A. No, sir.

Q. At page 66 of the testimony taken in this court on the 19th day of October, 1934, this question was asked of Mr. Havens Q. "Who was your lawyer at that conference?" and he answered "Mr. McCloskey." and the question was asked him Q. "Who was your lawyer as an individual," and he answered "Mr. McCloskey." Do you remember Mr. Havens testifying to that effect?

A. Yes, sir.

Q. You say you were not?

A. No, sir.

Q. That is correct?

A. Not any more than I represented Jane Westhall and Bessie Westhall.

Q. After all their presence was supererogatory at that conference.

A. Yes.

Q. It was to make assurance doubly sure that there would be no kick by them that you had them in.

A. I wanted them satisfied because they were the mothers of the minors.

Q. Do you think they were satisfied that night?

A. No, sir.

Q. Do you remember Jane Westhall saying to you "What about good will to this business"?

A. They all entered this discussion. I remember Mrs. Hooper saying that.

Q. Did you answer "there is no good will to this business?"

A. No, sir.

Q. Did anybody?

A. Mr. Havens did.

Q. Did you know at that time that Mr. Havens was going to buy the business when he answered so?

A. I think the conference got under way about eight o'clock, that is my best recollection, and we discussed the matter until twelve, for four hours.

Q. Did you know at the time Mrs. Hooper inquired as to the good will of the business that Mr. Havens wanted to buy it?

A. No, sir.

Q. And you know he was administrator of the estate that wanted to buy it as an individual?

A. No, he did not want to buy the business unless he could get it at his price, because he said he could move to a better location and open a business and he would not have to take this obsolete inventory that belonged to the Beatrice Westhall estate.

Q. But by the Law of 1927 you knew he could do nothing of the kind.

A. I answered that question before.

Q. Let me read to you Section 12 of the Laws of 1927, Chapter 156, providing for who shall carry on such a business. Without reading it all, "provided further that the Board may by rule or regulation permit the continuance of the business of a deceased embalmer or funeral director to whom a license shall have been issued under the provisions of this Act, under the supervision of a person duly licensed by the Board, for the benefit of the widow or of the estate, or of persons interested in the estate of decedent, for such time and in such manner as the Board shall determine."

Also in section seven of the same Law, same chapter, page 299. "No person shall engage in the business of embalming or preserving in any manner dead human bodies, unless he shall have a license as embalmer granted by the Board of Embalmers and Funeral Directors of the State of New Jersey in full force and effect and shall otherwise have complied with the provisions of this Act," and chapter 159, "Any person shall be regarded as transacting the business of embalming within the meaning of this Act who shall hold himself out as an embalmer, or engage in the business of preserving the dead human body, or who shall use in connection with his name, the word 'embalmer,' or any other title intending to imply or designate him as an embalmer, or as one engaged in the business of embalming or otherwise preserving the dead human body and any person shall be regarded as transacting the business of funeral directing who shall hold himself out as engaged in the business of directing or supervising funerals or the preparation or disposal of the dead

human body or who shall in connection with his name or business use the word 'funeral director,' 'undertaker' or any other title intending to imply or designate him as a funeral director, undertaker or one engaged in the business of preparing or disposing of the dead human body in any manner whatever." If you knew that law you knew he could not go and set up a business in any other location and he could not use his own name.

A. My answer still holds good. Nothing was mentioned about his own name. The law permits a business to be owned by a person not a licensed embalmer.

Q. But the public has to have before it the name of the licensed embalmer. I have just read that to you. Do you mean to say that Havens thought he could set up a business in someone else's name?

A. I don't know what he thought, I told you what he said.

Q. If what he said is what you said then unless he was something different from what he and you are he must have thought it ahead of time.

A. (No answer.)

Q. You at that time did not say anything about the good will of the business. Is that correct?

A. In my opinion the business had no good will but I do not recall saying that or entering the discussion.

Q. When you drew the contract subsequently you mentioned good will as part of the consideration.

A. That was a result of the conference.

Q. You allowed nothing for good will.

A. Yes, the consideration was taking care of the apartment building, managing the estate, and rent-

ing this property, which probably could not be rented otherwise unless Mr. Havens took it.

Q. Here was an asset of this estate which was producing under this man a net income of more than six thousand dollars a year, to be conservative. Under the law it might have been continued to produce that, as it did under Mrs. Westhall's ownership, and now you tell me that business was sold, the good will included, and nothing was paid for good will except the services Mr. Osborne Havens should render in taking care or janitorizing as he put it, the apartment house and the real estate of the estate. Is that your explanation?

A. That is substantially correct.

Q. You know now that the good will of this business is considerable.

A. I do not.

Q. Is it your position as proctor for this estate that the name Westhall means nothing to this estate and this business?

A. I would not say that exactly. In my opinion the Westhall business lost its good will a year before Mr. Westhall died. The business had no good will except that which belongs to Mr. Havens through his personal contacts and personal conduction of the business.

Q. Will you answer my question? Is it your position as proctor for this estate that the name Westhall means nothing to this estate and this business?

A. I have already answered that question.

Q. And it is your position that this business lost its good will a year after Mr. Westhall died?

A. I would say since the year before he died.

Q. The name Westhall means nothing?

A. No, in itself I do not think so.

Q. You were the proctor for the estate of E. J. Westhall?

A. Yes.

Q. And Beatrice Westhall carried on the undertaking business under the estate of E. J. Westhall, did she not?

A. I don't know just how it was carried on. I know she was supposed to own the business. I considered her as owning it, I don't know what the medium of carrying it on was.

Q. You knew that the business and all of the assets of the estate were left to Mrs. Westhall?

A. Yes.

Q. And the business was not sold during Mrs. Westhall's lifetime?

A. No.

Q. At that time did the name Westhall mean nothing?

A. I don't think so, it depended on the personal contact man.

Q. Were there any bids for the business beside Mr. Havens' suggestion that he buy it at the inventory figure?

A. Not to my knowledge.

Q. Did you hear the testimony of Mr. Brown at this trial?

A. Yes, sir.

Q. Did you hear him say that he was willing to buy the business?

A. Yes, sir.

Q. And yet you did not suggest, as proctor for the estate, that a better price be obtained for the business than Havens offered.

A. No, because all the parties in interest agreed to sell the business to Mr. Havens at his price.

Q. There was no attorney present representing these people?

A. I think sometimes they make out better if there is not an attorney present.

Mr. Matthews: Yes, I think this estate might have made out better without an attorney.

Mr. Tomlinson: I move to strike out the comment of counsel.

Mr. Matthews: Suppose we take out the first part of Mac's statement that sometimes they make out better without a lawyer. I think the Prerogative Court, if this should go to them would not agree with Mac at all.

The Court: Mr. Matthews, Mr. Tomlinson, will you come to side bar.

(Conference between Court and counsel.)

Q. Mr. McCloskey, after the conference got under way that night was there any discussion about the furniture in the deceased Mrs. Westhall's home?

A. Yes, sir.

Q. And do you recall that the girls, Jane and Bess, expressed a desire to have some of the articles of furniture in their mother-in-law's home?

A. Yes.

Q. Do you recall Osborne Havens saying he did not think they could have any, that his wife should

have it, and your saying "I think the girls have been fair, if they want something it should be allowed them"?

A. There was a discussion about the furniture in the house and as you say they said they would like to have some pieces of furniture. The result of the conversation was that they were to get together in the next two or three days and make their selections.

Q. Did they ever make selections?

A. I don't know.

Q. Was there a price agreed upon for the furniture that night?

A. Yes, sir.

Q. And Mr. Havens was to buy it all?

A. No, sir.

Q. What was the price agreed upon for the furniture?

A. The inventoried value.

Q. And did Mr. Havens agree to buy it?

A. No, sir.

Q. When did he agree to buy it?

A. It was some time later. They did not take any of the articles and they did not want to have a public sale and he took it over to help the estate out to dispose of the furniture.

Q. There was nothing about the sale of the furniture put in the agreement that night, was there?

A. No, sir.

Q. Was there any discussion at the conference about the amount of business done by the estate in the undertaking business?

A. No, sir.

Q. Did Mr. Havens reveal to the assembled body

that he had done a certain amount of business between the death of Mrs. Westhall and the date of this conference?

A. No, sir.

Q. I show you Exhibit E-1, or a copy. This is a contract for the sale of the business, and I ask you to look at the ordaining part of the contract, the part essentially of the agreement, this paragraph here.

A. Yes.

Q. In number one it says that the said parties of the first, second and third part do hereby consent that Osborne W. Havens, administrator of the Estate of Beatrice E. Westhall, should sell to Osborne W. Havens, individually, the undertaking business formerly conducted by the Estate of Edmund J. Westhall, in Lakewood, New Jersey, together with the good will of said business and together with the following merchandise, stock in trade, equipment and accessories, and then it recites all of the equipment and accessories.

A. Yes.

Q. For the sum of three thousand dollars—$3,842.00, which is the inventory and appraisement value of the same as determined and filed by Amory Parmentier and Arthur Smock. That is the amount of money that was agreed to be paid for the undertaking business and good will.

A. Yes, sir.

Q. "In consideration of the sale" and so forth, "by Osborne W. Havens, administrator, to the said Osborne W. Havens, individually, the said Osborne W. Havens shall pay forthwith to the Estate of Beatrice E. Westhall, deceased, the sum of $3,842.00." Is that correct?

A. Yes.

Q. Is there anything said in that agreement about Osborne keeping the moneys he had taken in from that business from the date of Mrs. Westhall's death until the date of this contract on the first of October, 1931?

A. No, sir.

Q. And yet you tell me you did know that when he bought this business he kept for himself the moneys that he had taken in from the business.

A. That is not a contract of sale, Mr. Matthews.

Q. What is it?

A. It is a contract between the parties in interest designating Mr. Havens as agent for the management of the real estate and reciting as part of the consideration the sale of this business and the consent of these parties that he should sell it. They had no right to sell the business, that was Mr. Havens' duty, but they simply subscribed their consent to it.

Q. When do you think the sale took place?

A. Immediately, on that night.

Q. Was or was not this a contract of sale?

A. No, sir.

Q. Was it an oral sale?

A. No, sir, as far as I know there was nothing except a bill of sale from Mr. Havens to himself.

Q. That bill of sale was not issued until the following July.

A. That is correct.

Q. Do I now understand you to say as proctor for this estate that there was no sale of this business which was a sale in law as you understand it until July, 1932?

A. No, I did not say that. I said he turned over the business that evening from himself as administrator to himself, as an individual. This was not intended as a contract of sale.

Q. Whether intended or not, W. Durward McCloskey, Esquire, it is. I am interested in your slant on the law. As proctor for this estate you allowed this man until July, 1932, when in your good offices as proctor for the estate you drew a bill of sale to Mr. Havens for this business, is that correct?

A. I know he operated the business and I knew I drew the bill of sale in July, 1932.

Q. When you drew the bill of sale in July, 1932, did Mr. Havens have a lawyer?

A. No, sir.

Q. Who represented him?

A. No one.

Q. You represented him simply as administrator.

A. I prepared the bill of sale.

Q. In the bill of sale, which is Exhibit A-3, you recite the consideration as $2,332.00 and you say it is for all the goods and chattels described and mentioned in the schedule hereto annexed, and the schedule hereto annexed was for all the goods in the undertaking parlor, but there is no recital of the automobiles in the business.

A. That is right.

Q. You don't recite anywhere in the bill of sale that it is pursuant to an agreement of the administrator to sell to himself.

A. No, there was no written agreement that I know of.

Q. What was this agreement here?

A. A contract for the management of the real estate, which recites a consent for the sale of this business.

Q. And therefore a consent for him to purchase?

A. That is right.

Q. And then you say you know he had not done anything to practicalize that consent legally until July when he came in to you and you drew the contract of sale for the business.

A. I did not say that.

Q. You drew the contract of sale which sold him part of the business.

A. That contract of sale recites the physical assets that were part of the estate of Beatrice E. Westhall that are mentioned in the agreement.

Q. And those assets mentioned in that agreement E-1 are all assets of the undertaking business.

A. That is correct.

Q. These assets mentioned in A-3 are only part of the assets of the undertaking business?

A. Yes. That is correct.

Q. And you know, don't you, that it was not until December of that year that there was made a transfer of the automobiles which were fifteen hundred dollars worth of the assets of this business from the administrator to himself individually?

A. That is my recollection of the testimony.

Q. Did you know that during all that time the administrator was running these automobiles under the license numbers and insurance policies of the estate of which you were proctor?

A. No, sir.

Q. Did you make any inquiry about it?

A. No, sir.

Q. You knew that you had executed or caused to be executed no bill of sale for these automobiles and no transfer of them.

A. That is correct.

Q. When you drew that bill of sale Exhibit A-3 you knew you had only transferred part of the assets?

A. By that instrument, yes.

Q. And by what instrument did you transfer any assets prior to this one?

A. I was only the proctor not the administrator.

Q. Did you know since you drew this agreement to manage the real estate with the recital of consent to sell and purchase the business, did you know that between that date the first of October, 1931, and A-3 dated on the blank day of July, 1932, that there had been no instrument drawn by you as the proctor to effectuate this sale?

A. Yes, sir.

Q. And did you know when you drew this instrument A-3 to effectuate that sale that it was only to effectuate the sale of part of the assets of the business?

A. Yes, sir.

Q. Did you cause to be prepared the instrument that transferred the automobiles?

A. No, sir.

Q. I notice the witness signature is that of your secretary.

A. Yes, sir.

Q. I notice this is a Chisholm Stationery Company blank for the bill of sale for the automobiles. Do you mean to say that that was not prepared in your office?

A. I did not say that.

Q. Or under your direction?

A. No, sir.

Q. Under whose direction then was it prepared?

A. Mr. Havens, I assume.

Q. So Mr. Havens came into your office and engaged the good offices of your secretary to draw this assignment.

A. I assume so. I knew that it was done but I don't recall that I knew when it happened.

Q. It happened on the 16th of December, 1931.

A. Yes.

Q. And this was for the transfer of some of the assets of the business he agreed to buy in September, 1931?

A. Yes.

Q. The agreement was executed when?

A. There was never any agreement that I know of.

Q. Well, the paper.

A. It was dictated by me on the 30th and I personally delivered five copies to Mr. Parmentier at the Lakewood Trust Company either the first of October or the first of the following week, and the five copies were returned to me executed by the Lakewood Trust Company, by Mrs. Jane Westhall, and Mrs. Elizabeth Westhall. The agreements were then executed by Mr. Havens and Mrs. Havens.

Q. In your office?

A. I don't know. Miss Pendle took care of the execution of the papers. On October 14th, they were mailed to Mrs. Virginia Hooper in Washington to be executed by her. Subsequently they were returned to my office, four copies executed by Mrs. Hooper,

and on October 26th, 1931, I distributed them executed.

Q. Did you send one to the Lakewood Trust Company?

A. Yes.

Q. Did you give one to Jane Westhall?

A. No.

Q. Bess Westhall?

A. No.

Q. To Jessie Havens?

A. No.

Q. And to Virginia Hooper?

A. Yes, sir, and one to the Lakewood Trust Company, there were five executed copies. I have one and you have one. I can account for two but I do not know where the other one is.

Q. Why didn't you give one to Jane or Bess?

A. I gave one to their legal representative, the Lakewood Trust Company.

Q. You think they were the legal representative?

A. They represented the wards by order of the Court.

Q. They were their guardians?

A. Yes.

Q. But they had no legal representative at that conference.

A. (No answer.)

Q. Did Mr. Halstead Wainwright pass on that agreement?

A. I don't know, sir.

Q. Did you ever consult with Mr. Halstead Wainwright about the reasonableness or the equity of that agreement?

A. No, sir.

Q. Well, between the 29th of September and the following December you had no conversation with Mr. Havens about the transfer of the assets of this estate.

A. No, sir.

Q. Outside of this agreement to buy, for which he was to pay the money stated, there was nothing more done about the transfer as far as you know until December 16th, at which time the automobiles were transferred.

A. The record would indicate that.

Q. And then you waited until July, 1932, before you transferred the assets outside of the automobiles of the undertaking business.

A. No, I think the assets were transferred to Mr. Havens on the evening of September 29th, 1931. The formal bill of sale was not executed until July, 1932.

Q. How could there be any transfer without consideration, will you tell me?

A. There could be a delivery of the articles, which was actually done.

Q. And you actually as proctor of this estate allowed these articles to be delivered to this man without any consideration paid or without any binding consideration or good and valuable consideration in the law except this agreement to buy.

A. I did not watch what he did. I was only proctor, and I am telling you what this agreement was that night.

Q. You said a minute ago you were only interested in the agreement that was to be drawn and was drawn that night. That agreement was oral you say that night, that agreement you now tell us was simply an agreement to buy on the part of the ad-

ministrator individually and an agreement to sell on the part of the administrator in his official capacity, which you say was coincided in by all those present. You say after that the assets were not transferred by any instrument until part of them were transferred in December in 1931, and the balance in July, 1932. You say further that you allowed this administrator to turn over these goods to himself with nothing more to bind him than the fact that you were his proctor and you drew the agreement to buy, and you did not know what was going on, at all; you did not even know whether he paid for them or not.

A. You have about seven questions in that. In the first place your premise is incorrect.

Mr. Matthews: Will the stenographer read the question?

(Question repeated by stenographer.)

A. I cannot answer that.

Q. You do say, do you not, that on the night of September 29th, 1931, you were interested in the fact that there was an agreement to be drawn, part of which concerned the buying of the business by Havens.

A. The consent for the sale, yes.

Q. A consent to buy and a consent to sell.

A. That is right.

Q. You say that subsequently you drew an agreement, which is Exhibit E-1 in this cause, which recited the agreement to buy and the agreement to sell.

A. I say it recited the consent of the parties in interest for the administrator to make the sale.

Q. After you drew that agreement you say the assets were turned over to Mr. Osborne Havens, from himself as administrator, you being his proctor, to himself individually, he being lawyerless as an individual.

A. I didn't say that. They were turned over as far as the parties in interest were concerned that evening.

Q. Who were the parties in interest?

A. The Lakewood Trust Company, the mothers of the infants, Mrs. Hooper, and Mrs. Havens, and Mr. Havens as the administrator.

Q. You were proctor for the administrator?

A. That is correct.

Q. And you know now that after these consents as you call them were signed, that the administrator turned the goods and chattels of the undertaking business over to himself.

A. I answer you again, no. He turned them over that night as far as I know. That was the understanding that he was to deliver immediate possession to himself as of August 13th, 1931, the date of Mrs. Westhall's death.

Q. You knew throughout that night, despite the fact that it was only a consent to buy and consent to sell, that your client the administrator was going to turn over the goods and chattels of this estate from himself as administrator to himself as an individual?

A. Yes.

Q. You knew that there was only a consent to sell and a consent to buy as of October first, 1931, as shown by E-1 in this case?

A. If you are referring to a written instrument, yes; your question embraces more.

Q. You knew when this agreement E-1 was drawn that it was only an agreement to buy and an agreement to sell or a consent to buy, as you call it, and a consent to sell, is that correct?

A. Yes, sir, as far as the business was concerned.

Q. You knew that that instrument therefore did not effectuate the sale of the business, didn't you?

A. Yes, sir.

Q. You did not do anything as proctor of this estate to advise this man to effectuate that sale until July, 1932.

A. I would not say that.

Q. When did you at any time do anything to advise this administrator to effectuate sale?

A. The sale had been effectuated that night, I assumed. As to the formal execution of the instrument and payment of the money, I had no knowledge at that time, and it was not until July, 1932, that the bill of sale was prepared.

Q. Will you tell me when you went to the trouble of preparing this agreement to buy and sell if the sale was completed why didn't you prepare the agreement to transfer the property?

A. I disagree with your premise, it was not an agreement to sell.

Q. Therefore another instrument was necessary, isn't that correct?

A. I assumed that personal property could be sold and delivered without the execution of any formal instrument.

Q. Then why did you go to the trouble of drawing this instrument when they had all agreed, hav-

ing them sign it two days afterwards, instead of drawing a bill of sale for the business?

A. This agreement referred to the appointment of Mr. Havens to manage the real estate.

Q. Could not you have drawn an agreement of that kind more easily and less complicatedly?

A. Yes, but that was a transaction between himself as administrator and himself individually to which the parties in interest agreed in writing.

Q. Isn't that all the more reason why you should not have mixed it up with another transaction of the estate?

A. You are the one that is mixing it up.

Mr. Matthews: I am unmixing it.

Mr. Tomlinson: I move to strike that out.

The Court: I will let it stay in.

Q. Isn't it also true, as my young Harvard associate suggests to me, that since this was a transaction for the sale of property over five hundred dollars that there should have been a written instrument or transfer of consideration?

A. I don't know, I refer you to the Harvard Classics.

Mr. Matthews: That is not a Harvard Classic, that is a legal elementary.

Q. Durward, you met on the 29th of September, in your office and you had an oral discussion of that

agreement which was virtually for the purpose of settling up the estate, was it not?

A. I suppose that might be termed correct, yes.

Q. All the matters of the estate which were presented at that time according to your good ideas about it were first the matter of the conduct of the undertaking business, concerning the purchase of which by the administrator you had no idea up to the time of the conference, and the second was the caring for the real estate which according to you needed janitorizing, renting service and so on. Is that correct?

A. Yes.

Q. You met that night and in the course of the discussion, you being the only lawyer present, it was determined that Mr. Osborne Havens should buy the undertaking business with the consent of everybody, according to your testimony.

A. That is correct.

Q. Not only was that true but it was agreed in addition to that that Mr. Osborne Havens would manage the real estate of the estate of Beatrice Westhall, deceased.

A. That is correct.

Q. Then you all left after there had been a unanimous agreement of the sale of the undertaking business as per the inventory which you had before you. After you had all agreed to that you left.

A. Yes.

Q. Then a day or two afterward you drew up Exhibit E-1 which is the instrument which we have been talking about, which I call an agreement of sale and you call a consent to sell and to buy.

A. Yes.

Q. In that agreement or consent you have two parts, the first part the agreement on the part of Havens to buy the business individually and an agreement upon the part of all in interest to sell it to Havens individually, and then you have a second part that Havens shall manage the real estate, and let me recite to you from the agreement just what it says. Two, on the page after the inventory. "In consideration of sale of said undertaking business, merchandise, stock in trade, equipment and accessories, by Osborne W. Havens, administrator, to Osborne W. Havens, individually—the said Osborne W. Havens shall pay forthwith to the estate of Beatrice Westhall, deceased, the sum of $3,842.00 and shall lease that part of the premises set forth in A in the recital to this agreement which has heretofore been employed in the undertaking business, consisting of the dwelling house, barn and chapel, from the heirs-at-law of the said Beatrice E. Westhall, deceased, for the term of one year from October 1st, 1931, at a yearly rental of $900.00, payable in equal monthly installments in advance and as a further consideration the said Osborne W. Havens shall supervise and manage all of the real estate of which the said Beatrice E. Westhall died seized and which is particularly set forth in the recital to this agreement. The duties, obligations and responsibilities of the said Osborne W. Havens shall include the following—then it says to exert his best effort to lease and keep them rented, collect the rent, to perform or cause to be performed the requisite janitor services for the said apartment at his own expense, and so on. You see here that it says he is required to pay the insurance, to keep and

maintain the store and apartment in good condition, to keep and maintain the dwelling house, barn and chapel, to keep and maintain the stores of the Second Street property, and to supervise in general the real estate of the said Beatrice E. Westhall estate. And then it recites that the charges shall be paid in a certain way, the gas and water charges and that he is to account to the heirs-at-law semi-annually on the first day of April and October of each year during the term of this agreement or its renewal. And then it provides for the continuation of this agreement if the parties shall so elect. And the next paragraph says that such services are to be performed in consideration of the sale of the undertaking business to him Osborne W. Havens and in further consideration of reduced rent of the premises that he is to occupy. When you dictated that did you mean a sale already completed?

A. Just what is it you want to know, I object to this omnibus question. In the first part Mr. Matthews recites something not true and then Mr. Matthews follows it up with a question I could answer.

Q. My question was based on the agreement which I have here in my hand.

A. What is it you want to know about it?

Q. In this statement is the omnibus you put in this agreement "it is further understood and agreed" and so forth "it being distinctly and expressly understood," that is in big type, " that such services are to be performed in consideration of the sale of the undertaking business to him." Did you consider when you dictated that that the business had been sold to him?

A. Yes, sir.

Q. Did you consider that this agreement was a bill of sale?

A. No, sir.

Q. Did you know that there had been no written instrument effectuating a sale?

A. I knew I had not prepared any.

Q. Did you know the transaction was for more than five hundred dollars?

A. Yes.

Q. Did you know that no cash passed either at the conference or at the signing of the agreement?

A. No, sir.

Q. You didn't know that?

A. No, sir.

Mr. Matthews: You should have.

Mr. Tomlinson: Object as entirely improper.

DEWITT MATTHEWS, a witness called by the exceptant being duly sworn according to law upon his oath testified as follows:

Direct examination.

By Mr. Crummy:

Q. Mr. Matthews, what is your business?

A. Real estate and insurance.

Q. Did you write the insurance of Beatrice E. Westhall in her life time?

A. Yes.

Q. It is stated that Beatrice E. Westhall died on August 13th, 1931. Can you tell from these records you have produced what policies were in force at that time covering the automobile liability expiring in 1932?

A. A Commercial Casualty premium $218.66.

Q. When was that written?

A. May 12th, 1931.

Q. To expire May 12th, 1932?

A. That is right.

Q. What is the next policy?

A. That is the last one we have for the estate.

Q. I refer you to the second page and ask if there were other policies written in 1931 expiring in 1932.

A. That is the Commercial Casualty.

Q. With reference to the automobile policy can you tell what the unexpired insurance was August 13th, 1931, or approximately how much it was?

Mr. Tomlinson: What do you mean?

Mr. Crummy: The cash surrender value of the policy.

A. Do you mean how much remained at that date?

Q. Yes, the unexpired insurance?

A. Around one hundred and forty-six dollars.

Q. That was at the death of Beatrice Westhall, August 13th, 1931?

A. Right.

Mr. Crummy: I offer this.

Mr. Tomlinson: I don't see why it is necessary.

Q. I show you here a paper writing and ask what that is?

A. That is an endorsement transferring the insurance from the estate of Beatrice Westhall to Osborne W. Havens, dated January 12th, 1932.

Q. That is with reference to policy No. 190166?

A. Yes.

Q. Is that the policy number you just computed the unexpired insurance on?

A. That's right.

Q. And that policy was transferred to Osborne W. Havens as of what date?

A. January 12th, 1932.

Q. Was any transfer made from the estate of Beatrice Westhall prior to that date that you know of?

A. Not that I know of.

Cross-examination.

By Mr. Tomlinson:

Q. As I understand it this policy you speak of was dated May 13th, 1931, and that would expire normally May 13th, 1932?

A. That's right.

Q. And in whose names or by whom was that policy issued?

A. It was issued to the estate of Beatrice Westhall, I think.

Mr. Matthews: Let him look at his records. I think he is mistaken about that.

A. No, it was issued to Beatrice Westhall.

Q. How many automobiles or motor vehicles does that policy cover?

A. Five.

Q. And what were the limits of liability prescribed by the policies?

A. The property damage was $5000.00 on them all. It was ten and twenty, the property damage $5000.00.

Q. And ten and twenty for personal injuries?

A. That's right.

Q. You gave Mr. Crummy the figures of $146.00 which you said represented the unexpired insurance as of August 13th, 1931, how did you compute that figure?

A. It is four months or a one-third of the year, or one-third of the $218.66 which would be the unearned premium.

Q. Suppose that policy had been surrendered August 13th, 1931, would there have been any cash surrender value?

A. Yes, $146.00.

Q. Is that the regular cash surrender value or do you arrive at that by figuring the unexpired term?

A. I pro-rated it. I could not give you the amount if it was short rated.

Q. What do you mean by short rated?

A. On three months you do not get the full unearned premium back unless the agent cancels it.

Q. You don't know how much it would have got back?

A. I could not tell, no.

(Recess till 2 P. M.)

W. DURWARD MCCLOSKEY, recalled.

Direct examination.

By Mr. Matthews (continued):

Q. You could have consummated the sale of the undertaking business by bill of sale the day after your conference on September 29th, could you not?

A. I assume any time after that date, yes.

Q. I show you Ex. A-4 which is a bill of sale for the furniture in the Beatrice Westhall home that was executed on the blank day of July and acknowledged on the twelfth day of July, the same day that Ex. A-3 for the sale of the undertaking business assets was executed.

A. Yes.

Mr. Tomlinson: July 12th, 1932?

Mr. Matthews: July 12th, 1932.

Q. Why the delay in the bill of sale for the furniture in the home until July, have you any idea? And you know, too, that was not paid until August, 1932, don't you?

A. That is the testimony I have listened to.

Q. But you did not know it at the time?

A. No, sir.

Q. And you did not make any inquiry about it?

A. No, sir.

Q. You had on the night of the conference an inventory, did you not?

A. Yes, sir.

Q. And you had prepared that in your office?

A. Yes, sir.

Q. Upon the information given to you by Messrs. Parmentier and Smock?

A. Yes, sir.

Q. And you also had in your office copies of the inventory of the estate of E. J. Westhall, did you not?

A. I think there was a copy in the file.

Q. Do you know whether you turned those over to Messrs. Parmentier and Smock before they appraised the business?

A. Not that I know of.

Q. How many copies of the inventory did you have on the night of the conference?

A. Several.

Mr. Tomlinson: You mean copies of the inventory in the Beatrice Westhall estate?

Mr. Matthews: Yes.

A. There were at least three or four copies.

Q. That had been prepared how long prior to the conference?

A. I don't know when it was prepared. It was transcribed in my office on the twenty-eighth and twenty-ninth of September.

Q. Did you make application to the Surrogate of Ocean County for the appointment of the appraisers?

A. Yes, sir.

Mr. Matthews: May I have the record from the Surrogate?

(Record produced.)

Q. The examination of the docket made by Mr. Crummy and myself previously and a check of the jacket now by the Surrogate reveals no application to the Orphans' Court for the appointment of appraisers.

A. That corresponds with my investigation.

Q. Then you did not make any application?

A. Yes, sir, but I did not find it of record in the Surrogate's office. Application was made at the time application was made for the granting of letters.

Q. Let me get that on the record, please.

A. I assume the stenographer has it.

Q. You now tell us that you made application to the Surrogate for the appointment of the appraisers?

A. Yes, sir.

Q. When did you make that application?

A. At the time of the application for letters of administration.

Q. Did the Surrogate appoint Mr. Parmentier and Mr. Smock?

A. We failed to find any copy of the appointment in the files but it is my recollection and that of the Surrogate that application was made at that time.

Q. It was only a verbal application?

A. The application was verbal and the appointment was written and signed by Mr. Havens with the consent on the bottom to be signed by the Surrogate when the letters were issued.

Q. You delivered that to the Surrogate?

A. That is my recollection.

Q. But your search and my search does not disclose any such paper?

A. (No answer.)

Q. Was it the gentleman in court, the Deputy Surrogate or the Surrogate?

A. It was Dr. Fogg, the Surrogate.

Q. Have you a duplicate copy of that?

A. No, sir, I have a duplicate appointment signed by Dr. Fogg.

Q. Don't you keep duplicate records of all these papers in your files?

A. But I cannot find this in the Surrogate's office or in my files.

Q. You prepared the final accounting and inventory, did you not?

A. I transcribed the inventory, if that is what you mean.

Q. You dictated the final accounting?

A. Yes, sir.

Q. And your secretary or stenographer took it?

A. Yes, you said the account and inventory.

Q. I mean the final account?

A. That was prepared by me.

Q. Did you prepare the New Jersey Inheritance Tax Return?

A. I did.

Q. Did you confer with Mr. Havens with reference to the preparation and filing of these papers?

A. I did.

Q. You were a director of the Lakewood Trust Company up to the time the bank closed, up to 1932?

A. Yes, sir.

Q. And you knew that the Lakewood Trust Com-

pany was guardian for the children whom we represent in this contest?

A. Yes.

Q. And they have a one-half interest in the estate of Beatrice Westhall and you always knew it?

A. Yes.

Q. Did you know of the precarious condition of the Lakewood Trust Company at any time between August, 1931, and its closing in 1932?

A. No, sir.

Q. I show you a document which I have subpoenaed which is the State Examiner's report on the condition of the Lakewood Trust Company at the close of business September 16th, 1931, and I turn to one of the pages which says—loans analysis, at the top of the left-hand corner and direct your attention to the note marked with an asterisk at the bottom which reads "as the need of liquidity is essential in these times the immediate efforts of the management should be directed toward the correcting of this precarious liquid condition." My question is based upon that, did you know about that report and what it showed?

A. No, I never saw the report.

Q. Was the report ever read at a meeting of the bank?

A. I have no recollection, although I did not attend every meeting. I don't know.

Q. I show you another book which I have in my hand and which I represent to you to be the minutes of the Lakewood Trust Company, and I point to page 151 and more particularly to the paragraph "moved and seconded that Mr. C. C. Pearce, Mr. McCloskey and Mr. Brinley be appointed an examining commit-

tee to examine the bank to January 1st, 1932, and in the event that any of the members be unable to serve that Mr. Lynch act as a substitute. Motion carried." Do you recall having been present when that resolution was passed?

A. I don't think I was. It does not seem to record me as being present.

Q. Did you ever serve on that committee?

A. Not to the best of my recollection.

Q. Did you know that you were appointed to that committee?

A. I have some recollection of that.

Q. Did the committee ever organize, to your knowledge?

A. I cannot tell you. I think the practice was to appoint the committee and have an auditor make the examination.

Q. What are the duties of an examining committee?

A. I think the practice in the Lakewood Trust Company, if I remember correctly, was to require the—the law or the regulations require an examination twice a year by the directors, but I think examination is actually performed by auditors, once by the State Examiner, and once by an auditor employed by the bank.

Q. Didn't you know from your attendance that the Board of Directors' meetings at that time that the liquidity of that bank was decreasing at the rate of about sixty thousand dollars a month?

A. I know the liquidity was decreasing, but I cannot say that.

Q. I turn now to page 159 of the minutes of the bank to a meeting which was apparently held on

the 2nd of December, 1931, and call your attention to the paragraph, "the report of the examination of the bank by the State examiners, as of September 16th, 1931, was read." You are not reported as present at that meeting, according to this record I have before me. Did you, as director, at that time or subsequent thereto, find out what that report showed?

A. I told you before I never saw a report. I knew generally from conversation with the other directors.

Q. And what did you find out generally from conversation with the other directors?

A. I knew there was a report on file.

Q. And didn't you, as a director, know what the report contained?

A. I would not say so, not without an examination of it.

Q. Didn't you, at that time, learn that the report spoke of the precarious condition of the bank?

A. No.

Q. Did your brother directors never reveal to you the fact that the bank examiners said that steps should be taken toward the correction of this precarious liquid condition?

Mr. Tomlinson: I think I ought to object because based upon a statement alleged to have been made by a person not a party to this proceeding. That report is not in evidence and it is not evidential.

Mr. Matthews: I am perfectly willing to offer it.

Mr. Tomlinson: I object to the report as being hearsay.

The Court: Repeat the question.

Q. Did your brother directors never reveal to you the fact that the bank examiners said that steps should be taken toward the correction of this precarious liquid condition?

Mr. Tomlinson: That question is based upon the premise that there was such a report and incorporates a statement alleged to have been made by somebody to the banking commission. It is not competent because it incorporates a hearsay statement relative to the condition of the bank.

Mr. Matthews: I think I showed the witness a statement by the State Bank Examiner and pointed to the statement in the report and asked if he had seen it and he said, no, and I then proceeded to ask the witness whether he knew anything about the condition of the bank and he said he had learned there was a report from his brother directors, and I asked him "didn't you as a director learn what the report contained," and he said, "No," and I said, "Did you discuss with your brother directors that a report had been made and they did not tell you that the bank was in a precarious condition." I quoted it again. If that is not competent, I don't know the meaning of competency.

Mr. Tomlinson: It is perfectly proper to ask if Mr. McCloskey saw a report relative to the bank's condition. He said he knew from conversation with his brother directors that there had been such a report and he was asked whether any of his brother

directors discussed its contents with him and he said no. That was perfectly proper. Now the question comes along in this fashion, didn't your brother directors reveal to you the contents of this report as follows. Now, that is incorporating in the question something that has not been proven, that is that the report contained what Mr. Matthews says it does. If he produces the report it would not be competent because it is mere hearsay as to the condition of the bank.

Mr. Matthews: Mr. McCloskey said they talked about the report to him. Now I am asking him, did they tell you that the report urged that the precarious condition of the bank should be taken care of?

Mr. Tomlinson: I have no objection to putting it in that form.

The Court: Put it that way.

Q. Did your brother directors inform you that the report of the Commission of Banking advised concerning the precarious condition of the bank?

A. No, sir.

Q. Let me get who your brother directors were. Charles McCue was a brother director?

A. Yes.

Q. W. H. Savage, was also a director?

A. Yes.

Q. Frank W. Sutton, Jr., George VanHise, H. G. Hagaman, Jacob Prown, C. C. Pearce, and Jasper Lynch?

A. Yes.

Q. C. J. Parmentier?

A. Yes.

Q. I show you the minutes of the bank, page 145, the meeting of September 25th, 1931, special meeting of the Board of Directors of the Lakewood Trust Company was held September 25th, 1931, and then the meeting was called at the request of the Bank Examiner, Mr. W. B. Firman, who was present and presented in general matters disclosed by the examination of the bank. Were you present at that meeting?

A. The minutes do not show it and I assume I was not.

Q. Did you ever discuss with your brother directors or any of them the purposes of that meeting?

A. I don't recall that.

Q. Did you ever discuss with your brother directors about what the bank examiner said at that meeting?

A. No.

Q. You received, of course, a notice of that meeting?

A. I don't know.

Q. So that you, despite the special meeting called to discuss the condition of the bank, despite the report made by the Bank Examiner calling the attention of the directors to the condition of the bank, you never knew anything about the precarious condition of the bank at all until its closing?

A. I never thought the bank was in a precarious condition or should have been closed. The bank was solvent when it closed and the bank had a working arrangement with all the banks in the county for a revolving fund to take care of any seepage.

Q. You think the bank was improvidently closed?

A. I think it was solvent when it closed.

Q. Today, despite its solvency under the arrangement for the payment of depositors and stockholders, is there any hope that the depositors will be paid in full?

A. I don't know. It was solvent when it closed.

Q. What produced its insolvency between then and now?

A. I don't think it was insolvent. Its funds were frozen and non-liquid.

Q. Don't you call a definition of insolvency an inability to pay one's obligations when they become due?

A. I think it was solvent and should not have been closed had not relief been withdrawn suddenly from this revolving fund that was established to take care of all the banks in the county. All the banks in the county were in no different condition.

Q. Were you a director of the Trust Company?

A. Certainly.

Q. Were you a director of any other bank?

A. I attended meetings as attorney for the People's National Bank in Lakewood.

Q. Were you present at the meeting when the bank was closed?

A. No.

Q. Did you get a notice of the meeting for the closing of the bank?

A. I had notice of the meeting but the purpose was not to close the bank.

Q. What was the purpose?

A. The purpose was to provide for the continuance of the bank, not the closing of it.

Q. I show you page 177 of the bank's minutes, a meeting held on the 14th of January, 1932. Frank Sutton offered the following resolution and moved its adoption: "Resolved, that in the opinion of the Board of Directors it is advisable in order to conserve the assets of the institution to close its doors and turn its affairs over to the Department of Banking and Insurance of the State of New Jersey, and a copy of this notice be posted on the doors of the Trust Company and the Commissioner of Banking and Insurance be notified." You were not present at that meeting?

A. No, sir.

Q. Mr. Jayne was?

A. Yes.

Q. And voted yes?

A. It is on the record.

Mr. Tomlinson: I move to strike that question and the answer.

The Court: Yes.

Q. Mr. Jayne was your partner?

A. Yes.

Q. You knew Mr. Jayne was going to that meeting?

A. I cannot say I did.

Q. Mr. Jayne was co-proctor for the estate, at that time?

A. Yes.

Q. In fact, Mr. Jayne, who is now Judge of the Circuit Court, was co-proctor until when?

A. Until October 15th, 1932, I think it was. Until the time he was appointed.

Q. I take it that Judge Jayne had nothing to do with the estate?

A. No.

Q. Factually you did it all?

A. That is correct.

Q. I show you page 163 of the minutes, I note your presence according to the record, and I note a resolution which provided for a moratorium of withdrawal of funds from the bank to the extent that ninety day notice shall be given. You voted for that?

A. I did.

Q. That is January 5th, 1932?

A. Yes.

Q. At that time did you know the bank was in a precarious condition?

A. I answered that, I don't think the bank was in a precarious condition, it only developed at the meeting that night, as I understood, from what knowledge I had.

Q. What night?

A. The evening of January 13th, 1932, at the time it was closed. It only happened because the officers and directors of the Trust Company were suddenly confronted with withdrawal of relief they had expected and did not have time to get the relief necessary before the bank opened the following morning.

Q. Why did you put that ninety-day clause in the resolution?

A. To stop the hysteria of withdrawing accounts and placing money in safe deposit boxes.

Q. Then you did know on the fifth of January that the bank was in a precarious condition?

A. No. I knew there was a general seepage.

Q. Did you suggest to the administrator of the Westhall estate that he take the estate moneys out of the bank?

A. No, sir.

Q. Did he speak to you about taking them out?

A. No, sir.

Q. Did you suggest to the bank that was guardian of the minor children's one-half of thirty thousand dollars that they protect their interest to the extent of putting them in a guardian account?

A. No, sir.

Q. You made no suggestion at all to anybody?

A. No, sir.

Q. And it is suggested to me by my associate that the moneys in the Westhall estate and the children's interest in this $30,000 was not subject to the moratorium clause because it was in a checking account?

A. That is not correct, I think.

Q. $19,000 was in the savings account and $8,000 in the checking account and $1500.00 more in some other account.

A. I don't know, you have the records there.

Q. Supposing the $19,000 was in a savings account. Could not the balance have been withdrawn without any notice?

A. Yes, sir, all that was in the checking account.

Q. I understand, Mr. McCloskey, that your statement is that you are not familiar and have never seen, to the best of your recollections, the examiner's report of the condition of the Lakewood Trust

Company at the close of business on the 16th of September, 1931?

A. Your understanding is correct.

Q. Therefore, you would not know whether the examining committee had reproved the bank for failing to follow its recommendations?

A. No, I don't think the bank did object to following the recommendations.

Q. I show you a page of that report with the heading "Collateral Loan Acceptances" and I read these recommendations made by the examining committee relative to charging those in notes and so forth disclosed by the examination conducted at the close of business 8/12/1930 was not complied with. The committee recommended that items totaling $127,595.00 be charged off or that a reserve be set aside for same. The recommendation was only complied with to the extent of $61,391.54. No expression is made as to the value of the assets by the directors' committee that made the examination at the close of business 6/23/31. Did you know that the bank examiner had thus in his report commented on its failure to follow those recommendations?

Mr. Tomlinson: Object as incompetent and hearsay. There is no connection shown between this witness and the report.

The Court: I think I will sustain Mr. Tomlinson's objection.

Mr. Matthews: His objection is on the ground that it is not competent. Mr. McCloskey has been asked whether or not as a director of this bank he

remembered that the banking department had reproved the bank for its failure to follow the banking department's recommendations. He said he had no recollections and did not know it had been done. I then showed him the report and my question would be whether that refreshes his recollection.

The Court: Repeat the question.

Q. (Repeated by Stenographer.) Did you know that the bank examiner had thus in his report commented on its failure to follow those recommendations?

Mr. Tomlinson: Object, he is predicating this question on the assumption that there was such a report and the report is not in evidence.

Mr. Matthews: He said he discussed it.

Mr. Tomlinson: He said he never saw it and didn't know what was in it.

The Court: Even suppose he had seen the report and suppose the banking examiner had, as you put it, reproved the board, what is the connection between that and the point you are trying to prove right now?

Mr. Matthews: The connection is this. This gentleman is proctor for Mr. Havens, administrator of the estate, he is also a director of the Lakewood Trust Company, and exceptions in this case go to

the negligence of the proctor in not taking the funds out during the precarious time of the bank. He pushed things over on his counsel and I now question his counsel whether or not he knew the precarious condition of the bank; without intending in any way in this question to question the integrity of Mr. McCloskey. I call his attention to this report. The report itself is competent because if the Lakewood Trust Company was known by Mr. McCloskey to be in a precarious condition at that time, it was Mr. McCloskey's duty to advise his client and it was the duty of the Lakewood Trust Company as guardian to protect the interests of the children. The Lakewood Trust Company is not a party in this proceeding but they will be shortly. I do not seek to create testimony in this case for that purpose. It is very competent if Durward was a director and also the adviser or proctor for this administrator to find out whether he did know or should have known the precarious condition of the bank. I am not asking to introduce this report in evidence although I would be glad to do it, but when the previous question was asked Mr. Tomlinson said "I have no objection to the question in that form." Whether in the original form or the form he consented to makes no difference if I am now jogging his recollection from this report as to what was discussed with him in the report, unless forsooth, you hold I have not proved the report. If you want that I will have him do it.

A. The report was never discussed with me. I am familiar with the controversy that existed between

the bank and the department but that was not discussed in reference to this report or any report.

Mr. Tomlinson: I want to point out in that connection that Mr. Matthews made the statement that one of his exceptions charged the proctor Mr. McCloskey, with laxity in that in a situation where he should have known or did know of the condition of the bank he did not take proper steps. There is no such exception filed. The exception charges Mr. Havens and not Mr. McCloskey.

Mr. Matthews: We have an exception objecting to Durward's fee and we must lay before the Court what course of conduct would amount to negligence.

Mr. Tomlinson: You are cross-examining to show that his charges are unreasonable?

Mr. Matthews: No, read the Judge's decision in the Megargee case.

The Court: As I recall the Prerogative Court did not think so much of those decisions, but coming back to this particular question, I thought the basis of that objection was going to be something else. I am going to let that question stand and the answer.

Mr. Tomlinson: Before your Honor finally rules I want to state my objection in full. The question that Mr. Matthews put to Mr. McCloskey assumed that there was in evidence this report and assumed that that report said so and so. Now, since that question was based necessarily and predicated upon

something which is not in evidence I submit that it is objectionable.

Mr. Matthews: I did not assume that at all, your Honor.

The Court: I don't subscribe to that at all, Mr. Tomlinson.

Mr. Tomlinson: If Mr. McCloskey had been asked whether he saw the report, that is perfectly proper, and been asked what was in the report, there is no objection to that but when the question was put substantially in this form, "this report shows so and so did you know that," I say that is objectionable. That is putting in evidence something that has not been properly proven.

Mr. Matthews: The Judge knows I would not do that. As a matter of fact, I had to ask the question on that basis.

The Court: The objection is overruled.

Mr. Tomlinson: Your Honor will allow me an exception?

The Court: You may have an exception.

Q. Did you know that the bank examiner had thus in his report commented on the bank's failure to follow those recommendations?

A. No.

Q. Did you advise Mrs. Havens to sell the stock of the Lakewood Trust Company before it closed?

A. No.

Q. Did you talk with him at all about it?

A. No, I did not.

Q. Did you advise him to hold on to it?

A. At the meeting in my office on September 29th, 1931, the question of the disposition of the securities of the estate was discussed and it was the unanimous opinion of all present that all the securities in the estate should be held in specie because of the poor market conditions at that time.

Q. Did Jane Westhall agree to that?

A. Yes.

Q. What did she say?

A. I recall that she said it would be a shame to sell the United Shoe Machinery stock because it was ten thousand dollars less than Mrs. Westhall had taken it over from E. J. Westhall estate for.

Q. What did she say about any other stock?

A. It was discussed, it was agreed that Mr. Havens should retain the securities of the estate in specie.

Q. You also said Jane Westhall said it would be a shame to dispose of the United Shoe Machinery stock?

A. That is correct.

Q. What did Mrs. Bess Westhall say?

A. I don't recall.

Q. What did Mrs. Virginia Hooper say?

A. I don't recall any specific statement, except that one made by Mrs. Jane Westhall.

Q. What did Mrs. Jane Westhall say about good will?

A. I don't recall that she said anything in par-

ticular. I assume she did, but all I remember about that is what Mrs. Hooper said.

Q. What did Mrs. Hooper say about good will?

A. She said she thought a business conducted by her father for so many years should have some good will value.

Q. What did Mrs. Jane Westhall say about anything beside that Shoe Machinery stock?

A. About what?

Q. About anything?

A. I cannot recall, we had a four-hour discussion. I can recall some specific statements but not all of them.

Q. Can you recall any statement about good will made by Mrs. Bess Westhall?

A. They all felt they should get more money for the business, and that the business should have some good will value.

Q. You heard Mr. Osborne Havens testify all through this cause, didn't you?

A. Yes.

Q. In his testimony on the sixteenth of November, 1934, at page 263, Mr. Tomlinson, I asked him this question: "Q. Did you ask counsel whether you should hold all of the stock and securities which came into your hands as administrator in the form in which you received them or whether you should sell them?" and he answered "A. I would say that was discussed," then there was the question, "Q. When," and the answer, "As I recall, the night of the agreement."

"Q. Did counsel tell you to sell them or not?

"A. Counsel told me to hold them. That is my best recollection on that. It is three years ago."

Q. Did you tell him to hold them?

A. No, all the parties in interest directed him to hold them.

Q. I just read that counsel told me to hold them. Did you?

A. If you want to know just what happened—after we had come to the conclusion on the disposition of the business and the real estate, I said to them, "You are all assembled here, there is another matter that should be decided by you people. There are certain securities that were owned by Mr. Westhall and transferred as such to Mrs. Westhall. The question arises whether you want the administrator to dispose of those securities or whether you wish them held and disposed of as part of the distributive share." That was discussed briefly and remarks made by some, of which I have mentioned one or two, and they all agreed that the securities should be retained by the administrator and distributed as such as part of the distributive share.

Q. There was no writing of that?

A. No.

Q. There was no mention in E-1 of that?

A. No, sir.

Q. You are familiar with section 28 of the Executors and Administrators Act of the State of New Jersey with reference to the sale or retention of securities as investments. It is not fair to ask you that way, I would not be familiar myself without looking it up. I show you this book.

A. Yes.

Q. Under that section the administrator has the right to apply to the Court for instructions with

reference to the holding or sale of investments and he is protected if he does thus apply?

A. That is right.

Q. You made no application for him?

A. No, sir.

Q. And yet you say because all the people gathered together at the meeting on September 29th, 1931, agreed that the investments should be held you took that agreement as binding upon the administrator and upon you as his proctor until you filed the account in September, 1934?

A. That is correct. We followed the same procedure that we did in the E. J. Westhall estate.

Q. Except that in the E. J. Westhall estate you filed the accounting and filed depreciation and charged yourself with it?

A. Yes.

Q. In this you did nothing of the kind?

A. No.

Q. And where there are infant heirs that section I read to you applies with greater force.

A. There is no question about that, any agreement is not binding on the infants.

Q. Did you ever notify Halstead Wainright to be present at that meeting, September 29th, 1931?

A. No, sir.

Q. You knew, did you not, at the time of the filing of the final account that the National Public Service Company had gone bankrupt?

A. Yes.

Q. You set it up in full value in your final accounting?

A. Yes.

Q. Why did you do that?

A. I understood that was the only way it could be done, there not being any conversion and there being no market value there is an unliquidated claim against the bankrupt estate, and it is my understanding of the law that those assets should be carried at inventory value until there is actual conversion.

Q. Did you file any claim against the National Public Service Company?

A. No, sir.

Q. Did you know their affairs are wound up?

A. No.

Q. Didn't you know that when you filed the account?

A. No.

Q. Did you make any investigation to find out?

A. No.

Q. Why didn't you write off depreciation in this accounting as you did in Mr. E. J. Westhall's, they were the same securities?

A. I explained, it is my understanding of the law that until there is an actual conversion those securities should be carried at inventory value.

Q. In the E. J. Westhall accounting you wrote off depreciation.

A. Yes.

Q. Why didn't you do it in the Beatrice Westhall estate?

A. I have explained twice.

Q. Will you explain again, please?

A. As I have told you before there had been no conversion in these securities and there was no market value and it was my understanding of the law that those assets should be carried at the inven-

tory value until there was actual conversion into cash.

Q. And that's the only reason why you did it?

A. Correct.

Q. Where did you find that in the law, will you tell me?

A. That is my understanding of the law.

Q. I show you the final accounting that you prepared, I believe in the estate of E. J. Westhall, and point to one of the pages, which is the continuation of the account, and ask you if in that account you show a depreciation on 427 shares United Shoe Machinery Corporation stock, mentioning the shares and numbers, of $2,989.00.

A. That is correct.

Q. Did you give Mr. Havens any advice with reference to estate matters at all?

A. Yes, sir.

Q. In what particular items did you advise him?

A. He conferred with me continuously.

Q. What one item did you advise him about?

A. All the routine work of the estate. I transcribed the inventory and appraisement, prepared the inheritance tax return, and I brought foreclosure proceeding to collect a mortgage.

Q. You were paid for that?

A. I received the taxed costs, I think. It may have included a fee.

Q. What else did you do, Mac?

A. I should be glad to submit an itemized statement of my services at the proper time, but I cannot tell you without reference to my books.

Q. Can you tell me any services you did besides preparing the account, the inventory, and foreclosing the mortgage, for which you were paid?

A. I would say, yes. I was in conference with him continuously.

Q. About what?

A. Without reference to my books I cannot tell you.

Q. You were not in conference with him much between the 13th of August, 1931, and the 29th of September, 1931.

A. I cannot tell you how many times I saw or conferred with him without reference to my books.

Q. Was there anything to confer about except the sale of the business?

A. I assume there were various matters in the estate that required attention.

Q. What one, Mac?

A. I cannot recall.

Q. Between the 29th of September, 1931, and the 9th of August, 1932, did you confer with Mr. Havens frequently?

A. I cannot tell you without reference to my books.

Q. Certainly you did not find out from him during that time that he had not paid for the business?

A. No.

Q. You didn't ask him about that?

A. No.

Q. You didn't ask to see his books of account?

A. No.

Q. He didn't ask you any questions about investments or about paying for the business?

A. No.

Q. What could possibly be an item of services that you could render to that man in that estate, as you know it, between the 29th of September and August 9th, 1932, when he paid his money for the business?

A. Well, there was some $16,000.00 worth of accounts receivable.

Q. Did you collect them for him?

A. I don't know that I brought any suits. I would not want to say offhand, but I don't recall any.

Q. What did you do with the accounts receivable?

A. I advised him what to do. I think he did bring some small cause suits.

Q. Did you know the transactions concerning the Hannon mortgage?

A. Yes.

Q. Did you draw the papers?

A. Yes.

Q. You represented him individually and as proctor?

A. I represented him in drawing the papers and in recording them.

Q. And that was a transaction between himself as proctor and between himself individually?

A. He paid that debt due the estate himself.

Q. That is what he told us.

A. He told you the truth.

Q. Did you represent him as proctor individually at that time?

A. I suppose I did.

Q. Did you advise him to execute that transaction?

A. As far as the estate was concerned I did, as far as he was individually concerned I think he made a bum deal.

Q. You did advise him as far as the estate was concerned?

A. I was interested in collecting all the money we could for the estate.

Q. Did you know that when he got the money he put it in an envelope and put it in a safe deposit box?

A. No.

Q. Did you advise him about the Matthews' mortgage?

A. I remember conferring with him several times about that.

Q. Did you execute the cancellation of the Matthews' mortgage?

A. I presume my office did.

Q. Was the money passed while you or your office were present?

A. No, sir.

Q. Did you know that he put that money in a tin box too?

A. Not at the time.

Q. When did you first find that out?

A. In your office.

Q. Since then you have not advised him to keep the money in a safe deposit box, have you?

A. No.

Q. He has kept it there despite your advice?

A. I have not advised him.

Q. What other advice do you think you gave Osborne at any time prior to the time you filed this accounting?

A. I do not know specifically, that I can tell you. I know we conferred about the payment of the mortgage on Mrs. Bessie Westhall's property.

Q. That was the payment of the money that was due from the Edmund Westhall estate?

A. That is right. I know there were a number of conferences with Mr. Havens in connection with the Inheritance Tax return and I obtained the appraisement of the Rice property.

Q. Now speaking for a moment about that Inheritance Tax return, you prepared that, didn't you?

A. I did.

Q. And the accounts receivable in that Inheritance Tax return were put in as $16,000.00?

A. That is right, approximately.

Q. Did you prepare Mr. Havens' personal income tax return?

A. No, sir.

Q. Did you take the affidavit to it?

A. I don't know.

Q. Did Mr. Havens tell you that in his personal income tax return he wrote off fifty-eight hundred dollars of what you put down in the Inheritance Tax return?

A. I don't know whether he did or not.

Q. You said the first time you knew of this box money deposit was when you and I were in conference in my office. You prepared this report starting back in July, that is the final accounting.

A. That is right.

Q. At that time you prepared the cash on hand item of $2,723.78.

A. That's right.

Q. Do you know where that cash on hand was?

A. No.

Q. Did you ever look at his books to see?

A. No.

Q. He didn't tell you?

A. No.

Q. He didn't tell you it was in a box?

A. No.

Q. Did you ever ask to see his bank account?

A. No.

Q. Did you ever investigate to see if that was true or not?

A. No, sir.

Q. You took his word for it?

A. (No answer.)

Q. Did you ask him where the money was?

A. No, sir.

Q. Prior to your preparing the final accounting and specifically on the 20th of March, 1934, Mr. Havens paid you $1000.00 on account, without any authorization from the Court, is that correct?

A. That is correct.

Q. You know, do you not, under the laws of the State of New Jersey and the rules of the Court that you are supposed to apply to the Court for an allowance?

A. Not necessarily.

Q. Can you get them without applying to the Court down here?

A. Yes.

Q. Where there are infants in the estate?

A. I did, I got it.

Q. At that time you did not file any affidavit of services rendered or anything of that kind?

A. No, sir.

Q. You rendered no bill to the estate?

A. No, sir.

Q. And in your final accounting you simply set it up as a payment on account?

A. That is right.

Q. Will you tell me who authorized that payment?

A. Nobody.

Q. I thought you told me the Judge did.

A. No.

Q. Did you apply to the Court at all?

A. No.

Q. There is no voucher in the estate for your services, you did not file any, did you?

A. No, sir.

Q. Why not?

A. I intended to make application for the allowance of counsel fee and proctor's fee at the final accounting and ask for credit for the amounts that had been advanced me.

Q. Did you make that application, Mac?

A. Not yet.

Q. Let me call your attention, Mac, to the rules of the Orphans' Court, edition of 1931, section 4, settlement of accounts, paragraph 17, vouchers to be lodged with Surrogate. "Executors, administrators, guardians and trustees who have noticed their accounts for settlement shall lodge with the Surrogate the vouchers and receipts for payments and disbursements claimed therein, at least twenty days previous to the day on which said account is noticed for settlement, which said vouchers shall be open to the inspection of all interested persons. The Surrogate shall not report any account to the Orphans' Court for allowance and settlement unless the said vouchers and receipts have been lodged with him in compliance with this rule." You are familiar with that rule, aren't you?

A. Yes, sir.

Q. I call your attention to Section 18. Notice of Settlement of accounts to be mailed. "In addition to the posting and publication of notices of settlement of the accounts of executors, administrators, guardians and trustees prescribed by law, one

month's notice of the settlement of all accounts, of executors, administrators, guardians and trustees, together with a statement as to whether counsel fees and commissions will be applied for by said accountant on the allowance of said account by the Court, shall be given by said accountant to all persons interested therein, which notice may be sent by mail with the postage thereon prepaid.'' You are familiar with that too?

A. Yes, sir.

Q. Is the stock of the Lakewood Trust Company worth anything today?

A. I don't know.

Q. You set it up in the final account as worth its value.

A. Yes, sir.

Q. You talked about conferring with Mr. Havens about the Rice property and that is in the final account as $7700.00, and in the State Inheritance Tax return it is valued at $3500.00. Why is that discrepancy?

A. No mortgage—first it was represented by a mortgage which had been taken by E. J. Westhall on the Rice property on Fifth Street, that had been reduced to $7500.00 or something like that at the time of Mrs. Westhall's death. That was the face amount of the indebtedness and was carried in the inventory and appraised by the appraisers at the face amount of the mortgage. When the Inheritance Tax return was prepared I felt that the property because of the present conditions would not bring the face value of the mortgage and I recommended to Mr. Havens that he obtain an appraisal by the Real Estate Board of Lakewood. The appraisal was obtained

from the Real Estate Board and was filed with the Inheritance Tax return and the appraised value fixed by the Real Estate Board was whatever is in the Inheritance Tax return.

Q. But in the final accounting filed subsequently you kept it $7700.00.

A. Yes, the mortgage was foreclosed and the property carried by the estate at the inventory value less the amount collected by the administrator.

Q. Did you handle the Shinn transaction?

A. I prepared the assignment and the agreement.

Q. You knew therefore what he was doing at that time?

A. Yes.

Q. You were his personal counsel as well as proctor.

A. I prepared the papers.

Q. You did not counsel against it?

A. No.

Q. Did you prepare the affidavit on behalf of the administrator for the services rendered by him for the estate?

A. No.

Q. You know under Orphans' Court Rule 23 you have to do that?

A. Yes, sir.

Q. Did you file your account separate and apart from your petition?

A. That is Mr. Havens' final account you mean.

Q. Were they two separate instruments?

A. Yes.

Q. Did you file them separately?

A. I don't know about that. Do you mean on separate days?

Q. Yes.

A. I don't know.

Q. I show you the account which I received from the Deputy Surrogate and I show you written in pencil "filed September 21, 1934," and underneath in ink "filed September 21, 1934," and ask if that is the account you filed with the Surrogate?

A. I think so. This is part of the Surrogate's record.

Q. Will you look and tell me when the affidavit was taken to that account?

A. The 12th day of September, 1934.

Mr. Matthews: I offer that in evidence.

The Court: If it is part of the Surrogate's file it is already in evidence.

Q. I ask you to look at the petition and I call your attention that there is also marked on the back of that in ink September 21, 1934, and I ask you to look at the affidavit date on that.

A. The 20th of September, 1934.

Q. Now, I produce before you a docket which has been produced for me by the Deputy Surrogate and ask if you find any record there in the items and proceedings of the filing of either the account or the petition?

A. No.

Q. I ask you if you see an erasure under the last typewritten line and if you can make out, as I can with my glass, the erased dates, 2/9/1934 account 6177.

A. That is apparently correct.

The Court: Let me see that.

Mr. Matthews: May I ask another question first, your Honor please.

Q. I ask you if you also find an entry 10/13/34, exceptions filed?

A. Yes.

Q. And 10/13/34 means October 13th, 1934.

A. That is right.

Q. And you tell me that both of these papers you find marked September 21, 1934, and you find no entry of them in the book?

A. No.

The Court: Let me see the account.

Mr. Matthews: There's the account and that is the petition.

(Papers handed to Court.)

Mr. Matthews: You may cross-examine.

Q. No, I forgot to ask you, under Section 19 of the Rules of the Orphans' Court, petition to be annexed to accounts, the Orp[illegible] Court requisite is that "All accounts of ex[illegible] administrators, guardians or trustees sha[illegible]ave annexed thereto a petition, which shall be addressed to the Orphans' Court, and which shall contain the names and addresses of all persons interested in said accounting," and so forth. That is a requisite of the Orphans' Court?

A. Yes.

Q. Your petition was not annexed?
A. No, it is a separate instrument.

Cross-examination.

By Mr. Tomlinson:

Q. You did in fact file a petition, did you not?
A. Yes.
Q. For the sake of the record may I ask you when you were admitted as attorney and when as counsellor?
A. I was admitted in 1918 as attorney and in 1921 as counsellor.
Q. And you have, and have had for some time, your offices in Lakewood in the Thompson Building?
A. Yes, sir.
Q. And as Mr. Matthews has suggested you were formerly the partner of Wilfred H. Jayne, Jr.
A. Correct.
Q. And upon his appointment to the Circuit Court bench you continued the practice of law alone.
A. That is correct.
Q. And you were the proctor in the E. J. Westhall estate.
A. Jayne & McCloskey.
Q. That was your f[illegible]m name?
A. Yes.
Q. And after the death o[illegible]s. Beatrice Westhall you became proctor in that estate?
A. Yes, sir.
Q. Can you tell us by consulting the records of the Surrogate if necessary when the decree to bar creditors was entered in the Beatrice Westhall estate?
A. I think it was February 25th, 1932.

(Consults Surrogate's records.)

A. February 26th, 1932.

Q. Prior to the death of Mrs. Beatrice Westhall will you tell us what your business associations had been with Mr. Osborne Havens, that is whether or not you had done much work for him?

A. Only representing him in the E. J. Westhall estate. I don't recall any transactions I performed for him prior to that.

Q. You had no retainer from him?

A. No.

Q. You simply did work for him on occasions?

A. That is correct.

Q. On those occasions you, of course, charged him a fee?

A. That is correct.

Q. Much has been said about the meeting that took place in your office on the night of September 29th, 1931. You told us, as I recall, that the various participants in that conference arrived at your office about seven-thirty.

A. I think the meeting was called for seven-thirty and everybody was there and we started at eight.

Q. This meeting took place where in your office?

A. In the library on the third floor of the building.

Q. Tell us again who attended that meeting.

A. Mr. Charles McCue and Mr. C. J. Parmentier, President and trust officer of the Trust Company, representing the Lakewood Trust Company, the guardian of the three minor children of Mrs. Jane Westhall and Mrs. Bessie Westhall, who had a one-half interest in the real estate and in the personal property; Mrs. Virginia Hooper, of Washington,

D. C., who had a quarter interest; Mrs. Jessie Havens, wife of Osborne Havens, who had a quarter interest; Mr. Havens; Mr. A. J. Parmentier, and Mr. Arthur R. Smock, who were the appraisers; Miss Pendle, my secretary, and myself.

Q. Mr. Matthews inquired of you as to whether or not Mr. Halstead Wainright was present on behalf of the Trust Company and your answer was no. You have spoken about Mr. Charles McCue who was present, what connection had he with the Lakewood Trust Company?

A. He was president.

Q. And you have spoken of Mr. C. J. Parmentier who was present, what connection had he with the Lakewood Trust Company?

A. At that time he was trust officer, secretary and treasurer.

Q. And Mr. Amory Parmentier was there.

A. Yes.

Q. What connection had he with the Lakewood Trust Company?

A. He was assistant trust officer and assistant treasurer to the best of my recollection.

Q. Did you or did you not, and when I say you I mean either you or Judge Jayne or the two of you, regularly represent the Trust Company?

A. No, we did not represent the Trust Company. We only did work occasionally.

Q. What kind of work was that?

A. Title work principally.

Q. From whom would you get your various assignments of work desired to be performed?

A. They were either all turned over to me by C. J. or Amory Parmentier.

Q. On occasions would you have conversations or receive communications from Mr. Halstead Wainright?

A. No. very seldom, I did not participate in any matters of which he had charge, it was only in the title work that was done by the bank itself that I handled.

Q. You were a director of the Lakewood Trust Company?

A. I was.

Q. Who was counsel for the Trust Company?

A. Halstead H. Wainright.

Q. I wish you would describe to us just exactly what transpired on this night in your office, everything that happened and everything that was said.

A. My best recollection is that we started about eight o'clock and I explained to them the purpose of the meeting, which was to make some arrangements for the management of the real estate and for the disposition of the undertaking business. There was a discussion which occupied, I would say, approximately four hours, in which the matter was discussed and the question of whether the business should be advertised in the New York paper was discussed and whether the business should be taken over by Mr. Havens. The inventory was examined as to the appraised value of the business equipment. It was remarked by those present that there was no provision for the good will of the business.

Q. Do you recall who made that remark?

A. It was a general discussion. I remember particularly Mrs. Hooper but I think Mrs. Jane Westhall probably made some remark about it. I know they all felt they should have more money for the

business. Mr. Havens claimed that the business did not have any good will. It was a personal service business and that any good will that existed at that time already belonged to him since he was the man in charge and had directed the work, and therefore any good will value was not part of the estate of Beatrice E. Westhall. I recall that they objected very strenuously to the value of the business without some value for the good will. I recall that Mrs. Hooper in particular stated her father having spent all his life in the business certainly the business should have some good will value.

Q. Was this before or after the suggestion was made that Mr. Havens buy the business?

A. This was in the early part of the evening. There was a general discussion, and the inventory was examined to ascertain the value of the business equipment. It was a question of whether the business should be sold for that value without some value for the good will and that was argued back and forth and Mr. Havens stated he did not want to buy it if he had to pay any more than that for it because he did not think it had any good will and was not worth any more. That was a general discussion that went back and forth during the evening and at times they discussed the property and what they should do with that. The problem that confronted the heirs most was the apartment building and the property that was occupied by the undertaking business. It was stated and discussed that the building was an old building and was in constant need of repairs and someone had to be present continuously to collect the rent and take care of the building. The advisability of employing someone was discussed, and it

was determined that that would be unsatisfactory, and the question of the sale and advertisement of the property for sale was discussed and the conclusion arrived at by all the parties present was that it would be inadvisable to even attempt to sell the real estate at that time because of market conditions. The principal item of real estate was the property on Second Street and in addition to that there was property located at Laurelton and in the Metedeconk development. Eventually, I think, it was Mr. McCue who said to Mr. Havens "What concrete proposition do you want to offer in this matter?" That was late after a thorough discussion of the matter and Mr. Havens got out pencil and paper and figured for a few minutes and then he stated he would take over the business as of the date of Mrs. Westhall's death at the inventoried and appraised value as set forth in the inventory which we had that night, and while he considered that there was no good will for the business that since they were dissatisfied and felt that the business should have a good will he would take care and manage the real estate including the apartment building for a period of one year with a privilege of an additional year without any charge, and that he would lease the property used in the undertaking business for a stated rental which I think was $900.00 a year, and that proposition was discussed whether it would be advisable to hire someone in the meantime to take care of the building and to advertise and see if they could not get a larger sum for the business, and eventually they agreed that the services in taking care of the apartment building was important to them in the preservation of that property and that it would be for the best in-

terests of all if the offer made by Mr. Havens should be accepted. So they all eventually agreed that Mr. Havens should take over the business as of August 13th, 1931, at the inventoried and appraised value as set forth in the inventory and that he should manage the real estate for a period of one year with the option of another year without any charge and should occupy the premises at a rental which I think was $900.00 a year, and the terms were taken down by Miss Pendle and the following day I dictated the agreement which is E-1.

Q. Do you know where Mrs. Hooper signed that agreement, Mr. McCloskey?

A. No, I don't. I know I sent it to Washington to her. Where she signed it I have no knowledge.

Q. I show you a carbon copy of a letter which I ask to have marked for identification (letter marked for identification Ident. F.)

Mr. Matthews: I object to any carbon copy, Mrs. Hooper is available.

The Court: It is offered only for identification.

Mr. Tomlinson: I show you this carbon copy of the letter marked Ident. F and asked if that is the letter you sent to Mrs. Hooper transmitting the instrument.

A. It is.

Q. Do you know where Mrs. Hooper is now?

A. I believe she is in Washington, D. C.

Mr. Tomlinson: I offer the letter Ident. F. in evidence.

Mr. Matthews: Object, Mrs. Hooper is available and because of her importance in this case we would be very happy to have her, but in any event you can get depositions.

Mr. Tomlinson: I make the offer and await the Court's ruling.

Mr. Matthews: Object as not proper proof.

The Court: For the time being I will sustain the objection. You may however take that up perhaps at the next session.

Mr. Tomlinson: I may say we have endeavored to get Mrs. Hooper up here and she says she will not come up.

Mr. Matthews: You can get depositions.

Mr. Tomlinson: Irrespective of the admissibility of that carbon copy in evidence, Mr. McCloskey may refresh his recollection in regard to what he did in sending that agreement to Mrs. Hooper.

Mr. Matthews: I object to Mr. McCloskey's using that to refresh his recollection.

The Court: As a matter of practice why not go ahead and question him on that?

A. I recall testifying this morning to what happened. The agreements were dictated the following day and they were prepared on either Saturday or Monday following which I think would be October

3rd. I delivered five copies to Mr. Amory Parmentier at the Lakewood Trust Company unsigned by anybody and they were subsequently returned to me signed by the Lakewood Trust Company, Mr. McCue as President, and C. J. Parmentier attested, as secretary, and by Mrs. Jane Westhall and Mrs. Bessie Westhall, and Amory Parmentier was the attesting witness. I then directed Miss Pendle to have them executed by Mr. Havens and Mrs. Havens, and October 14th I mailed the five copies to Mrs. Hooper at Washington, stating they had been signed by all the parties except her and requesting that she execute them before a witness and have him subscribe his name as attesting witness, and that she return four copies to me at my office and retain one. They were subsequently returned to me and on October 26th I sent a copy to the Lakewood Trust Company and delivered one to Mr. Havens.

Q. Going back to this conference, do you remember how many copies of the inventory and appraisement you had available?

A. I think three or four copies, I am not sure.

Q. Were they available to all members of the conference?

A. They were examined by the parties there, the appraised value of the business was examined and the appraised value of the jewelry was examined in detail, because they were going to select different articles of jewelry.

Q. Will you tell us whether or not any criticism was made or any exceptions taken to any part of the inventory and appraisal except as far as good will was concerned?

A. No, there was no criticism, except the mention of no value for good will.

Q. What, if any discussion, took place with reference to the disposal of the securities which comprised part of the estate?

A. After the other matter had been disposed of, I brought it to their attention that the assets of the Beatrice E. Westhall estate were the same as purchased by Mr. E. J. Westhall and they had been transmitted in specie to Beatrice E. Westhall and advised them that they ought to make some agreement or give some instructions to the administrator as to whether those securities should be retained as such and distributed as part of the distributive share, or whether they should be converted for the best price obtainable at that time or some future time, and the value of the securities was discussed, in particular the United States Shoe Machinery stock was mentioned and that was off about nine or ten thousand dollars at the time and all those present thought it inadvisable to attempt to dispose of any of the securities because everybody thought prosperity was right around the corner, and they should be held. That was what was stated.

Mr. Matthews: I object to that statement.

A. So they expressly agreed that the administrator should retain all of the assets and securities in the estate in the same form in which they were.

Q. Referring back to this United States Shoe Machinery stock, do you remember its market value at that time?

A. $21,000.

Q. And what is it now, if you know?

A. Approximately $31,000.

Q. So it has appreciated between the time of this conference and the present.

A. Somewhere between eight and ten thousand dollars.

Q. Mr. Matthews made some mention of whether Mr. Havens at this conference told any of those present as to how much this business had yielded since he had been running it. Will you tell us whether or not any of those present at the conference asked Mr. Havens as to how much the business had produced?

A. It was not mentioned.

Q. It was not mentioned by Mr. Havens and not by the others?

A. No.

Q. And no questions were asked about it?

A. No.

Q. Mr. Matthews asked you this morning as to your familiarity with the apartment and I think store building which comprises a part of the estate. Did you ever have occasion to go into these apartments and ascertain the condition of them?

A. No.

Q. So that you didn't know whether they needed repairs or not.

A. No.

Q. He spoke to you about this rule to limit creditors ——

Mr. Tomlinson: I will lead a little on this.

Mr. Matthews: You are entitled to, it is cross-examination.

Q. As I understand, Mr. McCloskey, the rule to limit creditors was taken out on the 25th of August, 1931, and the decree barring creditors was entered February 26th, 1932.

A. That is correct.

(Recess to January 4th, 1935 at 10 A. M.)

TESTIMONY

Toms River, N. J., January 11, 1935.

Before Hon. Russell G. Conover, Judge.

Appearances:

For the exceptants, John A. Matthews, Esq., Andrew B. Crummy, Esq.

For the accountant, W. Durward McCloskey, Esq., De Voe Tomlinson, Esq.

W. Durward McCloskey, Esq. (recalled).

Cross-examination.

By Mr. Tomlinson: (Continued.)

Q. Mr. McCloskey, you told us at the last hearing that the decree to bar creditors was entered on February 26, 1932.

A. That is correct.

Q. And how long before that was it that the Trust Company closed?

A. January 13th, 1932, or approximately a month and a half before the decree to bar creditors.

Q. If my recollection serves me correctly, you told us at the last hearing that your failure to file an account or to have Mr. Havens file an account earlier was due to the fact that you desired to see what turn the affairs of the Trust Company were going to take?

A. That is correct.

Q. And I think you also told us that as soon as the Trust Company reopened then you started in on this account.

A. That is correct.

Mr. Matthews: I don't recall any such testimony last time. I have the transcript right in front of me and I just read it over.

Mr. Tomlinson: There is, Mr. Matthews, I found it last night, and that is the basis of this question. I will find it for you if you want to take the time.

Mr. Matthews: I would like to have it found. That is news to me. I thought he testified he started this account in June.

Mr. Tomlinson: If your Honor will indulge me a moment, I will find the testimony for Mr. Matthews.

The Court: All right.

Mr. Tomlinson: I will read that part of the testimony to which I referred page 376 "Q. I show you a copy of the account filed by Mr. Havens with this Court and ask you does the date on the lower

left-hand corner refresh your recollection as to when that account was drawn up'' A. ''I don't need the account, it was started July, 1934, and finished in September and filed the end of September.'' Q. ''What took from July until September to draw this account?'' A. ''No special reason. We started to prepare the account immediately after the Trust Company reopened.''

Mr. Matthews: But there was no date of reopening, it was the Trust Company closing date in your question.

The Court: Let me have the question.

Q. (Repeated.) I think you also told us that as soon as the trust company reopened then you started in on this account.

Mr. Tomlinson: There was some testimony to that effect, your Honor. My last question refers to this testimony, and I have not yet finished it. Mr. Matthews asked this question. Q. ''Why did you wait until then?'' A. ''To find out what disposition would be made of the account in the Lakewood Trust Company.''

Mr. Matthews: You have not the date of the reopening.

Mr. Tomlinson: I will ask him again.

Q. When did the trust company reopen?
A. I don't know; I don't recall the date, it was in June or July, 1934, I think.

Mr. Tomlinson: Do you know when it reopened, Mr. Matthews? We only have a restricted basis opening.

Mr. Matthews: I don't remember beyond that.

A. The charter was issued in January, 1934, but it was not opened until June, 1934.

By Mr. Matthews:

Q. Was not the present set up arranged for in January?
A. Yes.

By Mr. Tomlinson:

Q. But the actual opening to the best of your recollection was in June?
A. Yes.

Mr. Matthews: If I recall right when they got the charter they were allowed to reopen on a restricted basis until they got deposit insurance.

Mr. Tomlinson: I confess to my ignorance of that fact.

A. That is not correct. As I said before they received their permission to reopen but did not reopen.

By Mr. Matthews:

Q. And then on a restricted basis?
A. No.

Q. Was not the set up ——

A. There is no use speculating about it. Mr. Parmentier is here and he can give you the exact dates.

Mr. Tomlinson: I am willing to withdraw Mr. McCloskey temporarily if you want to.

Mr. Matthews: It is not that important to me, I thought it might be to you.

The Court: We have the approximate dates, if it is necessary to have them exactly we will get Mr. Parmentier later.

By Mr. Tomlinson:

Q. At the last hearing, Mr. McCloskey, you were asked as to why you had not counselled Mr. Havens to pay over to the three infant beneficiaries their shares prior to the closing of the Lakewood Trust Company. Will you again tell us your reason?

A. Because the account in the Lakewood Trust Company had been opened by E. J. Westhall and passed substantially in the same amount to Mrs. Westhall and was part of her estate. The rule to bar creditors was not entered until February 26, 1932, and I did not feel that the administrator should make any distribution of funds until after the rule had been entered.

Q. Going back for a moment to the conference held in your office on the night of September 30th, you have spoken about Mrs. Jane Westhall and Mrs. Bessie Westhall attending that conference.

Mr. Matthews: Excuse me, Tom, but while you want to mean September 30th, you must say September 29th, according to your testimony.

A. That is correct, it was September 29th.

Mr. Tomlinson: That was just my faulty and defective memory and I thank you for the correction.

Mr. Matthews: You are welcome, Tom.

Q. Whenever it was that the conference was held in your office, you have spoken about Mrs. Jane Westhall and Mrs. Bessie Westhall attending at that conference. Had you ever represented them in other matters?

A. Yes.

Q. And you had known both of those ladies for some years, had you not?

A. Yes.

Q. Had Mr. Brown ever said anything to you about desiring to buy this business?

A. No, sir.

Q. Did you have anything to do with the preparation of the inventory in this case?

A. I only transcribed it.

Q. What if anything did you have to do with the appraisal?

A. Nothing.

Q. What if anything did you have to do with the assignments or with the preparation of the bills of assignments or bills of sale covering the automobiles?

A. I don't recall that I had anything directly to do with them, although I think the assignments were prepared in my office.

Q. I show you the bills of sale in question, Mr. McCloskey, marked one, two, three, four, five and ask you whether you had anything to do with the preparation of those bills of sale?

A. The executed assignment of one and the unexecuted assignment on three of them I think were prepared in my office.

Q. Have you any recollection whatsoever of dictating them or having anything to do with their preparation yourself?

A. No, sir.

Q. Referring to the so-called Shinn assignment, I show you the papers in question, Exhibit A-10, A-9, A-8, A-7, A-6, and ask you if you prepared all of those papers or any part thereof?

A. I prepared the assignment of the bond and mortgage from Elizabeth B. Shinn to Osborne W. Havens, or at least it was prepared under my direction, that is Exhibit A-7. I dictated and prepared the memorandum of agreement between Frank S. Shinn and Elizabeth B. Shinn, his wife, and Osborne W. Havens, dated October 19th, 1933, and marked Exhibit A-6.

Q. I show you Exhibit A-10, that is the assignment from Frank Shinn to Elizabeth B. Shinn and ask if you prepared that?

A. No, sir.

Q. This instrument purports to have been acknowledged before Kenneth Bennett, Master in Chancery of New Jersey. Mr. Bennett is a lawyer in Mr. Ewart's office here in Toms River, is he not?

A. Yes, sir.

Q. And you prepared neither the original mortgage nor the bond which accompanied it?

A. No, I did not.

Mr. Matthews: Are they all A-10?

Mr. Tomlinson: The mortgage is A-8, the bond is A-9, the assignment by Frank Shinn to Elizabeth Shinn is A-10, the assignment from Elizabeth B. Shinn to Osborne Havens is A-7, and the agreement is A-6.

Q. Referring to the Hannon matter, I show you bond Exhibit A-5 and mortgage which seems to be Exhibit A-5 also. You did prepare those or caused them to be prepared?

A. They were prepared in my office under my direction.

Q. Did you have any connection or anything to do with the liability insurance that was carried on any of the Westhall cars?

A. No, sir.

Q. Or with the liability insurance that Osborne Havens carried on the cars?

A. No, sir.

Q. And as a matter of fact you did not know anything about it, did you?

A. I did not.

Q. I show you Exhibit A-3 and Exhibit A-4 which are the bills of sale from Osborne W. Havens as administrator to Osborne W. Havens, individually, and ask you whether you prepared those or caused them to be prepared?

A. They were prepared in my office under my direction.

Q. When were they prepared?

A. July 7th, 1932.

Q. Both of them?

A. Yes, sir.

Q. And both of them were acknowledged before Miss Beatrice G. Pendle as notary public, were they not?

A. Yes, sir.

Q. And Miss Pendle was employed by you in your office at that time, was she not?

A. Yes, sir.

Q. Now mention has been made of the amount of insurance that was carried on the Rice property. Did you have anything to do with that, either by way of causing the insurance to be placed or by way of advising the amount of insurance to be carried?

A. Yes, Mr. Havens conferred with me concerning that.

Q. Will you tell us what the situation was in that regard?

A. As I explained before, it was originally a bond and mortgage held by E. J. Westhall, which passed from him to Beatrice Westhall and was part of her estate. The mortgage was in an approximate amount of seventy-five hundred dollars at the time of Mrs. Westhall's death. When the inheritance tax return was made I had caused an appraisal to be made by the real estate board of Lakewood, and I think they appraised the property at thirty-five hundred dollars. The appraisers however had inventoried and appraised the mortgage at its face value of seventy-five hundred dollars or seventy-

seven hundred dollars, the mortgage was foreclosed and the property was purchased by Mr. Havens as administrator for the benefit of the estate. The replacement value was probably more than the amount of the mortgage and therefore insurance was carried for the full amount of the mortgage. The market value I felt was less than that.

Q. In other words you carried that amount of insurance so as to afford ample protection?

A. That is correct.

Q. What did you have to do, if anything, with the Matthews' mortgage?

A. I had nothing to do, practically, with it. Mr. Havens conferred with me about it and we were about to start foreclosure and it was paid.

Mr. Tomlinson: That is all I have, unless, Mr. McCloskey, you have something further you desire to say.

Mr. McCloskey: I have nothing further.

Re-direct examination.

By Mr. Matthews:

Mr. Matthews: I have a few questions.

Q. You just told Mr. Tomlinson that the reason you did not counsel Mr. Havens to pay over to the three infant beneficiaries or apply to the Court, I suppose, to pay over, the reason you did not do that was because of the fact that your rule to bar creditors had not been filed?

A. It had not been entered.

Mr. Matthews: I accept your legal correction. In the matter of practice I am always, at my age very poor.

Q. You knew, however, did you not, that the debts of this estate at their very best were never more than thirty-six hundred dollars?

A. I would not want to say that. I don't know what they were. I have no personal knowledge of what the obligations were, no.

Q. Why didn't you find out?

A. We have advertised for the filing of claims and claims were filed by various people.

Q. When did you advertise?

A. August 26, 1931, I think it was.

Q. Did you find any claims that were filed in August of thirty-six hundred dollars?

A. I don't recall without examining although I think Mrs. Bessie—that is the Building Loan claim was almost that.

Q. Mrs. Elizabeth Westhall's claim was a claim of the mother of two of these heirs, wasn't it?

A. It was a mortgage indebtedness held by the Lakewood Building and Loan Association covering the premises occupied and owned by Mrs. Elizabeth Westhall.

Q. There is no question about that. How much was her mortgage?

A. I don't know.

Q. Thirty-two hundred dollars was the amount of her mortgage. Supposing, for the sake of argument, you add that to the thirty-six hundred. That would make the debts of the estate no more than sixty-eight hundred dollars.

A. I don't know without a reference to the papers. I don't know what the liabilities were. There was no obligation on the part of the administrator to distribute money, that was my position.

Q. You told me you had advised the administrator not to do what?

A. Not to distribute money until he was protected by a rule to bar creditors.

Q. Even then, the financial circumstances of the banks and the knowledge there was twenty-one thousand dollars on deposit in the Lakewood Trust Company and that there were debts, that could not exceed ten thousand dollars.

A. (No answer.)

Mr. Matthews: May I have the inheritance tax?

Q. Is there any answer?

A. I don't know what the question is.

Mr. Matthews: I will ask the stenographer to read it.

Q. (Repeated.) Even then, the financial circumstances of the banks and the knowledge there was twenty-one thousand dollars on deposit in the Lakewood Trust Company and that there were debts, that could not exceed ten thousand dollars.

A. I still don't understand the question. You premise it with the condition of the banks which destroys the question.

Q. And which you didn't know about. You didn't know anything about the condition of the banks?

A. Yes.
Q. What was it?
A. They were good.

Mr. Matthews: They must have been good.

Mr. Tomlinson: I object to the comment of counsel and move to strike.

Mr. Matthews: I will consent to it.

The Court: It may be stricken from the record.

Mr. Matthews: I will ask to have this inheritance tax return marked in evidence.

The Court: It may be marked.

(Inheritance tax return marked in evidence Exhibit E-30.)

Q. I show you, Mac, Exhibit E-30, and I turn to a page called "Schedule D" and I show you debt or claim Clinton O. Fogg "appraisers and administration expenses, estimated, $500.00; Jayne & McCloskey, counsel fees, $3500.00; Osborne W. Havens, administrator, administrator's commission $4000.-00." Commissions must not be estimated and claimed unless a final account is to be filed with the Surrogate, and then detail other debts and they are detailed down there in that fashion. The total of all the debts is $12,184.47, and, of course, your fees or your estimated fees and Mr. Havens' estimated commissions of seventy-five hundred dol-

lars would not be included in that, so that your debts according to your inheritance tax return filed were less than five thousand dollars, weren't they?

A. That's right.

Mr. Tomlinson: May I have the date of that?

Mr. Matthews: This was sworn to in May of 1932.

Q. But, of course, you had the figures for the debts long before that?

A. No, not before February, 1932.

Q. You didn't?

A. No.

Q. Wait till I show you. Did you have the "Robert Rice, opening of graves"?

A. I don't know when they were filed.

Q. You knew well that this estate had no debts, didn't you?

A. I knew it had some debts, yes.

Q. You knew they did not exceed five thousand dollars?

A. No.

Q. What did you think they were?

A. I had no definite knowledge of what they were until all the claims were filed.

Q. The rule to bar came in February, 1932, is that right?

A. Your memory is perfect.

Q. How soon before that did you know of the debts?

A. I did not know when they were filed.

Q. When they were filed they turned out to be

the five thousand dollars except your and Havens' projected fees.

A. That is approximately correct.

Q. So when you give as a reason for not advising Havens to distribute this money that was engulfed in the cataclysm of the Lakewood Trust Company, you are not serious about that, are you?

A. Yes, sir.

Q. In December, 1931, there was thirty thousand dollars in cash in that bank, the Lakewood Trust Company, belonging to the estate of Beatrice Westhall, and certainly by that time you knew that the debts were not any more than ten thousand dollars, didn't you?

A. No, I could not be positive until the time expired for the filing of the claims.

Q. You had been attorney or proctor for the estate of Mr. Westhall.

A. Yes.

Q. You had been the personal attorney for Mrs. Westhall, had you not?

A. I don't know that I did work for Mrs. Westhall.

Q. You did work for Mr. Havens who managed the business?

A. I don't recall that I did any work outside of estate work up to that time.

Q. What estate, Mr. Westhall's estate?

A. That was one.

Q. You filed the accounting for Mr. Westhall's estate, didn't you?

A. Absolutely.

Q. You took care of preparing the inventory for Mr. Westhall's estate.

A. I don't know what you mean by taking care of preparing the inventory, I transcribed it.

Q. So you were fully conversant with Mr. Westhall's estate up to the filing of the final accounting?

A. Yes, sir, you are talking about Mr. Westhall's estate.

Q. Yes.

A. I became familiar with the estate in the administration of it, I had no knowledge before.

Q. You testified before in this matter that the securities that came into the estate at the death of Mrs. Beatrice Westhall were almost identical with the securities at the death of her husband?

A. That is correct.

Q. The undertaking business that was carried on was identically the same business that Mr. Westhall had carried on?

A. Practically, yes.

Q. Osborne Havens was the same Osborne Havens who ran the business after Mr. Westhall's death and immediately after Mrs. Westhall's death?

A. Yes.

Q. Mr. Havens had been your personal client in some transactions?

A. I told you I did not recall.

Q. Let me jog your memory. Did you ever invest any of his money between the time Mrs. Westhall died and today?

A. Ever invest any of his money?

Q. Yes.

A. I don't know that I did. I don't know that he was as generous as that to ask somebody else to invest money. I don't know what you mean. If you are referring to the Shinn papers and the Hannon papers ——

Q. No, I would not be as cryptic as that with a brother attorney. I asked you did you invest any money for Mr. Havens in your own office finances or in other finances between the time Mrs. Westhall died and today?

A. I don't know what you mean by invest. I certainly never invested any money. I prepared legal papers for him.

Q. Did you have a lending company in your office?

A. Yes.

Q. What was the name of it?

A. The Jaromac Finance Company.

Q. Did you ever have any dealing with Mr. Havens with regard to that company?

A. Not that I recall.

Q. Do you recall him testifying that he invested some money in a transit company?

A. I know that is not so, because nobody invested any money in that company except Judge Jayne, Mr. Robbins, and myself.

Q. Do you recall Mr. Havens going to one of his books and saying he invested money, one thousand dollars in a company which he called a transit company?

A. I don't recall that.

Q. I will get it for you. Supposing I proceed while my associate looks it up for me.

Mr. Tomlinson: I don't recall any such testimony, and I would like to have it looked up.

Q. To come back to the question of whether or not you knew about the debts of this estate, I hold

in my hand receipts and vouchers in the matter of the estate of Beatrice Westhall and I ask you to look, if you will, as I pass through them, to see if we find any payments after 1932. I show you the first one, I show you the second one, I show you the third one, I show you the fourth one, the fifth, the sixth, the seventh, the eighth, the ninth, the tenth, the eleventh, the twelfth, the thirteenth, the fourteenth, the fifteenth, the sixteenth, the seventeenth.

A. It is marked the eighteenth. Did you skip seventeen?

Q. I will go back five and we will call it the next one and the next one and the one I skipped is Robert Rice 10-6-31.

A. It looks like 10-10 to me.

Q. But still in 1931?

A. Yes.

Q. And the next is 10-16-31?

A. Yes.

Q. And the next is 12-8-31, and the next is 12-10-31, and the next is 12-31-31, and the next is 2-25-30?

A. Yes.

Q. Dunn Applegate, four dollars, is that '32, 2-25-32, four dollars, that is carting and dray work?

A. That is right.

Q. The next is 2-25-32, Margaret Clayton, that is four dollars. Then there is 5-4-32, the People's National Bank for ten dollars, after your decree to bar.

A. Yes.

Q. Let's add these. There is 10-4, that is four in '32, that is eighteen dollars. There is one 8-11-32, the State of New Jersey, one thousand dollars, that is the inheritance tax.

A. That is correct.

Q. And there is 8-18-32, the Lakewood Building and Loan, that is after the decree to bar. Is that Bess Westhall's check?

A. That is the Lakewood Building and Loan check for her mortgage of thirty-two hundred dollars.

Q. That was after your decree to bar?

A. Yes.

Q. And there is Smock, ten dollars, 8-20-32?

A. Yes.

Q. And there is Hendrickson, ten dollars, 8-20-32, they are services in the appraisal of real estate?

A. That is right.

Q. And there is Matthews and Muller, 11-18-32, one hundred and ten dollars and thirty cents. And there is Reverend John F. Baldwin, 1-11-33, sixty dollars, after the decree to bar.

A. Yes.

Q. And Elizabeth Westhall $220.30, August 3rd, 1933, what is that?

A. That is a receipt signed by Mrs. Elizabeth Westhall for money.

Q. That money was for what?

A. An overpayment of interest to the estate, I think.

Q. Then there is a check 10-18-33, Durward McCloskey, $300.71.

A. Yes.

Q. Then there is Joe Hensler, the Sheriff, 11-9-33, $79.16.

A. Yes.

Q. Then there is W. D. McCloskey, 3-20-34, one thousand dollars.

A. That is correct.

Q. Matthews and Muller, 4-9-34, fifty-one dollars and ninety cents.

A. Yes.

Q. The last check 7-5-34, the People's National Bank for twenty-two dollars. After patiently going over all these are you still serious about your contention that you did not know what the debts of the estate were prior to your decree to bar?

A. I am not a mind reader and I could not tell definitely what the claims would be until the time expired for the filing of claims.

Q. There was no intimation to you at any time that there were other claims than those filed in 1931?

A. None others were attempted to be filed.

Q. You knew about the obligations of Mrs. Westhall's estate, because you had handled the E. J. Westhall estate.

A. I drew the agreement between Mrs. Elizabeth Westhall and Mr. Westhall.

Q. So you knew all about that obligation?

A. Absolutely.

Q. So there were no debts came after the decree to bar that you had not already known before.

A. No, all the claims were filed prior to February 26, 1932.

Q. And, of course, Mr. McCloskey, if you had counselled Mr. Havens to protect these children's interest by transferring the money to a guardian's account or by disbursing it to these infant children you could have taken a release and a refunding bond and taken care of any debts that might have come up.

A. Yes, I could have applied to the Court and received an order of distribution.

Q. Now, you say you had represented Mrs. Jane and Mrs. Elizabeth Westhall in other matters before that. Do you refer to the suits which you and Mr. Jayne, now Judge Jayne, compromised by reason of the deaths of their husbands, suits against the railroad?

A. Yes, sir.

Q. Did you represent Mrs. Jane in any other matter?

A. Not that I recall.

Q. Did you represent Mrs. Elizabeth Westhall in any other matter?

A. The only thing I recall was the agreement between Mrs. Elizabeth Westhall and Mr. Westhall.

Q. You were also representing the old gentleman at that time?

A. I assume so, yes.

Q. When did you represent Mrs. Jane Westhall in the settlement that you and Mr. Jayne received from the railroad by reason of the negligent death of their husbands?

A. I don't recall the date.

Q. Do you recall whether it was before the death of Mr. E. J. Westhall?

A. Yes.

Q. How long before?

A. I would say a couple of years.

Q. Mr. E. J. Westhall died when?

A. In 1928, I think.

Q. So the only time you represented Mrs. Jane Westhall, was in 1926 in that one transaction?

A. I think that is when the deaths occurred, I don't recall when the settlement was made.

Q. And for that, of course, you were paid?

A. Yes.

Q. Now you were asked by Mr. Tomlinson, "Had Mr. Brown ever said anything to you about buying the business," and you answered "No." Did you ever say anything to Mr. Brown about buying the business?

A. No.

Q. Did Mr. Havens ever say anything to you about Mr. Brown buying the business?

A. No, sir.

Q. Now you identify the bills of sale for the automobiles and you don't remember having had anything to do with the matter except on one unexecuted assignment, is that right?

A. I think the assignments were prepared in my office, it looks so by examination of the bills of sale, but they were not accepted by the motor vehicle agency and new assignments were prepared by the motor vehicle agency.

Q. But it is true with regard to September 16th, 1931, the automobiles which were part of the undertaking business were not transferred to Mr. Havens until then?

A. That is when the assignment was made, apparently.

Q. And they were a substantial part of the assets of the undertaking business, were they not?

A. Well, I think the total price was thirty-eight hundred dollars.

Q. And they were fifteen hundred?

A. I don't know without examination of the file you have.

Q. You never inquired from Mr. Havens whether or not he had transferred the automobiles and the

insurance and therefore the liability from the estate which you were proctor for?

A. No, sir.

Q. You say you did prepare the Shinn assignment, the assignment of the bond and mortgage and the memo of agreement. This was a transaction which inured for the benefit of Havens individually as well as allegedly to the estate, was it not?

A. No, sir. It did not inure to Havens' benefit at all, no, sir.

Q. Only to the estate?

A. Correct.

Q. Who holds it now?

A. Mr. Havens.

Q. Do you recall his testimony how the estate got the money piece-meal?

A. Yes, sir.

Q. Did you know that?

A. No, sir.

Q. Did you ever tell him "Since you are doing this now, Osborne, that money must immediately be deposited, because you are liable, since you have agreed to take over the obligation you are liable for that obligation in kind or money to the estate," did you ever so advise him?

A. It was not part of the estate. The money belonged to the heirs as owners of the real estate.

Q. It was not part of the estate, you say it belonged to the heirs as owners of the real estate therefore I wonder why on this alleged 29th you considered that the Lakewood Trust Company had any right to deal with reference to the appointment of Mr. Havens with reference to the care of the real estate.

Q. They were only guardians of the personal estate for these children, were they not?

A. That is all at that time.

Q. You have been telling us all during your testimony that this conference was called in order that the matters of the estate might be considered, and you mentioned two and perhaps three, correct me if I have missed the third, you said in your testimony, let me quote you.

Mr. Tomlinson: May I have the page?

Mr. Matthews: Page 453, in the middle of the page.

Q. (continued) "The problem that confronted the heirs most was the apartment building and the property that was occupied by the undertaking business. It was stated and discussed that the building was an old building and was in constant need of repairs and someone had to be present continuously to collect the rent and take care of the building. The advisability of employing someone was discussed, and it was determined that that would be unsatisfactory, and the question of the sale and advertisement of the property for sale was discussed and the conclusion arrived at by all the parties present was that it would be inadvisable to even attempt to sell the real estate at that time because of market conditions. The principal item of real estate was the property on Second Street and in addition to that there was property located at Laurelton and in the Metedeconk development." Now, Mr. McCloskey, why did you think that the Lakewood Trust Company had any-

thing to do with that? They were the guardians of the personal estate of these children.

A. I didn't know what the order of appointment provided.

Mr. Matthews: Let me help you. Will you give me the order of appointment, Mr. Surrogate?

(Jacket produced by the Surrogate.)

Q. I produce from the jacket the Surrogate offers me three papers. The first one which I show you is called "Petition for appointment of guardian" and I ask you, did you prepare that petition or advise its preparation?

A. I think so.

Q. Will you please, Mac, look at the petition a minute, and this is a petition with reference to James Edmund Westhall, Jr. Don't you recite in paragraph three that the said James Westhall is possessed of personal property of a value as nearly as your petitioner can ascertain of fourteen thousand dollars?

A. Yes, sir.

Q. What is the date of the preparation of that?

A. April 17th, 1928.

Q. And that was a guardianship for the fourteen thousand dollars that this young man got out of the settlement for the death of his father?

A. That is correct.

Q. And then there was an order on James Edmund on the 10th of May, 1928, which I show you, committing the guardianship of the person and property of this minor to the Lakewood Trust Company.

A. Yes.

Q. Your application was for fourteen thousand dollars.

A. That is what the minor was entitled to at that time.

Q. That was your application?

A. Yes.

Q. And in the form of the Surrogate that is your order?

A. The petition prays that letters of guardianship be granted.

Q. I show you now the third paper that I hold in my hand and it is a bond, is it not?

A. Yes.

Q. A bond given by whom to whom?

A. The Lakewood Trust Company to the Ordinary of the State of New Jersey.

Q. In the sum of what?

A. Twenty-eight thousand dollars.

Q. Which is double the amount recited in the petition?

A. That is correct.

Q. And the bond was filed the 10th of May, 1928?

A. It is dated that day.

Q. And your petition is dated the 17th of April, 1928?

A. Yes, sir.

Q. And the order is dated the 10th of May, 1928?

A. Yes, sir.

Mr. Matthews: I will offer these three paper writings in evidence.

The Court: They are part of the Surrogate's record.

Mr. Matthews: Yes, sir, but I would like to have them identified on this record.

The Court: You may do so.

Mr. Matthews: The first is a petition for the appointment of a guardian, numbered on the upper part of the back 5711. It is in the matter of the guardianship of James Edmund Westhall, Jr. The second is an order appointing the guardian, with the same number at the top 5711, in the matter of the same estate. The third is a guardianship bond, the Lakewood Trust Company to the Ordinary of the State of New Jersey and the number is the same 5711.

The Court: You have them identified in the record. I think it would be better not to mark them.

A. I made the applications, you recognize the name signed on the petition.

Q. I didn't even look at it.

A. I prepared the petition but I did not sign it.

Q. (Reading from paper.) "Lakewood Trust Company by Halstead Wainright, trust officer."

A. That is right.

The Court: There were two other children were there not?

Mr. Matthews: Yes, your Honor.

The Court: And the records in each of those cases show substantially the same thing.

Mr. Matthews: I wonder, I have examined the papers and the application for guardianship of the other children, and you, Mac, may look at the other two if you wish, but I have concluded they are the same kind of matters except that the amount differs in each instance, and so I will offer the guardianship applications for the three infant heirs in evidence.

The Court: Exhibit—you have the docket number.

Mr. Matthews: 5713 is the matter of the appointment of a guardian for Edmund J. Westhall, Jr.; 5712 is for Beatrice Elizabeth Westhall, a minor; 5711 was James Edmund Westhall, Jr., a minor.

Q. All of these applications and order were made in 1928, I represent to you from having looked at the papers, and that is your recollection.

A. Yes, sir.

Q. And when this meeting was called in your office the purpose of which I have recited from your testimony given last time, or one of the purposes, did you advise that the Lakewood Trust Company had no jurisdiction about the matter of the real estate?

A. No, sir.

Q. Did you say anything about it at all?

A. No, sir.

Q. Did you consider they did?

A. I considered the Trust Company were guardians of those three minors, yes.

Q. And that they could well and legally do anything with reference to the real estate which had to be done that night and which was done?

A. I knew the Lakewood Trust Company was

guardian of the person and property of those three minors.

Q. And you believed that night they could do what they did do with reference to the real estate?

A. Yes, sir.

Q. You knew they had never put up any further bond than the one put up when they were appointed guardians for the property that had come to these children as a result of the death of their fathers?

A. That is correct.

Q. You had given no advice that the Lakewood Trust Company should increase its bonds to protect these children's interest?

A. No, sir.

Q. So you actually knew from the time of the death of Mrs. Westhall no additional bond was put up by the Lakewood Trust Company to cover all interests in the personal estate and real estate coming to these infants under the intestate estate of Mrs. Beatrice Westhall?

A. I would not say I knew they had not. I had no knowledge of their having put up any additional bond.

Q. You gave no advice to Mr. Havens or to anyone interested in the matter that it should be done?

A. I did not represent the Lakewood Trust Company.

Q. Who represented them that night?

A. They were not represented by counsel. Mr. Parmentier and Mr. McCue were there.

Q. You were proctor for the administrator?

A. Yes.

Q. And he was entering into an agreement to manage the real estate?

A. Not as administrator.

Q. But as an individual?

A. That is correct.

Q. You said nothing to the guardians' representative about whether or not there was full right in them to consent to this agreement, did you?

A. No, sir.

Q. You said nothing to them about the fact that there had been no increased bond put up?

A. No, sir.

Q. As a matter of fact, Mr. McCloskey, the proposition of managing this real estate was only incidental to the sale of the undertaking business, wasn't it?

A. No, sir.

Q. Let us look at it from this standpoint. Recalling your testimony from page 453, that I have just read to you, and recalling the agreement E-1, Mr. Havens that night agreed to manage the real estate, and in consideration of managing the real estate he was to get a reduced rental on the undertaking business building and on the residence, was he not?

A. That is the way I expressed it in the agreement. I don't know whether you would consider it a reduced rental or not. That is the amount they agreed upon and I expressed it there as a reduced rental.

Q. Which would you think as a lawyer would be the binding agreement, the one you had taken the trouble to reduce to writing or your memory different from that?

Mr. Tomlinson: Object, that is not proper. That is hardly a question for the Court. I don't see how his opinion is material to this issue.

The Court: I suppose there is something to that.

Mr. Matthews: I thought so. I would not take the time for the question otherwise. Any act of his is under scrutiny. In your Honor's opinion in the Megargee estate, even though reversed, there is a well considered line that tells what a proctor and administrator may do.

The Court: He may answer.

Mr. Tomlinson: I further object that the question is not directed to what his construction was at the time, but what his present construction is.

Mr. Matthews: His construction of that agreement E-1? Is that what you mean, E-1 at the time or E-1 now?

Mr. Tomlinson: Yes.

Mr. Matthews: I hope that he did not have any different opinion then than he has now.

Q. Mr. McCloskey, when you drew this agreement E-1 did you have any different opinion than you have now?

A. No, sir.

Q. In the agreement E-1, on page 8, a copy of which I have in my hand, number four, "It is further understood and agreed that the said Osborne W. Havens shall receive no other consideration or compensation for the performance of his services as herein required, it being distinctly and expressly under-

stood that such services are to be performed in consideration of the sale of the undertaking business to him, and in the further consideration of the reduced rent of the premises that he is to occupy and use in the undertaking business." Now, he did then get a reduced rent for those premises used in the undertaking business, did he?

A. That is the way I expressed it, what they had in mind I don't know. I drew the agreement and I considered that is what they agreed upon, and that it was a reduced rent, and any value that the good will might have. That is what I understood them to have agreed upon and that is the way I expressed it, and that is what the agreement says.

Q. What was a rent that would not have been reduced?

A. There was no discussion as to the rent. The discussion centered upon the disposition of the business and on the management of the real estate. The nine hundred dollars rental was submitted in Mr. Havens' proposition to purchase. The amount of rental of the property was not discussed, that was simply one of the terms of his offer.

Q. So Mr. Havens said, "I will pay nine hundred dollars for the rental of the home which I occupy along with my wife and family."

A. Yes.

Q. "And of the chapel which is next door."

A. Yes.

Q. "And of the undertaking garage and workroom," how many buildings is that?

A. I think there are four or five.

Q. On one of the main thoroughfares of Lakewood?

A. Yes.

Q. When Mr. Havens said nine hundred dollars did anybody say "That is not enough"?

A. I said that was not discussed, that was simply one of the terms of his offer.

Q. Will you tell me why you put in this agreement and why that was considered a reduced rental?

A. I put it in, that was my construction of their agreement, and they signed it subsequently, so that must have been the agreement.

Mr. Matthews: I move that the latter part of that be stricken out.

Q. How could you put it in as a reduced rental if nobody had discussed the amount of rental?

A. It appears there in the agreement.

Q. What appears?

A. Just what you read.

Q. How would it appear that nine hundred dollars was a reduced rental if nobody else had said what any rental would have been?

A. I told you that matter of the rental was not discussed.

Q. So paragraph four on the tenth page of E-1, regarding the reduced rental of the property occupied by the undertaking business was not agreed upon by the parties but was put in by you, is that correct?

A. I said that the rental of nine hundred dollars was one of the terms of the offer of Mr. Havens to purchase the business.

Q. But the words "in further consideration of the reduced rent of the premises that he is to occupy and

use in the undertaking business'' you say was not discussed but was put in by you, is that correct?

A. Yes, sir.

Q. In your testimony you said the advisability was discussed of employing someone ——

Mr. Matthews: That is on page 453, Tom.

Q. (Continued.) ''It was determined that that would be unsatisfactory and the question of the sale and advertisement of the property for sale was discussed and the conclusion arrived at by all the parties present was that it would be inadvisable to even attempt to sell the real estate at that time because of market conditions.'' Do you recall that?

A. Yes.

Q. Who discussed the advisability of employing someone to manage the real estate?

A. Mrs. Hooper, and Mrs. Jane Westhall and Mrs. Bessie Westhall, Mr. McCue and Mr. Parmentier.

Q. What did anyone of them say?

A. I would not attempt to quote them.

Q. Why do you say they said it if you do not remember?

A. There was a discussion concerning it.

Q. Was there any proposition of how much it would cost to have one of your real estate men here collect the rent and recommend the repairs?

A. No.

Q. The condition of the building was such that someone was necessary constantly to take care of it?

A. Yes.

Q. Was that Mr. Havens that was necessary constantly?

A. Not necessarily Mr. Havens, but somebody.

Q. As a matter of fact ever since then he has not constantly taken care of it, has he?

A. Yes.

Q. Supervised it?

A. Yes.

Q. Was there any discussion about how much it would cost to have a competent man to take care of that one apartment house?

A. Not that I recall.

Q. And yet you recite that Mr. Osborne Havens taking care of this real estate was a part consideration for the sale of the undertaking business in your agreement?

A. Yes.

Q. The property in Laurelton and Metedeconk is just vacant land, isn't it?

A. Yes.

Q. Let us see what Mr. Havens had to take care of for the estate, will you tell us?

A. Mr. Havens didn't have to take care of any real estate for the estate.

Q. For whom was he to take care of it?

A. For the heirs-at-law.

Mr. Matthews: Sometimes in my section of the country, we call that the estate. However, I accept the Toms River correction.

Mr. Tomlinson: I think that is not quite fair.

The Court: It doesn't mean much to me after all.

Q. Now, Durward, what property of the estate did

Mr. Havens have to take care of or property of the heirs as a result of the signing of this agreement E-1?

A. I think it is described in the agreement.

Q. Was it the house he lived in?

A. I think all the property is described.

Q. Answer me please?

A. That was part of the property of the estate.

Q. The garage he used for his machines for the undertaking business?

A. What is the question.

Q. What was the property that Mr. Havens had to take care of as a result of his having signed E-1, this taking care being a part consideration for the sale of the undertaking business to him?

A. The property described in the agreement.

Q. Was the house he lived in considered as part of the property he was to take care of?

A. I say the property as described in the agreement.

Mr. Matthews: So long as you won't answer I will make you answer.

Mr. Tomlinson: I think there ought to be an end to this unpardonable rudeness.

Mr. Matthews: Rudeness? Do we lawyers think we have any more right than an individual when we are upon the witness stand? Why, your Honor —

The Court: Stop, both of you. What is the next question?

Mr. Matthews: I beg your pardon, your Honor.

Q. I am now looking at Exhibit E-1 or a copy of it. Looking particularly at the second page, and at the whereas at the bottom of the page, it says "whereas the said Beatrice Westhall died seized of the following tracts of land, A. Three and a half lots situated on the north side of Second Street between Clifton and Lexington Avenues, Lakewood, New Jersey, lots number six and number seven, block number fourteen, particularly described in a deed from May Belle Westhall to Edmund J. Westhall, dated June 22nd, 1896, and recorded in the Clerk's office in the County of Ocean at Toms River, New Jersey, on October 24, 1896, in Book 225 of Deeds for said county on pages 153 and so forth." Was that part of the property that Mr. Osborne W. Havens agreed to take care of as part consideration of his purchase of the undertaking business?

A. May I examine the agreement?

(Agreement handed to witness.)

A. This agreement recites ——

Q. No, I want you to answer me.

A. It provides that Mr. Havens was to keep and maintain the dwelling house, barn, and chapel, in a clean and sanitary condition, and in as good a state of repair as the same now is, reasonable wear and tear excepted, to keep and maintain the grounds on the Second Street property in as good a condition as they now are. That is what he had to do as far as that property is concerned.

Q. Was there any other property mentioned in the agreement?

A. Yes, to exert his best effort to rent, lease, and

keep rented and lease the store and apartment building situated on the north side of Second Street, Lakewood, New Jersey.

Q. How big an apartment house is that, how many families?

A. I think there are two stores and apartments.

Q. How many stories is the building?

A. Three.

Q. And the tenants live on the second and third floors?

A. Yes.

Q. That is the residential tenants?

A. Yes.

Q. The stores, however, are on the first floor?

A. Yes.

Q. And that is the only property beside the house he lived in and the chapel next door and the garage and the work room?

A. Except the unimproved property.

Q. What did he say that night he would have to do about that?

A. I don't think that was mentioned.

Q. What would he have to do?

A. Pay the taxes. I don't know that there is anything else here. It says to supervise in general the real estate of which the said Beatrice E. Westhall died seized and to do all things requisite and necessary to keep, maintain and preserve the same for the best interest of the heirs-at-law.

Q. So that now the property that Mr. Osborne Havens was to take care of in consideration of his purchase of the undertaking business at the price he did, consisted of some unimproved lots in Laurelton and Metedeconk, of the apartment house which con-

sisted of two stores on the first floor and four families occupying two floors above, and besides that Mr. Havens had to take care of the house in which he lived and the chapel next door and the garage or barn in back which he used for the undertaking business he was buying, all of the latter being part of the undertaking establishment, that is correct, is it not?

A. That is all the improved property Mrs. Westhall died seized of as I recall.

Q. I have mentioned two in that category that are not improved, Laurelton and Metedeconk.

A. I don't recall now.

Q. Will you look at this agreement and tell me?

A. That seems to be all.

Q. So I am correct in my previous question that the improved property was the house in which Osborne Havens lived with his family and in which there is no other tenant, the chapel next door which he used in the undertaking business he was buying, the garage in which he has his automobiles, and the work room in which a part of his business is conducted and the apartment in which there are four apartments and two stores.

A. That is correct.

Q. Mr. McCloskey, you recited nine hundred dollars as the rental which Mr. Havens was to pay for the house in which he lived, the chapel next door, the garage and trimming house, if I call it correctly, and of course the grounds adjacent and pertinent thereto, isn't that correct?

A. Yes, that is correct.

Q. You are pretty familiar with rental value in Lakewood as of that time, are you not?

A. I am not an expert on rentals.

Q. Who was there that night who did know about rentals in Lakewood?

A. Mr. Smock was a real estate agent. He was there as appraiser, not in that capacity.

Q. He didn't say anything about the rental?

A. No.

Q. Nobody did?

A. The amount of rental was not discussed, it was simply one of the terms of the offer.

Q. So when Mr. Havens, the administrator, who was selling to himself individually said "I will pay nine hundred dollars for the rental of this property" nobody said anything?

A. Not to the best of my recollection.

Q. Do you know, Mr. McCloskey, from your own experience, that any reputable real estate firm will undertake the care of any property for ten percent of its rental?

A. I do not know that.

Q. You have no property of your own you have had experience from in that regard?

A. No, sir.

Q. Do you know, by any chance, what the full sum rental of this apartment building would be if it were entirely rented?

A. No, sir.

Q. It surely would not exceed five thousand dollars a year?

A. I don't know what the rental is.

Q. If the rule were to be ten percent of the rental five hundred dollars a year would be a fee for taking care of that.

Mr. Tomlinson: That would be a mere matter of arithmetic.

Q. Nobody, however, Mr. Smock, a real estate man, an appraiser for the estate, and appraiser for the undertaking business who was present at this conversation, nobody mentioned how much it would cost the infant heirs or their guardians as their portion of keeping this property up, the job which Mr. Havens took in part consideration for the purchase of the undertaking business.

A. To the best of my recollection, no.

Q. And looking again, for the nonce, at the agreement at page ten in the number "I" which requires Mr. Havens to account to the heirs semi-annually for the rent from this building in accordance with their respective interests, do you know that he has never so accounted?

A. I think he testified to that fact. I don't know it.

Q. Didn't you ever as counsel for him, as proctor for this estate, or individually, advise him to do it?

A. I don't know whether he has made an accounting or not except from what ——

Q. Did you ever advise him?

A. No, I never advised him.

Q. You knew he had not made one when this case started?

A. He testified he had not when he was on the stand.

Q. And you are inclined to believe him?

A. I believe that is true.

Q. You put that clause in the agreement?

A. Yes.

Q. Nobody else suggested that, that was yours?

A. No, sir.

Q. And you thought when you put it in there, even

though you represented Mr. Havens as proctor of the estate, you were not concerned for the future whether he accounted or not, is that it?

A. I don't understand that the estate as such has anything to do with the rents that were collected.

Q. I am very glad to hear you say that because that is the law, I am glad to think you so construe it.

Mr. Tomlinson: Move to strike out the word glad.

The Court: All right.

Mr. Matthews: I will strike the gladly out. I agree with you in that interpretation of the law.

Q. Did you not consider the time this agreement was drawn that it was an administrator in a fiduciary capacity with reference to some minor children particularly, who was dealing with himself, and selling one of the assets of the estate to himself, and as a part consideration of that sale was agreeing individually to manage the real estate of these same children, and their interest was the same in amount in real estate as in personalty. Didn't you consider that was a very, very, very serious obligation this administrator was taking on himself, since the managing of the real estate as an individual was part of the consideration for which he was taking unto himself one of the valuable assets of the estate? Didn't you think so?

A. You have so many questions in there—I will say yes, it was a serious matter, and that is why I had everybody present to consent in writing.

Q. You knew in your heart you only had Bess and Jane there for scenery?

A. They took a large part in the discussion, so scenery is hardly accurate.

Mr. Tomlinson: I object to the word scenery.

The Court: Take it out.

Q. You knew they were mere human surplusage that night?

A. That was a family affair and the family gathered and agreed what they wanted to do and I reduced it to writing and they signed it.

Q. Oh, yeah?

A. Oh, yeah.

Q. But in reducing it to writing you made yourself a member of the family to the extent of putting in that there was a reduced rental as part of the consideration for the business?

A. It was part of my legal duty to properly draw the instrument.

Q. So you did know that Havens was in a particularly fiduciary capacity when he took the duty of managing the real estate and used it as a part payment for taking over unto himself an asset of the business?

A. The trouble is you are combining two things. I knew, as a fiduciary, the contract of the sale of the business to himself would be scrutinized very closely because of his relationship, but the management of the real estate involves no fiduciary duties.

Q. But it was made in that agreement a part con-

sideration, a part of the price he paid for the business?

A. The consent to sell to himself was agreed upon by all of them and signed by all of them.

Q. Again I say to you that the caring for the real estate was a part of the consideration that he paid for this asset?

A. That is correct.

Q. And you, after that, never gave it a thought, never asked him whether he accounted for it or anything else, did you?

A. I don't recall that I had any conversation with him concerning the real estate.

(Recess to two P. M.)

HALSTEAD H. WAINRIGHT, a witness produced on behalf of the exceptant, being duly sworn according to law, upon his oath testified as follows:

Direct examination.

By Mr. Matthews:

Q. Mr. Wainright, you are a practicing attorney and counsellor at law of the State of New Jersey?

A. I am.

Q. And have been how many years?

A. Fifty-six.

Q. You were at one time counsel for the Lakewood Trust Company, were you not?

A. I was.

Q. Did you have any assistant as counsel?

A. I think in the latter part of my service as such Mr. Jayne was appointed assistant counsel, the present Circuit Court Judge.

Q. When was that, if you recall?

A. I cannot fix the date. It was after he became a member of the Board of Directors of that bank, but just the time I am unable to say.

Q. Do you think it was as late as the year 1930 or prior to that?

A. I would not like to be bound by a statement fixing the time. I am unable to do so.

Q. I have in my hands some papers that have been marked in evidence in this case, and I will refer to them so that the stenographer may put it in her notes. They are petitions for the appointment of a guardian and an order for the appointment of a guardian in the matter of the children of Elizabeth and Jane Westhall and more particularly I show you a petition for the appointment of a guardian for Beatrice Elizabeth Westhall, a minor, and I show you the signature at the bottom of the page and ask if that is your signature?

A. It is.

Q. In what capacity have you signed it?

A. As trust officer.

Q. Is there an affidavit attached to it?

A. Yes, sir, that was made in the same capacity.

Q. As trust officer?

A. Yes, sir.

Q. Did you prepare those papers?

A. I did not.

Q. Who did?

A. My recollection is that they were produced to

me by Mr. McCloskey in the office I then used in connection with my service to the trust company in the rear of the bank building.

Q. At that time was Mr. Jayne, now Judge Jayne, an assistant counsel with you at the bank?

A. It is my recollection that he was.

Q. Was Mr. McCloskey his partner at that time?

A. Yes, sir.

Q. At any time after your signature as trust officer to the applications for guardianship of these children, which I have in front of you, did you have anything to do as trust officer or as counsel with the Westhall children's estate or with the guardianship of the Westhall children?

A. No, sir.

Q. Who during that time would have any legal doings with those matters?

A. So far as my observation went during the progress of that proceedings they were conducted by Mr. McCloskey.

Mr. Matthews: Tom, you may cross-examine. Pardon me a minute.

Q. Was there ever any application to the bank during your counselship for guardianship of the children with reference to the moneys accruing to them from the estate of Beatrice Westhall, who died in 1931?

A. I have no knowledge of that.

Q. Did you have anything to do with it as a lawyer?

A. I did not.

Q. Did you ever render any legal services for the

bank to the Beatrice Westhall estate, she dying in August, 1931?

A. I did not.

Q. I understand that any legal services or any advices which the bank got with reference to the guardianship of the Westhall children after the death of Beatrice Westhall would not have been given by you?

A. Not at all.

Q. And the only other counsel was your associate, Mr. Jayne, is that correct?

A. I believe that to be true.

Q. And Mr. McCloskey was his partner?

A. Yes, sir. There were four lawyers upon that board, Judge Jayne, Mr. McCloskey, Mr. Harold Brinley, and myself.

Cross-examination.

By Mr. Tomlinson:

Q. Mr. Wainright, are you certain that at the time these three petitions were signed and executed Mr. Jayne was assistant counsel for the bank?

A. That is my impression, my best recollection.

Q. Is it not true, Mr. Wainright, or is it not the fact, rather, that Mr. Jayne was made assistant counsel in the year 1931?

A. It may be so, I am not sure about that.

Q. I show you the minutes of the meeting of the Lakewood Trust Company of January 17, 1931, and refer you to the third paragraph, wherein it is said, "Mr. W. H. Jayne, Jr., was nominated for assistant counsel, there being no other nominates the secre-

tary was instruction to cast a ballot for Mr. Jayne as assistant counsel, which he did, and Mr. Jayne was thereupon elected for the ensuing year."

A. I have no doubt of the correctness of that entry.

Mr. Matthews: May I interrupt? That is for the year 1931. They are elected every year. Won't you look for the year prior?

Mr. Tomlinson: That is the first one I found. I will look to see if there are others.

Q. You were counsel for the Lakewood Trust Company?

A. Generally, yes.

Q. That was your title?

A. Yes.

Q. And your work consisted mostly of trust work, did it not?

A. No, there was not much of that to be done, there was some.

Q. What did your work mostly consist of as counsel for the Trust Company?

A. I conducted the litigations generally of the bank, whatever there was to do in my line.

Q. As counsel, if there was any trust work to be done you would do it?

A. Yes, except in instances where the matters came to the bank through the procurement of counsel who had been engaged in matters that were brought to the bank through their procurement.

Q. Have you any knowledge or recollection of Mr. Jayne, now Judge Jayne, performing any work for the Trust Company as assistant counsel?

A. I am not able to recall anything now. Let me see. I am not able to say, Mr. Tomlinson.

Q. Mr. McCloskey was never named as counsel or assistant counsel of the Trust Company during your connection with it, was he, Mr. Wainright?

A. Never so designated to my knowledge.

Q. You say, Mr. Wainright, that these petitions were brought to you, and you signed them on behalf of the Trust Company?

A. Yes, sir.

Q. And that thereafter so far as your knowledge went, the matters were handled by Mr. McCloskey?

A. I believe they were; not by me.

Q. You don't mean to tell us, do you, that Mr. McCloskey was acting for the Trust Company in connection with these matters?

A. No, I presumed he was acting for the estate and the interests of those children whom he represented.

Q. Didn't you understand he was acting for the administrator?

Mr. Matthews: There was no administrator in that.

Mr. Tomlinson: Strike it out.

Q. In any event, you did not think Mr. McCloskey was acting for the Trust Company. I think you have already stated that.

A. No, not as trust officer.

Q. Or as counsel for the Trust Company?

A. I cannot say about that. Just what his relation was to the Trust Company in connection with those proceedings I am unable to say.

Q. The real extent to which your knowledge goes, does it not, is that these papers were brought to you to be executed by you in behalf of the Trust Company, you so executed them and thereafter the matters passed beyond your ken?

A. That is right.

Mr. Tomlinson: That is all, thank you, Mr. Wainright.

The Court: May I see those just a minute?

(Papers handed to Court.)

Re-direct examination.

By Mr. Matthews:

Q. Mr. Wainright, I show you a minute book of the bank, dated January 18th, 1930, and particularly call your attention to page 15, and ask you do I read with you there, "Mr. W. H. Jayne, Jr., was nominated for assistant counsel. There being no other nomination, the secretary was instructed to cast a ballot for Mr. Jayne as assistant counsel, which he did, and Mr. Jayne was thereupon elected for the ensuing year."

A. Yes, sir.

Q. Do you find that under that date of January 18, 1930?

A. I do.

Q. That is a year prior to when Mr. Tomlinson just inquired about?

A. Yes, sir.

Mr. Matthews: Have you the minute book, Mr. Parmentier, prior to this year's?

Mr. Parmentier: No, sir, not here.

Mr. Matthews: May I reserve the right to put on the record the date of the appointment of Mr. Jayne from the minutes of the bank?

The Court: All right.

Q. You said you were counsel except where matters were brought to the bank through the procurement of one of the lawyers, then he acted as counsel in those matters he procured for the bank?

A. That is my understanding.

Q. Who procured the Westhall matter for the bank, the guardianship of these children?

A. It came originally, I think, through the recovery by Mr. Jayne of moneys in the suit brought at the instance of the Westhall people against a railroad company for loss of life.

Q. And then when Mr. E. J. Westhall died, did the bank have anything to do with his estate?

A. I don't know about that.

Q. But at any rate the procurement of the original guardianship of these children was through the office of Mr. Jayne?

A. Yes, Jayne and McCloskey.

Q. Mr. McCloskey testified on the stand this morning that he had represented Mrs. James Westhall, who is the mother of one of these infant children, and he said he represented her in that settlement. Is it my understanding of your testimony that that

would be a matter which the firm of Jayne and McCloskey brought to the bank, and that Mr. Jayne as attorney would handle that thereafter as far as the bank was concerned?

A. I believe that to have been the fact.

Q. And when you say that Mr. McCloskey brought the exhibits, namely, the petition for the appointment of guardians to the children, and you signed them, you said you presumed he was acting for the estate and for the children that he represented?

A. Yes, sir.

Q. If the bank had any legal duty to perform or any services needing an attorney beyond that point, do I understand you right that Mr. Jayne or Mr. McCloskey or the firm of Jayne and McCloskey would handle that?

A. I believe they did.

Re-cross examination.

By Mr. Tomlinson:

Q. Were they authorized by the Trust Company to act for them?

A. How they required that relation I am not able to say.

Q. They were never paid for any such services, were they?

A. Whether they were or were not, I do not know. I have nothing to do with the payment of the bills.

Q. These moneys that were recovered from the railroad company were invested by the Trust Company for these children, were they not?

A. That I do not know.

Q. As a matter of fact, you have not much acquaintance with this matter outside of signing those papers?

A. No, sir.

Re-direct examination.

By Mr. Matthews:

Q. You know, you did not invest them?

A. I know that, sir.

Q. And you did not draw any mortgages or make any assignments of mortgage or have anything to do with the moneys involved in the guardianship of these children?

A. No, sir.

Q. And if that had to be done, it had to be done and was done by the lawyers procuring the business for the bank, which in this instance was Jayne and McCloskey?

A. Yes, sir.

Re-cross examination.

By Mr. Tomlinson:

Q. Were you trust officer of the bank at the time of the signing of those papers?

A. Undoubtedly.

Q. And if moneys were invested by the Trust Company what officer would be in charge?

A. It was done, if at all, by the action of an investment committee or the executive committee of the Board of Directors.

Q. Would not the trust officer have something to do with that?

A. He did not, in fact.

Q. You don't, as I understand it, know whether these moneys recovered from the railroad company in this matter were or were not invested by the Lakewood Trust Company for the benefit of these infants?

A. I do not, sir.

W. DURWARD MCCLOSKEY, recalled.

Direct examination.

By Mr. Matthews:

Q. The Hannon matter, you said this morning, you caused the mortgage to be prepared?

A. The bond and mortgage.

Q. That was another matter in which Mr. Havens allegedly paid the estate money which was due from another to it and took a mortgage to himself from the original debtor to the estate?

A. Yes, sir.

Q. That was one of the transactions in which he testified in this court in your hearing that he put the money in a box and did not deposit it?

A. Yes, sir.

Q. Did you know that?

A. No, sir.

Q. Were you there when the consideration passed?

A. No, sir.

Q. Who handled it for you?
A. All I did was prepare the papers. I had nothing to do with the closing.
Q. Where was the closing?
A. I don't know.
Q. Wasn't it in your office?
A. No, sir.

Mr. Matthews: That is Ex. A-5, may I have it, please?

(Paper produced.)

Q. Did you close the Matthews' transaction?
A. No, sir.
Q. What did you have to do with that, you told Mr. Tomlinson this morning something about the Matthews' transaction?
A. I stated this morning I had several conversations with Mr. Havens concerning foreclosure, but before foreclosure was accomplished it was paid. I think my office prepared the papers for the cancellation of the mortgage.
Q. And that was another transaction where he put the money in a box and not in a bank, did you have any knowledge of that?
A. No, sir.
Q. Finally with reference to this conference which you have set as of the 29th of September, do you recall when the jewelry was partitioned among the people in this case, the heirs?
A. It is my recollection that some selections were made that night, although I am not positive. It was done within a very short time after that.

Q. That night was a meeting in your office, and the jewelry, I take it, was in a vault in the bank?

A. The jewelry was not in my office, I do recall they selected certain articles.

Q. Don't you recall that on the morning after the meeting at your office there was a meeting at the bank and the jewelry was taken out and each agreed what she should take?

A. I don't know, I was not present.

Q. And don't you know as a matter of fact, that the agreement had already been prepared on the first of October, that is the agreement of sale of the business, Exhibit E-1?

A. My recollection is that I dictated it on the thirtieth and it was prepared that day and my recollection is that it was delivered to the Trust Company on the following Monday.

Q. Your recollection is that it was typed on the first?

A. It was dictated on the thirtieth and I am not positive when the typing was completed. My best recollection is that it was the following Monday morning that I delivered them to the Lakewood Trust Company.

Q. Don't you know as a matter of very fact these copies of the agreement were signed the next morning after this meeting?

A. I do not.

Mr. Matthews: I am sure that you are going to be reminded that they were.

Mr. Tomlinson: I move to strike out that statement of counsel as improper and not evidence.

The Court: I suppose that is true, Mr. Tomlinson. Strike it.

Q. What makes you recall they were not signed the very next morning?

A. Because I don't think the typing of the agreement was completed on the next day.

Q. You say Miss Pendle was there that night?

A. Yes.

Q. Where was she?

A. In the library.

Q. Your secretary was present with all your clients while this discussion was going on?

A. Yes.

Q. You cannot be mistaken about that?

A. No.

Q. And did she take notes?

A. I think so, some notes.

Q. Then what happened after that?

A. The next morning I dictated the agreement.

Q. What notes did she take?

A. I don't recall.

Q. Did she use the notes she took?

A. I think I used the memorandum she made. I had it all in mind when I dictated the following morning.

Q. What was the need of having her there at a conference with private clients?

A. She was there as my secretary to take memoranda if necessary.

Q. Have you that memorandum she made?

A. I don't know.

Q. So your recollection is that on the next morning

which would be the first of October, you dictated this agreement?

A. No, my recollection is that on the next morning, September 30th, I dictated it.

Q. And then your next act with reference to it was a week afterward?

A. No, the following Monday. That is my best recollection, I would not be certain to the day.

Q. Why do you say the following Monday?

A. Because that is my best recollection.

Q. What makes you say Monday instead of Wednesday?

A. I know I delivered it immediately to the Lakewood Trust Company.

Q. That depends upon what day the 29th of September was?

A. My recollection was that it was Thursday.

Q. But next day, Friday, you dictated it, and Saturday would be the first, you say the agreement was dated the first of October?

A. Yes.

Q. No other date was on it?

A. No.

Q. And you think Monday, the third of October, you distributed it?

A. If the 29th was on a Thursday, that would be correct.

Q. Why did you put October first on the agreement if it was dictated on the 30th and not signed until the third?

A. As a matter of fact, the signing of it was not completed until the end of October.

Q. But I am asking you—the parties agreed, you say, on the 29th of September, you dictated it on

the 30th, it was typed sometime before Monday the third, and delivered on that day. Why was the date the first of October?

A. That was selected arbitrarily, it did not make any particular difference as to the date, as I recall.

Q. It did not make any particular difference as to the date when it involved the sale of the business?

A. The business was delivered that night.

Q. Why not put in the agreement that recited the delivery the date it was delivered, the 29th of September?

A. That was only the consent to sell the business to him, this agreement was concerned primarily with the real estate.

Q. You know that said "he shall pay forthwith for the goods and chattels of the undertaking business and the good will"?

A. Yes.

Q. It was a sale, wasn't it?

A. I have explained that the sale was made that night, according to my understanding of it.

Q. Why date the agreement the 30th of September if the sale was made on the 29th?

A. The agreement had nothing to do with the sale.

Q. That sale was made on the 29th of September?

A. Yes.

Q. And it was sold, according to your understanding, it was sold as of the date of death of Mrs. Westhall, August 13th, 1931?

A. Yes.

Q. Will you tell me why it was not inserted that it was sold as of the date of death of Mrs. Westhall?

A. No date is inserted, I don't know why that was done.

Q. Is it stated it was sold as of the time of the death of Mrs. Westhall?

A. There is no date to my recollection.

Q. In other words, the written instrument is silent as to as of when the business was sold?

A. Yes, because this agreement dealt primarily with the real estate. The agreement in regard to which was part of the consideration.

Q. Would you tell me why, if it dealt primarily with the real estate, why you put in the sale of the business at all?

A. So I would have the written consent of the parties in interest.

Q. Why didn't you just have a bill of sale?

Mr. Tomlinson: Mr. Matthews has asked these precise questions a dozen times of this witness.

Mr. Matthews: I submit this is legitimate examination, with reference to the cross-examination of Mr. Tomlinson.

The Court: Go ahead.

Q. Why didn't you do it by bill of sale?

A. It was done by bill of sale, eventually.

Q. Why not now, as the Gold Medal sign says?

A. I only prepared it when Mr. Havens requested a bill of sale.

Q. In other words you, the proctor of the estate, at a meeting that night, principally called to take care of the real estate drew an instrument which pur-

ported to be an agreement on the part of all interested parties to sell and an agreement on the part of the administrator to buy one of the assets of the estate, and thereafter you did not do anything until July of the following year when you drew a bill of sale for the business, is that correct?

A. Your premise is incorrect and therefore I cannot answer the question.

Q. What is wrong with the premise?

A. That is not an agreement for the sale of the business, it is a consent.

Q. It was the consent of the administrator to sell to himself and the consent of the heirs to sell to the administrator?

A. No, sir, this was a consent of all the beneficiaries of the estate and of Mr. Havens to sell the business to himself individually, that was part of the consideration for the other agreement and is so recited.

Q. And that is the only reason that the sale of the undertaking business was incorporated in that agreement?

A. It was incorporated to show the true situation, that they consented to the sale of the business, and it was part of the consideration.

Q. And the other part of the consideration was the reduced rental at which he took the buildings of the business and the janitorizing of the other building, is that right?

A. Yes.

Q. And so on that night there was an oral agreement with Mr. Havens, when he consented to buy and they consented to sell to him, they consented that

the sale should be as of the date of death of Mrs. Westhall?

A. I don't know whether you would say there was an oral agreement or not. There was a delivery by himself as administrator to himself as an individual with the consent of all the parties of one of the assets of the estate.

Q. The terms of the parties in interest were discussed?

A. Yes.

Q. But you have told me no mention was made of what was taken in by Mr. Havens since the death of Mrs. Westhall and up to the date of this conference, and that no mention was made of the buying of the business as of the date of death of Mrs. Westhall.

A. The first part of your question is correct, the second part is not.

Q. Will you tell me what the situation is while I find the testimony?

A. My testimony was to the effect that they had discussed the management of this real estate and the sale of this undertaking business for a period of four hours and that discussion resulted in an offer being made by Mr. Havens which was accepted.

Q. Did you say anything about my being partially wrong in my premise?

A. The first part of your question about whether anything had been said about what was taken in by Mr. Havens since the death of Mrs. Westhall and up to the date of this conference. Nothing was said to the best of my recollection. The second part was that Mr. Havens' offer was to take over the business as of August 13th, 1931.

Q. What was your answer?

A. Read it.

Q. Not read it. Did Mr. Havens say "I will take over the business as of August 13th, 1931?"

A. Yes, sir, that was part of his offer.

Q. That, however, was not recited in the agreement that you drew, was it?

A. No, sir.

Q. When was it agreed that he take the furniture?

A. I don't know.

Q. Wasn't that discussed that night?

A. No, sir.

Q. There was no discussion?

A. Yes, there was a discussion, which I told you previously, that they wanted some articles of furniture and they were to get together in the next few days and make their selections. It was never taken up with me after that.

Q. Was any agreement made?

A. They were to take over the furniture at inventory value.

Q. When was that entered into?

A. I don't know.

Q. You were not present?

A. No.

Q. Was there a bill of sale for it?

A. No, sir.

Q. And the first knowledge you had was when he came up to you and said "draw me a bill of sale for the furniture."

A. No.

Q. When was it?

A. I recall that he came to me and said that Mrs. Elizabeth Westhall wanted a spring out of one of the beds, and that is all she wanted and the bed would

be useless without the spring and therefore he said he would take over the furniture and avoid a public sale.

Q. But he never gave her the spring, did he?

A. I don't think so. I think he preferred to have the bed complete.

Q. And you then drew a bill of sale for the furniture?

A. Yes.

Q. Do you recall the date?

A. July 7th, 1932.

Q. And this conversation was September 29th, 1931.

A. That is correct.

Q. And in the interim this administrator purchaser was living in the house of the deceased, Mrs. Westhall, and running the business and using the furniture and had not paid for it, is that right?

A. Apparently that is correct, from testimony.

Q. And you knew it, didn't you?

A. I would not say that I did or that I did not. I know now it was paid in August, 1932.

Q. You know it was not even paid at the time the bill of sale was drawn, in spite of the fact that the agreement said "money in hand paid."

A. Yes, sir.

Q. You know, do you not, that Mrs. Virginia Hooper and her husband were present in Lakewood on the 29th of September, 1931?

A. I do not.

Q. Did you hear Mr. Havens testify that they were present in Lakewood?

A. I don't remember.

Mr. Tomlinson: It is immaterial whether he heard it or not, Mr. McCloskey says he does not know.

A. I know Mrs. Hooper was present in my office.

Q. Before I leave you will you look at this paper which is a petition for administration of the estate of Beatrice Westhall?

A. Yes.

Q. Will you look particularly at paragraph 4, "petitioner further states that the value of the personal estate for the administration of which this application is made will not exceed in value the sum of $25,000 and that the value of the real estate does not exceed in value the sum of $60,000." That is there, isn't it?

A. Yes, sir.

Q. Was that prepared by you?

A. No, sir.

Q. Now I show you another paper called administrator's bond from the Surrogate's record and ask if you prepared that bond?

A. Yes, sir.

Q. And you prepared that bond on or about when?

A. It is dated the 24th of August, 1931.

Q. What was the amount of that bond?

A. $40,000.

Q. All of the real estate in the Westhall estate was free and unincumbered, was it not?

A. To the best of my recollection it was.

Q. And of course all real estate is subject to all the debts of the estate, is it not?

A. Yes, sir.

Q. A lien is good against the real estate?

A. Yes, sir.

Q. That of course would have been another incentive for you to distribute the personalty to these children.

A. When?

Q. At almost any day from the date of her death that you knew about it.

A. No, sir.

Q. The bond that you put up was dated the 24th of August, and your administrator was appointed at about that time?

A. Yes.

Q. You knew there was $60,000 worth of unincumbered real estate.

A. I don't know about that.

Q. When did you learn it?

A. I don't know as to the value of it.

Q. I ask you to look at this exhibit from the Surrogate's office again and ask whether $60,000 is not there stated as the value of the real estate?

A. Yes.

Q. I ask you to look at the date?

A. The 24th of August, 1931.

Q. Isn't that signed by Osborne W. Havens?

A. Yes.

Q. Was not he administrator of the estate?

A. He became so shortly after.

Q. Didn't he advise with you about his bonds and other dealings?

A. I sent him down to make that petition.

Mr. McCloskey: There are two questions that you asked me this morning that I could not answer that I can answer now. You asked me about the one thousand dollars, that was the Lakewood Transportation

Company, I drew a chattel mortgage, a bond and mortgage.

Q. In what company was that?

A. That was loaned to the Lakewood Transportation Company. I had nothing to do with it except to draw the legal papers.

Q. You had no interest in the Lakewood Transportation Company?

A. No.

Q. Nor your office nor anyone in your office?

A. No. You also asked me whether I had ever represented Mrs. Jane Westhall except in the matter of the recovery for her husband's death. I represented Mrs. Jane Westhall when they purchased the property on Lexington Avenue, their former home. I handled the matter when it was sold, and I also prepared the legal papers on a loan Mrs. Jane Westhall made on a property at Whitesville.

Q. Was that prior to the date of death of her husband?

A. The purchase of the property was prior, the sale was subsequent and the loan to Newmeyer was subsequent.

Q. Was it prior to the death of Mr. Edmund Westhall?

A. I am not certain as to the date.

Q. You know it was not after the death of Mrs. Beatrice Westhall?

A. It was prior to that I am certain.

Cross-examination.

By Mr. Tomlinson:

Q. That was in 1928?

A. I don't recall the date.

Q. That Newmeyer loan was $2000?

A. Yes.

Q. Did you have anything to do whatsoever with the preparation or submission to the Surrogate of this petition for letters of administration?

A. No, sir.

Q. Coming back now to these petitions for the appointment of guardians which were executed in 1928 and concerning which Mr. Wainright has given testimony, after these petitions were signed and the orders made, what if anything further did you do in the matters?

A. Nothing. Well, we received the settlement checks and turned the money over to the Lakewood Trust Company. That is the last we had anything to do with it.

Q. You turned the money over to the Lakewood Trust Company for what purpose?

A. As guardian for the infants, the money to which they were entitled.

Q. After that did you do any work in connection with that matter?

A. No, sir, I had nothing to do with the investment or anything concerned with it.

Q. At the night of the meeting in your office, September 29th, 1931, was anything said in the course of that conversation with reference to advertising the business?

A. Yes, that was discussed, whether they should advertise in a New York paper, I think it is "The Embalmers Monthly" or some kind of magazine.

Q. What was the result of that discussion?

A. They decided it would be better to settle it there and let Mr. Havens have the business and not advertise.

MRS. JANE WESTHALL, a witness produced on behalf of the exceptants, being duly sworn according to law, upon her oath testified as follows:

Direct examination.

By Mr. Matthews:

Q. You are the mother of one of the children, a minor, who is one of the heirs of the intestate estate of Beatrice Westhall, deceased?

A. I am.

Q. What is your child's name?

A. James Edmund Westhall.

Q. How old is he now?

A. He was seven the 23rd of last August.

Q. Do you recall having been summoned to a conference at Mr. McCloskey's office with reference to the estate of Beatrice Westhall?

A. Yes.

Q. When did Mrs. Westhall die, do you know?

A. August 13th, 1931.

Q. And you remember when she was buried?

A. August 17th.

Q. Were you at the funeral?

A. I was.

Q. On that day did you talk to Mr. Havens?

A. I did.

Q. About the estate?

A. It was at the cemetery and he came up and asked Bess and me ——

Q. Bess is Elizabeth Westhall?

A. Yes.

Q. What did Mr. Havens say?

A. He asked Bess and me if we would come down to the Westhall house that evening.

Q. Did you go to the Westhall house that evening?

A. We did.

Q. Who were there?

A. Mrs. Havens, Mr. Havens, Virginia Hooper, Bess and myself.

Q. Did Mr. Havens have anything to say to you on that night?

A. He said that Mrs. Westhall had died without having left a will and that our children would come in for their father's share of the estate. He also said something would have to be done about the business as it could not go on the way it was and we should come to the house the next morning and Mr. McCloskey would be there.

Q. The next morning means the day after the funeral. Do you recall what day of the week Mrs. Westhall was buried?

A. Monday.

Q. And the next morning would be Tuesday. Do you know by the date of the month?

A. By the date of the month if she died on the 13th, Friday would be the 14th, Saturday the 15th,

Sunday the 16th, Monday the 17th, she was buried and that would be the 18th.

Q. Did you come back to the house on the day after the funeral?

A. I did.

Q. Who were there?

A. Virginia Hooper, Jessie Havens, Osborne Havens, Bess and myself.

Q. What if anything happened while you were there?

A. Mr. Havens said that he expected Mac at any time and he went to the telephone and presumably called Mac because he said ——

Mr. Tomlinson: Object.

The Court: Objection sustained.

Q. He made a telephone call?

A. Yes.

Q. And as a result of the telephone call what if anything happened?

A. Mr. Havens came back to the sitting room and said, Mac would be here at any time.

Q. And Mac means ——

A. W. Durward McCloskey, Esquire.

Q. Did Mr. McCloskey come?

A. In a very few minutes.

Q. You say Mr. McCloskey was present on Tuesday, the 18th?

A. He was.

Q. What was said or done at that conversation?

A. He told us that Mrs. Westhall had not left a will ——

By Mr. Tomlinson:

Q. Meaning Mr. McCloskey told you?

A. Yes, Mr. McCloskey told us that Mrs. Westhall had not left a will and that our children would come in for their father's share of the estate and also about the business.

By Mr. Matthews:

Q. What was said about the business, if anything?

A. Mr. McCloskey told us that it could not go on the way it was and we would have to have a buyer for it or make some other arrangement.

Q. Did Mr. Osborne Havens say anything about the business?

A. He said he would like to have it.

Q. While Mr. McCloskey was there?

A. Yes, but he said he would not be willing to pay for good will and I spoke up and said I thought that a business established since 1868, there was a good will to it and Virginia Hooper said that her father had always made a very good living from the business and if there was something good to it it should be paid for and if not why would he like to have it. Mr. Havens also said "Harry Brown would like to buy the business but he would not be able to handle it."

Q. When did you next see Mr. McCloskey?

A. That night in his office.

Q. What night were you notified to go to Mr. McCloskey's office?

A. September 30th.

Q. How do you remember that?

A. The next day we signed a paper in the bank and that was October first, Thursday.

Q. Who notified you to go?

A. Someone from Mr. McCloskey's office.

Q. And you did go to the conference?

A. Yes, I did.

Q. It has been testified that the parties present at this conference were C. J. Parmentier, Arthur Smock, Charles McCue, Amory Parmentier, Mr. McCloskey, Mrs. Virginia Hooper, Jessie and Osborne Havens, Elizabeth Westhall, yourself, and a Miss Pendle.

A. No, Miss Pendle was not there.

Q. Are you sure of that?

A. I am. I met Miss Pendle when we came in, downstairs in the office, but she was not present at the conference which was held upstairs.

Q. At any time during this conference in the library was Miss Pendle present?

A. She was not.

Q. At any time during the conversation did you see her taking any notes?

A. She was not.

Q. How did that conference open to the best of your recollection?

A. Mr. McCloskey just told us we were here to settle things, the matters of the estate, and also about the business.

Q. Tell us, was the jewelry, for instance, discussed?

A. Yes, but that was not the first thing discussed.

Q. What was the first things discussed at that conference?

A. The first thing discussed was the apartment building, the rents and so forth.

Q. What was said about that?

A. There were one or two tenants who had not paid up their rents and we were to have a letter sent jacking them up about that, and there was a discussion about reducing Frank Shinn's rent, and Osborne said, "No, that he had the better of the two stores and the better show window."

Q. What else was said about the apartment?

A. I don't recall anything.

Q. Was anything said about Osborne Havens managing the the apartment?

A. Not then.

Q. What next was discussed after the tenants that had not paid their rent and Shinn's reduction of rent?

A. The real estate was next.

Q. What was said about real estate to your recollection?

A. Not much was said, but owing to conditions we were to hold on to it and not sell it.

Q. What next was discussed?

A. Then the jewelry came in.

Q. What was the discussion about the jewelry?

A. We were told that Mrs. Westhall had left some very nice pieces of jewelry and Jessie Havens said that she would like to have a diamond ring and Virginia said she would like to have a diamond and sapphire bracelet and they asked if we would like anything and we said, "Yes," and it was left that we were to meet the next morning in the Lakewood Trust Company and select what we wanted.

Q. Let me take you away from the conference a minute and ask, did you go to the Lakewood Trust Company next morning and select jewelry?

A. Yes.

Q. Who were there?

A. We got there just about the time the bank opened, and the only one I remember speaking to was Amory Parmentier and then, after that, Virginia and Osborne and Jessie came in.

Q. So there were present at that time Elizabeth and yourself, Virginia, Osborne, Jessie, and Amory Parmentier?

A. Yes.

Q. What was done?

A. That morning?

Q. Yes.

A. We went upstairs and the jewelry was brought upstairs to us and was put on the table and we made our selections.

Q. While you were at the bank that morning was anything done about any papers?

A. Yes, when we came downstairs Osborne said, "As long as we are here we just as well can sign these papers."

Q. What papers did you sign?

A. An agreement for the business.

Q. Had you ever seen it before?

A. I had not.

Q. And when you say an agreement for the business do you refer to E-1, a memorandum of the agreement for the sale of the undertaking business and the management of the real estate?

A. Yes.

Q. You have never seen it up to that minute?

A. I had not.

Q. Who had it?

A. I don't remember whether it was Amory Par-

mentier or Osborne Havens. I cannot say, but they were there when we signed it.

Q. Did you read it?

A. No.

Q. Why not?

A. I thought they were doing it for our interest. I thought I could trust them.

Q. In that agreement you agreed to sell the undertaking business for $4200, and agreed to allow Osborne to rent the premises for $900, and agreed that Osborne should manage the real estate. Had you personally agreed to all those things the night before?

A. Not personally.

Q. Had they been discussed?

A. Yes.

Q. Tell me what was discussed the night before with reference to that business?

A. Mr. McCloskey turned to Osborne and said, "I will let you speak for yourself." That was regarding the business. Osborne said he would like to buy the business at inventoried value and would also like to rent the house, chapel, and barn for $900 a year, and that he would be willing to janitorize the apartment building, collect the rent and keep the grounds in good condition.

Q. And then what? Was there any objection to that?

A. And he also said when he made that offer that he would not pay for the good will of the business.

Q. In other words did he say he would pay the inventoried price but not for the good will?

A. That is what he said.

Q. What did any of you say?

A. No one said anything for awhile and Mr. Mc-

Closkey said hadn't there been a discussion about the good will and I said, "Yes, it was I," but no one offered any information at all on the matter. I looked at Virginia thinking she would say something because she felt the same as I did. ——

Mr. Tomlinson: Object and move to strike.

Q. Had Virginia written you about the business?
A. She had.
Q. And in that letter had she mentioned good will?
A. She had.

Mr. Tomlinson: Object to this as hearsay.

Mr. Matthews: Why shut it out? I have this letter here.

The Court: How is it binding upon the administrator?

Mr. Matthews: It was already testified to as the letter sent and I read him that portion and he said he did not know of any such attitude of Virginia on the good will. It does not make much difference so far as we are concerned.

The Court: Objection sustained.

Mr. Matthews: Your Honor will permit me an exception?

The Court: You may have an exception.

Q. At any rate did you say anything about good will?

A. I did.

Q. What did you say?

A. I voiced my sentiments the same as before. I said I certainly thought there should be a good will.

Q. Did you know at that time that there was going to be any agreement drawn that you were to sign?

A. No.

Q. Was anything said about an agreement being drawn?

A. No.

Q. Did Mr. McCue, for the bank, make any objection to the offer made by Mr. Havens?

A. No, he turned to Osborne and said, "I think that is a very fair offer."

Q. So the President of the Lakewood Trust Company, the guardian for your child, was present at this conference and when you spoke of good will and objected to its omission from the offer Mr. McCue did not join you in objecting?

A. No one did.

Q. Was it suggested by anybody at that conference that the business should be advertised for sale?

A. Not to my knowledge.

Q. You were there all the time?

A. Yes, and I am positive I heard nothing of the kind.

Q. It is not lack of memory?

A. No.

Q. Are you equally positive there was no mention of any agreement that was to be drawn that you were to sign?

A. Not to my knowledge.

Q. But next morning you went down to the bank. Did you go down to sign an agreement or to select jewelry?

A. I went down to select jewelry.

Q. And in that conference that night did you or did you not rely upon the Lakewood Trust Company as guardian for your child?

A. I did.

Q. And so whatever they did you thought would be for the interest of your child?

A. I had great confidence in them.

Q. You had no lawyer there?

A. No.

Q. Did you rely upon the lawyer present?

A. Yes, I thought he was working for our interest.

Q. You have know him a long time?

A. I have known him since he came first with Mr. Jayne.

Q. Was anything said about getting any other bids on the business?

A. Not that night of the meeting.

Q. Was there any discussion at that conference about the automobiles?

A. Osborne spoke up and said he would like to have the Buick car for Jessie, to which we all agreed.

Q. Was anything said about any of the other cars?

A. Yes, after the question of the business came up Osborne said he would like to have the hearses and open car and the Chevrolet delivery truck.

Q. Was there an inventory handed about that night?

A. Yes, there was one.

Q. Was there more than one?

A. I think there was one between Mr. Havens and

Mr. McCloskey, there might have been two passed around to us, but to the best of my knowledge there was just one for the rest of us to see. It was the first time we ever had seen it.

Q. When that was passed around did you see what the price was that they were going to sell the business for?

A. I did not have it long enough to see that.

Q. Have you told us everything you remember from that conference?

A. No, the question of the furniture came up.

Q. Tell us about that?

A. Mr. McCloskey asked if there was any of the furniture we wanted, and Bess said, "Yes, that she would like to have some part of a bed room set for her little girl, and I said I would like something too. Osborne immediately spoke up and said, "Have they any right to take anything that Jessie might want?"

Q. And then what?

A. Mr. McCloskey said that the girls had been very fair and if they wanted any of the furniture they were entitled to it and he suggested we go down that evening after the conference and select whatever furniture we might want, and Virginia said not to go down because she was afraid we would waken her baby.

Q. Virginia and her baby were staying there?

A. Yes.

Q. Was anything said that night about Mr. Havens rendering any services regarding the real estate in return for the price he was to pay for the business?

A. I don't recall that; Mr. Matthews, but it was when they were speaking about the rental of the

property, then he said he would janitorize the building, collect the rent and care for the grounds.

Q. In consideration of the amount of rent he was to pay for the buildings.

A. Yes.

Q. And you have no recollection of anything said with reference to the price for the business being lower on account of his janitorizing the apartment building?

A. No, I do not.

Q. Was anything said that night about the sale of the securities of the estate, stocks and bonds?

A. I cannot recall that there was.

Q. And you don't know whether yes or whether no?

A. No, I don't remember.

Q. Did you pay for the jewelry which you selected that next morning?

A. Not next morning.

Q. Did you pay for it at any time?

A. Yes, I did, when I got the money.

Q. How much did you pay, do you recall?

A. $69.58.

Q. And who did you pay it to?

A. Mr. Osborne Havens.

Q. And the jewelry selected and the automobiles selected by the other girls was charged to their shares of the estate?

A. I don't know what happened to that.

Q. You had no interest in the estate and thus it was only your child's interest?

A. Just the child, but naturally I was interested.

Q. Will you tell us when you got to the bank that morning and had looked over the jewelry what did

Osborne Havens say with reference to the agreement?

A. This agreement you just showed me?

Q. Yes, Exhibit E-1?

A. That was after we had selected the jewelry and were downstairs again and Osborne said that as long as we were here we could sign it now.

Q. You told me a few moments ago you did not expect to sign an agreement?

A. No.

Q. Did you inquire about it?

A. I thought we would have to sign something sometime or other.

Q. Who represented you?

A. No one that I know of.

Q. Was Mr. Parmentier there?

A. Yes, he took the affidavit and witnessed our signatures.

Q. And Mr. Parmentier was the assistant trust officer of the Lakewood Trust Company?

A. I don't know what position he held there.

Q. The Lakewood Trust Company was the guardian of your child?

A. Yes.

Q. Was there any price agreed upon for the sale of the furniture the night of September 30th?

A. Any we selected we could have at the inventoried price.

Q. Did Osborne subsequently purchase all of the furniture?

A. Yes, he did. At the meeting on August 18th, Osborne said that the furniture would have to be sold and turned into cash and rather than have a public sale and have people come in and out we could dispose of it between ourselves.

Q. On September 30th was anything said about it. Didn't the inventory show the furniture?

A. Yes, but we had just a glance at the inventory, we didn't know what they were inventoried at.

Q. Did I understand you that Mr. McCue of the Trust Company was present during all of this conference?

A. Yes.

Q. At any time since the death of Mrs. Westhall, did you ask Mr. Havens to pay over any money to you for the benefit of your child?

A. Two or three times I asked when we were going to have an accounting.

Q. When was the first time, do you recall?

A. I don't. I know it was after the year was up.

Q. When was the last time, do you recall?

A. The last was either August or September of this year.

Q. That is 1934?

A. 1934.

Q. And what did you say on those occasions?

A. I asked him when we were going to have an accounting; and he said he was preparing it now and that he had been working on it until three and four o'clock in the morning, but that the figures were there in the chapel and any time Bess and I would care to look at them we could. Bess was with me at the time and I said, "Let's go now," but Osborne said it was near supper time and he would call us when we could come down.

Q. Did he ever call you?

A. He didn't call me.

Q. Did he say anything to you as to what your expectancy for your child might be from the estate?

A. I asked him that day. He told me it would not be very much and that he had gotten a dividend of the United Shoe Machinery Company of something like twelve hundred dollars, and I said, how much is there to divide, and he said, about seven hundred dollars, and I said, "You mean for the four of us," and he said, "Yes, there won't be quite two hundred dollars apiece."

Cross-examination.

By Mr. Tomlinson:

Q. Mrs. Westhall, you say it was on October 1st you went to the bank?

A. It was.

Q. And who was present with you?

A. At the bank?

Q. Yes.

A. Bess, Virginia Hooper, Jessie Havens, Osborne Havens, and Amory Parmentier.

Q. That was all?

A. All I can remember now.

Q. Nobody else was there?

A. Not to my knowledge.

Q. You are certain?

A. Yes, as certain as I can be.

Q. What time of the day were you at the bank?

A. Shortly after the bank opened.

Q. After ten o'clock?

A. No, shortly after it opened.

Q. What time did it open?

A. I imagine the bank opened at nine o'clock.

Q. So it was shortly after nine?

A. Yes.

Q. How long had you been there before this paper was presented to you?

A. We had been upstairs, selected the jewelry, and come down, and were on our way out, or ready to go out.

Q. Who presented the paper to you?

A. That I do not know, it was either Amory Parmentier or Osborne Havens and I am inclined to think it was Osborne Havens.

Q. You said you had not expected to sign that paper that morning?

A. I had not, I went there with the expectation of selecting jewelry.

Q. And this paper was handed to you first?

A. It was handed either to Bess or myself.

Q. How many copies were passed around?

A. Do you mean for us to sign that morning?

Q. Yes?

A. There must have been four or five.

Q. And you did not read the paper?

A. No, I did not.

Q. You didn't ask anybody what it was?

A. Mr. Havens told us it was an agreement for the sale of the business.

Q. And you didn't read it?

A. No.

Q. You saw it was rather a voluminous affair?

A. Yes.

Q. You read no part of it?

A. I did not.

Q. You signed it?

A. I did.

Q. And all of the others signed at the same time?

A. No, just Bess and myself.

Q. Didn't the others sign?

A. Not while I was there. I had to get back to school.

Q. Didn't Mrs. Hooper sign?

A. Not in front of me, just as soon as I signed, I went back to school.

Q. Did Osborne sign?

A. I didn't see that.

Q. Had anybody signed the paper when you signed it?

A. No.

Q. So your signature was the first on it?

A. I think it was.

Q. You told us a few minutes ago that you had thought that there would be some agreement for you to sign?

A. Naturally there would be some sort of legal paper to sign.

Q. And that thought had come to you as a result of the conference on the previous evening at Mr. McCloskey's office?

A. Not particularly.

Q. What caused you to think there would be some sort of legal paper to sign?

A. There generally is in a case of this kind and I expected something.

Q. On the prior evening you had been to Mr. McCloskey's office from eight o'clock until midnight?

A. No, I had not.

Q. What time did you get there?

A. About half-past eight.

Q. What time did you leave?

A. Around twelve.

Q. You had been there at least from half-past eight until midnight?
A. Yes.
Q. Mr. Charles McCue was there?
A. Yes.
Q. You had known Mr. McCue for a number of years?
A. Many years.
Q. And you were friendly with him and his family?
A. Yes.
Q. Mr. C. J. Parmentier was there?
A. Yes.
Q. And you had known him a long time?
A. Many years.
Q. And Amory Parmentier was there?
A. Yes.
Q. You had known him a long time?
A. Yes.
Q. And Mr. McCloskey you had also known ever since he came to Lakewood from Point Pleasant?
A. Yes.
Q. You had known him and his wife for years?
A. Ever since she came to Lakewood.
Q. You held this conference up in the library on the second floor, didn't you?
A. Yes.
Q. Were you all gathered around the table that is in the middle of the room there?
A. Yes.
Q. Sitting around the table?
A. Yes.
Q. Aud the lights shine down on that table?
A. I didn't notice what kind of fixtures were there.
Q. There were lights there?

A. Yes.

Q. Most of the light is focused on the table in that library?

A. I did not notice. I know we could see.

Q. Did you see that at any time Miss Pendle was in that room?

A. Not to my knowledge.

Q. You make the direct assertion that at no time was she in any part of that room.

A. At no time did I see Miss Pendle in any part of that room that night.

Q. You don't know whether as a matter of fact she was sitting in the corner while you people were gathered around the table, do you?

A. I don't know where she was, she was not in the room that I saw.

Q. You had a discussion about the good will that night.

A. A very very short one, just what I said, no one else said anything.

Q. You and Mrs. Hooper both contended on that evening that this business had a good will attached to it?

A. On that evening Mrs. Hooper did not say a word about it.

Q. You on that evening said that the business had a good will and anybody that bought the business should pay for the good will.

A. I did.

Q. And on the other hand, Mr. Osborne Havens contended that the business did not have any good will, that is true, isn't it?

A. Yes.

Q. And subsequently Mr. Havens said, "I will

buy the business at the price of the inventory," did he not?

A. Yes.

Q. "And in addition to that I will janitorize the premises."

A. Not then, he didn't say that.

Q. Didn't he say that that night?

A. He said it that night.

Q. And he also said he would pay a rental of nine hundred dollars?

A. Yes.

Q. And isn't it true that after that Mr. Charles McCue said, "Well, Osborne that seems fair."

A. He said, "That is a very fair offer, Osborne."

Q. And shortly after that you left Mr. McCloskey's office?

A. We left around twelve o'clock.

Q. It was shortly after that remark of Mr. McCue, was it not?

A. That I don't know. I don't know what part of the evening that was.

Q. Was it not discussed that evening whether or not this business should be advertised in an undertaker's journal?

A. No, sir.

Q. You say that there was no such discussion?

A. That is what I said.

Q. You say as I understand your testimony, but if I am wrong correct me, that on the day after Mrs. Westhall's funeral and again at the time of this conference, which I understand you to say was on September 30th, I understand you to say that on both of those occasions the name of Mr. Brown was

mentioned as a person who would like to buy the business?

A. Mr. Brown, yes.

Q. Did you ever talk to Mr. Brown between those two dates?

A. No, sir.

Q. As to whether or not he would like to buy the business?

A. No, sir.

Q. And you never made any inquiry of him at all about that?

A. I had him in mind but I didn't make any inquiry about it. Mr. Havens brought it up himself.

Q. On this night at Mr. McCloskey's office it was agreed among you, as I understand your testimony, that anybody who wanted any of the furniture might take it at the inventoried price?

A. That is right.

Q. There were one or more copies of the inventory produced that night at the conference, is that correct?

A. There was one or two passed among us and there was one at the other end of the table where Mr. McCloskey and Mr. Havens sat.

Q. So you did have a copy of that inventory passed to you?

A. Yes, it was passed to me.

Q. Do I understand you did not read it?

A. I did not have time. I just got started and someone else had a hand out to read it.

Q. Didn't you say, "Just a moment, I want to read this inventory and appraisal."

A. I wanted to read what I could in the short time I had allowed to me to read that inventory.

Q. The appraisal was there?
A. I don't remember.
Q. Opposite each article was the appraised value?
A. Oh, yes.
Q. Didn't you say, "I want to read this over and see what it is all about."
A. No, I did not say so.
Q. Did you ask Mr. McCloskey to let you have a copy to take home with you so you might study it more carefully?
A. I asked for a copy that night on my way out, but I never got it.
Q. Did you ask him next day for it?
A. No.
Q. And the next day when you got this agreement, didn't you ask anybody to explain the terms of the agreement?
A. You mean when I signed it?
Q. Before you signed it.
A. I did not.
Q. And you never read it over?
A. No.
Q. Do I understand you correctly, were you teaching school at that time?
A. No.
Q. You said you had to get back to school?
A. Yes.
Q. What school did you have to get back to?
A. The Clifton Avenue grade school.
Q. Did you ask Mr. Havens at that time or at any other time or Mr. McCloskey for a copy of this agreement so that you might see what you say you signed without reading?
A. I asked Mr. McCloskey for a copy of that

agreement after I had signed it. I asked him for a copy some time after that and I got it, but it was after I had signed it.

Q. And after you got it you read it, of course.

A. I don't know whether I read it or not, because I just stumbled on it the latter part of last summer, I had forgotten I had it.

Q. In other words, as I understand your testimony, you asked Mr. McCloskey for a copy of that agreement and he complied with that request, and sent it to you, but you paid no attention to it until September, 1934?

A. I read it after I received it and put it away so safely I could not find it, and then I read it again and showed it to Bess.

Q. You read it when you first received it?

A. Yes.

Q. And put it away?

A. Yes.

Q. And some time last September you showed it to Mrs. Elizabeth Westhall?

A. Yes, I had forgotten I had received it.

Q. After you received this agreement from Mr. McCloskey or a copy of it, and as you say read it, did you then communicate with him about it?

A. No, I just put it away.

Q. And as a matter of fact am I correct in assuming you never communicated with anybody after receiving and reading this copy of the agreement until September, 1934?

A. That is right.

Q. At this meeting at Mr. McCloskey's office is it not true that Mr. McCloskey said, "Now, one of the questions we ought to discuss is as to what we ought

to do with the securities. These securities that were left by Mrs. Beatrice Westhall are substantially the same as those that came down from Mr. E. J. Westhall. The question is whether we ought to keep them as they are or whether we ought to sell them,'' was not that discussed?

A. I don't remember.

Q. You won't say it was not discussed?

A. I will just say I do not remember.

Q. Isn't it also true that at that same time either you or some other member of this conference in your presence and in your hearing said that in that person's opinion the securities ought to be kept as they were?

A. I don't remember that.

Q. Did you ask Mr. McCloskey or Mr. Havens that night what securities had been left by Mrs. Beatrice Westhall?

A. No, I did not.

Q. Did you ever have any conversation with Mr. Osborne Havens or Mr. McCloskey relative to the securities which had come down from Mrs. Beatrice Westhall?

A. Never with Mr. McCloskey and Osborne Havens told me about the United Shoe Machinery stock, that is the only stock I knew about. I knew there were others but that is the only one I was acquainted with.

Q. You never went to see Mr. McCloskey or talk to him on that topic?

A. No.

Q. Mr. McCloskey had represented you on several occasions, did he not?

A. I think that was through the Smock agency.

Q. Messrs. Jayne and McCloskey represented you in a suit against the railroad?

A. Yes.

Q. Didn't Mr. McCloskey represent you in the purchase of a house on Lexington Avenue?

A. I am inclined to think that was through the Smock agency.

Q. Didn't Mr. McCloskey represent you in connection with a loan of twenty-one hundred dollars you made to your brother Albert Wedderly?

A. Yes.

Q. Didn't Mr. McCloskey represent you in connection with a loan to Newmeyer?

A. I think that was through the trust company.

Q. But you did come in contact with Mr. McCloskey in regard to that Newmeyer loan?

A. I don't know that I did.

Q. But at no time did you go and see Mr. McCloskey or talk to him on the telephone or ask him to come to you with reference to these securities?

A. No.

Q. Do you say that the first time you had talked with anybody concerning this estate was on the day of Mrs. Westhall's funeral?

A. That is right.

Q. And this was at the cemetery, the first conversation?

A. At the cemetery he asked us to come to the house that evening.

Q. And that evening you went down to his house?

A. I went down to the Westhall homestead.

Q. And at that time he said that something would have to be done about the business?

A. Yes.

Q. He suggested a conference the following morning.

A. With Mr. McCloskey.

Q. Where was that conference held the following morning?

A. In the living room of the Westhall house on Second Street, or the parlor.

Q. Who was there?

A. Virginia Hooper, Osborne Havens, Jessie Havens, Bess Westhall, and myself at first and afterwards Mr. McCloskey.

Q. About how long did this conversation take?

A. It was very short.

Q. And there were no conferences I take it until this conference in September?

A. Yes, Virginia was to go back to Washington next day, and in a short time would come back.

Q. I was going to ask you about that, when you spoke of Virginia you refer to Mrs. Hooper?

A. Yes.

Q. She was residing in Washington and came up for the funeral?

A. Yes.

Q. Do you recall how long she stayed in Lakewood before she returned to Washington?

A. I think she went right back after the meeting with Mr. McCloskey in the Westhall house.

Q. How long had she been in Lakewood at the time the conference took place in Mr. McCloskey's office?

A. That I do not know.

Q. Do you know when she came up?

A. No.

Q. Do you know when she went home?

A. I think she went home October first, the same day we selected the jewelry.

Q. And the same day you signed the agreement?

A. Yes.

Q. Her husband's name is Albert G. Hooper?

A. That is right.

Q. Now, you made a statement as to some statement Mr. McCloskey made the night of this conference about the girls having been very fair. What was it you said in that connection?

A. That was in regards to the furniture.

Q. What was it he said?

A. Bess said, yes, there was something she would like to have, and I said I would too, and Osborne immediately turned to Mac and asked him if Jessie wanted anything could we have it and Mac said, "Well, the girls have been very fair," and he said they could have any part of the furniture they wanted, and Bess spoke up and said we would not want anything if Jessie wanted it.

Q. When Mr. McCloskey said about the girls being very fair, he referred to you and Mrs. Elizabeth Westhall?

A. I think he did.

Q. When was it you first spoke to Osborne Havens with reference to filing an accounting?

A. I really don't know, but I know it was after Mrs. Westhall had been dead a year.

Q. Where was it you had the conversation?

A. I saw him two or three times and one time he told me he could not give an accounting until the Trust Company did something, and another time he said we would have to have new guardians appointed.

Q. That was after the Lakewood Trust Company had closed?

A. Yes, and he also said that there was no money and we might have to dig down in our own pockets and help with the taxes and so forth on the buildings in Second Street.

Q. Do you know when this was?

A. A year had elapsed anyway, because we did not feel we could ask for an accounting until after a year, and when we didn't get it then I remember asking him two or three times.

Q. Do you know where these conversations were held?

A. One in front of the People's Bank and twice I think at my home.

Q. How did he come to be over at your house, was he visiting?

A. No, once he brought over a letter which he had opened that was addressed to me, that was one of the times and another time he came up to my house about some matter, I've forgotten what it was.

Q. There was no thought on your part that he had intentionally opened this letter.

A. I don't know. I don't know what his intentions were. It was addressed to me.

Q. Your thought was that he had intentionally opened it?

A. I don't know what my thought was at the time.

Q. In any event when you asked him if this account had been filed were simply occasions when you casually met him?

A. That was about all.

Q. You never went to see him about it?

A. I had made up my mind ——

Q. I didn't ask you that, I asked you what you did.

A. I met him three different times that I recall and I asked him those three times and also this past summer, August or September.

Q. But you never made any special trip to see Osborne Havens to ask him to file this accounting?

A. No, I did not.

Q. And you never made any special trip to ask when he was going to file an accounting?

A. No, Mr. Tomlinson, I did not.

Q. Did you at any time call up Mr. McCloskey and say "Mac," or "McCloskey," however you would address him, "When is the accounting going to be filed in our estate."

A. Yes, I happened to see him, I didn't call him. I was in my car and he was in his.

Q. You called out of your car to Mac, "Mac, how about that accounting?"

A. Just about that.

Q. What was Mac's response?

A. His response was, "You don't like Osborne very well, do you?" That was his answer to my question.

Q. On any other occasions outside of this time when you yelled to him out of your automobile —

A. I didn't yell to him out of my automobile I went over to his car, and at that time he said that Virginia was coming up next month and that things would be settled. When I asked him that it was in August, 1933. It was just two years then and I thought I could ask him then.

Q. Did you ask him any other time?

A. No, I did not.

Q. How long did it take you to select the jewelry in the bank, Mrs. Westhall?

A. Not very long.

Q. About how long?

A. I could not say, less than half an hour.

Q. So that the agreement was given to you for your signature at about nine-thirty.

A. I would not say just when.

Q. It was somewhere between nine-thirty and ten?

A. About that.

Q. Do you remember meeting Mrs. Beatrice Westhall at Lavine's house prior to her death?

A. I cannot recall any special occasion.

Q. Perhaps I can refresh your recollection. Do you recall speaking to Mrs. Beatrice Westhall at Lavine's house about your brother Albert buying this undertaking business?

A. I have no recollection of it. When do you mean?

Q. Shortly before Mrs. Westhall's death?

A. No, I did not.

Q. Didn't you ever have a conversation prior to Mrs. Westhall's death as to Albert buying the business?

A. No, sir, not to my recollection.

Q. And didn't Mrs. Westhall tell you that your brother Albert could not have it because of the fact that E. J. Westhall wanted Osborne Havens to have it?

A. No, sir.

Q. You have a brother Albert?

A. Yes.

Q. What does he do?

A. He works at the post office.

Q. What did he do in 1929?

A. In 1929 he worked at the post office.

Q. Isn't it a fact that you told Mrs. Westhall shortly before she died that you wanted to buy the business for your brother Albert and that she said "He cannot have it because E. J. always wanted Osborne Havens to have it"?

A. No, sir.

Re-direct examination.

By Mr. Matthews:

Q. When Mac said, "The girls have been very fair," were you discussing the furniture?

A. At that time.

Q. And is that what he meant you were being fair about?

Mr. Tomlinson: If she knows.

Mr. Matthews: If she doesn't know what is the sense of her saying it.

By the Court:

Q. Do you know?

A. Know what?

By Mr. Matthews:

Q. Do you know what Mac meant, what were you discussing?

A. I cannot answer unless I say I think.

Q. Tell me what you think?

A. I think he meant everything we had discussed prior to the furniture.

Q. Did he mean about the business?
A. I thought he did.

Mr. Tomlinson: Object to what she thought.

Q. Did you think he meant fair about the purchase of the business?
A. I just thought he meant we were fair about everything.
Q. And up to that time you had discussed everything?
A. Yes.
Q. Before the furniture was the jewelry and before the jewelry the business and before the business the real estate management?
A. Yes.
Q. And Mr. McCloskey said he thought you had been fair about everything?
A. Yes, that is what he said.
Q. Was there anything said that night about Osborne buying the business as of the death of Mrs. Westhall?
A. No, sir.
Q. Was there any discussion about what business he had done or how much he had taken in?
A. We knew nothing about that. That was not brought up at all.

By Mr. Tomlinson:

Q. Did you ask him?
A. No, I felt that the Trust Company were there acting for the interest of our children and I also felt the same way about Mac at the time.
Q. Did you ask him how much business he had done?
A. I did not.

(Recess until January 25th at ten A. M.)

TESTIMONY.

Toms River, N. J., March 29, 1935.

Before Hon. Russell G. Conover, Judge.

Appearances:

For the exceptant, John A. Matthews, Esq., Andrew B. Crummy, Esq.

For the accountant, W. Durward McCloskey, Esq., DeVoe Tomlinson, Esq., J. Elmer Matthews, Esq.

Mrs. Elizabeth Westhall, a witness produced by the exceptant, being duly sworn according to law, upon her oath testified as follows:

Direct examination.

By Mr. Matthews:

Q. Mrs. Westhall, you are the mother of two children who are heirs-at-law of the Estate of Beatrice E. Westhall, deceased?

A. I am.

Q. What are their names and ages?

A. Beatrice Elizabeth is fifteen, and Edmund James is nine.

Q. And where is Beatrice Elizabeth, at school?

A. Yes.

Q. Where?

A. In Lakewood.

Q. High school or grammer school?

A. High school.

Q. And James is at school where?

A. The Clifton Avenue grade school, Lakewood.

Q. They both live with you at home?

A. Yes.

Q. And are dependent upon your exertions for their living?

A. Absolutely.

Q. Do you recall when Mrs. Beatrice Westhall died?

A. August 13th, 1931.

Q. Do you recall by any chance what day of the week that was?

A. Yes, it was a Thursday.

Q. Were you at the funeral of Mrs. Westhall?

A. I was.

Q. After the funeral were you at Mrs. Westhall's home, the home of the deceased?

A. Yes, I stopped back there.

Q. At that time did you see Osborne Havens?

A. Yes, sir.

Q. Did you have a conversation with him relative to the estate of his mother-in-law, the decedent, Mrs. Beatrice Westhall?

A. Not at that time; he just asked me to stop at the house that evening.

Q. And you did stop at the house that evening.

A. Yes.

Q. Did you have a conversation?

A. Yes.

Q. Who were present?

A. Virginia Hooper, Jane Westhall, Jessie Havens, and Osborne and myself.

Q. At that conference was there any discussion of the estate or its assets?

A. The only thing mentioned was this, Osborne said Mrs. Westhall had not left a will and our children would get their father's share, and also that Mrs. Westhall had left some valuable pieces of jewelry and the two girls should have them, and also that the business could not continue and he would have to find a buyer for it.

Q. Was any appointment made for a later conference?

A. Yes, he said Mr. McCloskey would be there at ten o'clock the next morning and we should meet.

Q. And did you pursuant to that conversation meet the next morning at ten o'clock?

A. Yes, at Westhall's.

Q. What happened at that conference?

A. Mr. McCloskey said Mrs. Westhall had not left a will and the children would get their father's share and there was a discussion as to the business.

Q. Tell us what the discussion was as to the business?

A. Osborne said he would like to have the business but that he would not pay for the good will, and Virginia and Jane said they thought he should and I remember Virginia said the business was established in 1868, I think it was, and her father had

always derived a splendid income from it, and if it was not something worth while Osborne would not be anxious to get it.

Q. What did Osborne say in addition to that if you remember?

A. The matter was left at that, and Mr. McCloskey said we would have a meeting in a month's time when Virginia came back from Washington, and we would settle things then.

Q. Did Virginia come from Washington?

A. Yes.

Q. When was that meeting held?

A. September 30th.

Q. Do you remember what day of the week September 30th was?

A. I could not say exactly, but it was not either Friday or Saturday, because we met next morning at the bank and Jane had to go back to the school, but I could not say just what day of the week it was.

Q. Why do you remember it was September 30th?

A. Because next morning we signed the agreement for the sale of the business at the bank.

Q. By that agreement do you refer to Exhibit E-1? Mr. Tomlinson, will you agree to that?

Mr. Tomlinson: Yes, E-1.

A. Yes.

Q. And from the date of that agreement, you recall that it was the day before that you were at the office of Mr. McCloskey.

A. Yes.

Q. Who summoned you to Mr. McCloskey's office?

A. One of the girls in the office, by telephone.

Q. What time did you get there?

A. Around eight-thirty.

Q. Who went with you?

A. Jane.

Q. Who were there, if anybody, when you got to the office of Mr. McCloskey?

A. The officials of the Trust Company, and Jessie and Virginia and Osborne came in immediately after we got there.

Q. Where was the conference held?

A. In the room upstairs called the library, I think.

Q. Was there any discussion of the estate business downstairs in Mr. McCloskey's office?

A. No.

Q. When you got upstairs who were present at any and all times? That is to say, mention everybody that was in the room upstairs at any and all times during the conference.

A. Mr. McCloskey, Mr. McCue, Mr. Parmentier, Sr., Mr. Smock, Mr. Amory Parmentier, Virginia Hooper, Jane Westhall, I don't remember whether I said Jessie, and Osborne Havens and myself.

Q. Was not Miss Pendle there at any time?

A. Positively not.

Q. Are you absolutely sure Miss Pendle was never in that room?

A. Positively, I am. She was not upstairs in that room any time during the meeting. She was downstairs, but she was never upstairs during that conference.

Q. You know this is important, are you definitely sure that Miss Pendle was never upstairs during that conference?

A. I am sure.

Q. You were present during the entire conference?
A. Yes.
Q. You know Miss Pendle for many years?
A. Not very well, but I know her.
Q. You have been in McCloskey's office and seen her before?
A. Yes.
Q. You know her to be one of the stenographers in Mr. McCloskey's office?
A. Yes.
Q. Was the room well lighted during all the time of the conference?
A. Very well.

Mr. Tomlinson: Please don't lead.

Q. And your testimony is that she did not even come in.
A. She was not in the room at any time during the meeting.
Q. Who opened the meeting?
A. Mr. McCloskey.
Q. Give us your best recollection of what was said at that meeting and after you have exhausted your recollection, I am permitted to help you.
A. Mr. McCloskey began by saying that Mrs. Westhall had not left a will, and the first thing discussed was the apartment building. There was some talk about the tenants being behind in their rents and they agreed to write to those tenants and to check them up about it, and then there was a discussion about Frank Shinn's rent, which I understood that he wanted it reduced and Osborne did not think it should be and he and Mr. McCue had quite a

little discussion about that. Next thing they discussed was the real estate holdings, and they agreed to hold on to them because values were so low at that time, and the next thing was the jewelry. Mr. McCloskey said Mrs. Westhall had left the jewelry and what did we want to do with it, and I said I thought the two daughters should have it and Jane agreed with me.

Q. And by the two daughters whom did you mean?

A. Virginia Hooper and Jessie Havens.

Q. That is Jessie Havens, the wife of the administrator?

A. Yes.

Q. Proceed.

A. So Virginia said all she wanted was her mother's diamond bracelet, and Jessie wanted her two diamond rings and Virginia said there were a few other things we could have if we wanted them, and I said I would like to have something for my daughter when she came of age, and it was agreed we should meet the next morning at the Trust Company and select what we wanted. About that time Osborne spoke up for the Buick car, he said he would like to have that for his wife, to which we all agreed, and then came the business, and Mr. McCloskey turned to Osborne and said, "Osborne I will let you speak for yourself," and Osborne spoke up and said he would like to have the business and that he would pay the inventory price for it.

Q. At this time was there an inventory in your hands?

A. There was yes. It may not have been in my hands at the time but when the meeting started we had two or three copies and one copy was circulated

around, you really didn't have much chance to look at it, because someone always had their hand out for it.

Q. Let me interrupt you for a moment, did you have a personal lawyer there that night?

A. No, we did not. We were so thankful the officials from the Trust Company were there, because we really didn't feel competent to speak for the children.

Q. So the only lawyer present was Mr. McCloskey?

A. Mr. McCloskey.

Q. Had you know him a long time?

A. Yes.

Q. Had he ever represented you in any legal matters?

A. It was really Mr. Jayne, but Mr. McCloskey was connected with Mr. Jayne's office.

Q. You knew that the bank were the guardians of your children by reason of some money that had come to you through the death of your husband?

A. That is true.

Q. Will you now go back to the testimony you gave regarding Mr. Havens' offer for the business.

A. So Osborne said he would pay the inventory value for it, and at that time Mr. McCloskey turned around and said, "Didn't someone say something about good will," and Jane Westhall spoke up and said, "Yes, I did." That was simply passed over, no one said anything more about it and Osborne said he would like to continue the business in the premises, and Osborne offered nine hundred dollars a year for the property, and he said for that he would

janitorize the building, collect the rents and take care of the grounds.

Q. Was this janitorizing of the building in consideration of anything except the rental on the premises?

A. Nothing else was mentioned.

Q. Are you sure?

A. Positive.

Q. What was said with reference to the offer of nine hundred dollars rental of the Westhall premises?

A. Mr. McCue said, "Osborne, that is a very fair offer," and the matter was dropped.

Q. What was the next thing discussed?

A. The next thing discussed was the household furnishings, and Mr. McCloskey wanted to know if we wanted any of those. I knew Osborne and Jessie had their own furniture, and I said there were some things I would like, and Jane said she would too, and Mr. McCloskey thought it would be a good idea to go down after the meeting and select them, and Virginia didn't want us to do that for fear we would wake her baby. Then Osborne turned to Mr. McCloskey and said, "Mac, they cannot take anything if Jessie wants it, can they," and I said, "I wouldn't think of taking anything Jessie wanted," I thought she should have first preference, so that was dropped.

Q. Was anything else said about the business and Osborne's buying it?

A. No, I don't remember anything else.

Q. You have told us that Osborne said he would buy it at inventory price.

A. He did.

Q. You had the copy of the inventory and so you knew what the inventory price was?

A. I could not have told you. I had glanced through hurriedly and my recollection is it was two thousand dollars, but I cannot say that was the exact figure. That was not including the cars.

Q. Was anything said by anybody with reference to the business that had been done since the death of Mrs. Westhall?

A. No.

Q. Was anything said as to Mr. Havens buying the business as of the date of death of Mrs. Westhall?

A. That was not mentioned.

Q. You are certain?

A. Positive.

Q. Was anything said about moneys that had come in or that would accrue by way of accounts receivable?

A. No.

Q. Was anything mentioned as to the agreement that was to be signed by you to perpetuate in written form the oral conversations had that evening?

A. No.

Q. Were you told that night that there would be a meeting at the Trust Company the next morning?

A. No, we were to meet at the Trust Company to select the jewelry, that is the only thing we were to go down there for.

Q. Do you recall anything else that was said at that conversation at Mr. McCloskey's office that night?

A. No, I do not.

Q. Was there any discussion about the stocks, and bonds, and securities and their retention?

A. There was absolutely no discussion about that.

Q. Now, the next morning did you go to the bank for the purpose you have described?

A. We did.

Q. Who went with you?

A. I went alone, but just as I got there Jane drove up and we went in together.

Q. When you went in, who did you see, if anybody?

A. The rest had not got there and we went over and talked to Amory Parmentier.

Q. Who were the rest?

A. Virginia, Jessie, and Osborne.

Q. What, if anything, did you all do?

A. As soon as we got there Mr. Parmentier left, I suppose to get the safe deposit box, and we went on upstairs, I think it was the directors' room, and Mr. Parmentier came in with the box and put it on the table and Virginia took a bracelet and Jessie said she was going to take the rings, and the other things were put on the table and we made our selection.

Q. What did you take?

A. I took a gold bangle bracelet, and Mrs. Westhall's watch and a pin.

Q. Did you pay cash for those to the estate?

A. Afterwards, but I didn't understand that at the time.

Q. Did Mrs. Jane Westhall make some selections?

A. She did.

Q. After that what happened?

A. Virginia took her bracelet, and I asked Osborne

if we might take ours and he said no, he had to make out receipts. He put the things in the safe deposit box and came downstairs, and when we got downstairs Osborne took a paper out of his pocket and said, that as long as we were all there together we might as well sign the agreement. Jane and I signed, I don't know whether anyone else did.

Q. And by the agreement you refer to this paper, Exhibit E-1?

A. Yes.

Q. Why did you sign it without reading it, if you did so sign?

A. It was all over my head, I didn't know anything about the business and as long as the Trust Company officials seemed to approve, I thought I had to sign it.

Q. Was anybody else present beside you and Jane when you signed?

A. Amory Parmentier, Virginia Hooper, Jane, Jessie, and Osborne.

Q. You had no lawyer of your own either at Mr. McCloskey's office or at the bank?

A. Not at any time.

Q. Did you rely upon those present to take care of your interests?

A. Yes.

Q. And they were who?

A. The officials of the Lakewood Trust Company, I had all the confidence in the world in them, and in Mr. McCloskey, and in Osborne at that time.

Q. I show you Exhibit E-1 in this case and point to the last page and to the signature, Elizabeth C. Westhall, is that your signature?

A. Yes, it is.

Q. Whose signature is that to the left of yours?

A. Amory Parmentier.

Q. And do you recognize your sister-in-law's signature?

A. Yes, I do.

Q. Mrs. Jane Westhall?

A. Yes, sir.

Q. And that is Mr. Parmentier's signature beside hers?

A. Yes, sir.

Q. You saw him sign that signature when your sister-in-law and you signed?

A. I did.

Q. After you signed the agreement was there a copy given to you?

A. I never received a copy of it.

Q. You have never had one?

A. No, never.

Q. When you came down from the upper room of the bank, did Mrs. Hooper and Mrs. Havens come down with you?

A. Yes, we all came down together.

Q. They did not sign the agreement?

A. I don't know, they were still in the bank when we left. I was in a hurry and Jane had to get back to the school, so immediately after signing, we left.

Q. So you don't know whether they signed that day or another?

A. I could not say when they signed it, it was not in my presence.

Q. Did you have a discussion with Mr. Osborne Havens from the day you signed the agreement, Exhibit E-1, which was October 1st, 1931, after that date with reference to the estate?

A. Several.

Q. What is the first one you recall?

A. The first one was a year after Mrs. Westhall's death, the latter part of October.

Q. What was that discussion?

A. I asked him if he would give us an accounting of the estate and he said he could not until the Trust Company did, and I asked him at that time if he was going to distribute any moneys and he said that there was not any money to distribute, that whatever money there was, was tied up in the Trust Company.

Q. Is that the sum and substance of your first talk with him?

A. Well, there was the matter of my building loan.

Q. Was that at the same conversation or another?

A. At the time Mrs. Westhall died he told me to pay the September payment and immediately after Mr. McCloskey would present a bill which I was to sign against the Westhall estate, which would take care of my building loan. He said this payment would be refunded to me.

Q. Was that done?

A. Yes, about a year after.

Q. This mortgage and building loan transaction was a transaction whereby your deceased father-in-law had assumed the obligation of the mortgage on his deceased son's home, your husband.

A. Yes.

Q. And that carried over in the Westhall estate when he died and from his estate into the Beatrice Westhall estate and was recognized as an obligation by both Mr. Havens and Mr. McCloskey?

A. That is right.

Q. When was that obligation met?

A. I never knew exactly when. I imagine about two weeks after that, October first meeting, Osborne told me to come down to Mr. McCloskey's office, that he was going to make out this bill, and I went down and it was nearly twelve o'clock at night and Mr. McCloskey said he would not expect Miss Pendle to wait to transcribe it that night, and that they would call me when it was ready to sign.

Q. Did they do that?

A. A couple of weeks went by and I told Osborne that Mr. McCloskey had not called me to sign that, and he said, "I suppose he is busy and did not get around to it." November went by and meantime reports were flying thick and fast ——

Mr. Tomlinson: Object.

Mr. Matthews: You will have to leave the reports to our imagination.

Q. Because of reports, what did you do?

A. I again went to Osborne and I told him I was so much worried about it because of these reports and I could not understand the delay.

Q. What did he say?

A. He said he didn't think there was anything to worry about and to call Mr. McCloskey up, which I did the next morning, and the answer I got was that they had been waiting for me to sign it. Afterward when the bank closed, January 13th, 1932, I went to Osborne and asked was my building loan paid and he said no, it was not, and I said, "There is something mighty funny about the whole busi-

ness." He told me not to worry it would be taken care of.

Q. That was in January, 1932?

A. Yes.

Q. Have you learned since, when it was paid?

A. It was some time during the following summer, I was at the house and we had been talking about this George Matthews mortgage that had been called in. I told him that I had heard that this George Matthews mortgage had been called in and he said, he called it in to pay off my building loan and he held up what I suppose was the mortgage and he said, "Your home is free and clear." I said, "I am thankful to know it," and I said, "Can I have the deeds to my house," and he said, "Not yet, I still need them, but I will let you have them later" but I have never received them.

Q. When was that conversation?

A. November or October of 1932.

Q. When was this discussion about the Matthews mortgage?

A. At the time he told me he had called it in. It may have been 1933.

Q. The records in the case show that the Matthews mortgage was paid August 9th, 1932. Was it on the date it was paid?

A. No, it was some time after that.

Q. Did you have any other discussion with Mr. Osborne Havens, administrator, with reference to the estate and your children's interests?

A. I asked him for money several times.

Q. When was the first time, if you recall?

A. In October of 1932, when I asked for an accounting, and he told me there was not any money

and I asked him at least five or six times afterward and I always got the same answer, that there was no money.

Q. Did you tell him why you needed it?

A. Yes, I said I needed it for the children and I did need it very badly.

Q. Are you employed?

A. I am.

Q. Are you employed regularly?

A. Yes.

Q. At that time were you regularly employed?

A. Yes.

Q. Do you want to put your income on this record?

A. If you wish me to.

Q. All right.

A. I get fifteen dollars a week now, for the past two years.

Mr. Tomlinson: If the Court please, I don't see how it is material.

The Court: Go ahead.

Q. Did Mr. Havens ever give you an accounting with reference to your children's interest in the estate?

A. No.

Q. How many times did you ask him for money or some accounting?

A. Five or six times I asked for money.

Q. Did you ever speak to Mr. McCloskey about the estate after the death of Mrs. Westhall and after the conference you spoke about in the office?

A. No, I went to Osborne.

Q. You were friendly with Mr. Osborne Havens?
A. Yes.
Q. You always have been?
A. Yes.
Q. Did Mr. Havens ever account to you or to your children or to their guardian either in April or October of any year since the death of Mrs. Beatrice Westhall for the rents, the surplus rents, if any, of the estate, he was managing?
A. Never.

Mr. Tomlinson: Object as immaterial, that deals with the real estate, not the personal property.

Mr. Matthews: That goes to the very essence of this matter. The executor's liability to the children is in this agreement, but if you speak of that, they say that is a different matter. The entire matter is a question of his faithfulness to his trust.

The Court: It depends, as I recall, upon the final interpretation of that agreement. If the agreement is interpreted one way, it is material, if it is interpreted the other, it is not. I will let it stand.

Mr. Tomlinson: May we have the benefit of an exception?

The Court: Oh, yes.

Q. You answered, Mrs. Westhall, did you?
A. He never did.
Q. Did Mr. Havens ever tell you when he expected to file an account?

A. No, never.

Q. When did you first have any notice that he had filed an account?

A. In August of 1934, Jane and I met Osborne, in fact, we were on our way to see Osborne in his home, to ask for an accounting, and we met him in front of the house, and Jane said we were very anxious to have an accounting, and he said, he was getting it ready at that time, and I said, "I am more anxious to have some money, if you could let me have just fifty dollars, it would be a big help to me," and he said, there was seven hundred dollars he could divide and then in August he told us of the dividends of the Shoe Machinery stock he had received in January, and I said, "Cannot you divide that too," and he said, "I have not that much now, you forget the expenses and the taxes that are always accruing."

Q. Was there anything further you recall with reference to any conversation you had with Mr. Osborne Havens with reference to this estate and your children's share?

A. One of the times I asked him for money was after the Peoples Bank closed. That was in his home. I asked him for money and I said, "Since the Trust Company closed everything seems to have gone sour," and he said, "You are not the only one that needs money, I need it, too. I have been caught in five banks."

Q. Is there anything further that you recall?

A. Not at the moment.

Cross-examination.

By Mr. Tomlinson:

Q. When was this occasion upon which Mr. Havens said, you were not the only one needed money, he had been caught in five banks?

A. It was shortly after the bank holiday, I think that was in March of 1934 or 1933.

Q. Where was the conversation?

A. In his home in the sitting room.

Q. Where did you have these other conversations you say you had with reference to getting some money from him?

A. Sometimes in his home, sometimes in my home, once or twice on the street.

Q. Do you remember when those conversations took place?

A. The first was in October, 1932, then after the bank holiday, and January a year ago in my home I again asked for money, and I said it was funny with the rents and the interest on that Shoe Machinery stock why there was no money.

Q. You never asked for an accounting, did you?

A. I thought the whole thing was combined. After the closing of the Lakewood Trust Company the Ocean County Trust Company was going to take over the guardianship and the first thing Mr. VanHise asked for was an accounting in this guardianship.

Mr. Tomlinson: That is not relevant, your Honor, please. Suppose I repeat the question.

Q. You never asked Mr. Havens to account to you for these rents, did you?

A. Yes, several times.

Q. When?

A. I cannot tell you exactly when, perhaps he can, I didn't take particular notice of the dates, but I asked him several times and wondered where the rents went.

Q. I am not asking you about your wonder, I am simply asking you whether you asked Mr. Havens to account to you for these rents?

A. I did.

Q. When and where?

A. In his home.

Q. When?

A. I could not tell you exactly when, I was down there often.

Q. Who else was present beside you and Osborne?

A. There was never anyone else because he did not want me to discuss things in front of his wife.

Mr. Tomlinson: I ask to strike out the last part as not responsive.

The Court: It doesn't mean anything.

Q. You were present in court at the last hearing in January of this year?

A. Yes.

Q. You heard Mrs. Jane Westhall testify at that time?

A. I did.

Q. And is it not true that before coming on the

witness stand today you have read over her testimony?

A. No.

Q. Or you have discussed it with her?

A. Not since shortly after the last hearing, not since then.

Q. And isn't it true that you have read over the testimony she gave at that time?

A. I give you my word of honor, I did not.

Q. You say, as I understand it, that Miss Pendle was not present at this conference in Mr. McCloskey's office in September, 1931?

A. I did.

Q. Arthur Smock was there?

A. Yes.

Q. He attended that conference?

A. Yes.

Q. He was present during all of the conference?

A. Yes.

Q. You have known Arthur Smock for some years?

A. I have.

Q. Amory Parmentier was there?

A. Yes.

Q. You have known him some years?

A. Yes.

Q. Mr. C. J. Parmentier was there?

A. Yes.

Q. You had known him for some years?

A. Yes.

Q. Mr. McCue, Charlie McCue, as some of us call him, was there?

A. He was there.

Q. You have known him some time?

A. Yes.

Q. Mr. McCloskey was there, Mr. Havens was there, Mrs. Havens was there?

A. Yes.

Q. But you say emphatically and positively that Miss Pendle was not there?

A. I do.

Q. Now, you did see her at some place at Mr. McCloskey's office that night, didn't you?

A. When we first came in she was downstairs.

Q. And when you went out you saw her, didn't you?

A. No, I did not.

Q. You made some statement with reference to a visit you made to Mr. McCloskey's office to the effect that Miss Pendle could not transcribe some notes or some memorandum, to what date did you refer?

A. I refer to the night I went down there in the middle of October, 1931, when Mr. McCloskey compiled a bill against Mrs. Westhall's estate for my building and loan.

Q. Approximately what time did you leave Mr. McCloskey's office on the night of this conference, that you say was September 30th?

A. It was some time after twelve, it was between twelve and twelve-thirty.

Q. It was quite late?

A. Yes, it was.

Q. And what fixes in your mind definitely that this was the 30th of September?

A. Because the next morning we met at the bank and signed that agreement and I remember distinctly the meeting was September 30th. Virginia

was spending her vacation in Lakewood at that time.

Q. When did Mrs. Hooper go back to Washington?

A. October first.

Q. Was she in the bank on the morning you signed the agreement?

A. She was.

Q. Was her husband there?

A. No, he had been in Maine and he was to stop for her on the way back. He had not returned yet.

Q. He was not in Lakewood at that time?

A. Not to my knowledge.

Q. And at the time you signed this agreement in the bank together with Mrs. Jane Westhall, Mrs. Virginia Hooper was also present?

A. She was.

Q. You left Mr. McCloskey's office that night quite late, between twelve and twelve-thirty and when you left you didn't see anything of Miss Pendle?

A. No, I did not.

Q. She was not upstairs in the library as you say?

A. No.

Q. And as you come down the stairs you have to pass through a corridor to get to the door that leads out of the office?

A. That's right.

Q. And you didn't see her in the corridor or in any of the offices that face on the corridor?

A. I did not.

Q. You went to the bank next morning at what time?

A. Exactly at quarter past nine.

Q. That was shortly after the bank opened?

A. Shortly after the bank opened.

Q. And then you went upstairs and selected jewelry?

A. Yes.

Q. How long were you upstairs?

A. Not very long, about half an hour.

Q. Then you came downstairs somewhere between half-past nine and ten o'clock?

A. Yes.

Q. And as soon as you got downstairs you say Osborne Havens came in?

A. No, Osborne came down with us.

Q. When was it that he first showed to you this agreement?

A. When we got downstairs he said, "We are all together now and we can sign this agreement," and went over to Amory Parmentier's desk and I followed him.

Q. Then you signed the agreement?

A. Yes.

Q. You followed him over there?

A. Yes.

Q. What is the nature of your employment?

A. I am a stenographer and typist.

Q. You have been a stenographer and typist for a considerable period?

A. On and off, yes.

Q. As a matter of fact, you do some public work?

A. Yes.

Q. Public stenographer?

A. Yes.

Q. And you say no mention had been made on the previous evening with reference to the execution of an agreement?

A. I am pretty positive it was not.

Q. You are sure nothing had been said at Mr. McCloskey's office with reference to executing any agreement?

A. Nothing had been said.

Q. You had not expected to sign any agreement?

A. No.

Q. This was a total surprise to you, when Osborne displayed this agreement?

A. It was.

Q. And you, without having had any expectation of being called upon to sign this agreement, signed this agreement without reading it or asking for any explanation?

A. He told us it was an agreement for the sale of the business that had been agreed upon the night before, and I glanced over the first two pages ——

Q. But you didn't read it?

A. Mr. Tomlinson, when you trust people ——

Mr. Tomlinson: Object as not responsive.

By the Court:

Q. Did you read it or didn't you?

A. I did not.

By Mr. Tomlinson:

Q. Did you ask Osborne to read it over to you?

A. No, I did not.

Q. Was Amory Parmentier there?

A. Yes.

Q. He was assistant trust officer?

A. He was.

Q. You have known Amory for many years?

A. Yes, I have.

Q. Did you ask him to read it over to you?

A. No. The fact that Amory seemed to think it was all right to sign it, I signed it without question.

Q. Did you say to Osborne, or to Amory, or to anyone, "Let Jane and myself have this a little while and go over it to see if we want to sign"?

A. I did not.

Q. You say you were not furnished with a copy, did you ever ask Mr. McCloskey or Mr. Havens for a copy?

A. I thought the Trust Company getting one was all that was needed, that I was not supposed to have one.

Q. Please answer my question, did you ever ask Mr. McCloskey or Mr. Havens for a copy of this agreement?

A. No, I didn't.

Q. As matter of fact, isn't it true that subsequent to your signing this agreement you spoke to Mrs. Jane Westhall and she showed you a copy of the agreement she had received?

A. Yes, last summer.

Q. That is true, isn't it?

A. Yes.

Q. After signing this agreement you saw Mr. McCloskey on numerous occasions, didn't you?

A. No, very seldom.

Q. But occasionally you met him?

A. I may have seen him on the street but I never met him to speak to.

Q. You have known him many years?

A. Yes.

Q. As a matter of fact, he and Wilfred Jayne represented you in the suit against the railroad?

A. Yes.

Q. You never called up Mr. McCloskey and asked him for a copy of this agreement, did you?

A. No.

Q. At the time of this conference, wasn't there a discussion as to what should be done with the stock that Mrs. Westhall left?

A. I don't recall any such discussion.

Q. Wasn't there a statement by some participant in this conference to the effect that the stocks or investments or investment securities that Mrs. Beatrice Westhall had left were substantially the same as those that Mr. E. J. Westhall had left and that something should be decided or some decision made as to whether or not those stocks should be held intact or whether they should be sold?

A. I don't remember any such conversation.

Q. Wasn't there any discussion about the Shoe Machinery stock?

A. I don't recall it. I would say positively no.

Q. You are certain about that?

A. I am pretty sure.

Q. Coming back to the first time you had any discussion with anybody about the sale of the business, I understand that was on the day of Mrs. Beatrice Westhall's funeral.

A. That evening.

Q. Osborne said he would like to see you?

A. Yes, he asked me to come to the Westhall house.

Q. And you saw him that evening?

A. Yes.

Q. Where?

A. In the Westhall home on Second Street.

Q. At that time, as I understand, and if I am wrong please correct me now, he said something has got to be done about this business, isn't that true?

A. He said some decision must be made as to what we are going to do with the business. That was the substance of it.

Q. That is substantially a correct statement?

A. Yes.

Q. What did you say?

A. I didn't say anything. He said we would meet the next morning and Mr. McCloskey would be there and we would talk it over.

Q. Did you meet the next morning?

A. Yes.

Q. Where?

A. In the Westhall home on Second Street.

Q. And the next morning Mr. McCloskey told you that Mrs. Westhall had left no will and that some decision would have to be made about the business?

A. Yes.

Q. As a matter of fact, I think on the previous night when you were talking to Osborne he said, "We will have to find a buyer for the business."

A. That was about the substance of it, I don't recall his exact words.

Q. When you met there with Mr. McCloskey what did Mr. McCloskey have to say outside of the fact that Mrs. Beatrice Westhall left no will?

A. The conversation centered around the sale of the business, and Mr. McCloskey said something would have to be done about it, and Osborne spoke up and said he would like to buy it.

Q. And didn't he say also that he would not pay anything for the good will?

A. He did.

Q. And that was in August of 1931?

A. Yes.

Q. I take it that was about the fifteenth of August?

A. No, it was the eighteenth, the day after Mrs. Westhall's funeral.

Q. Was anything more said between you and Mr. Havens or you and Mr. McCloskey until the meeting at Mr. McCloskey's office?

A. No.

Q. When you met at Mr. McCloskey's office, Mr. Havens repeated that he was still interested in the buying the business but he would not pay anything for the good will?

A. No, Mr. McCloskey said—there was some discussion about good will. Mr. McCloskey said, "Didn't someone say something about good will," and Jane said, "Yes, I did," and that is all was said, it was just glossed over.

Q. Didn't Virginia say something?

A. No, she did on the morning of the eighteenth of August.

Q. I will ask you whether or not Mr. Havens said on the evening of the conference in Mr. McCloskey's office, whenever it was, that he would not pay anything for the good will. Isn't it a fact that he said, "I will buy the business but I won't pay anything for the good will?"

A. My recollection is that he said he would buy the business at the inventory price.

Q. And didn't he also say in conjunction with that

statement that he would not pay anything for the good will?

A. I don't recall his saying that, no.

Q. He said he would buy the business at the inventory price, and several copies of the inventory and appraisement were available, were they not?

A. I recall Mr. McCloskey had one, and Osborne had one and to the best of my recollection there was one copy passed around among the lot of us.

Q. Mrs. Jane Westhall had one for a space of time that evening?

A. Yes.

Q. You saw her reading it?

A. Yes.

Q. And as a matter of fact, you had a copy of this inventory and appraisement to look at?

A. Yes, for a time.

Q. No one suggested that you could not read it or were not allowed to read it?

A. I glanced through it but it was rather lengthy and I didn't have much time.

Q. You got in there around half-past eight and left around half-past twelve?

A. Yes.

Q. There was also an agreement that anybody who wanted any of the furniture might take it at the inventory price, was there not?

A. Yes.

Q. After Osborne said he would buy the business at the inventory price, did anybody express any objection to that?

A. I said, I would like to have something and Jane said she would, too, but there was not really any objections raised to it.

Mr. Matthews: I think she misunderstood the question.

Q. You told us that Osborne said that he would buy the business at inventory price?

A. Yes.

Q. Did anybody express any objection to that?

A. I misunderstood you, I thought you meant the furniture. When Osborne said he would buy the business at inventory price, no one made any objection, nothing was said about it.

Q. When you said you wanted something you meant the furniture and jewelry, didn't you?

A. When they spoke of the furniture I said I would like to have some things.

Q. And you agreed among yourselves that anybody that wanted furniture might take it at the inventory price?

A. No, Osborne seemed to resent it, and he turned to Mr. McCloskey and said, "They cannot take anything, if Jessie wants it, can they?" and Mr. McCloskey turned to him and said, "I think the girls have been very fair, if they want anything, they should have it."

Q. He said, "The girls have been very fair," that was referring to you and Mrs. Jane Westhall?

A. Yes.

Q. You say he said that you and Mrs. Jane Westhall had been very fair, did he say what you had been fair about?

A. I thought he meant about the things we had been discussing.

Q. Had there been any discussion to elicit that remark?

A. I presume he meant about the jewelry which had been discussed before and about the car, we were very glad for Jessie to have it. I suppose he meant that.

Q. When you started on this conference the first thing you discussed was the real estate?

A. The apartment building was the first thing.

Q. And somebody brought out the fact that Frank Shinn wanted his rent reduced?

A. Yes, Osborne did.

Q. And Mr. McCue was rather inclined to the thought that there should be some reduction in Frank Shinn's rent?

A. Yes.

Q. But Mr. Osborne Havens took issue with that and insisted there should be no reduction?

A. Yes, he said Mr. Shinn had the better display window.

Q. But whatever the reason, Mr. Havens opposed any reduction in Mr. Shinn's rental?

A. Yes.

Q. After you got that thrashed out, what was the next discussion?

A. Real estate.

Q. What was the discussion?

A. The discussion was that values were so low they would hang on to them and not sell them.

Q. And what was the next thing discussed?

A. The jewelry. Virginia said she would like to have her mother's diamond bracelet and Jessie said she would like to have her mother's diamond rings and Jane and I said we would like to have something and it was arranged that we should pick out what we wanted the next day at the bank.

Q. After the matter of the jewelry was decided, what was the next thing under discussion?

A. Osborne spoke about the Buick, he said he would like to have the Buick car for Jessie.

Q. Then what was after that?

A. After that was the business.

Q. And the business was the last topic of discussion?

A. No, the furniture.

Q. The furniture was the last?

A. Yes.

Q. The business was the next to the last?

A. Yes.

Q. During the conversation that evening, did you or anybody in your hearing ask Osborne how much the business had produced while he was running it?

A. No, we did not.

Q. You never made any inquiries of that sort?

A. No, I left that to the Trust Company.

Q. But you never made any inquiries yourself?

A. No, I did not.

Q. You told us quite a lot about this building and loan transaction. As a matter of fact, that was paid, wasn't it?

A. Yes.

Q. On this occasion when, as you say, you asked Mr. Havens as to when he was going to render an account, that was after the Trust Company had failed?

A. Yes.

Q. You said that at one meeting you had Mr. McCloskey turned around to Mr. Havens and said he would let him speak for himself?

A. Yes.

Q. When was that?

A. The September 30th meeting, in regard to the business.

Q. In other words, somebody brought up that question and Mr. McCloskey turned to Mr. Havens and suggested that he explain the proposition himself?

A. Mr. McCloskey brought it up, he referred to the business as coming next and then turned to Osborne.

Q. Mr. McCloskey brought up the topic of discussion and then referred to Mr. Havens to discuss it with you?

A. Yes, Mr. Tomlinson.

By Mr. Matthews:

Q. You told Mr. Tomlinson you did not read the agreement, and you were going to volunteer why but it was not responsive and I now ask you why?

A. It was all over my head and I admit that frankly, and I depended upon the Trust Company and upon Osborne.

Q. Is that the reason why you did not ask Osborne or Amory to read it?

A. Yes.

By Mr. Tomlinson:

Q. You have two children?

A. Yes.

Q. What are their ages?

A. I have one fifteen and one nine.

Q. And you are a semi-public stenographer and typewriter?

A. I have been doing that, at the present time I am secretary for Mrs. Lynch, in Lakewood.

Q. You say that an agreement such as this purported to be from the reading of two pages, was so much over your head that you did not feel confident to read it and understand it?

A. No, you don't understand, Mr. Tomlinson. I did semi-public work a short space of time, but very little of it; and when it came to agreements or mortgages, I don't know the first thing about them.

Q. But I say, you felt, after reading the first two pages of this agreement, that it was so much over your head that you did not feel confident to read it?

A. I glanced over the first two pages and it was party of the first part and names repeated over and over again and Osborne said, "It is just what we discussed last night about the business," and I felt it was certainly all right when Amory stood there and did not say anything.

Q. But I want to know whether you felt, after reading the first two pages of this agreement, that it was so much over your head that you did not feel competent to read it for yourself?

A. The night we went down to the meeting, September 30th, I said, "Absolutely, I know no more than my two children would know to go down here, but ——

Q. Despite Mr. Matthews' gestures I would like you to give me an answer to my question.

Mr. Matthews: I object to that remark, your Honor please, I have been making no gestures.

The Court: Proceed.

Q. You said it was so much over your head. Tell me when it was you decided it was so much over your head that you didn't want to read it?

Mr. Matthews: The fact remains that she didn't read it, she has so testified.

Mr. Tomlinson: Your Honor, I resent Mr. Matthews' constant interruption. If counsel has legal objection they may be addressed to the Court, but this constant interruption of my examination of the witness ——

The Court: Go on, Mr. Tomlinson.

A. I didn't read it, I glanced over the first two pages. I knew before I looked at it, I was not competent to understand it.

Q. Why did you look at it at all?

A. It was just curiosity. I naturally wanted to know something about it.

Q. Why didn't you read all of it, then?

A. Because I trusted them.

Q. Then it was not because you felt a lack of ability to read it and understand it?

A. It was not that entirely, it was the fact that the officials of the Trust Company seemed to think it was all right, and I trusted them. The whole thing was done hurriedly. Virginia was leaving that day to go to Washington.

Q. Why didn't you ask for time?

A. I told you that I trusted the officials of the

Trust Company and at that time I also trusted Osborne.

Q. Nobody told you you had to sign it?

A. No.

Q. And as a matter of fact, you know that Mrs. Hooper signed it later on?

A. I didn't know that then, I found that out since.

Q. You found out she signed it in Washington later on?

A. Yes.

By Mr. Matthews:

Q. You were not commanded to sign it, were you?

A. No.

Q. And the fact that the agreement was over your head, you found it difficult to understand then like we are finding it now? Nobody knows what it means, in fact.

Mr. Tomlinson: I object to that, your Honor, that is mere comment of counsel.

A. Practically.

By Mr. Tomlinson:

Q. When you left the bank, did you leave with Mrs. Jane Westhall?

A. No, she had her own car. We came out together and she immediately left to go to the school and I went directly home.

Q. But you and Mrs. Jane came out of the Trust Company door together?

A. Yes.
Q. Where was Mrs. Hooper?
A. Still in the bank with Osborne and Jessie.

By Mr. Matthews:

Q. Did you ever have in your hands the copies of this testimony that I bought from the stenographer during the entire trial?
A. Never.

Mr. Matthews: I have subpoenaed Mr. Charles McCue. Mr. McCue is very ill I am informed and have no doubt. I would like to have Mr. McCue's testimony and I want to consult the doctor as to the possibility of taking it at his bedside. Beside that testimony and some exhibits, I have nothing further, and we rest at this time, with that reservation with the respect to the Court the exceptants rest. My associate has knowledge of the exhibits and I will ask him to present them.

Mr. Crummy: The first exhibit is in my handwriting and I believe some months ago we stipulated that Mr. Elmer Matthews and I would go over the books of Mr. Havens from August 13th, 1931, to August 9th, 1932. I was to take off the figures and check them in the presence of Mr. Havens, which I did. I submitted a statement to Mr. Havens and he went over and checked the figures and he finds a correction of two hundred dollars. I have made that correction and now offer the statement in evidence.

The Court: Has Mr. Tomlinson or Mr. McCloskey seen it?

Mr. Tomlinson: As a matter of fact, neither Mr. McCloskey nor I have seen it. Mr. Havens did go over it with Mr. Elmer Matthews and I understand Mr. Havens says it is substantially correct.

The Court: Is there any objection?

Mr. Tomlinson: Upon our theory of the case, I submit it is not relevant. This shows an income from the business from August 13th, 1931, up to and including the date Mr. Havens paid for the business. Our contention is that the sale was as of the 13th of August, when Mrs. Westhall died.

The Court: I suppose when this agreement was first introduced I should have formed some idea what my attitude would be toward that exhibit. It is probably too late now.

Mr. Matthews: This was admitted by your Honor subject to check and your Honor admitted it upon the theory of your ultimate construction of the agreement.

The Court: I will admit this exhibit.

(Statement marked in evidence Ex. E-50.)

Mr. Tomlinson: And we may have an exception?

The Court: You may have an exception. Whether

or not it is admissible depends upon my construction.

Mr. Crummy: I have five income tax returns, one of E. J. Westhall, deceased, and four of Beatrice E. Westhall, these have been admitted but not marked.

(Tax slips marked in evidence Ex. E-51, E-52, E-53, E-54, E-55.)

Mr. Matthews: We called Mr. McCue's home last night and he is quite ill. In fact, he has a heart condition, and he spoke to me some time ago on one of the earlier days, and I told him I would not put him on. Rather than cause him any attack on his heart, I told him I would waive his testimony.

Mr. Tomlinson: I told Mr. Matthews I didn't want to put him on the stand and subject him to any strain.

The Court: How much testimony will you have, Mr. Tomlinson?

Mr. Tomlinson: Two witnesses.

The Court: Suppose we proceed and meantime you find out about Mr. McCue's condition.

(Recess to one-thirty P. M.)

AMORY PARMENTIER, a witness produced on behalf of the accountant, being duly sworn according to law, upon his oath testified as follows:

Direct examination.

By Mr. Tomlinson:

Q. Mr. Parmentier, you have already testified in this matter, and during the course of your testimony you stated that you were present at a conference in Mr. McCloskey's office on the evening which has been mentioned?

A. Yes, sir.

Q. What have you to say as to whether or not Miss Pendle was present at that conference?

Mr. Matthews: Object, he has already testified to whom were present at the conference.

Mr. Tomlinson: I think we have a perfect right to call him on behalf of the accountant. He was produced by Mr. Matthews and testified certain persons were present at the conference. He didn't say whether Miss Pendle was there or not. We think it is perfectly competent to ask him later.

Q. Will you tell us, Mr. Parmentier, whether or not Miss Pendle was present at that conference?

A. I believe she was there.

Cross-examination.

By Mr. Matthews:

Q. What do you mean, you believe she was there?
A. Just that. I will answer Miss Pendle was there.
Q. Where was she sitting?
A. I don't recall.
Q. What time did she come in?
A. I don't remember.
Q. Was she there during all of the conference?
A. I remember seeing her at the conference.
Q. Did you see her upstairs or downstairs?
A. The conference was held in the library.
Q. I am asking you specifically whether if you saw Miss Pendle you saw her downstairs or you saw her upstairs?
A. I saw her upstairs in the library.
Q. During how long a part of the conference was she there?
A. I cannot tell you.
Q. You don't know whether she was there five minutes or three minutes or three hours?
A. I don't recall.
Q. Do you recall testifying on the 19th of October, 1934?
A. Yes, sir.
Q. Do you recall, at page 7, gentlemen, being asked "Q. And you say you were present in no official capacity?" "A. That is right," did you so answer?
A. Yes, sir.
"Q. Who else was there at that conference beside you?
A. As I recall, Mr. McCue, Mr. Charles J. Par-

mentier, Mr. Smock, Mr. McCloskey, Mrs. Jane Westhall, and Mrs. Bessie Westhall, and I believe Virginia C. Hooper, and Jessie Westhall."

Q. And Mr. Havens. Do you recall saying that?

A. It is in the record, I must have said it.

Q. I show you the record, I show you the question and I show you the answer on page seven and eight of the testimony. Here is the question and here is the answer. Have you read the question and answer?

A. I have.

Q. Do you find when you were asked at that time that you recalled that Miss Pendle was there?

A. Not according to the record.

Mr. Matthews: That's all.

ARTHUR SMOCK, a witness produced by the accountant, being duly sworn according to law, upon his oath testified as follows:

Direct examination.

By Mr. Tomlinson:

Q. Mr. Smock, where do you live?

A. Lakewood.

Q. How long have you lived in Lakewood?

A. About thirty-five years.

Q. At the time of the death of Mrs. Beatrice E. Westhall what was your occupation?

A. Principally real estate.

Q. And you were acquainted with Beatrice E. Westhall?

A. I was.

Q. Had you been acquainted with E. J. Westhall?

A. I had.

Q. And you know Mrs. Elizabeth and Mrs. Jane Westhall?

A. Yes.

Q. Mr. Smock, were you present at the conference that took place in Mr. McCloskey's library on the evening that has been described?

A. I was, yes, sir.

Q. Do you recall the date?

A. Only that it was in the latter part of September, some time.

Q. Can you tell us who were present in that conference beside yourself?

A. Mr. Amory Parmentier and I were there, Mr. Charles McCue, Mr. C. J. Parmentier of the Trust Company, Mr. McCloskey, Mrs. Hooper, Mrs. Jessie Havens, Mrs. Jane Westhall, Mrs. Elizabeth Westhall, and Miss Pendle.

Q. You say Miss Pendle was there?

A. She was there.

Q. You have known her for some time during her service in Mr. McCloskey's office, have you not?

A. For a number of years, yes.

Q. Can you tell us what time the conference began?

A. My best recollection is that it got under way possibly around eight o'clock or quarter after eight.

Q. Will you tell us what was discussed at the conference?

A. The inventory and appraisement Mr. Parmentier and I had prepared was submitted and dis-

cussed in quite considerable detail, there was also the question of the advisability of disposing of the assets of the estate, whether the market was ripe or whether they should be held over.

Q. When you speak of the assets do you mean real or personal property or what?

A. Real estate and everything covered by the inventory.

Q. Directing your attention specifically to securities, what, if anything, was said about disposing of the securities that formed a part of the estate of Mrs. Beatrice Westhall?

A. I do not know exactly what was said, but to my recollection the final decision was that it was not the proper time to sell them.

Q. What else was discussed beside the sale of the assets and the inventory and appraisement?

A. The question of continuing the business or selling it was also discussed.

Q. What was said and by whom in that regard?

A. That is hard to answer. I can say there was a general discussion about what should be done with the business and I do recall Mr. Havens stating that he was willing to take it over, but further than that I could not recall.

Q. Do you remember any discussion beside that? You have told us about the inventory and appraisement, the disposal of the assets, and the question of Mr. Havens buying the business.

A. I have a distinct recollection that Mr. Havens made a proposition to buy the business at its inventory value and it did not seem to meet with the approval of the interested parties.

Q. Did they say what their objection was?

A. They did not think it was enough money.

Q. What else was discussed if you recall?

A. Finally the question came up of the disposition of the apartment building and the real estate, and before the meeting adjourned I recall a final offer was made by Mr. Havens in which he agreed to rent the property for a period of years at an annual rental and also look after the apartment building, give janitor service and collect the rents, and that seemed to turn the tide and those present seemed to be in accord then.

Q. Do you recall any comment made by Mr. McCue?

A. I cannot recall any specific comment made by anyone excepting Mr. Havens' various offers. I know the general discussion.

Q. Approximately what time did the meeting break up?

A. I think it must have been very close to twelve o'clock.

Cross-examination.

By Mr. Matthews:

Q. Where was Miss Pendle when you came there to this conference?

A. I think when Mr. Parmentier and I first came there, we were a little early and she was not there. She came in later.

Q. Where were you when she came in?

A. I was sitting at the west end of this library table on the third floor.

Q. I am not interested in the geographical position

so much as the particular room in Mr. McCloskey's office.

A. The library on the third floor.

Q. Were all present when Miss Pendle came in?

A. I am not sure, I cannot answer that.

Q. Where was Miss Pendle sitting, now you can be geographically particular, if you wish?

A. When I first recall her, she was sitting between where I was sitting and the main entrance to the library.

Q. She was sitting at the table?

A. No, back from the table as I recall.

Q. Was she there all evening?

A. I don't think so.

Q. How long do you think she was there?

A. I don't know. She was there when we first started to discuss the matter and then I think she went out for some papers, but I recall she was there when the final details were arranged.

Q. What papers did she go out after?

A. My recollection is that Mr. McCloskey sent her downstairs for papers once or twice in connection with what was being discussed.

Q. You were discussing the real estate, the business, the inventory—was it perhaps the inventories he sent her downstairs for?

A. I don't think so, I think they were on the table at the time.

Q. Who brought those up?

A. I could not say.

Q. What were the papers, can you recall?

A. No, I cannot recall.

Q. At what stage of the conference did Mr. McCloskey send her downstairs?

A. I don't remember.

Q. How long had the conference been under way before Miss Pendle was sent downstairs for papers?

A. It would be my guess, possibly half an hour.

Q. And during that time Mrs. Bessie Westhall was there.

A. I am not certain.

Q. Aren't you certain she was there during all the conference?

A. Yes, she was.

Q. So she would have been there when Miss Pendle was sent downstairs?

A. Yes.

Q. She could not help but see her, this was a small room, wasn't it?

Mr. Tomlinson: Object to the question.

Mr. Matthews: Strike out "she could not help but see her."

The Court: I will let it stand.

A. It is a room about twenty by thirty as I recall.

Q. There was a table in the center of the room?

A. Yes.

Q. And you were all sitting around the table.

A. No, most of the time we were sitting around the room. Sometimes they came to the table.

Q. And you say Mrs. Elizabeth Westhall was there all the time?

A. Yes.

Q. And so was Mrs. Jane Westhall?

A. That is my recollection.

Q. Did you go upstairs together all of you conferees.

A. No.

Q. Who went up first?

A. I think Mr. Parmentier and I came in together and Mr. McCue I think was with us. Other than that, I don't know. I think they came in at separate times.

Q. Were you all there when Miss Pendle came in?

A. I think we were.

Q. When she came in what did she do?

A. She had some papers and a note book with her, and sat down in a chair.

Q. What kind of chair?

A. A chair somewhat similar to this.

Q. With no arm on it other than the regular arm such as that has?

A. Just like that. (Referring to chair used by counsel.)

Q. What did she say, if anything?

A. I don't recall that she said anything at all.

Q. Did anybody say anything to her?

A. Not that I recall for some time.

Q. At any time did anyone say anything to her?

A. Mr. McCloskey ordered her to get papers once or twice.

Q. Outside of Mr. McCloskey ordering her to get papers once or twice was anything said to her?

A. Mr. McCloskey during the latter part of the conference dictated some rough memoranda to her with reference to the lease.

Q. What time of night was it?

A. It must have been around half past eleven.

Q. And the people were there still?

A. Yes.

Q. And from eleven to eleven-thirty Mr. McCloskey dictated something to her?

A. It was between those two times.

Q. How long did he dictate?

A. At a guess, ten or fifteen minutes.

Q. Where was she when he dictated to her?

A. Sitting near him at the east end of the table.

Q. She got up from where she was sitting near you.

A. She may have left on the order for some papers and sat near Mr. McCloskey when she came back. I know she was there when he was dictating.

Q. You don't remember what papers she was sent for?

A. No.

Q. But they certainly were pertinent to the discussion.

A. Something to do with the Westhall estate.

Q. That's the only time Mr. McCloskey spoke to her, the twice he sent her for papers and the ten or fifteen minutes he dictated to her?

A. I don't recall.

Q. As he talked to her did anybody say anything?

A. My recollection is that at the time he was dictating these terms and conditions the people were sitting around in various groups discussing various things.

Q. What group were you in?

A. With Mr. Parmentier, Mr. McCue, and Mr. C. J. Parmentier.

Q. Were you a director of the bank at that time?

A. I think I was.

Q. Your corporation was one of the guardians of these infant children?

A. The bank was, yes.
Q. And you were a director of the bank?
A. I am not sure whether I was a director in 1931.
Q. What were you doing there?
A. I was there with Mr. Parmentier as one of the appraisers.
Q. You were there only as one of the appraisers.
A. That is my recollection, of course, the records of the Trust Company will speak as to that.

Mr. Matthews: May we call Mr. Parmentier for a moment?

(Mr. Amory Parmentier appears.)

Direct examination.

By Mr. Matthews:

Q. Mr. Parmentier, will you produce your records and turn to the part that covers September, 1931?
A. (Book produced, witness turns to page requested.)

By Mr. Matthews: (Addressing Mr. Smock.)

Q. The records do not show that you were a director in 1931.
A. I was not. The bank closed in 1932, and I was not a director.
Q. So you were there only as having made this inventory and appraisement?
A. That is true.

Q. I show you a copy of the inventory and ask you whether or not that is the inventory you were present with that night?

A. That is the one, yes, sir.

Q. Will you look at this jurat of Amory J. Parmentier and tell me the date of the jurat?

A. The fifth day of October, 1931.

Q. So that the inventory was sworn to on the fifth of October?

A. That is evident from the affidavit.

Q. That affidavit reads "Amory J. Parmentier, being duly sworn, according to law upon his oath deposes and says that he is one of the appraisers in the foregoing inventory named; that the goods and chattels, rights, credits and effects, in said inventory specified were by him appraised at their just and true respective values according to the best of his judgment, and that Arthur R. Smock, the other appraiser in said inventory named, was present at the same time with deponent and consented to the said valuation and appraisement." That is the way it reads.

A. Yes.

Q. But on the night, the date of which you don't remember, but in the end of September, that this inventory was being passed around ——

A. Copies of it were, yes, sir.

The Court: What is the date of that inventory?

Mr. Matthews: That is the only date the inventory has, your Honor. There is no other date on this inventory except that.

The Court: There ought to be.

Q. Did you hear Mrs. Elizabeth Westhall testify less than two hours ago?

A. I did not get down here until quarter past twelve.

Q. Did you come while she was on the stand?

A. No, sir, there was a recess when I came.

Q. Besides the twice that Mr. McCloskey sent Miss Pendle out for papers and the time when he allegedly dictated to her for ten or fifteen minutes, was there any conversation between Mr. McCloskey and Miss Pendle or anybody else and Miss Pendle that night?

A. I don't recall it, no.

Q. Do you know what Mr. McCloskey dictated to Miss Pendle?

A. In a general way.

Q. What is your general recollection?

A. My general recollection is that he gave Miss Pendle a very brief outline of the contract which Mr. Havens was to sign for the rental of nine hundred dollars a year and the real estate in which he was to maintain that building, give janitor service and collect the rents and so forth for the benefit of the estate.

Q. And after that was done, what did Miss Pendle do?

A. I think about that time we all went home.

Q. Did Miss Pendle go out with you all?

A. I think Miss Pendle went out before we did.

Q. Alone?

A. That is my recollection.

Q. Was she gone when you got downstairs?

A. I didn't see her any more that night.

Q. Did you go out with Mr. McCloskey?

A. No, I went out with Mr. Amory Parmentier.

Q. Who was the last out, do you know?

A. I don't know.

Q. Was Mr. McCloskey there after you left?

A. Yes, we left ahead of him.

Q. Didn't you all meet and go somewheres afterwards?

A. Not that I recall.

Q. Didn't you men go to the Elks?

A. Not that I remember.

Q. Did you see Mac on the sidewalk after this was over?

A. It might have been possible, I don't recall it.

Q. Did Mr. McCue say anything about the price of the business?

A. Mr. McCue made a remark about he was glad that the matter was all settled satisfactorily.

Q. That is not what I asked you to volunteer. Mr. McCue is not here, he is ill. I am asking you now did Mr. McCue say anything about the price of the business?

A. I don't recall.

Q. You said that something seemed to turn the tide, when was the tide turned?

A. No, I didn't say that, I said when Mr. Havens agreed to take over and operate the building and take care of the real estate.

Q. That seemed to turn the tide?

A. Yes.

Q. When was that?

A. It was pretty well along in the conference, after we had been there quite a while.

Q. Will you tell me what you were doing there after your inventory had been handed in?

A. I don't know.

Mr. Matthews: Neither do I.

Mr. Tomlinson: I ask to strike that comment of counsel.

Mr. Matthews: I consent that it be stricken.

Q. But you stuck there all night.
A. We all stayed.
Q. I am talking about you, you didn't have anything to say in the conference, did you?
A. I don't think I had any part in the discussion. Mr. Parmentier and I were there to defend our inventory or to explain any item if called upon to do so.
Q. What item were you called upon to defend or explain?
A. I don't recall any, except the statement that someone made that they thought the business was valued too low.
Q. You didn't think it was, did you?
A. I did not at that time, no, sir.
Q. How much of the appraisal had you made?

Mr. Tomlinson: If the Court please, I submit that is not proper cross-examination. I interrogated the witness simply upon his participation in this meeting, and therefore I say any questions about the inventory and appraisement are not proper cross-examination.

Mr. Matthews: My answer is that this man had no legal business there except to justify any item of the inventory made by him in conjunction with

Mr. Parmentier that might have been questioned. Now he says that some question was raised as to the valuation put upon the business being too low and my question was predicated upon that to test his credibility.

The Court: Let me have the question.

Stenographer: (Repeats question.) How much of the appraisal had you made?

The Court: I think you have hit the limit of that.

Mr. Matthews: This man's credibility is a vital thing. If Mrs. Elizabeth Westhall told the truth, he is a perjurer. Isn't your Honor interested to determine that sitting here as Judge and jury? This is to test his credibility.

The Court: Yes, but you cannot wander all over Ocean County to do that.

Mr. Matthews: With respect to the Court, I resent that, after twenty-five years' experience at the bar, when I am just asking what I believe to be an admissible question, as would be any question going to the credibility of a witness whose testimony, if believed, would discredit a very important element in the exceptants' case.

The Court: How does that particular question tend to test his credibility?

Mr. Matthews: If I show, as is our contention, that he made virtually none of this inventory and

appraisement, then his presence at that conference that night was not even necessary. More than that if I pursue that when he says that the question of the amount at which the business was appraised was discussed and when he makes the statement that he was there for the purpose of defending his inventory and appraisement, the answer becomes a nugatory answer and your Honor can conclude as between Mrs. Elizabeth Westhall and Mr. Arthur Smock who is telling the truth. That is rather important.

Mr. Tomlinson: I want to point out to your Honor that everyone in this case has testified that Mr. Smock was present and therefore the reason for his presence does not become a question of any moment.

Mr. Matthews: We admit he was there, your Honor.

Mr. Tomlinson: If we get into the question of his inventory and appraisement, we are going away from the point for which we put him on the witness stand.

Mr. Matthews: I will make him my own witness, your Honor please.

Mr. Tomlinson: I put this witness on for one precise line of inquiry with respect to what happened in Mr. McCloskey's office that night. Not what he was doing there, but simply what he observed. If they proceed to examine him as to the inventory and appraisement they are going away beyond the purposes for which he was put on the stand and it is no

answer for Mr. Matthews to say he would make him his own witness. He has finished his case and we are on our case.

The Court: I am going to sustain the objection.

Mr. Matthews: Your Honor will allow me an exception?

The Court: Oh, yes.

Mr. Matthews: I wish to state for the record that I wish to test this witness on a matter vital to this case.

Q. You didn't make any of this appraisal for the Westhall estate personally, did you?

Mr. Tomlinson: Object.

The Court: Objection sustained.

Q. So on the night of the meeting your presence there as to the value of the goods in that inventory did not mean a thing, because you did not know anything about that.

Mr. Tomlinson: Object as not proper cross-examination and as calling for a conclusion from the witness.

The Court: Objection sustained.

Q. Mr. Smock, the affidavit taken to this inventory

was taken by Mr. Parmentier as I showed you a few moments ago, was it not?

A. That is correct.

Q. And it was he who swore that you the other appraiser were present with him at the same time and consented to the appraisement?

A. That is the affidavit.

Q. When did you appraise the caskets in this inventory?

Mr. Tomlinson: Object as not proper cross-examination.

The Court: Objection sustained.

Mr. Matthews: Exception.

The Court: You may have an exception.

Q. Were you present with Mr. Parmentier at his appraisement of every good and chattel of this estate?

Mr. Tomlinson: Object as not proper cross-examination.

The Court: Objection sustained.

Mr. Matthews: Your Honor will allow me an exception?

The Court: Exception.

Q. On the night in question when the amount being

offered for the business was objected to what did you say?

A. My recollection is that I didn't say anything.

Q. And the reason you didn't say anything was because you had not done anything in the appraisal.

Mr. Tomlinson: Object as immaterial.

The Court: Objection sustained.

Mr. Matthews: Your Honor will allow me an exception?

The Court: You may have it.

Q. So that the entire night you said nothing at the conference even when the only item of the inventory that was discussed was up before the conference, is that correct?

A. I think at one time Mr. Parmentier and I were both asked about the appraisal and we made the statement in our judgment we had established fair valuations for the whole property. That was about the only discussion that I had.

Q. Did you speak together or did you speak alone?

A. I don't remember but we probably spoke separately.

Q. When you said that you had not examined the caskets to appraise them, had you?

Mr. Tomlinson: Object as improper cross-examination.

Mr. Matthews: It is on that fair valuations an-

swer that I predicated my question. That answer told what he discussed.

The Court: Let me have that answer.

Stenographer: A. I think at one time Mr. Parmentier and I were both asked about the appraisal and we made the statement in our judgment we had established fair valuations for the whole property. That was about the only discussion that I had.

The Court: It is a volunteered statement outside the scope of the question.

Mr. Tomlinson: The purpose and intent of this line of questioning are obvious, it is an attempt to attack this gentleman's inventory and appraisement, and that is not the purpose for which he was placed upon the witness stand. He was placed upon the witness stand to testify to the persons who participated in the conference at which he admittedly was present.

Mr. Matthews: This was to attack his credibility and attack the statement he has just made.

The Court: The objection will be sustained and you may have an exception.

Q. You had not appraised any of the physical assets of this property, had you?

Mr. Tomlinson: Object.

The Court: Objection sustained.

Mr. Matthews: Your Honor will allow me an exception?

The Court: You may have an exception.

Q. And yet despite the fact that you had not appraised any of these goods, you made the statement that the valuations were fair.

Mr. Tomlinson: Object as not proper cross-examination, and assuming something not proven.

The Court: Objection sustained. Exception.

Q. So that as a matter of fact at that conference you were supercargo, weren't you?

Mr. Tomlinson: Object.

The Court: Objection sustained.

Mr. Matthews: Your Honor will allow me an exception?

The Court: You may have an exception.

Q. What is your business now, Mr. Smock?

A. Principally real estate.

Q. What is it secondarily?

A. I do auditing work for the Beverage Tax Department.

Q. Is that Mr. Burnett's department?

A. No, Mr. Grimm's.

Q. Do you do business with the office of Mr. McCloskey, formerly Jayne and McCloskey?

A. Very little lately.

Q. In 1929, 1930, 1931, and 1932, did you do a lot of business with their office?

A. No, it has been several years, much prior to 1929. I have done very little business since then.

Q. Who appointed you appraiser?

Mr. Tomlinson: Object as improper cross-examination.

The Court: Doesn't the record speak for itself on that.

Mr. Matthews: It does not speak, that is the trouble, your Honor.

The Court: There was something said about that on the first day of this hearing, wasn't there. I will let that question stand and you may have an exception.

Q. Who appointed you appraiser?

A. I think I received a notification that Mr. Parmentier and I had been appointed through Mr. Havens, that is my best recollection.

Q. Mr. Havens, the administrator in this case?

A. Yes, sir.

BEATRICE E. PENDLE, a witness produced by the accountant, being duly sworn according to law, upon her oath testified as follows:

Direct examination.

By Mr. Tomlinson:

Q. Miss Pendle, where do you live?
A. In Lakewood.
Q. Where in Lakewood?
A. Laurel Avenue.
Q. For a number of years you have been employed in Mr. McCloskey's office?
A. I have.
Q. As Mr. McCloskey's secretary?
A. Yes.
Q. During the year 1931, including the months of August and September, were you Mr. McCloskey's secretary?
A. Yes, I was.
Q. Do you remember a conference that took place in Mr. McCloskey's office as has been described here?
A. I do.
Q. Were you or were you not present at that conference?
A. I was.
Q. Do you recall, Miss Pendle, the date on which that conference was held?
A. September 29th.
Q. Where were you at the time the conference took place?
A. I was in the library.

Q. Were you present during the entire conference or simply part?

A. If I remember correctly I was there during the whole time.

Q. At any time did you leave the conference or the library temporarily to get books or anything like that?

A. I might have gone downstairs to get some papers but I don't remember.

Q. How many tables were in the library at that time?

A. One.

Q. Can you tell us approximately the size of that table?

A. It is as long as those two together (indicating the two tables for counsel).

Q. A rather long table?

A. Yes.

Mr. Matthews: Does your Honor want to approximate that distance?

The Court: My guess is about six feet each.

Mr. Matthews: Mr. Elmer Matthews says the table in the library is thirteen or fourteen feet long.

Q. What time did this conference start if you recall?

A. I think I got there about seven-thirty and the rest came one or two at a time and I think everyone was there by quarter to eight or shortly after.

Q. Do you recall what was discussed?

A. I remember quite a lot of it.

Q. Will you tell us to the best of your recollection that part you do recall?

A. I know they talked about the real estate, what would be done with that, whether it should be sold or whether they would keep it and I remember they looked over the inventory and they talked about the jewelry, what should be done with that, and whether each one would take some of it, and they talked about the furniture and they talked about selling the business.

Q. Do you recall what was said about selling the business?

A. Mr. Havens offered to buy it at the inventory price. He also said he would not pay anything for the good-will and Mrs. Hooper objected. She said her father had always made a good living from the business and she thought it should have some good-will.

Q. Was anything further said as a result of that.

A. I don't recall what else was said.

Q. What if anything did you hear Mr. Havens say with reference to real estate or taking care ——

Mr. Matthews: Object as leading.

The Court: I suppose you are correct but the leading is apparently done now.

Mr. Matthews: It is an important element in this case.

A. Mr. Havens offered to take care of the property and real estate, especially the apartment building on Second Street. Then he wanted to rent the house where he now lives.

Q. Is that the extent of your recollection about it?

A. I don't think I remember anything more about it.

Q. What time did the meeting break up?

A. It was nearly twelve o'clock when I left and everyone else was still there.

Q. You left ahead of everyone else?

A. Yes.

Q. You left by yourself?

A. Yes.

Q. I show you an agreement marked Exhibit E-1 and ask you if you had charge of the preparation of that agreement?

A. Yes, I did.

Q. And from whom did you get the necessary data for the purpose of preparing that agreement?

A. From Mr. McCloskey and from what I had heard at the conference.

Q. Now you have told us that this meeting took place on the evening of September 29th, 1931.

A. That is correct.

Q. When was it that Mr. McCloskey dictated to you the data which you said you received from him for use in the preparation of the agreement marked Exhibit E-1?

A. The next afternoon.

Q. And when was it, Miss Pendle, the agreement was finally finished?

A. Either the first or second of October.

Q. And did you have anything to do with its disposition after its preparation had been completed?

A. No, I did not. Mr. McCloskey delivered them to the Lakewood Trust Company.

Q. And do you know the date on which he delivered them?

A. I am not sure about it, but I think it was the fourth of October.

Q. I show you, Miss Pendle, a bill of sale marked Exhibit A-4 from Osborne W. Havens as administrator to Osborne W. Havens, individually, for a consideration of four hundred and twenty-seven dollars and fifty cents and ask if you had anything to do with the preparation of that instrument?

A. I had charge of the preparation, I didn't do the actual typing.

Q. I invite your attention to the acknowledgment on the back of this instrument and ask you if you took that as notary public?

A. I did.

Q. When did you take that acknowledgment?

Mr. Matthews: Object, the instrument speaks for itself.

Mr. Tomlinson: There has been some insinuation that she did not put the correct date on there.

Mr. Matthews: There were not insinuations, there was testimony.

The Court: By whatever name you call them I think I recall some statements in the testimony which looked toward showing that that instrument was not prepared or the acknowledgment was not taken on the date it purported to be.

Mr. Matthews: We claim they were made since this case started.

The Court: For that very reason this question is pertinent.

Mr. Matthews: I will withdraw the objection, I thought the instrument itself was in evidence.

Q. I ask you the direct question whether or not you took the acknowledgment on the date shown therein?

A. I did, July twelve, 1932.

Q. I also ask you if you can tell us when that instrument was prepared?

A. July seventh, 1932.

Q. I put another direct question to you. Have you drawn that instrument since the institution of this litigation?

A. I have not.

Q. And dated it back?

A. I have not.

Q. I invite your attention to another bill of sale marked in evidence Exhibit A-3, from Osborne Havens, administrator, to Osborne Havens, individually, consideration two thousand three hundred and thirty-two dollars and ask you if you had charge of the preparation of that instrument?

A. I did.

Q. And will you tell us when that instrument was prepared?

A. July seventh, 1932.

Q. I call your attention to the acknowledgment on the back of this instrument and ask if you took that acknowledgment?

A. I did.

Q. I ask you in addition whether or not you took

the acknowledgment on the date stated therein, to wit, July 12, 1932?

A. I did.

Q. Did you or did you not prepare this instrument after the institution of this litigation and date it back?

A. I did not.

Cross-examination.

By Mr. Matthews:

Q. What were you doing at the conference?

A. I was there as Mr. McCloskey's secretary.

Q. What did you do?

A. I took a few notes and listened to what everyone was saying.

Q. What for, for what reason did you listen to what everyone was saying?

A. In case they wanted any papers drawn that night I was there to do it.

Q. You have a perfectly lovely office downstairs?

A. We have.

Q. This was none of your legal business, you were not an heir-at-law of this estate?

A. No.

Q. Did you take any notes?

A. I think I took a few.

Q. Have you them?

A. No, I have not.

Q. When you say a few how much do you mean in pages?

A. I don't know how many pages.

Q. What did you do with those notes?

A. If they were on a yellow pad, I suppose they were destroyed after the agreement was prepared.

Q. You don't mean to tell me that you prepared the agreement from those notes?

A. It might have been.

Q. What did you do, you didn't prepare the agreement from those notes?

A. Partly.

Q. You did?

A. Yes.

Q. I show you Exhibit E-1, will you point to one page you think you prepared from the notes you took that night upstairs?

(Witness examines pages of agreement.)

A. I think this page where it provides about the rental of the property.

By Mr. Tomlinson:

Q. What page is that?

A. The eighth page.

By Mr. Matthews:

Q. Now, pointing to the eighth page, will you show me what you wrote from the notes you took upstairs that night? Will you read into the record what you prepared from the notes you took upstairs that night?

A. This part which begins "in consideration of the sale of said undertaking business, merchandise, stock in trade, equipment, and accessories by Os-

borne W. Havens, administrator, to Osborne W. Havens, individually, the said Osborne W. Havens shall pay forthwith to the estate of Beatrice E. Westhall, deceased, the sum of three thousand, eight hundred and forty-two dollars and shall lease that part of the premises set forth in A in the recital to this agreement which has heretofore been employed in the undertaking business, consisting of dwelling house, barn, and chapel, from the heirs-at-law of the said Beatrice E. Westhall, deceased, for the term of one year from October first, 1931, at the yearly rental of nine hundred dollars, payable in equal monthly installments in advance, and as a further consideration of the said Osborne W. Havens, shall supervise and manage all the real estate of which the said Beatrice E. Westhall died seized and which is particularly set forth in the recital to this agreement."

Q. You took all that that night?

A. Not that word for word, but the terms of that paragraph.

Q. I wondered if you took it in those words.

A. No.

Q. In your wisdom as a secretary and a good secretary you know you didn't take that word for word that night.

A. No, I didn't mean that I took that whole paragraph word for word, I took the amount of the rent and the terms.

Q. In other words, you took those figures?

A. That is right.

Q. You didn't take the terms in the sense of the language but in the sense of the figures.

A. That is right.

Q. That didn't take very long, did it?

A. No.

Q. How long do you think that took?

A. I don't know.

Q. Should I prompt your memory a bit, would you agree with an old fellow like me that has had a secretary for twenty-five years that it would take about three minutes?

A. It may have taken three minutes.

Q. And the next day according to your recollection was the thirtieth of September.

A. That is correct.

Q. And in the afternoon of that day your boss, Mr. McCloskey, dictated this agreement, is that right?

A. That's correct.

Q. When did you type it?

A. I didn't do the actual typing.

Q. Who did?

A. One of the other girls in the office.

Q. What is her name?

A. Miss Nester.

Q. Is Miss Nester still employed by you?

A. Yes.

Q. When did she type it?

A. She might have started it the same afternoon it was dictated and then she typed it the next day, October second.

Q. And she finished it October second.

A. I am not sure. I don't know how long it took her to type it or how many other things she did that day.

Q. When did you get your dictation from Mr. McCloskey?

A. I don't remember.

Q. Didn't you talk it into a machine that day?

A. No, it was dictated to her, not to me, but I was in the room while it was being dictated.

Q. What were you doing?

A. I was listening to it being dictated.

Q. Why didn't you take it?

A. I suppose because Mr. McCloskey wanted Miss Nester to type it.

Q. Really?

A. I cannot give you any other reason.

Q. I know you cannot. I am wondering if you are recollecting properly. You now tell me that you, Mr. McCloskey's secretary, who were upstairs during all this conference, you who had some terms in shorthand were not called upon to take the dictation on the agreement but another girl was.

A. That happens lots of times.

Q. How did she get the terms you had taken the night before?

A. When he came to that part of the agreement and he didn't remember himself he asked me what my notes said.

Q. You only had three figures to remember.

A. Only three figures? I don't know about that.

Q. Let me get it straight. You were up at the conference all evening from eight-thirty to twelve o'clock and for about three or five or eight minutes you took down some figures.

A. Yes.

Q. And then the next day in the afternoon Mr. McCloskey dictated the agreement, Exhibit E-1, which I hold in my hand, but not to you who had been up there all during the night and had taken some notes, but to your junior in employment, Miss Nester—I know nothing about the years of either of you—but

he dictated it to your junior in employment and you sat there all the time while he was dictating, is that right?

A. That is right.

Q. Now what time was that?

A. I don't remember that, whether it was in the afternoon or right after lunch that he started.

Q. And that day was September 30th?

A. Yes, sir; September 30th.

Q. And then the next day you think she wrote the agreement.

A. She typed it out.

Q. And did she finish it that day?

A. I don't remember.

Q. Didn't you look it over before it went out?

A. I might have, but I don't remember whether it was that day or not.

Q. I am looking now at Exhibit A-3, you testified about it a moment ago and you said that you took the acknowledgment on that on the twelfth of July. Where is the date, the twelfth?

A. The twelfth is in the acknowledgment.

Q. You also witnessed it, didn't you?

A. I did.

Q. When did you witness it?

A. On the twelfth.

Q. Where is the date?

A. There is no date there.

Q. Did you forget to put that date in there?

A. Evidently I did.

Q. Look at this Exhibit A-4, this is your signature, isn't it?

A. Yes.

Q. And that is dated on the back, the seventh?

A. It is.

Q. And you forgot to put the date in that too, didn't you?

A. I admit that too.

Re-direct examination.

By Mr. Tomlinson:

Q. You have charge of the title work in Mr. McCloskey's office, do you not?

A. Yes, I have.

Q. Referring to this agreement E-1, will you tell us who got out the descriptions of the various lots contained in this agreement?

A. I did.

Q. And you turned those descriptions over ——

Mr. Matthews: Object as leading.

Mr. Tomlinson: I will cease right away, just as soon as you object.

Q. What did you do with those descriptions when you got them?

A. I gave them to Mr. McCloskey.

Mr. Tomlinson: We rest.

Mr. Matthews: I have a bit of rebuttal. I will recall Mrs. Elizabeth Westhall.

MRS. ELIZABETH WESTHALL, recalled.

Direct examination.

By Mr. Matthews:

Q. At any time during the conference did you hear Mr. McCloskey dictate anything to Miss Pendle?
A. I did not.

Mr. Tomlinson: It is my conception that since Mr. Matthews' clients are the moving parties we are entitled to their brief and then we can reply and they can file a reply brief, if they wish.

The Court: How soon can you get your briefs in?

Mr. Matthews: About two weeks to present it to DeVoe and Mac and then in two weeks you give me yours and maybe I won't have any reply.

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Volume III

Toms River, N. J., April 15, 1936.

Before Hon. Russell G. Conover, Judge.

Appearances:

For the Exceptants: John A. Matthews, Esq., Andrew B. Crummy, Esq.

For the Accountant: W. Durward McCloskey, Esq., De Voe Tomlinson, Esq.

Mr. Tomlinson: It is my understanding, your Honor please, that we were to submit testimony this morning as to the value of the good will of the Westhall Estate, and that being so I suppose Mr. Crummy will put in his testimony first.

Osborne W. Havens, recalled.

Direct examination.

By Mr. Crummy:

Q. Mr. Havens, have you got with you the income tax returns, first of E. J. Westhall for the period of

January first, 1928 to September 8, 1928, the date Mr. Westhall died?

A. Yes.

Q. And the returns for his estate, or the return of Beatrice E. Westhall from September 8, 1938, to December 21, 1928?

A. I have, sir.

Mr. Tomlinson: I think they are both in the record, Mr. Crummy. Do you wish to have them again?

Mr. Crummy: I have them as Exhibits 51, 52, 53 and 54.

The Court: They were in evidence.

Mr. Tomlinson: If you want to re-state what those returns show, I am perfectly agreeable.

Mr. Crummy: If you have them, Mr. Havens, we can put them in the record now.

A. What was the period again?

Q. January 1, 1928 to September 8, 1928, the date of E. J. Westhall's death.

A. There it is. (Paper produced.)

Q. This exhibit I show you, E-51, that shows the receipts from the business on an accrual basis, does it not?

A. Correct.

Q. Reading from the exhibit, the total receipts from the business of funeral director, on an accrual basis, is $17,202.82.

A. That is correct.

Q. And deductions, total deductions $11,476.03.
A. Right.
Q. Showing a net profit from the business for the period from January 1, 1928 to September 28, 1928 —
A. Pardon me, September 8, 1928.
Q. Yes, to September 8, 1928. Showing a net profit of $5,726.79.
A. (No answer.)
Q. Have you a return for Beatrice E. Westhall for the balance of 1928 from the business?
A. Right.

Mr. Tomlinson: That is from September 8, 1928 to December 31, 1928.

Mr. Crummy: Yes.

Q. Reading from Exhibit E-52, the total receipts for the period beginning September 8, 1928, and ending December 31, 1928, on an accrual basis is $7,400.94—no, strike that. We will put down $7,544.88, and the total deductions for the same period is $4,816.96, making a net profit for the period of $2,727.92.
A. That is correct.
Q. Have you the return of Beatrice E. Westhall for the calendar year 1929?
A. Yes.

Mr. Tomlinson: I might say, Mr. Crummy, all these figures are in your brief, and we are perfectly satisfied with them. If you want to put them in again, all right.

Q. Reading from Exhibit E-53, for the calendar year 1929, the total receipts from the undertaking business on an accrual basis is $23,614.63, total deductions $17,231.26, net profit $6,383.37. I am reading from Exhibit E-53.

A. Yes.

Mr. Crummy: Reading from Exhibit E-54, the income tax return of Beatrice E. Westhall for the calendar year 1930. It shows total receipts from the business of $28,558.64, on an accrual basis, with total deductions of $18,776.59, or a net profit of $9,782.05.

Reading from Exhibit E-55 the return of Beatrice E. Westhall, deceased, for a period beginning January 1, 1931 and ending August 13, 1931, on an accrual basis, total receipts $17,948.43, total deductions $18,593.71, showing a net loss for the period of $645.28. Item 14 of this schedule—included in the deductions for the period is an item of $5,837.25, representing bad debts, which have been charged off against the income for the period January 1, 1931 to August 13, 1931.

The return of Osborne W. Havens—O. W. Havens trading as E. J. Westhall, for the period beginning—there are some figures missing here but I believe that is in the record.

The Court: If it is I will find it.

Mr. Crummy: I offer in evidence a duplicate copy of the income tax return of O. W. Havens trading as E. J. Westhall for the calendar year 1932.

The Court: It may be marked.

(Paper marked in evidence Exhibit E-56.)

Mr. Crummy: Reading from Exhibit E-56, showing total receipts from the undertaking business on a cash receipt and disbursement basis, $22,670.65, total cash deductions of $16,214.15, or a net profit for the calendar year 1932 of $6,456.50.

I offer in evidence duplicate copy of the federal income tax return of O. W. Havens, trading as E. J. Westhall, for the calendar year 1933.

The Court: It may be marked.

(Paper marked in Evidence Exhibit E-57.)

Mr. Crummy: Reading from Exhibit E-57, federal income tax return of O. W. Havens, trading as E. J. Westhall, for the calendar year 1933, shows total receipts from the undertaking business on a basis of cash receipts and disbursements, total receipts $21,216.21, total cash disbursements $14,793.98, or a net profit of $6,422.23.

I offer in evidence duplicate copy of the federal income tax return of O. W. Havens, trading as E. J. Westhall, for the calendar year 1934.

The Court: It may be marked.

(Paper marked in evidence Exhibit E-58.)

Mr. Crummy: Reading from Exhibit E-58, total receipts from the undertaking business on a basis of cash receipts and disbursements $17,647.21, total cash disbursements $10,695.97, net profit $6,951.24.

I offer in evidence duplicate copy of the federal income tax return of O. W. Havens, trading as E. J. Westhall, for the calendar year 1935.

The Court: Mark it in evidence.

(Paper marked in evidence Exhibit E-59.)

Mr. Crummy: Reading from Exhibit E-59, total receipts from the undertaking business on a cash receipts and disbursement basis, $17,490.51, cash disbursements of $11,828.28, net profit $5,662.23.

Q. Have your books ever been examined by the federal government, Mr. Havens?

A. Yes. On '34 you will find an approval sealed.

Q. Was there any disallowance made by the federal government on any of the examinations made?

A. No.

Q. Did you ever have to pay any additional tax?

A. Never.

Q. Will you kindly look and tell us what the breakdown of Item 16 on Schedule A is?

A. Yes.

Q. That is referring to Exhibit E-59, for 1935. I will strike that question. I think I can expedite matters.

Q. In Item 16, Schedule A, you have included a rental item of nine hundred dollars.

A. Yes.

Q. That includes the rent for the home you live in?

A. It is the house in which I live; it is not my home.

Q. Do you pay rent other than at that place?

A. Yes. I maintain a separate home, 565 Front Street. I vote from that residence and have my light and telephone there and the place fully furnished.

Q. Don't you feel that any part of that nine hundred dollars is a personal item?

A. None whatsoever, because of the facts I have just stated. I maintain this home on Front Street, it is fully furnished, I have the telephone and lights on, and I vote from that residence and always have.

Q. Don't you sleep and eat in this residence at the undertaking parlor?

A. Yes, what time I sleep.

Q. You don't sleep and eat in the Front Street home?

A. I still call that my home.

Q. How much rent do you pay in the Front Street house?

A. I own it. I pay taxes on it, telephone, water rent, and electric.

Q. I show you here Exhibit E-50 and call your attention to the cash receipts for the period beginning August 13, 1931, up to and including October first, 1931, of $717.00. Do you recall that those figures were taken off in your presence by Mr. Elmer Matthews from Mr. McCloskey's office?

A. Yes, I remember they were.

Q. And accounts receivable for the same period of $1,439.45, making an aggregate gross business for the period August 13, 1931 to October 1, 1931, of $2,156.45; and cash receipts for the period beginning October 1, 1931, and up to and including December 31, 1931, of $5,820.75, and sales on account for the same period, or accounts receivable as designated on

Exhibit E-5, of $4,375.43, or an aggregate gross business for the period October 1, 1931 to December 31, 1931, of $10,196.18, making a total gross business for the period beginning August 13, 1931, up to and including December 31, 1931, of $12,352.63. Is that correct, Mr. Havens?

A. It seems to be. It would appear so.

Q. Have you got any books or records with you that will show the total deductions to be subtracted from the gross business for the period beginning August 13, 1931, and ending December 31, 1931, so that we may arrive at the net profit for that period?

A. I don't have those with me. I think you took those figures off.

The Court: That was in the record last time, I think.

Mr. Tomlinson: That is my recollection, your Honor.

Mr. Crummy: I will endeavor to find that, your Honor.

Q. Have you found any appreciable difference in the receipts of the business, whether on an accrual basis or a cash receipts and disbursement basis?

Mr. Tomlinson: From what time?

Q. From the period beginning in August, 1928, up to and including 1935.

A. I am not in a position to answer that now. I do not have those figures in my mind.

Q. If you will refer to the returns on a cash basis and the returns on an accrual basis I think you can form some opinion.

A. It would be only a guess.

Q. No, I think if you look at the returns you can give us your opinion.

Mr. Tomlinson: I object, your Honor please. I think the question has been asked and answered. If he says he cannot do it I don't think counsel ought to tell him he can do it.

Q. I will take each of the returns and list the profit on an accrual basis and again on a cash basis.

A. You have already done that.

Q. Reading from Exhibit E-51, year 1928, on an accrual basis profit $5,726.79. That is for the period of January 1, up to and including September 8, 1938. There is to be added to that for the calendar year 1928 $2,727.72, making in the aggregate in round numbers $84,053.00 on an accrual basis. You have seen these figures.

A. You went over them before.

Mr. Crummy: I want to get these in the record, your Honor.

The Court: Go on.

Mr. Crummy: Reading from Exhibit E-53, for the calendar year 1929, on an accrual basis, shows a profit of $6,383.37. Included in the gross receipts of the undertaking business on E-53, calendar year 1929, is an item marked "other," which Mr. Havens

states to be receipts from other than the undertaking business, but he does not know just what the receipts are.

Q. Is that right, Mr. Havens?
A. Offhand, I would say yes.

Mr. Crummy: Exhibit E-54, on an accrual basis shows for 1930 a profit of $9,782.05. Exhibit E-55, for the period beginning January 1 and ending August 13, 1931, shows a net loss on an accrual basis of $645.28. The figures for the balance of the year are not available at the moment. The cash receipts for 1932, or the receipts on a cash basis for 1932 are $6,456.50, for 1933, $6,422.23, for 1934, $6,951.24, for 1935, $5,662.23.

Q. How often do you close your books, Mr. Havens, in the undertaking business at the present time?
A. How often do I close them?
Q. Yes.
A. Just what do you mean?
Q. How often do you bring down your trial balance or figure your profit and loss?
A. At income tax periods only.
Q. You don't know your profit or loss for the present time, up to the present date for the year 1936?
A. I do not.

Cross-examination.

By Mr. Tomlinson:

Q. In these returns that were filed on behalf of E. J. Westhall during his lifetime, did those returns include any salary or compensation to you for your services?

A. They did.

Q. And what was that compensation or salary?

A. As near as I can recall my first salary was fifty dollars a week. It was later raised to sixty, but just when I don't remember. It was later raised to seventy-five.

Q. When was it raised to seventy-five?

A. After Mr. Westhall died I was raised by Mrs. Westhall voluntarily.

Q. In addition to this compensation of seventy-five dollars a week was there also awarded to you by way of compensation some share in the profits?

A. Ten percent of the profits.

Q. These returns that you filed on behalf of Mrs. Westhall, do they include compensation to you?

A. Yes.

Q. The returns that you filed since Mrs. Westhall's death, that is, those you filed in the name of O. W. Havens, trading as E. J. Westhall, have those returns included any compensation or salary to you?

A. None whatsoever.

Re-direct examination.

By Mr. Crummy:

Q. Have you got copies of your individual income tax returns from 1928 on? I have them from 1932.

A. I don't have any with me only what are here.

Q. Have you your individual returns from 1928 on at home?

A. I would have to look.

Q. Do you know whether you have them or not?

A. Offhand I don't.

Q. How much did Mr. Brown receive from Mr. Westhall as salary in 1928?

A. I think it was thirty dollars per week. I am not sure about that.

Q. Who else was working for the undertaking establishment in 1928?

A. No one that I know of.

Q. How much did Mr. Brown receive in 1929 in salary?

Mr. Tomlinson: I might say we are going to have Mr. Brown here.

The Court: What difference does it make, Mr. Crummy? That would be included in the item of deductions, but it would not make any difference one way or the other, would it, in considering whether or not Mr. Havens was operating the business on his own behalf. It would be a deduction of the same type whichever way it operates.

Mr. Crummy: I realize that the deduction of whatever Mr. Havens received was already deducted be-

fore arriving at the net profit. I only wanted to go into the matter whether it was fifty, sixty, or seventy-five to see whether would be entitled to that deduction on his own return. That is the only thing I have, your Honor.

HARRY E. BROWN, recalled.

Direct examination.

By Mr. Tomlinson:

Q. Mr. Brown, you live in Lakewood?
A. I do.
Q. And you are a licensed undertaker and embalmer?
A. Yes, sir.
Q. You have been such for how many years?
A. Over thirty years.
Q. You knew E. J. Westhall in his lifetime?
A. Yes.
Q. And you were associated with him in business were you not?
A. I was.
Q. For how long a time prior to his death, approximately, had you been associated with Mr. E. J. Westhall?
A. I had been ever since I have been in the undertaking work, associated with Mr. Westhall and no one else.
Q. So you had been with him approximately how many years?
A. The entire time.

Q. Were you there when Mr. Havens came with him?

A. I was, yes, sir.

Q. Do you recall about how long before Mr. Westhall's death Mr. Havens came with him?

A. Not just exactly. It was on the death of his two sons; just the exact time I cannot tell you.

Q. Somewheres around 1927 or 1928, wasn't it?

A. Something like that.

Q. You have been connected with that business ever since?

A. Yes, sir.

Q. And are still connected with it?

A. Yes, sir.

Q. Were you connected with the business during the lifetime of Mrs. Westhall, after Mr. Westhall died?

A. Yes, sir.

Q. In other words you have been connected with that business continuously.

A. Continuously, yes, sir.

Q. Mr. Brown what have you to say as to whether or not at the time Mrs. Westhall died there was any good-will attached to that business?

Mr. Crummy: Object. I don't think this man is qualified to testify as to what the good-will of this business is. He says he is an embalmer and has been for thirty years and worked as an employee for these people.

The Court: I will go back and view this in connection with the previous testimony of this same witness. In other words this man indicated on a for-

mer hearing that he knew as much, if not more, than anybody else about this business. I will let it in for what it is worth.

Mr. Crummy: Your Honor will allow an exception?

The Court: Yes.

Q. (Repeated by stenographer) Mr. Brown, what have you to say as to whether or not at the time Mrs. Westhall died there was any good-will attached to that business?

A. If I may explain in my own way—Mr. Westhall, by virtue of his habits, by virtue of the fact that on a number of occasions he was not himself, that he had gone out on a number of calls in an intoxicated condition, he had destroyed and brought to a very low value the business, and also due to the fact that Mr. Westhall refused to modernize, that our business was not up to what it had been before. Our paraphernalia had been in existence and used by us for a number of years, so that at the time Mr. Westhall died and Mrs. Westhall died we were using paraphernalia that was out of date and obsolete.

Q. In your opinion, at the time Mrs. Westhall died was there any good-will attached to this business?

Mr. Crummy: That I object to, your Honor.

The Court: It is the same old question. I am going to let him answer yes or no or whatever it was.

Mr. Crummy: Exception.

The Court: You may have it.

A. I do not think so, for the answer previously stated.

Q. Do you think at the time Mr. Westhall died the business had any good-will?

A. No, sir, it did not.

Q. You were asked at the prior hearing in connection with this matter whether you would have made an offer for this business; do you remember so testifying?

A. Yes, sir.

Q. At the time you gave that testimony did you know how much Osborne Havens had paid for the business?

A. I did not, no, sir.

Q. Do you know now?

A. Not definitely, only approximately.

Q. If you had known that the business was for sale and you had made a bid, would you have paid anything for the good-will?

Mr. Crummy: Object to that. That is speculative as to what was done in the past.

Mr. Tomlinson: They asked him themselves as to whether or not he would have made an offer for the business and he said he did not know the business was for sale. I am following up his testimony given when he was called before.

The Court: I will let this witness answer a question something like this: If you had known the business was for sale would you have offered for it?

A. Is that the question?
Q. Yes.
A. Because of the two reasons ——

The Court: I don't care why, for the time being.

Q. The judge's question was this: If you had known the business was for sale how much would you have paid for the business?
A. I would not have offered as much as Mr. Havens offered because of the reasons stated.

By the Court:

Q. Where are you working now?
A. I am working for Mr. O. W. Havens.

Cross-examination.

By Mr. Crummy:

Q. Do you do any work for Mr. Havens at the present time?
A. I do, yes, sir, because he owns the undertaking business.
Q. And you work for Mr. Havens now?
A. Yes.
Q. In 1928 you received thirty-five dollars a week?
A. Yes, sir.
Q. You were receiving that when Mrs. Westhall died?
A. Yes, sir.
Q. Will you kindly tell me what is good-will?
A. What is meant by good-will?

Q. Yes.

A. The service and everything that goes to make up a successful business. Personal attention, personal service and attention to business.

Q. Did you give this business personal attention from September 8, 1928, up to August 31, 1931, the date that Mrs. Westhall died?

A. I always have, sir.

Q. And you gave it your best service, did you not?

A. I have, yes, sir.

Q. And during that same period Mr. Havens worked for Mrs. Westhall, did he not?

A. Yes, sir.

Q. And he gave it his best services, did he not?

A. Yes, sir.

Q. And since Mr. Havens came in 1928 you had a rather successful business after the old gentleman died?

A. Yes, sir.

Q. You had three or four successful years?

A. Yes.

Q. You got new paraphernalia in during that time?

A. Yes, sir, after Mr. Havens took charge.

Q. You got some new auto equipment after Mr. Westhall died?

A. Yes.

Q. And you had all of the automobiles and everything in spick and span condition when they were sent out on a mission?

A. Yes, sir.

Q. And you were in attendance at that place all hours of the day?

A. I was.

Q. And the same with Mr. Havens?
A. Yes, sir.
Q. So in 1931, when Mrs. Westhall died, the business was rather flourishing, wasn't it?
A. Yes, sir.

OSBORNE W. HAVENS, recalled.

Direct examination.

By Mr. Tomlinson:

Q. I think this is in the record but I want to make sure. When was it you came with Mr. Edmund J. Westhall?
A. January 21, 1927.
Q. And he died when?
A. September 8, 1928, about eighteen months later.
Q. You were with him continuously from the time you came into his employ until his death?
A. Yes, sir, practically day and night.
Q. After his death you kept on conducting the business?
A. Yes, for Mrs. Westhall.
Q. Did Mrs. Westhall during her lifetime ever take any part in this business?
A. None whatever. In fact after Mr. Westhall died Mrs. Westhall spent rather less than two weeks in her home.
Q. Where did she spend her time?
A. In Washington, Montclair, Spring Lake; she did not like the business and did not want to be

around it. At no time did she help Mr. Westhall with the business.

JOHN W. FLOCK, a witness produced by the accountant, being duly sworn according to law upon his oath, testified as follows:

Direct examination.

By Mr. Tomlinson:

Q. Where do you live, Mr. Flock?

A. Long Branch.

Q. What is your business or occupation or profession?

A. Undertaking.

Q. Are you a licensed undertaker and embalmer of the State of New Jersey?

A. I am.

Q. For how long have you been such?

A. Ever since the law required it. I think that was in 1896.

Q. And what is the business name of your establishment in Long Branch?

A. John W. Flock Funeral Home, Incorporated.

Q. And that business was established in 1896 by yourself, is that correct?

A. Correct.

Q. And I assume in the course of your experience you have come in contact with other funeral directors and embalmers?

A. I have.

Q. Were you acquainted with Mr. Edmund J. Westhall during his lifetime?

A. I was.

Q. How well did you know him?

A. I knew him quite well in a business way and socially.

Q. You had business dealings with him?

A. Some.

Q. Do you know Mr. Osborne Havens?

A. I do.

Q. How long have you known him?

A. Eight or nine years, probably longer.

Q. Were you familiar with the business that Mr. Westhall carried on, the E. J. Westhall business?

A. I had some knowledge of it.

Q. You remember the fact of his death?

A. I do.

Q. And you recall his widow's death?

A. I read about it in the paper.

Q. Now I want to ask you, Mr. Flock, whether in your judgment there was at the time of Mr. Westhall's death any good-will to that business?

Mr. Crummy: That I object to, your Honor. I don't think Mr. Tomlinson has sufficiently laid a basis. For instance, he has not advised this man of the business or what the tangible assets were worth. I don't think there is any basis for arriving at that conclusion.

The Court: Objection overruled.

Mr. Crummy: Your Honor will grant me an exception?

The Court: Exception.

Q. (Repeated.) A. I would answer that question in this way: If a man has given his personal attention to conducting his business in a proper manner he should be able to hold his business as long as he lives.

Q. But when he dies ——

A. In a community like here in the country, through Monmouth and Ocean County, a man would have to have personal contact to hold it in any profession, I should say.

Q. And that being so, what in your judgment happens to the good-will of the business when the man dies?

A. Well, it depends in my judgment upon who takes care of it what happens to it.

Q. You knew who took care of E. J. Westhall's business after he died?

A. Yes, sir, I have been told—in fact, I know.

Q. Mr. Havens?

A. Mr. Osborne W. Havens.

Mr. Crummy: I presume, your Honor, I have an exception to this general line of testimony?

The Court: You may have.

Q. And that being so, Mr. Flock, are you in a position to say whether or not at the time of E. J. Westhall's death, after he died, that business had any substantial good-will attached to it?

The Court: Now, wait a minute. Aren't we interested rather in the good-will at the time of Mrs. Westhall's death?

Mr. Tomlinson: I thought if there was none at the time of his death there would not be at the time of her death.

The Court: I will allow it as to Beatrice Westhall but not as to E. J. Westhall.

Q. Assume that E. J. Westhall died September 8, 1928 and that his widow Mrs. Beatrice Westhall died August of 1931. Are you in a position to say whether at the time of her death in 1931 this business, which originally was established by E. J. Westhall had any good-will attached?

A. After she passed away I would say no, because as I understand it Mrs. Westhall never conducted the business. I don't see how she could have any good-will, because she did not manage the business.

Q. In determining the success or failure of an undertaking business, what part, in your judgment, does the personal service of the man conducting the business play?

A. If he knows his business and is an expert at it, with proper personal services and personality I think it means everything.

Q. You mean his personal characteristics?

A. Absolutely.

Q. Now, Mr. Flock, permit me to ask you this further question. Suppose that a man—we will assume that a man is conducting an undertaking and embalming business, and that he dies. We will assume for the sake of argument that when he dies there is some good-will attached to the business. As the years go on after his death what happens to that good will? Does it remain the same, or grow greater or less?

A. Naturally it would grow less.

Q. With each year?

A. Absolutely. If there is any competition at all it would not be long before you would not have any business.

Cross-examination.

By Mr. Crummy:

Q. In your answer to the last questions I am frank to say I understand everything except the "naturally" part. What do you mean it naturally grows less as the years go on?

A. It naturally grows less because there is nobody there to represent him.

Q. Are you familiar with the 1927 statute that governs your business?

A. Not particularly.

Q. Do you know anything about it?

A. 1927?

Q. Yes. The Act under which you are personally licensed.

A. I was licensed long before that.

Q. The Act under which you are personally licensed.

A. (No answer.)

Q. Do you know anything about the Act of 1908 which refers to the undertaking and embalming business?

A. I suppose I have read it.

Q. Do you recall that in 1908 when a man died his license expired as to his business?

Mr. Tomlinson: Object to that as not proper cross-examination and calling for an argument as to law.

The Court: He may answer.

A. I think there is a provision for that.

Q. Do you recall in 1927 an Act was passed by which the business might be carried on by the widow or next of kin of the decedent?

A. Yes, provided you have a licensed assistant.

Q. Exactly. And you know after Mr. Westhall died in September of 1928 his widow carried on the business under the name of E. J. Westhall?

A. I understand that was the situation, with a licensed man, but I am not positive.

Q. You are not positive about it?

A. It has been going on, I know that.

Q. But you don't know who carried it on?

A. I understand Mr. Havens and Mr. Brown.

Q. From where did you get your knowledge?

A. When I went there they were the ones I met.

Q. How often did you go there?

A. Three or four times a year.

Q. Do you know what the tangible assets of this business were from 1928 to 1931?

A. Only what I saw.

Q. Do you know the value of what you saw?

A. No.

Q. Do you know how much money the Westhall establishment made in the calendar year 1928?

A. I don't know a thing about it.

Q. Or in any year?

A. No.

Q. Were you in the court room when Mr. Brown testified?

A. Yes.

Q. Did you hear Mr. Brown say he and Mr. Havens had paid strict attention to the business from 1928 until 1931, when Mrs. Westhall died?

A. Yes.

Q. Did you hear him say that from 1928 until 1931, when Mrs. Westhall died, they had a flourishing business there?

A. I heard him say that.

Q. Do you know what year this business was established?

A. I have no idea.

Q. Would it change your opinion if I told you it was established in 1868, over sixty-six years ago?

A. I know it has been there a long time.

Q. And you know it has been continued under the name of E. J. Westhall ever since Mrs. Westhall died, do you not?

A. I thought it was E. J. Westhall Estate.

Q. Do you know whether it was continued under the name of E. J. Westhall or E. J. Westhall Estate?

A. I understood it was established under the name of his estate. I may be wrong.

Q. When you went to the establishment three or four times a year did you ever see the name displayed?

A. I cannot say I did.

Q. I show you here Exhibit E-21, dated January 24, 1935 and ask you to look at that exhibit and let me know whether the business was conducted under the name of Estate of E. J. Westhall or E. J. Westhall.

Mr. Tomlinson: I cannot tell what the exhibit shows. I object.

The Court: Objection sustained.

Q. Did you ever see the name of Westhall over the funeral parlor on Second Street in Lakewood?

A. I believe I have.

Q. Did you ever see anything about the estate of E. J. Westhall on that sign?

A. I did not pay any particular attention. I don't know that I ever noticed it.

Q. Do you think the name of E. J. Westhall has any value at all?

A. I would say no.

Q. Why not?

A. Because people in Lakewood, Toms River, Long Branch, or any other place, know that Ed Westhall is dead and if they called him on the 'phone or any way they could not get him, and someone has to represent the firm.

Q. But they would get the establishment formerly owned by him?

A. No doubt about that.

Q. You have perpetuated your business by incorporating it.

A. I have.

Q. And after your death it can be carried right on as the Flock Funeral Parlor, Incorporated.

A. I don't know what would happen after I am dead.

Q. But it could be carried on, could it not?

A. If they made enough money to keep it going they might.

Q. In 1928 this business, after paying Mr. Harry Brown his salary and paying Mr. Havens his salary, made a net profit of $8,454.71. In 1929, after paying the salaries the net profit was $6,383.37, and in 1930

after paying a salary of $35.00 a week to Mr. Brown and either sixty or seventy-five dollars a week to Mr. Havens, plus a bonus of ten percent on the profits, they paid an income of $9,782.35. For those three years the net profit aggregating $24,620.43. With those figures in mind, taking a round figure of $24,000.00, and shown by an inventory filed in this court there was an appraisal of $4,024.00, total value of the assets, with those figures in mind would you say there was any good-will attached to the business as of the date of Mrs. Westhall's death, August 13, 1931?

A. If Mrs. Westhall conducted that business during those years I would say she did well.

Q. Mrs. Westhall filed an income tax return each year and they are all in evidence, showing that she received the profits and she hired as two employees of hers one Osborne Havens and one Harry Brown, and paid them salaries, and after paying those salaries there was an aggregate net of twenty-four thousand. I ask you whether or not you would say, in view of those figures, there was any good-will attached to that business as of August 13, 1931, the date she died?

A. That probably would depend on who was conducting the business. It was the only firm in town during that time, and there is no way to judge whether if another business had been started there, whether she had interest enough to hold the business would be one thing, and it is a question who held the business. I am not in a position to say.

Q. All I ask is your opinion from the figures I gave you, whether or not you attribute any good-will ——

A. I would say that was a successful business.

Re-direct examination.

By Mr. Tomlinson:

Q. Generally speaking the profits of an undertaking business depend upon the personal services of the man running the business or upon the capital invested.

Mr. Crummy: Object there has been no foundation for that question.

Mr. Tomlinson: I think the direct foundation was laid by Mr. Crummy's own question.

The Court: I will let it in for what it is worth.

A. I think both have a lot to do with it.
Q. Which do you think more important?
A. I don't think any business could be successful without both.

CHARLES ANDERSON, a witness called by the accountant, being duly sworn according to law, upon his oath testified as follows:

Direct examination.

By Mr. Tomlinson:

Q. You live here in Toms River, Mr. Anderson?
A. Yes, sir.

Q. How long have you been a resident of Toms River?

A. Fifty-five years.

Q. You are a licensed undertaker and embalmer and funeral director?

A. I am.

Q. For how long a period have you been licensed?

A. Whenever that law went into effect, I think it was 1908.

Q. You have the only undertaking establishment in town?

A. At present, yes, sir.

Q. Did you know Mr. Edmund J. Westhall?

A. Yes, sir.

Q. How long had you known him prior to his death?

A. Twenty-five years, I should say.

Q. You knew him well?

A. Well, no. I was not real well acquainted with him.

Q. Were you acquainted with him in a business way?

A. Well, yes.

Q. You had business dealings with him occasionally?

A. A little.

Q. Do you know Osborne Havens?

A. Yes.

Q. How long have you known him?

A. Well, seven or eight years, I would say.

Q. Have you had business dealings with him?

A. No, I guess not.

Q. You have been in the undertaking business ever since 1908?

A. Yes.

Q. Do you remember the fact that Mr. Westhall died in 1928?

A. Yes, sir.

Q. And that his widow died in 1931?

A. Yes.

Q. Do you know who ran the business between the date of Mr. Westhall's death and the date of Mrs. Westhall's death?

A. Mr. Havens.

Q. In your judgment, Mr. Anderson, was there any good-will attached to this business ——

Mr. Crummy: Object.

The Court: Let him finish the question.

Q. (Continued) as of the date of Mrs. Westhall's death in 1931?

Mr. Crummy: Object, your Honor.

The Court: Yes. You may have an exception.

A. Shall I answer?

Q. Yes, sir.

A. I would say not.

Q. Why?

A. Mr. Westhall, as you just said, was the man who ran this business, and he died a year and a half or so before Mrs. Westhall ——

Q. It was three years.

A. Mrs. Westhall lived three years after he died. After a person is dead they are quite soon forgotten.

The Court: Did that question go to the value of the good-will at the time of E. J. Westhall's death or at the time of Mrs. Westhall's death?

Mr. Crummy: Mrs. Westhall's death, August 13, 1931.

A. At her death I would not think Mr. Westhall's good-will meant much.

Q. In your judgment how much is the success or failure of an undertaking business dependent upon the personal services of the individual who conducts the business?

A. His personal services and his equipment are the vital thing.

Q. Now, Mr. Anderson, assume for the sake of argument that an undertaker dies, that at the time of his death there is some good-will attached to his business, whether little or large. What happens to that good-will as the years go by after his death?

A. Well, as I say, that disappears.

Cross-examination.

By Mr. Crummy:

Q. Will you tell his Honor whether or not the name Westhall has any value?

A. No.

Q. That is, you cannot tell?

A. No, I don't think it does have.

Q. On what do you base your opinion?

A. Mr. Westhall is dead and Mrs. Westhall is dead. The name is familiar to the older people, but

as far as the business is concerned it is done by different people.

Q. This business was established in the name of E. J. Westhall back in 1868. Do you think that is at all significant?

A. Well, to the older people.

Q. And not to the younger people growing up?

A. No.

Q. If the older people had their funerals conducted by Mr. E. J. Westhall in 1927 and he gave them good service do you not think their children might take the same establishment as very possibly one of their parents?

A. As I said, a person dead is soon forgotten, and if somebody else is carrying on the same line of work those people did, they will do the business.

Q. How many undertaking establishments are in Lakewood at the present time?

A. Two at present.

Q. When did the second one come into Lakewood?

A. Within the last six months, I think.

Q. Last January, was it not?

A. I don't know the date.

Q. Prior to that for how many years was there only one undertaking establishment in Lakewood?

A. A good many years.

Q. And that one was E. J. Westhall?

A. Yes.

Q. And that was the only one in Lakewood for years and years and years?

A. I don't know whether it was the only one all that time.

Q. Do you suppose the gentleman now running the business, Mr. Osborne Havens, would advertise in

the newspaper that that business was established in 1868 if that had no significance?

Mr. Tomlinson: Object.

The Court: Objection sustained.

Q. Do you know how much the equipment of the estate of Beatrice Westhall was valued at, at the time of her death?

A. I have no idea.

Q. Do you know what the net profits were for any of the years beginning 1928 up to 1932?

A. Only what I have heard here.

Q. You know since 1927 an undertaking establishment might be carried on by a widow or next of kin of a deceased undertaker?

A. Yes.

Q. And continue right on as Mr. Havens is continuing this business?

A. Yes.

Q. Do you know whether or not this business could be continued under any other name under the present circumstances, Mr. Havens not being a licensed embalmer but having a licensed embalmer working for him?

A. I don't know.

Re-direct examination.

By Mr. Tomlinson:

Q. Mr. Anderson, Mr. Crummy asked you about the older generation and the younger generation patronizing the Westhall establishment. Do you be-

lieve people go to an undertaking establishment because of the name or because of the people that run it?

A. I would say because of the people who run it. I can cite an instance in Barnegat. A man by the name of Bugbee runs it but it is in the name of Job Smith, who has been out of it for twenty-five years. I don't believe you will hear anybody in Ocean County speak of it as Job Smith's business, although it is his business today and has been for years, but he is not active in it and Bugbee is the man who runs the business and everybody speaks of it as Bugbee's business.

Q. One other question. In answer to Mr. Crummy's question you said that for a long time there had been but one undertaking establishment in Lakewood. During that time did you do some business in Lakewood?

A. Yes.

Q. And you know of other undertakers outside of Lakewood who went in there to do business?

A. Yes.

Q. Can you mention some of their names?

A. Mr. Clayton, in Adelphia; Mr. Harvey, in Point Pleasant; they came in, and Mr. Lefferson from Manasquan. They are about the nearest ones.

Cross-examination.

By Mr. Crummy:

Q. How many funerals have you had in Lakewood in the past five years?

A. I don't know. Half a dozen, maybe ten.

Q. You talked about a Mr. Bugbee who is running a business. What is the name of the business he runs?

A. The business is owned by Job M. Smith.

Q. What is the name of the establishment?

A. It runs today under the name of J. A. Bugbee. I guess that is the name it runs under.

Q. Don't you know?

A. There is a plate on the house with his name on it.

Q. And doesn't he conduct that undertaking business under the name of Smith?

A. I don't know, but I never hear Smith's name mentioned.

Q. Do you know under what trade name Bugbee conducts his business?

A. Don't know.

Q. Where is he located?

A. Barnegat.

Q. You mentioned that as an instance that it is the man that counts and not the name.

A. Yes.

Q. Do you know under what name he conducts the business?

A. I don't know, but he is the man that conducts the business, I know that.

HARRY J. BODINE, a witness produced by the accountant, being duly sworn according to law, upon his oath testified as follows:

Direct examination.

By Mr. Tomlinson:

Q. Mr. Bodine, where do you live?

A. Asbury Park, New Jersey.

Q. And you are a licensed undertaker, embalmer and funeral director in this state?

A. I am.

Q. And have been how long?

A. I have been in the business thirty-five years. I have been in the undertaking business forty years, but since the license came into effect, I don't remember the time, but we took a license the same as other undertakers in the State. I don't remember that year.

Q. At what address do you conduct your business?

A. 1007 Bangs Avenue, Asbury Park.

Q. Is that where it has been for the greater part of the time?

A. No. For about twenty years it was 702 Mattison Avenue, and then I burned out, and I bought this location on Bangs Avenue. I have been in the two locations for thirty-five years.

Q. Under what name do you conduct your business?

A. Bodine Funeral Home.

Q. Did you know the late E. J. Westhall in his life time?

A. Yes, quite well.

Q. Did you see him frequently?

A. No.

Q. But you say you knew him quite well.

A. Yes. I was to his funeral.

Q. Did you have business dealings with him occasionally?

A. Yes, I have had business dealings with him.

Q. You have been to his place in Lakewood, I presume?

A. Yes, twenty-five or thirty times, quite frequently.

Q. You were familiar generally with his business?

A. Well, from more or less hearsay. Not personally, no.

Q. You know Mr. Havens?

A. I have known Mr. Havens for twenty some years.

Q. Did you know Mr. Havens when he came with Mr. Westhall?

A. Yes.

Q. You have had business dealings with him occasionally?

A. Yes, I have had business dealings with him.

Q. I assume you recall the death of Mr. Westhall, you said you attended the funeral?

A. I do.

Q. That was in 1928, was it not?

A. 1928.

Q. I assume you recall the fact of his widow's death in 1931, too.

A. Yes, I recall it.

Q. It has been testified here that during the interval between his death and his widow's death the business was carried on by Osborne Havens.

A. That is true, I know that.

Q. Now Mr. Bodine, in your judgment at the time of Mrs. Westhall's death in 1931, on August 13, 1931, was there any good-will attached to that business?

Mr. Crummy: Object to that and to the line of questioning with reference to good-will with this man. Does your Honor want me to state my reasons?

The Court: No. I will allow it.

A. I would say no, unless she had actively attended to the business and come in contact with the people during the three years prior to her death. If so, yes. Personality and contact are everything in any business in my opinion.

Q. And is not that particularly true in the undertaking business?

A. Yes. I can cite a case in my own instance if I may.

Q. Go ahead.

A. I had my limb amputated three and a half years ago, and since that time I cannot come in contact with the trade. Part of me is dead and buried and I cannot come in contact with my trade personally on account of it, and a dead man would lose more.

Q. In your judgment does the success or failure of an undertaking business depend or not upon the personal services of the man actually conducting the business?

A. Absolutely, yes.

Q. Assume for the sake of argument that there is some good-will attached to an undertaking business

after the death of the man who has been running it, even though it may be small. What happens to that good-will as the years go by?

A. It would die out the next day unless his wife or son had personal contact with the business and had had personal contact before his death. That is my opinion.

Q. During the time that the Westhall funeral establishment was the only funeral establishment in Lakewood, did you occasionally do business over in Lakewood?

A. Yes, I had cases there, and lots of other undertakers did.

Q. Do you know some of them by name?

A. Clayton had almost as many as the Westhall establishment, and those that Mr. Anderson named —Mr. Harvey and Mr. Lefferson. Mr. Anderson himself had a great deal of work there in years back.

Cross-examination.

By Mr. Crummy:

Q. Although you have been so unfortunate as to lose your limb, you have in the past five years paid attention to your business.

A. No, sir. I have not conducted a funeral in three years and a half.

Q. How many cases did your establishment have in Lakewood in the past five years?

A. Maybe a dozen, offhand. I could not tell exactly without looking up my record, but years back we had more.

Q. What was your income in 1932 from your business?

A. I could not tell without my records. Since I have had my limb amputated I have done less business.

Q. Can you tell me what your income was in 1934 or 1935?

A. I know it has decreased since the banks closed. I am living on borrowed life insurance money. It was different in Asbury Park from what it was in some parts of the State because we had so many banks close—the Seacoast closed, the East Jersey, the Monmouth, the Asbury Park and Ocean Grove, and none of those has paid a dividend with the exception of the Asbury Park and Ocean Grove has paid fifteen percent and the Seacoast has never paid a dividend and the Monmouth Mortgage and Title Company and the East Jersey Mortgage Company have never paid a cent of their resources.

Q. In the vernacular times were tough in Asbury Park.

A. They certainly have been for the last three years.

Q. Do you know how much your business fell off from 1933 to 1934?

A. I could not tell exactly. My wife sees to the books.

Q. How do you know your business fell off?

A. I did not have any money and had to borrow on my life insurance.

Q. Do you know how much your business fell off from 1932 to 1935?

A. Well, in 1932 the banks closed and I had my leg off.

Q. The only thing you know about the business of E. J. Westhall up to 1931 was what you learned by hearsay?

A. No, I would not say that. I was there different times.

Q. Do you know the net profits in that business in any year from ——

A. No. How would I know, man?

FERD S. LEFFERSON, a witness produced by the accountant, being duly sworn according to law upon his oath testified as follows:

Direct examination.

By Mr. Tomlinson:

Q. Where do you live, sir?

A. Manasquan, New Jersey.

Q. How long have you resided there?

A. I was born in Manasquan, been there all my life.

Q. You are engaged in the undertaking business there?

A. Yes, sir.

The Court: This witness, I assume, is another undertaker, who is going to testify right along the same lines.

Mr. Tomlinson: Yes, sir. Mr. Lefferson and one other man.

The Court: Is there any point in which the testimony of these next two witnesses would differ or

cover a further field or in any way elaborate upon the testimony of the other undertakers that have gone before?

Mr. Tomlinson: I cannot say that there would be any substantial difference between Mr. Lefferson's testimony and that of the preceding witnesses, except in one slight respect, but Mr. Medlar, the last witness I expect to produce, was intimately acquainted with the Westhalls. I think I should have the benefit of his testimony, but if your Honor thinks I should not go ahead ——

The Court: It does not mean a thing to me.

Mr. Tomlinson: Mr. Medlar knows more about the Westhall situation than anyone else.

The Court: Cannot you stipulate that the testimony of this witness would be substantially the same, and you may have the benefit of your exception.

Mr. Crummy: I will so stipulate.

Mr. Tomlinson: Very well. I will excuse Mr. Lefferson and put on the next witness.

CHARLES S. MEDLAR, a witness produced on behalf of accountant, being duly sworn according to law upon his oath testified as follows:

Direct examination.

By Mr. Tomlinson:

Q. Mr. Medlar, where do you live?

A. In Brooklyn. 87 Chauncey Street, Kings County.

Q. What is your occupation?

A. Sexton, Collegiate Church of St. Nicholas, Fifth Avenue and Forty-eighth Street, and undertaker.

Q. You are a licensed undertaker and embalmer of what State?

A. New York.

Q. You have been engaged in that occupation for how long?

A. About forty-two years.

Q. Did you know Mr. Edmund J. Westhall in his lifetime?

A. Intimately.

Q. How long had you known him prior to his death?

A. I should say thirty-eight years.

Q. Do you know Mrs. Westhall?

A. Very well.

Q. Do you know Mr. Havens?

A. Yes.

Q. How long have you known Mr. Havens?

A. Time flies so it must be six or seven years anyway.

Q. Did you know Mr. Havens when he was associated with E. J. Westhall?

A. I did.

Q. Did you come down to Lakewood frequently?

A. I did, yes.

Q. Do you remember who conducted the Westhall business after the death of Mr. Westhall and before the death of Mrs. Westhall?

A. I should say Osborne Havens and Harry Brown.

Q. As a matter of fact you buried Mr. Westhall, did you not?

A. Yes, I think I buried the whole family.

Q. I ask you the same question I asked the other witnesses. In your opinion, at the death of Mrs. Westhall on August 13, 1931, was there any good-will attached to this business?

Mr. Crummy: That I object to, your Honor, on the same basis as my previous objection.

The Court: I will overrule the objection and let it stand for what it is worth. Exception.

A. From that time and years before I should have said there was not.

Q. Why?

A. Well, I have heard it said so many times here. Men in the undertaking line must come in contact with their clientele and deliver service; personal touch is what I call it. They must render the best possible service.

Q. To phrase it a little bit differently, in your

opinion does the success of an undertaking business depend or not upon the personal services of the man running the business?

A. It certainly does.

Q. And personal contact?

A. Yes, in a business of this character.

Q. In a community the size of Lakewood is it your judgment that people go to an undertaking establishment because of the name of the business or because of the individuality and personality of the man that is actually running the business?

A. Well, that is a question that requires some thought. In this particular case there was not much choice, there was only one undertaker then, though I understand there are two now. People in Lakewood knew that there was one undertaker and they would naturally go there for convenience sake, that is, if they got the service.

Q. Assume that a man is running an undertaking business and that at the time of his death there is some good-will to that business, what happens to that good-will every year, if anything?

A. Naturally it diminishes.

Q. To the vanishing point?

A. I think so.

Cross-examination.

By Mr. Crummy:

Q. How many years would you say it would take to reach the vanishing point?

A. Will you put that question again?

Q. You say that after the death of a gentleman who runs an undertaking business under a given name that good-will diminishes every year. Can you tell his Honor how much it would diminish in the first year?

A. I am not in a position to state that. I would not want to say.

Q. You say in time it would diminish to the vanishing point. In how much time, would you say?

A. I cannot answer that.

Q. Mr. Medlar, do you know a concern in Newark by the name of Smith and Smith?

A. Yes.

Q. Do you know a concern named Hengler and Hengler?

A. I know of them.

Q. Do you know the gentlemen connected with Smith and Smith?

A. Yes.

Q. Do you know of any Mr. Smith connected with that firm today?

A. No.

Q. That is an old establishment, eighty or ninety years old, is it not?

A. I know it has been established a long time.

Q. And they have a fine reputation?

A. Very good.

Q. And have not Hengler and Hengler a fine reputation?

A. I do not know.

Q. Did you know any of the original Henglers connected with that firm?

A. Only by name.

Q. You know, as a matter of fact, that there are none of the original Henglers connected with that firm?

A. I would not want to say. I don't know.

Q. How frequently did you come to Lakewood?

A. Are you referring to late years?

Q. No, prior to 1931.

A. I would say Mr. Westhall called me down there three or four times a year, and I would see him when he came to New York.

Q. Did Mr. Westhall ever tell you anything about his business in the line of dollars and cents?

A. No.

Q. Do you know how much this business produced between 1928 and 1931?

A. No, I never was interested.

Q. Did he ever tell you?

A. No.

Q. Do you know what condition the paraphernalia of that business was in from 1928 to 1931?

A. I had no occasion to know. I did not come in contact with it.

Q. Do you know how much the value of the paraphernalia was that they had?

A. I did not see it. I would have to see it to give you a figure.

Re-direct examination.

By Mr. Tomlinson:

Q. Does the personality of the man running an undertaking business count for more in a big place or in a small place?

A. I should think in a small town that would be the criterion.

The Court: Do you have any other witnesses?

Mr. Crummy: No, I have not, your Honor.

EXHIBIT R-1.
N. W. B.

OCEAN COUNTY SURROGATE'S COURT

STATE OF NEW JERSEY, }
County of Ocean, } ss.

I, CLINTON O. FOGG, Surrogate of the County of Ocean, do hereby certify that on the tenth day of May, A. D. 193 28 I admitted Lakewood Trust Company of (L. S.) Lakewood, New Jersey as Guardian of the person and property of Beatrice Elizabeth Westhall of Lakewood, New Jersey being a minor under the age of fourteen years.

WITNESS my hand and seal of office this tenth day of May in the year of our Lord one thousand nine hundred and Twenty-eight.

Clinton O. Fogg,
Surrogate
By Percy L. Grover,
Deputy Surrogate

10

OCEAN COUNTY SURROGATE'S OFFICE

STATE OF NEW JERSEY, } ss.
COUNTY OF OCEAN }

20 I, CLINTON O. FOGG, Surrogate of the County of Ocean, do certify the foregoing to be a true copy of LETTERS OF GUARDIANSHIP, in the matter of the guardianship of BEATRICE ELIZABETH WESTHALL, a minor, ~~deceased~~ as the same remains of Record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office, at Toms River, New Jersey,
(Seal) the 22d day of September, in the year of
30 onr Lord, one thousand nine hundred and thirty-seven.

Clinton O. Fogg
Surrogate.
By Percy L. Grover
Deputy Surrogate.

Exhibit R-2, Letters of Guardianship

(On back:)

SURROGATE'S COURT
OCEAN COUNTY, N. J.

IN THE MATTER OF THE
ESTATE OF
BEATRICE ELIZABETH WESTHALL,
MINOR ~~Deceased.~~
CERTIFIED COPY
OF
LETTERS OF GUARDIANSHIP

EXHIBIT R-2.
N. W. B.

OCEAN COUNTY SURROGATE'S COURT

STATE OF NEW JERSEY, }
County of Ocean, } ss.

I, CLINTON O. FOGG, Surrogate of the County of Ocean, do hereby certify that on the tenth day of May, A. D. 193 28 I admitted Lakewood Trust Company of (L. S.) Lakewood, New Jersey as Guardian of the person and property of Edmund J. Westhall of Lakewood, New Jersey being a minor under the age of fourteen years.

WITNESS my hand and seal of office this tenth day of May in the year of our Lord one thousand nine hundred and twenty-eight.

Clinton O. Fogg,
Surrogate
By Percy L. Grover,
Deputy Surrogate

OCEAN COUNTY SURROGATE'S OFFICE

STATE OF NEW JERSEY, }
COUNTY OF OCEAN } ss.

I, CLINTON O. FOGG, Surrogate of the County of Ocean, do certify the foregoing to be a true copy of LETTERS OF GUARDIANSHIP, in the matter of the guardianship of EDMUND J. WESTHALL, a minor, deceased as the same remains of Record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office, at Toms River, New Jersey, (Seal) the 22d day of September, in the year of our Lord, one thousand nine hundred and thirty-seven.

Clinton O. Fogg
Surrogate.
By Percy L. Grover
Deputy Surrogate.

Exhibit R-3, Letters of Guardianship

(On back:)

SURROGATE'S COURT
OCEAN COUNTY, N. J.

IN THE MATTER OF THE
ESTATE OF
EDMUND J. WESTHALL,
Minor Deceased.
CERTIFIED COPY
OF
LETTERS OF GUARDIANSHIP

EXHIBIT R-3.
N. W. B.

OCEAN COUNTY SURROGATE'S COURT

STATE OF NEW JERSEY, }
County of Ocean, } ss.

I, CLINTON O. FOGG, Surrogate of the County of Ocean, do hereby certify that on the tenth day of May, A. D. 193 28 I admitted Lakewood Trust Company of
(L. S.) Lakewood, New Jersey as Guardian of the person and property of James Edmund Westhall, Jr., of Lakewood, New Jersey being a minor under the age of fourteen years.

WITNESS my hand and seal of office this tenth day of May in the year of our Lord one thousand nine hundred and thirty-eight.

Clinton O. Fogg,
Surrogate
By Percy L. Grover,
Deputy Surrogate

OCEAN COUNTY SURROGATE'S OFFICE

STATE OF NEW JERSEY, }
COUNTY OF OCEAN } ss.

I, CLINTON O. FOGG, Surrogate of the County of Ocean, do certify the foregoing to be a true copy of LETTERS OF GUARDIANSHIP, in the matter of the guardianship of JAMES EDMUND WESTHALL, JR., a minor, deceased as the same remains of Record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office, at Toms River, New Jersey, (Seal) the 22d day of September, in the year of our Lord, one thousand nine hundred and thirty-seven.

Clinton O. Fogg
Surrogate.
By Percy L. Grover
Deputy Surrogate.

Exhibit C-1, Agreement

(On back:)

SURROGATE'S COURT
OCEAN COUNTY, N. J.

IN THE MATTER OF THE
ESTATE OF
JAMES EDMUND WESTHALL, JR.
Minor ~~Deceased.~~
CERTIFIED COPY
OF
LETTERS OF GUARDIANSHIP

EXHIBIT C-1.
N. W. B.

MEMORANDA OF AGREEMENT
Made this First day of October, Nineteen Hundred and Thirty-one,
BETWEEN—
LAKEWOOD TRUST COMPANY
a banking association organized under the laws of the State of New Jersey, with its banking house in the Township of Lakewood, Ocean County, New Jersey, and
ELIZABETH C. WESTHALL and JANE W. WESTHALL
of the Township of Lakewood, County of Ocean and State of New Jersey, party of the first part;

AND—

JESSIE M. HAVENS

of the Township of Lakewood, County of Ocean and State of New Jersey, party of the second part;

AND—

VIRGINIA HOOPER

of the City of Washington, District of Columbia, party of the third part;

AND—

OSBORNE W. HAVENS, individually and as administrator of the estate of Beatrice E. Westhall, deceased, of the Township of Lakewood, County of Ocean and State of New Jersey, party of the fourth part.

WHEREAS Beatrice E. Westhall died a resident of the Township of Lakewood, in the County of Ocean and State of New Jersey on August 13, 1931, intestate, leaving her surviving as her only heirs at law and next of kin the following named persons: Jessie M. Havens, daughter; Virginia Hooper, daughter; Beatrice Elizabeth Westhall and Edmund J. Westhall, children of Leon E. Westhall, deceased, a son of the decedent, Beatrice E. Westhall; James E. Westhall, Jr., a son of James E. Westhall, Sr., deceased, a son of the decedent, Beatrice E. Westhall; and

WHEREAS the Lakewood Trust Company was heretofore duly appointed guardian of the person and property of the infants, Beatrice Elizabeth Westhall, Edmund J. Westhall and James E. Westhall, Jr., by the Surrogate of the County of Ocean on May 29, 1928; and

WHEREAS Elizabeth C. Westhall is the widow of Leon E. Westhall and the mother of the infants, Beatrice Elizabeth Westhall and Edmund J. Westhall; and

WHEREAS Jane W. Westhall is the widow of James E. Westhall, Sr. and the mother of the infant, James E. Westhall, Jr.; and

WHEREAS the said Beatrice E. Westhall died seized of the following tracts of land:

A. 3½ lots situate on the North side of Second Street, between Clifton and Lexington Avenues, Lakewood, New Jersey:

Lot No. 6 and No. 7, Block No. 14, particularly described in a deed from May Belle Westhall to Edmund J. Westhall, dated June 22, 1896 and recorded in the Ocean County Clerk's Office at Toms River, New Jersey on October 24, 1896 in Book 225 of Deeds for said County on pages 153 &c.

Lot No. 8, Block No. 14, particularly described in a deed from James Westhall, widower, to Edmund J. Westhall, dated November 23, 1892 and recorded in the Ocean County Clerk's Office at Toms River, New Jersey on November 28, 1892 in Book 192 of Deeds for said County on pages 180 &c.

Westerly one-half of Lot No. 9, Block No. 14, particularly described in a deed from Park Hill and wife to Edmund J. Westhall, dated May 18, 1896 and recorded in the Ocean County Clerk's Office at Toms River, New Jersey on October 24, 1896 in Book 225 of Deeds for said County on pages 150 &c.

There is erected upon these tracts of land, a store

and apartment building, dwelling house, barn and chapel, heretofore used by Edmund J. Westhall in his undertaking business.

B. Tract of 74.75 acres of scrub oak and scrub pine, located South of Lakewood to Point Pleasant road in the rear of Charles Estell property, particularly described in a deed from Charles Estell and wife to Edmund J. Westhall, dated January 9, 1907 and recorded in the Ocean County Clerk's Office at Toms River, New Jersey on April 5, 1907 in Book 306 of Deeds for said County on pages 324 &c.

C. 3 lots designated by Nos. 22, 23 and 30 on a map of property belonging to Abram C. Clayton, Laurelton, N. J. and particularly described in a deed from Abram C. Clayton and wife to Edmund J. Westhall, dated October 9, 1916 and recorded in the Ocean County Clerk's Office at Toms River, New Jersey on December 4, 1916 in Book 478 of Deeds for said County on pages 142 &c.

D. 1 lot designated as Lot No. 29 on map of property of Abram C. Clayton, Laurelton, N. J. and particularly described in a deed from Josiah S. Sculthorpe and wife to Edmund J. Westhall, dated December 8, 1927 and recorded in the Ocean County Clerk's Office at Toms River, New Jersey on March 24, 1928 in Book 777 of Deeds for said County on pages 491 &c.

E. Lot No. 17 on Survey Map No. 1, in the Metedeconk property located in Brick Township and par-

ticularly described in a deed from Metedeconk Company to Edmund J. Westhall, dated May 29, 1925 and recorded in the Ocean County Clerk's Office at Toms River, New Jersey on September 14, 1925 in Book 650 of Deeds for said County on pages 291 &c.

F. 3 lots designated as Lots Nos. 62, 63 and 64 on Map "D" of the Metedeconk property located in Brick Township and particularly described in a deed from Metedeconk Company to E. J. Westhall dated May 29, 1925 and recorded in the Ocean County Clerk's Office at Toms River, New Jersey on September 14, 1925 in Book 659 of Deeds for said County on pages 293 &c.

G. 2½ lots designated as one-half of Lot No. 59 and Lots Nos. 60 and 61 on Map "D" of the Metedeconk property located in Brick Township and particularly described in a deed from Metedeconk Company to E. J. Westhall dated July 20, 1925 and recorded in the Ocean County Clerk's Office at Toms River, New Jersey on September 14, 1925 in Book 659 of Deeds for said County on pages 295 &c.

H. 3 lots designated as Lots Nos. 1, 2 and 3 on Map "D" of the Metedeconk property located in Brick Township and particularly described in a deed from Metedeconk Company to E. J. Westhall dated June 1, 1925 and recorded in the Ocean County Clerk's Office at Toms River, New Jersey on May 11, 1926 in Book 689 of Deeds for said County on pages 489 &c.

I. 2½ lots designated as Lots Nos. 4, 5 and west one-half of No. 6 on Map "D" of the Metedeconk property located in Brick Township and particularly described in a deed from Metedeconk Company to E. J. Westhall dated July 15, 1925 and recorded in the Ocean County Clerk's Office at Toms River, New Jersey on September 14, 1925 in Book 659 of Deeds for said County on pages 297 &c.

WHEREAS the said Beatrice E. Westhall left as part of her personal estate the undertaking business formerly conducted by her husband, Edmund J. Westhall, deceased, and since his death operated for her by the said Osborne W. Havens, and the merchandise, stock in trade, equipment and accessories used and employed in said business; and

WHEREAS it is deemed for the best interests of the heirs and next of kin of the said Beatrice E. Westhall, deceased, that said undertaking business should be sold by the said Osborne W. Havens as administrator to himself, individually, and that the said Osborne W. Havens should be employed as the agent of the heirs to superintend, supervise and manage the real estate of which the said Beatrice E. Westhall died seized.

WITNESSETH that the said parties hereto, in consideration of the foregoing recitals and the covenants and agreements hereinafter contained, do hereby mutually agree as follows:

1. The said parties of the first part, second part and third part do hereby consent that the said

Osborne W. Havens as administrator of the estate of Beatrice E. Westhall, deceased, should sell to Osborne W. Havens, individually, the undertaking business conducted by Beatrice E. Westhall at Lakewood, New Jersey, together with the good will of said business, and together with the following merchandise, stock in trade, equipment and accessories:

1 Motor Hearse — Lorraine Car Company
Engine No. 11497 Car No. 4990
1 Chevrolet Commercial Delivery — Capital
Model Serial No. 2AA53620 Motor No. 3366621
1 Meteor Motor Car Company Hearse — 1929
Engine No. 15 a 2669 Serial No. 11269
1 Oakland 5 passenger Sedan 1929
Engine No. 252595 Serial No. 240671 Model AAS
5 Floor Rugs
1 Desk
1 Desk Chair
1 Safe
4 Wicker Chairs (Bad Order)
1 Wicker Settee
1 Waste Basket
13 Assorted Mounted Birds
7 Assorted Pictures
1 Electric Fan 14 inch — old
1 Clock — old
1 Single Book Case and books
1 Desk Lamp
1 Fireplace Screen
1 Pair Brass Sconces
1 Lecturn
1 Oak Chair
1 Bible
20 yds. Cacket Mattress

3 doz. Grave Markers
3 doz. Grave Vases
2 baskets artificial flowers
3 Artificial Door badges
1 Casket Bier
1 Casket Lamp
3 Flower Racks and Stand
1 Tarpaulin
Odd lot Excelsior
Odd lot Sheet Cotton
6¾ gr. Escutcheons and thumb screws
1 gr. Bolts and sleeves for Bx. Hdles
1 lb. 3 oz. tacks
2 gr. #6 screws
8 gr. #9 screws
2 lb. Escutcheon Pins
Babies Carrying Case
1 Mens Robe
6 Ladies' Robes
Broken Bx. Memo Books
Broken Bx. Announcement Cards
30½ doz. pr. Gloves
5¾ cases Embalming Fluid
2 bottles San O Spray
45 Caskets
22 Outside Boxes
14 doz. prs. Casket Handles
14 sets Casket Handles
4 Casket Pillows
33 yds. Casket Lining
37 sets Casket Linings
7 1/3 doz. pr. Bx. Handles
3 sets Grave Lining
Lot of odd lumber

20 doz. Camp Chairs
6 doz. Camp Chairs
2 Chests old tools
Miscellaneous small tools, nails, etc.
4 Bx. Picture Glass
Odd lot old picture molding
2 old Mahogany Tables
2 Ladders
5 Embalming Boards
1 Child's Embalming Board
1 Carrying Basket
3 prs. Casket Pedestals (old)
5 Floor Rugs
1 Gray Plush Carriage Robe
1 pr. Black Horse Blankets
1 Fur Carriage Robe
4 pr. Bench Pedestals
2 Casket Trucks
1 frigid Lowering Device
10 lb. Candles

for the sum of

THREE THOUSAND EIGHT HUNDRED FORTY-TWO DOLLARS

which is the inventory and appraisement value of the same as fixed and determined by Amory J. Parmentier and Arthur R. Smock, appraisers appointed by Clinton O. Fogg, Surrogate of the County of Ocean.

2. In consideration of the sale of said undertaking business, merchandise, stock in trade, equipment and accessories by Osborne W. Havens, administrator, to Osborne W. Havens, individually, the said Os-

borne W. Havens shall pay forthwith to the estate of Beatrice E. Westhall, deceased, the sum of

THREE THOUSAND EIGHT HUNDRED FORTY-TWO DOLLARS

and shall lease that part of the premises set forth in A. in the recital to this agreement, which has heretofore been employed in the undertaking business, consisting of dwelling house, barn and chapel, from the heirs at law of the said Beatrice E. Westhall, deceased, for the term of one year from October 1, 1931, at the yearly rental of NINE HUNDRED DOLLARS, payable in equal monthly installments in advance, and as a further consideration the said Osborne W. Havens shall supervise and manage all of the real estate of which the said Beatrice E. Westhall died seized and which is particularly set forth in the recital to this agreement. The duties, obligations and responsibilities of the said Osborne W. Havens shall include the following:

(a) To exert his best effort to rent, lease and keep rented and leased the store and apartment building situate on the North side of Second Street, Lakewood, New Jersey.

(b) To collect the rents.

(c) To perform or cause to be performed the requisite and necessary janitor service for said store and apartment building, at his own cost and expense.

(d) To cause to be made and to supervise the necessary repairs to said store and apartment building, the cost of which shall be paid by the heirs.

(e) To pay the insurance premiums and taxes covering all of the real estate hereinbefore mentioned, from the proceeds of the rents collected.

(f) To kep and maintain the store and apartment building in a clean and sanitary condition and in as good a state of repair as the same now is, reasonable wear and tear excepted.

(g) To keep and maintain the dwelling house, barn and chapel in a clean and sanitary condition and in as good a state of repair as the same now is, reasonable wear and tear excepted.

(h) To keep and maintain the grounds on the Second Street property in as good a condition as the same now are.

(i) To supervise in general the real estate of which the said Beatrice E. Westhall died seized, and to do all things requisite and necessary to keep, maintain and preserve the same for the best interests of the heirs at law.

(j) The charges for gas, water, electric and sewer services and heat furnished to the store and apartment building shall be deducted from the proceeds of the rents.

(k) Said Osborne W. Havens shall make all necessary repairs to the interior of the dwelling house, barn and chapel and shall pay or cause to be paid all charges for gas, water, electric and sewer ser-

vices furnished and supplied to the said dwelling house, barn and chapel.

(l) To account to the heirs at law, semi-annually on the first days of April and October of each year, during the term of this agreement or its renewal, and to distribute such surplus rents as may be on hand at such time to the said next of kin in accordance with their respective interests.

(m) The said Osborne W. Havens shall not make any material alterations or repairs at the cost and expense of the heirs at law, or reduce any rents, or rent any of the premises at a reduced rent without the written consent of three-quarters in interest of the heirs at law or their representatives.

3. IT IS UNDERSTOOD AND AGREED and the said Osborne W. Havens does hereby acknowledge that he is obligated to continue this agreement under the same terms and conditions as herein contained for an additional year beginning October 1, 1932 if the heirs at law or their representatives so elect.

4. IT IS FURTHER UNDERSTOOD AND AGREED that the said Osborne W. Havens shall receive no other consideration or compensation for the performance of his services as herein required, it being distinctly and expressly UNDERSTOOD that such services are to be performed in consideration of the sale of the undertaking business to him and in the further consideration of the reduced rent

of the premises that he is to occupy and use in the undertaking business.

5. IT IS FURTHER UNDERSTOOD AND AGREED that if the said Osborne W. Havens should become incapacitated from performing the services herein required by reason of death or otherwise, that the next of kin, or their representatives, of the said Beatrice E. Westhall, deceased, shall have the right, privilege and option of terminating this agreement and re-purchasing from the said Osborne W. Havens, or his estate, the undertaking business so sold to him at the inventory value of the merchandise, stock in trade, equipment and accessories on hand at the time of the termination of this agreement.

6. The said Elizabeth E. Westhall and Jane W. Westhall do hereby expressly consent to this agreement and do hereby direct and authorize the Lakewood Trust Company to enter into this agreement for and in behalf of their infant children who are the legal wards of the said Lakewood Trust Company of Lakewood, New Jersey.

7. IT IS EXPRESSLY UNDERSTOOD AND AGREED that at the expiration of the term herein provided, or the sooner termination thereof, the said Osborne W. Havens will quit and surrender the premises hereby demised in as good a state and condition as reasonable use thereof will permit, damage by the elements excepted.

8. IT IS UNDERSTOOD AND AGREED that if any of the stores and apartments in the building

hereinbefore mentioned should be rented and leased through a broker, that the regular commissions charged shall be paid from said rents.

9. The heirs at law and representatives mentioned in "m" hereinbefore set forth shall and are hereby construed to be Lakewood Trust Company, Jessie M. Havens and Virginia Hooper.

10. IT IS FURTHER UNDERSTOOD AND AGREED that the said Osborne W. Havens shall not be personally liable for any of the charges herein intended to be deducted from the rents or paid by the heirs at law.

11. IT IS FURTHER UNDERSTOOD AND AGREED that in the event that the rents accruing from the real estate herein mentioned shall be insufficient to pay the charges herein intended to be deducted therefrom, that then in such event the respective heirs at law and their representatives shall on demand from the said Osborne W. Havens pay to him sums of money equal to their prorata share of said deficiency.

12. IT IS FURTHER UNDERSTOOD AND AGREED that the said heirs at law and their representatives shall have the right, privilege and option of renewing this agreement for an additional term of one year commencing October 1, 1932 and shall give notice of their intention to renew said agreement on or before October 1, 1932.

13. IT IS UNDERSTOOD AND AGREED that the premises leased by the said Osborne W. Havens

and designated as that part of the premises formerly used and employed in the undertaking business shall, in addition to the dwelling house, barn and chapel mentioned in this agreement, include the trimming house and garage.

14. IT IS FURTHER UNDERSTOOD AND AGREED that the terms, conditions, covenants and provisions herein contained shall be altered, amended or changed only in writing, signed by all of the parties hereto.

IN WITNESS WHEREOF, the said LAKEWOOD TRUST COMPANY has caused these presents to be signed by its President, attested by its Treasurer, and its corporate seal to be hereto affixed, and the said ELIZABETH C. WESTHALL and JANE W. WESTHALL, JESSIE M. HAVENS, VIRGINIA HOOPER and OSBORNE W. HAVENS, individually and as administrator of the estate of Beatrice E. Westhall, deceased, have hereunto set their hands and seals, the day and year first above written.

LAKEWOOD TRUST COMPANY
By Charles McCue
President

ATTEST:
A. J. Parmentier
(Seal) Treasurer
SIGNED, SEALED and
DELIVERED
in the presence of—

Exhibit E-17, Permit to Continue Business of Deceased Licensee

A. J. Parmentier
Elizabeth C. Westhall (Seal)
A. J. Parmentier
Jane W. Westhall (Seal)
(As to Jessie M. Havens
(and Osborne W. Havens
Beatrice G. Pendle
Jessie M. Havens (Seal)
Albert G. Hooper
Virginia W. Hooper (Seal)
Osborne W. Havens (Seal)
Individually and as administrator of the estate of Beatrice E. Westhall, deceased.

EXHIBIT E-17.

(Permit to continue business of deceased licensee)

BOARD OF EMBALMERS AND FUNERAL DIRECTORS
OF THE STATE OF NEW JERSEY

THIS IS TO CERTIFY THAT permission is hereby given to

——BEATRICE WESTPHALL——

to continue the business of Embalming or Funeral Directing, or both, of the late Edmund J. Westphall, a licensee of the Board of Embalmers & Funeral

Exhibit E-17, Permit to Continue Business of Deceased Licensee

Directors of the State of New Jersey, to whom was issued License No. 563.

This permit is issued for the benefit of the widow or of the estate or of persons interested in the estate of decedent, and said business shall be continued under the supervision of a person duly licensed by the Board for such time and in such manner as the Board shall determine, pursuant to the provisions of Section 12, Chapter 156, Laws of 1927, and Section 22 of the Rules and Regulations adopted in accordance therewith.

IN TESTIMONY WHEREOF are hereunto affixed the seal and the signatures of the President and Secretary of the Board of Embalmers and Funeral Directors of the State of New Jersey, this —— day of —— 1929.

(Seal)

(signed) John V. Burke
President

(signed) Bert A. Waters
Secretary

(On back, typewritten:)

This is a copy of the original certificate that should be on file in the office of the establishment of E. J. Westphall.

EXHIBIT E-18.

APPRENTICESHIP RECORD

Name O. W. HAVENS
Employer Harry E. Brown License No. 461
Address 225 Second Street
Lakewood Ocean
City or Town County

Date of Registration	Renewal Date	Date of Termination	Examination Record
	1/1/32		
	1/1/32		
	1/17/33		
	6/26/34		

(On back:)

STATE BOARD RECORDS

EXHIBIT E-19.

APPRENTICESHIP RECORD

Name O. W. HAVENS

Employer E. J. Westphall—W. H. Freeman, Mgr.
License No. 935

Address 225 Second St
Lakewood, New Jersey Ocean
City or Town County

Date of Registration	Renewal Date	Date of Termination	Examination Record
September 1, 1927	7/30/29		
	12/1/30		
	1/17/31		

(On back:)

STATE BOARD RECORDS

EXHIBIT E-25.

APPRENTICESHIP RECORD

Name O. W. Havens
Employer Harry E. Brown License No. 461
Address 225 Second Street
Lakewood Ocean
City or Town County

Date of Registration	Renewal Date	Date of Termination	Examination Record
	1/1/32		
	1/17/33		
	6/26/34		

The above is an exact copy of Apprenticeship Record of O. W. Havens in the employ of HARRY E. BROWN, on file in the office of the Board of Embalmers and Funeral Directors of the State of New Jersey

Bert Crater
(Seal) Sec'y

Exhibit E-25, Apprenticeship Record

(On back:)

STATE BOARD RECORDS

APPRENTICESHIP RECORD

Name O. W. Havens

W. H. Freeman, Mgr.

Employer E. J. Westhall—Deceased /

License No. 563 935

Address 225-2nd St.,

Lakewood, New Jersey Ocean Co.

City or Town County

Date of Registration	Renewal Date	Date of Termination	Examination Record
September 1, 1927	7/30/29		
	12/1/30		
	1/17/31		

The above is an exact copy of Apprenticeship Record of O. W. Havens in the employ of W. H. FREEMAN, on file in the office of the Board of Embalmers & Funeral Directors of the State of New Jersey

(Seal)

(On back:)

STATE BOARD RECORDS

EXHIBIT E-26.

(Newspaper Clipping:)

FRIDAY, NOV. 16, 1934
E. J. WESTHALL
Funeral Director
and Embalmer
Office, Chapel and Show Rooms, Second St., between Clifton and Lexington Aves., Lakewood, N. J.
Phone 277
Transportation of bodies to and from any part of the United States. Tombstones & monuments furnished. Camp Chairs to Rent for parties, etc.
Established in Lakewood in 1868

EXHIBIT E-50.

ESTATE OF BEATRICE E. WESTHALL, DECEASED.

1931	Accounts Receivable	Total	Bal 10-1-31	Bal 12-31-31	Bal 8-9-32
Aug 18	Wm A. Ryno	315 70	315 70	65 70	65 70√
26	A. S. Smith	419 √			
28	Chas. Rippen	43 √			
Sept 1	C. Tambuno	150 —√			
10	Wm. H. Lawler	482 85	482 85	482 85√	
11	Sarah Rose	100 √			
15	James Cole	271 70	195 70	150 70	150 70√
18	Mr. Randell	15 —√			
27	A. V. Bryan	71 35	71 35√		
29	Norbert/Gall.	305 00	305 00√		
30	Chas Stangler	68 85	68 85√		
	Totals	2242 45	1439 45		

Oct	2	E. J. Lanzzo	51 —√		
	3	Louis C. Cuneo	50 √		
	13	Chas L. Lindley	75 —√		
	14	H. Brawer	12 √		
	10	A. P. Linke	65 —√	15 —√	15 —√
	15	A. Montague	55 —√		
	17	J. R. Mahn	729 25√		
	20	M. E. Scott	245 —√	33 46√	33 46√
	22	E. L. Whitman	49 50√		
	25	M. E. McDevitt	336 35√	336 35√	300 —√
	26	E. B. Conington	110 —√		
	26	R. Whalen	65 —√		
	27	C. J. Gleason	619 78√		
	30	Jos. Lawrence	210 —√	10 —	
	30	L. M. S. Bennett	585 20√		
Nov	2	I. Jacobs	100 —√		
	5	J. H. Wright	10 —√		
	5	F. Branson	45 —√		
	5	J. J. Irons	497 50√		
	9	Louis Mayers	68 —√		

	11	A. J. Behrman	183	90√				
	17	A. Applegate	128	—√	128	—√		
	23	J. H. Niller	471	65√				
	27	A. Bauman	40	—√				
	28	I. L. B. Celade	321	38√				
	28	E. Langford	37	14√	37	14√		
Dec	4	C. J. Parmentier	475	04√	475	04√	475	04√
	6	K. Kling	271	20√	271	20√	271	20√
	11	M. Rabinowitz	50	—√	50	√		
	15	M. I. Caffery	320	—√	210	—√		
	19	A. V. Walsh	402	10√	402	10√		
	21	S. Boxsoffsky	43	00√				
	23	G. Smilka	50	√	50	—√		
	24	M. Kraus	496	70√	296	70√		
	26	I. Katske	100	√				
	28	J. Bimand	100	—√				
	30	A. M. Spanks	711	55√	711	55√		
	30	O. C. Honey	649	64√	649	64√		
			8829	80	4375	43		

1932						
Jan	2	Louis Weil	100	√		
	5	A. Tarnish	25	—√		
	8	L. G. Adams	465 30	√	465 30	√
	13	Louis Rolke	45	—√		
	18	A. J. Brown	50	√		
	20	J. Williamson	463 25	√	100	—√
	26	E. Levine	25	—√		
Feb	8	R. Feingold	40	—√	20	—√
	8	M. E. Gallagher	167 48	√	167 48	√
	10	E. R. Wells	85	—√	75	—√
	12	A. M. Withers	235	—√	56 86	√
	19	S. Duitsch	15	—√		
	29	S. S. Schriver	407 32	√		
Mar	1	W. R. Combs	657 85	√		
	2	E. W. Kemps	300	—√	290	—√
	6	T. J. Sprawl	646 96	√		
	8	N. R. Wanderhof	42 00	√		
	9	A. Fleischer	43 00	√		
	9	A. P. Cohen	203 32	√	153 32	√
	13	L. Koniski	139	—√		

	13	L. Koniski	130 —√		
	14	W. E. Fuchs	555 35√	5 —√	
	15	G. F. Heldorfer	230 —√		
	17	M. Teller	375 —√		
	19	M. J. Campbell	400 —√		
	22	J. J. Mourninger	277 25√		
	23	J. Nisselson	40 —√		
	23	C. F. Dwyer	82 10√		
	25	I. K. Sellman	110 —√	25 —√	
	29	A. Patterson	45 —√		
	30	A. Olson	262 √		
	31	A. E. Jones	227 50√	121 90√	
Apr	1	C. F. Johnson	551 00√		
	3	J. Wemgarter	40 —√		
	5	A. Patterson (Disinterment)	50 —√		
	6	Jas. Genere	50 —√		
	7	S. D. Kennedy (in pencil) $70.√			
		A. Patterson	45 —√		

	11	T. Bauman	40 —√	
	11	A. D. Kearney	1097 90√	
	17	Chas J. Obendorfer	240 —√	
	22	G. J. Stillwell	371 —√	
	26	S. Newman	40 —√	
	27	M. J. Ericson	118 00√	
	30	S. Grossman	110 00√	
May	1	J. Ressler	400 —√	
	3	O. L. Emmie	297 75√	
	5	M. J. Dommerque	500 —√	
	21	J. Withers	304 09√	304 09√
June	2	M. E. Campbell	595 66√	
	6	E. J. Dall	111 70√	61 70√
	12	J. A. Jensen	307 00√	
	14	M. E. Gulick	524 26√	
	14	J. Clade	342 00√	342 00√
	20	J. S. Miller	230 38√	
	21	J. J. Haley	335 00√	
	29	Jacob Obendorfer	250 —√	

July	1 J. F. Brown	638 50✓			
	8 E. Schwitzler	470 60✓		(in pencil, with circle)	270 60
	11 John N. Turner	407 55✓			277 55✓
	15 N. Szucs	172 55✓			20 —✓
	18 L. A. Grant	483 00✓			483 00✓
	22 J. P. Lowe	294 29✓			294 29✓
Aug	2 H. Saymon	768 40✓			768 40✓
	2 J. A. Cilli	426 00✓			426 00✓
	8 A. Bjornberg	12 00✓			12 00✓
		17338 31	1439 45	4375 43	5509 99
				(in pencil)	270 60
				(in pencil)	5780 59

RECAPITULATION

	8-13-31— 10-1-31	10-1-31— 12-31-31	1-1-32— 8-9-32	8-13-31 8-9-32 Total
Cash Receipts	$717 —	$5820 75	$16284 00	22821 75✓
			5780 59	
Accounts Receivable (x)	1439 45	4375 43	5509 99	5509 99
Gross Business	2156 45	10196 18	21893 99?	$28331 74
	(In pencil:)		22064 59	28602 34

(x) as of the end of each period.

(On back:)
Figures of Business
Aug 13, 1931 — Sept 30/31
Oct 1/31 — Dec 31/31
Jan 1/32 — Aug 9/32
Aug 13/31 — Aug 9/32

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the Matter of the Estate of Beatrice E. Westhall, deceased.

On Appeal from Decree of the New Jersey Prerogative Court.

BRIEF FOR THE APPELLANT, OSBORNE W. HAVENS.

I.

PREFATORY STATEMENT.

This matter comes before this Court on appeal from a final decree entered in the Prerogative Court October 18, 1938 (Case, 127).

Beatrice E. Westhall, the widow of Edmund J. Westhall (commonly known as and hereafter referred to as E. J. Westhall), died intestate, a resident of Lakewood, N. J., August 13, 1931 (Case, 8). Osborne W. Havens, her son-in-law, was appointed administrator of her estate by the Surrogate of Ocean County, August 25, 1931 (Case, 11). The ad-

ministrator filed his account in the Orphans' Court September 21, 1934 (Case, 39); exceptions were filed thereto October 13, 1934 (Case, 67); and supplemental exceptions were filed December 14, 1934 (Case, 75).

Numerous hearings on the exceptions were had before the Orphans' Court of Ocean County and, by a final decree of that court filed November 25, 1936 (Case, 88), the administrator, Havens, was surcharged with $12,800.00, plus interest thereon at 6% per annum from October 1, 1931; commissions were allowed the administrator on the income collected by him, but commissions were disallowed on the corpus of the Estate.

The exceptants in the Orphans' Court appealed to the Prerogative Court (Case, 90, 94), and the Administrator, Havens, filed a cross-appeal to the Prerogative Court (Case, 93, 107).

The decree entered in the Prerogative Court (Case, 127) modified the decree of the Orphans' Court to the extent that the surcharge of $12,800.00, plus interest, imposed by the decree of the Orphans' Court, was reduced to $6,400.00, plus interest at 6% per annum from October 1, 1931 (Case, 129); the administrator was allowed a commission of 2% on the corpus of the Estate (Case, 130); and the proctor for the exceptant was allowed a counsel fee of $1,000.00, together with the taxed costs, one-half thereof to be paid by the administrator, Havens, personally (Case, 131).

Exceptions to the account of the administrator were originally filed in the Orphans' Court (Case, 67) by Lakewood Trust Company, in charge of the

Commissioner of Banking and Insurance, as guardian of the person and property of the three minor grandchildren of the decedent, viz: James Edmund Westhall, Beatrice E. Westhall, and Edmund J. Westhall (Case, 9), and also by Jane Westhall, mother of the minor, James Edmund Westhall, and by Elizabeth Westhall, mother of the minors, Beatrice E. Westhall and Edmund J. Westhall, Jane Westhall and Elizabeth Westhall both being daughters-in-law of the decedent, Beatrice E. Westhall (Case, 67, 68). However, by the final decree of the Prerogative Court (Case, 130), that Court found that Jane Westhall and Elizabeth Westhall, the daughters-in-law, had no personal interest in the matter; were not proper parties to join in the proceedings; and their appeal was accordingly dismissed.

A chronological statement of the important events occurring in the present controversy is as follows:

CHRONOLOGICAL STATEMENT.

9-8-1928 E. J. Westhall died (282,377).

8-13-1931 Date of death of Beatrice E. Westhall (8).

8-17-1931 Date of Mrs. Westhall's funeral (611).

8-24-1931 Petition filed by Havens for Letters of Administration (8).

8-25-1931 Letters of Administration issued to Havens (11).

9-29-1931 Date of family conference in office of Attorney McCloskey, regarding disposition of E. J. Westhall undertaking business and disposition of other assets of Estate (451, 708).

10-5-1931 Inventory and appraisal dated and sworn to (37-39).
9-21-1934 Inventory and appraisal filed (12).
9-21-1934 Petition and account filed (39).
10-13-1934 Exceptions filed (67).
12-14-1934 Supplemental exceptions filed (75).
3-26-1936 Conclusions filed in Orphans' Court (77).
10-20-1936 Conclusions (Part II) filed in Orphans' Court (86).
11-25-1936 Decree filed in Orphans' Court (88).
12-23-1936 Notice of appeal to Prerogative Court filed by Lakewood Trust Company, Guardian, et al. (90).
1-3-1937 Petition of appeal to Prerogative Court filed by Lakewood Trust Company, Guardian, et al. (94).
2-20-1937 Notice of appeal to Prerogative Court filed by Havens, administrator (93).
2-24-1937 Answer by Havens, administrator, to petition of appeal in Prerogative Court filed (104).
3-10-1937 Petition of appeal by Havens, administrator, to Prerogative Court filed (107).
3-18-1937 Answer by Lakewood Trust Company, Guardian, et al. to Havens' Petition of Appeal in Prerogative Court filed (111).
7-13-1938 Opinion of Prerogative Court filed (113).
10-7-1938 Addendum to opinion of Prerogative Court filed (125).
10-18-1938 Final decree filed in Prerogative Court (127).
11-3-1938 Notice of appeal by Havens, administrator, to Court of Errors and Appeals filed (1).
11-4-1938 Petition of appeal by Havens, administrator, to Court of Errors and Appeals filed (3).

The administrator, Osborne W. Havens, being aggrieved by the decree of the Prerogative Court, appeals to this Court. No appeal from the decree of the Prerogative Court has been taken by Lakewood Trust Company, guardian of the person and property of the three minors aforesaid, nor by Jane Westhall or Elizabeth Westhall, mothers respectively of the three minor grandchildren, and daughters-in-law of the decedent, Beatrice E. Westhall.

The surcharge against the administrator, Osborne W. Havens, of $6,400.00, together with interest thereon at 6% per annum from October 1, 1931, made by decree of the Prerogative Court (Case, 129) was based upon the proposition that the E. J. Westhall undertaking business, sold by the administrator, Havens, possessed good will to the value of $12,800.00; that the administrator, not having collected anything for the value of the alleged good will, was chargeable with one-half of the value thereof; and the surcharge of $6,400.00, plus interest from the date of the sale on October 1, 1931, was made accordingly. The only points involved in this appeal are (1) the propriety of the surcharge of $6,400.00, together with interest, against the administrator, Havens, as representing one-half of the value of the alleged good will of the E. J. Westhall undertaking business; and (2) the propriety of assessing against the administrator, personally, one-half of the counsel fee of $1,000.00, and costs. If the surcharge of $6,400.00, plus interest, was properly made, we concede the imposition of a counsel fee against Havens was proper. On the other hand, if the surcharge of $6,400.00, plus interest, against Havens was improper, then of course

he ought not to be assessed with a counsel fee in favor of the unsuccessful litigant.

The printed record in this case consists of three Volumes. In the portions of this Brief following, reference will be made to particular pages in the State of the Case by figures enclosed in parentheses, without specific use of the words "Case" or "page."

Throughout the printed record, more or less frequent reference will be found to an agreement entered into under date of October 1, 1931, between the administrator, Havens, and the heirs and next of kin of Beatrice E. Westhall, deceased, the agreement being frequently referred to as Exhibit E-1. In Volume III of the State of the Case (pp. 777-792) the agreement of October 1 will be found marked as Exhibit C-1, rather than E-1. For some unexplained reason, by inadvertence we presume, the Court Stenographer actually marked the agreement Exhibit C-1, and the printer was correct in so showing it in the State of the Case. However, the Exhibit shown as C-1, at page 777 of Volume III of the State of the Case, is the same Exhibit constantly referred to throughout the record as Exhibit E-1.

II.

THE PROOFS.

1. History of the operation of the E. J. Westhall undertaking business.

The E. J. Westhall undertaking business was said to have been established in Lakewood in the year

1868. It was owned by E. J. Westhall and nominally operated by him until his death on September 8, 1928 (282, 377), and thereafter by his widow, Beatrice E. Westhall, until her death on August 13, 1931 (8).

Actually, however, Osborne W. Havens, son-in-law of E. J. Westhall and Beatrice E. Westhall, his wife, had been brought in to manage the business January 21, 1927, and has conducted the business from that date until the present time (741). In the latter years of his life, the condition and habits of E. J. Westhall were such that he could not manage himself, let alone manage and operate the undertaking business; he was frequently intoxicated; and brought the reputation of the business to a low state (737). The equipment of the business was old, obsolete and out of date (737), and the caskets on hand were of very poor quality, some of them being cheap pine varnished boxes of a value as low as $7.00 or $8.00 (235). And, after the death of E. J. Westhall, on September 8, 1928, his widow, Beatrice E. Westhall, never took any part in the business. In fact, after the death of E. J. Westhall she remained in her home in Lakewood for only about two weeks, and spent the rest of her lifetime in Washington, D. C., Montclair, Spring Lake and other places, until her death on August 13, 1931. Nor had she ever participated in the management and operation of the business with her husband, E. J. Westhall (741-742).

When Havens was first employed in the business, on January 21, 1927, he was paid by E. J. Westhall a salary of $50.00 per week; thereafter his salary was raised to $60.00 per week; and, after the death of E. J. Westhall, on September 8, 1928, the widow,

Beatrice E. Westhall, paid him a salary of $75.00 per week, plus 10% of the net profits, for his services in operating the business (733).

2. Earnings of the E. J. Westhall undertaking business.

At the request of proctor for the exceptants, the administrator, Havens, produced at the hearings in the Orphans' Court, and the exceptants offered and had admitted in evidence, copies of the income tax returns made by E. J. Westhall, by Beatrice E. Westhall, and by Osborne W. Havens, showing the gross income, deductions, and resulting net income derived from the operation of the E. J. Westhall undertaking business, for the period extending from January 1, 1928, to the end of the calendar year 1935 (724-728). Each of these copies of the income tax returns were marked as exhibits as follows, viz:

Exhibit E-51—Period from January 1 to September 8, 1928 (724).
Exhibit E-52—Period from September 8 to December 31, 1928 (725).
Exhibit E-53—Calendar year 1929 (726).
Exhibit E-54—Calendar year 1930 (726).
Exhibit E-55—Period from January 1 to August 13, 1931 (726).
Exhibit E-56—Calendar year 1932 (726-727).
Exhibit E-57—Calendar year 1933 (727).
Exhibit E-58—Calendar year 1934 (727).
Exhibit E-59—Calendar year 1935 (728).

It likewise appeared from the proofs (724-728) that the income tax returns were made on an accrual basis up to August 13, 1931 and, after that, upon a cash basis.

A tabulation of the gross income, expenses, and resulting net income of this E. J. Westhall undertaking business, from January 1, 1928 to the end of the year 1935, is as follows:

TABULATION.

Period	Cash or Accrual Basis	Gross Income	Expenses	Net Income
1/1/28 to 9/8/28	Accrued	$17,202.82	$11,476.03	$5,726.79
9/8/28 to 12/31/28	Accrued	7,544.88	4,816.96	2,727.92
Year 1928	Accrued	24,747.70	16,292.99	8,444.71
Year 1929	Accrued	23,614.63	17,231.26	6,383.37
Year 1930	Accrued	28,558.64	18,776.59	9,782.05
1/1/31 to 8/13/31	Accrued	17,948.43	18,593.71	Loss, 645.28
Year 1932	Cash	22,670.65	16,214.15	6,456.50
Year 1933	Cash	21,216.21	14,793.98	6,422.23
Year 1934	Cash	17,647.21	10,695.97	6,951.24
Year 1935	Cash	17,490.51	11,828.28	5,662.23

In reading the foregoing tabulation, the following points should be borne in mind:

(a) The Proofs do not show the net earnings for the period from August 13 to December 31, 1931.

(b) The income shown is on an accrual basis from 1928 to August 13, 1931, and on a cash basis from 1932 to 1935, both inclusive.

(c) The expenses of the business for the years 1932, 1933, 1934 and 1935 do not have included therein any salary or compensation whatsoever to Osborne W. Havens, who then owned and was operating the business (733). Accordingly, in arriving at the earning power of the business itself for the years mentioned, there should be deducted from the net income shown the value of the services rendered by Osborne W. Havens, bearing in mind that during the lifetime of Mrs. Westhall, and until August 13, 1931, he was paid by her compensation at the rate of $75.00 per week ($3,900.00 per annum), plus 10% of the net profits.

3. Death of Beatrice E. Westhall; assets of her estate; and administration of her estate, etc.

Beatrice E. Westhall, the widow of E. J. Westhall, died August 13, 1931 (8), intestate, leaving her surviving as her only heirs at law and next of kin, the following persons:

JESSIE M. HAVENS, daughter.

VIRGINIA W. HOOPER, daughter.

JAMES EDMUND WESTHALL, a grandson, being the child of James E. Westhall, Jr., a deceased son of Beatrice E. Westhall.

BEATRICE E. WESTHALL, a granddaughter, and

EDMUND J. WESTHALL, a grandson, being children of Leon E. Westhall, a deceased son of Beatrice E. Westhall.

(9)

These grandchildren were all minors, James Edmund Westhall being four years of age; Beatrice E. Westhall, eleven years of age, and Edmund J. Westhall, six years of age (9).

Lakewood Trust Company, respondent in the present appeal, had been appointed guardian of the person and property of each of these three minor children by the Surrogate of Ocean County on May 10, 1928. (Exhibits R-1, R-2 and R-3, pp. 771-776.)

Letters of administration upon the Beatrice E. Westhall Estate were issued to Osborne W. Havens, the appellant, by the Surrogate of Ocean County, August 25, 1931 (11). He was the son-in-law of the decedent, Beatrice E. Westhall, and husband of her daughter, Jessie Havens.

Amory J. Parmentier and Arthur R. Smock were appointed appraisers (12), and the inventory and appraisement disclosed a personal estate aggregating in value $92,726.65 (37).

In addition to the personal estate, decedent left several parcels of real estate not, of course, included in the inventory and appraisal, but described in Exhibit C-1 (779-782), one of which consisted of a store and apartment building in Lakewood, N. J. (786).

4. Family conferences and discussions regarding disposition of the undertaking business and other assets of the estate.

Havens had been operating the undertaking business for E. J. Westhall and his widow, Beatrice E. Westhall, from January 21, 1927 (741), but, after the death of Mrs. Westhall, intestate, on August 13, 1931, he of course had no authority, as administrator, to continue the business. The day following Mrs. Westhall's funeral, on August 17, 1931 (611), there appears to have been a meeting at the Westhall home in Lakewood, attended by the administrator, Havens; his wife, Jessie Havens; Virginia Hooper; Jane Westhall, and Elizabeth Westhall, the latter two being the mothers, respectively, of the minor grandchildren. At that time, Havens said something would have to be done about the undertaking business; that it could not go on as it was, and that a buyer would have to be found, or other arrangements made (614, 646).

Thereafter, a general family conference was held at the office of Mr. McCloskey, attorney for the Estate, at his office in Lakewood, on the evening of September 29, 1931 (614, 647). Present at the conference were Mr. McCloskey, the attorney; Miss Pendle, his secretary; Osborne W. Havens, the administrator; Amory J. Parmentier and Arthur R. Smock, the appraisers; Charles McCue and Charles Parmentier, president and secretary-treasurer, respectively, of the Lakewood Trust Company, guardian of the three minor grandchildren; Virginia

Hooper; Jessie Havens and Jane Westhall and Elizabeth Westhall, the latter two being mothers, respectively, of the three minor grandchildren interested in the Estate. (532, 533, 138, 160, 378, 460, 615, 648, 685, 688.)

The parties gathered at about 8:00 o'clock in the evening and the conference lasted until midnight or after. (380, 470, 534, 709, 711, 688, 690, 628.)

Several matters were discussed at this family conference, including (a) the apartment building containing the stores and apartments owned by the Estate, collection of rentals, etc. (454); (b) disposition to be made of the undertaking business (456); (c) division of the household furniture (476); (d) securities in the Estate and the advisability of holding or selling the same (515); (e) division of jewelry, rather than sale of the same. (See also Case, 615, 616, 618, 622.)

Although the inventory and appraisement was sworn to October 5, 1931 (37), and not filed until September 21, 1934 (12), yet the inventory and appraisement had, in fact, been made up by the appraisers prior to the meeting on September 29, 1931, in McCloskey's office; several copies were available at that time; and copies of the inventory and appraisal were at that time passed around among the people present at that family conference. (146, 161, 380, 496, 497, 539, 621, 622, 632, 633, 650, 689, 696.)

At this family conference, the matter of the sale of the undertaking business, and the question as to whether or not there was any good will attached to the undertaking business, was also considered, dis-

cussed and a conclusion arrived at. Some of those present thought there was good will attached to the business. However, Havens, the administrator, offered to buy the undertaking business and pay the inventoried and appraised price therefor, namely, $3,842.00, but insisted that he would not buy it, if there was to be a value annexed for good will, in addition to the inventoried price of the physical assets and equipment. (193, 194, 470, 535, 536, 710, 614, 618, 620, 630, 646, 651, 673.)

In the words of Elizabeth Westhall, one of the exceptants:

> "Osborne said he would like to have the business but that he would not pay for the good will, and Virginia and Jane said they thought he should and I remember Virginia said the business was established in 1868 * * *."
>
> (646)

And, in the words of Mrs. Jane Westhall, another of the exceptants, referring to the statement made by Osborne W. Havens:

> "And he also said when he made that offer that he would not pay for the good will of the business."
>
> (618)

Finally, after a long and thorough discussion of the matter, and in view of the contention of some of those present that the business did have a good will, in the words of Attorney McCloskey, Mr. Havens made the following proposition to the people assembled at the conference, viz:

"That was late after a thorough discussion of the matter and Mr. Havens got out pencil and paper and figured for a few minutes and then he stated he would take over the business as of the date of Mrs. Westhall's death at the inventoried and appraised value as set forth in the inventory which he had that night, and while he considered that there was no good will for the business that since they were dissatisfied and felt that the business should have a good will he would take care and manage the real estate including the apartment building for a period of one year with a privilege of an additional year without any charge, and that he would lease the property used in the undertaking business for a stated rental which I think was $900.00 a year, * * *."

(536)

Thereupon, according to the testimony of Mr. McCloskey, that proposition was discussed by the people at the conference and they all agreed that Havens' offer to take care of the apartment buildings and stores and to provide janitor service, as well as to pay the appraised value of the equipment used in the undertaking business, should be accepted (536-537).

5. Use of the inventory and appraisal at the family conference on September 29, 1931.

In the opinion filed in the Prerogative Court (113), the Vice-Ordinary apparently labored under the im-

pression that the undertaking business had not been appraised at the time of the family conference in McCloskey's office (l. 30, p. 116) and apparently based his conclusions, at least in part, upon that erroneous assumption, having stated in the opinion that the Lakewood Trust Company, guardian, signed the agreement hereafter referred to without a full knowledge of the facts (l. 24, p. 121); that the guardian acted without a full disclosure of the facts (l. 23, p. 121) and that:

> "and if the inventory had then been made and the value of the business fixed, the representative of the guardian might not have so readily acted. The facts thus concealed were material and might well have been controlling upon the action of the guardian."
>
> (l. 36, p. 121 to l. 5, p. 122)

As a matter of fact, the inventory had been made up prior to the family conference on September 29, 1931; several copies thereof were available at the conference and the copies of the inventory and appraisement were passed around among those present. (See Case, 146, 380, 496, 497, 539, 161, 689, 696, 621, 622, 632, 633, 650.)

Attorney McCloskey testified that the figures incorporated in the inventory and appraisal were brought into his office and by his office transcribed during the days of the 28th and 29th of September, 1931; that several copies were made and that there were at least three or four copies on hand at the family conference (497).

Amory J. Parmentier, one of the appraisers, testi-

fied that the inventory and appraisement was present at the night of the conference (161).

Smock, the other appraiser, testified that the inventory and appraisement of the Estate, prepared by him and Mr. Parmentier, was submitted and discussed in detail at the family conference (688-689) and he identified a copy of the inventory produced by exceptants' counsel as the inventory that had been used at the family conference the night mentioned (689).

Mrs. Jane Westhall, one of the exceptants, likewise testified that the inventory was handed about at the conference (621, 622); that two copies of the inventory were passed around among the people present and that there was another copy down at the end of the table (632) and that the appraised values were in the inventory at that time (633).

Elizabeth Westhall, another of the exceptants, likewise testified that there were two or three copies of the inventory present at the family conference in the office of Attorney McCloskey (650).

The inventory and appraisal, together with several copies thereof, was in fact on hand and was in fact examined and used at the family conference in the office of Attorney McCloskey, at the meeting on September 29, 1931, and the physical assets and equipment, etc., of the undertaking business, together with the appraised values thereof, did form a part of that inventory. (See Case, 29 and 31-34.)

And, while the inventory and the appraised values were examined at the family conference on September 29, 1931, no criticism was made by any of the parties with respect to the inventory or the appraised

values shown therein, excepting only the discussion that took place at the conference regarding the question as to whether or not there was good will attached to the undertaking business, for which the Estate sought to realize some value (539).

6. Counsel representing the various parties to the agreement, Exhibit E-1 (or C-1) (Case, 777).

W. Durward McCloskey was the only attorney present at the family conference in his office on September 29, 1931, at which time a verbal understanding was reached concerning various problems present in the Estate, and at which it was agreed that the E. J. Westhall undertaking business should be sold to Osborne W. Havens (469). McCloskey was proctor for the administrator (449), but was not the personal attorney of the administrator, Havens (450). Nor was McCloskey attorney for the Lakewood Trust Company, guardian of the three minor Westhall grandchildren (455). The late Halsted Wainwright was trust officer of the Lakewood Trust Company and general attorney for the Lakewood Trust Company (455, 534, 590), although McCloskey testified he had done some title work, but no trust work, for the Lakewood Trust Company (456).

McCloskey had also theretofore acted in several matters as attorney for Mrs. Jane Westhall and Mrs. Elizabeth Westhall, mothers, respectively, of the three minor Westhall grandchildren (548, 609).

After the verbal agreement regarding the disposi-

tion of the undertaking business, arrived at in McCloskey's office at the conference on September 29, 1931, he dictated and had typed in his office the agreement, Exhibit E-1 (or C-1) (777), and delivered five copies of the agreement for the disposition of the undertaking business to the Lakewood Trust Company for execution (453), but was not present when they were executed by the several parties thereto (617, 618, 668).

7. The agreement and consent for the disposition of the E. J. Westhall undertaking business; its preparation; execution; consideration therefor, etc.

The agreement in question, referred to throughout the record as Exhibit E-1, but shown in the record as Exhibit C-1, will be found in Volume III of the State of the Case, pages 777-792. A reference to its terms will reveal that it is not a contract of sale, but is rather *a formal written agreement and consent, entered into by all parties in interest,* that Havens, as administrator of the Westhall Estate, should sell to himself, individually:

> " * * * the undertaking business conducted by Beatrice E. Westhall at Lakewood, New Jersey, together with the good will of said business, and together with the following merchandise, stock in trade, equipment and accessories * * *."
>
> (783)

following which quoted portion of the agreement is a detailed list and description of the various articles of merchandise and equipment of the undertaking business included in the agreement (783-785).

And, it will be noted, that the agreement and consent was made and given not only in consideration of the payment by Havens of the inventoried and appraised value of $3,842.00 (785), but also that Havens should pay an annual rental of $900.00 for the use of the dwelling house, barn and chapel used in the undertaking business (786); should supervise and manage all of the real estate of which Beatrice E. Westhall died seized, including in such undertaking his services to keep the stores and apartments rented, collect the rents, furnish janitor service *at his own expense* for the store and apartment building, to cause to be made and to supervise the necessary repairs to the store and apartment building, at the expense of the Estate (786); and to render the other services connected with the real estate as in the agreement particularly set forth (786-787), all of which, by the terms of the agreement, was to be done by Havens without further or additional compensation to himself, excepting only the consideration of the sale of the undertaking business and of the reduced rental of the premises to be occupied by him in the conduct of the undertaking business (788-789).

Following the family conference at the office of Attorney McCloskey on September 29, 1931, at which a verbal agreement respecting these matters was arrived at by the parties in interest, Attorney McCloskey dictated the agreement (which was after-

wards executed) the day following the family conference, which would be on September 30th. (453, 482, 537, 711.)

While the agreement bears date October 1, 1931 (777), McCloskey testified that it was about October 1st, 1931, or possibly the first of the following week, before the typing of the agreement, which covers fifteen pages in the printed record, was completed, whereupon he delivered five typwritten copies thereof to the Lakewood Trust Company for execution (482). His secretary, Miss Pendle, says that it was October 1st or 2nd before the typing of the agreement was completed and that it was some time after that date that Mr. McCloskey took the agreements over to the Lakewood Trust Company (711, 712). In any event, at a later date the five copies, duly executed by Lakewood Trust Company, as guardian, by Mrs. Jane Westhall and Mrs. Elizabeth Westhall, were returned to him by the bank, whereupon he had them executed by Mr. and Mrs. Havens; under date of October 14th, 1931, he mailed them to Virginia Hooper in Washington, D. C., for execution by her; he received back four executed copies from Virginia Hooper (482); and, on October 26th, 1931, he distributed the executed copies to the bank and others of the parties in interest (483).

Mrs. Jane Westhall, however, testified that she signed the agreement in question at the Lakewood Trust Company at about 9:30 A. M., on the morning following the family conference at McCloskey's office the night before (641), without having read it (618) and Mrs. Elizabeth Westhall gave substantially similar testimony with respect to the time

and place where she executed the agreement (667-668) and also said that she glanced through her first two pages, but did not read the agreement completely (669). However, a reference to the agreement (777-792) will reveal that it covers fifteen pages of the printed record. Bearing in mind that the family conference the night before lasted until midnight or after, it is difficult to believe that counsel could have prepared an agreement of such length, dictated and had it typed, with five copies and have it delivered to the Lakewood Trust Company by 9:30 o'clock the following morning, for execution, from which circumstances we infer that Mrs. Jane Westhall and Mrs. Elizabeth Westhall are mistaken in saying that they executed the agreement at 9:30 A. M., at the Lakewood Trust Company, the very next morning after the family conference in McCloskey's office the night before.

It will be noted that the agreement and consent for the disposition of the undertaking business was duly executed by Lakewood Trust Company, guardian of the three minor grandchildren, having been signed on behalf of the Trust Company, guardian, by its president, Charles McCue, and its treasurer, A. J. Parmentier (791); by Elizabeth C. Westhall, mother of the two minor grandchildren, Beatrice E. Westhall and Edmund J. Westhall; by Jane W. Westhall, mother of the minor grandchild, James Edmund Westhall; by Jessie M. Havens; by Virginia W. Hooper and by Osborne W. Havens, both individually and as administrator of the Estate (792), the parties who signed the agreement constituting all of the heirs at law and

next of kin of Beatrice E. Westhall, deceased, and, in addition, while the Westhall grandchildren were legally represented by their guardian, the Lakewood Trust Company, nevertheless, to avoid any misunderstandings or difficulty, the agreement was also signed by Jane W. Westhall and Elizabeth C. Westhall, mothers, respectively, of the three minor grandchildren.

8. Other prospective or possible purchasers of the Westhall undertaking business.

In the opinion of the Prerogative Court, some reference is made to the failure of the Administrator Havens to disclose to the members of the Westhall family the fact that a former employee of the business was a possible purchaser. (l. 35, p. 121.) No doubt the reference was to Harry E. Brown, who testified that after the death of E. J. Westhall, on September 8, 1928, he mentioned to Mr. Havens that if the business should be sold, he thought he should be given preference, in view of his years of service (238). However, as the record shows, the business was not sold after the death of E. J. Westhall, but was continued by his widow until her death, on August 13, 1931, under the management of Mr. Havens. Brown further testified, however, that after Mrs. Westhall's death, on August 13, 1931, he said nothing further to anyone about desiring to purchase the business (238). He likewise testified that he had worked for E. J. Westhall for thirty years (233-234); that he received a salary of $35.00

per week (234); that in his opinion there was no good will attached to the business at the death of Mrs. Westhall (737-738); and further, that he would not have offered for the business as much as Mr. Havens paid (739).

9. Regarding alleged good will of the E. J. Westhall undertaking business.

While a good will is not mentioned or appraised as an asset in the inventory filed, nevertheless, it was included in the agreement signed by all of the parties consenting to the sale of the business to the administrator Havens, the agreement, in part, reading:

> "* * * should sell to Osborne W. Havens, individually, the undertaking business conducted by Beatrice E. Westhall at Lakewood, New Jersey, together with the good will of said business, and together with the following merchandise, stock in trade, equipment and accessories:"
>
> (783)

Attorney McCloskey testified that the good will was included in the Agreement prepared by him because of the discussion that had taken place the night before in his office, at the family conference, at which time good will was fully discussed, and it was agreed to sell the business, including good will, to Havens in consideration not only of the appraised price in the inventory, but also in consideration of the other

services to be rendered gratis to the estate by him (472).

Havens had operated the undertaking business for the Westhalls continuously since January 21, 1927 (741), and maintained that there was no good will attached to the undertaking business, for which the estate could realize anything of value (470).

The question of the existence or non-existence of a good will attached to the undertaking business, and its value, if any, were thoroughly discussed by all of the parties at the family conference in attorney McCloskey's office on September 29, 1931, before the preparation and execution of a formal written agreement and consent for the disposition of the business to Havens. Such was the testimony not only of the appellant, Havens, and of Mr. McCloskey, but of the opposing parties as well. (193, 194, 470, 534, 535, 618, 620, 630, 651, 673.)

And, at the Westhall home, on September 18, 1931, some eleven days before the family conference above mentioned, Havens at that time told the members of the family that the business had no good will and that he would not buy the business, if good will had to be paid for. (614, 646, 673.)

Havens repeatedly stated, prior to the execution of the formal agreement and consent, that the business, in his opinion, had no good will and that he would not buy the business if he had to pay for a good will. (535, 614, 618, 646, 673.)

Havens said, among other things:

> "* * * he could move to a better location and open a business and he would not have to take

this obsolete inventory that belonged to the Beatrice Westhall estate."

(470)

And, at the family conference:

"Mr. Havens claimed that the business did not have any good will. It was a personal service business and that any good will that existed at that time already belonged to him since he was the man in charge and had directed the work, and therefore any good will value was not part of the estate of Beatrice E. Westhall."

(535)

It also appeared by the proofs that the condition and habits of E. J. Westhall, during the latter years of his life (he died 9-8-28) were such as to make him of no value to the business, and in fact, he brought the business to a low value. (Brown, 737.) And his widow, Mrs. Beatrice E. Westhall, never participated in the conduct of the business and, after the death of her husband, on September 8, 1928, spent only about two weeks of the remainder of her life in Lakewood, but spent her time with relatives in Washington, D. C., Montclair, Spring Lake, New Jersey, and other places, until her death on August 13, 1931 (741).

The income produced by the business from January 1, 1928 to the end of the year 1935, as shown by the tabulation of income hereinbefore set forth, was earned in a period during all of which the business was operated and managed by the appellant, Havens, who had in his employ and who has con-

tinued in his employ a duly licensed embalmer, namely Harry E. Brown (233, 735), Havens himself being registered as an apprentice (308), and the business being operated under Brown's license, as a licensed embalmer (322). In referring to the tabulation of income earned, as hereinbefore set forth, one should bear in mind that while Havens was paid as compensation for his services, up to the time of Mrs. Westhall's death on August 13, 1931, a salary of $75.00 per week, plus 10% of the net profits, yet the income of the business, earned subsequent to August 13, 1931, does not have included in expenses any salary or compensation whatever to Havens personally (733), so that, to get a true picture of the earning power of the business subsequent to Mrs. Westhall's death, one should deduct from the net income shown at least the same rate of compensation for Havens' services that he had been receiving up to the time of her death.

In addition to the foregoing, five disinterested undertakers, all of whom were acquainted with E. J. Westhall and with his undertaking business at Lakewood, testified that in their opinions there was no good will attached to the E. J. Westhall undertaking business at the date of death of Beatrice E. Westhall, on August 13, 1931. These men were:

John W. Flock, of Long Branch (742, 745).
Charles Anderson, of Toms River (752, 753, 754).
Harry J. Bodine, of Asbury Park (759, 761).
Fred S. Lefferson, of Manasquan (764, 765).
Charles S. Medlar, of Brooklyn, N. Y. (766, 767).

As the reason for their opinions, these undertakers said, in substance, that the successful conduct of an

undertaking business depends primarily upon the personal service and the personal contacts of the person operating the business, particularly in a small town (767, 768, 771).

III.

LAW AND ARGUMENT.

This whole controversy revolves about the question as to whether or not there existed any good will of appreciable value attached to the Westhall Undertaking Business at the death of Beatrice E. Westhall on August 13, 1931; the fair value at that time of the good will, if any existed; and the validity of the sale of the undertaking business, including good will, made by the administrator, Havens, with the written consent of every one of the parties in interest.

We contend that in law and in fact there was no good will of appreciable value attached to the Westhall undertaking business at the date of death of his widow on August 13, 1931; that if any good will in fact be found to exist, that the sale of the undertaking business, including good will, made by the administrator with the formal written consent of all parties in interest was a valid sale; that the respondent is estopped at this time to object to the sale or to the price paid for the business; and that, in any event, the alleged good will possessed no such value as $12,800 fixed by the decree of the Court below.

We make the following points:

Point 1.

As a matter of law, any good will attached to the Westhall undertaking business ended with the death of Beatrice E. Westhall, on August 13, 1931.

Chapter 219, P. L. 1906, was enacted to regulate the practice of embalming, burial and disposal of human bodies; to license undertakers and embalmers; and to punish persons violating the provisions thereof.

Section 10 *of that Act* reads, in part, as follows:

> "No person who has not been licensed as prescribed in this act shall transact the business of undertaking or embalming, or the business of preserving or disposing of dead human bodies by any means whatever; * * *."
>
> Comp. Stat., 5703.

Mullin v. Mullin, 85 N. J. Eq. 531, dealt with the sale of an undertaking business made by the executrix of Peter M. Mullin, deceased, and with the question of whether or not there was any good will attached to such business. In passing upon this question, this Court said:

> "We think it doubtful whether in a business of that character, consisting of personal services and evidently dependent largely, if not entirely, upon the personal characteristics of the individ-

ual, there would be any good will as late even as four or five years after a man's death. * * * such good will is, at best, a wasting asset, and must become less valuable with each year."

(page 535.)

"Moreover, seven years before the agreement expired, the good will of the estate of Peter M. Mullin was ended by legislation. In 1906, an act was passed regulating the business of undertaking, and prohibiting under a penalty any unlicensed person from conducting the business. Comp. Stat., p. 5700. From that time forward, the estate could not legally carry on the business."

(page 536.)

The 1906 Act, as amended, was repealed by Chapter 381, P. L. 1931, page 1067, but, in the meantime, to take the place of the 1906 Act, there had been enacted Chapter 156, P. L. 1927, page 295 (R. S. 45:7-1 to 31), which was also an Act to regulate the business of dealing with dead human bodies, including their preparation, preservation, and disposal, and the business of funeral directing, embalming, undertaking, etc.

Section 7 of the 1927 Act provides in part:

"No person shall engage in the business of embalming, or preserving in any manner dead human bodies, unless he shall have a license as embalmer granted by the Board of Embalmers and Funeral Directors of the State of New Jersey in full force and effect and shall

otherwise have complied with the provisions of this act, and no person shall engage in the business of funeral directing or of preparing or disposing of dead human bodies by any means whatever unless he shall be the holder of a license as funeral director granted by the Board of Embalmers and Funeral Directors of the State of New Jersey in full force and effect, and shall otherwise have complied with the provisions of this act."

Section 12 *of the* 1927 *Act* (P. L. 1927, pp. 302-303) contains an exception or proviso, however, modifying the prohibition contained in Section 7 of the Act, as follows:

> "* * * and provided, further, that the board may, by rule or regulation, permit the continuance of the business of a deceased embalmer, or funeral director to whom a license shall have been issued under the provisions of this act, under the supervision of a person duly licensed by the board for the benefit of the widow or of the estate or of persons interested in the estate of decedent for such time and in such manner as the board shall determine."

The prohibition against unlicensed persons carrying on the business of embalming or funeral directing as contained in Section 10 of the 1906 Act (4 Comp. Stat., p. 5703) is substantially repeated by Section 7 of the 1927 Act (P. L. 1927, p. 299).

The prohibition of the 1927 Act against unlicensed persons carrying on such business was in force at

the death of E. J. Westhall on September 8, 1928; at the death of his widow Beatrice E. Westhall on August 13, 1931; and is still in force.

Under the decision of this Court in *Mullin v. Mullin, supra,* the Act of 1906 therein referred to, as later supplanted by the Act of 1927, effectively terminated and ended by legislation any supposed good will connected with the business of a deceased undertaker or embalmer, for the reason that, from the time of the death of such licensed embalmer or undertaker, his estate could not legally carry on such business.

However, it is claimed by respondent that the proviso in Section 12 of the 1927 Act (P. L. 1927, p. 303) operates to protect the interest of the estate of Beatrice E. Westhall in the Westhall undertaking business and the alleged good will connected therewith. Not so. The proofs in this case show that the late E. J. Westhall was a licensed embalmer and funeral director and carried on the Westhall undertaking business in Lakewood for a great many years up to the time of his death on September 8, 1928. But the proofs also show that his widow, Beatrice E. Westhall, never participated in the management or operation of the business during the lifetime of her husband and, after her husband's death on September 8, 1928, she took no part whatever in the business; that thereafter she spent only about two weeks at Lakewood, New Jersey, and spent the remainder of her life with relatives in Washington, D. C., Montclair, N. J., Spring Lake, N. J., and other places.

The proofs do not disclose that she was ever li-

censed as an embalmer or funeral director and, in fact, she never was. A careful reading of the proviso contained in Section 12 of the 1927 Act will reveal that it would suffice to permit the operation of the Westhall undertaking business after the death of E. J. Westhall for the benefit of his widow. However, the proviso in Section 12 only applied to the E. J. Westhall Estate because he was a duly licensed undertaker and embalmer. Upon his death, his estate passed to his widow, Beatrice E. Westhall. She was not a duly licensed embalmer or undertaker and, consequently, the proviso in Section 12 of the 1927 Act does not apply to the conduct of the undertaking business by her estate for the reason that a license was never issued to her, nor did she ever hold a license as embalmer or funeral director.

It is for these reasons and in reliance upon the decision of this Court in *Mullin v. Mullin,* 85 N. J. Eq. 531, that we contend that, as a matter of law, any good will attached to the Westhall undertaking business ended upon the death of Beatrice E. Westhall on August 13, 1931.

Point 2.

As a matter of fact, there was no good will attached to the Westhall undertaking business on the date of the death of Beatrice E. Westhall, on August 13, 1931.

It is a well recognized rule of law that good will does not adhere to a business or profession depen-

dent solely on the personal ability, skill, integrity, or other personal characteristics of the owner.

28 *C. J.*, pp. 732, 733.

In *Mandeville v. Harman*, 42 N. J. Eq. 185, Vice-Chancellor Van Fleet held that there could be no good will attached to the practice of a physician capable of transfer to another, for the reason that his practice is a thing purely personal, depending upon the public's confidence in his skill and ability.

Similarly, in *Kremelberg v. Thompson*, 87 N. J. Eq. 655, this Court held that there could be no good will of appreciable value attached to the business of a commission merchant dealing in tobacco, citing *Mullin v. Mullin*, 85 N. J. Eq. 531.

In the *Kremelberg* case, affirmed on the opinion delivered by Vice-Chancellor Stevens, in the Court of Chancery, the Court said:

> "The good will of the business of a successful professional man, practicing alone, if good will it may be called, dies with him. He is employed because of his personal ability and reputation."
>
> (p. 659)

The appellant Havens consistently contended that there was and could be no good will attached to the Westhall undertaking business and refused to consider the purchase of the business if good will was to be regarded as an asset of the business and to be paid for.

In the Orphans' Court, the appellant called as witnesses five independent undertakers and embalmers from surrounding communities, all of whom

testified that in their opinions there was no good will attached to the E. J. Westhall undertaking business at the time of Beatrice E. Westhall's death on August 13, 1931. These men were John W. Flock of Long Branch (742, 743); Charles Anderson of Toms River (752, 753, 754); Harry J. Bodine of Asbury Park (759, 761); Fred S. Lefferson of Manasquan (764, 765) and Charles S. Medlar of Brooklyn, N. Y. (766, 767).

As the reason for their opinions, these undertakers said in substance that the successful conduct of an undertaking business depends primarily upon the personal service and the personal contacts of the person actually operating the business, particularly so in a small town (767, 768, 771).

The reasons of these undertakers given in support of their opinion that there was no good will attached to the undertaking business after the death of Mrs. Westhall are not materially different from the reasoning of this Court in *Mullin v. Mullin,* 85 N. J. Eq. p. 531, where this Court, in passing upon the question as to whether or not there was any good will attached to the business of a deceased undertaker, said:

> "We think it doubtful whether in a business of that character, consisting of personal services and evidently dependent largely, if not entirely, upon the personal characteristics of the individual, there would be any good will as late even as four or five years after a man's death. * * * such good will is, at best, a wasting asset, and must become less valuable with each year."
>
> (p. 535)

In the case at bar, it will be recollected that the appellant Havens was brought in to manage and operate the Westhall undertaking business on January 21, 1927; that he has operated and managed it continually from that date to the present time; that the condition and habits of the late E. J. Westhall in the later years of his life were such that he had brought the business to a low ebb; that, after his death on September 8, 1928, his widow never participated in the management or operation of the business (and indeed, the proofs show that she never participated in the business at all during the lifetime of her husband); that she spent only approximately two weeks of the remainder of her life in Lakewood, but spent her time in Washington, D. C., Montclair, N. J., Spring Lake, N. J., and other places, until her death on August 13, 1931; and that, during all of this period from January of 1927, the business was in fact operated, managed and carried on by the appellant Havens, who must of necessity have become known in the small community of Lakewood as the person who was actually managing and carrying on the business and to whose credit or discredit must be attributed the quality of the services rendered to those in need of services of that character.

In the light of these facts and circumstances, it is not difficult to understand and appreciate the sincerity of the contention of the appellant Havens that there was no good will belonging to the Estate of Beatrice E. Westhall of appreciable value, and that, if there were any good will at all, it was good will that attached to him because he was the person

who had actually been in charge of the business since January, 1927, with whom the public had dealt and to whom the public looked for the services required.

In support of our contention that the business of embalming and undertaking is in fact a personal service business in the nature of a profession, to which no good will attaches, it is not without significance that the Legislature, in enacting laws dealing with and regulating embalmers and funeral directors, places this legislation in the Revised Statutes under Title 45, dealing with "Professions and Occupations" along with the statutes dealing with accountants, architects, barbers, beauty culture, chiropody, dentists, engineers and land surveyors, medicine and surgery, and the other professions to be found under Title 45 of the Revised Statutes, all of which are professions the practice of which is regulated by law and for which the State has set up boards to conduct examinations and grant licenses.

Furthermore, we are not here dealing with a large business organization or an established house employing numbers of people and with a large capital.

The proofs are that the business was carried on by the appellant Havens, both during the lifetimes of E. J. Westhall and Beatrice E. Westhall and likewise after the death of Beatrice E. Westhall, by himself as the manager and operator and with the assistance of one person, Harry E. Brown, a licensed embalmer.

For the foregoing reasons, we think it manifest that the Westhall undertaking business was a personal service business or in the nature of a pro-

fessional business, to which no good will can be said to attach or be capable of transfer upon the death of the owner.

Point 3.

Assuming the Westhall undertaking business possessed good will of appreciable value, $12,800 was an excessive and unreasonable sum at which to value it.

The decree of the Orphans' Court fixes at $12,800 the value of the good will of the Westhall undertaking business (l. 23, p. 89) and in the opinion filed in the Prerogative Court, that Court approved the method adopted by the Orphans' Court in arriving at the value of the good will. (l. 30, p. 120.)

Referring back to the conclusions filed in the Orphans' Court (pp. 86, 87), that court found that the average annual net income of the business during the life of the decedent, Beatrice E. Westhall, after deducting interest on capital and bad accounts chargeable to those years, approximated $6,400 per year; that because of the "personal service" element existing in that type of business, two years should be used as the multiplying factor in arriving at the value of good will, citing in support of the method of arriving at good will the cases of *In Re Hall,* 94 N. J. Eq. 398, and *In Re Deutz,* 105 N. J. Eq. 671.

Even assuming for the purpose of the argument under this point that the Court was justified in

finding that good will existed and that the proper method of determining the value of good will was to multiply by two the average net earnings of the business during the lifetime of Beatrice E. Westhall, but after having deducted interest on the capital, still it would appear by the proofs that the figure of $6,400 as the average net annual earnings is not a correct figure.

Referring to the tabulation of earnings and net income of the business hereinabove set forth and remembering that E. J. Westhall died September 8, 1928, the business during the period between the death of E. J. Westhall on September 8, 1928 and the death of Beatrice E. Westhall on August 13, 1931, showed net earnings, as follows:

Period Covered	*Earnings*
9-8-28 to 12-31-28	$ 2,727.92
Year 1929	6,383.37
Year 1930	9,782.05
Total	$18,893.34
1-1-31 to 8-13-31, DEDUCT Net Loss	645.28
Total Net Income, 9-8-28 to 8-13-31	$18,248.06
Average Net Monthly Income over the period covered	$ 521.37
Average Annual Income over the period covered	$ 6,256.44
DEDUCT rent of chapel, barn and house used in conduct of undertaking business	900.00
Balance	$ 5,356.44

DEDUCT interest at 6% on value of physical equipment used in business; viz., at valuation of $3,824	230.52
Resulting Average Annual Net Income of the undertaking business from 9-8-28 to 8-13-31, after deducting rental for place of business and 6% interest on value of physical equipment.....	$ 5,125.92
Average Net Annual Income of $5,125.92, as aforesaid, multiplied by 2, equals	$10,251.84

The proofs reveal that the Westhall undertaking business was conducted in a property on Second Street in Lakewood owned by the decedent, E. J. Westhall, which property was improved by an old dwelling-house, a barn and a chapel. Such a business must have some place from which to operate—it cannot be conducted from a street corner. There are no proofs in the record to show the value of that property, but the appellant Havens leased the same property from the heirs of Beatrice E. Westhall at an annual rent of $900 (Case, p. 786), so that there would seem to be no question but that the rental value of the property should be deducted as a business expense in arriving at the net income of the business.

The value of the physical equipment (personal property) used in the business is likewise fixed at the sum of $3,842.00, that being the inventoried appraised value and the sum paid by the appellant Havens to the Estate for the sale of the physical equipment to him. (Case, p. 785.)

Accordingly, it will appear that even using the method adopted by the Court below, the sum of money arrived at as the value of the good will should be $10,251.84, and not $12,800.00.

In the opinion filed in the Prerogative Court, that Court held that the net income of the business after its purchase by the appellant Havens, for the period from October 1, 1931, to August 9, 1932, amounted to $11,777.26, a sum equal to nearly three times the purchase price (p. 117).

While the figures cited by the Court are approximately correct on their face, yet they are eminently unfair to use as a guide or measure of the earning power of this business. The proofs showed that the receipts from October 1, 1931, to December 31, 1931, amounted to $5,820.75 (p. 187); that the disbursements during the same period amounted to $1521.74 (p. 188); and the net profit was $4,299.01. That, during the period from January 1, 1932 to August 9, 1932, the receipts amounted to $16,284.10 and the disbursements for the same period to $8,905.85, leaving a net profit for the period last named of $7,378.25 (pp. 188-189).

A recapitulation of these figures would show:

Net Profit for the period, 10-1-31 to 12-31-31	$ 4,299.01
Net Profit for the period, 1-1-32 to 8-9-32	$ 7,378.25
Total Net Profit, 10-1-31 to 8-9-32.....	$11,677.26

That the foregoing figures are utterly misleading as indicating the earning power of this undertaking business will be revealed by noting the following facts and considerations, viz.:

(A) After the death of Mrs. Westhall on August 13, 1931, the books were kept on a cash basis, instead of upon an accrual basis, and the net profits shown for the period from October 1, 1931, to August 9, 1932, took no notice of bills that had accrued and were not paid.

(B) The total net profits for the year 1931, shown by the same records upon which the Prerogative Court relied, showed net loss of $645.28 for the period from January 1, 1931, to August 13, 1931; a net gain, on a cash basis, of $4,299.01 for the period from October 1, 1931, to December 31, 1931, or a net profit for the year 1931, of $3,653.73.

(C) The net profit for the calendar year 1932, as shown by the tabulation hereinbefore set forth, was $6,456.50.

(D) The proofs are that, in the net profits shown for the period subsequent to Mrs. Westhall's death on August 13, 1931, there was not included in expenses deducted the value of the services rendered by the appellant Havens. Up until her death on August 13, 1931, he was paid a salary of $75.00 per week, plus 10% of the net earnings, and the value of such services should likewise be deducted from the net earnings subsequent to August 13, 1931, to fairly arrive at the true earning power of the business.

Taking net earnings of $6,456.50 for the year 1932, as shown by the tabulation hereinbefore set

forth, and deducting therefrom a salary for the appellant Havens of $75.00 per week, or $3900 per year, would leave a resulting net income of $2,556.50, and, further deducting 10%, or $255.65, of the net profits last above named, would give a resulting net profit of $2300.85 for the business itself in the year 1932, after allowing Havens for his services at exactly the same rate paid to him by Mrs. Westhall prior to her death.

A similar computation for the year 1933, in which the tabulation above mentioned shows net income of $6,422.23, will result in the business showing net income, after deducting the value of Havens' services, of only $2,270.01 for the year 1933.

A similar computation for the year 1934 will show a resulting net income of $2,746.12.

A similar computation for the year 1935 will show a resulting net income of only $1,586.01.

Or, to summarize, the net income earned by this business for the years 1932, 1933, 1934 and 1935, after deducting compensation for Havens at the same rate paid to him by Mrs. Westhall before her death, will show an average net annual income for those four years of $2,230.75, without making any allowance for interest on invested capital or for the responsibilities assumed by the management of any business undertaking.

Hence, we contend that not only are the figures of $11,777.26, cited in the opinion of the Prerogative Court as the net earnings of the business for the period from October 1, 1931, to August 9, 1932 (p. 117), entirely misleading, although approximately accurate upon their face, but also that a valuation

of $12,800 as the fair value of the good will of the Westhall undertaking business is entirely excessive and unreasonable.

Point 4.

Sale of the Westhall undertaking business to appellant Havens was made with the formal written consent of all parties in interest; at a fair price; with a full knowledge of the facts; and after due deliberation and discussion.

Upon the death of Beatrice E. Westhall, on August 13, 1931, the appellant, Havens, as administrator of her estate, had no authority to continue the operation of the undertaking business for the estate and, had he done so, he would have become personally liable for any losses that might have occurred.

1 Kocher's Probate Law, p. 372;
Kick v. McCauley, 118 N. J. Eq., p. 252.

Furthermore, because of the special nature of this business, the Beatrice E. Westhall Estate was prohibited by law from continuing the operation of the business.

Section 7, Chapter 156, P. L. 1927;
Mullin v. Mullin, 85 N. J. Eq., p. 531.

At that time, the world-wide business depression and the disruption of the ordinary economic processes, of which our Courts have taken judicial notice in more than one case, made it extremely hazardous to attempt to continue a business enter-

prise, and extremely difficult to obtain a fair price for any species of property. The only two banks in the community of Lakewood closed their doors shortly thereafter (146, 223). In view of these circumstances, it is not difficult to understand the statement made by the appellant, Havens, to the other members of the Westhall family, on August 18, 1931, the day following Mrs. Westhall's funeral, that something would have to be done about the undertaking business and that it could not go on as it was (614, 646).

In this state of affairs, a meeting of the family was held at the Westhall home on August 18, 1931 (611), attended by the administrator, Havens, his wife, Jessie Havens, Virginia Hooper, Jane Westhall and Elizabeth Westhall, the latter two being the mothers respectively of the three minor grandchildren. At that time, Havens said some disposition would have to be made of the business; that he was willing to take it over at the inventoried and appraised price; but that the business had no good will and he would not pay for good will (614, 646).

And thereafter, a general family conference was held at the office of Attorney McCloskey on the evening of September 29, 1931 (614, 647), at which all of the parties in interest were present, the three minor grandchildren being represented not only by their mothers, Jane and Elizabeth Westhall respectively, but also by their legal guardian, the Lakewood Trust Company, represented by its president, Charles McCue, and its secretary-treasurer, Charles Parmentier. (532, 533, 138, 160, 378, 460, 615, 648, 685, 688.) That meeting lasted from about 8:00

o'clock in the evening until midnight or later. (380, 470, 534, 709, 711, 688, 690, 628.)

At the conference in question, the inventory and appraisal of the assets of the Estate, including the undertaking business, had been made up and typed; the two appraisers were in attendance; and several copies of the inventory and appraisal, showing the appraised value of the assets of the undertaking business, were passed around among the parties present. (146, 161, 380, 496, 497, 539, 621, 622, 632, 633, 650, 689, 696.) The Prerogative Court was clearly in error in stating in its opinion that the undertaking business had not at that time been inventoried or appraised. (l. 30, p. 116, l. 24, p. 121; l. 36, p. 121, and l. 1, p. 122.)

At this family conference on September 29, 1931, the matter of the undertaking business and its proposed sale, and the question of whether or not there was good will attached thereto, was considered and discussed at length; the appellant, Havens, offered to pay the inventoried and appraised price of the physical assets of the undertaking business, but stated that there was no good will and he would not pay for it. (193, 194, 470, 535, 536, 710, 614, 618, 620, 630, 646, 651, 673.)

Finally, after a considerable discussion concerning the question of good will, Havens offered to pay not only the appraised price of the physical assets of the undertaking business, but offered, in addition, to assume management of the real estate, including a three-story apartment house, containing stores and apartments, without additional compensation, and to pay $900.00 per annum rental for the real estate in

which the undertaking business had theretofore been conducted. All of the parties present assented to that proposition; the family conference adjourned; and the formal written agreement and consent for the sale of the undertaking business, including the good will (Exhibit C-1, pp. 777-792), was prepared by Attorney McCloskey and executed by the parties in interest at a somewhat later date. It will be noted that the agreement specifically includes the sale of good will (783).

The consideration price named in the agreement (Exhibit C-1) was not only a cash consideration of $3,842.00 (785), that being the inventoried and appraised price of the physical assets of the business, but, in addition thereto, by the terms of the agreement, the appellant, Havens, bound himself to perform, gratis, numerous services connected with the management of the real estate left by decedent, as particularly set forth in the agreement (Exhibit C-1, pp. 786-788), included in which was an agreement on the part of Havens:

> "(c) To perform or cause to be performed the requisite and necessary janitor service for said store and apartment building, *at his own cost and expense.*"
>
> (786)

The Prerogative Court found that the administrator should be surcharged with the real value of the undertaking business, less what he actually paid (120); credited him with the cash consideration of $3,842.00 named in Exhibit C-1; but entirely overlooked giving any credit or consideration to the ap-

pellant, Havens, for the services which he bound himself to perform, gratis, with respect to the real estate, as in said agreement set forth at pages 786-788.

It should also be noted that no complaint was made as to the fairness of the appraised value of the physical assets of the undertaking business (539), nor will the record reveal any proofs tending to establish a value for the physical assets of the undertaking business different than those set forth in the inventory and appraisal.

The Prerogative Court, in its opinion, said that the agreement in question was signed by the guardian as a mere matter of form, without full knowledge of the facts, and without any consideration of the transaction by its Board of Directors, the president of the institution apparently acting upon his own individual volition, and with little regard for the interests of the infant beneficiaries (l. 22, p. 121). How the Court could properly reach that factual conclusion is beyond our understanding. Both the president and secretary-treasurer of the Lakewood Trust Company, the guardian, participated in the conference lasting at least four hours, at which the matter was fully discussed pro and con. The agreement, Exhibit C-1, was signed not by the president alone, but by both the president and secretary-treasurer of the guardian trust company (791). There is no proof that the transaction was not passed upon by the Board of Directors of the Bank. And, the statement of the Prerogative Court to the contrary notwithstanding, the president and secretary-treasurer of the guardian trust company, had before them a

complete and fully itemized inventory and appraisal of all of the physical assets of the undertaking business.

Neither can it be properly said that the guardian trust company acted without independent advice. (l. 32, p. 121.) The agreement was signed by the trust company some days subsequent to the date upon which the family conference was held, on September 29, 1931. There was full time for reflection and consideration between the date of the agreement, on September 29th, and the date of the execution of the agreement. And, the trust company had as trust officer and general counsel the late Halsted H. Wainwright, who was altogether competent to give such advice as the trust company might feel was required.

Moreover, the infants interested in the transaction were represented at the conference not only by their legal guardian, the Lakewood Trust Company, but also by their respective mothers, namely Jane Westhall and Elizabeth Westhall, both of whom, at the time, assented to the agreement reached, and both of whom subsequently signed the formal written agreement and consent (792). Thus, the interests of the infants would appear to have been fully guarded in the agreement to dispose of the undertaking business, they having been represented not only by their mothers, but also by their legal guardian, a situation strikingly similar to the circumstances present in *Caruso v. Caruso,* 106 N. J. Eq., p. 130, where this Court, in speaking of an agreement and adjudication reached respecting the interests of the infant, Gloria Caruso, said, at page 144:

> "Moreover, Gloria had not only her mother, representing her as her general guardian, at the family council, to safeguard her, Gloria's interest in the Caruso estate, but she had also, in order to fully protect her interest therein, a special guardian, and one who had no interest in the estate * * *."
>
> (144)

In its opinion, the Prerogative Court refers to a failure of the administrator to disclose to the guardian the fact that a former employee of the business was a possible purchaser. (l. 33, p. 121.) The only proof that will support the conclusion that a former employee was a possible purchaser is that Harry E. Brown, a witness for the exceptants in the Orphans' Court, testified that after the death of E. J. Westhall, on September 8, 1928, he mentioned to Havens that if the business should be sold, he thought he should be given preference, in view of his years of service (238). However, the business was not sold after the death of E. J. Westhall, but was continued by his widow, Beatrice E. Westhall, until her death in August of 1931. And Brown further testified that after Mrs. Westhall's death in August of 1931, he said nothing further to anyone about desiring to purchase the business (238); that in his opinion there was no good will attached to the business at the death of Mrs. Westhall (737-738); and that he would not have offered for the business as much as Mr. Havens paid (739).

Hence we think it may fairly be stated that not only was the business sold to the appellant, Havens,

with the formal written consent of all parties in interest, at a fair price, but also that the parties in interest had a full knowledge of the facts, and the agreement was only entered into after due deliberation and a discussion participated in by all of the parties in interest.

Point 5.

The Lakewood Trust Company, as guardian of the three Westhall children, had and possessed full authority in law to enter into and sign the agreement, Exhibit C-1 (777-792).

It is a well-established rule of law that the guardian of the person and property of an infant, without any application to, approval of, or order by the Court, has the legal power to manage, control, sell and dispose of his ward's personal estate, being held accountable for any misuse or abuse of that power.

12 R. C. L. Secs. 23, 24 and 25, pp. 1122-1124;

28 *C. J.*, Sec. 204, p. 1123, and Sec. 222, p. 1134;

108 A. L. R., p. 937;

Yerger v. Jones, et al., 16 Howard 30 (38);

Macley v. Equitable Life Assurance Society, 152 U. S., p. 499;

Fletcher Trust Co. v. Hines, 4 N. E. (2nd), p. 562 (Indiana).

28 *C. J.*, Section 204, p. 1123, states:

"A lawfully appointed general Guardian or

Guardian of the Estate has general authority over the property and affairs of his ward and is entitled to represent him in all legal and business transactions."

12 R. C. L., Section 23, p. 1122, states:

"It is inherent in the very nature of a guardianship over the Estate of a ward that the Guardian is entitled and bound to take the possession and management of all his ward's property, real and personal."

12 R. C. L., Section 25, p. 1124, states:

"The power of a Guardian over the personal estate includes the choses in action belonging to his ward."

In 108 A. L. R., p. 937, it is said:

"By the great weight of authority, a Guardian, unless restrained from doing so by statute, has the power to sell his ward's personal property without an order of Court."

In *Fletcher Trust Co. v. Hines*, 4 N. E. (2nd), p. 562 (Indiana), the Court upheld the power of a guardian to deal in and dispose of and sell the personal property of the ward, without any application to or order by the Court. The Court said:

"It is contended by the appellant that under the common law a Guardian has power to sell personal property of the ward without an order of the Court and this is conceded by the appel-

lee. This seems to be well settled by the weight of authority. 12 R. C. L. 1124, Sec. 24; 28 C. J. 1134, Sec. 222."

In *Yerger v. Jones, et al.*, 16 Howard, p. 30, the United States Supreme Court said, at page 38:

> "By the common law, and in those states where it has not been modified by statute, he (a guardian) is considered as having legal power to sell or dispose of the personal estate of his ward."

In *Macley v. Equitable Life Assurance Society*, 152 U. S., p. 499, the United States Supreme Court said:

> "A Guardian, unless his powers in this respect are restricted by statute, is authorized, by virtue of his office, and without any order of Court, to sell his ward's personal property, and reinvest the proceeds, and to collect or compromise and release debts due to the ward, subject to the liability to be called to account in the proper Court if he has acted without due regard to the ward's interest."

Legal title to the assets of the Westhall undertaking business was, of course, vested in Havens, as administrator of the estate. Lakewood Trust Company, as guardian of the infants, had a beneficial interest therein, however, along with the other next of kin of Beatrice E. Westhall, deceased. If the Lakewood Trust Company, as guardian, possessed legal power to sell and dispose of the per-

sonal property of its wards, without any order of Court, as we contend it had under the foregoing authorities, then certainly it would have full power, in its management and control of the wards' personal estate, to enter into an agreement consenting to the sale and disposition of an item of personal property (the undertaking business), as to which the wards had an undivided beneficial interest.

Point 6.

Lakewood Trust Company, as guardian of the Westhall children, had no power to rescind the agreement (Exhibit C-1) and is estopped from objecting to the sale made of the undertaking business.

After having entered into the formal written agreement and consent for the sale and disposition of the undertaking business, under date of October 1, 1931, the Lakewood Trust Company, as guardian of the Westhall children, some three years after the execution of the agreement, comes in for the first time on exceptions to the administrator's account in the Orphans' Court and, by exceptions filed October 13, 1934 (67), objects to the sale to which it had theretofore consented, and attempts to surcharge the appellant Havens, as administrator, with the supposed value of the good will of the Westhall undertaking business. And, in support of its right to make such objection and to take such exception, it says that the administrator had no right to pur-

chase, for his own account, an asset of the estate of which he was in charge as administrator.

We, of course, recognize the old and well-established rule of law that neither an executor, administrator, guardian or trustee, or person acting in a fiduciary capacity, has the right to purchase for his own account property of the estate or trust of which he is in charge, and to which he has possession in his fiduciary capacity.

Michoud, et al. v. Girod, 4 Howard, p. 503 (555); 11 L. Ed. 1076 (1099);
Arrowsmith v. Van Harlingen, 1 N. J. L., p. 29;
Flett v. South Jersey Title & Finance Co., 96 N. J. Eq., p. 244 (245);
The Pennsylvania Co., etc., v. Doughty, 98 N. J. Eq., p. 578.

Such prohibited sales if made, however, are not absolutely void, but are voidable only.

Mulford v. Minch, 11 N. J. Eq., p. 16;
Goodell v. Monroe, 87 N. J. Eq., p. 328;
Den v. McKnight, 11 N. J. Law, p. 385 (392).

And so it was held by the Prerogative Court (Case, 120).

Notwithstanding the general rule above cited, prohibiting a fiduciary from selling trust property to himself, it is equally well settled that the beneficiaries of an estate, or the *cestui que* trust of a trust estate, may, by their conduct or agreement, or by subsequent ratification of a completed transaction, estop themselves from thereafter objecting to it.

In *Mulford v. Minch*, 11 N. J. Eq., p. 16, Chancellor Williamson stated:

> "That there may be such acts of acquiescence on the part of a *cestui que* trust, standing in the relation which these defendants bear to the complainant in this transaction, as will debar him from the right of having the sale set aside, there can be no doubt."

In *Tucker v. Tucker*, 29 N. J. Eq., p. 286, an executor had made an unauthorized disposition of his testator's farm property. Ordinary Runyon, in the Prerogative Court, reversed the Orphans' Court, which had surcharged the executor with $26,000.00 (28 N. J. Eq., p. 223), and held that the transaction, when it was made, had the approval of all parties in interest, even though unauthorized; that the proofs showed that the transaction had been made by the executor with the actual and express consent of some of the parties in interest, and with such understanding between the executor and the other parties in interest as to estop them from denying the authority of the executor to make the transaction questioned by the exceptants.

In *Voorhees v. Bailey*, 59 N. J. Eq., p. 292, Vice-Chancellor Pitney upheld an indirect sale of real estate made by an administrator to himself, through the intervention of a third party, even in the face of the general rule that an administrator or other trustee has no power to buy at his own sale. The Court found that the parties in interest were fully cognizant of the facts; acquiesced in the transaction; and that their conduct amounted to a practical

confirmation of the sale. After citing the general rule prohibiting an administrator from being interested in or buying property which the law required him to sell, as administrator, the Court nevertheless said:

> "* * * it is equally important in administering those rules to bear in mind that trustees have the same right to equitable treatment at the hands of *cestuis que trustent* that the latter have against the former."
>
> (303)

In re Leupp, 108 N. J. Eq., p. 49, Vice-Chancellor Lewis stated:

> "It is well settled both upon principle and by the authorities, that no *cestui que trust* can claim that to be a breach of trust which has been done under his own sanction, whether by his previous request or consent or by his subsequent ratification. The application of this wholesome doctrine is, in effect, equivalent to an application of the maxim '*volenti non fit injuria*' which is almost of universal recognition and acceptation in the Courts of the United States as well as elsewhere."
>
> (65)

And the Vice-Chancellor also stated:

> "Mr. Justice Holmes in Pope v. Farnsworth, *supra* (at p. 344) (*Pope v. Farnsworth*, 16 N. E. Rep., p. 262), aptly said: 'There is no illegality in a *cestui que trust* authorizing an

act which otherwise would be a breach of trust towards himself.' ''

In *Ross v. Savings Investment & Trust Co.*, 120 N. J. Eq., p. 87, Vice-Chancellor Stein said:

> "It is established by all the cases, that if the *cestui que trust* joins with the trustee in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust. I go further and agree that concurrence in the act or acquiescence without original concurrence will release the trustee. Lord Eldon in Walker v. Symonds, 3 Swanst. 1; 64; 36 Eng. Rep. (1818), 751, 754."
>
> "No *cestui que trust* can claim that to be a breach of trust which has been done under her own sanction, whether by her previous request or consent, or by her subsequent ratification. The application of the doctrine is, in effect, equivalent to an application of the maxim '*Volenti non fit injuria.*' In re Leupp, 106 N. J. Eq., p. 49."

Thus it will appear to be quite well established law that the beneficiary of an estate, by expressly consenting to a transaction that might otherwise be voidable, may effectually estop himself from thereafter complaining of the very transaction to which he consented and in which he acquiesced.

Nor do we think the fact that three infants, represented by their guardian, the Lakewood Trust Company, had an interest in the estate ought to change

the rule in any respect. The rights of infants are no greater than the rights of adults.

In re Shreve, 87 N. J. Eq., p. 7 (11), (Affirmed 87 N. J. Eq. 710).

While the opinion of the Prerogative Court refers to the signing of the agreement by the guardian, Lakewood Trust Company, as a breach of trust (l. 28, p. 122), we respectfully submit that there was, in fact and in law, no breach of trust by the Lakewood Trust Company, but that it had full power and authority to enter into the agreement consenting to the sale and disposition of the undertaking business. Furthermore, if there were a breach of trust by Lakewood Trust Company, it, as guardian, is fully answerable to its infant wards for any misuse or abuse of its power.

The Court also refers to the infant beneficiaries having elected to rescind the sale in question (l. 26, p. 120), but we submit this is not an attempt by the infants to rescind, but is an attempt by the Lakewood Trust Company, as guardian, to rescind. By law, the guardian has full power to manage, control, dispose of and sell the personal property of its ward and the ward himself possesses no such power. Having no power to sell, the ward certainly would have no power to rescind a sale made by his guardian.

Again, the Court refers to the guardian having acted without independent advice (l. 32, p. 121). We know of no rule of law requiring competent independent advice to be given to a corporate guardian, to make its transactions valid. However, the proofs do show that the Lakewood Trust Company had, as its

trust officer and general attorney, the late Halsted H. Wainwright, who was entirely competent to give such advice as the officers of the trust company might require, and the proofs also show that the formal written agreement was not executed for some days after the verbal understanding reached at the conference in the office of Attorney McCloskey, on September 29, 1931.

While the Prerogative Court held that the adults, Virginia Hooper and Jessie Havens, were in fact estopped by the agreement in question (Exhibit C-1) from objecting to the sale made of the undertaking business (bottom page 125 and top page 126) yet, the Court held that the Lakewood Trust Company, as guardian, was not so estopped. In reaching the conclusion that the guardian was not estopped, the Prerogative Court appeared to rely upon the decision of the late Chancellor Walker *In re Vieweger*, 93 N. J. Eq., p. 527 (Case, 121). But, we respectfully contend that the decision of the late Chancellor Walker in the Vieweger case constitutes no authority for the decision of the Prerogative Court in this case.

In the Vieweger case, Chancellor Walker said:

> "It is to protect minors that guardians are appointed for them to conserve their Estates, and to see to it that their property is not wasted. And this, because of the real or supposed incapacity of infants' minds to make judicious contracts. See La Rosa v. Nichols, 91 N. J. L. 355, 357; Reversed, but on other ground, S. C., 92 N. J. Law 375. A contract which the law would avoid for the infants' protection, if made by him,

the Court will not allow a guardian to make for him."

In that case, Judge Thompson, of Atlantic City, had been appointed guardian of an infant. The guardian applied to the Court of Chancery for instructions, including among the instructions requested the question of whether or not to purchase, out of the infant's Estate, an automobile to enable the infant to drive from his home in Esteville to Ocean City, to attend a school at the latter place, rather than to reach the school in Ocean City by going from Mays Landing by train. And, in disposing and disapproving the application, the late Chancellor Walker made the statement quoted above. And the Chancellor also said that he could see no justification in law for the purchase of the automobile, the capital cost of which would be considerable and which would also be expensive to maintain and operate, and therefore instructed the guardian not to purchase the automobile.

An examination of the report of the Vieweger case wil reveal that the statement of law from that case, quoted by the Prerogative Court (l. 11, p. 121) is pure dictum. It is pure dictum because no contract had in fact been made, which it was necessary to rescind or avoid. The guardian was merely seeking the instructions of the Court before undertaking to purchase an automobile for the infant. Furthermore, the Chancellor cited no authority for his statement of law. Hence we say that the statement contained in the Vieweger case, relied upon by the Prerogative Court in the disposition of the case at bar, consti-

tutes no authority whatever for the rule attempted to be here applied that the guardian of an infant, of his own volition, or the Court at its own instance, may avoid and rescind the formal written contract of a guardian, disposing of the personal property of his ward, in cases where no fraud, deceit or misrepresentation is found to exist.

Furthermore, the doctrine enunciated by the Court in the Vieweger case, and relied upon by the Prerogative Court in the case at bar, would constitute a radical change and departure from the long established law, far reaching in its consequences, for these reasons, viz.:

(a) The law is now well established, both in the State of New Jersey and throughout the United States generally that a guardian has full power and authority in law, to manage, control, sell and dispose of the personal property of his ward, without any order of Court, being accountable only for a misuse or abuse of his authority.

(b) If we now adopt the rule that this power of a guardian is qualified to the extent that the guardian, of his own volition, or the Court at its own instance, even in the absence of any fraud, deceit or misrepresentation, may at any time set aside, avoid and rescind such contract or sale by a guardian, then, in effect, we are stripping the guardian of an infant of his power and authority to deal with, sell and dispose of the personal property of his ward, and are establishing a new rule of substantive law, without any enabling Act of the Legislature, which would require

a guardian to first obtain the approval of and an order from a Court of competent jurisdiction, before disposing of or attempting to dispose of any of the personal property of his infant ward.

(c) The adption of such a rule of law, by judicial decision, will make it impossible for any person hereafter to purchase personal property from the guardian of an infant, without an order of Court first obtained.

And we respectfully invite the attention of the Court to the fact that there is no proof in the case, nor was there any finding either in the Orphans' Court or the Prerogative Court, that there was any misrepresentation, deceit or fraud in the making of the agreement (Exhibit C-1). Indeed, in finding that the adults, Virginia Hooper and Jessie Havens, were estopped from objecting to the sale of the undertaking business by reason of their having entered into the formal written agreement (125-126), it necessarily follows that the Court found an absence of any misrepresentation, deceit or fraud; otherwise the principle of estoppel would not have been applied to Virginia Hooper and Jessie Havens.

Point 7.

The appellant Havens should not be charged with the payment of a counsel fee to the respondent for the proceedings in the Prerogative Court.

By its final decree (p. 131) the Prerogative Court allowed the proctor for the Lakewood Trust Com-

pany, guardian, a counsel fee of $1,000.00, together with the taxed costs of the appeal, the counsel fee and costs to be paid one-half thereof by Havens, individually, and the balance thereof to be paid out of the amount of the sur-charge recovered by the guardian.

As will be revealed by an examination of the final decree in the Prerogative Court (pp. 127-131), substantially all of the guardian's appeal to the Prerogative Court was dismissed, excepting only with reference to the sur-charge against the administrator, Havens, on account of good will.

If the sur-charge against the administrator be sustained by this Court, we have no complaint to make with respect to the counsel fee allowed. However, if the decree of the Prerogative Court, surcharging Havens with $6,400.00, plus interest, be reversed by this Court, as we contend it should, then it would follow as a matter of course that Havens ought not to have imposed upon him a counsel fee in favor of Lakewood Trust Company, guardian, which would become the unsuccessful litigant.

CONCLUSIONS.

In conclusion, we earnestly urge upon the Court the following points:

A.

Neither in fact nor in law was there any good will attached to the Westhall undertaking business at the death of Beatrice E. Westhall on August 13, 1931.

B.

However, if it be found that there was good will of appreciable value, then the valuation of $12,800.00 for good will was clearly excessive and unreasonable.

C.

The sale of the Westhall undertaking business to the administrator, Havens, was made with the formal written agreement and consent of all parties in interest at a fair price; with a full disclosure of the facts; and only after due discussion and deliberation by all parties in interest.

D.

The guardian of an infant is vested by law with full power and authority to manage, control, sell and dispose of the personal property of his ward, without any application to or order from a Court, being accountable only for a misuse or abuse of his authority.

E.

In the absence of misrepresentation, deceit or fraud, neither the guardian of an infant, nor the Court of Chancery or Prerogative Court, is at lib-

erty to void and rescind a formal written contract or agreement relating to the disposition and sale of personal property of the guardian's infant ward. Nor is the decision *In re: Vieweger,* 93 N. J. Eq. 527, authority for such proposition.

F.

Lakewood Trust Company, as guardian, by having become a party to and having formally executed the agreement and consent (Exhibit C-1, pp. 777-792) was estopped from coming into the Ocean County Orphans' Court, after the lapse of three years, and, by exceptions filed October 13, 1934 (p. 67), objecting to the sale of the undertaking business, including good will, made by the administrator, Havens, to himself individually.

G.

If this Court determine that there should be no sur-charge against the appellant, Havens, for the good will of the undertaking business, then the decree of the Prerogative Court imposing upon him counsel fees ought also to be set aside.

H.

The administrator, Havens, equally with the beneficiaries of the Beatrice E. Westhall Estate, is entitled to the consideration and protection of his

rights by this Court. He was guilty of no misrepresentation, deceit or fraud, but did the act complained of with the full knowledge, acquiescence and with the formal written consent of all parties in interest. The imposition upon him of a sur-charge of $6,400.00, together with interest at 6% from October 1, 1931, amounting to a further sur-charge of approximately 45% of the original amount, was, we urge, unjust, inequitable and illegal under the laws of this State.

For all of which reasons we respectfully submit that the decree of the Prerogative Court ought to be reversed and set aside.

EWART & BENNETT,
Proctors for the Appellant,
Osborne W. Havens.
HOWARD EWART,
Of Counsel.

New Jersey Court of Errors and Appeals

In the Matter of the Estate of Beatrice E. Westhall, *Deceased.*	On Appeal from Decree of the New Jersey Prerogative Court.

BRIEF FOR RESPONDENT.

Statement of Facts.[1]

The statement of facts set out by the appellant-administrator, Havens, has to be supplemented in many particulars in order that the court may get a true picture of the situation as it existed at the time of and before the death of Beatrice E. Westhall and up to the time the appellant filed his account in the Ocean County Orphans' Court.

Beatrice E. Westhall died August 13, 1931 (S. C., p. 8) and was buried August 17, 1931 (S. C., p. 611). At the cemetery, during the burial of Beatrice E. Westhall, the appellant asked Elizabeth and Jane Westhall to come to the Westhall house that evening (S. C., p. 612). Mr. Havens, his wife, Jessie Havens, Virginia Hooper, were at the Westhall residence on the evening of the 17th when Elizabeth and Jane Westhall arrived. Mr. Havens said:

> "* * * that Mrs. Westhall had died without having left a will and that our children would come in for their father's share of the estate. He also said something would

[1] Italics ours unless otherwise noted.

> have to be done about the business as it could not go on the way it was and we should come to the house the next morning and Mr. McCloskey would be there."

The same people met at the Westhall residence on the morning of August 18th (S. C., p. 612) and Mr. McCloskey, a counsellor-at-law, was called to the conference. He came to Havens' home. Mr. McCloskey told the people in interest that the undertaking business of E. J. Westhall could not go on the way it was and the people would have to get a buyer for it or make some other arrangements (S. C., p. 614, ll. 10-15). Mr. Havens said he would like to have the business but he would not be willing to pay for the good will at which time Mrs. Jane Westhall said:

> "* * * I thought that a business established since 1868, there was a good will to it and Virginia Hooper said that her father had always made a very good living from the business and if there was something good to it it should be paid for and if not why would he like to have it. Mr. Havens also said 'Harry Brown would like to buy the business but he would not be able to handle it.' "

Appellant was appointed administrator August 25, 1931 (S. C., p. 11). The mothers of the infant children were notified to be and were present at Mr. McCloskey's office on the night of September 30, 1931. A discussion took place relative to the matter of the estate. The mothers of the infants had no lawyer present to advise them (S. C., p. 621). Lakewood Trust Company, the corporate guardian, had no lawyer present, but the administrator-appellant had Mr. McClos-

key present who acted as counsel to the appellant in his individual capacity (S. C., p. 192) and Mr. McCloskey was also proctor for the estate (S. C., p. 449).

The details of the meeting of September 30th are substantially as related in appellant's brief. There was the discussion with reference to the value and sale of good will. Nothing had been included in the inventory for the value of good will.

Mr. Amory J. Parmentier, one of the appraisers selected by appellant, when asked about the item of good will and if it was discussed at the family conference said "A. I recall that when the sale offer was made it was made to include good will and certain business equipment. I recall that. "Q. But you did not appraise good will? A. No, sir" (S. C., p. 140).

Law and Argument.

Chief Justice Shaw, one of the most learned members of the Supreme Judicial Court of Massachusetts, when speaking of the intention of a man said "No man knoweth his brother's intention, the devil himself knoweth it not, but when the surrounding circumstances justify the inference the intention is established". Did appellant scheme to acquire the business of E. J. Westhall?

The appellant while at the cemetery during the burial of his mother-in-law had the business of the deceased on his mind. He began to scheme. Before the funeral cortege had left the cemetery the appellant asked the mothers of the infants (who were entitled to one-half of the estate) to come to the home of the decedent that very evening (S. C., p. 612). The business had to be disposed of and the people were told to return the next morning. They did, and met

appellant, Havens, and his attorney, Mr. Durward McCloskey, at the home of deceased (S. C., p. 614). Again the disposal of the business was discussed. Why all the hurry? The people in their sorrow were likely prey for the big business man, the man who had run this business since January 21, 1927 and all during the time when Mrs. Westhall was in Lakewood but two weeks a year (S. C., pp. 741-742).

It was agreed (with later regrets) that the appellant be appointed administrator. Letters of administration were issued on August 24th. The appellant selected his appraisers (no court order was entered appointing them). A meeting of the family was called and the stage was set to put across the sale. A so called inventory not sworn to was handed the parties present. It was sworn to on October 5, 1931 following the alleged sale and on September 19, *1934* filed in the Ocean County Orphans' Court.

The corporate guardian was present in the person of its president, Mr. McCue, but the trust officer, Mr. Parmentier, was absent. Neither the trust company nor the mothers had any counsel present but the appellant-administrator had Mr. McCloskey present to take care of his interest. The inventory contained no reference to good will and no appraisal was made of this most valuable asset (S. C., p. 140).

Mr. Havens, the appellant, the day following the funeral is alleged to have said "Harry Brown would like to buy the business, but he would not be able to handle it". Harry Brown was the licensed embalmer employed by Mrs. Beatrice E. Westhall, a man who was in the continuous employ of the Westhall family for over thirty years (S. C., p. 234).

Was the business advertised "For Sale"? No. Was it ever offered to Mr. Harry Brown? No. As a matter of fact the whole deal so far as

the appellant thought, was consummated by the Agreement Exhibit E-1 dated October 1, 1931. So clever was the appellant in the concealment of the purchase of the business that Mr. Brown did not learn that Mr. Havens was the owner until two weeks prior to November 9, 1934 (S. C., pp. 232-233). Brown was under the impression that he was working for the Estate of E. J. Westhall all the time subsequent to August 13, 1931, the date of Mrs. Beatrice E. Westhall's death.

The courts will not countenance an administrator or any fiduciary buying at a public sale, although the price bid is fair and in excess of any other bid.

The total price paid for the business of E. J. Westhall by the appellant was $3,842, Exhibit E-1 (S. C., p. 785). That was the inventory price of the tangible assets, but when Mr. McCloskey drew the agreement, Exhibit E-1 (S. C., p. 785) he included therein the "undertaking business conducted by Beatrice E. Westhall of Lakewood, New Jersey", and also included "together with the good will of said business and together with the following merchandise, stock in trade, equipment and accessories". Then a list is made of the articles. The administrator was to make the payment of $3,842 "forthwith", Exhibit E-1 (S. C., p. 786), October 1, 1931, but as a matter of fact did not make payment of the said sum into the estate until August 9, 1932 after he had cleared a net profit on the business of $11,777.26 as found by the Vice-Ordinary (S. C., p. 117).

The matter has been summed up in the opinion of the Vice-Ordinary when writing of the sale of the business on October 1, 1931 (S. C., p. 116):

> "However, the undertaking business had not, at that time, been appraised, at least

no inventory or appraisement had been signed or filed. Nor was it filed until September 21, 1934. Moreover, when it was filed no mention was made therein of the goodwill of the business. It merely showed an appraisal of $3942 for the physical assets of that business. Yet the agreement (E-1) purports to sell not only the business, but the good-will thereof, for the appraised valuation of the physical assets; and the purchase price was not paid until nearly a year later although the agreement provided for payment 'forthwith'. Again, the testimony shows that between the date of purchase, October 1, 1931, and August 9, 1932, at which time the business was actually paid for, the *net income* was $11,777.26, nearly three times the purchase price."

The Orphans' Court Judge of Ocean County in his Conclusions Part I (S. C., p. 84) found that:

"* * * This alleged sale included 'good will' and the use of the name 'Westhall', but the value thereof formed no part of the consideration money to be paid. This 'good will' had a substantial value. Hence, the purchase price of the business was grossly inadequate. The inadequacy of the purchase price of the business is very forcibly demonstrated by the fact that the annual income from the business is approximately double the amount of the so-called agreed purchase price.

3. The fiduciary attempted to deal with himself as an individual to his own advantage and to the disadvantage of his trustants.

4. Two of the next of kin of the decedent were minors. It is questionable whether or

not their guardian had the power to, or could with propriety, enter into the agreement of October 1, 1931 (Exhibit E-1)."

Both the Orphans' Court and the Prerogative Court agree that nothing was paid for the good will of this business. It will be shown in the pages following that this business had a decided good will value and that the administrator and his attorney, Mr. McCloskey, knew it but nothing was paid for it.

Law.

POINT I.

As to law,

"* * * a trustee may buy from the *cestui que* trust, provided there is a distinct and clear contract, ascertained after a jealous and scrupulous examination of all the circumstances; that the *cestui que* trust intended the trustee to buy, and there is *fair consideration* and no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. * * *."

1 Perry on Trusts 318, *et seq.*, citing among other cases *Wright* v. *Smith*, 23 N. J. Eq. 106.

The same author at Section 205, page 338, writes:

"The same principles apply to attempted purchases by administrators and executors of the estate under their charge to admin-

ister. When the purchase is directly from beneficiaries of their interest, or when the purchase is assented to by all the beneficiaries, the executor or administrator has the burden of showing that the beneficiaries selling or those assenting to his purchase knew that he was the purchaser and were fully informed by him of everything which might influence them in selling their interest or assenting to his purchase of the property, and that no undue influence was used by him and no unfairness practiced."

There can be no quarrel with the above statement of the law.

Let us take a hurried glance at the administrator's conduct in the case *sub judice*. Examination of Mr. McClosky (S. C., p. 541):

"Q. Mr. Matthews made some mention of whether Mr. Havens at this conference told any of those present as to how much this business had yielded since he had been running it. Will you tell us whether or not any of those present at the conference asked Mr. Havens as to how much the business had produced? A. It was not mentioned.

Q. It was not mentioned by Mr. Havens and not by the others? A. No.

Q. And no questions were asked about it? A. No."

The administrator refers to persons having "full knowledge" of the transaction. There was no disclosure made by Mr. Havens to the parties in interest about the finances of the business or that he intended to purchase it and that he kept the receipts in a "tin box" between August 13, 1931 and September 30, 1931.

A cursory reading of the figures will convince one that the business had a good will and that the value of it was never included in the inventory and that Mr. Havens paid not one cent for it although the contract, Exhibit E-1, provided that the good will was sold to Mr. Havens.

Mr. Havens admitted that he was entirely familiar with the business, its assets and accounts receivable, that he was the bookkeeper, prepared and filed the income tax return. Mr. Havens knew every detail. The guardian knew nothing, took no interest and did not even seek advice of its counsel in order to protect the interest of the infant wards.

Here is what our Court of Chancery in 1925 in the case of

Pennsylvania Co. v. *Doughty*, 98 N. J. Eq. 578 at 586

says:

> "The fundamental principle governing all dealings with property held in trust is that the *cestui que* trust is entitled to the best efforts of the trustee to further in all legitimate ways the interests of the *cestui que* trust. It is the duty of the trustee to use and exercise such care and diligence in dealing with the trust estate as a prudent, sagacious man would bestow upon his own. The trustee is not permitted to have any interest in the subject of the trust antagonistic to, or in any degree inconsistent with, that of the *cestui que* trust. It follows from this that where there is a trust for sale, the trustee cannot become, either directly or indirectly, a purchaser at his own sale, even though the sale be at auction and so conducted as to insure the best price, and

in point of fact, the price actually paid appears to be a fair and full one. The principal reasons for extending the restrictions so far are—(1) that the trustee shall not be subject to the least temptation to abate any reasonable efforts to procure the best price for the trust property; (2) the danger that the trustee may have become possessed, in the course of his dealing as trustee, of some secret information of fact and circumstances affecting the value of the trust property, of which he may take advantage for his own benefit, and (3) the difficulty of ascertaining whether, in fact, all proper efforts have been made by the trustee to procure the best price."

See also:

Arrowsmith v. *Van Harlinger,* 1 N. J. Law 26.

And in

Caruso v. *Caruso,* 102 N. J. Eq. 393 at 398,

the Chancellor wrote:

"And it has been held in this state that while the rights of infants are not superior to those of adults, the difference between the two classes of persons is, that *the rights of infants must be protected by the court,* while adults must protect their own. *In re Shreve,* 87 N. J. Eq. 7; affirmed, Ibid. 710, for the reasons given by the chancellor. And this court held in *Caruso* v. *Caruso, supra* (101 N. J. Eq. 350), *that nothing can be taken as admitted against an infant, either by his default or on the answer of his guardian;* and that it is the rule, that

a next friend or guardian, cannot, by admissions or stipulations, surrender the rights of an infant. And this court held that minors cannot make an election themselves, and a guardian is without authority to make it for them. *Brengel* v. *O'Toole,* 101 N. J. Eq. 449."

* * * * * * *

"b. Sale of trust property to the trustee individually. A trustee with power to sell trust property is under duty not to sell to himself either by private sale or at auction, whether the property has a market price or not, and whether or not the trustee makes a profit thereby. It is immaterial that the trustee acts in good faith in purchasing trust property for himself, and that he pays a fair consideration.

The trustee cannot properly purchase trust property for himself even though he does not make the sale. Thus, he cannot properly purchase trust property for himself on a foreclosure sale or tax sale or sale on execution of a judgment. To permit him to do so would create a situation where his personal interest would be in conflict with his duty as trustee. It is his duty as trustee to prevent the sale if possible or to see that the property is sold for as much as can be obtained. If he were permitted to bid in the property for himself at the sale, it would be for his personal advantage not to prevent the sale and to have as few bidders and as low bids as possible. The trustee who bids in the property for himself at such a sale is not permitted to keep the property, even though in the particular case he attempted to secure as many bidders and as high bids as he could and

the amount which he bid was a fair consideration for the property.

Where there are several trustees, one of them cannot properly purchase trust property for himself, although his co-trustees are not personally interested in the purchase and consent to the sale." Sec. 170 (b) Restatement of the Law of Trusts (p. 431).

"h. Purchase by trustee individually of an interest in the subject matter of the trust. If the trustee purchases for himself individually an interest in the subject matter of the trust of such a character that the effect of permitting him to purchase the interest for himself might be to subject him to a temptation not to act solely in the interest of the beneficiary in the administration of the trust (see Section 170, Comment j), the beneficiary can charge him as constructive trustee of the interest so purchased and can compel him to account for any profit which he makes thereby." Sec. 206 (h) Restatement of the Law of Trusts (p. 562).

Mr. Havens knew Mr. Brown a long faithful employee of the Westhall undertaking business was interested in putting in a bid for the business (S. C., p. 234) but the administrator never told him one thing about the contemplated sale. The administrator wanted it for himself or Jessie (the administrator's wife), the daughter of deceased. Mr. Havens never told Brown he had bought the business; he knew of no reason for telling Brown (S. C., pp. 232-233).

The Court of Chancery in

Staats v. *Bergen,* 17 N. J. Eq. 297 at 306,

quotes the rule applicable to this case. The

Staats case was affirmed in 17 N. J. Eq. 554. The Chief Justice writing the opinion for the Court of Errors and Appeals says at page 558:

> "* * * The trustee is not prevented from bidding for property which he himself sells on the ground simply of a supposition of actual fraud, but because the law has established, as an inflexible rule, applicable to every emergency, that he shall not place himself in a situation in which he will be tempted to take advantage of his *cestui que trust.* This is a wise public regulation, intended to protect a species of property, which, otherwise, would be constantly exposed to peculiar hazard. The trustee, therefore, must submit to this regulation, and if he does an act in violation of it, no matter how pure his intention may be, such act is voidable at the instance of the person whom he represents. 'However innocent the purchase may be in the given case', says Chancellor Kent, in *Davoue* v. *Fanning,* 2 Johns. Ch. R. 260, 'it is poisonous in its consequences. The *cestu que trust* is not bound to prove that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power, distinctly and clearly to show it. There may be fraud, as Lord Hardwicke observed, and the party not be able to prove it'. At these sales, then, the trustee is forbidden to purchase, because his interest, as such purchaser, is opposed to the interest of his *cestui que trust,* and he acts, therefore, under a bias in his own favor. Nor does this rule rest, to any considerable extent, in the fact that, in a particular line of cases, the trustee has peculiar opportunities for the practice of fraudulent

acts, with regard to the property in his charge. The rule, to be efficacious, must be general, and the law implies, therefore, that in all cases of trusts, such opportunities may exist, and consequently the prohibition is universal, that he may not do anything which, while it is an advantage to himself, is, or may be, a loss to the trust estate. So jealous is the law upon this point, that a trustee may not put himself in a position, in which to be honest must be a strain upon him. The general rule, therefore, applies, not merely in those cases in which the confidence is absolutely betrayed, but when the circumstances are such that there was a temptation to violate it. *Moore* v. *Moore,* 4 Sandf. Ch. R. 37. I think, upon correct principle, a trustee, in no case, nor in any crisis, can become the purchaser of property, when the fact of his making such purchase, has a tendency to promote his own interest, at the expense of his *cestui que trust.* This, it is conceived, is the groundwork of the decisions, in England, and in this country."

To the same effect is the case of

Marshall v. *Carson,* 32 N. J. Eq. 250 (E. & A.).

It is worthy of note that the appellant does not argue against the opinion of the Vice-Ordinary which holds that an administrator cannot purchase as an individual the estate's property.

It is respectfully submitted that the surcharge of $6,400, together with interest, should be affirmed.

POINT II.

The business of E. J. Westhall had a considerable good will which was not paid for by appellant although included in the sale to him.

The evidence clearly shows that the business assets of this estate are not appraised at their true and respective values.

A mere glance at the figures showing the business done by the administrator in conducting the undertaking establishment of the decedent, which is one of the principal assets of this estate, reveals these facts: the following statement taken from the testimony of Mr. Havens shows that between the date of the alleged purchase, October 1, 1931, and August 9, 1932, when he paid for the business, the net income was $11,777.26. The net income from the date of death of Beatrice E. Westhall, August 13, 1931, to October 1, 1931, the date of the alleged purchase of the business, amounted to $245. The total net income from August 13, 1931 to August 9, 1932 was $11,922.26.

Cash Basis

	8/13/31-10/1/31	10/1/31-12/31/31	1/1/32-9/9/32	8/13/31-8/9/32 Totals
receipts	$717.00	$5,820.75	$16,284.10	$22,821.85
rsements	472.00	1,521.74	8,905.85	10,899.59
ash eipts	$245.00	$4,299.01	$ 7,378.25	$11,922.26

The undertaking business conducted under the name of E. J. Westhall was established in 1868 by E. J. Westhall, Sr. and continued by E. J. Westhall, Jr., the husband of Beatrice E. West-

hall, deceased. E. J. Westhall, Jr. died September 8, 1928 and the business was continued by Beatrice E. Westhall as widow of E. J. Westhall, Jr. under a permit to continue the business of a deceased licensee (Exhibit E-17). Osborne W. Havens, the administrator of the estate of Beatrice E. Westhall, was employed by his mother-in-law to manage the undertaking business from September 8, 1928 and so continued as manager until August 13, 1931, the date of death of Mrs. Westhall. Mr. Havens was registered as an apprentice with the State Board of Embalmers and Funeral Directors September 1, 1927 (Exhibit E-19) but has never qualified as either an embalmer or director.

A full summary of the business conducted by E. J. Westhall for the years 1926-1927 and up to and including September 8, 1928 is as follows:

	1926	1927	1928 1/1—9/8
Gross Income	$29,495.54	$30,611.85	$17,202.82
Net Income	6,167.26	6,565.52	5,726.79
Percent of Net to Gross	20.9%	21.4%	33.3%
See Ex. E-51 to E-55, inc.			
Total Net Income 1926 to Aug. 13, 1931, inc.			
Average Net Income 5.62 years		$ 6,531.60	$ 6,531.60
Average Net Income 1928 to Aug. 13, 1931—3.62 years			$ 6,622.64

A full summary of the business conducted by Beatrice E. Westhall from September 8, 1928 up to and including August 13, 1931 is as follows:

	1928 9/8—12/31	1929	1930	1931 1/1—8/13
Gross Income	$7,544.88	$23,644.63	$28,558.64	$17,948.43
Net Income	2,727.92	6,383.37	9,782.05	645.28
Percent of Net to Gross	36.1%	27.0%	36.2%	

gross business transacted by Osborne W. Havens om August 13, 1931 to August 9, 1932 (accrual sis) amounted to (see Exhibit E-50)	$28,602.34
gross cash receipts for the calendar year 1932 were	$22,670.65
net cash receipts for the calendar year 1932 were	$ 6,456.50
gross cash receipts for the calendar year 1933 were	$21,216.21
net cash receipts for the calendar year 1933 were	$ 6,422.23

The figures for 1934 were not made available. The average net income (cash basis) two years subsequent to the death of Beatrice E. Westhall was $6,439.66. The business produced an average net income from 1926 to 1931 of $6,531.60 and a net income for two years subsequent to the death of Beatrice E. Westhall of $6,439.36. It is evident if a man pays only $3,842 for the tangible assets of a business producing an average net income of $6,439.36 there must be a good will value or such an investment would never yield a net income of approximately $6,500 a year, or 171% of the investment.

> "* * * The name given to the value created by the excess earnings of a business is 'good will' * * *.
>
> "Since good will is a measure of earning capacity, it follows that only an established business can possess it. It resides usually in the reputation the business has built up in consequence of the excellence of its product, the practices of fair dealing or any other characteristics of its management giving it an advantage over its competitors. * * *"
>
> Waton & Finney—Mathematics of Finance—p. 117.

It was always contemplated by Havens and his counsel, Mr. McCloskey, that Havens should acquire the good will of the business and it was so stated in paragraph 1, page 6, Exhibit E-1:

> "* * * the said parties do hereby consent

that the said Osborne W. Havens as administrator of the estate of Beatrice E. Westhall, deceased, should sell to Osborne W. Havens, individually, the undertaking business conducted by Beatrice E. Westhall at Lakewood, N. J., *together with the good will* of said business, and together with the following merchandise, stock in trade, equipment and accessories:".

When the agreement to sell is consummated we find no mention of the sale of the good will (see paragraph 2, p. 8, Exhibit E-1).

The name of E. J. Westhall has been continued as a trade name since Beatrice E. Westhall died, an electric sign with the name Westhall has been placed on the funeral chapel (S. C., p. 327); E. J. Westhall billheads are used in billing patrons of the undertaking establishment; all goods for the business are purchased in the name of E. J. Westhall (S. C., p. 328). The following advertisement (Exhibit D-26) was bought and paid for by Osborne W. Havens:

"E. J. WESTHALL
Funeral Director
and Embalmer

Office, Chapel and Show Rooms, Second St., between Clifton and Lexington Aves., Lakewood, N. J.

Phone 277

Transportation of bodies to and from any part of the United States Tombstones & monuments furnished Camp Chairs to Rent for parties, etc.

Established in Lakewood in 1868"

"Established in Lakewood in 1868" is noteworthy.

When we consider these figures and reflect that the alleged contract of sale or agreement to sell (Exhibit E-1), especially mentioned the good will of the undertaking business, we can see that this administrator in dealing with himself, selling to himself, one of the prime assets of this estate, not only betrayed the trust of these minor children, but deliberately planned to deprive them, and did deprive them, of a business that was clearly worth over $25,000 based on the figures set out in detail above.

The testimony of Havens that he did not do anything, or say anything, or know anything, about his purchase of this undertaking business until shortly before the "conference" in Mr. McCloskey's office on the night of Spetmber 30, 1931, is so overwhelmingly refuted by the facts and testimony to the contrary, that we need do little more than point out the following glaring facts, which are the worst exhibition of an administrator planning from the very beginning to grab a prime asset of the estate for himself.

(a) Havens admits that he kept all the receipts of the undertaking business between the time of the death of Mrs. Westhall and October 1, 1931, the date he alleges he bought the business, in a "desk drawer". The exhibits in the case show that Havens used his own personal account to handle these moneys and when he was pressed for an explanation of whether he got cash or checks for the services rendered by the estate's undertaking business during this period, he said that if he got checks he cashed them and kept all of the money in his "desk drawer". Pressed further as to why he did this, if he did not know that he was going to buy the business, he offered no explanation and boldly and untruthfully insisted that he did not know he was going to buy the business at this time.

(b) Havens was pressed to tell why he did not account for the business done by the undertaking establishment between the death of Mrs. Westhall and the time he alleges he bought it. And why he didn't mention at the "conference" at which he agreed to buy the business, the fact that there was cash in his "desk drawer" which had come from the business since the death of Mrs. Westhall. His answer was that he did not mention it and did not account for it because he bought the business on October 1, 1931 as of the date of death of Mrs. Westhall. Pressed again to explain why he kept untruthfully insisting that he knew nothing about his buying the business until the "conference" in Mr. McCloskey's office September 30, 1931, particularly now in view of this statement that he bought the business as of the date of death of Mrs. Westhall, and that therefore he bought the money in his "desk drawer" as part of the business, he was at a total loss for an explanation, and simply reiterated his bold and patently untruthful statement that he did not know he was going to buy the business until the "conference" or perhaps a day or two before.

(c) Havens did not pay for the business at the ridiculous price fixed by his self-appointed appraisers until August 9th, 1932, despite the fact that the "contract" stated that the consideration for the business should be paid "forthwith". His foolish, and it was foolish, because he knew it was untruthful, explanation of his failure to pay for the business until almost a year after he bought it, was that he did not know what "forthwith" meant.

But Havens did know that in the year that had elapsed between the "conference" and the day he paid the unconscionable price "fixed" for the business by his self-appointed appraisers he

had made more than enough out of the business to pay for it. Mr. Havens had made a net cash profit from the business between August 13, 1931 and August 9, 1932 which amounted to $11,922.26.

The figures set out under Point II of the law clearly show the business had a good will value over and above the amount paid for the tangible assets. The appellant argues under Point 2 (Appellant's Brief, p. 33) that no good will attached to the Westhall undertaking business, yet Mr. McCloskey, Mr. Havens' counsel, was sure to include "good will" in the sale of the business to Mr. Havens. The appellant continues to point out in the advertisements issued by him (Exhibit D-26) that the "E. J. Westhall" business was "Established in Lakewood in 1868."

It is a fact as stated by appellant (Brief, p. 37) that the Embalming and Funeral Directing business is placed under "Professions and Occupations", Title 45 of the Revised Statutes. The source of that law is Chapter 156, L. 1927. Prior to 1927 the business of a deceased undertaker could not be carried on by anyone else under the name of deceased. The case of *Mullin* v. *Mullin,* 85 N. J. Eq. 531, cited by appellant is not applicable to the case *sub judice* since that case was decided prior to the 1927 Statute *Re Undertakers.*

The contention raised by appellant (Point I, Brief, pp. 29 *et seq.*) is in nowise favorable to him. Appellant is not a licensed undertaker, embalmer or funeral director. The business of E. J. Westhall now owned by appellant Havens employs a licensed embalmer, Mr. Brown. The business is not conducted "for the benefit of the widow or of the estate or of a person interested in the estate of decedent" as contemplated by Section 12, R. L. 1927, pages 302, 303 (*vide,* Appellant's Brief, p. 31).

If the appellant had not purchased the good will, the trade name would not go with the tangible assets. If appellant did not acquire the name he could not continue this business one day in his own name because under R. S. 45:7 he could not obtain a license.

Point 3, page 38, appellant's brief has been fully answered under Point II of this brief. No juggling of figures by appellant can change the result. The Vice-Ordinary and the Orphans' Court Judge gave no little consideration to this matter and arrived at a just and equitable decision which, it is submitted, should be affirmed.

As to Point 4 of Appellant's Brief, page 44.

Appellant says:

> "Furthermore, because of the special nature of this business, the Beatrice E. Westhall Estate was prohibited by law from continuing the operation of the business."

This is not a fact. On page 31 of appellant's brief he quotes an excerpt from Section 12, P. L. 1927:

> "* * * and provided, further, that the board may, by rule or regulation, permit the continuance of the business of a deceased embalmer, or funeral director to whom a license shall have been issued under the provisions of this act, under the supervision of a person duly licensed by the board for the benefit of the widow or of the estate or of persons interested in the estate of decedent for such time and in such manner as the board shall determine."

The "world-wide business depression and the disruption of the ordinary economic processes,

of which our courts have taken judicial notice in more than one case, made it extremely hazardous to attempt to continue a business enterprise, and extremely difficult to obtain a fair price for any species of property." Well, the poor old depression is to be blamed again. Mr. Havens didn't even try to obtain other buyers or bids. How did he know it was "extremely difficult"? Furthermore, people did not outlive the depression, more died because of it and the cost of funerals went on just the same and the testimony shows mortgages were taken by Mr. Havens as security for burial bills. Mr. Havens never suffered a loss in the business which might have been continued for the people interested in the estate (*vide,* Appellant's Brief, p. 31, Sec. 12, P. L. 1927).

As to Point 5 of Appellant's Brief, page 51.

It is true as a general proposition that a guardian may sell the property of its ward without approval or order of the Court. But the guardian is answerable for its or his action or non action as the case may be.

Appellant loses sight of the fact that the guardian did not sell the property in this case but the Administrator, Havens, sold to Mr. Havens individually property of the estate in which the wards had an interest and that interest was not protested by the Corporate Guardian. The Vice-Ordinary held:

> "* * * the guardian was remiss in its duty, and that the agreement was signed as a mere matter of form without full knowledge of the facts, and without any consideration of the transaction by its board of directors, * * * (S. C., p. 121; l. 20).

As to Point 6 of Appellant's Brief, page 54.

Appellant contends that the guardian cannot rescind and is "estopped from objecting to the sale made of the undertaking business".

The appellant is most desirous of holding on to the business for which he paid so little and raises any argument in his endeavor to prevail and reverse a well considered opinion of the Vice-Ordinary who wrote (S. C., pp. 122-123):

> "After the Commissioner of Banking and Insurance took over the trust company guardian, independent counsel saw that the interests of the minors had not been properly protected and took prompt action. That the wards might have recovered their loss from the guardian because of its breach of trust (had it remained solvent) is no answer to the liability of the administrator. I do not mean to suggest that there may not be circumstances under which a ward might not be bound by the consent of his guardian, and the guardian estopped to question the validity of a transaction assented to by it, and prejudicial to the interests of his ward; but this is not such a case. A breach of trust by the guardian cannot excuse or validate a similar breach of trust by a trustee, especially where the ward and the *cestui que trust* are one and the same person. The duty of the administrator-trustee to his *cestui que trust* was not less than that of the guardian to its ward. The administrator-appellant is not an innocent party to the condemned transaction.
>
> Under the circumstances of this case the plea of estoppel cannot avail."

It is respectfully submitted that not one case cited by appellant in his brief, pages 55 to 63 inclusive, is in point or of aid or assistance to the appellant.

Appellant (Brief, p. 59) says:

> "Furthermore, if there was a breach of trust by Lakewood Trust Company, it, as guardian, is fully answerable to its infant ward for any misuse or abuse of its power."

Appellant failed to further state that this corporate guardian is hopelessly insolvent (S. C., p. 122, l. 22).

It is respectfully submitted for all of the reasons urged that the decree of the Prerogative Court should be affirmed.

JOHN A. MATTHEWS,
Proctor for Respondent, Lakewood Trust Company, Guardian, etc.

ANDREW B. CRUMMY,
Of Counsel.