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NOTICE OF APPEAL.

(Filed Oct. 10, 1930.)

NEW JERSEY PREROGATIVE COURT.

In the matter of the appeal of CORN EXCHANGE NATIONAL BANK AND TRUST COMPANY from an order of the Orphans' Court of the County of Atlantic, allowing the account of the Corn Exchange National Bank and Trust Company, Executor of the ESTATE OF WINFIELD S. NICE, deceased, and adjudicating the exceptions filed thereto.	On Appeal from the Atlantic County Orphans' Court. Notice of Appeal.

The Corn Exchange National Bank and Trust Company, executor and trustee of the estate of Winfield S. Nice, deceased, hereby appeals from the final decree of the Ordinary, advised by Vice-Ordinary Ingersoll, and made in this court, in the above stated cause, dated the 13th day of September, 1930, which orders, adjudges and decrees that the decree in the above entitled cause, of the Atlantic County Orphans' Court, dated the 22nd day of March, 1929,

be affirmed with costs, and that the accountant, Corn Exchange National Bank and Trust Company, be surcharged with the sum of thirty thousand nine hundred fifty-three dollars ($30,953) together with costs and interest from the date of the decree of the said Atlantic County Orphans' Court, to the New Jersey Court of Errors and Appeals in the last resort in all cases.

Dated September 22, 1930.

STARR, SUMMERILL & LLOYD,
Solicitors for Corn Exchange National Bank and Trust Company, Executor.
LEWIS STARR,
Of Counsel.

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

LEWIS STARR,
Of Counsel with Corn Exchange National Bank and Trust Company, Executor.

PETITION OF APPEAL.

(Filed Oct. 17, 1930.)

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

The petition of Corn Exchange National Bank & Trust Company, executor under the will of Winfield S. Nice, deceased, respectfully shows:

1. Your petitioner finds itself aggrieved by a final decree made in the New Jersey Prerogative Court by his Honor Edwin Robert Walker, Ordinary of the State of New Jersey, upon the advice of Vice-Ordinary Ingersoll, bearing date the 13th day of September, 1930, in the matter of the estate of Winfield S. Nice, deceased, wherein the said Corn Exchange National Bank & Trust Company, executor, etc., was appellant from a decree of the Honorable William H. Smathers, Judge of the Orphans' Court of the County of Atlantic, and Catherine Grubb, Mary E. Vetterlein, Isabella S. Schreiber and Deborah Seal, exceptants to the account of the Corn Exchange National Bank & Trust Company, executor, filed in the office of the Surrogate of the County of Atlantic, were respondents, in this respect, to wit: That the said final decree ordered, adjudged and decreed that the decree in the above entitled cause of the Atlantic County Orphans' Court, dated the 22nd day of March, 1929, be affirmed with costs, and that the accountant therein named, Corn Exchange National Bank & Trust Company, executor, etc., be surcharged with the sum of thirty thousand

nine hundred fifty-three dollars ($30,953), together with costs and interest from the date of the said decree of the Atlantic County Orphans' Court.

2. Your petitioner humbly appeals from that part of the decree of the said Ordinary, which decrees that the order and decree of the Orphans' Court of the County of Atlantic, dated March 22, 1929, be affirmed with costs and that the said accountant be surcharged as aforesaid, upon the ground that the decree of the Ordinary is erroneous and that the said Ordinary should have reversed and set aside the order of the Orphans' Court, upon the appeal to the Prerogative Court of the said Corn Exchange National Bank & Trust Company, executor as aforesaid.

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

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

STARR, SUMMERILL & LLOYD,
Solicitors of Appellant, Corn Exchange National Bank & Trust Company, Executor, etc.

LEWIS STARR,
Of Counsel.

PETITION.

(Filed Oct. 16. 1928.)

ATLANTIC COUNTY ORPHANS' COURT.

In the matter of the Estate of Winfield S. Nice, deceased.	On Final Accounting Petition.

To the Orphans' Court of the County of Atlantic:

The petition of Corn Exchange National Bank Philadelphia, now Corn Exchange National Bank and Trust Company Philadelphia shows that it is the executor of the estate of Winfield S. Nice, deceased, late of Ventnor, in the County of Atlantic, and State of New Jersey, and that it herewith presents a second and final account of its administration, which is hereto attached and made a part hereof, a summary of which is as follows:

To amount of balance of assets and cash in hands of accountant sur decree William H. Smathers, Judge, on audit of accountant's first account		$59,176.92
LESS		
Commission to accountant allowed	$928.92	
Counsel fee allowed	1,000.00	1,928.92
		$57,248.00

Less also expenditures for which credit is asked (page 4)	19.78	19.78
		$57,228.22
Legacies paid (page 4)		20,000.00
Balance of Principal		$37,228.22
Amount of income overdraft (page 7)		553.19
		$36,675.03

Your petitioner further shows that the names and addresses of all persons interested in said account are as follows:

Charles N. Weston, 3708 Baring Street, Phila., Pa.

Mrs. A. J. Golden, 1119 Stratford Ave., Melrose, Pa.

Mrs. Chas. M. Grubb, 17 S. Newark Ave., Ventnor, N. J.

Mrs. Julius Vetterlein, 17 S. Newark Ave., Ventnor, N. J.

Mrs. John H. Seal, Hazelhurst Ave., Marion, Pa.

Mrs. Geo. A. Schreiber, 13 S. Buffalo Ave., Ventnor, N. J.

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

CORN EXCHANGE NATIONAL BANK, PHILADELPHIA, now CORN EXCHANGE NATIONAL BANK & TRUST COMPANY, PHILADELPHIA, *Executor,*

BY EDGAR W. FREEMAN,
Vice-President & Trust Officer.

Dated: Philadelphia, Pa.

COMMONWEALTH OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.*

EDGAR W. FREEMAN, of full age, being first duly sworn, according to law, on his oath, says that he is the vice-president and trust officer of Corn Exchange National Bank, Philadelphia, now Corn Exchange National Bank and Trust Company, Philadelphia, the petitioner in the foregoing petition named, and that the matters and things contained therein are true to the best of his knowledge and belief.

EDGAR W. FREEMAN.

Sworn and subscribed to before me this 9th day of Oct. A. D. 1928.

LAURA MARSHALL,
(Seal) *Notary Public.*

Commission expires at end of next Session of Senate.

(I am not a director, or officer in the bank, banking institution or trust company for which I hereby act as Notary Public.)

ATLANTIC COUNTY ORPHANS' COURT.

In the matter of the Estate of WINFIELD S. NICE, deceased.	On Accounting. Second and Final Account.

The second and final account of Corn Exchange National Bank, Philadelphia, now Corn Exchange

National Bank and Trust Company, Philadelphia, executor of the estate of Winfield S. Nice, deceased, late of Ventnor, in the County of Atlantic and State of New Jersey, as well of and for such and so much of the goods, chattels, rights, credits and effects of the said decedent that have come to its hands to be administered as for its payments and disbursements out of the same.

The accountant charges itself as follows:

Balance remaining in hands of accountant sur decree of William H. Smathers, Judge, allowing first account		$59,176.92	
LESS—			
Commission to accountant allowed	$928.92		
Counsel fee allowed	$1,000.00	1,928.92	$57,248.00
1927			
July 7 To second dividend from Receivers of Nice & Schreiber Co.	$3,034.24		
1928			
Aug. 9 to third and final dividend from Receiver of Nice & Schreiber Co.	576.14		
			$57,248.00

The accountant prays allowances as follows:

Voucher

1. Geo. Wagner balance of

subscription to two copies Price Geneology ordered by decedent	$7.70	
2. Affidavit to first account	1.00	
3. Thomas L. Caskill refund of sundry expenses per statement dated July 8, 1927	5.98	
4. Edgar W. Freeman expenses to Mays Landing to attend audit of first account	2.10	
5. Two Prothonotary's certificates	1.50	
6. Affidavit of A. J. Golden release	.50	
7. Affidavit of A. J. Golden Bond	.50	
8. Affidavit re sale of real estate	.50	
	$19.78	
9. Chas. N. Weston payment in full of Legacies under will and second codicil as per agreement dated 10/31/27	$15,000.00	
10. A. J. Golden payment of Legacy under will	$5,000.00	
11. Overdraft in income account page 7	553.19	20,572.97
		$36,675.03
LESS:		
Albert C. Abbott, Surrogate, fees on accounting	31.40	

Atlantic County Record Publ. notice of settlement	9.88	
Commission to accountant	none	
Proctor's fee	none	
Balance in hands of accountant	$36,633.75	
	$36,675.03	36,675.03

The following is a full list or statement of the securities investments and assets of which the balance of the aforesaid, estate of Winfield S. Nice, deceased, in the hands of Corn Exchange National Bank, Philadelphia, now Corn Exchange National Bank and Trust Company, Philadelphia, executor as aforesaid, consists, and a statement of all changes made in the securities of the said estate since the filing of the first account.

SECURITIES NOW IN THE HANDS OF ACCOUNTANT

$75	Fire Company of Ashland & Vicinity 6s 1923 @	0.00
20000 shrs.	American River Corp.	0.00
100 "	American Spring Car Motor Co. of Camden, N. J.	0.00
10 "	American Union Fire Insurance Co.	0.00
500 "	Buena Gold Mining Co. of Colorado	0.00
100 "	Columbia Graphophone Mfg. Co. common	0.00
50 "	Cramer & Rogers Grocery Co. common	0.00

5	"	Engravograph Corp. common)		
5	"	Engravograph Corp. pfd.) units @ 5	25.00	
20	"	Federated Engineers Development Corp.)		
20	"	Federated Engineers Development common) units @ 18	360.00	10
501	"	John J. Habecker Co. common	0.00	
8000	"	Hancock Silver Mining Co. of Colorado	0.00	
25	"	Hydro Refrigerator Co. Inc. @ 2	50.00	
4	"	International Submarine Co.	0.00	
100	"	Island Oil & Transport Corp.	0.00	
1019	"	Nice & Schreiber Co. @ 30	30,570.00	20
200	"	Phila. Crude Ore Co.	0.00	
15000	"	Rebekah Mining Co.	0.00	
4500	"	Roper Croup Mining Co. of New Mexico	0.00	
30	"	Rote Automatic Brake Co.	0.00	
500	"	San Jacinto Oil Co. of Beaumont, Texas	0.00	
500	"	Silver Nugget Mining Co.	0.00	
500	"	United Shoe Store Co. pfd.	0.00	
1	"	Worcester & Somerset RR. Co.	0.00	30
		Cameo Locket	1.00	
		Cash in bank	6,222.22	
		Total	$37,228.22	

The following changes in investments and cash listed in the first account have been made by the accountants since the filing thereof.

Personal account of decedent with Nice & Schreiber collected in full from Receivers		$3,610.38	
Cash in bank as stated in the first account, principal		$24,254.03	
Income		409.38	
		$24,663.41	
Payments therefrom			
Surrogate's fee and cost of advertising	102.87		
Attorney fee and commission to accountant	1,928.92		
Sundry expense items (page 4)	19.78		
Legacies under will (page 4)	20,000.00	22,051.57	
		$ 2,611.84	
Collected since first account as above		3,610.38	$6,222.22
The accountant paid George Wagner balance of subscription made by decedent to two copies Price Geneology	$7.70		

INCOME OF PERSONAL ESTATE

Dr.

The accountant charges itself with income received as follows:

1927			
June 27	To int. on cash balance to	6/19/27	$190.27
Sept. 20	" " " " "	9/19/27	186.46
Dec. 20	" " " " "	12/19/27	96.85
1928			
Mar. 20	" " " " "	3/19/28	36.38
June 20	" " " " "	6/19/28	34.74
Aug. 9	" int. on claims vs. Nice & Schreiber Co.		75.99
Sept. 20	" int. on cash balance from 6/20 to 9/19/28		43.56
			$664.25

Cr.

The accountant claims credit for payments from income as follows:

1927		
May 6	By first half 1927 taxes prem. 13 S. Buffalo Ave., Ventnor, N. J.	$119.19
	By second half 1927 taxes prem, 13 S. Buffalo Ave., Ventnor, N. J. $119.19 less $2.38 discount	116.81
Oct. 15	By E. Loulu Woodward six months int. on mtge. prem. 13 S. Buffalo Ave., Ventnor, N. J. due 10/16/27	360.00
1928		
Apl. 9	By E. Loulu Woodward six months int. on mtge. prem. 13 S. Buffalo Ave., Ventnor, N. J. due 4/16/28	360.00

	17	By Lumbermens Insurance Co. premium on $3000 policy #614568 expiring 4/16/31	29.25
	26	By affidavit to State Board of Taxes	.50
May	7	By first half 1928 taxes prem. 13 S. Buffalo Ave., Ventnor	117.01
		By second half 1928 taxes prem. 13 S. Buffalo Ave., Ventnor	
10		$117.02 less $2.34 discount	114.68
			$1,217.44
		Balance, overdraft in account excluding $409.38 balance of income as shown by first account and added to principal in decree	553.19
			$664.25

20

CORN EXCHANGE NATIONAL BANK, PHILADELPHIA, now CORN EXCHANGE NATIONAL BANK & TRUST COMPANY, PHILADELPHIA,

BY EDGAR W. FREEMAN,

Vice-President & Trust Officer.

Dated:

30

COMMONWEALTH OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.*

EDGAR W. FREEMAN, of full age, being first duly sworn according to law on his oath, says that he is the vice-president and trust officer of Corn Exchange National Bank, Philadelphia, now Corn Exchange National Bank and Trust Company, Philadelphia, the executor, aforesaid, and that the foregoing account is in all things just and true, both as to the charge and discharge thereof, according to the best of his knowledge and belief.

EDGAR W. FREEMAN.

Sworn and subscribed to before me this 9th day of October A. D. 1928.

LAURA MARSHALL,
(Seal) *Notary Public.*

Commission expires at end of next Session of Senate.

(I am not a director or officer in the bank, banking institutionor trust company for which I hereby act as Notary Public.)

The above account having been placed on the files of my office on the sixteenth day of October, 1928, and being by me audited and stated, is now reported for settlement.

Dated: November 28, 1928.

ALBERT C. ABBOTT,
(Seal) *Surrogate.*

Filed October 16th, 1928.
Partially allowed March 22nd, 1929,
Allowed March 23rd, 1929.

AMENDED EXCEPTIONS TO FINAL ACCOUNT.

(Filed Dec. 5, 1928.)

ATLANTIC COUNTY ORPHANS' COURT.

In the matter of the ESTATE OF WINFIELD S. NICE, deceased.	Amended Exceptions to Final Account.

Catherine Grubb (Mrs. Charles M. Grubb), Mary E. Vetterlein (Mrs. Julius Vetterlein), Isabella F. Schreiber (Mrs. George Schreiber), of the City of Ventnor City, County of Atlantic and State of New Jersey, and Deborah Seal (Mrs. John H. Seal), of Merion, County of Philadelphia, State of Pennsylvania, except to the final account filed by the Corn Exchange National Bank of Philadelphia, now the Corn Exchange National Bank and Trust Company of Philadelphia, executor of the estate of Winfield S. Nice, as follows:

1. They except, as hereinafter particularly set forth in paragraphs one to thirty, inclusive, to the statement on page one of the petition wherein the accountant alleges that it has a balance of assets and cash in hand in the sum of $59,176.92. Said balance consists of stock which it alleges to be worth $30,570.00, when, as a matter of fact, said stock is

practically worthless, due to the executor's gross carelessness and indifference in the management of the estate. It was grossly careless, negligent and indifferent in having the Nice & Schreiber Company placed in the hands of receivers, as hereinafter set forth. The executor was grossly careless, reckless and indifferent, and acted negligently and imprudently in filing a bill for receivers without disclosing the fact that the Nice & Schreiber Company had a very large sum in cash in banks. The executor should be surcharged with the value of said stock and the loss which the exceptants have sustained.

2. They except to the allowance of $1,928.92 for executor's commission and counsel fees, because of its culpable maladministration of the estate, as hereinafter set forth in paragraphs one to thirty, inclusive. They also except to any final allowance of executor's commission or counsel fee and ask that any allowance heretofore made be returned to the estate because of its maladministration.

3. They except to the account as stated wherein the accountant on page five lists among "Securities now in hands of accountant," item $1019 shares of Nice & Schreiber Company @ $30.00—$30,570.00," because this stock is worthless due to gross carelessness and indifference in the management of the estate. As hereinafter set forth in paragraphs one to thirty, inclusive, the executor, through gross carelessness, wantonness and indifference, caused unnecessary litigation, disastrous to the value of the said stock. Said item of 1019 shares should have been made to appear as a charge and a prayer should have been made by the accountant for its allowance.

4. The accountant has not charged itself with the sum of $9,604.46, which should be charged against it as hereinafter particularly set forth in paragraphs thirty-one to thirty-three, inclusive. The executor was grossly careless and indifferent in the matter and imprudently and improperly acquiesced in the transfer of most of the fixed assets of the Nice & Schreiber Company in consideration of the withdrawal of a spurious claim against the company.

5. The executor was grossly careless, wanton and indifferent in the management of the estate in that it acquiesced in, consented and agreed to the allowance of the exorbitant and excessive fees for receivership proceedings as hereinafter particularly set forth in paragraphs one to thirty, inclusive, whereby the aforementioned stock was greatly diminished in value and because it was made practically worthless.

6. The exceptants charge that the executor maladministered the estate and was grossly careless and indifferent in its management in that it did not inquire into the shortage and discrepancy in the accounts of the receivers hereinafter named and the receivership hereinafter mentioned. This exception is hereinafter particularly set forth in paragraphs thirty-four to thirty-five, inclusive.

As to the first, second and third exceptions:

1. The exceptants are the next of kin of the late Winfield S. Nice, who died testate on the third day of March, 1926, at his home in Ventnor City, N. J.

2. At the time of his death, the said Winfield S.

Nice, as aforesaid, was the owner of 1019 shares of the 1026 shares of the Nice & Schreiber Company stock then outstanding, of which said company he was, at the time of his death, and for a long time prior thereto had been, the president.

3. On the second day of March, 1926, the day preceding the death of the testator, the financial condition of the Nice & Schreiber Company was as follows:

Due from F. W. Aiken	$1,221.30
" " Wm. L. Lippincott	766.42
Cash on hand	350.00
Accounts receivable	186,187.91
Advances on account of merchandise in transit	18,973.00
Inventory of stock on hand	67,571.99
Outside investments	2,456.15
Machinery, fixtures and automobiles	11,242.00
Deferred charges	796.56
	$289,546.23

For the purpose of said financial statement, all assets of doubtful nature, approximating in amount the sum of $56,249.41 in accounts receivable and advances to shippers, are treated as valueless and not included in above items. After deducting from the above valuation placed upon the fixed items, consisting of machinery, fixtures—automobiles, etc., of $11,242.50, there remained quick assets upon the said second day of March, 1926, of a value of $278,-303.33. The liabilities of the said Nice & Schreiber Company were placed at the sum of $207,761.40. The book value of the outstanding stock was $87,785.00. The stock owned by the said Winfield S. Nice was worth on the aforesaid said $87,118.20.

4. On the twenty-eighth day of April, 1926, the date of the filing of the bill for receivers, the financial condition of the corporation remained practically unchanged from the statement set forth in the above paragraph three, except that the Nice & Schreiber Company had cash in banks in the sum of $41,156.39, and which sum, through the executor's gross carelessness, neglect, wantonness and indifference, was omitted and undisclosed, so that it did not appear to the Court making the appointment of receivers that there was such a huge sum in cash which could be used for the payment of obligations. One, H. L. Burton, with a claim of $13,873.49, was the only pressing creditor and, as aforesaid, there was ample cash on hand to satisfy him. A partial payment even on the Burton claim would have satisfied said creditor.

5. Notwithstanding the solvency of said Nice & Schreiber Company, and the fact was admitted in the petition for receivers, hereinafter mentioned, and the substantial excess of its quick assets above its liabilities, the said corn Exchange National Bank, as executor of the estate of said Winfield S. Nice, deceased, and Charles N. Weston, as the owner of four shares of stock of said company, filed, on the twenty-eighth day of April, 1926, their bill of complaint in the United States District Court for the District of Pennsylvania, wherein the Corn Exchange National Bank, as said executor, alleged that the said Nice & Schreiber Company was indebted to the estate of the said Winfield S. Nice in a sum exceeding $10,000.00 and prayed that a receiver or receivers in equity be appointed to carry on the business of said corporation and protect the creditors and stockholders.

6. The said executor, as complainant in the bill for receivers, made the following statement in its bill of complaint:

> "11. Complainants aver that the indebtedness of the respondent is represented by open accounts and unsecured obligations in writing, some of which have matured and the others of which are about to mature, and that because of the foregoing said respondent, while amply solvent, is temporarily embarrassed, and if its business can be maintained and continued respondent will be able to pay in full all indebtedness and the business saved for the stockholders.
>
> 12. Complainants aver that a part of creditors to whom respondent is indebted are pressing for immediate payment of their claims, and threatening to enter suit and levy attachments and executions on the property of respondent; that such actions, if pursued, will result in the sale of the assets of the corporation, so that the plant and property thereof will be disintegrated, with the consequent impossibility of conducting the business of the respondent."

7. There was no allegation in the bill aforesaid for the appointment of receivers, that any suit or suits had been commenced against the said company, nor was there any reason therein given why the said company could not, out of its quick assets, provide for any outstanding claim or claims.

8. Notwithstanding that the appointment of a receiver or receivers was sought to carry on the business, which was that of dealing in eggs, butter and poultry, by wholesale or in commission, two members of the Philadelphia Bar, *viz.:* John Weaver,

Esq., and Sidney E. Smith, Esq., were selected and duly appointed as such receivers.

9. A. J. Davis, Esq., a young office associate of the said Sidney E. Smith, entered an appearance of record for the receivers, and Russell C. Cooney, Esq., also acted as counsel for the receivers but did not enter an appearance, although a fee equal to that of each of the receivers was allowed him by the Master. Four attorneys were therefore engaged in attending to the details incidental to this receivership, and three appraisers were deemed necessary to prepare an inventory and appraisement of the assets and liabilities of the company, although a report had been prepared by accountants and given to the officers of the company on March 2, 1926, less than two months before the filing of the aforesaid bill, in which report all items of assets and liabilities had been detailed and which, according to an allegation contained in said bill, remained practically unchanged at the time of the filing of the bill.

10. On July 16, 1926, and within about three months after their appointment, the receivers had collected, out of the quick assets, the sum of $138,-141.60, and thereupon filed an interlocutory report wherein the appointment of a Master to make distribution of this fund was prayed for. Morton Z. Paul, Esq., of the Philadelphia Bar, was thereupon appointed by the Court, and on October 11, 1926, filed his report. Said report was confirmed November 1, 1926. The receivers' supplemental account, filed October 11, 1926, showed that they had collected to October 7, 1926, the sum of $141,316.66.

11. No exceptional or professional skill was called

for or exercised by said receivers and their attorneys in collecting the assets of the said Nice & Schreiber Company, and no litigation was required to realize upon the same, but notwithstanding these facts, the Master, in his report, filed as of October 11, 1926, awarded a dividend of but 75% upon proved claims aggregating $116,813.67 and allowed expenses and fees for administration as follows:

Receivers	John Weaver	$7500.00	
	Sidney E. Smith	7500.00	$15,000.00
Attorneys	A. J. Davis	7500.00	
	Russell C. Cooney	7500.00	15,000.00
Appraisers			1,000.00
Master	Morton Z. Paul		3,500.00
	Sundry		203.00
			$34,703.00

12. The executor was grossly careless, reckless, indifferent, negligent and imprudent in acquiescing in and consenting to the aforesaid outrageous and exorbitant fees without notifying any of the exceptants, and did not appeal therefrom or except thereto.

13. The receivers, on April 2, 1927, filed a second report of the receivership, in which they showed that they had received, since the filing of the first account, the sum of $12,127.20.

14. The Master filed a second report on June 10, 1927, the fund for distribution being $30,390.52. Deducting the amount of the balance carried over from the first account, *viz.:* $18,388.00, additional collec-

tions of but $12,002.52 had at this time been made by the receivers. A further dividend of 21% was awarded and administration expenses of $5,750.00 were allowed, which latter sum included a fee of $750.00 for the Master and $5,000.00 for receivers and their attorneys. The executor was grossly careless and indifferent in the matter and imprudently and improperly acquiesced in the allowance of these exorbitant fees and did not appeal therefrom. The executor, however, did file with the Master a faint formal protest against the allowance to receivers of $5,000.00 aforesaid.

14. (a) The receivers, in their third account, filed May 23, 1928, showed that they had received since the filing of the second account the sum of $6,694.09.

15. A third report was filed by the Master on June 30, 1928, in which he reported a balance of $6,133.55 for distribution. The Master allowed himself $500.00 on this report.

16. Besides allowing the great majority of the creditors' claims, the Master held five meetings and considered and reported upon contested creditors' claims against the corporation aggregating approximately $2,560.00. These claims appear to have been amicably disposed of or withdrawn.

17. The only claim in which litigation was involved was that against Herbert P. Brown, who, it appears, was indebted to the corporation in the sum of about $35,000.00. A suit was entered by the receivers to recover this amuont and defendant admitted a personal indebtedness of $1,900.00 and denied liability as to the balance on the ground that

liability was incurred by a corporation bearing his name. Upon the trial of this issue the defendant did not appear and but one witness was called by the plaintiff, and therefore but little time was consumed and no extraordinary skill or effort required to secure judgment on what was practically an uncontested claim. Prior to the death of Winfield S. Nice, the defendant, Brown had conveyed to him three parcels of improved real estate to secure the payment of this indebtedness. Brown satisfied this judgment for the sum of $6,000.00.

18. The services rendered by counsel called for no exceptional skill or effort and produced no material increase in the assets of the corporation, and the judgment was procured after the filing of the first account.

19. Thus, out of a fund of $160,013.27 received and collected by the receivers from good accounts receivable, from which sum $117,058.64 in provable debts were satisfied, their predatory instinct unhampered by the executor cost the estate the following for administration expense:

First Account			
Receivers	John Weaver	$7,500.00	
	Sidney E. Smith	7,500.00	
Attorneys	Russell C. Cooney	7,500.00	
	Alfred Davis	7,500.00	
Appraisers (3)		1,000.00	
Incidentals—clerk hire, etc.		203.00	
Master		3,500.00	
	Total		$34,703.00
Second Account			
Receivers	John Weaver	1,250.00	
	Sidney E. Smith	1,250.00	

Attorneys	Russell C. Cooney	1,250.00	
	Alfred Davis	1,250.00	
Master		750.00	5,750.00
Third Account			
Master			500.00
	Total Administration expenses,		$40,953.00

20. The Master allowed each receiver and each attorney identical compensation; no distinction is made, as far as counsel is concerned, as to relative value of services rendered, nor does the Master specifically refer to work done that justifies a payment of $17,500.00 to counsel alone.

21. There was an imprudent and wanton allowance to the appraisers of a fee of $1,000.00 for preparing schedules of assets and liabilities essentially made up from the books of the corporation. No expert skill in valuation was called for. Through the gross carelessness, negligence and indifference of the executor and its inattention to the receivership, an exorbitant fee of $3,500.00 was allowed the Master on the first audit.

22. In his first report the Master refers specifically to but one act of the receivers as calling for emphasized commendation, and that was the deposit by them of the sum of $100,000.00 at 4% interest, whereby the assets of the estate were increased to the extent of $600.00. Apart from this the Master refers to their collection of a large sum in a relatively short time, as evidencing superior skill and effort.

23. The collection of the sum of $138,141.00 within a period of less than three months after their appointment, and without litigation, was due primarily to the fluid nature of the corporation's assets rather than any superior efficiency of the receivers. The only work apparently involved was that of collection and distribution.

24. The receivers did not carry on the business, except for its slight attention the first three weeks after their appointment; no returns from such a source are indicated in their accounts. In fact, in their preliminary report they state that it is not advisable to do so, and the fixed assets of the corporation were sold to an employe for a net cash consideration of $1,634.00.

25. Notwithstanding the fact that the exceptants, the residuary legatees, were vitally interested in the conservation of the assets of the Nice & Schreiber Company, they were not advised by anyone, of the institution of the receivership proceedings or of the filing of the accounts of the receivers and the reports of the Master, and the exceptants did not learn until long after said report had been confirmed, and were thereupon unable to appear and object to said proceedings or file exceptions to said report.

26. The exceptants did not know with certainty the disastrous effect on the value of the 1,019 shares of the Nice & Schreiber Company stock until June 30, 1928, the date of the filing of the last report by the Master in the receivership proceedings.

27. A few weeks after the death of the testator, two bona fide cash offers of $40,000.00 and $42,000.00,

respectively, for the 1,019 shares of stock in the Nice & Schreiber Company were made to the executor, but these offers were refused by the executor, who demanded over $70,000.00.

28. Thus, while the executor did not think it was prudent to accept $42,000.00 for the stock, it did think it was prudent to put the Nice & Schreiber Company in the hands of receivers and permit the estate to be mulcted of over $40,000.00 in receivers' and attorneys' fees, and making the stock worthless.

29. The exceptants charge that the act of the executor, the Corn Exchange National Bank, in procuring and causing the needless receivership of a company in which the estate was so vitally interested, was imprudent, improper and wanton, and due to gross carelessness and indifference. Therefore, the executor should be charged with the loss of the value of said stock which the exceptants sustained because of said receivership.

30. The exceptants charge that it was the duty of the executor not to acquiesce in the allowance of the exorbitant fees of the receivers and their counsel, but to take exception thereto and appeal therefrom. It was also the duty of the executor to notify the exceptants of the receivership proceedings. Having failed in this duty, the executor should be charged with the loss the exceptants sustained thereby.

As to the fourth exception:

31. The business carried on by the said Nice & Schreiber Company had been long established and

highly successful. In the year preceding the death of the said Winfield S. Nice, the said company had done a gross business exceeding four and one-half million dollars, and Charles N. Weston, for many years, had been connected with the said Winfield S. Nice and the said company as a bookkeeper and one William H. Lippincott had been employed by said company as a salesman.

32. The said William H. Lippincott was, at the time of the death of Winfield S. Nice, indebted to the said Nice & Schreiber Company in the sum of $766.46, and he, without basis, alleged that the said Nice & Schreiber Company was indebted to him in the sum of $17,000.00. This alleged indebtedness does not appear as an item or liability in the accountant's report above referred to, nor does the Master's report show that any proof or attempted proof thereof was made. Upon the basis of the withdrawal of this unproved claim, the fixed assets of the said Nice & Schreiber Company, consisting of fixtures and machinery in its place of business and an automobile, all valued by said accountants at $11,242.00, were sold by the receivers to the said William H. Lippincott for the price or sum of $2,400.00, from which was deducted his indebtedness to the company of $766.46. The said William H. Lippincott is now conducting business in the premises formerly occupied by said Nice & Schreiber Company, such as was formerly carried on by said company.

33. The accountant, though in duty bound, not having attempted by legal measures or otherwise to prevent the allowance of this base compromise, should therefore be charged with $11,242.00, being the value of the fixtures conveyed by the account-

ants to Lippincott, less $2400.00, being the amount paid therefor, plus $766.46, being the indebtedness of Lippincott to the company, and which claim the accountants waived, or a total charge of $9,608.46.

As to the sixth exception mentioned on page three herein:

34. The appraisers appointed in the receivership heretofore mentioned, showed that there was cash in bank on April 28, 1926, the date of the filing of the petition for the appointment of receivers, the sum of $41,156.39. The receivers in their report alleged that there was $36,383.58 cash in banks to the credit of the Nice & Schreiber Company on April 28, 1926. The executor was grossly careless, indiscreet, negligent and indifferent in allowing the passing of the first receivers' account without requiring the receivers to account for said discrepancy.

35. The executor, in its bill for the appointment of receivers, listed the following assets:

EXHIBIT "A."

Assets		
CURRENT ASSETS		
Cash on hand	350.00	
Accounts Receivable	186,178.91	
Advances to Shippers for Merchandise in Transit	18,973.00	
Advances to Employees	1,987.72	
Inventories—Merchandise & Supplies	67,561.99	
Total Current Assets		275,051.62

OUTSIDE INVESTMENTS		
Delaware Storage & Freezing Co. stocks	500.00	
Girard Family Stores Co. stock	500.00	
Real Estate—Glassboro, N. J.	1,456.15	
Total Outside Investments		2,456.15
FIXED ASSETS		
Machinery and Fixtures	6,171.92	
Automobiles	3,627.00	
Improvements to Leased Property	9,753.05	
Total Fixed Assets	19,551.97	
Less—Reserves for Depreciation	8,309.80	
Net Book Value of Fixed Assets		11,242.17
DEFERRED CHARGES		
Prepaid Insuranc	732.32	
Prepaid Interest	64.24	
Total Deferred Charges		796.56
Total Assets		289,546.50

The receivers accounted for only $160,013.27. The executor was grossly careless, indiscreet, negligent and indifferent in allowing the passing of the first receivers' account without requiring the receivers to account for said discrepancy.

SAMUEL MORRIS,
Proctor for Exceptants.

ORDER TO AMEND AMENDED EXCEPTIONS TO FINAL ACCOUNT.

(Filed and recorded Feby. 16, 1929.)

ATLANTIC COUNTY ORPHANS' COURT.

In the matter of the ESTATE OF WINFIELD S. NICE, deceased.	Order to Amend Amended Exceptions to Final Account.

It is, on this 13th day of Feb., 1929, ordered that paragraph three (3) on page four (4) of the amended exceptions to the final account be stricken, and instead thereof the following paragraph be substituted as an amendment.

"3. On the second day of March, 1926, the day preceding the death of the testator, the financial condition of the Nice & Schreiber Company, according to the executor's statement in its petition for receivership hereinafter mentioned, was as follows:

Assets

CURRENT ASSETS	
Cash on hand	$350.00
Accounts Receivable	186,178.91
Advances to Shippers for Merchandise in Transit	18,973.00
Advances to Employees	1,987.72

Inventories — Merchandise & Supplies	67,561.99	
Total Current Assets		$275,051.62
OUTSIDE INVESTMENTS		
Delaware Storage & Freezing Co. stocks	$500.00	
Girard Family Stores Co. stock	500.00	
Real Estate—Glassboro, N. J.	1,456.15	
Total Outside Investments		2,456.15
FIXED ASSETS		
Machinery and Fixtures	$6,171.92	
Automobiles	3,627.00	
Improvements to Leased Property	9,753.05	
Total Fixed Assets	$19,551.97	
Less — Reserves for Depreciation	8,309.80	
Net Book Value of Fixed Assets		11,242.17
DEFERRED CHARGES		
Prepaid Insurance	732.32	
Prepaid Interest	64.24	
Total Defered Charges		796.56
Total Assets		$289,546.50
Liabilities		
Current Liabilities		
Bank Overdrafts	$15,743.20	
Collateral Loans	30,878.30	
Notes Payable	52,549.00	
Loans Payable	12,395.67	

Accounts Payable	34,822.48		
Freight Bills Payable	1,765.31		
Due Warehouses —Storage Chgs., etc.	37,872.44		
Due to Officers	16,913.12		
Accrued Payroll	306.43		
Accrued Rent	22.22		
Reserve for Fed. Income Tax, 1925	654.98		
Total Current Liabilities		$203,923.15	
CAPITAL STOCK & DEFICIT			
Common Stock—authorized	$150,000.		
Common Stock—unissued	47,400.		
Common Stock—issued and outstndg.	102,600.		
Deficit	16,976.65		
Capital stock less deficit		85,623.35	
Total liabilities, capital & defic.		$289,546.50	$289,546.50

The stock owned by the said Winfield S. Nice was worth, according to the company's books, on the aforesaid date the sum of $85,039.20 or $83.45 per share."

It is further ordered that paragraph nineteen on page ten of said amended exceptions to final ac-

count be stricken and instead thereof the following paragraph be substituted as an amendment:

"19. Thus, out of a fund of $160,137.95 received and collected by the receivers from good accounts receivable, from which sum $117,058.64 in provable debts were satisfied, their predatory instinct, unhampered by the executor, cost the estate the following for administration expense:

First Account			
Receivers	John Weaver	$7,500.00	
	Sidney E. Smith	7,500.00	
Attorneys	Russell C. Cooney	7,500.00	
	Alfred Davis	7,500.00	
Appraisers (3)		1,000.00	
Incidentals—clerk hire, etc.		203.00	
Master		3,500.00	
Total			$34,703.00
Second Account			
Receivers	John Weaver	$1,250.00	
	Sidney E. Smith	1,250.00	
Attorneys	Russell C. Cooney	1,250.00	
	Alfred Davis	1,250.00	
Master		750.00	
Total			5,750.00
Third Account			
Master		$500.00	500.00
Total Administration Expenses			$40,953.00"

WM. H. SMATHERS.
SAMUEL MORRIS.

OPINION.

(Filed March 22, 1929).

ATLANTIC COUNTY ORPHANS' COURT.

In the matter of the ESTATE OF WINFIELD S. NICE, deceased.	On Exceptions to the Account of the Trustee and Executor. Opinion.

The Executor has filed a final account in the above-entitled matter, praying for the allowance thereof, and also for the allowance of counsel fees and commissions. The next of kin make numerous objections and exceptions to the said account, the principal exception being, that the Executor imprudently brought into existence a needless receivership whereby the assets of the company of the deceased were wasted. The next of kin, therefore, except to the allowance of the account and pray that the Executor be surcharged with the loss to the estate by reason of the receivership, which loss amounts to $30,953.00, represented by fees allowed the Receiver and counsel for Receiver.

In March of 1926, and at the time of the death of the deceased, the Nice & Schreiber Company, of which the deceased was the President and majority stockholder, had assets of $289,546.23. The liabilities of the said Company were placed at $207,761.46.

On the 28th day of April, 1926, the date of the filing of the bill for the Receivers, the financial condition of the corporation remained practically unchanged from its condition as stated on March 2, 1926, with the exception that it had in cash in banks the sum of $41,156.39, which said sum, through the Executor's gross negligence and indifference to duty, was omitted, and the Executor in the said bill praying for the receivership, failed to disclose the true sum of cash on hand amounting to $41,156.39, but erroneously and improperly stated in the said bill praying for the receivership, that the company had cash on hand in banks amounting only to $350.00.

It appears from the testimony taken that the said sum of $41,156.39 was more than sufficient to pay the pressing obligations then outstanding against the company of the deceased. Notwithstanding the solvency of the company of the deceased, which solvency is admitted in the petition for the Receivers, the Executor, in its bill of complaint in the United States District Court for the District of Pennsylvania, did allege that there was only $350.00 in cash on hand and obtained the appointment of Receivers.

From an examination of the receivership records and the testimony taken, it appears that the Receivers did nothing more than to liquidate the assets of the said company by collecting the bills of account and paying the liabilities of the company.

This duty, in the opinion of the Court, was clearly the duty of the Executor. Had the Executor, prior to the filing of the bill for Receivers, caused the books of the Company of the deceased to be audited, such an audit would have revealed to the Executor that the company of the deceased had $41,156.39 in cash. As a result of the receivership, the Executor, the Corn Exchange National Bank and Trust Com-

pany was required to pay receivership fees and counsel fees in connection with the receivership in the sum of $30,953.00, which rightly belonged and should have gone to the next of kin.

In the opinion of the Court, the Executor was grossly careless and negligent in the administration of the said estate, and by reason of such negligence the Executor should, and is hereby surcharged with the loss sustained by the exceptants, by reason of the said receivership, in the sum of $30,953.00.

There will be no allowance of commission made to the Executor for the reasons set forth in the above opinion.

WM. H. SMATHERS,
Judge of the Atlantic County Orphans' Court.

DECREE PARTIALLY APPROVING ACCOUNT AND ADJUDICATING UPON EXCEPTIONS.

(Filed March 22, 1929.)

ATLANTIC COUNTY ORPHANS' COURT.

In the Matter of the Estate of Winfield S. Nice, deceased.	Decree partially approving Account and adjudicating upon Exceptions.

The Surrogate having audited and stated the account of the Corn Exchange National Bank & Trust Company, Executor of the Estate of Winfield S. Nice, and placed same on the files of his office twenty days previous to the twenty-eighth day of November, 1928, and having, on the day last aforesaid, reported the same to this Court for allowance and settlement and it having been proved to the satisfaction of the Court that notice of its intention to settle its said account on the twenty-eighth day of November, 1928, was given by said accountant, according to law; exceptions having been filed to said account by Catherine Grubb (Mrs. Charles M. Grubb), Mary E. Vetterlein (Mrs. Julius Vetterlein), Isabella F. Schreiber (Mrs. George Schreiber) and Deborah Seal (Mrs. John H. Seal), residuary legatees and heirs of Win-

field S. Nice, deceased, and the proofs and allegations of the parties having been heard and considered by the Court, and the Court being satisfied that the Executor was grossly negligent and indifferent in the management of the estate, in that it presented a petition to the United States District Court for the Eastern District of Pennsylvania, for the appointment of Receivers of the Nice & Schreiber Company, in which Company the Estate owned 1019 of the 1026 outstanding shares of stock of the Company, and which Company was admittedly solvent; that it alleged in said petition that the Nice & Schreiber Company had only $350.00 cash in bank, when, as a matter of fact, it had $41,156.39 cash in bank; that the Receivers were appointed for said Company as a result of said petition and allegation; that said receivership was needless and disastrous to the interests of the Estate; that the fees and expenses of said receivership amounted to $40,953.00 of which sum $35,000.00 was paid to the Receivers and counsel, and $3,500.00 to the Master, for fees; that the Estate sustained a loss of $30,953.00 as a result of said needless receivership which was caused by the gross carelessness, negligence and indifference of the Executor, and with which loss the Executor should be surcharged; and that there should be no further allowance of fees to the Executor or Proctor;

It is, on this 22nd day of March, 1929, ordered, adjudged and decreed that the exception first submitted be and the same is hereby allowed and that the Accountant be surcharged with the sum of $30,953.00; that the exception secondly submitted be and the same is hereby overruled, except as to the request that no further Executor's commission or counsel fee be allowed; that the exception thirdly submitted

be and the same is hereby allowed except insofar as same is inconsistent with the rulings on the first exception; that the exception fourthly submitted be and the same is hereby overruled; that the exception fifthly submitted be and the same is hereby overruled; that the exception sixthly submitted be and the same is hereby overruled;

And the Court, having examined said account and the vouchers and receipts for payments and disbursements claimed therein and having found same to be otherwise correct in all particulars;

It is, on this 22nd day of March, 1929, ordered, adjudged and decreed that the said account be re-stated in accordance with the foregoing and that as so restated, the said account be allowed and the entire sum including the amount which the Executor now has on hand, together with the amount for which it is surcharged, be disposed of according to law.

W. H. SMATHERS.

NOTICE OF APPEAL.

(Filed March 26, 1929.)

ATLANTIC COUNTY ORPHANS' COURT.

In the matter of the ESTATE OF WINFIELD S. NICE, deceased.	On Petition of Appeal. Notice of Appeal.

Corn Exchange National Bank and Trust Company, Executor of Winfield S. Nice, deceased, hereby appeals to the Prerogative Court from the following portions of the decree approving the account and adjudicating upon exceptions entered herein on the 22nd day of March, 1929, to wit:

(a) That portion ordering, adjudging and decreeing that the first exception submitted to the final account of Corn Exchange National Bank and Trust Company, Executor of the Estate of Winfield S. Nice, deceased, be allowed and that the accountant be surcharged with the sum of $30,953.

(b) That portion of said decree holding that the exception secondly submitted to said account be overruled except as to the request that no further Executor's commissions or counsel fee be allowed.

(c) That portion of said decree holding that the exception thirdly submitted be and the same is here-

by allowed, except insofar as the same is inconsistent with the rulings on the first exception.

(d) That portion of said decree ordering, adjudging and decreeing that the account of said accountant be re-stated, in accordance with the provisions of said decree and that as so re-stated the said account be allowed and the entire sum, including the amount which the Executor now has on hand, together with the amount for which it is sur-charged, be disposed of according to law.

Dated: Camden, N. J.,
March 25, 1929.

STARR, SUMMERILL & LLOYD,
Solicitors for and Proctors with Corn Exchange National Bank and Trust Company, Executor of Winfield S. Nice, deceased.

PETITION OF APPEAL.

(Filed April 11, 1930.)

NEW JERSEY PREROGATIVE COURT.

In the matter of the appeal of CORN EXCHANGE NATIONAL BANK AND TRUST COMPANY from an order of the Orphans' Court of the County of Atlantic allowing the account of the Corn Exchange National Bank and Trust Company, executor of the ESTATE OF WINFIELD S. NICE, deceased, and adjudicating exceptions filed thereto.	On Petition of Appeal. Petition of Appeal.

To the Ordinary of the State of New Jersey:

The petition of Corn Exchange National Bank and Trust Company, a banking corporation doing business in the City and County of Philadelphia and State of Pennsylvania, respectfully shows that:

1. The said Corn Exchange National Bank and Trust Company, executor under the last will and

testament of Winfield S. Nice, deceased, presented its account as such to the Orphans' Court of the County of Atlantic, and exceptions having been filed thereto by Catherine Grubb, Mary E. Vetterlein, Isabella F. Schreiber and Deborah Seal, residuary heirs and legatees of Winfield S. Nice, deceased, the said Orphans' Court, on the 22nd day of March, 1929, made its order sustaining the first exception submitted to said account and surcharging the said accountant with the sum of $30,953 and overruled the second exception submitted to said account, except as to the request that no further executor's commissions or counsel fee be allowed, and sustained the third exception submitted to said account insofar as the same was inconsistent with the ruling on the first exception, and ordering said account restated in accordance with the adjudication and exceptions so filed.

2. Your petitioner hereby appeals from the following portions of the aforesaid order:

(a) That portion ordering, adjudging and decreeing that the first exception submitted to the final account of Corn Exchange National Bank and Trust Company, executor of the estate of Winfield S. Nice, deceased, be allowed and that the accountant be surcharged with the sum of $30,953.

(b) That portion of said decree holding that the exception secondly submitted to said account be overruled, except as to the request that no further executor's commissions or counsel fee be allowed.

(c) That portion of said decree holding that the exception thirdly submitted be and the same is

hereby allowed, except insofar as the same is inconsistent with the rulings on the first exception.

(d) That portion of said decree ordering, adjudging and decreeing that the account of said accountant be re-stated, in accordance with the provisions of said decree, and that as so re-stated the said account be allowed and the entire sum, including the amount which the executor now has on hand, together with the amount for which it is surcharged, be disposed of according to law.

3. Your petitioner complains and alleges that the aforesaid order of the Orphans' Court of Atlantic County is erroneous, improper and illegal in the foregoing particulars, in that the said Orphans' Court of Atlantic County was not justified in holding that the said executor was grossly negligent and indifferent in the management of the estate in the presentation of a petition to the United States District Court for the Eastern District of Pennsylvania, for the appointment of receivers of the Nice & Schreiber Company, and that the said receivership was needless and disastrous to the interest of the estate and that the said estate sustained a loss of $30,953 as a result of said needless receivership caused by the gross carelessness, negligence and indifference of the said executor, and the said Orphans' Court was not justified in holding that the executor should be surcharged with said loss and that no further allowance of fees should be made to the executor or proctor, and upon the further grounds that it appeared from the testimony taken under the exceptions filed to said account, that the said executor was not grossly negligent or indifferent in the management of the estate in the par-

ticulars aforesaid, and that the said receivership was not needless and disastrous to the interest of the estate, and that the estate did not sustain a loss of $30,953, or any other sum, as a result of the said receivership; and the said testimony taken upon said exceptions also showed that the beneficiaries of said estate, who filed said exceptions, were represented by counsel at the time the receivership proceedings were initiated, which counsel participated in such proceedings which resulted in the appointment of said receivers, and that said counsel was appointed one of the receivers. And it further appeared from the testimony that the said executor acted in good faith and upon reasonable grounds in the application for the appointment of receivers and that the same was necessary for the preservation of the assets of the corporation, and that the facts, upon which said application was made, were truthfully stated in the petition filed therefor, and the order for the appointment of receiver was made by a Court of competent jurisdiction, after full investigation. And that the testimony showed that the beneficiaries, who filed exceptions to said account, were estopped from raising the objections upon which the said order appealed from was based. And it further appeared from the testimony that a general release was given by said beneficiaries, which was a bar to the claim made on their behalf, who filed the exceptions to surcharge the said executor by reason of any matter or thing connected with the appointment of the receivers or their conduct. And that the testimony also showed that the conduct of the receivers received the approval and sanction of the United States District Court, by whom they were appointed. And it further appeared from said testimony that the said executor did not fail to disclose the true financial condition of the said

corporation of Nice & Schreiber at the time the said petition was filed. And it also appeared from said testimony that it was not the duty of the executor to liquidate the assets of the Nice & Schreiber Company by collecting bills of account and paying the liabilities thereof.

4. Your petitioner, therefore, alleges that it is aggrieved by reason of the making of said order for the reasons herein stated.

Dated: Camden, New Jersey,
April 11, 1929.

STARR, SUMMERILL & LLOYD,
Proctors for and of Counsel with Appellant.

ANSWER TO PETITION OF APPEAL.

(Filed March 30, 1929.)

NEW JERSEY PREROGATIVE COURT.

In the matter of the appeal of CORN EXCHANGE NATIONAL BANK AND TRUST COMPANY, from an order of the Orphans' Court of the County of Atlantic allowing the account of the Corn Exchange National Bank and Trust Company, executor of the ESTATE OF WINFIELD S. NICE, deceased, and adjudicating exceptions filed thereto.	On Petition of Appeal. Answer to Petition of Appeal.

The answer of Catherine Grubb, Mary E. Vetterlein, Girard Trust Company, executor of the estate of Isabella F. Schreiber, and Deborah Seal, respondents, to the petition of appeal of the Corn Exchange National Bank and Trust Company, appellant, respectfully shows that:

1. The respondents admit the allegations shown

in paragraph one of the petition of appeal filed herein.

2. The respondents admit, as to paragraph two of said petition, that the appellant appeals from certain portions of the order of the Atlantic County Orphans' Court.

3. The respondents are advised, believe and submit that said decree is just and in accordance with law and deny that said decree or any part thereof is erroneous, improper or illegal, but, on the contrary, allege that said decree, in every part thereof, is legal, proper and correct.

They therefore pray that said decree may be in all things affirmed, with costs to be adjudged to these respondents.

SAMUEL MORRIS,
Proctor for and of Counsel with Respondents.

CONCLUSIONS.

(Filed Sept. 1, 1930.)

NEW JERSEY PREROGATIVE COURT.

In the matter of the appeal of CORN EXCHANGE NATIONAL BANK AND TRUST COMPANY, from an order of the Orphans' Court of the County of Atlantic allowing the account of the Corn Exchange National Bank and Trust Company, executor of the ESTATE OF WINFIELD S. NICE, deceased, and adjudicating exceptions filed thereto.

On Bill from the Atlantic County Orphans' Court.
Conclusions.

These conclusions are not to be published in the official or unofficial reports.

MR. SAMUEL MORRIS, proctor for respondents.

MESSRS. STARR, SUMMERILL & LLOYD, proctors for appellants.

INGERSOLL, V. C.:

The decree of the Atlantic County Orphans' Court, dated the twenty-second day of March, 1929, will be affirmed for the reasons stated by Judge Smathers in his opinion.

FINAL DECREE.

(Filed Sept. 13, 1930.)

NEW JERSEY PREROGATIVE COURT.

In the matter of the appeal of CORN EXCHANGE NATIONAL BANK AND TRUST COMPANY, from an order of the Orphans' Court of the County of Atlantic allowing the account of the Corn Exchange National Bank and Trust Company, executor of the ESTATE OF WINFIELD S. NICE, deceased, and adjudicating the exceptions filed thereto.	On Appeal from the Atlantic County Orphans' Court. Final Decree.

This cause coming on to be heard on appeal from the Atlantic County Orphans' Court, in the presence of Samuel Morris, Esq., proctor for respondents, and Hon. Lewis Starr, of the firm of Starr, Summerill & Lloyd, Esqs., proctor for appellants;

The Court having read and considered the transcript of the record brought up from the lower court, including the testimony and the exhibits offered in the court below, the amended exceptions

filed in this court by the respondents-exceptants, the additional testimony taken orally in open court and the stipulations of counsel; the Court being satisfied that the decree appealed from should be affirmed;

It is, on this 13th day of September, 1930, ordered, adjudged and decreed that the decree in the above-entitled cause of the Atlantic County Orphans' Court, dated the twenty-second day of March, 1929, be affirmed with costs; that the accountant, Corn Exchange National Bank and Trust Company, be surcharged with the sum of thirty thousand nine hundred fifty-three ($30,953.00) dollars, together with costs and interest from the date of the decree of the Atlantic County Orphans' Court.

E. R. WALKER,
C.

Respectfully advised,
R. H. INGERSOLL,
V. C.

LAST WILL AND TESTAMENT OF WINFIELD S. NICE.

I, WINFIELD S. NICE, of Atlantic City, New Jersey, being of sound mind, memory and understanding, do make, publish and declare this to be my Last Will and Testament, hereby revoking and setting aside all wills, codicils and testamentary writings by me at any time heretofore made.

FIRST: I direct that my just debts and funeral expenses be paid as soon as possible after my decease.

SECOND: I give, devise and bequeath unto my bookkeeper, CHARLES N. WESTON, in consideration of his faithful and long service with me, the sum of Ten Thousand Dollars ($10,000.00) absolutely, and free of Inheritance Taxes.

In the event of the death of the said CHARLES N. WESTON during my lifetime, I then give, devise and bequeath unto FANNY B. WESTON, his wife, the said sum of Ten Thousand Dollars ($10,000.00) as mentioned in the said paragraph of my Will, absolutely and free of Inheritance Taxes; and further, in the event of the death of the said CHARLES N. WESTON and his said wife, FANNY B. WESTON, during my lifetime, then the said sum of Ten Thousand Dollars ($10,000.00) shall go absolutely and free of Inheritance Taxes to their two daughters, MARY F. WESTON and FRANCES S. WESTON.

THIRD: I give, devise and bequeath unto my old employee, A. J. MIMNAGH, the sum of Five Thousand Dollars ($5,000.00) absolutely, and free of Inheritance Taxes, but if he shall die before me, then this provision shall be void.

FOURTH: I give, devise and bequeath unto MRS. A. J. GOLDEN, the widow of Albert J. Golden, the sum of Five Thousand Dollars ($5,000.00) absolutely, and free of Inheritance Taxes.

FIFTH: All the rest, residue and remainder of my estate, real, personal and mixed, whatsoever and

wheresoever situate, I give, devise and bequeath the same in equal shares to my four sisters, MRS. CHARLES M. GRUBB, MRS. JULIUS VETTERLEIN, MRS. JOHN H. SEAL and MRS. GEORGE A. SCHREIBER, their heirs and assigns forever, and free of Inheritance Taxes.

SIXTH: I nominate, constitute and appoint THOMAS L. GASKILL and CORN EXCHANGE NATIONAL BANK OF PHILADELPHIA executors of my estate.

IN WITNESS WHEREOF, I have signed my name on the margin of the preceding page and have set my hand and seal at the end hereof, this 28 day of February A. D. 1923.

Winfield S. Nice (SEAL)

Signed, sealed, published and declared by the above named Testator as and for his Last Will and Testament, in our presence, who, in his presence, at his request and in the presence of each other, have hereunto set our names as subscribing witnesses.

Carl D. Bosch
1447 Princess Ave
Camden N J,
Edward W France
128 So— 36 St—

CODICIL TO LAST WILL AND TESTAMENT OF WINFIELD S. NICE

I, WINFIELD S. NICE, of Atlantic City, New Jersey, being of sound mind, memory and understanding, do make this codicil to my last Will and Testament, dated the twenty-eighth day of February, 1923.

FIRST: At the time of the execution of this codicil a considerable portion of my property is invested in the business of NICE & SCHREIBER CO. a New Jersey Corporation, of which I am the principal stockholder. On account of the valuable services rendered to me and to the said business by CHARLES N. WESTON and WILLIAM M. LIPPINCOTT, I authorize and direct my executors to continue them in the management of the business, and that neither of them be removed except for justifiable cause.

I further authorize and direct my executors to have an audit made of the business of NICE & SCHREIBER CO. as soon after my death as practicable by competent auditors and accountants for the purpose of determining the cash value of my holdings of the stock of said corporation. The goodwill of said business is to be wholly disregarded in determining the cash value aforesaid. I further authorize and direct that said CHARLES N. WESTON and WILLIAM M. LIPPINCOTT be permitted to purchase my holdings in said corporation in equal shares at the cash value thereof as so determined. In the event of the death of either of said CHARLES N. WESTON or WILLIAM M. LIPPINCOTT before this right of purchase becomes

operative, then the survivor of them shall have the right to buy the entire holdings of my estate in said corporation. Payment for the purchase of this stock is to be made in ten equal annual instalments, the first instalment to be paid one year from the date of my death. No interest is to be charged on unpaid instalments unless and until they become overdue, in which case interest at the rate of four (4%) per cent. annum shall be payable. My executors are herewith authorized and directed to take and accept the promissory note or notes of said CHARLES N. WESTON and WILLIAM M. LIPPINCOTT or the survivor of them for such unpaid balances, the stock of the corporation to be collateral security in connection with said notes. As payments are made by said CHARLES N. WESTON and said WILLIAM M. LIPPINCOTT, stock so held as collateral security is to be proportionately released and delivered to them respectively or to their respective successors in interest.

Said Charles N. Weston and William M. Lippincott shall be permitted to anticipate the payment of any such balances to such extent as they may desire. If the said Charles N. Weston or William M. Lippincott, or either of them, should at any time be unable to pay the said balance or any part thereof, I direct that my executors shall not proceed, in satisfaction of any debt or debts or judgment or judgments arising out of the non-payment of said balances or of any part thereof, against any property belonging to said Charles N. Weston and William M. Lippincott, or either of them, other than the stock of Nice & Schreiber Co. remaining as Collateral security for any unpaid balance or balances.

If the said CHARLES N. WESTON and WILLIAM M. LIPPINCOTT shall purchase my hold-

New Jersey State Library

ings in said corporation, as aforesaid, I strongly urge that they enter into an arrangement between themselves whereby if either should desire to sell or dispose of his share of said stock, he shall first give to the other the right or option to purchase his holdings at the book value thereof, and I further urge that said CHARLES N. WESTON and said WILLIAM M. LIPPINCOTT shall by will each give to the other the right or option within a reasonable period after his death to purchase such shares of the stock of the NICE & SCREIBER CO. as he shall have at the time of his decease at the book value thereof, or that they shall each make such provision for the disposition of said stock as will not adversely affect the rights or benefits of the survivor in the enjoyment of his holdings.

SECOND: In all other respects, I hereby confirm and ratify my said last Will and Testament as written.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this Twenty ninth day of December A. D. 1923.

Winfield S. Nice (Seal)

Signed, sealed, published and declared by the above named Testator, as and for a codicil to his last Will and Testament, in the presence of us, who, in his presence, at his request, and in the presence of each other, have hereunto set our names as subscribing witnesses.

Jane S. Gaue
Charles M Grubb

SECOND CODICIL TO LAST WILL AND TESTAMENT OF WINFIELD S. NICE

I, WINFIELD S. NICE, of Atlantic City, New Jersey, being of sound mind, memory and understanding, do make this second codicil to my last will and testament dated the twenty-eighth day of February, 1923.

FIRST: In addition to the gift, and bequest to my book-keeper, CHARLES N. WESTON, mentioned in the SECOND clause of my said will, I hereby give and bequeath unto said Charles N. Weston the further sum of Fifteen thousand ($15,000) dollars absolutely, free of all inheritance, succession and estate taxes. In the event that the said Charles N. Weston should predecease me, I then give and bequeath the said sum of Fifteen thousand ($15,000) dollars unto FANNY B. WESTON, his wife, absolutely, and free and clear of inheritance, succession and estate taxes. In the event that the said Charles N. Weston and the said Fanny B. Weston should predecease me, then the said sum of Fifteen thousand ($15,000) dollars, mentioned above, shall pass absolutely and free of inheritance, succession and estate taxes, equally to their two daughters Mary F. Weston and Frances S. Weston and their son Edward M. Weston.

SECOND: In all other respects I hereby confirm, ratify and republish my said last will and testament as written and the first codicil thereto dated the twenty-ninth day of December, 1923, as written.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this Fourteenth, 14 day of February A. D. 1924.

Winfield S Nice
W S Nice (SEAL)
E. G. Stoerrle
A Notary Public in and for New Jersey

My commission expires July 9th, 1928

Signed, sealed, published and declared by the above named testator, as and for a second codicil to his last Will and Testament, in the presence of us, who, in his presence, at his request, and in the presence of each other, have hereunto set our names as subscribing witnesses.

(NOTARIAL SEAL)

C. P. Schwendy Jr Alice E Strickland

THIRD CODICIL TO THE LAST WILL AND TESTAMENT OF WINFIELD S. NICE

I, WINFIELD S. NICE, domiciled in Atlantic City, New Jersey, being of sound mind, memory and understanding do make, publish and declare this as a third codicil to my Last Will and Testament dated the 28th day of February 1923.

FIRST: I hereby revoke all of the provisions contained in item or clause First of the first codi-

cil to my last will and testament which said codicil is dated the 29th day of December 1923.

SECOND: In all other respects I hereby confirm, ratify and republish my said last will and testament as written and the second codicil thereto dated the 14th day of February 1924 as written.

IN WITNESS WHEREOF I have hereunto set my hand and seal this Seventeen day of November A. D. 1924.

Winfield S. Nice (SEAL)

Signed, sealed, published and declared by the above named WINFIELD S. NICE, testator, as and for a third codicil to his last Will and Testament dated the 28th day of February 1923, in the presence of us, who, at his request, in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

Name Kathryne D. Curley
Address 314 N. Wayne Ave. Wayne Pa.
Name E. M. Holbrook —
Address 4618 Cedar Ave Phila.

AMENDED EXCEPTIONS TO FINAL ACCOUNT.

(Filed Oct. 25, 1929.)

NEW JERSEY PREROGATIVE COURT.

In the matter of the Estate of Winfield S. Nice, deceased.	Amended Exceptions to Final Account.

Catherine Grubb (Mrs. Charles M. Grubb), Mary E. Vetterlein (Mrs. Julius Vetterlein), of the City of Ventnor City, County of Atlantic and State of New Jersey; The Girard Trust Company, of Philadelphia, executor of the estate of Isabella F. Schreiber, deceased, and Deborah Seal (Mrs. John H. Seal), of Merion, County of Philadelphia and State of Pennsylvania, except to the final account filed by the Corn Exchange National Bank of Philadelphia now the Corn Exchange National Bank and Trust Company of Philadelphia, executor of the estate of Winfield S. Nice, as follows:

1. They except, as hereinafter particularly set forth in paragraphs one to thirty, inclusive, to the statement on page one of the petition wherein the accountant alleges that it has a balance of assets and cash in hand in the sum of $59,176.92. Said balance consists of stock which it alleges to be worth

$30,570.00, when, as a matter of fact, said stock is practically worthless, due to the executor's fraudulent conduct bad faith, gross carelessness and indifference in the management of the estate. It wasted the estate. It was guilty of a fraud and bad faith in having the Nice & Schreiber Company placed in the hands of receivers, as hereinafter particularly set forth. The executor acted fraudulently in filing a petition for receivers without disclosing the fact that the Nice & Schreiber Company had a very large sum in cash in banks, and in alleging that the financial condition of the company was substantially the same on April 28th as on March 2nd, 1926. The executor should be surcharged with the value of said stock and the loss which the exceptants have sustained.

2. They except to the allowance of $1,928.92 for executor's commission and counsel fees, because of the culpable maladministration of the estate as hereinafter set forth in paragraphs one to thirty, inclusive. They also except to any final allowance of executor's commissions or counsel fees and ask that any allowance heretofore made be returned to the estate because of its maladministration.

3. They except to the account as stated wherein the accountant on page five lists among "Securities now in hands of accountant" item "1019 shares of Nice & Schreiber Company @ $30.00— $30,570.00," because this stock is worthless due to bad faith, gross carelessness and indifference in the management of the estate. As hereinafter particularly set forth in paragraphs one to thirty, inclusive, the executor fraudulently caused unnecessary litigation disastrous to the value of said stock. Said

item of 1019 shares should have been made to appear as a charge and a prayer should have been made by the accountant for its allowance.

4. The accountant has not charged itself with the sum of $9,604.46, which should be charged against it as hereinafter particularly set forth in paragraphs thirty-one to thirty-three, inclusive. The executor was grossly careless and indifferent in the matter and imprudently and improperly acquiesced in the transfer of most of the fixed assets of the Nice & Schreiber Company in consideration of the withdrawal of a spurious claim against the company.

5. The executor was grossly careless, wanton and indifferent in the management of the estate in that it acquiesced in, consented and agreed to the allowance of the exorbitant and excessive fees for receivership proceedings as hereinafter particularly set forth in paragraphs one to thirty, inclusive, whereby the aforementioned stock was greatly diminished in value and because it was made practically worthless.

6. The exceptants charge that the executor maladministered the estate and was grossly careless and indifferent in its management in that it did not inquire into the shortage and discrepancy in the accounts of the receivers hereinafter named and the receivership hereinafter mentioned. This exception is hereinafter particularly set forth in paragraphs thirty-four to thirty-five, inclusive.

As to the first, second, third and fifth exceptions:

1. The exceptants are the next of kin of the late

Winfield S. Nice, who died testate on the third day of March, 1926, at his home in Ventnor, N. J.

2. At the time of his death, the said Winfield S. Nice, as aforesaid, was the owner of 1,019 shares of the 1,026 shares of the Nice & Schreiber Company stock then outstanding, of which said company he was, at the time of his death, and for a long time prior thereto had been, the president.

3. On the second day of March, 1926, the day preceding the death of the testator, the assets and liabilities of the Nice & Schreiber Company, according to the executor's statement in its petition for a receivership, hereinafter mentioned, were as follows:

ASSETS

CURRENT ASSETS		
Cash on hand	$350.00	
Accounts Receivable	186,178.91	
Advances to Shippers for Merchandise in Transit	18,973.00	
Advances to Employees	1,987.72	
Inventories—Merchandise & Supplies	67,561.99	
Total Current Assest		$275,051.62
OUTSIDE INVESTMENTS		
Delaware Storage & Freezing Co. stocks	$500.00	
Girard Family Stores Co. stock	500.00	
Real Estate—Glassboro, N. J.	1,456.15	
Total Outside Investments		2,456.15
FIXED ASSETS		
Machinery and Fixtures	$6,171.92	

Automobiles	3,627.00	
Improvements to Leased Property	9,753.05	
Total Fixed Assets	$19,551.97	
Less—Reserves for Depreciation	8,309.80	
Net Book Value of Fixed Assets		11,242.17
DEFERRED CHARGES		
Prepaid Insurance	$732.32	
Prepaid Interest	64.24	
Total Deferred Charges		796.56
Total Assets		$289,546.50

LIABILITIES

CURRENT LIABILITIES		
Bank Overdrafts	$15,743.20	
Collateral Loans	30,878.30	
Notes Payable	52,549.00	
Loans Payable	12,395.67	
Accounts Payable	34,822.48	
Freight Bills Payable	1,765.31	
Due Warehouse — Storage Chgs., etc.	37,872.44	
Accrued Payroll	306.43	
Due to Officers	16,913.12	
Accrued Rent	22.22	
Reserve for Fed. Income Tax, 1925	654.98	
Total Current Liabilities		$203,923.15

CAPITAL STOCK & DEFICIT			
Common Stock— authorized	$150,000.00		
Common Stock— unissued	47,400.00		
Common Stock— issued and outstanding	102,600.00		
Deficit	$16,976.65		
Capital stock less deficit		85,623.35	
Total liabilities, capital & deficit		$289,546.50	$289,546.50

The stock owned by the said Winfield S. Nice was worth, according to the company's books, on the aforesaid date, the sum of $85,039.20 or $83.45 per share.

4. On the twenty-eighth day of April, 1926, the date of the filing of the petition for receivers, the financial condition of the corporation remained practically unchanged from the statement set forth in the above paragraph three, except that the Nice & Schreiber Company had cash in banks in the sum of $41,156.39. The executor, in bad faith and fraudulently, obtained the appointment of the receivers for the Nice & Schreiber Company by misrepresenting in said petition to the Federal Court the financial condition of the said company, by falsely alleging in said petition that the financial condition of the Nice & Schreiber Company was substantially the same on April 28th, 1926, the date of the filing of the petition, as on March 2nd, 1926, the date of the rendition of the company's last financial state-

ment. Said allegation was materially false and fraudulent in that, while on March 2nd, 1926, the company had $350.00 cash in bank, as alleged in the financial statement annexed to the petition, yet on April 28th, 1926, the company had $41,156.39 cash in banks. The company had been liquidating its assets from March 2nd to April 28th, 1926. One H. L. Burton, with a claim of $13,873.49, was the only pressing creditor and, as aforesaid, there was ample cash on hand to satisfy him. A partial payment even on the Burton claim would have satisfied said creditor.

5. Notwithstanding the solvency of said Nice & Schreiber Company, and the fact was admitted in the petition for receivers, hereinafter mentioned, and the substantial excess of its quick assets above its liabilities, the said Corn Exchange National Bank, as executor of the estate of said Winfield S. Nice, deceased, and Charles N. Weston, as the owner of four shares of stock of said company, filed on the twenty-eighth day of April, 1926, their petition in the United States District Court for the District of Pennsylvania, wherein the Corn Exchange National Bank, as executor, alleged that the Nice & Schreiber Company was indebted to the estate of Winfield S. Nice in a sum exceeding $10,000.00 and prayed that a receiver or receivers in equity be appointed to carry on the business of said corporation and protect the creditors and stockholders. The same Charles N. Weston, after being joined with the Corn Exchange National Bank, in filing said petition for the appointment of receivers, filed, as secretary and treasurer of the Nice & Schreiber Company, an answer admitting what he alleged to be the truth of the petition, and also asked that a

receiver be appointed. Said answer was false and fraudulent and deceived the Federal Court which relied thereon.

5. (a) On the date of the appointment of the receivers, over $41,000.00 was transferred from the Union National Bank of Philadelphia to the Corn Exchange National Bank of Philadelphia, the executor. The Corn Exchange National Bank, the executor, knew of the existence of said fund before the receivers were appointed, and it caused said funds, after the appointment of the receivers, to be transferred, as aforesaid.

5. (b) If the executor did not know of the existence of said $41,000.00 cash in banks before the appointment of the receivers, it was guilty of a fraud and bad faith in failing, after the appointment of the receivers, to disclose to the Court the existence of said fund before the receivership needlessly progressed.

6. The said executor, as complainant, in the bill for receivers, made the following statement in its bill of complaint:

> "11. Complainants aver that the indebtedness of the respondent is represented by open accounts and unsecured obligations in writing, some of which have matured and the others of which are about to mature, and that because of the foregoing said respondent, while amply solvent is temporarily embarrassed, and if its business can be maintained and continued respondent will be able to pay in full all indebtedness and the business saved for the stockholders.

12. Complainants aver that a part of creditors to whom respondent is indebted are pressing for immediate payment of their claims, and threatening to enter suit and levy attachments and executions on the property of the respondent; that such actions if pursued will result in the sale of the assets of the corporation, so that the plant and property thereof will be disintegrated, with the consequent impossibility of conducting the business of the respondent."

7. There was no allegation in the bill aforesaid for the appointment of receivers, that any suit or suits had been commenced against the said company, nor was there any reason therein given why the said company could not, out of its quick assets, provide for any outstanding claim or claims.

8. Notwithstanding that the appointment of a receiver or receivers was sought to carry on the business, which was that of dealing in eggs, butter and poultry, by wholesale or in commission, two members of the Philadelphia Bar, *viz.:* John Weaver, Esq., and Sidney E. Smith, Esq., were selected and duly appointed as such receivers.

9. A. J. Davis, Esq., a young office associate of the said Sidney E. Smith, entered an appearance of record for the receivers, and Russell C. Cooney, Esq., also acted as counsel for the receivers but did not enter an appearance, although a fee equal to that of each of the receivers was allowed him by the Master. Four attorneys were thus engaged in attending to the details incidental to this receivership, and three appraisers were deemed necessary to prepare an inventory and appraisement of the

assets and liabilities of the company, although a report had been prepared by accountants and given to the officers of the company on March 2, 1926, less than two months before the filing of the aforesaid bill, in which report all items of assets and liabilities had been detailed and which, according to an allegation contained in said bill, remained practically unchanged at the time of the filing of the bill.

10. On July 16, 1926, and within about three months after their appointment, the receivers had collected, out of the quick assets, the sum of $138,141.60, and thereupon filed an interlocutory report wherein the appointment of a Master to make distribution of this fund was prayed for. Morton Z. Paul, Esq., of the Philadelphia Bar, was thereupon appointed by the Court, and, on October 11, 1926, filed his report. Said report was confirmed November 1, 1926. The receivers' supplemental account, filed October 11, 1926, showed that they had collected to October 7, 1926, the sum of $141,316.66.

11. No exceptional or professional skill was called for or exercised by said receivers and their attorneys in collecting the assets of the said Nice & Schreiber Company, and no litigation was required to realize upon the same, but notwithstanding these facts, the Master, in his report, filed as of October 11, 1926, awarded a dividend of but 75% upon proved claims aggregating $116,813.67 and allowed expenses and fees for administration as follows:

Receivers	John Weaver	$7,500.00	
	Sidney E. Smith	7,500.00	$15,000.00
Attorneys	A. J. Davis	7,500.00	
	Russell C. Cooney	7,500.00	15,000.00

Appraisers		1,000.00
Master	Morton Z. Paul	3,500.00
	Sundry	203.00
		$34,703.00

12. The executor was grossly careless, reckless, indifferent, negligent and imprudent in acquiescing in and consenting to the aforesaid outrageous and exorbitant fees without notifying any of the exceptants, and did not appeal therefrom or except thereto.

13. The receivers, on April 2, 1927, filed a second report of the receivership in which they showed that they had received, since the filing of the first account, the sum of $12,127.20.

14. The Master filed a second report on June 10, 1927, the fund for distribution being $30,390.52. Deducting the amount of the balance carried over from the first account, *viz.:* $18,388.00, additional collections of but $12,002.52 had at this time been made by the receivers. A further dividend of 21% was awarded and administration expenses of $5,750.00 were allowed, which latter sum included a fee of $750.00 for the Master and $5,000.00 for receivers and their attorneys. The executor was grossly careless and indifferent in the matter, and imprudently and improperly acquiesced in the allowance of these exorbitant fees and did not appeal therefrom. The executor, however, did file with the Master a faint formal protest against the allowance of $5,000.00 aforesaid.

14. (a) The receivers, in their third account, filed

May 23, 1928, showed that they had received, since the filing of the second account, the sum of $6,694.09.

15. A third report was filed by the Master on June 30, 1928, in which he reported a balance of $6,133.55 for distribution. The Master allowed himself $500.00 on this report.

16. Besides allowing the great majority of the creditors' claims, the Master held five meetings and considered and reported upon contested creditors' claims against the corporation aggregating approximately $2,560.00. These claims appear to have been amicably disposed of or withdrawn.

17. The only claim in which litigation was involved was that against Herbert P. Brown, who, it appears, was indebted to the corporation in the sum of about $35,000.00. A suit was entered by the receivers to recover this amount and defendant admitted a personal indebtedness of $1,900.00 and denied liability as to the balance on the ground that liability was incurred by a corporation bearing his name. Upon the trial of this issue the defendant did not appear and but one witness was called by the plaintiff, and therefore but little time was consumed and no extraordinary skill or effort required to secure judgment on what was practically an uncontested claim. Prior to the death of Winfield S. Nice, the defendant, Brown, had conveyed to him three parcels of improved real estate to secure the payment of this indebtedness. Brown satisfied this judgment for the sum of $6,000.00.

18. The services rendered by counsel called for no exceptional skill or effort and produced no ma-

terial increase in the assets of the corporation and the judgment was procured after the filing of the first account.

19. Thus, out of a fund of $160,137.95 received and collected by the receivers from good accounts receivable, from which sum $117,058.64 in provable debts were satisfied, their prediatory instinct, unhampered by the executor, cost the estate the following for administration expense:

First Account			
Receivers	John Weaver	$7,500.00	
	Sidney E. Smith	7,500.00	
Attorneys	Russell C. Cooney	7,500.00	
	Alfred Davis	7,500.00	
Appraisers (3)		1,000.00	
Incidentals—clerk hire, etc.		203.00	
Master		3,500.00	
Total			$34,703.00
Second Account			
Receivers	John Weaver	$1,250.00	
	Sidney E. Smith	1,250.00	
Attorneys	Russell C. Cooney	1,250.00	
	Alfred Davis	1,250.00	
Master		750.00	
Total			5,750.00
Third Account			
Master			500.00
			$40,953.00

20. The Master allowed each receiver and each attorney identical compensation; no distinction is made, as far as counsel were concerned, as to rela-

tive value of services rendered, nor does the Master specifically refer to work done that justifies a payment of $17,500.00 to counsel alone.

21. There was an imprudent and wanton allowance to the appraisers of a fee of $1,000.00 for preparing schedules of assets and liabilities essentially made up from the books of the corporation. No expert skill in valuation was called for. Through the gross carelessness, negligence and indifference of the executor and its inattention to the receivership, an exorbitant fee of $3,500.00 was allowed the Master on the first audit.

22. In his first report, the Master refers specifically to but one act of the receivers as calling for emphasized commendation and that was the deposit by them of the sum of $100,000.00 at 4% interest, whereby the assets of the estate were increased to the extent of $600.00. Apart from this the Master refers to their collection of a large sum in a relatively short time, as evidencing superior skill and effort.

23. The collection of the sum of $138,141.00 within a period of less than three months after their appointment, and without litigation, was due primarily to the fluid nature of the corporation's assets rather than any superior efficiency of the receivers. The only work apparently involved was that of collection and distribution.

24. The receivers did not carry on the business, except for its slight attention the first three weeks after their appointment. No returns from such a source are indicated in their accounts. In fact, in

their preliminary report they state that it is not advisable to do so, and the fixed assets of the corporation were sold to an employe for a net cash consideration of $1,634.00.

25. Notwithstanding the fact that the exceptants, the residuary legatees, were vitally interested in the conservation of the assets of the Nice & Schreiber Company, they were not advised by anyone of the institution of the receivership proceedings or of the filing of the accounts of the receivers and the reports of the Master; and the exceptants did not learn until long after said report had been confirmed, and were thereupon unable to appear and object to said proceedings or file exceptions to said report.

26. The exceptants did not directly or indirectly, by themselves, or through counsel, consent to the appointment of the receivers or their counsel, or to the allowance of the excessive fees.

27. The exceptants did not know with certainty the disastrous effect on the value of the 1,019 shares of the Nice & Schreiber Company stock until June 30, 1928, the date of the filing of the last report by the Master in the receivership proceedings.

28. A few weeks after the death of the testator, two bona fide cash offers of $40,000.00 and $42,000.00, respectively, for the 1,019 shares of stock of the Nice & Schreiber Company, were made to the executor, but these offers were refused by the executor, who demanded over $70,000.00.

29. The exceptants charge that the act of the executor, the Corn Exchange National Bank, in pro-

curing and causing the needless receivership of a company in which the estate was so vitally interested, was fraudulent and without cause or reason. Therefore, the executor should be charged with the loss of the value of said stock which the exceptants sustained because of said receivership, or with such other loss as this Court finds that the exceptants sustained.

30. The exceptants charge that it was the duty of the executor not to acquiesce in the allowance of the exorbitant fees of the receivers and their counsel, but to take exception thereto and appeal therefrom. It was also the duty of the executor to notify the exceptants of the receivership proceedings. Having failed in this duty, the executor should be charged with the loss the exceptants sustained thereby.

As to the fourth exception:

31. The business carried on by the said Nice & Schreiber Company had been long established and highly successful. In the year preceding the death of the said Winfield S. Nice, the said company had done a gross business exceeding four and one-half million dollars, and Charles N. Weston for many years had been connected with the said Winfield S. Nice and the said company as a bookkeeper and one William H. Lippincott had been employed by said company as a salesman.

32. The said William H. Lippincott was, at the time of the death of the said Winfield S. Nice, indebted to the said Nice & Schreiber Company in the sum of 766.46, and he, without basis, alleged that the said Nice & Schreiber Company was indebted to

him in the sum of $17,000.00. This alleged indebtedness does not appear as an item or liability in the accountant's report above referred to, nor does the Master's report show that any proof or attempted proof thereof was made. Upon the basis of the withdrawal of this unproved claim, the fixed assets of the said Nice & Schreiber Company, consisting of fixtures and machinery in its place of business and an automobile, all valued by said accountants at $11,242.00, were sold by the receivers to the said William H. Lippincott for the price or sum of $2400.00, from which was deducted his indebtedness to the company of $766.46. The said William H. Lippincott is now conducting business in the premises occupied by said Nice & Schreiber Company, such as was formerly carried on by said company

33. The accountant, though in duty bound, not having attempted by legal measures or otherwise to prevent the allowance of this base compromise, should therefore be charged with $11,242.00, being the value of the fixtures conveyed by the accountants to Lippincott, less $2400.00, being the amount paid therefor, plus $766.46, being the indebtedness of Lippincott to the company, and which claim the accountants waived, or a total charge of $9,608.46.

As to the sixth exception, mentioned on page three herein:

34. The appraisers appointed in the receivership heretofore mentioned, showed that there was cash in bank on April 28, 1926, the date of the filing of the petition for the appointment of receivers, the sum of $41,156.39. The receivers in their report alleged that there was $36,383.58 cash in banks to

the credit of the Nice & Schreiber Company on April 28, 1926. The executor was grossly careless, indiscreet, negligent and indifferent in allowing the passing of the first receivers' account without requiring the receivers to account for said discrepancy.

35. The executor, in its bill for the appointment of receivers, listed assets amounting to $289,546.50. The receivers accounted for only $160,013.27. The executor was grossly careless, indiscreet, negligent and indifferent in allowing the passing of the first receivers' account without requiring the receivers to account for said discrepancy.

Samuel Morris,
Proctor for Exceptants.

TESTIMONY.

ATLANTIC COUNTY ORPHANS' COURT.

In the matter of the estate of
WINFIELD S. NICE,
deceased.

Before HONORABLE WILLIAM H. SMATHERS, Judge, at May's Landing, New Jersey, Wednesday, January 20, 1929, at ten o'clock in the forenoon.

APPEARANCES:
SAMUEL MORRIS, ESQ., for the exceptants.
LEWIS STARR, ESQ., for the accountants.

Hearing before HONORABLE WILLIAM H. SMATHERS, Judge, at May's Landing, New Jersey, on Wednesday, January 30th, 1929, at 10 o'clock in the forenoon.

Mr. Starr: We are here, your Honor, in response to exceptions filed by Mr. Morris, representing the exceptants, in the W. S. Nice estate.

The Court: What is the nature of the exceptions?

Mr. Starr: There are several. One exception has to do with the propriety as to the act of the executor in applying for a receivership. The other is as to the conduct of the receivers in that suit.

So far as the first exception referred to is concerned, I have made arrangements with Mr. Morris, subject to your Honor's approval, that testimony on both sides, as to that exception, should be taken, and that then, as far as the other exceptions relating to the conduct of the receivers is concerned, we have a release given by the exceptants, to the receivers, which, we claim, is a bar to any action in this suit; and that then your Honor would determine whether that is a bar and, if it is a bar, then that would be the end of that phase of it as to these exceptions; and, if it is not a bar, then we are to have another day.

Mr. Morris: The exceptions are before your Honor. I think it would be advisable to give a sort of resumé of the facts in the case.

We seek here to surcharge the Corn Exchange National Bank by reason of maladministration of the estate entrusted to its care. The testator was Winfield S. Nice, who was a resident of and had his place of business in the City of Philadelphia, but died in Atlantic City, New Jersey. He was the president and leading man, in what was known as the Nice & Schreiber Company, butter and egg business, in Philadelphia, which company did a business of about four and a half million dollars a year. He owned 1019 of the 1026 shares of the Schreiber & Nice Company, which had a book value

of $85,000. The executor, the Corn Exchange National Bank, in its inventory said that the stock was worth, was placed at a value of $38,000, they placed that value on the stock, and which they admitted was a very low value. The testator died on March 3, 1926, and a few days before his death an accountant firm had gone over the accounts of the Nice & Schreiber Company and found that they had liquid assets of $289,000.00, most of which consisted in easily collectible debts. Their liabilities were supposed to be $207,000.00; their assets were $289,000.00. As it turned out, within three months, the receivers had collected $141,000.00, on these good account receivables. And $117,000.00 in debts were proven. The executor, when it took over the estate, said that the testator owned this interest in this big business.

On April 28th, less than a month—less than two months after the death of the testator, it petitioned the Federal Court in Philadelphia, for the appointment of a receiver, admitting in its petition, that the Nice & Schreiber Company was solvent and alleging that it had $289,000.00 in assets and $207,000.00 in liabilities, but the reason that it gave for this action was that creditors were pressing for payment. It is significant that in its bill of complaint for a receiver, it said that the business of the Nice & Schreiber Company had $350 cash in hand when, as a matter of fact, when that petition was filed, the company had $41,000 in cash in bank and they made a statement that it merely had $350 cash in bank on hand.

We will show that there were no pressing obligations. Perhaps there was one creditor who had a claim, or perhaps only one who could be said to be pressing, and that was Wilbur Burton, for $17,000,

and he could have been satisfied with a partial payment; and instead of calling in, satisfying the creditors and showing the condition of the company, they immediately petitioned for a receivership, which proved disastrous, as I will show your Honor.

The Court: How can the Court go beyond the actions of a Federal Judge in creating a receivership?

Mr. Morris: I will show you that the receivership was improper.

The Court: Unless it is alleged that the reasons as set forth in the petition were false and fraudulent, how can we go into it?

Mr. Morris: If your Honor wants to go into that, I can; otherwise I thought that I would reserve argument on the law, until later, under your ruling, but if your Honor wants to hear me now, I will argue it. Does your Honor wish to hear me now?

The Court: Yes.

Mr. Morris: In the first place, as I say, this is an action to surcharge the executor with maladministration.

I might add that this receivership cost the estate $40,000.

Mr. Starr: I agreed that today we should not go into the question of the conduct of the receivership, but only as to the propriety of the receivership application.

Mr. Morris: First of all, as to surcharging, the Court has a right to surcharge the executor with maladministration of the estate.

The Court: On what grounds?

Mr. Morris: For gross negligence, indifference, fraud or waste, and the executor of the estate may be held so liable. I say that its conduct involved gross carelessness in the administration of its duty.

The Court: Did this administrator or executor allege false statements in the petition, which enabled him to obtain a receivership?

Mr. Morris: Yes. I would not say that they were guilty of any fraud, but by reason of gross carelessness and indifference they did not inquire into the condition of the company and said in its petition for a receiver that they only had $350 cash in hand when as a matter of fact they had $41,000 on hand.

The Court: What they alleged in the petition—that was wrong?

Mr. Morris: They allege, as I say, that they had $350 in hand when, as a matter of fact, they had $41,000 on hand; and the creditor who was pressing had a claim of $14,000 and, if he was paid, he could have been satisfied if he was even partially paid. And, in addition to that, they said that they were afraid of attachments, etc., and whatnot; and that is not true.

The Court: I cannot pass on what they were afraid of.

Is it a fact that they allege that they only had $351 when as a matter of fact they had $41,000?

Mr. Morris: They alleged that they had cash $351, when as a matter of fact they had $41,000 in cash.

(Citations and argument.)

The Court: In connection with the question of the release that you name, is there a release?

Mr. Morris: Yes.

The Court: Signed by whom?

Mr. Morris: Judge Starr will produce the release, signed by the heirs, releasing the receivers, not the executors, but the receivers.

The Court: What is your other point?

Mr. Morris: Does your Honor want to hear me about the effect of the release?

The Court: As to only releasing the executors?

Mr. Morris: No, the receivers.

The Court: From what? Have you the release, and can I see it, Judge Starr?

(Paper handed to the Court by Judge Starr.)

Mr. Morris: Do you want to hear me on the release?

The Court: Go ahead.

Mr. Morris: On the release? On the effect of the release?

The Court: We will have to wait until Judge Starr presents it.

Mr. Morris: Does your Honor want me to go ahead with the case?

The Court: Yes. I would like to have the matter under headway so we can confine ourselves to the issue.

Mr. Starr: I would like to state for the record that the Corn Exchange National Bank was the executor of Mr. Nice's estate. He died March 3, 1926. After making some bequests in the will, the residuary estate consisted of stock of the Nice & Schreiber Company, practically all of it. I think there was some outstanding shares in the name of somebody else. That business has been profitable in the years past, but after Mr. Nice's death it was decided to sell the business to persons who had been employed there. Propositions were made back and forth and the executor was unable to sell the business or the stock in the corporation. Mr. Nice was president of the corporation. The corporation voted to liquidate; they took proceedings to liquidate because of inability to sell the stock and to turn the business over to anybody else, to any one who would buy it, and the trust officers of the Corn Exchange National Bank and one other person were appointed as liquidating trustees.

Before they got very far in the way of liquid-

ating peremptory demand was made by a creditor, Wilbur Burton, who claimed to have a claim of $17,000 against the corporation, and negotiations for the settlement of that claim between the attorneys for Mr. Burton and the corporation were made. The corporation was then represented by Mr. Davis, in Philadelphia, and Mr. Logan Gaskill represented the executor, the Corn Exchange National Bank. Finally a letter came from Mr. Burton, saying that the same was to be paid by ten o'clock that next morning otherwise application would be made to throw the company into bankruptcy. That created consternation and a general conference followed and was had as to what was the best method of conserving the assets for the benefit of the creditors and the stockholders, and it was unanimously decided that Mr. Davis, who represented the corporation, and Mr. Freeman, who was the trust officer, and Mr. Gaskill, who represented the bank, Mayor Weaver, John Weaver—representing the persons who are excepting to this account, the next of kin; between these parties a general conference was had which was generally understood from everybody concerned that the only thing that would save the financial status of that corporation was to have an equity receiver appointed so as to prevent the bank, the executor of the estate, from being thrown into Court; and this was done so that everybody could be paid.

Consequently the Corn Exchange National Bank, who was also a creditor of the Nice corporation, and a Mr. Weston, who was the secretary of the corporation, became the plaintiffs in this equity suit. The bill was perfected over night, and in order to prevent this creditor from getting any benefit by bankruptcy proceedings, the next morning, by con-

sent of everybody, application was made and consented to by the action of the corporation. The consent was given to the filing of a receivership and John Weaver, who was personal counsel for these exceptants, the beneficiaries under the will, and a gentleman, named Smith, were appointed receivers, with the consent of everybody, with the idea of conserving the assets so that the company would not be thrown into bankruptcy.

That is the reason why application was made for an equity receivership, and not because it was insolvent.

The Court: Is it a fact that you alleged in your petition that you only had this $351 in cash when as a matter of fact you had $40,000?

Mr. Starr: No. What happened was this: attached to the petition was an exhibit which was an audit by a firm of certified public accountants, as of the date of the death of Mr. Nice, on March 2, that shows cash on hand $350. There is no allegation of that was the status of the corporation at the time that the petition was filed.

The statement of the financial status of the company is this as it appears in paragraph 10 of the petition:

(Mr. Starr at this point reads paragraph ten of the petition):

And, in support of that, there is attached to the complaint a statement of the assets and liabilities with respect to the financial condition of the company at the time of Mr. Nice's death.

No appraisement was made. The matter came on

so suddenly and no appraisement was made of the assets at the time the petition was filed. They merely used the statement which had been obtained from the expert accountants on March 2nd.

There is no allegation in the bill that there was $40,000 cash on hand. Whether or not there was $40,000 on hand I do not know.

I think that it would be apparent from any testimony that might be given that there was not in bank that sum on deposit. Whether or not there was that amount on hand or not, the executor acted in good faith, with no fraud or carelessness; the executor acted in good faith, on the advice of counsel, in order to conserve the assets of this corporation, to prevent it being thrown into bankruptcy.

That is the statement with respect to the institution of receivership proceedings and in order to protect other persons who are now complaining, John Weaver was made receiver. So that they were represented all the way through the proceedings by Mr. Weaver.

Mr. Wilbur Burton's claim was disputed and the receivers denied that there was any liability. And these two gentlemen who were in duty bound to conserve the assets of the corporation acted in good faith without any idea of committing any wrong or fraud on the persons interested.

The Court: As I see it, the right to have this executor surcharged would depend upon whether or not it was a fact that, at the time you asked for this receivership, you had $40,000 on hand which could have been used in order to relieve the situation and pay the creditors the money due them.

Mr. Starr: I think that the testimony which will

be adduced will not justify that statement as far as we are concerned in this situation.

There were two audits, in Philadelphia, under the authority of the Court, with respect to the administration of the receivership. After the audits were all completed, and I might add that the Corn Exchange National Bank filed exceptions to some of the allowances which were claimed and which were dismissed by the Court, and after the audit had been made and approved, some of the persons who appear now objected and had some attorneys in Philadelphia make application, an informal application to Judge Dickinson of the United States District Court in Philadelphia, to have the audit and approval of the audit, opened so that they could file exceptions as to the allowances to the receiver and counsel.

An answer was filed by the receiver and counsel, and that was something in which the Corn Exchange National Bank had been in no way connected. They had made their objections and were overruled by the Court.

There was an informal hearing before Judge Dickinson with the receivers, counsel and parties in interest, and Judge Dickinson wrote a letter to counsel, a copy of which we have here, the purport of which is, as he suggested, that there ought to be some adjustment, some settlement, between the exceptants and the receivers and counsel.

As a result of that, negotiations were carried on between lawyers representing the Nice corporation and the receivers and counsel, as a result of which ten thousand dollars was refunded to these exceptants, and this release which your Honor has read was given by the exceptants to the receivers, and so forth, upon the payment of the ten thousand dollars.

That ten thousand dollars did not come into the estate or the corporation and, of course, in the ordinary run of events if it had been a refund it would have come to the estate or to this company, and not to these individuals. They released all interest they had, and therefore these persons who now claim made it impossible to collect from the receivers. They are now estopped from claiming moneys from the executors, by reason of this state of facts.

The Court: Let us hear testimony as to whether there were any assets.

Mr. Morris: This is a certified copy of the Federal receivership record, and the appraisers say, on page 24, in their inventory:

"Cash in bank, as of April 26th, Corn Exchange National Bank, $111.38; Union National Bank, $41,045.01."

There is an exemplified copy from the Federal Court.

The Court: As of what date?

Mr. Morris: That petition in bankruptcy was filed April 28th. That is the date on which the petition in bankruptcy was filed.

Mr. Starr: Do you offer that in evidence?

Mr. Morris: I suppose I have not started yet.

Mr. Starr: I have objected to the offering of that exemplified record. I object to it being offered in evidence.

The Court: It must be offered in evidence before I can rule on it.

Mr. Starr: In this proceeding the executor, the Corn Exchange National Bank, is not bound by the action taken by the persons not acting for them, consequently we are not bound by the acts of the appraisers or the accountant or anything of that kind. They are bound by the allegations in the bill of complaint, but for extraneous matters we are not.

The Court: Have you a copy of the bill?

Mr. Starr: Yes.

The Court: What does it allege as to cash on hand?

Mr. Starr: $350 cash on hand as of March 23.

Mr. Morris: They show that the conditions are the same as of the date of the filing of the petition.

The Court: Did the Corn Exchange National Bank admit that there was $41,000 in the Union National Bank in Philadelphia?

Mr. Starr: No.

The Court: Is this all the proof that you have

Mr. Morris: That is the receivership record. Do you want to hear from me as to whether or not that record can be admitted?

The Court: I don't think there is any question that it can be admitted.

Mr. Starr: Subject, of course, to our right to submit evidence rebutting the evidential force of matters against us for which we are in no wise responsible.

Mr. Morris: Does your Honor want me to prove my case?

The Court: Yes.

Mr. Morris: First of all, I find that I made a few typographical errors in figures and Judge Starr has consented that I change those figures as they appear in paragraph 3 of the accountant's exceptions, page 4, I have made some errors in figures and I would like to amend that at this time.

Mr. Starr: I understand there is not a lot of it there. Amend it so that we can have it. I have no objection to the amendment.

Mr. Morris: Suppose I do this now.

Mr. Starr: I do not see it is necessary to do that.

The Court: Have you any proof other than the record that there was $41,000 on deposit in the Union National Bank on that date?

Mr. Morris: I have the bookkeeper of the bank who knows that it was in the bank at that time.

The Court: Call him.

Mr. Morris: Do you want to hear him first?

The Court: I do not see that we need any proof except as to the question of whether or not they had this money on hand when they made that claim.

Mr. Morris: I would like to prove the petition and exceptions in their order.

The Court: I do not see any necessity for that. I am not going into the questoin as to whether or not the Corn Exchange National Bank made a mistake in judgment or anything like that. But one point of the case which I can see something in is whether or not they had this money on hand and could have paid that claim or taken that method to relieve the pressure of the suit. Then that, of course, throws us into the question of this release.

Mr. Morris: If your Honor please, as to that record I want to say I want to quote from Greenleaf, on evidence, page 523.

(Mr. Morris reads from Greenleaf on evidence.)

Mr. Morris: Do you have the records of the Nice & Schreiber Company?

Mr. Starr: Your request came yesterday morning and it was too late to have them here this morning, but we have the check book, if that will do any good. I brought that down.

Mr. Morris: The check book would not help me out.

The witness can testify from his memory.

TESTIMONY ON BEHALF OF THE EXCEPTANTS.

GEORGE H. BEDELL, called as witness on behalf of the exceptants, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Morris:

Q. What is your full name?
A. George H. Bedell.
Q. Where do you reside?
A. Collingswood, New Jersey.
Q. By whom are you now employed?
A. By Mr. Weinstein.
Q. Where?
A. 631 North Second Street, Philadelphia.
Q. Were you ever employed by the Nice & Schreiber Company in Philadelphia?
A. Yes.
Q. Was Mr. Winfield S. Nice the president of that company?
A. Yes.
Q. He is the decedent of this estate?
A. Yes.
Q. When were you employed by that company?
A. 1910.
Q. 1910?
A. Yes.
Q. 1910 until when?
A. Until the time that the receiver was appointed, and I worked a few months for the receiver collecting the money in.

Q. In what capacity were you employed?
A. Bookkeeper.
Q. Bookkeeper?
A. Yes.
Q. As bookkeeper do you know whether the Nice & Schreiber Company had cash in banks on April 28th, 1926, to the sum of $41,156.29?
A. I believe that is the amount that the receivers drew out when they were appointed.
Q. Did they have cash in bank?

Mr. Starr: This petition was sworn to on the 28th.

This is objected to. I think we ought to have some information as to the beginning of that date, as to when the deposits were made in order to show the relevancy of his testmony. He says that the money was drawn out by the receivers to that amount.

Q. (Repeated by the stenographer): Did they have cash in bank?
A. Yes.

Cross-examination.

By Mr. Starr:

Q. Did you keep the check book?
A. Yes.
Q. I show you a check book and ask you whether or not that is the check book that the corporation had and which was kept by you? (Book shown witness.)

Mr. Morris: Before the witness goes on does he say he knows they had that money in bank?

The Witness: There is the amount there.

Q. Just state whether this is the book of the corporation?

A. Yes.

Q. And kept by you?

A. Yes.

Q. This check book shows the amount and methods of deposit at various times, is that right?

A. Yes.

Q. I call your attention to page, here, and figures as follows, $2,064.96?

A. Yes.

Q. That represented a balance?

A. Yes, at that time.

Q. On the 26th of April, is that right?

A. Yes.

Q. April 26th?

A. Yes.

Q. Was that the morning of April 26th?

A. That was the morning of April 26th.

Q. The business was being conducted and there was no cessation in the business from the date you mentioned up until the time the receiver was appointed?

A. Yes, it was conducted.

Q. And the check book I show you—that is the check book of the Union National Bank?

A. Yes.

Q. And the active account of the corporation was kept in the Union National Bank?

A. Yes.

Q. What deposits were made on the 26th of April, 1926?

A. Let me look at it.

Q. Look at the book and tell us.

A. On the 26th, there was one deposit made, in the morning, April 26th, of $14,728.38. The afternoon deposit was $5932.65.

Q. The company was liquidating at that time?

A. No, sir.

Q. Was not?

A. No, sir.

Q. What was the deposit on April 26th, 1926?

A. The 26th?

Q. You have April 26th and 27th?

A. 27th?

Q. Yes.

A. The morning deposit was $5,604.36; the afternoon deposit was $741.90. Balance in there, of the 29th, at the end of the 27th, was $29,077.25.

Q. On the morning of the 28th what was the balance?

A. On the morning of the 28th there was deosited $13,000.00.

Q. Were there any deposits?

A. $29,000 was deposited.

Q. What were the deposits on the 28th?

A. The deposits on the 28th were $13,272.27.

Q. So that, with that deposit, there was ——

A. $42,344.52.

Q. That deposit on the 28th, or after that deposit was made on the 28th, what was in the bank—$42,-344.52?

A. Yes.

Q. Had any checks been drawn?

A. Yes.

Q. Against the various balances?

A. When I made these checks out that left a balance of—after the checks were left, after they were made out, of $18,871.38, after the obligations were paid out.

Q. When was that balance? That balance was in the afternoon of the 28th—the evening?

A. The evening of the 28th, balance of $18,871.38; then in the afternoon a deposit made, on the 28th, of $2,418.08.

Q. And from time to time, from the morning of the 26th of April, when the balance was $18,871.38, your checks were all drawn on this account?

A. Checks all drawn on this account.

Q. What was the total amount of checks drawn from the 26th, the morning of the 26th of April, 1926, until the evening of the 28th of April, 1926—total amount of checks?

A. On the 26th, the only checks drawn out were $52.00, no, let's see. I can't tell without a piece of paper.

Mr. Morris: While the witness is figuring I would like to note the death of one of the exceptants, Mrs. Schreiber, and substitute in her place her executor, or administration—I don't know just who it is but I think it is the Girard Trust Company.

Mr. Starr: I have no objection; so that we get the information to complete the record.

The Court: What is the name of this witness?

Mr. Morris: Mr. Bedell.

By the Court:

Q. Who was the secretary and treasurer of the company, Mr. Weston, who makes this affidavit?

Mr. Starr: He joined in the petition for the appointment of a receiver.

A. (Continuing): $5957.52, made out on the 26th, the checks.

Q. What about the 27th? What was the amount of checks made out then?

A. No checks made out then. The last check made out was April 27th, for $27.21; that has been included in there.

Q. What about April 28th, were any checks drawn?

A. No; 27th of April was the last check drawn, one check was drawn on the 27th.

The Court: Were you keeping this check book at that time?

The Witness: Yes.

The Court: Under whose directions?

The Witness: Mr. Weston's.

The Court: He was the secretary of the company?

The Witness: Yes.

The Court: At that time was the company being operated by the Corn Exchange National Bank as the executor?

The Witness: No, the Corn Exchange National Bank was not operating the business.

The Court: They were not?

The Witness: No, sir.

By Mr. Starr:

Q. Who was in active charge of the business?
A. Mr. Lippincott. He was the salesman and sold all merchandise, and Mr. Weston acted as secretary and treasurer.
Q. Mr. Weston was secretary and treasurer, and he was your boss?
A. Yes, he was directly over me.
Q. He was the one who directed you to keep these books?
A. Yes.
Q. May I have this check book marked in evidence for identification?

(Check book offered in evidence and marked Accountants' Exhibit #1.)

By Mr. Morris:

Q. Do the records show here when the Corn Exchange National Bank qualified as executor?

Mr. Morris: Do you have the date?

Mr. Starr (addressing Mr. Freeman): Have you the letters there, Mr. Freeman?

Mr. Freeman: No.

By Mr. Morris:

Q. Then do I understand it to be true that on April 28th, the date that the receivership was made of the Nice & Schreiber Company, by the Federal Court, that there was cash in bank to the credit of Nice & Schreiber Company, of $41,156.29?

Mr. Starr: Objected to. He asked that before. It is not redirect. I put on record the details, the exact date and times, and I don't think that it is proper examination.

The Court: What is the objection?

Mr. Starr: In the first place it is leading, and secondly it is a repetition of what was said before; and I have, in cross-examination, put figures, dates, and amounts, and it seems to me that if there is any discrepancy between the two, the items ——

The Court: Objection sustained.

By Mr. Morris:

Q. Can you tell me how much cash there was in bank to the credit of the Nice & Schreiber Company, on April 28th, 1926?

Mr. Starr: We offer the same objection.

The Court: He has already told you, $41,000.

Mr. Morris: Well, it is true then, is it?

The Court: I don't know whether it is true or not. He said so.

Mr. Morris: I don't know just what your Honor intends to do here.

I want to go on and prove my exceptions. I do not know just what your Honor wants me to do now. I understood that your Honor wanted to hear about this $41,000, and I put the witness on.

The Court: Is there anything else in his testimony that you want to bring out?

Mr. Morris: As to the $41,000. Is there any other question?

The Court: No; as to any other question?

Mr. Morris: I will ask him about the truth or falsity of the other matters.

By Mr. Morris:

Q. Do you know whether or not on or before April 28th, 1926, there were records there showing that the property of the Nice & Schreiber Company would be attached, be levied on and sold separately by various creditors?

Mr. Starr: That is objected to.

The Court: He doesn't know anyway. I think he has answered your question.

The Witness: I didn't answer the question.

Mr. Morris: He said he hasn't answered the question.

Mr. Starr: My first objection is that it is leading.

Mr. Morris: I withdraw the question.

By Mr. Morris:

Q. Was there any pressing creditors with claims

against the Nice & Schreiber Company, on or before April 28th, 1926?

A. There was not. There was not any pressing creditors.

Q. No pressing creditors?

A. No, sir.

Q. Did you know of the claim of Mr. Burton?

A. I did.

Q. Approximately, how much was that?

A. Around fourteen, fifteen or sixteen thousand dollars. I can't give the exact figures.

Q. Do you know whether or not he could have been satisfied with partial payment of his debt?

Mr. Starr: That is objected to as immaterial and irrelevant. The witness has not knowledge as to the payment of any creditor.

Mr. Morris: I asked him if he knows.

The Court: Ask him whether or not the Nice & Schreiber Company on the 28th of April, 1926, had sufficient money on hand to pay Mr. Burton's claim?

The Witness: Yes, they had.

By Mr. Morris:

Q. Were there any other pressing obligations?

A. No, sir.

Q. On or before that date?

A. No, sir, none whatever.

Q. Do you know of any reason why the Nice & Schreiber Company should have been put in the hands of the receiver?

A. No, I do not.

Mr. Starr: That is objected to as irrelevant.

Q. Were you as bookkeeper ——

Mr. Starr: Do you withdraw the question?

Mr. Morris: No.

The Court: I sustain the objection.

By Mr. Morris:

Q. Were you, as bookkeeper, consulted by the Corn Exchange National Bank, or Mr. Freeman, its vice-president, or any other officer of the Corn Exchange National Bank, as to the propriety or the necessity for a receivership?

A. No, I was not.

Q. You say you were in charge of the books of the Nice & Schreiber Company?

A. Yes.

Q. Were you at any time, on or before April 28th, 1926, consulted as to the company's financial condition by the Corn Exchange National Bank, or any other persons?

A. No, sir.

Q. If you had been consulted by them would you have informed them that the receivership was not necessary?

Mr. Starr: Objected to.

The Court: Objection sustained.

A. Yes.

Q. Do you know of any writ of attachment made

against the Nice & Schreiber Company by reason of a claim that the Nice & Schreiber Company owed creditors?

A. No, sir.

Q. There were none?

A. No, sir.

Q. What was the nature of the accounts receivable which the Nice & Schreiber Company had, on or before April 28th, 1926?

A. How much accounts receivable?

Q. No, what was the nature of accounts receivable—were they good accounts receivable, or were they all poor accounts?

A. All good, quick assets, every one of them.

The Court: How much did this receivership cost this estate?

Mr. Morris: $40,000—thirty-nine thousand dollars and one thousand dollars in fees.

The Court: I don't want to know about—I want to know figures.

Mr. Morris: The attorneys took $39,000 on the first account.

Mr. Starr: I think the Court should say ——

The Court: I want to know the cost of the receivership to the estate. I do not want to be told who received it, I want just the figures.

Mr. Morris: On page 11 of my exceptions I show the total administration expense—$40,953.00. That is proved by the receivership records. Does your Honor want to know how that is made up?

The Court: No.

The Witness: They were all good, except one one account.

The Court: I do not think that it makes any difference about these accounts receivable.

By Mr. Morris:

Q. This was a butter and egg business?
A. Yes, sir.
Q. Who were the receivers that were appointed —all lawyers, weren't they?
A. Mr. Weaver was one, and Mr. Smith.
Q. Who were their counsel?
A. Mr. Davis and Mr. Conwell, I think.
Q. These lawyers were all associates of the receivers?
A. Yes.
Q. They were in their offices?
A. Yes.
Q. Did they carry on the business?
A. No, sir.

Mr. Starr: I object to it. It is immaterial it seems to me.

The Court: I do not see anything in the proposition except: did the executor, through carelessness, indifference, or neglect, file a petition, alleging that it had $300 in cash when as a matter of fact it had $40,000 in cash alleging as the reason for the petition that it was a pressing claim of $14,000, which by inference they could not pay; when, as a matter of fact, they could pay and cost the estate

$40,000 in fees, by that proposition. And you have that, as I understand, in the case already.

Mr. Morris: Then there is no use my going on any further.

Are you through with the witness?

Mr. Starr: Yes, I am through with the witness.

(Witness excused.)

Mr. Morris: I would like the record to be completed.

The Court: I do not understand what you mean by "completed."

Mr. Morris: So that I prove my exceptions. I would like to prove my exceptions.

The Court: What are they?

Mr. Morris: The allegations. I have not proved yet that the exceptants are of the next of kin. I haven't proved that yet.

Mr. Starr: We will admit that.

The Court: You may stipulate it.

Mr. Morris: It is stipulated that the exceptants are the next of kin of W. S. Nice, who died March 2nd, 1926, at his home in Ventnor City, New Jersey.

That at the time of his death, that Mr. Nice was

the owner of 1019 shares out of the 1026 shares, of the Nice & Schreiber Company stock, then outstanding, of which said company he was, at the time of his death and for a long time prior thereto, had been the president.

On the 2nd day of March, 1926, the day preceding the death of the testator, the assets of the Nice & Schreiber Company were as shown on page 15 and 16 of the exceptions.

Mr. Starr: If the figures given, are in accordance with the account attached to the bill we are bound by that.

Mr. Morris: The figures are the same as the figures shown in the executor's petition for the appointment of a receiver, totalling $289,546.50.

The said stock, owned by the late W. S. Nice, had a book value of $85,000.

The Court: Stipulate on the record the date that the Corn Exchange National Bank was qualified as executor.

Mr. Morris: I think, if your Honor please, if I might say a few words, I think that the record should show the book value and the inventory value.

The Court: Why?

Mr. Morris: To show that the stock was valuable, was worth some money.

The Court: Assume that it was. Assume that it is valueless today, do you contend that the executor, the Corn Exchange National Bank, is responsible for that?

Mr. Morris: If the stock was valuable at that time and the company had not gone into the hands of a receiver the stock would still be valuable as it was then.

Mr. Starr: That does not necessarily follow.

Mr. Morris: The receivership was what wasted this estate.

The Court: Perhaps the death of Mr. Nice and his loss to the company is what depreciated the stock.

Mr. Morris: The executor was offered $40,000 for the stock.

The Court: Suppose the executor did not take it. Are you going to hold the executor responsible for that?

Mr. Morris: I think it should be held responsible for the stock that it wasted. The cases have so held. I will give the Court the citations.

The Court: Have you any record when the Corn Exchange National Bank took over the direction of this business as executor?

Mr. Starr: We will furnish that. During the noon recess we will ascertain when they qualified.

The Court: The petition does not say.

Mr. Starr: No; they didn't take over the business. It had a corporate existence. As executors they took title to the stock.

Mr. Morris: They had a right to inquire into its condition. May I put in the value of the stock?

Mr. Starr: We do not agree to that.

Mr. Morris: The record offered in evidence shows that it had a book value of $85,000, the receivership record.

This entire record is in evidence, and more particularly, would I like to offer here, in stipulation, the second part of your account.

Mr. Starr: We are not bound by that but by what is in the bill.

Mr. Morris: That is what I am talking about. Here it says $85,000. All the facts in the petition for the appointment of the receivers are also stipulated herein.

Mr. Starr: That is all right. We are bound by that.

Mr. Morris: The bill for the appointment of a receiver was filed April 28th, 1926, and as shown on page 24—will you allow the fact that it had $41,000 at that time?

Mr. Starr: It doesn't say that anywheres in that record.

Mr. Morris: The receivership record.

Mr. Starr: We do not agree to that.

Mr. Morris: That is in evidence, anyway.

The Corn Exchange National Bank, as executor of the estate of W. S. Nice, deceased, and Charles N. Weston, as the owner of four shares of stock of said company, filed their bill of complaint for a receiver in the United States District Court for the the Eastern District of Pennsylvania. That has been referred to.

The Court: How are you going to go behind the affidavit made by the secretary and treasurer of the company and hold the executor of this man's estate responsible for a mis-statement of fact sworn to by the secretary of the company?

Mr. Morris: If your Honor please, if the defendant had exercised any reasonable care or judgment, the executor or one of its executor's officers would have gone down to the business and looked at the books and inquired of the agent, as Mr. Bedell said, the assistant, that if he had been asked he would have been able to show these people that this company had over $41,000 in cash in bank on the date that the receivership was made.

The Court: What further inquiry would you require of the executor than to make inquiry of the secretary and treasurer and have him make an affidavit as to the $351 in cash?

Mr. Morris: They could have looked at the books.

The Court: That does have some significance. I had fixed in mind that the secretary was running and operating the business.

Mr. Morris: They were charged with responsibility for doing it.

The Court: Do you take the position that they were standing in the shoes of one of the stockholders of this company?

Mr. Morris: If your Honor please, if I may say this, this executor was not acting as executor of an individual who owned ten shares of stock. Mr. Nice was the main stockholder, was the main man. He owned 1019 shares out of 1026 shares, and the other seven shares were held merely for the purpose of having a corporation.

The Court: What could he do?

Mr. Morris: This was the main asset. This was their business. It is the same as if it were a partnership. It was a closed corporation.

The Court: It was a corporation?

Mr. Morris: Yes.

The Court: He was simply one director and had the voice of one director.

Mr. Morris: Which one had the voice of one director?

The Court: The deceased.

Mr. Morris: He controlled it.

The Court: How could his administrator or executor rise any higher than he could?

Mr. Morris: He controlled the business. Certainly Mr. Weston who controlled but seven shares

could not have managed that business, exclusive of the testator, in his lifetime.

The Court: The voice only began at the direction of the directors. He was one of three directors.

Mr. Morris: Were they so helpless that they could not go down to look at the books? Suppose the secretary and treasurer had been guilty of fraud or misconduct and that he was striving to take this business away. Suppose he had said to the Corn Exchange National Bank, "we do not have anything. We only have two cents in the treasury, and no bills collectible. We have nothing." Would they be justified in accepting that statement? Don't you think the proper thing to have done would be for the executor to say, "let us see your books. Let us verify what you say"?

I do not think, of course, that this executor was bound by everything that Mr. Weston told them. Suppose he told them that the Nice & Schreiber Company had failed two years ago, that the assets were transferred long ago? Suppose he said, "You have no interest in this company." Would they in that case be bound by that?

I would like more particularly to show the situation on page 5 of the receivership record that A. J. Davis, an office associate of Sidney E. Smith, entered an appearance of record for the receivers; and Russell C. Cooney, also acted as counsel for the receivers, and did not enter an appearance, although a fee equal to that of each of the receivers was allowed him by the Master.

Mr. Starr: That is immaterial.

The Court: I think so too. I do not feel I can allow that to go into the record.

Mr. Morris: Will you allow me an exception?

The Court: All right. Exception allowed.

Mr. Morris: On July 16th, 1926, and within three months after the appointment of the receivers, the receivers had collected out of the quick assets $138,-141.60, as shown on page 46 of the receivership record.

Mr. Starr: Objected to as immaterial.

The Court: It seems so.

Mr. Morris: Will you allow that to go in?

The Court: No.

Mr. Morris: Will you allow me an exceptoin?

The Court: Yes.

Mr. Morris: Will your Honor allow that to be proved from the record?

The Court: I do not think that it is material at all. That is the reason that I have tried to have you come to one point in your case and then rest your case.

Mr. Morris: Can I go ahead and prove my case, take the exceptions on, or otherwise, and offer my proofs?

The Court: Yes.

Mr. Morris: Does the Court grant an exception to its refusal to my offer to prove that on July 16, 1926, that within about three months of the appointment of the receivers, the receivers had collected out of the quick assets the sum of $138,141.60.

Mr. Starr: That is objected to. That is a stipulation and not on the record, and I do not see that it is material.

Mr. Morris: This is for the purpose of stipulation, or to prove it by the receivership record.

The Court: What is your purpose in attempting to stipulate what is already in evidence in a Federal Court record?

Mr. Morris: Then the entire record is in evidence?

The Court: You had it admitted.

Mr. Morris: I thought that it ought to be particulary noted, to have it admitted in proper order. I would like to prove at this time that the heirs never knew about this receivership until long after the allowance of the first fee, of $30,000, to the receivers.

The Court: All right.

Mr. Starr: I suppose that he wants to prove that fact. But if he is permitted to do it, I do not think it is material, I do not think it is a question material to the issue of the receivership.

The Court: What materiality has it?

Mr. Morris: I say that this receiver, this executor, put this man's assets of the company, to wit, the stock of the company, in the hands of the receiver without notifying or getting in touch with the heirs to see what their opinion might be in the matter.

The Court: I think that that is proper. Can you stipulate that the officers of the Corn Exchange National Bank knew that or not?

Mr. Starr: All that we know is that Mr. John Weaver represented them, was one of the receivers and a party to the appointment of the receivers.

Where is that letter (addressing Mr. Freeman)?

Mr. Freeman: I have it.

The Court: What about the proposition that John Weaver was their attorney?

Mr. Morris: Not for this purpose.

The Court: For what purpose?

Mr. Morris: Not for the purpose of putting them into the hands of a receiver.

Mr. Starr: Here is a letter, signed by the next of kin, dated March 22, 1926, addressed to Mr. Weaver:

"March 22, 1926.

We, the undersigned, give Mr. John Weaver, attorney, power to represent the heirs and direct

the affairs of the estate of W. S. Nice until the business is settled or until such time as this authority may be withdrawn.

Mary E. Vetterlein (seal)
Isabelle T. Schreiber (seal)
Kathryn A. Grubb (seal)
Emma D. Seal

Witness:
George Wm. H. Potter

State of New Jersey }
County of Atlantic } ss.

Be it remembered that on this 22nd day of March, 1926, before me a Notary Public in and for the State of New Jersey, personally appeared Mary E. Vetterlein, Isabella T. Schreiber, Kathryn A. Grubb and Emma D. Seal, who I am satisfied are the signers who acknowledged they signed the above document.

George Wm. H. Potter
(SEAL)."

Mr. Starr: That was signed by all these people whose names I have just read.

(Admitted in evidence, marked Accountants' Exhibit No. 2.)

(At this point of the proceedings, Mary E. Grubb, upon being in the witness box, was interrogated as follows): (Not yet sworn.)

By Mr. Morris:

Q. Have you been sworn?

The Court: I do not see any use or purpose of taking her testimony in view of the fact that she was one among those who appointed Mr. Weaver, her attorney, to take care of these proceedings as well as agreeing to that. Under that state of fact how is she going to get away from that?

Mr. Starr: That was signed by Catherine Grubb, your mother? (Addressing Mary E. Grubb.)

A. Mary E. Grubb, yes. The bill was not to be prepared unless Mr. Freeman brought down the waiver, the waiver of fifteen thousand dollars, under the codicil and because of that we engaged Mr. Weaver, and Mr. Weaver charged him with fraud.

Mr. Starr: I move that that be stricken out.

The Court: Mrs. Grubb has not yet been sworn.

Mr. Starr: I didn't know that.

Mr. Morris: Can I have Miss Grubb sworn, and show why, for what purpose, Weaver was appointed?

Mrs. Mary E. Grubb, sworn.

The Court: There was an appointment. Why try to go behind that?

Mr. Morris: I still think that we are not bound by it. I do not think that Mr. Weaver could go in

and assign this whole business for this. I do not think that that is an excuse for the Corn Exchange National Bank's negligence.

The Court: The point that you attempt to make by this witness is that this proceeding was taken without their knowledge, and so forth? Is that what you want to show?

Mr. Morris: Yes.

The Court: There is in evidence a written instrument whereby these people appointed and constituted John Weaver, as their attorney, and the Corn Exchange National Bank consulted him so what is the use of putting in testimony to the effect that you were not consulted?

Mr. Morris: Then your Honor will allow me an exception to your refusal to admit in evidence the testimony as to the lack of knowledge on the part of the heirs, as to the receivership proceedings, or as to the maladministration of the W. S. Nice estate?

The Court: No. They did not know anything about it but their attorney did.

Mr. Morris: Has that been offered in evidence?

Mr. Starr: No, you can offer it in evidence.

Mr. Morris: I do not want it.

Mr. Starr: I submitted it to you for your examination.

Mr. Morris: I am not going to make any formal objection to it, if you want it in. I would like to prove by Mr. Grubb, that offers were made for this stock shortly to the receivership, a tentative offer of $41,000 was made to Mr. Freeman, the executor, $41,000 for this stock, and that this offer was refused and that another tentative offer was made for $42,000 for the stock.

The Court: I will permit you to put that in.

Charles M. Grubb, called as a witness on behalf of the exceptants, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Morris:

Q. Where do you reside?
A. In Ventnor, New Jersey.
Q. Are you the husband of Catherine Grubb, one of the exceptants?
A. I am.
Q. Do you know whether or not Mr. Freeman, the Vice-president of the Corn-Exchange National Bank, and the executor of the estate of Winfield S. Nice, the deceased, was offered any money for these 1019 shares of stock of the Nice and Schreiber Company, just prior to the receivership?

Mr. Starr: Objected to.

A. Yes.

Mr. Starr: There is nothing to show that this witness has any personal knowledge.

The Court: I will let him say yes or no.

By Mr. Morris:

Q. Do you know?
A. Yes.
Q. Did Mr. Freeman tell you?
A. Yes.
Q. What did he tell you about the offer, what his offer was?
A. About $42,000, from Mr. Lippincott, and $43,000 from Mr. Burton, and then he said that their security was not good enough.
Q. Mr. Freeman said that?
A. Yes, that the bank security—could not give bank security.
Q. How much did you offer Mr. Freeman for that stock?
A. I don't know.

Mr. Starr: I object to that as immaterial.

By Mr. Morris:

Q. Did you make an offer to Mr. Freeman for the stock?
A. I told Mr. Freeman that I would make an offer for this stock, but Mr. Freeman said that it would have to be over $70,000.
Q. He told you he wouldn't accept an offer for less than $70,000 for this stock?

A. That it would have to be over $70,000.

Q. Do you know whether this is a copy of a letter written by you or rather by Mr. Burton to the Corn Exchange National Bank, for this stock?

A. Yes.

Q. Where did you get that letter?

A. Mr. Burton sent it to us, down in Ventnor.

Q. Mr. Freeman did not give you that?

A. No; that is a copy sent to Mr. Freeman.

Cross-examination.

By Mr. Starr:

Q. You had a talk with Mr. Freeman about the offers which had been made for the stock?

A. Yes.

Q. By whom did he tell you that certain offers were made?

A. By Mr. Lippincott and Mr. Weston, and then Mr. Burton.

Q. He told you also that the offers were not satisfactory to him and that is the reason why they were not accepted?

A. That is what he said—well, I have something else to say about Mr. Weaver. We engaged Weaver to fight Mr. Freeman, about that waiver in the codicil. We never engaged him as a corporation; it was a private corporation. Then he got Mr. Weaver to go on the other side right against us.

Q. Do you know anything at all about that letter?

(Paper shown to witness.)

A. No, I don't think I ever saw it.

Q. Do you know whether or not your wife ever signed that?

A. She never saw a letter like that. Mrs. Grubb never saw that letter.

Q. Did she see it?

A. I don't think she did.

Q. Look at the signature in there. Is that in her handwriting, is that your wife's signature?

(Shown witness.)

A. I don't know whether or not it is.

Q. Look at it and tell us whether or not she signed it?

(Shown witness.)

A. I don't know. I couldn't tell you. It was not for the corporation, but to sue the corporation.

Mr. Morris: Has that power of attorney been offered in evidence?

Mr. Starr: Do you want to offer it?

Mr. Morris: No, I don't want to offer it.

Mr. Starr: We do propose to offer it in evidence.

Mr. Morris: In my exception number 4, if your Honor please, I said, "The said Wm. L. Lippincott was, at the time of the death of Winfield S. Nice, indebted to the said Nice and Schreiber Company in the sum of $766.46, and alleged that said Nice and Schreiber was indebted to him in the sum of $17,000. This alleged indebtedness does not appear

as an item of liability in the accountant's report, nor referred to, nor does the Master's report show that any proof or attempted proof thereof was made; that upon the basis of the withdrawal of this unimproved claim, the fixed assets of the said Nice and Schreiber Company consisting of fixtures and machinery in the place of business, and an automobile, all valued by said accountants at $11,242.00, were sold by the receivers to the said William H. Lippincott for the price of sum of $2400, from which was deducted his indebtedness to the company, of $755.46, leaving the net sum received for said fixed assets of but $1633.54 and that the said Charles N. Weston and William H. Lippincott are now conducting business in the premises formerly occupied by the said Nice and Schreiber Company, such as was formerly carried on by said company." What we want to show is that while Mr. Lippincott offered $43,000 for the business, left the net sum received for said fixed assets of but $1633.54 and I want to show by Mr. Bedell that he has no pending claim against the Nice and Schreiber Company.

Mr. Starr: The record shows that the whole situation was to be passed upon by the Federal Court in the State of Pennsylvania, and that this action was directed to be made by the Court, and I do not think that this Court wants to examine into the propriety of that action.

The Court: No.

Mr. Morris: The executor did not defend that litigation and I would like to offer proof in substantiation of that charge. Does the Court overrule me?

The Court: Yes.

(Exception.)

Mr. Morris: The receivers in their report allege that there was $385.58 to the credit of the Nice and Schreiber Company on April 28th, 1926. The question of the allowance of the receiver's fees is then set forth.

Mr. Starr: That is covered by the release and I do not assume that you are going to take testimony on that today. That is as to the conduct of the receivers.

Mr. Morris: I do not want to take any testimony at this time as to the excessiveness of fees.

Mr. Starr: You have no other testimony.

Mr. Morris: No.

(Recess until 1:30 o'clock P. M.)

(AFTER RECESS.)

Mr. Starr: I told your Honor during the recess that I would get the date of the probate of the will, March 27, 1926. I got that from the Surrogate's office and with Mr. Morris' permission that will go on the record.

Mr. Morris: That is all right.

A. J. Davis, called as a witness on the part of the accountants, being sworn, was examined and testified as follows:

Mr. Starr: I offer in evidence, letter signed by Mrs. Vetterlein and Mrs. Schreiber, Mrs. Catherine A. Grubb and Emma D. Seal, dated March 16, 1926; reading as follows: "To the executors of the estate of Winfield S. Nice: Dear sirs: We, the undersigned; and heirs of W. S. Nice, wish to have Harvey L. Burton appointed general manager of the business of Nice and Schreiber Company at 23 South Water Street, Philadelphia, to be effective at once, and if necessary to appoint any officers to have the said Harvey L. Burton elected president temporarily.

It is our desire that William Lippincott sever his connection with the firm of Nice and Schreiber Company.

(Signed Emma D. Seal
Catherine A. Grubb
Mary E. Vetterlein
Isabella T. Schreiber."

(Admitted, marked A/c Exhibit No. 8.)

By Mr. Starr:

Q. Are you a member of the Philadelphia bar?
A. I am.
Q. When were you admitted?
A. In 1920.
Q. At any time, did you represent the Nice and Schreiber Company involved in this matter?
A. I did.
Q. When did you represent them?

A. I represented them about, I think, the latter part of 1924, and the early part of 1925, up to the time of the receivership.

Q. By whom were you employed?

A. Mr. Weston. I never knew Mr. Nice personally.

Q. Did you act for the corporation continuously up to the time that the receiver was appointed?

A. As far as I know, yes.

Q. Was there a Mr. Burton—did you know him?

A. I did.

Q. Do you know whether or not he made any claim against the Nice and Schreiber Company with reference to the indebtedness that he alleged was due him at that time?

A. Yes, I know such claim was made.

Q. When did you first hear of that claim?

A. I think it was on the morning of April 27, 1926.

Q. How did you get information with respect to that claim?

A. Mr. Weston came to my office and gave to me a letter which he had received from Herbert W. Salus, a member of the Philadelphia bar, representing Mr. Burton.

Q. Mr. Weston was secretary of the company?

A. Yes.

Q. Have you that letter here?

A. Yes, I have it.

Q. Will you produce it?

(Witness produces paper.)

Mr. Starr: Is this the letter, dated April 26th, 1927, addressed to the Corn Exchange National Bank attention Mr. Freeman?

The Witness: Yes.

Mr. Starr: I offer in evidence this letter of April 26th, 1926.

(Accountants' Exhibit Number 3 admitted in evidence.)

Mr. Starr: May I read this so that you can get the purport of it? As I said, the letter is dated April 26, 1926, and addressed to the Corn Exchange National Bank. The letter reads as follows: "April 26, 1926, Corn Exchange National Bank, 1512 Chestnut Street, Philadelphia, Penna. Attention Mr. Freeman; Dear Sir: I represent Mr. Harvey L. Burton, who has a wage claim against the Nice and Schreiber, Inc., for $17,000.00.

Our investigation has shown that Nice and Scheiber Inc., of which your bank as trustee for the estate of Winfield S. Nice, is in actual control, has recently made a preference in payment to the Corn Exchange National Bank, On behalf of Mr. Burton, I hereby notify you that unless Mr. Burton receives a substantial check on account of his claim, of at least 50%, by Wednesday, the 28th instant, we are going to ask for a Receiver.

While it is not Mr. Burton's desire to embarrass this company, yet inasmuch as the bank has taken care of itself, Mr. Burton, as one of the creditors, insists that the creditors be taken care of equally as well. We can see no reason for any preference to any creditor, especially the Corn Exchange and Union National Banks, and of course, if it will go into a Receivership, we will have to ask that these preferences be returned, inasmuch as this company from its own statement, was insolvent on the second of March.

I would appreciate a reply from you today, Tuesday as to what you intend to do.

Very truly yours,

HWS. E H. W. Salus."

Q. As attorney for the corporation, after the receipt of that letter, what did you do?

A. That letter was brought to me, if I remember correctly, by Mr. Weston, who was very much excited and exercised about it, and he said that their company was by no means in position to meet the demands of the letter. Thereafter a letter was also had by Mr. Freeman, several in point of fact, and at this time I learned, for the first time, that Mr. Nice's firm, that the Nice Company was in process of liquidation, by corporate action, by the action of its board of directors; and inasmuch as the company was not in position to meet the demands, as was explained by Mr. Weston, I conferred with Mr. Freeman then, and as a result of that, got in touch with Mr. Gaskill.

Q. Mr. Gaskill, who represented the Corn Exchange National Bank?

A. Yes, and I believe he was also the New Jersey counsel for the Schreiber Company, and he had handled their corporation affairs to that extent. After a series of telephone calls and many conferences, it was decided that in view of the fact that there was already a liquidation in process and further, in view of the antagonistic action that was being pursued on the part of some creditors, and which was threatened, the next morning we felt justified in applying to the Federal Court, for an equitable receiver. That was talked over by myself, Mr. Freeman, Ex-mayor Weaver and myself, and it appeared to be justified, the advisable thing to do, under the circumstances.

Q. Did you know that Mr. Weaver represented the beneficiaries or the next of kin under the will?

A. Yes, because I had been so advised by Mr. Freeman.

Q. He was brought into the conference?

A. Yes; may I correct that? I won't say that he was brought into the conference to the extent of discussing the terms of the receivership, at least not so far as we were concerned, but the conferences with Mr. Weaver were all held by Mr. Freeman.

Q. Were papers prepared as the result of this conference for an equity receivership?

A. Yes. As a matter of fact, the last telephone call with Mr. Gaskill and Mr. Freeman and myself, was a call to my home, around eight o'clock, or nine o'clock, with a discussion of the bankruptcy proceeding staring us in the face, so we met at nine o'clock the next morning, and it was decided then that Mr. Smith and myself would come down to the office immediately, and prepare a bill in equity, that evening.

Q. How did Mr. Smith get into it?

A. Mr. Smith and I have offices together and at that time I called him into it for the purpose of preparing a bill in equity, for the purposes of the appointment of a receiver. He and I came into the office and worked that night until twelve o'clock to get things in shape, after making arrangements with Mr. Freeman, he and Mr. Weaver were to meet at my office the next morning and hold a meeting, and we consented to application for the appointment of a receiver. Mr. Weaver had also been informed that his name would be presented to the Court as receiver and he was asked to be present the next morning. After we made the appointment, we met the next morning and afterward there was a meeting of the

board of directors. There was an answer to be filed to the petition, and that answer was filed. I think that at that time Mr. Freeman came in and we were then discussing as to who should be receivers. Mr. Freeman had, before, early in the evening, and the next day, advanced the thought that on account of Mr. Weaver representing the legatees or devisees, that he would be a very proper person to have as receiver, and with that thought I coincided. The other question was as to who would be co-receiver with him, and it was first suggested that Mr. Freeman might be co-receiver, but after some discussion at length that in his position as secretary of the Corn Exchange National Bank, of which he was secretary and treasurer, and executor under the will, it was through my suggestion that Mr. Smith was asked to be receiver and Mr. Weaver heartily welcomed that suggestion.

Q. The papers were prepared on the 27th?

A. Yes.

Q. Who actually did the mechanics of preparing the papers—you or Mr. Smith?

A. Both of us.

Q. That was finished on the 27th?

A. Yes.

Q. When did you next appear in the post-office building, in Philadelphia, the next morning, with respect to the appointment?

A. About 9:20. As a matter of fact, Mr. Weaver, had not yet gotten into court at the time the petition had been handed to the clerk and I think the appointment had then been made.

Q. After you made arrangements with the clerk to be there early that morning, did the proceedings go on?

A. If my memory serves me correctly, yes.

Q. When, according to your recollection, was this bill verified, by Weston and Freeman?

A. On the morning of the 28th.

Q. The appointments were made on the same day?

A. Exactly so.

Q. Acting as attorney for the bank, what was your opinion, with reference to the advisability of an equitable receiver, in view of the demand made by Mr. Salus?

A. In view of the demand which Mr. Salus had made, and in view of the information which had been given to me by Weston, that it was impossible to meet that demand, and in view of the further claim, as I say, by Mr. Burton's action, the Nice-Schreiber Company had agreed on Tuesday to go through a process of liquidation and I thought that it would be to the best interest of the business to have a Federal receiver, and at that time to have it in the hands of persons who would not be antagonistic, an antagonistic receiver, as what might happen in the event that bankruptcy proceedings would be instituted the next day, as had been threatened.

Q. In the conferences with Mr. Weaver, either before or after he was appointed receiver, did he coincide with that conclusion?

A. Yes.

Q. As to the institution of proceedings for a receivership?

A. Unqualifiedly so. I might also suggest that at that point there was some serious question as to the legitimacy of this claim of Mr. Burton's, which had been made.

Q. Had you talked that over with Mr. Burton as to the validity of the claim?

A. At least as to the amount, if not the soundness of the claim; in fact, the matter of the amount, after proving, was less than the amount fixed later.

Q. As attorney, did you have any duty in mind other than the conversation of the assets of the corporation?

A. No, sir. I not only relied upon my own judgment but that of Mr. Gaskill and Mr. Weaver.

Mr. Starr: I call on you to produce a copy of petition or the exceptions filed in the receivership suit in the State of Pennsylvania (addressing Mr. Morris).

Mr. Morris: Judge Starr served notice on me to produce such petition. I might say that I have in my file such certified petition, but whether it is complete or incomplete I do not know; but if there is such petition, the only way it can be admitted as evidence is as a matter of record. If it is not a matter of record, it cannot be admitted.

I object to the offer on the ground that it is incompetent and irrelevant and not a matter of record; secondly, I do not know whether the papers that I have are the ones that Judge Starr wants, or whether they are a true copy of the petition as filed.

The Court: Do you decline to produce what is asked for?

Mr. Morris: I do object to it, but I will produce whatever I have to.

Mr. Morris: I will produce whatever I have to.

The Court: Do you decline to produce?

The Court: You can either produce it or decline

to produce it and Judge Starr can then take such action as he sees fit.

Mr. Morris: I object to producing it.

Mr. Starr: You won't produce it? If you do not produce it I will have to produce it, if your Honor wants it to go into the record.

Mr. Morris: But I object to it; however, if your Honor asks me to produce it I will.

The Court: I will not ask you to produce anything.

Mr. Morris: Well, then, I object.

Q. The Court: You decline to produce it? The Judge will then have to prove it in some other way. You can produce it for what it is worth.

Mr. Starr: Without reading it I offer it in evidence.

Mr. Morris: That is objected to.

Mr. Starr: There is a release involved here, and it is encumbent upon us to show whether it is pertinent under the circumstances in which it has been given. This paper which is produced, was filed, for the persons represented by Mr. Morris, in the proceeding in the Federal Court, with respect to certain fees allowed in the conduct of the receivership and an application to have the audit opened so that objections could be made. There is the situation here with relation to the allowance of the fees. To that

petition there was filed an answer by the receivers. Then there was a letter written by Judge Dickinson, to counsel, in which he suggested that there ought to be some sort of adjustment; and as a result of that letter an agreement was made by which these clients got from this receiver ten thousand dollars, and gave a release. Now, for some reason, I do not know whether it was because of the letter written by Judge Dickinson, but those papers were never filed. A petition was not filed and an answer was not filed, and the letter, which amounted to an order, or equivalent to an order, was never filed in this proceeding, which we have here. It seems to me that it is proper to show, in support of our claim, that the release is a bar, under the circumstances, under which it was given.

The Court: The original of this paper was never filed?

Mr. Starr: No.

The Court: Then if that is so, how can it be admitted in evidence?

Mr. Starr: It is a direct declaration by these parties. Any declaration made by a party, is relevant, whether it is a matter of record or not. It is offered as a record of a statement made by them, to the Court, in which they raised certain questions, then I propose to present the answer to that, and then show the letter from Judge Dickinson, this letter in which he shows under what circumstances it was executed.

The Court: I will admit it.

Mr. Morris: I object to it further on the ground that I had nothing to do with that. They are lost. In fact, I don't know whether it was lost or not.

The Court: Then, you have no desire to produce it?

Mr. Morris: I said that I do not know whether that is the paper that he wants or not. He looked at it and he says, "That is the paper I want." But whether that is just the paper or not he wants I don't know. Is it or not? (Addressing Mr. Starr.) I do not see how that is evidential. I want to be honorable about it, but I do not see how a loose bunch of papers can be admitted as a copy of a record filed.

The Court: It is not supposed to be admitted as a copy. He wants to show the position you take, the position you took at the time the release was made, which they are going to offer in evidence.

Mr. Morris: I except to its admission. (Exhibit 3½.)

Mr. Starr: I call upon you for the answer filed by the receivers, and counsel, with reference to this petition, marked Accountants' Exhibit Number 3½.

Mr. Morris: I am not going to hide any papers, but is this what you mean? (Producing paper.)

Mr. Starr: I don't know.

Mr. Morris: I am going to object. I do not offer this to the Court, I refuse to offer this to the Court.

The Court: Are you familiar with the evidence Act under which notice can be served upon you if you do not do that. You may have to produce it.

Mr. Morris: I have them in my file. I do not produce them. I do not think it is competent for him to ask production of a record that is not official.

The Court: That is not the question, whether it is competent or not, at this time.

Mr. Morris: I don't think we ought to produce any more.

Mr. Starr: You are not going to produce it?

Mr. Morris: No.

(Witness excused.)

Samuel Morris, called as a witness on behalf of the accountants, being sworn, was examined and testified as follows:

Mr. Starr: As solicitor for the exceptants have you in your possession a paper which purports to be an answer of the executor to the petition filed by counsel that I have referred to? (Exhibit A/c 3½.)

Mr. Morris: I don't know. I have a paper in my file.

Mr. Starr: A paper purporting to be such answer?

Mr. Morris: I refuse to produce it unless the Court demands that I produce it.

Mr. Starr: I am entitled to have him produce any paper in his possession.

The Court: I do not think so. The Act provides that you may serve notice to produce papers.

Mr. Starr: Suppose I serve a subpoena and he had the papers in his possession in court. He is bound by it, under the subpoena regardless as to whether he was served with notice or not. The paper is in court, and I am entitled to have it offered in evidence in order that your Honor might determine whether or not it is evidential.

The Court: Having produced half of them, what is the idea of not producing the rest of them?

Mr. Morris: If I knew for a certainty that these were the papers filed or copies, I would not object to it. I would not conceal anything from the Court, but Judge Starr has tried to offer in evidence papers that do not appear to be either copies or originals of those filed, copies, I mean of the originals filed. He does not say that they were not filed, but he says they are some papers that ought to be filed. I don't know whether these papers are copies of those filed or not. I don't know whether or not these are the original drafts of the papers.

Mr. Starr: You produce them and I will say whether they are.

Mr. Morris: I want to get along with Judge Starr, and wouldn't want to take advantage of any

technicality, but I do not think it is right to offer papers, any papers that I have in my file as copies, because I don't know whether they are or not. I was not attorney of record. I didn't file them.

The Court: Well, proceed.

Mr. Starr: Does your Honor relieve him from the obligation to produce this paper which he has?

The Court: I understand that the rules call upon him to do so.

Mr. Starr: I call upon you to produce what purports to be a copy of a letter, in some cause, addressed to counsel and signed O. B. Dickinson.

Mr. Morris: A letter? What is that?

Mr. Starr: Here is a copy of it.

Mr. Morris: What is that—an opinion?

Mr. Starr: A letter, written by Judge Dickinson.

(Letter shown Mr. Morris.)

Mr. Morris: You want what?

Mr. Starr: I want a copy of that letter that you have in your possession.

Mr. Morris: I don't believe I have it.

Mr. Starr: Then, that is the answer. You are given notice to produce the paper, and upon your refusal I will go after it in some other way.

Mr. Morris: You gave me notice to produce that other paper, I believe.

Mr. Starr: Here is the office copy of paper marked, "In the District Court of United States for the Eastern District of Pennsylvania, sitting in equity. Corn Exchange National Bank v. Nice and Schreiber, March Session, 1926. Number 3701. Receivership Bill. To Counsel," &c.

Mr. Morris: I have not it, and if I had I would refuse to produce it.

(Witness excused.)

A. J. Davis, recalled.

Direct examination.

By Mr. Starr:

Q. You acted as one of the attorneys for the receiver in receivership proceedings in Philadelphia, in the matter of the Nice estate?

A. Yes.

Q. I show you paper marked Exhibit Number three and a half, and ask you whether or not that is a copy of the paper which was presented to Judge Dickinson in the administration of that receivership?

(Paper shown witness.)

A. It is, yes.

Q. Was an answer filed to that petition by you and the other gentlemen involved?

A. There was.

Q. I show you a paper which is produced in the cause, directed to the Honorable Judges of the District Court of the United States for the Eastern District of Pennsylvania, and ask you whether or not that is a copy of the answer filed with Judge Dickinson in that cause?

Mr. Morris: Objected to.

The Court: What is the objection?

Mr. Morris: That is not the way to prove a record.

The Court: I will permit it.

(Exception allowed to exceptants.)

The Court: The witness can testify that he filed the answer.

By Mr. Starr:

Q. That was signed by whom? I see the signatures on that paper are omitted from the carbon copy.

A. Sidney E. Smith, John Weaver, A. J. Davis and Russell C. Cooney.

Mr. Morris: That is objected to.

The Court: It is admitted.

(Exception allowed to exceptants.)

(Accountants' Exhibit No. 4 offered in evidence and reads as follows):

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No 3701 March Term, 1926.

10

IN EQUITY.

CORN EXCHANGE NATIONAL BANK, Trustee under the Will of Winfield S. Nice, Deceased, and CHARLES N. WESTON, Complainants

20

vs.

NICE & SCHREIBER COMPANY

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

The Answer of SIDNEY E. SMITH and JOHN WEAVER, Receivers of the Nice & Schreiber Company, and A. J. DAVIS and RUSSELL CONWELL COONEY, Attorneys for the Receivers in the above entitled case, to the Petition of CATHERINE A. GRUBB, MARY E. VETTERLEIN, ISABEL T. SCHREIBER and DEBORAH SEAL,

30

RESPECTFULLY REPRESENTS:

1. Respondents are informed and believe that the averments of Paragraph 1 of the Petition are true.

2. Respondents are informed and believe that the averments of Paragraph 2 of the Petition are true.

3. Respondents are informed and believe that the Report referred to by Petitioners in Paragraph 3 of the Answer was not furnished to the Nice & Schrieber Company on the 2nd day of March, 1926, but was furnished sometime subsequently to March 22nd, 1926, and Report being dated March 22nd, 1926, as of March 2nd, 1926. Respondents are informed and believe that said Report showed a value as set forth in said Petition, but respectfully suggest that said figures were arrived at by a reference to the values and amounts set up on the books of said Nice & Schreiber Company, and that the value set forth in said Report do not purport to be an appraisement or valuation by the accountants who made up the Report.

4. Respondents are informed and believe that the Bill of Complaint filed herein, on April 28th, sets forth that the Nice and Schreiber Company owned assets worth, according to its books, the sum of $285,000, and that a fair valuation of those assets was not less than $250,000. Respondents deny that said Bill averred that the items and amounts of assets and liabilities were substantially as set forth in the above mentioned accountants' report.

5. Respondents admit that a Bill of Complaint was filed in this Court, as of the above term and

number, by the Corn Exchange National Bank, as Executor of the Estate of Winfield S. Nice, deceased, and Charles N. Weston, as the owner of four shares of stock, asking for the appointment of a Receiver or Receivers in Equity.

6. Respondents admit that the reasons set forth in the Bill of Complaint, as a ground for equitable relief, was that there was danger of suits being entered against said Nice and Schreiber Company, thereby endangering its assets.

7. Respondents admit that Sidney E. Smith and John Weaver were appointed Receivers by your Honorable Court.

8. Respondents admit that A. J. Davis, Esq., who at that time occupied and now occupies an office in the same suits with Sidney E. Smith, entered an appearance of record, and that Russell Conwell Cooney, Esq., who has an office in the same suite with John Weaver, Esq., also acted as counsel for the Receivers.

Respondents are now informed that through some oversight, said Russell Conwell Cooney failed to formally enter his appearance as of counsel for said Receivers, but the Respondents aver that the said Russell Conwell Cooney, Esq., acted throughout the entire transaction, as such counsel, and his appearance should have been entered of record. Respondents admit that three Appraisers were appointed by the Court, namely John P. Hill, William Rowland and W. A. Rex Schultze. Respondents deny that the items of assets and liabilities as set forth

in the above mentioned Accountant's Report remained practically unchanged at the time of the filing of the Bill, as is more particularly set forth by the Report of the Appraisers, appointed by your Honorable Court, filed of record in this case.

9. Respondents admit the averments of Paragraph 9 of the Petition.

10. Respondents admit that the allowances set forth in Paragraph 10 of the Petition were duly made by the Master, but deny that no exceptional professional skill was exercised by the Respondents. Respondents aver that upon the audit of the account the sum of $10,000 each was asked for by your respondents.

The Corn Exchange National Bank, as Executor of the Will of said Winfield S. Nice, the holder of all but Seven shares of the Capital Stock of said Corporation, and a creditor, in the sum of $14,744.-65; and Charles N. Weston, the holder of four of the remaining shares, and a creditor in the sum of $2168.47, objected to the amount of said requests. No other person raised any objection and after some discussion the above mentioned agreed to the allowances which were made by the Master, as above set forth. Said allowance was made by the Master upon statement by the objectors that such an allowance was satisfactory. Confirming the approval as above set forth, the Attorney for said Charles N. Weston, acting on behalf of Weston, and, as respondents were advised, with the full approval of the Corn Exchange National Bank, as executor, and creditor aforesaid, wrote the following letter to the Master:

"October 9th, 1926.

Morton Z. Paul, Esq.,
518 Stephen Girard Bldg.,
Phila., Pa.
In re: Nice & Schreiber Company.
Dear Sir:

We return herewith the copy of your report as Special Master in the above matter which you kindly loaned us yesterday.

We had a conference at Mr. Smith's office this morning, at which Mr. Freeman, Mr. Cooney, Mr. Davis, Mr. Smith and myself were present, at which it was finally agreed that the Receivers and their counsel would ask for only $7500 each, at this time, and they are not to be precluded from asking for additional counsel fee at a later date, nor are we to be precluded from objecting to such additional claims. With this understanding, we are not objecting to the present allowance of $7500 each. Mr. Smith will take up with you the details of the revision of your report to include the above understanding.

Very truly yours,
HB: L HOWARD BORTT"

Respondents aver that they have no knowledge of any objection being made to the allowance to the Appraisers; or to the amount of the fee of the Master.

11. Respondents have no personal knowledge of the statements made in Paragraph 11 of the Petition, but are informed and believe that the losses in the business, during the year preceding the appointment of the Receivers were so great as to be disastrous to the company.

12. In answer to Paragraph 12 of the Petition, Respondents aver that it is true that at the time of the death of Winfield S. Nice, one William M. Lippincott appeared on the books, as indebted to the Nice and Schreiber Company, in the sum of $755.46. Demand was made on the said William M. Lippincott, for the payment of this amount, and the said William M. Lippincott contested that the said sum had been paid him, on account of earned bonus or commissions, and further gave notice of a counter-claim, in the sum of approximately $17,000.-00. Said William M. Lippincott claimed an interest in the profits of the Butler Department of the Nice and Schreiber Company, in pursuance of an alleged agreement between himself and the Nice and Schreiber Company. An inquiry and investigation of the books of the company disclosed that in former years the said William M. Lippincott had received a bonus, based on the profits of the business as a whole, the business being comprised of three departments, butter, eggs and poultry. The Receivers interviewed Charles N. Weston and George Bedell, the Treasurer and bookkeeper respectively, who were the only ones who would be likely to possess any information on this matter. Both of these persons, while stating their disbelief in the likelihood of such an arrangement would not and could not go so far as to say that such a contract had never been made. The Receivers bore in mind the possible difficulty which the said William M. Lippincott might encounter in proving his claim, but were faced with the absolute lack of evidence to disprove it. At this time the lease on the premises occupied by the Nice and Schreiber Company had approximately three years to run, at a total rental of $9,000.00. Exhaustive

efforts were made to secure a purchaser for this lease, but with no success. The fixed assets had been attached to the premises for some period of time, most of it for several years, and it was questionable whether or not the same could be removed, and if so what if any sum could be realized upon their sale. William M. Lippincott offered to the Receivers to release his claim of $17,000.00, and purchase the fixed assets, at a price of $2400.00, in consideration of the release by the Receivers of the claim against him, and the assignment of the lease. This property is owned by Armour and Company and when the matter of an assignment to Lippincott was taken up with the said Armour and Company, this Company would agree to such an assignment only upon the furnishing of security to it, for the balance of the term. The Receivers then managed to secure Edson and Company, a financially responsible concern, to become surety on the lease of William M. Lippincott. A petition was filed in your Honorable Court, asking leave to make the compromise herein set forth; notice was given all creditors, in accordance with the Rules of Court, and said compromise was authorized. In purusance of such authorization, the lease was assigned, and mutual releases exchanged, and a release from Armour and Company to the Nice and Schreiber Company of all liability under the lease. The sum of $4384.05 thereof was the value placed by the Appraisers on machinery and equipment attached to the building and used in the business. Respondents are informed that this was the cost value. Said machinery and apparatus had been in use for some years. There was considerable doubt as to the right of the Receivers to remove the machinery and equipment in

view of the methods by which it was attached to the buildings. Other parts of the merchandise transferred to said Lippincott were stamped and marked paper and fillers which could not be sold to anyone not continuing the business. All of which is more particularly set forth in the petition heretofore referred to, and filed in this case. Respondents have no knowledge that said Charles N. Weston and William M. Lippincott are now conducting business in the premises formerly occupied by said Nice and Schreiber Company, and are informed and believe that Weston is in no way connected with said William M. Lippincott, and has at no time since the transaction been so connected.

13. Respondents say that the facts set forth in paragraph 13 of the petition are true.

14. Respondents respectfully suggest that the statement of the services rendered by the Receivers was before the Master and is referred to by the Master. Respondents aver that less than four per cent of the face value of their claim remains due to the creditors.

15. Your respondents, upon information, say that they believe the averments in Paragraph 15 are correct.

16. In answer to paragraph 16, your respondents are informed that the averments therein are erroneously stated, and are informed that the real facts are as follows: During the latter part of the month of March, 1926, John Weaver, Esq., was consulted by Mrs. Schreiber one of the petitioners, and there-

after, he had certain conferences with her sisters, the other petitioners. At that time, Mr. Weaver was informed that the petitioners were the residuary devisees in the estate of Winfield S. Nice, deceased. That the decedent had left a will and certain codicils, executed shortly before his death, and by the terms of the will Charles N. Weston was given a legacy of $10,000.00, and by the terms of the codicils an additional legacy of $15,000.00. That the petitioner had consulted with the Corn Exchange National Bank, executors of the will, and there had been certain negotiations with Gill, Guckes & Schrader, Esqs., as attorneys for Mr. Weston, which had resulted in Weston executing a document and delivering the same to the Corn Exchange National Bank, whereby the said Weston released all claim to all legacies in excess of $10,000, in consideration of his being retained in the employ of the Nice and Schreiber Company, and no contest being made to the will. That this document having been delivered to the executor of the estate was thereafter by it returned to Weston, for acknowledgement, and Weston refused to surrender it. The petitioners recited to Mr. Weaver various facts, in connection with the manner and execution of the codicils, and based upon this information Mr. Weaver advised them that in his opinion there was a substantial chance of setting aside the legacy to Mr. Weston, contained in the codicils, and recommended that Honorable Clarence L. Cole, of Atlantic City, New Jersey, be retained to represent the interest of the petitioners in contesting the claim of Mr. Weston under these codicils.

Thereafter, Mr. Weaver had various communications with the attorneys for Weston, in an effort to

get the document returned, and took the question up with Mr. Cole, of Atlantic City, with the result that Mr. Cole prepared a petition for appeal from the probate of the will, which was executed by the petitioners. About that time Mr. Cole advised Mr. Weaver and the petitioners that in his opinion there might be great difficulty in setting aside the legacy contained in the codicils, but that in his judgment the validity of the agreement, to abandon the claim of the legacy for $15,000 contained in the codicils, could be established before the Courts of New Jersey, even though the original document had been returned to Mr. Weston, for acknowledgment, and he still held it; and the petitioners advised Mr. Weaver and Mr. Cole that they preferred not to have a contest, in which the evidence might be detrimental to their brother, and upon the instructions of the petitioners the appeal from the probate was never filed. During the course of these negotiations, the petitioners also consulted Mr. Weaver in regard to the advisability of the estate of Winfield S. Nice deceased, selling the stock of the Nice and Schreiber Company to Harvey S. Burton and William M. Lippincott.

Upon information, it is denied that the amount of the fee to be paid Mr. Weaver was fixed at $500, or any other price, for his services in representing the petitioners in their contest with the said Weston, although the said Jon Weaver, Esq., avers that he may, at some time, have suggested that the probable cost for counsel fees would be about $500.

17. Your respondents have no knowledge as to the contents of the account filed in the estate of Winfield S. Nice, deceased, but aver, upon information,

that during the month of June, 1927, Clarence L. Cole, Esq., was advised by the petitioners not to contest the legacy of $15,000 given to Mr. Weston by the codicils, and that thereafter the petitioners entered into separate negotiations with Weston, which resulted in the execution of a new agreement, whereby Weston accepted a sum of $15,000 as a compromise of all claims under his bequests under the will and codicils of Winfield S. Nice, which sum has been paid to, and accepted by the said Weston.

18. In answer to paragraph 18, your petitioners have no knowledge as to whether or not the Corn Exchange National Bank, as executors of the estate of Winfield S. Nice, deceased, ever advised the petitioners of the details of the receivership in Equity, but aver that the said Corn Exchange National Bank, executor of the estate of Winfield S. Nice, deceased, as a creditor and stockholder of the said Nice and Schreiber Company, were advised at all times of all steps of the receivership and attended various meetings before the Master.

Your respondents aver, upon information, that one of the petitioners, to wit, Isabella F. Schreiber, as a creditor of the Nice and Schreiber Company, received notice of the filing of all accounts, petitions, and meetings, and as a creditor of the said Nice and Schreiber Company, received dividends as declared on each of the two accounts filed in this estate.

Your respondents further aver that John Weaver Esq., was asked by the Corn Exchange National Bank, at 9 o'clock in the evening, preceding the filing of the Bill, whether or not, if the Court appointed him, he would serve as a Receiver of this estate, and that was the first notice he had of the

filing of the Bill; and that Sidney E. Smith, Esq., was asked about 9:30 o'clock in the morning of the filing of the Bill whether he would serve as Receiver, if the Court appointed him, and gave his assent.

19. Respondents say that while it is true no formal exceptions were filed by the Corn Exchange National Bank, as executor of the estate of Winfield S. Nice, such fact is because of the compromise agreement entered into between receivers and counsel, and said Corn Exchange National Bank and said Charles N. Weston, as set forth in paragraph 10 above. Respondents deny that said allowances were grossly excessive for the reasons set forth in the petition, or for any other reason.

Respondents aver that exceptions to the Master's Report on the second account of the Receivers were filed by the Corn Exchange National Bank; that a hearing was held thereon; argument had; and that a report, dismissing the exceptions was filed by the Master appointed by your Honorable Court, to which no exceptions were taken.

Respondents respectfully suggest to your Honorable Court that the Court was finally adjudicated and confirmed the Reports of the Master.

20. Your respondents aver that the distribution decreed by your Honorable Court was made by the Receivers prior to notice of the application of the petitioners.

All of which your respondents aver to be true, or are informed, verily believe, and expect to be able to prove.

Sworn and subscribed to before me, this day of December, 1927 : Sidney E. Smith
: John Weaver
: A. J. Davis
: Russell Conwell Cooney

COMMONWEALTH OF PENNSYLVANIA, }
CITY AND COUNTY OF PHILADELPHIA, } ss

SIDNEY E. SMITH, JOHN WEAVER, A. J. DAVIS and RUSSELL CONWELL COONEY, being each duly sworn according to law, depose and say that the facts set forth in the foregoing answer are just and true to the best of their knowledge, information and believe. : Sidney E. Smith
Sworn and subscribed to before me this day of December, 1927. : John Weaver
: A. J. Davis
: Russell Conwell Cooney

By Mr. Starr:

Q. I show you paper entitled in this same cause, "Brief summary of the conduct of the Receivership," and ask you whether or not that is a copy of the paper filed with Judge Dickinson, in that cause, by the two receivers and two counsel?

Mr. Morris: That is objected to.

The Witness: That is a correct copy.

(Objection overruled.)

(Exception.)

(Paper admitted in evidence marked Exhibit #5, entitled: "A Brief summary of the conduct of the Receivership," which reads as follows):

EXHIBIT NO. 5.

IN THE
DISTRICT COURT OF THE U[illegible]D STATES.
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 3701 March Term, 1926

IN EQUITY

CORN EXCHANGE NATIONAL BANK, trustee under the Will of Winfield S. Nice, Deceased, and CHARLES N. WESTON,
Complainants
vs.
NICE AND SCHREIBER COMPANY, a corporation.
Respondent.

BRIEF SUMMARY OF THE CONDUCT OF THE RECEIVERSHIP

TO THE HONORABLE OLIVER B. DICKINSON, JUDGE OF THE UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF PENNSYLVANIA:

SIDNEY E. SMITH and JOHN WEAVER, Receivers in equity of the above names respondent and A. J. DAVIS, ESQ., and RUSSELL CONWELL COONEY, ESQ., attorneys for the Receivers, in accordance with the suggestion made by you, submit herewith a brief summary of the most important features touching upon and concerning the conditions met by the receivers and their counsel in the conduct and administration of the receivership under the jurisdiction of your Honorable Court.

It is now understood that the petition which was submitted to you on December 16th had been the subject of an informal discussion between you and counsel for the petitioners sometime age and that you suggested the matter of the contents of the petition be taken up with us with the idea that some adjustment might be reached between all of us without the necessity of submitting the matter to the Court. It is here stated that up to December 16th, 1927, no request was made by counsel for the petitioners that any refund be made to the receivership estate. The written demand made prior to December 16th, 1927, by the attorneys for petitioners was that the receivers and counsel should pay to them for account of their clients, the petitioners, a specified sum of money and that failure of counsel and receivers to agree to this would result in the filing of a petition.

It is thought proper, before discussing the activi-

ties of receivers and counsel, to call to the attention of the Court that apparently these petitioners had full knowledge of at least all the facts in the case prior to the time that the second report of the Master was confirmed—this, notwithstanding the statement in their petition that they had no knowledge of any of the proceedings. The affidavit to the petition is dated June 22nd, 1927; the second report of the master was filed June 11th, 1927, and was finally confirmed July 2nd, 1927. The first notice which came to the Receivers and counsel of any action on the part of these petitioners was by a letter from counsel for the petitioners dated July 14th, 1927.

THE REASON FOR THE RECEIVERSHIP.

The Nice and Schreiber Company, respondent in the above case, was a corporation under the laws of the State of New Jersey. Its principal business was in Philadelphia. For a long time prior to the receivership, it had been engaged in the business of sell butter, eggs, and poultry as commission merchants and on its own account. Prior to the formation of the corporation the business had been carried on as a partnership and during the greater period of the operation of the corporation and its predecessor, the conduct of the business had been under the personal supervision and control of Winfield S. Nice, president of the corporation and the holder of practically all of the stock of the corporation. Mr. Nice had been prevented by illness for a greater part of the year previous to the appointment of the receivers, from attending to the ad-

ministrative duties of the business and during that time, it had been carried on by three heads of departments. The illness of Mr. Nice resulted in his death on March 2nd, 1926. The Corn Exchange National Bank of Philadelphia qualified as executor under the will of Mr. Nice and Mr. Edgar W. Freeman, the trust officer of the Corn Exchange National Bank, was elected a member of the board of directors of the company in place of Mr. Nice. The business was conducted by the corporation from that date until the receivership, April 28th, 1926.

The report of the accountants who audited the books of the corporation, the audit being made as of the date of the death of Mr. Nice, showed that at the time of his death the corporation was indebted, among others, to the Union National Bank in the sum of $13,029.62 for overdrafts, and $20,000 in notes, $10,000 of which matured on March 11th, 1926, and $10,000 of which matured on March 18th, 1926. The corporation was also indebted to the Corn Exchange National Bank in the amount of $2,713.58 for overdrafts, and $10,000 represented by notes, $5000 of which matured on March 15th, 1926, and $5000 of which matured on March 16th, 1926. We are informed that these notes bore the personal endorsement of Mr. Nice. Immediately upon the death of Mr. Nice the banks required that all overdrafts be immediately paid, and demanded payment of the notes as they fell due. As a result there was paid to the bank between the death of Mr. Nice and April 27th, 1926, out of the liquid capital of the corporation a total of $45,743.20, with interest.

One Harvey L. Burton had been for some time

prior to the death of Mr. Nice in charge of the poultry department of the company and continued as such down to the receivership and was familiar with the affairs and condition of the company. He was a creditor claiming about $17,000. Approximately $15,000 of this was admitted by the company. He objected to the substantial withdrawals from the capital of the company for the purpose of payment to the bank and demanded the immediate payment of at least fifty per cent of his claim. The company had reduced its cash balance to a few hundred dollars, and its merchandise and inventory had been reduced to an absolute minimum. It was impossible, therefore, for the company to meet the demands of Mr. Burton. The latter was represented by the office of Saus and Salus, Esqs. His attorneys, on April 26th, 1926, notified the Corn Exchange National Bank that Burton believed the company was insolvent and that unless at least one-half of his claim was paid by the 28th, a petition in bankruptcy would be filed against the company, alleging as an act of bankruptcy, the payments of preferences to the banks while insolvent. The letter giving such notice is attached hereto and marked "Exhibit A."

The officers of the company felt that the filing of bankruptcy proceedings would be disastrous. They communicated, first with Mr. Davis, who was and had been for some time, counsel for the company in Philadelphia, and with Thomas L. Gaskill, a member of the New Jersey Bar and Referee in Bankruptcy for the Camden District, who was counsel for the company in New Jersey and counsel for the estate of Winfield S. Nice. After considera-

tion of the conditions confronting the company and consideration of the accountants' report of March 2nd, which showed the company to be solvent, it was decided that the bankruptcy proceedings which threatened should be prevented if possible. Thereupon numerous conferences and telephone conversations were had and it was determined that the best interests of the company would be preserved by the appointment of Receivers in equity by your Honorable Court. In these conferences, Mr. Freeman of the Corn Exchange National Bank and Mr. Weston, who was a stockholder, took very active parts. This decision having been reached, a Bill was prepared in which Mr. Weston, who was an officer of the company and also a creditor, and the Corn Exchange National Bank, executor of the Estate of Winfield S. Nice, as a stockholder and creditor, joinee. A Bill asking for the appointment of Receivers and the Answer of the Company consenting to the appointment of the Receivers was filed thereupon. Late in the event of April 27th, 1926, the Officers of the Company asked John Weaver if he would serve as Receiver if he were appointed by the Court, and about ten o'clock that evening, Mr. Weaver stated that he would serve if the Court saw fit to appoint him. It was decided that evening to ask the Court to also appoint Mr. Freeman as the co-receiver. At a meeting of the parties, on the following morning, immediately before the Bill was filed, Mr. Freeman stated that in view of the fact that he was Trust Officer of the Corn Exchange National Bank, which was the executor of Mr. Nice's estate, it would not be advisable for him to become receiver because, among other things, there might be some embarrassment if a situation arose in the receivership as to

which the executor might feel dissatisfaction. At this time, Mr. Freeman asked Sidney E. Smith if he would serve as co-receiver if he were appointed by the Court. As a result of this, when the Bill and Answer were filed, the Court appointed Sidney E. Smith and John Weaver as the receivers.

THE CONDITION OF THE COMPANY— NATURE OF THE ASSETS

The last statement of the condition of the company, which the company had at the time of the appointment of the Receivers, was the statement prepared by George K. Watson and Company, as of March 2nd, 1926. This report showed that according to the books of the company the assets of the company were valued by the company at $289,761.40. The Bill was filed about six weeks after this, during which time the liquidating trustee had been endeavoring to realize on these assets. The figures of the accountants' report were the only figures available at the time and were used in the Bill as the best information at the hand of the officers of the company. The receivers instituted immediately an investigation and this investigation showed that the actual values and the condition of the company were materially different from those reflected by its books. In the Report of the accountants, as of March 2nd, 1926, the inventory of merchandise, which was shown on the report as $67,561.99, had been reduced to approximately $7297.22. These latter figures included printed cartons and wrappers to the total amount of

approximately $850. These printed cartons and wrappers were really valueless unless the business was continued by the company or one bearing the same name.

The Accounts Receivable, shown on the accountants' report as of March 2nd, 1926, as $186,178.91, were reduced to accounts believed to be good to $72,738.62; accounts possible of collection (of which it was estimated 50% could be collected) amounted to $9128.08; and doubtful accounts, $28,135.15. In other words, the Accounts Receivable at the time of the receivership had been reduced from $186,178.91 to $110,001.85, quite a large percentage of which were questionable in their value.

The item of "advances to shippers" which was included in the Accounts Receivable for merchandise referred to in the Accountants' Report, as being $18,973.00, had been transferred to a distinct account Receivable and was included in the above mentioned $110,001.85.

The fixed assets shown in the accountants' report at $11,242.17 were appraised at $5388.40. Included in this was a refrigerating plant, appraised at $4300. This price, we were informed, was the cost price of the plant about five years before the receivership. This plant was attached to the real estate under such conditions as made it extremely doubtful whether any portion of it could legally be removed by the tenant. Aside from this, it appeared that the value of the refrigerating plant, even if it could be removed, would be practically nothing.

One branch of the company's business had been the sale of butter on commission. In carrying on this business, it had been the policy of the company to advance moneys to shippers against butter in

transit on drafts accompanied by Bills of Lading. The item of $18,973 (mentioned above) shown on the accountant's report, was an item arising out of this practice. At the time of the receivership, this had been reduced to $11,689.98 against butter coming in. Between the death of Nice and the receivership, some negotations had been had with Edson Brothers, a concern doing practically the same business as Nice and Schreiber, with the purpose of having Edson Brothers take the butter on its arrival and refund the advances against it. The item of $11,689.98 shown on the books at the time of the receivership as an Account Receivable from Edson Brothers represented this account. The Receivers found that Edson Brothers' understanding was that they were to take the butter when it arrived, by an endorsement of the Bill of Lading by Nice and Schreiber Company and refund to the company the amount it had advanced against the shipment if and when the butter had been sold. The butter had been coming in on a declining market. The Receivers, after a great deal of negotiation, induced Edson Brothers to refund the full amount of $11,689.98 to the company and take an endorsement of the Bill of Lading on the cars coming in so that the entire amount was recovered by the Receivers prior to the delivery of the butter. An item of $56,259.41 appeared on the books as advances to shippers on account of eggs. This amount was made up of advances that had been made against eggs shipped the previous year. On investigation, it was found that the eggs had been shipped to the Nice and Schreiber Company by western shippers, for sale as Commission Merchants, had been received on a declining market and that instead of disposing of

the eggs, the company had held them over a period of time, which in some cases was several months, hoping that the market would go up. The market became lower and continued until the goods had been finally disposed of at a price which left the shippers indebted to the company in the amount of $56,000. This amount was not shown on the accountant's report as a valuable asset, a reserve of the full amount having been set up against it. The shippers generally claimed that the loss was due to the failure of the company in many instances to obey instructions, and in all cases to use reasonably good judgment in the disposition of the eggs. Various shippers threatened suit for damages. A vigorous pressing of the various claims by the receivers resulted in the collection of between $11,000 and $12,000 on these accounts. After the death of Mr. Nice, and prior to the appointment of the Receivers, there had been repeated efforts on the part of the company to sell the assets as a going concern. These efforts had been without success. The company, shortly before the appointment of the receivers, formally voted to liquidate, and Charles N. Weston and Edgar W. Freeman (who was Trust Officer of the Corn Exchange National Bank, the Executor of Nice's will) had been appointed liquidating trustees, in acordance with the New Jersey Corporation Law. Therefore, while the accountant's report of the condition of the business showed a book value of the assets to be $289,546.50, the actual inventory and appraisement of the assets made by the appraisers appointed by the Court, as of the date of the appointment of the receivers on April 28th, 1926, showed assets of the value of $139,573.22.

LIQUIDATION OF THE ASSETS

Immediately after the receivers were appointed, they and their counsel saw from an investigation of the situation that the principal assets of the estate were Accounts Receivable. They were aware that Accounts Receivable of a concern in liquidation are usually subject to an extremely large shrinkage and depreciation. They knew that the only possible way to overcome the usual shortage and depreciation in this case was to devote all the time and attention possible to the collection of the accounts and to permit nothing to delay any efforts that could be made toward the collection of the accounts. The usual policy of sending out letters demanding that debtors pay was not adopted. Letters were sent out but they were immediately followed by personal calls of representatives, repeatedly made where necessary, upon the debtors (these calls in some instances being daily), repeated telephone calls, threats of suit, and in some cases suits. The result was that practically the accounts receivable were collected. The exact percentage is not available, but it is believed that, aside from the advances against the egg account, against which a reserve had been set up, the collections amounted to between 95 and 100 percent. The collections in the egg account, it is believed, reached about 20 per cent.

In addition to the question of making the book accounts good, many other problems confronted the Receivers and their counsel. Some of these are referred to hereinafter under the heading "Special Problems of the Receivership."

Many of the creditors of the company were being severely embarrassed by the non-payment of their claims. They were very anxious that a dividend in some form and in some amount be distributed as quickly as possible. This was considered by the receivers to be a proper request and accordingly, in July of 1926, a preliminary report and account was filed, showing in the hands of the receivers $138,-141.48. The matter was referred to Morton Z. Paul, Esq., Special Master. At the conclusion of the meetings before him, a supplemental report was filed in which was included additional collections to October 2nd, 1926, inclusive, amounting to $6834.88. This brought the total receipts, up to October 2nd, 1926, to $144,976.38, this amount being, of course, subject to certain disbursements as set forth in the account. Subsequent to this, a second account was filed which brought the total amount collected by the receivers up to the time of the filing of such second account the sum of $

SPECIAL PROBLEMS OF THE RECEIVERSHIP

MERCHANDISE IN TRANSIT

The matters of the drafts on merchandise in transit has been discussed previously under the former headings and reference is here made for the purpose of indicating to the court that the Nice and Schreiber Company received without loss of a single penny the entire amount of these advances.

HARVEY L. BURTON CONTROVERSY

When the receivers took over control of the Nice and Schreiber Company, they learned that one Harvey L. Burton had been managing the Poultry Department under a specific contract with Nice and Schreiber Company for an equal division of the profits of that Department. Some poultry had been stored in a public warehouse in the name of Nice and Schreiber Company prior to the Receivership. Burton procured the warehouse receipt and surrendered it, taking out in his own name a non-negotiable receipt. The poultry had a market value of about $4,000. Burton claimed title to the poultry on the ground that prior to the receivership, it had been turned over to him as a payment of account of his claim. Negotiations looking toward an amicable adjustment and turning over by Burton of this merchandise brought no results. It became necessary for the Receivers to institute an action in this Court in an effort to obtain an order on Burton to turn over the receipt or the poultry, there being two petitions to this end. Service of the petitions on Burton was accomplished with considerable difficulty. Before final disposition of the last of the two petitions, Burton finally agreed that the poultry be sold and that the proceeds be turned over to the receivers, all of which was subsequently done.

WILLIAM M. LIPPINCOTT

William M. Lippincott, had for a number of years been in charge of the Butter Department on a

salaried basis. In prior years, various sums of money in the nature of bonuses had been given to him, depending upon the profits of the business as a whole for the particular year. In the year preceding the receivership, while the business as a whole sustained a heavy loss, the Butter Department had shown a substantial profit. Upon the receivership, Lippincott claimed that he had an oral agreement with Mr. Nice whereby Lippincott was to receive a percentage of the profits of the Butter Department, without regard to the profit of the business as a whole. He claimed the percentage entitled him to approximately $17,000. The Receivers and counsel made an exhaustive investigation to ascertain the soundness of the claim. This investigation finally narrowed to the point, in view of the fact that no writings could be found, that there were only two persons who would be likely to know of such an arrangement or agreement, and they, one Charles N. Weston, the Treasurer, and one Bedell, the bookkeeper. Neither of these men could give much information on the subject. Both of them thought it unlikely that such an arrangement had been made, but neither was in a position to say that it had not been made. There appeared on the books of the company advances to Lippincott in excess of $700 on account of whatever bonuses he was to have received. The receivers and their counsel appreciated the possible difficulty on the part of Lippincott to establish this claim, color to which was added by the admitted fact that Nice had made a similar agreement with Burton for the Poultry Department. They were confronted with the fact that if Lippincott was able to produce any evidence of the making of the contract, the receivers were absolutely lack-

New Jersey State Library

ing in any defense. Vigorous demands were made by the attorney for Lippincott and after very considerable negotiation, an adjustment was made which resulted in the withdrawing of the claim and in other manners, which the Receivers believed were very advantageous to the estate. When the receivers took possession, they were informed of the efforts which had been made by the company from the time of the death of Nice and by the liquidating trustees subsequent thereto, up until the appointment of the receivers, to dispose of the business as a going concern, which would have included the releasing of the company from liability under its lease. At the time of the receivership, the liability to accrue under this lease amounted to approximately $9,000. No offers could be obtained for the business as a whole, and although much effort was made and negotiations entered into with various people interested in the same line of business and familiar with the standing theretofore of the Nice and Schreiber Company, and receivers were not able to make a sale of the business as a going concern and up until the adjustment about to be referred to, could not find anyone who would take over the lease without any consideration, other than the assumption of the liability thereunder. The question of the fixed assets and whether they could be removed from the premises proved a serious question in the minds of the persons who were approached on the subject, it being the thought that they were only of a value so long as they were installed in the premises, and it being doubtful whether they could be removed. Finally, after failing in a number of directions in the effort to dispose of the business and the lease and as a result of numerous conferences and

negotiations with Lippincott and his counsel concerning the claim of the latter, an agreement was reached with Lippincott whereby in consideration of the assignment to Lippincott by the receivers of the lease on the property and the transfer to him of the items set forth in Schedules "G", "H", and "I" of the Inventory (which consisted of machinery and equipment, with supplies, office furniture and fixtures) and a Buick automobile referred to in Schedule "J" of the Inventory and Appraisement, and the release of the claim of the estate against Lippincott of $700 appearing as advances on account of earned bonuses, Lippincott paid to the receivers $2400 in cash and executed a release of all claims against the estate, including the claim for bonuses of $17,000 and agreed to assume all liability on the lease. The figure of $2400 was arrived at as it is now recollected, on the following bases: In the items of Schedule "G" machinery and equipment, was a refrigerating machine valued at $4300. This was the cost price of the machine at the time of its installation five years before. Assuming that it could legally be removed and was capable of being removed and reinstalled, the best advices given the receivers were that it could not bring more than $1500 at the outside and possibly less; in addition, in Schedule "J" appeared the items of butter wrappers and cartons printed with the name of Nice and Schreiber Company and which would therefore be valueless to anyone else, which were appraised at approximately $600. The Buick Roadster, which was stored at St. Cloud, Minn., and which had been used by agents of the company in visiting various shippers in that section of the country, was appraised at $500 from the best information in the

possession of the appraisers at that time. Investigation developed that this was entirely too high a value because the car was in very poor condition, had charges for storage against it, and in all probability, could not have been disposed of for a price in excess of $200. Diligent inquiry by the receivers developed these facts. The other items transferred to Lippincott were transferred at appraisal value and it seemed to the receivers that they were realizing a little in excess of the actual value of the equipment, in addition to which they were obtaining relief from the burden of the lease. The owner of the property, Armour and Company, refused to agree to the transfer unless someone other than Lippincott assumed liability and in order to carry out this settlement, it became necessary for Lippincott to obtain an agreement by Edson Brothers above mentioned, to become surety on the lease. This having been done, the receivers filed a Petition in your Honorable Court for leave to make the compromise. Notice was sent to all creditors and the Court authorized the carrying out of the settlement. The net result of all this was that the Receivers, by the surrender of a claim against Lippincott of $700, which was doubtful of collection, decreased the claims against the estate by $17,000 eliminated a claim for rent which would have been preferred and which would have amounted to about $9000 and obtained a little more than full value for machinery and supplies, concerning the ability to realize anything from which there would have been otherwise very considerable doubt.

GLASSBORO LOTS

The Receivers discovered on the books of the company that there three lots in Glassboro, New Jersey, belonging to the company, but title to which was held in the name of Charles N. Weston. The Receivers secured from Weston a deed placing title in their name. The lots had been owned by the company for a number of years and the Receivers found that the market for sale was very limited. The information given was that the lots had been placed some years before under a development plan covering a large tract of ground which was never carried out, so that the lots had no great value and no buyer for them had been found. They were appraised at $1,000. Numerous inquiries were made of and considerable correspondence had with local real estate firms and others in an effort to dispose of the lots. Finally, an offer was made in the sum of $500. This was rejected by the receivers. After much negotiation back and forth, the receivers managed to secure an increase of the offer to $1500. Believing this to be an excellent price, a sale was made after petition filed in your Honorable Court, with notice to all creditors, asking leave to make the sale.

CLAIMS AGAINST WESTERN EGG SHIPPERS

These claims amounted to something in excess of $56,000 for which a reserve had been set up in the

books of the company. It seemed to be the opinion of everyone in the trade that these accounts were not collectible. Persons knowing conditions in the West at the time and the conditions of the particular shippers involved, stated that they believed the accounts to be worthless, aside from the defenses which were set up by the shippers, as above recited. A great deal of correspondence was had, many demands and threats of suit were made. Eventually, between $11,000 and $12,000 was collected upon what appeared to be a worthless asset. This matter is still under attention, and while nothing definite can be said, an effort is being made to realize further.

CONTESTED CLAIMS BEFORE MASTER

Quite a number of claims were presented before the Master which were contested by the Receivers. The principal claim was that of Droste and Snyder Company of New York City, and amounted to between $2,000 and $3,000. At least two special meetings were held before the Master, at which Arthur G. Dickson, Esq., representing the claimant, endeavored to prove a claim for damages for the failure of Nice and Schreiber Company to accept a shipment of butter. Testimony was taken. The defense of the receivers was that shipment was not in accordance with the sample and the result was that Droste and Snyder finally withdrew its claim.

The Pennsylvania Railroad presented a claim for a balance of freight due on a shipment of eggs. Counsel for the railroad introduced testimony in

support of the claim but was not able over the objections of the Receivers to prove the claim. The attorney for the Railroad Company thereupon agreed to withhold further presentation of the claim until an effort had been made to collect from the shipper. Up to this time, no further action against the estate has been taken by the Railroad Company.

Numerous other claims were contested on the ground of variation between the amounts of the claims and the amounts shown on the books of Nice and Schreiber Company. As a result of exhaustive inquiries and checking up in most instances the figures of the Receivers were accepted by the claimants as the amount for which the claim should be admitted.

PREFERRED CLAIMS

The receivers were confronted with the necessity of adjusting the taxes and filing returns on the same to the states of New Jersey and Pennsylvania and the United States of America. This required many conferences with the officers of the company, with Bedell, the bookkeeper and with George K. Watson and Company, the accountants, in order to secure and compare information necessary for the returns to the two states. Such conferences were necessary also in the matter of the United States Tax. In this last matter, an investigator of the Government worked in the office of counsel for the Receivers continuously for approximately one whole week, during which time he required practically all the time of one of counsel for information and assis-

tance in order to enable the making up of the Report.

RENT.

Nice and Schreiber Company occupied the premises under a lease with Armour and Company, paying a monthly rental of $333.33, the lease expiring in 1928. The inability to find a buyer for the business, a buyer for the lease or someone who would take over the lease, made it appear for a while as if the estate would suffer considerable loss by reason of this liability. By reason of the adjustment and settlement made with William M. Lippincott, as above set forth, a release was given by Armour and Company to the receivers for all rental, and no claim for rent was presented before the Master.

P. F. BROWN AND COMPANY

There appeared on the books of the company an open account due by P. F. Brown and Company in the sum of approximately $35,000. For some years before the receivership, Herbert H. Brown had traded under the name of P. F. Brown and Company. This concern and Nice and Schreiber Company had been doing business for a long period of time. Several years before the receivership, Brown was indebted to Nice and Schreiber Company for approximately $35,000. At that time, Brown and wife conveyed to Winfield S. Nice the title to 1931 Diamond Street, Philadelphia (which had been

theretofore owned by the wife of Brown), 1349 North Front Street, Philadelphia, and several lots in Bucks County, Pennsylvania. These properties were all subject to certain mortgage debts. The matter was very informally done, but it appeared that the conveyance was made as security for an indebtedness due by P. F. Brown and Company to Nice and Schreiber Company. Title to this property remained in Mr. Nice until the date of his death. Mr. Nice's will contained no power of sale of real estate. By his will, after making certain bequests, Nice devised the remainder of his estate to four sisters, three of whom are married. Demand was made on Brown for the payment of his indebtedness. Brown denied that he was individually indebted. He took the position that the indebtedness to secure which the properties had been conveyed, had been long ago paid off and he was entitled to a reconveyance of the properties. He also took the position that the indebtedness standing on the books at the time of the appointment of the receivers was an indebtedness of the corporation which he had several years before caused to be created and which was known as P. F. Brown and Company, and that it was not his individual indebtedness. The receivers took the position that the indebtedness was that of Brown individually and that the conveyance of the properties had been made not only to secure such indebtedness as existed at the time of the conveyance, but an indebtedness which might become into existence thereafter. Nothing was accomplished by negotiation. It was a fact that although the title had been conveyed to Nice, Brown had remained and had continued down to the receivership, in possession of

the properties without leases and without paying any rent.

The receivers brought suit against Brown individually and on defense being filed, it was necessary to go to a Jury trial. Much preparation was necessary for this trial, including investigations in Harrisburg and in Philadelphia. It was denied by the officers of the company that the company had any knowledge of sales to a corporaton and the books of the company showed no change in the method of keeping the account. Because of the difficult situations appearing before the Receivers and their counsel, all four participated in the preparations for this trial and attended the trial in person. A verdict was rendered in favor of the receivers against Brown individually for the full amount of the claim. It may be stated here that investigation by the receivers developed the fact that the corporation of P. F. Brown and Company had apparently done no business and the investigation developed that it was a grave question whether it had been completely organized. The receivers instituted inquiries as to the value of the equities of the properties and received varying opinions. In the meantime, and before a verdict could be obtained, judgment by confession had been entered by a bank against Herbert H. Brown in a large sum. On this judgment an execution was issued and the receivers immediately issued execution on their judgment and forced a sale, but the amount realized by the sale left nothing for the receivers. They now were met with the practical proposition of how to obtain title to the real estate and of disposing of it after getting the title. The legacies of Mr. Nice were a lien on the real estate as well as debts

and taxes. Brown persisted in his contention that the receivers had no right to the real estate for the reason above set forth, and particularly as to the Diamond Street property, on the ground that it had been the property of his wife at the time of the conveyance. In this difficult situation, the receivers had numerous conferences with various of the creditors of the Nice and Schreiber Company and with the executor of Nice and with the Vice President and title officer of the Land Title Company. At one time, it seemed that a Bill in Equity would be necessary to secure conveyance by the Nice Estate and such Bill and Petition to this Court for leave to proceed were drafted and re-drafted. Before anything definite was done along this line, a negotation was opened by Brown's attorney, looking to an adjustment and an offer received from him to pay $5,000 in satisfaction of the judgment and for reconveyance of the real estate. After full and exhaustive inquiry as could be made by the receivers in the effort to locate any assets of Brown from which recovery could be made, this inquiry extending to the trade, it had been about concluded that the only opportunity to recover anything on account of this indebtedness would be by realization on the real estate, if we were able to maintain our title. Because of this situation, the Receivers laid before the meeting of the creditors of the Nice and Schreiber Company the entire corporation and the creditors informally approved the acceptance of the offer. The receivers were strongly influenced along this line by reason of the fact that the creditors for the most part were men who were personally acquainted with Brown and his business and financial standing. They then succeeded in having the offer

increased to $6,000. In accepting this offer, the receivers required that the money be actually deposited with a third party as a condition precedent to an application by the Receivers to this Court for an approval of the compromise settlement and the taking of the necessary steps to secure a conveyance of the property. Title searches had been secured by Brown about ten days or two weeks prior to the time of the meeting of December 16th, 1927, counsel for the receivers made request of the legatees under the will of Nice to join in a deed with the receivers to Brown in order to carry out this settlement. Counsel have apparently investigated the matter and the receivers are now advised that such legatees will join in such deed. This deed is ready for execution and the settlement should be completed within a very short time.

The foregoing is a brief outline of some of the problems that were met by the receivers and their counsel in the administration of this estate. To give the work done in the administration of this estate in detail would mean the attachng of our files, which are very voluminous and the amplification thereof, which is harly practical. It has been the intent merely to suggest to the Court the character and kind of work which was done. No time, thought or effort was spared to render the best possible service for the benefit of this estate, and a much larger portion of the time of the receivers and their counsel has been devoted to the administration and service of the estate than is usual in such matters. It is not possible to state in hours, days or weeks the actual time that has been spent by each of the receivers for each of the counsel. It is stated, however, that practically the entire time

of both counsel, during the first two months of the receivership, was consumed in the work of the estate and that during this time both receivers devoted a very substantial part of their time to the work. The amount of time devoted to the administration of the estate after the first two months, while somewhat less than during the first two months, was not materially reduced until after the date of the distribution on the first account, which was about six months after the date of the receivership. From the date of the filing of the first account until the present time, all of the parties interested in the administration of this estate have devoted a considerable portion of their time to its affairs. It is respectfully suggested that the amount of the compensation was fair, just and warranted by the character and amount of the services rendered and the results obtained. The amount of compensation which was allowed was arrived at in each case only after scrutiny by the parties in interest and was approved by all the creditors and by the executor of the Nice estate through which estate these petitioners claim. When the first allowance was made, to which no creditors objected, such objection was raised by the executor of Winfield S. Nice and the other stockholder. This objection was frankly and fairly discussed between the parties and resulted in the approval by the executor and by the other stockholder of the amount which was allowed. Because of such objection, the master withheld making any allowance and filed his report only after the objecting parties had, in writing, stated their satisfaction. This report was filed by the Master on October 11th, 1926, after notice to all parties and the Decree confirming his report

was entered by the Court on November 1st, 1926. At least one term of court had passed before the matter was even informally taken up and three or four terms have passed at this time.

When the second account was audited, objection was raised by creditors and by the executor and the other stockholder. The receivers and counsel again endeavored to meet the wishes of the parties and reduced their request one-half, with the result that all objecting creditors withdrew their objections. Notwithstanding this fact, the executor filed exceptions and was represented at the argument of these exceptions by Thomas L. Gaskill, Esq., above referred to. The master, in his report and supplemental report filed June 10th, 1927 and June 11th, 1927, dismissed these exceptions and notice of the filing of these reports went to everyone in interest. It is hard to understand how these petitioners could have signed and sworn to a petition on June 22nd, 1927 if they did not have knowledge of all that had happened in plenty of time to have either asked the Master to reopen the matter or to have filed exceptions in this court before the confirmation by the court on July 2nd, 1927 of the report of the Master.

Prompt distribution was made by the receivers without knowledge of any kind that anyone contemplated action by these parties or anyone else, although by the petition, it appears that they could have prevented the final confirmation of the account and have held up distribution if they had acted, as they were ready to act, at any time within ten days prior to the final confirmation. These petitioners, it is true, were not of record but one of them was a creditor and had actual notice of every proceed-

ing in the case. She had received a dividend under the first account and she had received before she swore to this petition, notice that the master's account was filed in this Court. Aside from this, they were adequately, faithfully and thoroughly represented by the executor of the Will under which they claim, acting through its Trust Officer throughout the proceedings.

In addition to the suggestion that there is no merit in the action of these petitioners, it is respectfully suggested that under the law, the decisions of the Federal Court and the rules of this Court, the Petitioners have no right to raise the question they have and that they should not be permitted to have upset and set aside all the decisions of the courts and rules of procedure merely by making allegations, most of which are not justified or sustained by the record.

It is, therefore, further respectfully suggested that the action of the master in allowing and the action of the receivers and their counsel in receiving the compensation allowed and paid in this case should not be disturbed.

RESPECTFULLY SUBMITTED,

Sidney E. Smith
John Weaver
A. J. Davis
Russell Cornell Cooney

We certify that the facts contained in the foregoing statement, so far as they are based on our own knowledge, are true and so far as they are based on information, we believed at the time of our actions and now believe to be correct; that the figures set forth in the foregoing statement were

obtained from the records and we believe are from sources which are accurate.

A. J. Davis
Walter Weaver
Sidney E. Smith
Russell Conwell Carey

By Mr. Starr:

Q. Do you know what became of the original of these papers that I show you?

A. Yes.

Mr. Morris: Objected to.

The Court: Objection overruled.

(Exception allowed to exceptants.)

Q. What became of it?

A. After the answer had been filed by the receivers and counsel, on this history of the receivership, and after an agreement had been reached between Mr. Furst and Mr. Dalbey, ——

Q. They represented whom?

A. —the exceptants.

Q. The beneficiaries here?

A. Yes; we met in Judge Dickinson's office and after having explained to him the situation it was then in, it was suggested that all the original papers be destroyed and they were destroyed, in my presence, and in the presence of the other counsel and receivers, and in the presence of Judge Dickinson and in the presence of Mr. Furst.

Q. These papers which you have are office copies?

A. Yes.

Q. Which were retained, of the original?

A. Yes.

Q. Was there a hearing or informal conference between Mr. Dalbey and Mr. Furst and Mr. Smith and yourself, and Mr. Weaver?

A. Yes.

Q. Before Judge Dickinson?

A. There was.

Q. And as a result of that did you receive a letter from Judge Dickinson?

A. Yes, resulting from the discussion; Judge Dickinson dictated a memoranda which he sent to counsel in the case.

Q. I show you a paper and ask you if that is a copy of the memoranda sent to counsel by Judge Dickinson?

Mr. Morris: Objected to.

(Objection overruled.)

(Exception allowed to exceptants.)

A. That is a correct copy.

Mr. Starr: We offer this in evidence.

Mr. Morris: That is objected to.

(Exception allowed for exceptants.)

(Exhibit #6 admitted in evidence, being memoranda mentioned by Mr. Starr, signed by Judge Dickinson, a copy of which follows:

EXHIBIT 6.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SITTING IN EQUITY

CORN EXCHANGE NATIONAL BANK VS. NICE & SCHREIBER COMPANY	March Sessions 1926 No. 3701 RECERVERSHIP BILL.

TO COUNSEL:

We declined to express in this case any extra judicial opinion. The wisdom of withholding one is as a general proposition conceded. The question raised, however, is one which might well be adjusted by the interested parties, and upon further reflection we feel that it is an exception to the general rule, and that we should perhaps aid the parties to an agreement by discussing some of its features. The broad question is one of the allowance of fees to Receivers, Counsel and the Master appointed by the Court. We feel that we should begin with a comment which will take out of the case any element of reflection upon the recipients of these fees

because of any intimation that they were seeking to feather their own official nests. The comment is that the complaint of the charges comes doubtless as a surprise because the fees charged were not only fixed by those who at the time were thought to be the interested parties but were fixed at sums less than in some instances the recipients were urged to charge. It is this which we think misled them. The real fact situation is now known to be that those who were then thought to be paying these fees were paying them not with their own money but with the moneys of the present petitioners. It is a proverb that liberality with the money of others is always to be mistrusted.

An outline fact statement will make this situation clear. The defendant is a corporation but was really Winfield S. Nice Incorporated as he owned all the stock of the corporation except a few shares nominally owned by others for organization purposes. He died leaving the petitioners his residuary legatees. The Corn Exchange Bank is the Executor of his will. It thus came about that the defendant company was in real fact unrepresented in the proceedings and the petitioners were not formally parties. The shares constituted after payment of specific legacies the whole estate of the decedent. Color is given to the legal rights of the petitioners by the fact that they are the sisters of the decedent, are now getting on in years and their brother in his life time and what they get out of his estate was and is their chief dependence for support. It happened that on the eve of the death of the testator a balance sheet of the financial condition of the corporation was made out by skilled accountants which showed, after throwing out

doubtful assets, that the stock had a book value of about $90,000.00. One result of the Receivership has been to turn over the business of the corporation to those now conducting it who were concerned with the Receivership litigation. Another result is that the estate is barely solvent and those interested in the stock will receive nothing. Another result is that the administration expense of paying creditors has been over 30% of the sum paid. The expenses with which we are now concerned are these items:

Receivers	$16,250.00
Counsel	16,250.00
Master	3,250.00
	$35,750.00

The balance sheet assets were in round numbers valued at $290,000.00 and the liabilities stated at $200,000.00. At the time of the Receivership the latter had been reduced to $116,000.00. Making a corresponding reduction in the assets, they were at that time about $206,000.00. The total sum realized (assuming it to be enough to pay the debts and expenses charged) may be put at $150,000.00. No one can review this record without feeling that the affairs of this company were wound up in a way most unfortunate in its results. There is no question on the part of any one of the good faith of the Receivers and their counsel. We assume and are persuaded that they did their best. The purpose of the Receivership, we assume was to save the consequences of a possible bankruptcy. So far as we can see there was undue alarm from the threat of this but what concerns us is that if bankruptcy had intervened, the administration expenses would have

been notably less than they have been. The one proceeding is a fair analogue for the other —— The Receivers corresponding to the Trustee, and Counsel having about the same relation to the case, and the Master and Referee having much the same duties to perform. In the case of Master and Referee it must be borne in mind however, that the former has only the one case to which he must give the right of way over his professional work while the latter is doing what to him is routine work.

The net conclusion we have reached is that this controversy is one which can be best adjusted by the parties themselves, and that they should be given an opportunity to do so. Failing agreement, we will fix the fees.

Yours truly,
(Sgd O. B. Dickinson.)''

By Mr. Starr:

Q. As a result of these negotiations between Judge Dickinson and counsel was there any sum paid by them as receivers?

A. There was.

Q. How much?

A. Ten thousand dollars.

Q. What was executed to show the settlement or payment of that amount of money?

Mr. Morris: Objected to.

I do not think that that is relevant, admissible, or evidential in this case. We seek to surcharge the executor and this is an agreement between the receiver and the heirs and is therefore objected to.

(Objection overruled.)

(Exception allowed to exceptants.)

The Witness: There was a release executed in quadruplicate, a copy being given to each of the receivers and each of counsel.

Q. I show you a paper which purports to be a release and ask you if that is your original paper from which the copy was made at the time?

(Paper shown witness.)

Q. That is an exact copy made from the original?
A. It is the original, exact copy.

Mr. Morris: Objected to.

(Objection overruled.)

(Exception allowed to exceptants.)

(Exhibit offered in evidence, marked Number 7, admitted, and which reads as follows:

"KNOW ALL MEN BY THESE PRESENTS, that we, MRS. CHARLES M. GRUBB, MRS. JULIUS VETTERLEIN, MRS. JOHN H. SEAL and MRS. GEORGE A. SCHREIBER, for and in consideration of the sum of one dollar, and other valuable considerations, receipt whereof is hereby acknowledged, do hereby remise, release, and forever discharge SIDNEY E. SMITH, JOHN WEAVER, and/or the ESTATE OF JOHN WEAVER, DE-

CEASED, A. J. DAVIS, RUSSELL CONWELL COONEY and MORTON Z. PAUL, and each of them, their and each of their heirs, executors and administrators, of and from all, and all manner of, actions and causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, agreements, judgments, claims and demands whatsoever in law or equity, especially all claims which we now have, or ever did have, or ever may have, either individually or as residuary devisees under the Will of WINFIELD S. NICE, deceased, as stockholders, creditors, or in any otherwise, against the NICE and SCHREIBER COMPANY, a corporation, or which against the said Sidney E. Smith, John Weaver, and/or the Estate of John Weaver, deceased, A. J. Davis, Russell Conwell Cooney and Morton Z. Paul, or any of them, by reason of the administration of the Receivership of the Estate of the Nice and Schreiber Company, at the suit of the Corn Exchange National Bank, Trustee under the Will of Winfield S. Nice, deceased, and Charles N. Weston, Complainants, against Nice and Schrieber Company, a corporation, Respondent, in the District Court of the United States for the Eastern District of Pennsylvania, March Term, 1926, No. 3701, in Equity, either as Receivers, Counsel for Receivers, Master, or otherwise, which we the aforesaid Mrs. Charles M. Grubb, Mrs. Julius Vetterlein, Mrs. John H. Seal and Mrs. George A. Schreiber ever had, now have, or which our, or any of our heirs, executors, administrators or assigns, or any of them, hereafter can, shall or may have, for, or by reason of any cause, matter or thing whatsoever, from the beginning of the world to the date of these presents.

IN WITNESS WHEREOF, we have hereunto set our hands and seals the 12th day of April in the

year of our Lord one thousand nine hundred and twenty-eight (1928).

Catherine A. Grubb
Mrs. Charles M. Grubb (Seal)
Mary E. Vetterlein
(Mrs. Julius Vetterlein (Seal)
Emma D. Seal
(Mrs. J. Seal) (Seal)
Isabella T. Schreiber
(Mrs. Geo. A. Schreiber (Seal)

SEALED AND DELIVERED
in the presence of
Mary E. Grubb
Jos. A. Randolph

STATE OF PENNSYLVANIA)
SS
COUNTY OF PHILADELPHIA)

Before me, the subscriber, a Notary Public for the Commonwealth of Pennsylvania, residing in the County of Philadelphia, personally appeared the above named Mrs. John H. Seal and Mrs. George A. Schreiber, to me personally known, and they each having been duly sworn according to law, acknowledged the foregoing instrument as and for their act and deed and desired the same might be recorded as such.

WITNESS my hand and Notarial Seal this 12th day of April in the year of our Lord one thousand nine hundred and twenty-eight (1928)

J. RAYMOND KELLY
Notary Public

My commisison expires at the end of next Session of Senate."

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC } SS

Before me, the subscriber, a Notary Public for the State of New Jersey, residing in the County of Atlantic, personally appeared the above named Mrs. Charles M. Grubb, Mrs. Julius Wetterlein, to me personally known, and they each having been duly sworn according to law, acknowledged the foregoing instrument as and for their act and deed and desired that the same might be recorded as such.

WITNESS my hand and notarial seal this 12th day of April in the year of our Lord one thousand nine hundred and twenty-eight (1928)

JOSEPH A. LANDOLFI,

(SEAL) My commission expires Sept. 1932.

IN THE COURT OF COMMON PLEAS OF ATLANTIC COUNTY

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC } SS

(SEAL)

I, WILLIAM A. BLAIR, clerk of the County of Atlantic, and Clerk of the Court of Common Pleas, said Court being a court of Record having a common seal, being the officer authorized by the laws of the State of New Jersey to make the following certificate.

DO HEREBY CERTIFY, that Joseph A. Landolfi, whose name is subscribed to the Certificate of the acknowledgement, proof or affidavit, was at the time of taking such acknowledgement, proof or affidavit, a

NOTARY PUBLIC of the State of New Jersey, residing in the County aforesaid, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgements and proofs of deeds or conveyances for lands, tenements and hereditaments and other instruments in writing to be recorded in said State of New Jersey, and to all whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that I am well acquainted with the handwriting of the said NOTARY PUBLIC and verily believe the signature to the attached certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said County and Court this 12th day of April in the year of our Lord, one thousand nine hundred and twenty-eight. (1928)

WM. A. BLAIR, Clerk."

By Mr. Starr:

Q. In the preparation of the petition for the Receiver in the State of Pennsylvania, did you make inquiry of Mr. Weston as to the actual money on hand, the bank balance, or anything of that kind?

A. Not particularly, for the reason, as my memory now calls to me, several times during the proceeding, two or three weeks ——

Mr. Morris: Objected to.

The Court: Objection sustained.

(Exception to the exceptants.)

Mr. Starr: I think we are entitled to have his recollection whether particularly or otherwise. May I have an exception to your Honor's ruling?

The Court: Yes.

By Mr. Starr:

Q. Did you at the time that this paper was filed, the petition for a receiver was filed, know what the actual balance of the Nice Company was?
A. I don't know actually.

Mr. Morris: Objected to.

Q. What do you know about it?

Mr. Morris: That is objected to on the ground that the knowledge of this witness does not bind us, because we are charging the executor; and this witness was not an officer of the executor, the Corn Exchange National Bank.

Mr. Starr: The testimony is that this witness —

The Court: Let the witness proceed. He says he doesn't know.

By Mr. Starr:

Q. What do you know about it?

Mr. Morris: Objected to.

(Objection sustained.)

(Exception allowed to defendant.)

By the Court:

Q. For whom were you acting in the preparation of the bill filed for the receivership?

A. I was acting for the Corn Exchange National Bank as executor, and also in behalf of Mr. Weston as stockholder and the Corn Exchange National Bank was also a creditor as well as a stockholder.

Cross-examination.

By Mr. Morris:

Q. Were you associated with the late John Weaver?

A. In no way at all.

Q. You had adjoining offices with him?

A. No, they are separate buildings.

By Mr. Morris:

Q. You say that the Corn Exchange Bank,—that this letter addressed to the Corn Exchange Bank by Mr. Salus was the moving cause of this receivership, is that right?

A. One of the moving causes.

Q. What other moving causes were there?

A. Because of the fact that the concern was at that time in process of liquidation and it was not, at the time considered advisable to continue it, to go on indefinitely.

Q. Was there any other reason?

A. Yes, if the liquidating had been done by men of business, at that time, it could be done better than under the guidance of a receivership.

Q. You think that the liquidation of assets could

go on better under the guidance of a $40,000 receiver than under a bookkeeper?

Mr. Starr: He hasn't said anything of the kind.

Q. Don't you think the liquidating process could go on as well before the appointment of a receiver as it did afterwards?

A. Providing there was no antagonistic action there, yes.

Q. As a matter of fact the receivers did nothing more than the employees of the company did before the appointment of receivers?

A. I didn't say so.

Q. In fact, the employees of the Nice Estate did all the work of the receivership, did they not?

A. I say no.

Q. No?

A. I say no.

Q. What more did the receivers do, outside of collecting these debts?

A. They did quite a large bit of work.

Q. Who collected the debts?

A. I personally devoted one month of my time to the practical exclusion of everything else.

Q. Who collected the debts?

A. The receivers and their counsel.

Q. Didn't Mr. Bedell do the collecting?

A. No, sir.

Q. Wasn't the money that he collected, the sum of $140,000, wasn't that collected within three months after the appointment of receivers?

A. Do you mean through Mr. Bedell?

Q. Yes.

A. By no means.

Q. Who did?

A. The receivers and their counsel.

Q. Did they go out and collect this money from the creditors?

A. It was done by letter and by telephone calls, and I did it many times myself.

Q. What do you show for your supervision of it?

A. I couldn't estimate.

Q. More than five thousand dollars collected?

A. Without a doubt.

Q. Mr. Bedell did most of the collecting?

A. I won't say that he did.

Q. Didn't most of the money come through his efforts and turned over to you?

A. Very frequently due to the writing of letters or a telephone call from myself, or by letter, the money was brought in.

Q. You wrote letters and the money came in?

A. No, not by any means, not all of it.

Q. Mr. Salus doesn't say anything in his letter at all about bankruptcy, but merely threatens to ask for the appointment of a receiver.

A. He mentions a preferential demand.

Q. Does he say anything about bankruptcy here?

A. No, not in that letter.

Q. Why do you say that there was a threat of bankruptcy in that letter, and you say also that you stayed up until 12 o'clock at night getting the papers ready for the receivership?

A. I had an interview with Mr. Salus, where he repeated his demands.

Q. He didn't press for bankruptcy proceedings?

A. No, he demanded settlement.

Q. Under threat of what?

A. Bankruptcy.

Q. In this letter he doesn't threaten bankruptcy?

A. Only Mr. Freeman had inferred the fact that

he was going to ask for a receiver, or a preferential receiver.

Q. If he did petition for bankruptcy proceedings, you could have successfully defended, or the Nice Company could have successfully defended bankruptcy proceedings, because the company was solvent?

A. Yes—pardon me ——

Q. Never mind. You answered that question. Did you show Mr. Salus the financial position of the company, did you show him the books to show him that the company was solvent and that it was not necessary to have the appointment of a receiver?

A. No.

Q. Did Mr. Freeman?

A. I don't know.

Q. You were acting for Mr. Freeman at the time?

A. I was acting for the Corn Exchange National Bank.

Q. You were acting for the Corn Exchange National Bank, and yet you didn't think it worth while, or proper, to investigate, yourself, as to the solvency or insolvency, to ward off the claims of creditors?

A. If an attorney cannot rely on the word of the secretary and treasurer of a company, I do not know whose word he is going to take.

Q. If this secretary and treasurer had said that there were three cents in his treasury, would you have believed it?

A. If I had no reason to believe otherwise.

Q. You wouldn't look at the books, in that case, to find out if it were so?

A. I am not a bookkeeper, no.

Q. Why didn't you go down to Mr. Bedell or any of the other employes of the company and try to

find out what the financial condition of the company was?

A. I never knew Mr. Bedell until after the receivership.

Q. You say that Mr. Weaver represented the heirs. As a matter of fact don't you know that Mr. Weaver only represented the heirs for one specific purpose and that was to contest the claim of Mr. Weston?

A. I know absolutely nothing at all about it; the only thing I do know, we were discussing candidates for the receivership, with Mr. Freeman and myself, and Mr. Freeman suggested Mr. Weaver because, he said, Mr. Weaver had represented the residuary legatees.

Q. Who told you that?

A. Mr. Freeman.

Q. He told you that Mr. Weaver represented the residuary legatees of the Nice Estate?

A. Yes.

Q. You don't know that his only purpose in representing them was to contest the claim of Mr. Weston under the will? You don't know that?

A. Without a doubt, no.

Q. Did you inquire of Mr. Weaver what his authority was in the matter?

A. No.

Q. Do you know whether or not Mr. Salus, or Mr. Burton, would have accepted a partial payment on account of Mr. Burton's indebtedness?

A. I don't know. I didn't make the offer.

Q. You don't know?

A. I didn't make the offer for the reason that Mr. Weston said that they were not in position to make it.

Q. An offer for what?

A. An offer for the payment of a substantial amount.

Q. You didn't know that the company had $41,000 cash in bank on the date of the appointment of the receivers?

A. No, they did not.

Q. They did not?

A. No.

Q. In spite of the fact that the appraisers in the receivership reported that they did?

A. Yes, if there is an explanation there I would be glad to give it to you.

Q. You have answered it. Who was it consented to the appointment of a receiver? Who authorized you to draw these papers?

A. Mr. Freeman and Mr. Weston.

Q. You knew that Mr. Weston was the only minority stockholder, the only one, he holding about seven shares of stock in the Nice Company?

A. Aside from Mr. Nice, he was the minority stockholder.

Q. You know that Mr. Nice was practically the sole owner of that company?

A. Yes, and I realized that I was dealing with Mr. Freeman as a representative of the estate.

Q. You thought that he should know about the financial condition of the company?

A. As representing the executor, I thought so.

By the Court:

Q. What explanation did you make or start to make about there not being $40,000 in cash on hand?

A. With this qualification, that at the time the receivership came along the actual cash balance we knew was considerably less by some thousands of

dollars; I don't know, because the actual number of checks sent out the preceding day or days, to various western shippers, had come back, and on which payment was stopped.

By Mr. Morris:

Q. Do you know how much they amounted to?
A. No, offhand I don't.
Q. Was it less than ten thousand dollars?
A. Yes.
Q. So that there was $31,000 left, and Burton's claim was how much?
A. I think at that time that Mr. Burton's claim was $13,000.
Q. Yet there never was enough balance there to take care of that?
A. Not according to the information.
Q. You said the outstanding checks amounted to ten thousand dollars?
A. I didn't say anything of the kind. I said that Mr. Weston afterwards, Mr. Weston advised that there was not sufficient money to meet it, or any part of it.
Q. What makes you identify that loose bunch of papers as being the petition filed in the Federal Court?
A. Because I have seen the petition and the copy so frequently, and noticed it so frequently, that when it was offered in evidence I was willing to take the responsibility of saying, "This is a copy."
Q. You know that that is an extra copy?
A. I would say it is a correct copy.
Q. Every word in it is an exact copy?

The Court: Let us proceed.

By Mr. Morris:

Q. The heirs were not consulted in this application for the appointment of a receiver, and did not know anything about it until after the receivership had been made?

A. No; because the title to the stock was in the name of the Corn Exchange National Bank as executor and trustee.

(Witness excused.)

SIDNEY E. SMITH, called as a witness on behalf of the accountants, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Starr:

Q. You are a member of the Philadelphia bar?

A. Yes.

Q. When were you admitted?

A. 1902.

Q. Were you appointed one of the receivers of the Nice-Schreiber Company by Judge Dickinson in the District Court of Pennsylvania, in Philadelphia?

A. Yes.

Q. When did you first know anything about the application for a receivership?

A. I would say my best recollection is around seven o'clock or so, on the evening, I think it was

following the evening of the 28th, or on the evening of the 27th, at my home, Mr. Davis called me over, I presume, from his home.

Q. Mr. Davis called to see you?

A. No, he called me on the phone.

Q. When you had the conference with him, that was when you had the conference with him, on the letter from Mr. Salus, Exhibit 3?

A. I have nothing in my recollection at this time to say whether I saw the letter or whether Mr. Davis told me of the letter, and his conversation with Mr. Salus. I think I became acquainted with this letter that was received, and that we had a conference.

Q. Did you assist in the preparation of papers for the appointment of a receiver?

A. Yes.

Q. These papers were prepared when?

A. That evening in the office.

Q. About when was it sworn to, do you know when it was sworn to?

A. On the following morning, the morning of the 28th.

Q. About what time in the morning were they prepared or verified?

A. It was sometime after nine, probably before nine. Mr. Davis said about half-past nine, so that I imagine it was round about that time.

Q. You were then appointed one of the receivers?

A. Yes.

Q. Do you know anything about the fact as to whether or not Mayor Weaver represented the beneficiaries?

A. Only to the extent that I was so told, by, I think ——

Mr. Morris: Objected to, unless the witness knows of his own personal knowledge.

By Mr. Starr:

Q. You heard Mr. Davis testify with relation to an informal conference between Mr. Davis and Mr. Freeman, representing the next of kin, the beneficiaries, and Mr. Weaver, and yourself, and the other gentlemen representing the proceedings before Judge Dickinson?

A. Yes.

Q. Without going into detail of those conferences, what was the result of that, what happened?

A. The ultimate result, of course was, turning over the ten thousand dollars ——

Mr. Morris: Objected to on the same ground that I objected to testimony of Mr. Davis.

The Court: Overruled.

(Exception to exceptants.)

The Witness: Shall I answer?

Q. Yes.

A. The ultimate result was the turning over to Mr. Furst, as representing these folks, ten thousand dollars, and the delivery by Mr. Furst, of, I think, there were four separate releases executed as originals, all of the same tenor and effect.

(Witness shown Exhibit No. 7.)

By Mr. Starr:

Q. Is that one of the releases that was turned over?

A. Yes, that was the release I think which was, as a matter of fact, given to me personally.

Q. From your knowledge of what occurred, with respect to the preparation of the papers, as incidental to the appointment of a receiver, what was the object of having a receivership made?

Mr. Morris: Objected to.

Mr. Starr: It seems to me that he can testify as to that. That is all.

(Witness excused.)

Edgar W. Freeman, called as a witness on behalf of the accountants, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Starr:

Q. Are you one of the vice-presidents of the Corn Exchange National Bank and also have charge of the trust department?

A. Yes.

Q. The record shows that the will was probated March 27, 1926. When did you have any negotiations or conferences with John Weaver as representing the next of kin?

Mr. Morris: Objected to. We do not admit that John Weaver did represent the next of kin.

Mr. Starr: I will amend that question by striking out "representing the next of kin" and inserting "any matter connected with the Nice Schreiber Company or the Nice estate."

The Witness: As I recall, my first conferences with Mr. Weaver, had to do with the probate of Mr. Nice's will. I saw Mr. Weaver shortly after Mr. Nice's death, two or three days after, and at that time there was some question of a possible contest of the probate. I had several conferences with Mr. Weaver in that regard.

Q. Your understanding was that he was representing whom?

A. I understood that he represented all four of the residuary legatees. Later on I conferred with Mr. Weaver with regard to the disposition of the Nice and Schreiber business, upon the understanding that he still represented the residuary legatees, and I wanted to get his approval of anything I did in connection with the disposition of the business.

Q. Without going into details to any great extent, what efforts did you make to dispose of the Nice Schreiber business, or the stock owned by the Nice estate, in that corporation?

A. Soon after Mr. Nice's death, and before the will was probated, I had a number of conferences with the Nice Schreiber associates, in the business, Mr. Weston, Mr. Lippincott and Mr. Burton. It appeared that for some period of time before his death Mr. Nice had not been good health and had not been able to give much attention to the conduct of the business.

Mr. Morris: Objected to.

Does your Honor propose to go into the question of the excessiveness of fees?

Mr. Starr: We haven't gone into that at all.

Mr. Morris: Today?

The Court: All that I am interested in is the sum total, not how the figures are made up. If I am going to surcharge this executor it will be on the ground that by reason of having the unnecessary expense of $40,900, and some odd dollars, receivership, it should be charged with that.

Mr. Morris: I say in one of my exceptions that the executor should be surcharged for its misconduct, gross negligence and indifference, even after the appointment of the receivership, in that it consented to excessive fees. Will your Honor allow me an exception to its refusal to hear testimony as to excessive fees?

The Court: Yes, for fees allowed in the City of Philadelphia, State of Pennsylvania.

The Witness: The situation at that time was that the business was under the management of Mr. Weston, generally, who was secretary and treasurer, and under him Mr. Lippincott had charge of the butter department and Mr. Burton had charge of the poultry department, and another gentleman, I don't recall his name, had charge of the egg department; and that gentleman had left the company prior to Mr. Nice's death on account of losses sustained in the egg department. They had an account with the Nice Schreiber Company—the Nice Schreiber Company had an account in my bank and we knew its general condition. After consulting with my associate officers in the bank it was deter-

mined that we couldn't hope to get—to operate the business successfully, and the next alternative was to sell the business as a going concern. After some inquiries in the butter and egg trade, it was seen that the only possible purchaser in the business, were those who were already associated in it. With that in view I consulted with Mr. Lippincott and Mr. Weston on the one hand and Mr. Burton on the other hand. Mr. Burton had not been working in harmony with the other two gentlemen, and there were those two distinct factions in the business. The first proposition that I recall was made by Mr. Lippincott and Mr. Weston, who offered $52,500 for Mr. Nice's stock. That offer was given consideration, and on the same day or the day after, Mr. Burton submitted an offer of $55,000. We had already been advised by the four residuary legatees that they wanted Mr. Burton to continue the business.

Q. Now right there. Is this the letter that you received from them with respect to Burton continuing the business?

(Letter shown witness, heretofore marked Accountants' Exhibit No. 8.)

A. Yes.

By the Court:

Q. Were these offers made in cash?

A. No, they were made on various settlement terms, part cash, and carried over the period of a year.

(Accountants' Exhibit No. 8 above mentioned read to Mr. Starr to witness.)

By Mr. Starr:

Q. Go ahead where you left off.

A. When Mr. Burton's offer of $55,000 was received, and in view of the fact that the four beneficiaries wanted Mr. Burton to continue the company, we were forced to decline Mr. Lippincott's offer because it was in less amount and made by a person not acceptable to the interested parties. I may say that Mr. Lippincott's offer was not turned down because he did not have sufficient financial backing. His offer was perfectly good. As I recall there were further negotiations between Mr. Lippincott and Mr. Weston on the one hand, and Mr. Burton on the other. Mr. Lippincott made possibly one more offer, increased the amount; and Mr. Burton made a still higher offer. Mr. Lippincott then made other arrangements, and withdrew all his offers. About the same time Mr. Burton withdrew his offer. We were then faced with the situation where there was no possibly purchaser for the business. I had inquired of other people in the butter and egg trade, my senior officers had also consulted some of the butter and egg people, and it was apparent that there was no possibility of selling the business as a going concern. Then, as I recall, Mr. Burton made us an offer of $1500, merely for the good will of the business. A day or so later negotiations were resumed with Mr. Burton, who made an offer of $45,000 for the business and we accepted it. Mr. Burton's attorney, Mr. Salus, prepared an agreement of sale that was submitted to Mr. Gaskill for his suggestions and I re-dressed the agreement of sale, which was on a basis of $45,000 for Mr. Nice's stock; submitted it to Mr. Burton, and he turned it down. Thereafter, a meeting of the directors of the Nice Schreiber Company was held, at which it

was voted to liquidate the company under New Jersey corporation laws.

The Court: How many were there, were there three serving or two serving?

A. Two serving; and I was appointed a director sometime during the course of the negotiations. We were liquidating the business for possibly two weeks I should say, when the letter from Mr. Burton's attorney was served upon us, threatening immediate institution of bankruptcy proceedings.

By Mr. Starr:

Q. Did you receive a letter from Mr. Burton with reference to the payment of his claim, dated April 19, 1926—did you receive that from Mr. Burton?

(Paper shown witness.)

A. Yes.

(Letter offered in evidence and marked Accountants' Exhibit number 9, admitted, and which reads as follows:

"April 19, 1926.

Attention of Mr. Freeman.
Corn Exchange National Bank,
Executors for the Estate of
Winfield S. Nice, deceased,
1510 Chestnut St.,
Philadelphia, Pa.
Gentlemen:

Will you please arrange to pay me at the very

earliest time possible at least $10,000 on account of my accumulated poultry profits with the corporation of Nice & Schreiber Company. Your prompt attention in this matter will greatly oblige,

Yours very truly,

Dict.—HLB/B H. L. Burton")

By Mr. Starr:

Q. I show you letter dated the same date, signed by Mr. Burton, in which he withdrew all offers to buy the business?

A. Yes.

Q. Did you see that?

(Paper shown witness.)

(Letter dated April 19, 1926, offered in evidence, marked Accountants' Exhibit No. 10, admitted and which reads as follows:

"I hereby withdraw all offers to buy the stock of the Nice Schreiber Company, owned by the estate of Winfield S. Nice. Very truly yours, H. L. Burton.")

Mr. Starr: Where is that file of Mr. Weaver's correspondence, will you get it?

(Witness gets papers.)

By Mr. Starr:

Q. I show you letter, signed by you, addressed to Mr. Weaver under date of April 21, 1926. Did you sign that letter to Mr. Weaver relative to the Nice Schreiber Company?

(Paper shown witness.)

A. Yes.
Q. Also to the estate?
A. Yes.

(Letter dated April 21, 1926, offered in evidence, on behalf of the accountant, marked Accountants' Exhibit No. 11, admitted, and which reads as follows:

"Philadelphia, April 21, 1926.

Re: W. S. Nice Estate.
Hon. John Weaver,
Commercial Trust Bldg.,
Philadelphia.
Dear Mr. Weaver:

As I advised you by phone, we are preparing an agreement of sale with Mr. Burton of the Nice and Schreiber Company stock owned by the above estate. This agreement of sale contemplates a gross purchase price of $45,000, of which $30,000 will be paid in cash within thirty days, at which time the control of business will be turned over to Mr. Burton, and the balance of $15,000 will be represented by three notes of $5000 each, payable respectively in six, twelve and eighteen months, with interest at 6%. We shall retain the Nice & Schreiber stock as collateral and will also have life insurance covering the unpaid balance assigned to us, together with 120 shares of building and loan stock, aggregating approximately $3000. I shall consult with you when the agreement of sale has been prepared and shall appreciate any suggestions you may have.

One other small matter, which I believe I discussed with you briefly before. Mr. Nice, as you know,

owned premises 13 South Buffalo Avenue, on which the semi-annual interest amounting to $360 was payable April 16th. As I understand it, the estate is chargeable with mortgage interest on this property up to the date of death, March 3d, and that thereafter your clients take the property subject to encumbrances. We shall, however, be very glad to pay the full amount of interest with their approval and I shall appreciate it if you will inform them of the situation and advise me whether they will consent to the payment of the interest by us.

Very truly yours,
EDGAR W. FREEMAN,
Vice President and Trust Officer.

EWF:H'')

Q. I show you another letter dated April 22, 1926, and ask you did you send that letter to John Weaver, enclosing draft of the Burton agreement?

(Paper shown witness.)

(Letter dated April 22, 1926, marked Accountants' Exhibit No. 12, admitted in evidence, which reads as follows:

"Philadelphia,
April 22, 1926.

Re: W. S. Nice Estate.
Hon. John Weaver
Commercial Trust Bldg.,
Philadelphia.
Dear Mr. Weaver:

I am enclosing herewith a draft of proposed agreement between this bank and Mr. Burton with reference to the sale of the Nice & Schreiber Co. stock.

Inasmuch as we are anxious to consummate this matter as soon as possible, I shall very much appreciate it if you will let me have your comments on the proposed agreement at your early convenience.

Very truly yours,
Edgar W. Freeman,
Vice President and Trust Officer.

EWF:H
Enc.")

By Mr. Starr:

Q. After the letter came from Mr. Salus, with reference to the Burton claim, what happened?

A. As I recall, the letter came to me and I telephoned Mr. Weston and told him the contents of the letter, and asked him whether the company had enough cash on hand to pay Burton's claim and he said no. Then I asked him to come with me or to meet me at Mr. Davis' office, to discuss what best should be done.

Q. Mr. Davis represented whom at that time?

A. He was attorney for the company. Mr. Weston and I then went to Mr. Davis' office, talked over the whole situation, and, as Mr. Davis testified, we came to the conclusion that the most advisable course was for an equity receiver. We were not entirely sure of whether Mr. Burton's claim was a proper one at that time. Mr. Weston told us there was not enough money to pay it, anyhow, and we were also somewhat concerned about the solvency or insolvency of the company, and as to whether or not it was solvent, we were not sure. We were therefore worried about the threatened bankruptcy proceedings, and, as to the best means of preserving the assets of the company, we decided upon an equity receivership. Either myself or Mr. Davis,—I forget which, tele-

phoned to Mr. Gaskill and this was late in the afternoon of the 27th.

Q. Who is Mr. Gaskill?

A. He was proctor for the executor. We explained the situation to Mr. Gaskill and he agreed with us that an equity receiver was the best course; and later on that evening I called Mr. Weaver by telephone, explained the situation to him and asked him what he thought was the best thing to do. He also agreed that the receivership was advisable, and I asked him if he would consent, at that time, to act as one of the receivers, and he said he would. My purpose in doing that was so that the four beneficiaries of the estate would have complete knowledge of everything that was done in the receivership proceedings and would be directly represented. The next morning it was recommended that Mr. Weston and myself go to Mr. Davis' office to sign a petition. That was done, and the petition was taken to the District Court, in the morning.

Q. It was verified by you and Mr. Weston at what time?

A. At nine o'clock or nine twenty.

Q. On the morning of what?

A. On the morning of the 28th of April. The petition was then taken to the Federal Court and filed, and an order appointing a receiver was handed down the same morning.

Q. There has been some criticism here, with respect to the allegation in the petition, that on the second day of March there was the sum of $350 in bank, and that at the time the petition was verified, the financial condition of the company was substantially the same. Do you know anything about the amount of money in the various banks at the time you filed the petition?

A. I did not get the exact figures. I relied upon Mr. Weston. I knew during the period that there had been sales of merchandise, there had been purchases of merchandise, so that the corporation had received checks and had paid out checks. I didn't inquire the exact balance in bank from day to day, but I did ask Weston several times what was the cash position of the company, particularly asking him, when Mr. Burton's threat of bankruptcy was received, whether the company was in position to pay it, and he said no.

Q. Did you have in your mind any other thought than the preservation of the assets of the corporation,——

Mr. Morris: Objected to.

Q. ——when you filed a petition for a receiver?

Mr. Morris: That is objected to. I think we are entitled to facts and not his conclusion.

The Court: It is permitted.

(Exception allowed to the exceptants.)

A. No.

By Mr. Starr:

Q. And you were acting upon the advice of whom when the petition was filed?

Mr. Morris: Objected to.

A. Acting under the advice——

Mr. Morris: Objected to. This witness is a lawyer and I say that the advice of counsel is no defense.

The Witness: I am a member of the bar but not a practicing attorney.

Mr. Morris: This is objected to. I say that the advice of counsel is no defense.

The Court: It is permitted.

(Exception allowed to the exceptants.)

The Witness: I acted upon the advice of Mr. Gaskill, who was proctor for my bank, in his capacity as executor; and upon the advice of Mr. Davis, who was attorney for the Nice and Schreiber Company, and upon the advice of Mr. Weaver who was attorney for the four beneficiaries.

Q. Did you consult with Mr. Weaver from time to time as to winding up the business of the estate and also the corporation?

A. I tried to consult with him before doing anything of importance in connection with the administration of the estate.

Mr. Morris: I ask that that be stricken.

The Court: It may be stricken.

The Witness: Can I amend my answer? I consulted Mr. Weaver in connection with every important step in the administration of the estate and in the disposition of the business.

By Mr. Starr:

Q. I show you a letter dated April 22, 1926, addressed to the Corn Exchange National Bank, to Mr. Freeman, signed by John Weaver. Did you see that letter from Mr. Weaver?

(Paper shown witness.)

A. Yes.

Mr. Starr: I would like to offer this in evidence.

Mr. Morris: All right.

Mr. Starr: Will you mark it?

(Letter dated April 22, 1926, offered in evidence marked Exhibit No. 14 for accountant, and admitted, which reads as follows):

(This exhibit will be found copied at the end of this transcript as provided for in the index.)

By Mr. Starr:

Q. I show you letter dated May 13, 1926, signed by you, addressed to Hon. John Weaver, and ask you whether or not you mailed that letter and sent it to him?

(Paper shown witness.)

A. Yes.

(Letter dated May 13, 1926, offered in evidence

marked Accountants' Exhibit No. 15, admitted, and which reads as follows:

"Philadelphia, Pa.,
May 13, 1926.

Corn Exchange National Bank.
Trust Department.
1510 Chestnut St.,
Philadelphia, Pa.

Re: W. S. Nice Estate.
Honorable John Weaver,
Commercial Trust Bldg.,
Philadelphia.

Dear Mr. Weaver:

Pursuant to your request, I give you herewith a brief statement of the negotiations, as I remember them, with Howard Edson and Lippincott with regard to the sale of assets belonging to the Nice and Schreiber Company.

In the early stages of our handling of the Nice & Schreiber Company, when the question was as to the sale of the business as a going concern, or its liquidation, and before Lippincott Corporation was organized, or, so far as I know, even projected, Lippincott advised me that in case of liquidation Edson Brothers would purchase all the butter on hand at cost, would take up all drafts for incoming shipments of butter and would take an assignment of the lease. Howard Edson confirmed this to me by telephone. I told him at the time that we could not give him a definite answer and he advised me that he would hold his offer open for a reasonable time. In these arrangements, of course, Lippincott was acting on behalf of Nice & Schreiber, and we all considered Edson's offer an advantageous one to accept in case of liquidation.

There ensued, as you know, negotiations with

Weston and Lippincott on one hand and with Burton on the other for the sale of our holdings of Nice & Schreiber stock. During these negotiations, Edson's offer was held in abeyance on the theory that the purchaser of our stock might himself deal with the offer when the sale of the stock had been consummated.

Still later Weston and Lippincott dropped out as prospective purchasers of the Nice and Schreiber stock, and it was at that time, I believe, that the formation of the William L. Lippincott Co. was projected. Negotiations for the sale of the stock, however, continued with Burton and Edson's offer was, therefore, still held under consideration. At one stage of these negotiations, it appeared that sale of the stock to Burton would be consummated, and, pending the execution of an agreement of sale, Burton, as the prospective owner of the stock, and the business, was necessarily consulted to a certain extent with regard to the management of the business. He decided that even if he should purchase the business, he would not continue the butter business on a large scale and was willing that the offer made by Edson should be accepted. Accordingly, I instructed Burton and Weston to sell the butter on hand and the incoming butter to Edson or to the W. L. Lippincott Company, in accordance with Edson's previous offer. The Lippincott Company at this time was in process of organization, but because of Edson's relation to the company and the fact that he would provide the money, I felt that it made little difference who was the purchaser of record. The question of taking the lease, however, was still deferred, because Burton was undecided whether or not to take the lease himself. At about this time Lippincott went west and the transactions were carried out

through Howard Edson, although it was generally understood that he was acting on behalf of the W. L. Lippincott Company. Before going west, Lippincott told me that Edson had full authority to act for him, and that any arrangements made with Edson, would have his, Lippincott's approval, and Edson advised me confidentially that he was financing the new company. Under this arrangement, butter on hand was sold to Edson, acting for the Lippincott Company, and the drafts for incoming shipments of butter were turned over to him. Mr. Weston can undoubtedly give you the details of these transactions.

Burton then withdrew his offer for the purchase of the Nice and Schreiber stock and the directors of Nice and Schreiber voted formally to liquidate, Mr. Weston and myself being appointed liquidating trustees in accordance with the New Jersey Corporation Law. Weston and I then conferred with Howard Edson and advised him of the situation. By this time all the butter on hand had been sold and Edson or the Lippincott Company were using part of the building in their business under an arrangement previously made by Burton with Edson and approved by me. The discussion with Edson at this time related largely to the question of paying drafts drawn by Western butter shippers on Nice and Schreiber, covering butter which had been sold by Nice and Schreiber to Edson or the Lippincott Company. I advised Weston not to pay these drafts because it might constitute a preference, but Edson argued that they represented consigned goods, to be sold for the shipper's account and could therefore properly be paid without any question of preference. Weston and I both wished to pay these drafts, if it could properly be done, in order

that Edson and Lippincott would not lose the business of these western shippers, and, of course, Edson was anxious that the drafts be paid for the same reason. In fact Edson offered to pay us immediately for the butter, covered by the draft, which he had purchased, if we would pay the draft. After consideration, however, I advised Weston not to pay them, because from what Weston told me they did not involve consigned goods, but ordinary purchases by Nice and Schreiber for its own account.

A day or two thereafter you and Mr. Smith were appointed receivers and are familiar with subsequent events. If I have omitted any important information in the above, please call upon me.

Very truly yours,
Edgar W. Freeman,
Edgar W. Freeman,
Vice President and Trust Officer."

EWF:h

By Mr. Starr:

Q. I show you another letter purported to be signed by Mr. Weaver, dated October 14, 1926. Did you receive that?

(Paper shown witness.)

A. Yes.

(Letter dated October 14, 1926, offered in evidence marked Accountants' Exhibit No. 16, admitted, a copy of which appears at the end of this transcript of testimony, appearing on page 241).

By Mr. Starr:

Q. I show you another letter dated October 16, 1926, from Mr. Weaver. Did you receive that?

(Paper shown witness.)

(Letter dated October 16, 1926, offered in evidence marked Accountants' Exhibit No. 17, admitted, a copy of which appears at the end of this transcript of testimony, on page 242.)

By Mr. Starr:

Q. I show you another letter dated December 15, 1926, from Mr. Weaver. Did you receive that?

(Paper shown witness.)

(Letter dated December 15, 1926, offered in evidence, marked Accountants' Exhibit No. 18, admitted, a copy of which appears at the end of this transcript of testimony on page 243).

By Mr. Starr:

Q. I show you another letter dated May 10, 1927, from Mr. Weaver. Did you receive that?

(Paper shown witness.)

(Letter dated May 10, 1927, offered in evidence, marked Accountants' Exhibit No. 19, admitted, a copy of which appears at the end of this transcript of testimony on page 244).

By Mr. Starr:

Q. I show you another letter dated December 21, 1926, written by Mrs. Grubb,——

The Witness: Mr. Grubb, isn't it?

Q. C. M. Grubb. Who is C. M. Grubb? Did you receive that letter?

(Paper shown witness.)

A. Yes.

(Letter dated December 21, 1926, offered in evidence, marked Accountants' Exhibit No. 20, admitted, a copy of which appears at the end of this transcript of testimony on page 245).

By Mr. Starr:

Q. I show you another letter dated December 25, 1927, from Mr. Weaver. Did you receive that letter?

(Paper shown witness.)

A. Yes.

(Letter dated May 25, 1927, offered in evidence, marked Accountants' Exhibit No. 21, admitted, a copy of which appears at the end of this transcript of testimony on page 246).

By Mr. Starr:

Q. I show you letter dated December 13, 1927, signed W. S. Furst. Did you receive that letter?

(Letter shown witness.)

A. Yes.

Q. Who was Mr. Furst?

A. He is, as I understand, or was, attorney for the beneficiaries.

Mr. Morris: That is objected to.

A. At least, he represented them in the petition before Judge Dickinson.

Mr. Starr: I offer in evidence letter dated December 13, 1927, marked Accountants' Exhibit No. 22, admitted, a copy of which appears at the end of this transcript of testimony at page 247).

By Mr. Starr:

Q. I show you what purports to be a carbon copy of a letter sent to Mr. Furst. Was that letter sent to him?

(Paper shown witness.)

A. Yes.

(Letter dated November 28, 1928, offered in evidence, marked Accountants' Exhibit No. 23, admitted, a copy of which appears at the end of this transcript of testimony on page 248).

By Mr. Starr:

Q. I show you a letter written by Mr. Furst to your bank, dated December 18, 1928, and ask you did you receive that?

(Paper shown witness.)

A. Yes.

(Letter dated December 18, 1928, offered in evidence, marked Accountants' Exhibit No. 24, admitted, a copy of which appears at the end of this transcript of testimony at page 249).

By the Court:

Q. How long have you been trust officer?
A. Four years.

By Mr. Starr:

Q. I show you a letter addressed by Mr. Freeman to Mr. Furst, dated December 8, 1928, and ask you if you sent that letter?

(Paper shown witness.)

A. Yes.

(Letter dated December 8, 1928, offered in evidence, marked Accountants' Exhibit No. 25, admitted, a copy of which appears at the end of this transcript of testimony at page 250).

Cross-examination.

By Mr. Morris:

Q. How old are you?
A. 38.
Q. When were you admitted to the Pennsylvania Bar?

A. 1924, as I recall.

Q. When did you become vice-president and trust officer of the Corn Exchange National Bank?

A. Trust officer of the Corn Exchange National Bank January 1, 1925, and vice-president about a year later.

Q. Your father is a big stockholder and director of the Corn Exchange National Bank?

A. No.

Q. He is the holder of stock in the Corn Exchange National Bank?

A. No.

Q. He is an officer in the Corn Exchange National Bank?

A. No.

Q. What are the assets of the Corn Exchange National Bank?

Mr. Starr: Objected to as immaterial.

Mr. Morris: Question withdrawn.

The Witness: I can answer it.

By Mr. Morris:

Q. You say that you were appointed January 1, 1925, as trust officer?

A. Yes.

Q. Your company took charge of this estate on March what?

A. March 27, wasn't it?

Q. March, 27, 1926?

A. Yes.

Q. That was the first estate your company handled in New Jersey?

A. I think it was, yes.

Q. Was that the first estate you ever handled for the bank?

A. No.

Q. Was it the first time you ever handled it in New Jersey?

A. Yes.

Q. One of these letters, of Mr. Weaver to you, says something about him in connection with the claim of Weston. Do you recall that $15,000 claim, contest, the will contest?

A. Yes.

Q. Do you know as a matter of fact, or don't you know, that Mr. Weaver only represented the heirs in that contest?

A. I know he did represent them in that contest, but not only that.

Q. Do you know whether or not he represented them in any other matter?

A. I assume he did.

Q. You assume he did?

A. Yes.

Q. What right have you to assume?

A. I have seen the letter of attorney.

Q. When did you get hold of that?

A. I physically got hold of it yesterday.

Q. When did you know of it before yesterday?

A. Sometime during March of 1926.

Q. Where did you see it?

A. Weaver told me about it.

Q. Did he show it to you?

A. I don't think so.

Q. Mr. Weaver told you he had such letter?

A. Yes.

Q. For the purposes of the will contest?

A. He didn't specify. He said he did have a letter of attorney to represent the four residuary legatees.

Q. In what manner?

A. He didn't say.

Q. You didn't ask him?

A. I assume it was for all purposes. I didn't press it.

Q. You say that when your company joined in the petition for the receivership you made up, as part of the petition for the receivership, the attached statement showing the company said it had $350 in bank?

A. Yes.

Q. You knew that that statement was made up on March 2nd, and the petition filed on April 28th?

A. Yes.

Q. You knew that during the time that elapsed the company was in the course of liquidation?

A. Yes.

Q. You knew that the company was collecting money in the meantime?

A. Yes.

Q. You didn't think it was right to inquire how much cash they had collected as soon as the statement was made up?

A. I did inquire.

Q. You did?

A. Yes.

Q. Of whom?

A. Mr. Weston.

Q. When?

A. Several times.

Q. When in particular?

A. In particular, after receiving Mr. Salus' letter threatening bankruptcy proceedings.

Q. Did Mr. Salus' letter threaten bankruptcy?

A. No, receivership.

Q. Why do you want to give the Court the impres-

sion that it was bankruptcy proceedings that were threatened?

A. I was informed that he had a conversation with Mr. Davis.

Mr. Morris: I only want to know of your own personal knowledge; no other information.

By Mr. Morris:

Q. That letter, without a doubt, refers to bankruptcy proceedings, because they speak of preferences; and if they committed an act of bankruptcy, there can be no doubt but that it meant bankruptcy, there can be no other construction on it, can there?

Q. You got this information from somebody else, did you?

A. Yes.

Q. From whom?

A. Mr. Davis.

Q. However, from your conversation or correspondence with Mr. Salus or Mr. Weston,—who was it who had this claim of Mr. Burton's, who represented him?

A. Mr. Salus.

Q. They didn't tell you that they threatened to throw the company into bankruptcy?

A. No.

Q. The letter only mentions receivership, that is all, isn't it?

A. The word "receivership" is used.

Q. Didn't you know, as a matter of fact, that if they had filed a petition for bankruptcy, that you could have successfully defended that petition by showing the solvency of the company?

A. If it had been solvent, yes.

Q. Did you know that it was solvent?

A. No.

Q. Don't you know in your petition that they said the company was solvent?

A. Yes.

Q. Why do you say then that you did not know that it was solvent?

A. I assumed that it was, but there was some doubt about it.

Q. What do you mean when you made the declaration to the Federal Court in Philadelphia, if you only go on an assumption?

A. I think it is based on information and belief.

Q. Didn't you think it would be pertinent, or didn't you think it was your duty to inquire into the status of the company before filing a petition in bankruptcy?

A. I did inquire.

Q. Of whom?

A. Mr. Weston.

Q. You took a two-months' old report from him?

A. I did not.

Q. What did you do?

A. I inquired from him from time to time, at the time that we were trying to liquidate the company.

Q. Did you ask him how much cash he had received since that account was rendered by you?

A. I asked him,——

Q. I asked did you ask him?

A. No, because——

Q. You didn't ask him before the petition was filed how much cash the company had received from the time of the rendition of that account up to the time of the filing of the petition?

A. Not in those words.

Q. What words did you ask him?

A. I asked him from time to time what was the cash position of the company.

Q. What did he tell you?

A. Different things on different days.

Q. What did he tell you about the cash account of the company?

A. On what date?

Q. Anywhere between those two dates?

A. On April 27th he said the company did not have sufficient money to pay the Burton claim.

Q. You are evading the question.

A. I am not.

Q. Did Weston tell you the financial, cash, condition of the company at any time between the time of the rendition of that statement of account, on March 2, to April 28th? Did he tell you on any date between those two dates?

A. He told me on several occasions.

Q. What did he tell you?

A. It necessarily varied on different days.

Q. Tell me one of the statements that he made.

A. Had I asked on April 26th, he would have said $18,000, because that is what the check book showed on that day.

Q. On April 26th do you know what the check book showed?

A. The check book showed $18,000.

Q. Don't you know that the appraisers in the receivership reported that there was cash in bank on April 28th, the sum of $41,000 and some odd dollars?

A. I do, yes.

Q. Do you know whether or not that is true?

A. I believe it is.

Q. Couldn't you have found that out had you inquired of Mr. Bedell or any of the other employees of the company who had charge of the books?

A. I could only find out by asking the banks.

Q. Did you ask the banks?

A. No.

Q. Why?

A. Do you ask the bank when you draw checks on your own account? I was interested in what was the apparent balance shown by the check book, not the actual cash.

Q. You knew that putting this company into the hands of a receiver would involve expensive litigation?

A. Yes.

Q. You knew this?

A. Yes.

Q. You knew what kind of man Mayor Weaver was?

A. I respected him.

Q. You knew that he was not going to work for nothing?

A. Certainly not.

Q. You knew that he was a pretty expensive man, didn't you?

A. No.

Q. Did you think he was a cheap man?

A. No, I respected Mayor Weaver and thought he was a fair man.

Q. And yet, in spite of the fact that you say you did inquire of Mr. Weston as to the financial condition, the cash condition of the company, you were content to take a two months' old statement or report, and say that that is substantially, that that is substantially the financial condition of the company?

A. That was true.

Q. Did the company have $41,000 cash in bank?

A. We didn't know it. Nobody knew it.

Q. If you had inquired you could have found it out?

A. No, we could not.

Q. If you had called up the Union National Bank, wouldn't they have told you that they had $41,000 to its credit?

A. No, because $21,000 had been drawn.

Q. Do you know that?

A. The check books show so.

Q. Show me where the check book shows?

The Court: What act other than a prudent act did this man do, in taking the statement or affidavit of the secretary and treasurer, the man who handles the money for this company?

Mr. Morris: This man knew Weston, the secretary and treasurer of the company, knew that he was antagonistic to the company and to the heirs.

The Witness: I knew no such thing.

By Mr. Morris:

Q. Did you know that Weston was supposed to get $15000 under the will of Mr. Nice?

A. He was given a legacy of $25,000 under the will.

Q. You knew that the legatees were contesting it?

A. They were contesting it.

Q. You knew that Weston's feelings toward the heirs were not very pleasant?

A. Weston was a fair man.

Q. I didn't ask you that.

A. I didn't know anything about the relations of the four beneficiaries.

Q. You know that his feelings toward the beneficiaries were not very pleasant?

A. I did not.

Q. Didn't you know that they were fighting his claim for $25000?

A. Yes.

Q. Don't you know that he had to finally compromise for ten thousand dollars?

A. He did compromise it, yes, but that would not affect the records of the financial condition of the company.

Q. You said before that there were $20,000 outstanding claims,—checks, on the check books. Show me where there is $20,000?

A. On April 28, there was outstanding checks of $14,000; on the 26th and 27th there were checks,—— $22,000 in checks outstanding.

Q. You didn't add those two together, did you?

A. No. When I want to find out my bank balance I look at my check book.

Q. So that there was $14,000 in checks outstanding on the day before?

A. Yes, the 28th, the day of the petition.

Q. Wasn't it the 27th that you said as to the $14,000?

A. On the twenty-seventh, $14,000 in check payments were stopped by the receivers.

Q. On the 28th?

A. Yes.

Q. $14,000?

A. Yes.

Q. They had $41,000 cash in bank?

A. As later developed, yes.

Q. It is true that they had $41,000?

A. They thought they only had some $18,000. That is what they were going on. I might say,——

Q. There is no question pending. Did you inquire of Mr. Bedell as to the financial condition of the company before you filed that receivership petition?

A. I think not.
Q. All that you inquired of was Mr. Weston?
A. Yes.
Q. Did you look at the books?
A. No.
Q. Did you go down to see Mr. Weston?
A. Yes.
Q. Where?
A. At the office, at the Nice, Schreiber Company.
Q. When?
A. Several times.
Q. I mean as to the financial condition of the company?
A. Several times.
Q. When was the last time you went down there prior to the receivership?
A. I don't recall.
Q. About when?
A. Four or five days before, I should say.
Q. Did you ever look at the books when you went down there?
A. Yes, occasionally, casually.
Q. What books did you look at casually,—you saw the books there?
A. I am not a bookkeeper and I wouldn't know a cash ledger from something else. I left that to Mr. Weston.
Q. If Weston told you that he had two cents worth of assets you would have believed him?
A. Probably not.
Q. If he had told you he had $1000 would you have believed him?
A. Yes, that happened on several occasions.
Q. When?
A. On March 2nd,—$350 cash.
Q. But there were outstanding accounts receivable, that were worth over $186,000?

A. Yes.

Q. And you say that you were concerned about this threatened bankruptcy proceeding. Would that bankruptcy proceeding have cost more as compared with this receivership proceeding?

A. I can't answer that.

Q. Would it have cost as much, do you know?

A. I don't know.

Q. You don't know that fees in the bankruptcy proceeding would have been less than the receiver's fees?

A. No.

Q. Have you read the rules of the bankruptcy court?

A. At the time the petition was filed we all considered and thought that bankruptcy proceedings would be more expensive than a receivership.

Q. You know better now?

A. Not necessarily.

Q. Bankruptcy proceedings could not have eaten up all the assets of this company, could it?

(Question withdrawn.)

Q. You say you had offers of $55,000 and $52,000. From whom were the offers made, by whom?

A. Mr. Lippincott, Mr. Weston and Mr. Burton, I think the three of them. One offer of $55,000.

Q. Who else offered money?

A. Mr. H. L. Burton.

Q. What other offers were there?

A. That is all.

Q. Did Mr. Grubb offer you $40,000?

A. He did not.

Q. Didn't he say that he and Mr. Klener were willing to pay that amount?

A. He told me several times that he had expected to get an offer of $75,000 and I said, "Get it. We will sell to you."

Q. Didn't you say you would not sell for less than $70,000?

A. Yes.

Q. You didn't state the maximum figure on this stock?

A. No, I wouldn't because I had prior to that agreed to sell to Mr. Burton for $45,000.

Q. Prior to that time hadn't you already set a maximum or a minimum?

A. No, sir, we made an offer to Mr. Lippincott, of $54,000.

Q. Who was it made the offers and then withdrew the offers? How many were made, how many offers were made on this?

A. Two; I recall Mr. Weston made two offers and each time Mr. Burton made a higher offer.

Q. Were all the offers withdrawn?

A. Yes, Mr. Lippincott withdrew his offer first because he wanted to make other arrangements.

Q. What became of the other offers?

A. Then Mr. Burton withdrew all his offers and a few days later we re-opened negotiations with him and he offered $45,000 and then we accepted and then he backed out.

Q. Didn't you think that you could hold any of these people to the offers when they had made them?

A. Of all the offers which we received we only accepted one offer.

Q. And he withdrew?

A. Yes, that was Burton.

Q. You didn't hold him to his agreement?

A. He wasn't financially responsible.

Q. Here is a letter which I show you purporting

to be a copy of an offer made and signed by Mr. Burton. Was that offer received by you?

(Paper shown witness.)

A. I don't recall receiving any letters to this effect but I do remember that he made an offer substantially on this basis.

Q. In that letter he offers you $10,000?

A. Yes.

Q. You turned that down?

A. Yes.

Mr. Morris: That is offered in evidence.

Mr. Starr: That is objected to. There is nothing to show that it reached the Corn Exchange National Bank.

By Mr. Morris:

Q. Didn't you say you received a letter to that effect?

A. I don't recall it. I looked in my files and didn't see the offer.

Mr. Morris: Does your Honor wish me to go into the question of excessive fees?

The Court: I do not know that it is important or admissible at this time.

Mr. Morris: Will your Honor allow me an exception to your ruling?

The Court: Yes.

(Exception allowed to exceptants.)

By Mr. Morris:

Q. Don't you know that Mr. Weston was an old man and was not able to take care of the books of the Nice, Schreiber Company?

A. I knew he was an old man.

Q. How old was he?

A. I should say 70 years of age.

Q. He was rather a feeble man?

A. Physically, yes.

Q. You knew he was not very active about the books of the Nice, Schreiber Company?

A. No, I thought he was.

Q. Did you know that he was somewhat of an invalid?

A. No.

Q. Do you know whether or not he was in and about the business every day attending to the books?

A. I assumed that he was.

Q. What made you assume that?

A. Every time I telephoned him he was there.

Q. Where?

A. At the office.

Q. How often did you telephone?

A. Several times a week, I should say.

Q. Altogether three times?

A. No, four or five times a week.

Q. What did he tell you on those occasions?

A. He was always there, he was still active in business.

By Mr. Starr:

Q. So far as Mr. Weston is concerned, did you

know him before he became, or rather before the bank became executor of the Nice Estate?

A. I had known him for about a year prior to that.

Q. In what way did you come in contact with him?

A. In connection with a revision of Mr. Nice's will.

Q. Had you any reason to believe from your associations with Mr. Weston that he would deceive you with reference to the financial condition of the company?

A. No.

Q. And did, as a matter of fact, you believe the statements he made as to the condition of the company?

A. I did. I relied entirely upon his honesty.

Mr. Morris: We rest at this point, that is, upon this feature of the case.

Does your Honor wish to listen to any other feature?

(Argument: Mr. Morris cites 73 Eq., page 628.)

The Court: Do you contend that I would have jurisdiction to determine this matter as to the allowance of fees in the State of Pennsylvania on the ground that they were excessive fees?

Mr. Morris: I think so.

The Court: Are you not entitled to a proceeding in the State of Pennsylvania if you think the fees are excessive?

Mr. Morris: The heirs didn't know anything

about the fees until a long time after the allowance of these excessive fees.

We were not informed of it and we contend that the executor did, and the record shows, that it consented to these excessive fees, and we contend that they should be surcharged therefor. I would like to put a couple witnesses on the stand to rebut a few matters, and to show that Mr. Weaver's authority was rescinded after the receivership, so that he did not represent them as they say he did.

The Court: All right.

(Witness excused.)

MARY E. GRUBB, recalled.

Mr. Starr: May I suggest that you lay the foundation for the personal knowledge of this witness and not ask general questions from which information would come from other sources.

By Mr. Morris:

Q. You are the daughter of Catherine Grubb, one of the exceptants in this matter?
A. Yes.
Q. Your mother is quite aged?
A. Yes.
Q. Is she confined to her bed?
A. Not in bed.
Q. She is unable to get around?
A. Yes.
Q. Do you handle her matters?

A. I am there whenever anything happens.
Q. You receive all mail that comes into the house?
A. Yes.
Q. You transact her business for her?
A. Yes.
Q. You are the one that prepared that power of attorney that has been offered in evidence by Mr. Starr?
A. Yes.
Q. That power of attorney says: "March 22, 1926, We the undersigned, give Mr. John Weaver, attorney, power to represent the heirs and direct the affairs of the estate of W. S. Nice until the business is settled or until such time as this authority may be withdrawn.

Mary E. Vetterlein.	(Seal)
Isabella T. Schreiber	(Seal)
Emma D. Seal	(Seal)
Kathryn A. Grubb	(Seal)

Witness
Geo. M. H. Potter.

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC } SS

Be it remembered that on this 22nd of March, 1926, before me a Notary Public in and for the State of New Jersey, personally appeared Mary E. Vetterlein, Isabella T. Schneider, Kathryn A. Grubb, and Emma D. Seal, who I am satisfied are the signers, who acknowledged they signed the above document.

George M. H. Potter,
Notary Public of New Jersey.

My commission expires January 21, 1928.
(Seal)"

(The foregoing power of attorney marked Accountants' Exhibit No. 2, already admitted in evidence, page 49).

By Mr. Morris:

Q. Was that authority ever withdrawn?

Mr. Starr: Objected to. This witness cannot testify to that question unless she had personal knowledge. The question should be framed so that the answer should be based on personal knowledge and not what somebody else told her.

Mr. Morris: You can bring that out in cross-examination.

Mr. Starr: You must lay the foundation for it.

By Mr. Morris:

Q. You prepared this power of attorney for your mother?

A. Yes.

Q. You were handling this matter for your mother?

A. Yes.

Q. In connection with the Corn Exchange National Bank and the Nice Estate,—you were handling all these matters for her?

A. Yes.

By Mr. Starr:

Q. Did you say something else?

A. I said I am always there, always attend to mother's business.

By Mr. Morris:

Q. Was that authority withdrawn?

Mr. Starr: Objected to as being a conclusion.

By Mr. Morris:

Q. Did you ever on behalf of your mother, or did your mother, withdraw that authority, that power of attorney?

Mr. Starr: Objected to.

A. We got other lawyers.

Q. Was any act upon behalf of your mother, or was there any act of your mother, to your knowledge, to withdraw that power of attorney pursuant to that power of attorney?

Mr. Starr: Objected to.

A. We engaged other lawyers.

Mr. Starr: Does your Honor allow the question?

The Court: I suppose so. She has put in an answer.

Mr. Starr: I object to the question in the form in which it was put.

The Court: I will sustain the objection. Ask her what her mother, or she on behalf of her mother, did, in connection with giving the power of attorney, and after it was given, if anything.

By Mr. Morris:

Q. What did you, in behalf of your mother, do, in connection with the power of attorney, to revoke it? Do you understand the question?

A. No, I do not understand the question.

Q. Did you on behalf of your mother do anything to withdraw the power of attorney that was given to John Weaver, as set forth in this paper, which I handed you, and which I now hand you?

(Paper shown witness.)

A. I understand that it was withdrawn because we engaged another lawyer.

Mr. Starr: I ask that be stricken out.

The Court: Yes.

By Mr. Morris:

Q. After the receivership, was John Weaver authorized to act on behalf of your mother?

Mr. Starr: That is objected to as a conclusion. There is nothing to show that this witness has any personal knowledge.

The Court: Objection sustained.

(Exception allowed to exceptants.)

By Mr. Morris:

Q. You say in here, "Until such time as this au-

thority may be withdrawn." Was that authority withdrawn?

Mr. Starr: Objected to, the same objection.

The Court: The same exception is allowed.

By Mr. Morris:

Q. Did Mr. Weaver act on your behalf or on behalf of your mother after the receivership?
A. No.
Q. Who did act in his stead?
A. Mr. Dalbey and Mr. Furst.
Q. Did Mr. Weaver have any authority to act for your mother?
A. Not after the receivership.

Cross-examination.

By Mr. Starr:

Q. When did Mr. Dalbey and Mr. Furst begin to represent you?
A. After we knew there was a receivership.
Q. Will you give the date?
A. I don't know any dates. It was after we found out.

By Mr. Morris:

Q. Found out what?
A. That it was in the hands of a receiver, after my father's death.

By Mr. Starr:

Q. You know that Mr. Weaver is dead now?
A. I certainly do.

Mr. Morris: That is all.

Mr. Starr: No further testimony.

Mr. Morris: No further testimony.

Mr. Starr: That closes the testimony with reference to the first exception and with reference to the propriety of the receivership.

Mr. Starr: The question to be determined on the release, as to whether or not it is a bar, does your Honor desire to have some brief submitted on that question?

The Court: Yes.

Mr. Starr: I suppose it is up to us to establish the effect of that release.
I will send your Honor a brief.

The Court (addressing Mr. Morris): Do you want to brief the question as to whether or not the Corn Exchange National Bank was indifferent in its duty in petitioning the Court for a receiver?

Mr. Morris: Do I want to brief?

The Court: Yes; do you want to brief that question?

Mr. Morris: Yes, I will be very glad to.

The Court: Suppose you brief the question and send your brief to Judge Starr and he will answer it. You can deal with the question of the release at the same time.

(Accountants' Exhibit 3½ offered in evidence on page 75 of this transcript and admitted, as follows):

EXHIBIT 3½.

CORN EXCHANGE NATIONAL BANK, Executor under the Will of Winfield S. Nice, deceased and Charles N. Weston, Complainants vs NICE AND SCHREIBER COMPANY, Respondent	DISTRICT COURT OF THE U. S. FOR THE EASTERN DISTRICT OF PENNSYLVANIA NO. 3701 March 2, 1926.

TO THE HONORABLE THE JUDGES OF THE ABOVE COURT:

Your petitioners, CATHERINE E. GRUBB, and MARY E. VETTERLEIN, residing in Ventnor City, in the State of New Jersey, ISABEL T. SCHREIBER, residing in the City of Philadelphia, in the State of Pennsylvania, and DEBORAH SEAL, residing at Merion in the said State of Pennsylvania; respectfully shows, that:

1. They are the sisters and sole next of kin of the late WINFIELD S. NICE, who died, testate, upon the third day of March, 1926, at his home in Ventnor in the State of New Jersey, designating your petitioners in his last Will and Testament as the residuary legatees of his estate.

2. At the time of his death the said Winfield S. Nice was the owner of 1019 shares of the 1026 shares of the Nice and Schreiber Company, named as respondent herein, then outstanding, of which said Company he was, at the time of his death, and for a long time prior thereto had been, the president.

3. Petitioners are informed and believe and therefore aver that upon the second day of March, 1926, the day preceding the death of the said Winfield S. Nice, George K. Watson & Company of Philadelphia, certified public accountants, furnished to the said Nice & Schreiber Company, a statement of its then financial condition of which the following is a summary:

Due from F. W. Aiken	$1221.30
" " Wm. L. Lippincott	766.42
Cash on hand	350.00
Accounts receivable	186178.91
Advances on account of merchandise in transit	18973.00
Outside investments	2456.15
Inventory of stock on hand	67561.99
Machinery, fixtures and automobiles	11242.00
Deferred charges	796.56
TOTAL ASSETS	$289546.23

All assets of doubtful nature, approximating in amount the sum of $70,000. in accounts receivable and advances to Shippers, were treated as valueless by said accountants and not included in above items. After deducting from the above the valuation placed upon the fixed assets, consisting of the machinery, fixtures—automobiles, etc. of $11,242.50, there remained quick assets upon the said second day of March 1926 of a value of $278,303.33. The liabilities of the said Nice and Schreiber Company were placed by said accountants at the sum of $201,761.40 and a book value of $87,785 was given in said statement to the said outstanding stock or a value of $87,118.30 to the stock owned by the said Winfield S. Nice.

4. Petitioners are informed and believe that in the Bill filed herein by complainants, upon the 28th day of April 1926, it is alleged that the financial condition of the corporation remained practically unchanged from that shown in said accountant's report and the items and amounts of assets and liabilities, as above set forth, are substantially, recited therein and made part thereof.

5. Notwithstanding the solvency of said Nice & Schreiber Company, and the substantial excess of its quick assets above its liabilities the said Corn Exchange National Bank, as executor of the estate of said Winfield S. Nice, deceased, and Charles N. Weston, as the owner of four shares of the stock of said Company filed in this court their bill of complaint herein, wherein the said Corn Exchange National Bank, as said Executor, alleged that the said Nice and Schreiber Company was indebted to

the Estate of the said Winfield S. Nice in a sum exceeding ten thousand dollars and prayed that a receiver or receivers in equity be appointed to carry on the business of said corporation and protect its creditors and stockholders.

6. Petitioners are informed and believe that the reason set forth in said complaint as a ground for equitable relief, was that there was danger of suits being entered against the said Nice and Schreiber Company, thereby endangering its assets. Although no allegation that any suit or suits had been commenced against said Company was made therein, nor was any reason therein given why the said Company could not out of its quick assets provide for any outstanding claim or claims.

7. Notwithstanding that the appointment of a Receiver or receivers was sought to carry on the business, which was that of dealing in eggs, butter and poultry, by wholesale or on commission, two members of the Philadelphia bar viz: John Weaver, Esq. and Sidney E. Smith, Esq. were selected and duly appointed as such receivers.

8. Petitioners are informed and believe that A. J. Davis, Esq. a young office associate of the said Sidney E. Smith, entered an appearance of record for the receivers and that Russell C. Cooney, Esq. a young office associate of John Weaver, Esq., also acted as counsel for the receivers, but did not enter an appearance, although a fee, equal to that of each of the receivers, was allowed him by the master. Four attorneys were therefore engaged in attending to the details incidental to this receivership, and

three appraisers were deemed necessary to prepare an inventory and appraisement of the assets and liabilities of the company, although a report had been prepared by accountants and given to the officers of the company upon March 2nd, 1926, less than two months before the filing of the bill herein, in which report all items of assets and liabilities had been detailed and which, according to the allegation contained in said bill, remained practically unchanged at the time of the filing of the bill.

9. Petitioners are informed and believe that upon July 16th, 1926, and within about three months after their appointment, the receivers had collected out of the quick assets a sum of $138,141.00, and thereupon filed an interlocutory report wherein the appointment of a Master to make distribution of this fund was prayed for and Morton Z. Paul, Esq. of the Philadelphia Bar, was thereupon appointed by your Honorable Court, and upon October 11th, 1926, filed his report, which was confirmed November 1st, 1926.

10. Petitioners are informed and believe, and therefore aver that the record herein and the said Master's report show that no exceptional professional skill was called for or exercised by said receivers and their attorneys in collecting the assets of the said Nice & Schreiber Company, and no litigation was required to realize upon the same; and that notwithstanding these facts the Master in his report so filed as on October 11th, 1926, awarded a dividend of but 75% upon proved claims aggregating but $116,311.00 and allowed expenses and fees for administration as follows:

Receivers—	John Weaver	$7500.00	
	Sidney E. Smith	7500.00	$15,000
Counsel —	A. J. Davis	7500.00	
	Russell C. Cooney	7500.00	15,000
Appraisers			1,000
Master	Morton Z. Paul		3,500
	Sundry		203 10
	TOTAL		$34,703.00

11. The business carried on by the said Nice & Schreiber Company had been long established and highly successful and petitioners are informed and believe that in the year preceding the death of the said Winfield S. Nice, the said Company had done a gross business exceeding four and a half million dollars and Charles N. Weston, of complainants herein, had, for many years, been connected with the said Winfield S. Nice and the said Company as a bookkeeper and one William H. Lippincott had been employed by said Company as a salesman.

12. Petitioners are informed and believe and therefore aver that the said William L. Lippincott was, at the time of the death of Winfield S. Nice, indebted to the said Nice and Schreiber Company in the sum of $766.46 and alleged that said Nice & Schreiber Company was indebted to him in the sum of $17,000. This alleged indebtedness does not appear as an item of liability in the accountants' report, above referred to, nor does the Msater's report show that any proof or attempted proof thereof was made: that upon the basis of the withdrawal

of this unproved claim, the fixed assets of the said Nice & Schreiber Company consisting of fixtures and machinery in its place of business and an automobile all valued by said accountants at $11,242, were sold by the receivers to the said William H. Lippincott for the price or sum of $2400, from which was deducted his indebtedness to the company of $766.46, leaving the net sum received for said fixed assets of but $1633.54, and that the said Charles N. Weston and William H. Lippincott are now conducting business in the premises formerly occupied by said Nice & Schreiber Company, such as was formerly carried on by said Company.

13. Petitioners are informed and believe that a second partial account was filed by said Receivers upon April 2nd, 1927, and Morton Z. Paul, Esq. was again appointed Master to make distribution of the fund, a further dividend of 21% was awarded after deduction of the following expenses and fees allowed by the Master:

Receivers—John Weaver		1250	
	Sidney E. Smith	1250	$2500.
Counsel —A. J. Davis		1250	
	Russell C. Cooney	1250	2500.
Master —Morton Z. Paul			750.
	TOTAL		$5750.00

14. This report does not show any peculiar or exceptional services to have been rendered by Receivers or their counsel in connecting this additional fund, and a balance of 4% or approximately $4500

yet remains due creditors and subject to further account and charges.

15. The will and codicils thereto of said Winfield S. Nice, in which The Corn Exchange National Bank of Philadelphia and Thomas L. Gaskill were named as Executors, and in which your petitioners were named as said residuary legatees, was probated March 27th, 1926, at May's Landing, the county seat of Atlantic County, New Jersey, the testator having been a resident of Ventnor in said State. At the time of said probate the said Thomas L. Gaskill renounced his right to act as such Executor, and was thereupon duly appointed proctor or counsel for the remaining executor, the Corn Exchange National Bank, of complaints herein.

16. Subsequent to the probate of said Will and Codicils your petitioners retained the services of John Weaver, Esq. of the Philadelphia bar, and one of the receivers above named, to file objections or exceptions to the probate thereof. In one of said codicils, Charles N. Weston of complainants, had been given the sum of $15,000 in addition to a gift of $10,000 contained in said will, and had agreed to renounce all claim to the additional bequest in said codicil, which agreement he failed to consummate. A petition alleging exceptions and objections to said probate was prepared by counsel in Atlantic City, as associate of said John Weaver, then so retained by petitioners, and executed by your petitioners and returned to said Weaver, for use in said proceedings, and petitioners are now informed and believe that the proposed proceedings were never urged or said petition filed, although petitioners

were never advised that the same had been abandoned, and had agreed to pay said Weaver a fee of $500 to secure the performance of said agreement of said Weston.

17. The first account of the executor of the estate of Winfield S. Nice, which has been noticed for audit at the Surrogate's court, Atlantic County, N. J. for June 29th, 1927, shows a balance on hand of $59,279. of which sum $30,750 is the value fixed in the inventory and appraisement of said estate of the decedent's stock in the said Nice and Schreiber Company, which item because of this receivership and the expense thereof, is not available as an asset of said estate, leaving but an actual balance for distribution of but $28,527. from which is to be paid specific bequests to Charles N. Weston of complainants herein, of $25,000, and to one Mrs. Golden of $5,000. besides Executor's commissions, costs and counsel fee, and there will, therefore, be no balance in which your petitioners may participate as residuary legatees, notwithstanding the fact that the stock of decedent now apparently valueless, was appraised as of March 2nd, 1926, by the accountants at $87,000. and in the inventory of the estate, filed on or about March 27th, 1926, at $30,500.

18. Notwithstanding that your petitioners are vitally interested as such residuary legatees, in the conservation of the assets of the said Nice & Schreiber Company, they were not advised by the said John Weaver or by the Corn Exchange National Bank as executor of the estate of Winfield S. Nice, of the institution of these receivership proceeding or of the filing of the accounts of the receivers, and

the reports of the Master, and did not learn of the filing of the first Master's report herein until long after said report had been confirmed, and were thereupon unable to appear and object to said proceedings or file exceptions to said report, nor were petitioners advised of the filing of the said Master's second report.

19. Petitioners are informed and believe and further aver that notwithstanding the administrative charges allowed in the first account, and which, it is respectfully submitted, were grossly excessive for the reasons above set forth, no exceptions were filed thereto by the Corn Exchange National Bank as Executor of the estate of said Winfield S. Nice, and that by reason of the allowance thereof and of the fees allowed by the Master in the second accounting and the fees and expenses that may be sought upon further accountings, your petitioners' interest in the estate of the said Winfield S. Nice will be greatly diminished in value or become entirely worthless.

20. Your petitioners aver that the rights of no third parties have intervened since the inception of these proceedings, nor will any such rights be affected by any order or decree that this honorable court may make in affording equitable relief to your petitioners as prayed for.

Your petitioners, needing equitable relief, therefore pray:

1st. That your Honorable Court reopen the adjudication of the first account, filed by the Receivers herein, and the confirmation of the first report of

the Master, the said Morton Z. Paul, and now permit your petitioners to file objections or exceptions thereto in relation to the amount of compensation allowed by said Master to the Receivers, Counsel, Master and Appraisers.

2nd. That your petitioners be now permitted to file objections or exceptions to the second report of the said Master in relation to his allowance therein of compensation to the Receivers, their counsel, and the Master.

3rd. That the said Receivers, be ordered and directed to forthwith pay the balances due all creditors of the said Nice and Schreiber Company out of the funds now in their hands, as shown by said second account.

4th. That the said Receivers be restrained from making further payments out of the monies now in their hands to themselves as such Receivers, to their attorneys or to the master.

H. HOMER DALBEY
W. S. FURST
Counsel for Petitioners.

CITY OF VENTNOR
COUNTY OF ATLANTIC SS
STATE OF NEW JERSEY

CATHERINE A. GRUBB, ISABEL T. SCHREIBER and, MARY E. VETTERLEIN, of full age, being duly sworn according to law, upon their oaths depose and say:

That they are the petitioners named in the foregoing petition: that they have read the petition and know the contents thereof; that the same are true to their own knowledge, except as to matters and are therein stated to be on information and belief, and as to those matters that are stated on information and belief, they believe them to be true.

CATHERINE A. GRUBB
ISABELLA T. SCHREIBER
MARY E. VETTERLEIN

Sworn and subscribed to before me this
day of June, A. D. 1927.
(Seal) Joseph A. Landolfi,
My commission expires Sept. 2nd, 1932.

COUNTY OF MONTGOMERY } SS
STATE OF PENNSYLVANIA }

DEBORAH SEAL, of full age, being duly sworn according to law, upon her oath deposes and says:

That she is of the petitioner's named in the foregoing petition: that she has read the petition and knows the contents thereof: that the same are true of her own knowledge, except as to matters that are therein stated to be on information and belief, and as to those matters that are stated on information and belief, she believes them to be true.

DEBORAH SEAL.

Sworn and subscribed to before me this 22nd day of June, A. D. 1927.

Malvin B. Wallace,
(Seal) Notary Public,
Commission expires March 7th, 1931.

ACCOUNTANT'S EXHIBIT No. 14.

1/30/29

Philadelphia · April 23, 1926.

Corn Exchange National Bank,
2d & Chestnut Sts.,
Phila., Pa.

Attention: Mr. Edgar W. Freeman

Dear Mr. Freeman:

I return herewith the draft of the agreement that you sent me, in regard to a proposed sale of the stock of the Nice & Schreiber Company to Harvey O. Burton.

Of course, I cannot pass on this at the present time, as I am getting advice on the New Jersey law, in regard to whether we can rest on the agreement with Weston to give up his $15,000 legacy mentioned in one of the codicils, that you had delivered back to him—the original executed copy—as you say, for the purpose of having it acknowledged, and until I get this report I cannot determine whether or not I shall file the appeal from the probate of the will and codicils.

Yours very truly,

John Weaver

JW/MMD

ACCOUNTANT'S EXHIBIT 16.

Philadelphia October 14, 1926

Corn Exchange National Bank,
#1510 Chestnut St.,
Phila., Pa.

Attention: Mr. Edgar W. Freeman

Gentlemen:

I duly received your letter of the 8th inst., enclosing a bill for six months interest on the mortgage on the Nice property in Atlantic City.

Haven't you, in the Nice Estate, money enough to pay this interest, and isn't it worth while to save the equity by paying it? There might not be sufficient money in this Estate to pay off all its debts, obligations and the cash legacies, so that it might be necessary for you to sell this real estate, for the payment of those legacies. If that is so, I think it would be very poor policy for the heirs to pay this interest.

Yours very truly,

John Weaver

JW/MMD

ACCOUNTANT'S EXHIBIT 17.

Philadelphia October 16, 1926.

Corn Exchange National Bank,
#1510 Chestnut St.,
Phila., Pa.

Attention Mr. Freeman.

Gentlemen:

I have your letter of October 15th in the Nice Estate, in regard to the payment of the interest on the mortgage secured on premises in Ventnor, and I would suggest that you pay this interest out of the Estate funds, as you say you are willing to do in your letter. I return herewith the bill, and thank you very much.

Yours very truly,

John Weaver

RCC/MMD

c.

Encl.

ACCOUNTANT'S EXHIBIT 18.

Philadelphia
December 15, 1926.

Edgar W. Freeman, Esq.
Vice President and Trust Officer,
Corn Exchange National Bank,
#1510 Chestnut St.,
Phila., Pa.

Dear Mr. Freeman:

I have written to the heirs of W. S. Nice, Deceased, asking for further information about the

payment of the claim that you speak of, and shall let you hear from me as soon as I hear from them.

Yours very truly,

John Weaver

JW/MMD

ACCOUNTANT'S EXHIBIT 19.

Philadelphia May 10, 1927.

Edgar W. Freeman, Esq.,
(Vice-President and Trust Officer)
Corn Exchange National Bank,
15th & Chestnut Sts.,
Philadelphia, Pa.

Dear Sir:

I have yours of the 9th inst., enclosing copy of the Account filed in the Winfield S. Nice Estate.

I should like to have all the heirs receive a copy of this Account. I wonder if you could send me (4) additional copies for Mrs. Schreiber, Mrs. Seal, Mrs. Vetterlein, and Mrs. Grubb.

I should also like to know whether you have had any further communications with either Mr. Weston or his Attorney, in regard to the amount of the Legacy you are to pay him, as of course you know the heirs will contest anything over and above the $5000.

Yours very truly,

John Weaver

JW/MMD

ACCOUNTANT'S EXHIBIT 20.

17 S. Newark Ave.,
Ventnor City, N. J.
Dec. 21, 1926

Mr. Freeman
Dear Sir:

I have not received the copy of the Receiver's Report of the Nice & Schreiber Bankruptcy Case. Please send it soon as possible to above address and oblige

Yours Respectfully
C. M. Grubb
for C. A. Grubb

ACCOUNTANT'S EXHIBIT No. 21.

Philadelphia May 25, 1927.

Corn Exchange National Bank,
15th & Chestnut Sts.,
Philadelphia
Attention: Mr. Freeman
Gentlemen:

My correspondent, Judge Cole, of Atlantic City, writes me, in regard to the Nice Estate, that he will represent the heirs against the Weston claim, at the next meeting, and that he desires you to be present, with a copy of the agreement you kept, when you returned the original to Weston for acknowledgment.

Will you please let me know whether you will be there, and see Judge Cole, and be ready to testify?

Yours very truly,
John Weaver

JW/MMD

ACCOUNTANT'S EXHIBIT 22. 10
1/30/29

Philadelphia, Pa. December 13th, 1927
Corn Exchange National Bank,
2nd & Chestnut Sts.,
Phila., Pa.
Attention Mr. Freeman, Trust Officer
Gentlemen:

You are advised that there has been lodged with Judge Dickinson in re Corn Exchange National 20 Bank, Executor u/w Winfield S. Nice, Deceased, et al, Complainants, vs. Nice and Schreiber Company, a Petition on behalf of the residuary legatees under the will of Winfield S. Nice, Deceased, wherein the Petitioners pray, inter alia, that the Court will reopen the Adjudication of the First Account filed by the Receivers &c., and permit the petitioners to file Objections or Exceptions thereto relative to the compensation allowed by the Master to the Receivers, their counsel, the Master and the Appraisers 30 and likewise with reference to the second report of the Master, &c., &c.

Judge Dickinson has agreed to hear parties in interest sur Petition, in his Chambers in the Post Office Building on Friday morning next, the 16th instant, at 10 o'clock.

You are invited to be present and on behalf of the residuary legatees, the Petitioners in said Petition, represented by H. Homer Dalbey, Esq., and myself, you are asked to intervene therein and join in the Prayer of the Petition.

I have no extra copy of the Petition, but your attorney, John Weaver, Esq., has a copy which he will doubtless show you.

Kindly acknowledge receipt of this letter.

Yours very truly,

F:R W. S. Furst

ACCOUNTANT'S EXHIBIT 23.
1/30/29

November 28, 1928

WINFIELD S. NICE, DECEASED
William S. Furst, Esq.
916 Stock Exchange Building
Philadelphia,
Dear Mr. Furst:

We have received today a notice from Sydney E. Smith, Esq., surviving Receiver of the Nice and Schreiber Company, that on Wednesday, December 5, he will present his petition in the United States District Court at 10 A. M. asking that the Receivership be terminated; that he be ordered to turn over to the proper officers of Nice & Schreiber Company such books, records, documents and assets, including the above named accounts,* as are now in his possession, and for further order discharging him as Receiver of Nice & Schreiber Company, including a release of him and the Estate of John Weaver,

dec'd. (the said John Weaver having been one of the Receivers).

No doubt you will wish to consider at this time the question of what disposition should be made of the remaining corporate assets after they are turned back to the Corporation. As I recall, the suggestion was made at our recent conference that the Corporation, prior to its final dissolution, assign its assets to your clients, or their nominee, so that if they have any value such assignee might realize upon it.

Very truly yours
EDGAR W. FREEMAN
Vice President & Trust Officer

EWF/L
*Claims against western shippers

ACCOUNTANT'S EXHIBIT 24.

Philadelphia, Pa. December 18th, 1928

Corn Exchange National Bank,
15th & Chestnut Sts.,
Phila., Pa.

Gentlemen: Attention: Mr. Freeman

Mr. Dalbey has filed Exceptions to the Final Adjudication of the Account of the Corn Exchange National Bank, Executor of the Estate of Mr. Nice, and I understand hearing is fixed for January 7th, next.

His objections go to the total loss of value of this stock by reason of negligence of the Executor in relation to receivership proceedings and payments.

I fear that if residuary legatees now accept this

stock, without qualification as to the effect of such action upon pending proceedings, their interests might be jeopardized.

I was hopeful that you would make a settlement with Mr. Dalbey and I hope that it still may be secured, rather than have all these affairs aired in the Courts and public press.

If there is anything I can do, call on me.

Yours very truly,

F/R W. S. Furst

ACCOUNTANT'S EXHIBIT 25.
1/30/29

December 8, 1928

WINFIELD S. NICE, DECEASED
William S. Furst, Esq.
916 Stock Exchange Building
Philadelphia

Dear Mr. Furst:

I have your letter of December 7 suggesting that the officers of the Nice & Schreiber Company authorize the surviving Receiver to deliver to you all of the remaining books, records and assets of the Corporation now in his possession. I hardly feel that the officers of the Corporation have this authority as this seems to me to be a matter which should be determined by the stockholders. I would, therefore, suggest as a more appropriate procedure that the Nice and Schreiber stock remaining in our hands be transferred to the residuary legatees under Mr. Nice's will, as a distribution in kind of part of their share in the Estate, and that thereafter

they dispose of the remaining corporate assets as they deem best. You will recall that at our last meeting in your office I suggested this procedure but you were apparently unwilling to permit your clients to accept delivery of the Nice and Schreiber stock.

I see no reason why this stock cannot be transferred at this time to Mr. Nice's four sisters so that they will have full control of the Corporation.

Very truly yours,

EDGAR W. FREEMAN

EFW/L Vice President & Trust Officer

IN THE MATTER OF THE ESTATE OF
WINFIELD S. NICE, Deceased.

Hearing held at two o'clock P. M., Monday, December 2, 1929, at 335 City Hall, Philadelphia, Pennsylvania, before Ernest N. Ross, Commissioner appointed by the Prerogative Court of New Jersey, for the purpose of taking testimony of Charles N. Weston and George H. Beddall.

Present:
Honorable Louis Starr,
Samuel Morris, Esq.

Charles N. Weston, sworn.

By Mr. Morris:

Q. Where do you live?
A. 3708 Baring Street, Philadelphia.
Q. Yes.
A. Philadelphia.
Q. And in 1926 did you have any official capacity with the Nice and Schreiber Company?
A. Yes.
Q. Do you recall that Mr. Nice died on March 2, 1926?
A. I believe that is the date.
Q. And that receivers were appointed for the company on April 28, 1926?

A. I do not know the date.
Q. About that time?
A. Somewhere.
Q. And do you recall whether or not from the time of the death of Nice—whether the company liquidated its assets?

Judge Starr: I object to that. It calls for a conclusion. We are entitled to have what the company did, and to let the court determine whether it is a liquidation or not.

Mr. Morris: Of course, the procedure here, I understand, is for counsel to make objection, after the question is asked, or the objection to be recorded, and to let the witness go ahead and answer.

Judge Starr: Yes.

By Mr. Morris:

Q. Do you recall whether the Nice and Schreiber Company liquidated any assets after the death of Mr. Nice?

Judge Starr: That is objected to on the same ground.

A. How do you mean, by liquidating any assets?

By Mr. Morris:

Q. Did they begin a course of collection of assets?

Judge Starr: That is objected to on the same ground.

By Mr. Morris:

Q. What did the company do towards the collection of assets?

A. Well, the company was ——

Q. After the death of Mr. Nice.

A. The company was running along, and kept up a running business, a going business. There was nothing particularly done. They finally went into liquidation. That was a short time—about the time they finally went into liquidation.

Q. What do you mean by finally going into liquidation?

Judge Starr: That is objected to as leading.

By Mr. Morris:

Q. What do you mean when you say you finally went into liquidation?

A. I mean proceeding to liquidate the assets—divide them up, pay off the obligations, and settle up. That was the idea, I suppose.

Judge Starr: I move that the answer be stricken out, because it is a mere conjecture.

By Mr. Morris:

Q. Please tell us only what you know, and try to speak succinctly, so that the stenographer can understand, and take your testimony.

Do you recall, prior to the time, fixing the time, prior to the appointment of the receivers, to wit, around April 28, 1926 ——

A. Do you mean the liquidation?

Q. No; I say just fix that period in your mind, around April 28, 1926.

A. Yes.

Q. That is about the time of the appointment of the receivers for the Nice and Schreiber Company?

A. Yes.

Q. Did Mr. Freeman ask you, about that time or before, as to the financial condition of the Nice and Schreiber Company?

A. I don't remember his doing so. That is, no statement ——

Q. What is that?

A. Was there any particular question?

Q. Yes.

A. Of what nature?

Q. Did Mr. Freeman ask you whether or not the company was able to pay the claim of Harvey and Burton?

Judge Starr: That is objected to as leading.

By Mr. Morris:

Q. You can answer.

A. No; not that I know of; no.

Q. Please answer.

A. He did not; to the best of my recollection, he did not.

Q. If you don't know, say you don't know.

A. I don't know.

Q. Did Mr. Freeman ask you whether or not the company had sufficient assets to pay the claim of Mr. Burton?

Judge Starr: That is objected to as leading.

By Mr. Morris:

Q. Did Mr. Freeman ask you that?
A. No. You mean sufficient assets?
Q. You answered it. On or before the date of the appointment of the receivers, did Mr. Freeman ask you concerning the financial condition of the company?

Judge Starr: That is objected to as leading,—upon the ground stated before.

A. No.

By Mr. Morris:

Q. Did Mr. Freeman ever come to the place of business of the Nice and Schreiber Company to look things over?

Judge Starr: That is objected to on the same ground.

By Mr. Morris:

Q. To look over the books of the company?
A. He was there frequently. I don't know to what extent he examined the books.
Q. Did you ever see Mr. Freeman look at the books of accounts of the Nice and Schreiber Company?
A. No; I did not. You mean before the receivership?
Q. Yes; before the receivership?
A. I did not see him look at any of the accounts —books of accounts.
Q. Let me get clearly on the record whether or

not Mr. Freeman ever asked you concerning the financial condition of the Nice and Schreiber Company?

Judge Starr: That is objected to on the ground as stated before.

A. Yes.

By Mr. Morris:

Q. What?

A. He certainly did talk about the financial condition of the company.

Q. What did he say?

A. For instance,—I don't know that he said anything particularly, myself.

Q. What did he ask you?

A. He had a statement from us after the death of Mr. Nice.

Q. You mean that Mr. Freeman had the March 2nd, statement?

A. I believe that he had.

Q. And after that did Mr. Freeman—after March 2nd did Mr. Freeman ask you about the financial condition of the company?

A. In a general way, do you mean, or any special question?

Q. Either.

A. I don't recall any.

Q. To the best of your knowledge did Mr. Freeman ever ask you whether or not the company had sufficient assets to pay the claim of Harvey Burton?

Judge Starr: That is objected to on the same ground.

A. Wasn't that same question asked before?

By Mr. Morris:

Q. Yes; I want to get that straight.
A. I want to get it straight, too.
Q. To the best of your knowledge did Mr. Freeman ever ask you whether or not the company had sufficient assets to pay the claim of Mr. Burton?

Judge Starr: That is objected to on the same ground.

A. I think at one time Mr. Burton demanded some money, and Mr. Freeman may have asked, or said, pay it.

By Mr. Morris:

Q. You see we want just the testimony. We don't want mere conjecture. If you know, tell us. If you do not know, tell us also.

Judge Starr: That is objected to.

A. You are going back four years.

By Mr. Morris:

Q. I know. But you are not helping the Court when you say, "may have" or "may not have," or "a thing may have happened."

Judge Starr: I object to the manner in which counsel is admonishing the witness.

By Mr. Morris:

Q. Now I will ask you again, did Mr. Freeman ever ask you whether or not the company had sufficient assets to pay the claim of Harvey Burton?

Judge Starr: That is objected to on the same ground.

A. Never in those words; no.

By Mr. Morris:

Q. In what words did he ask you?

A. He never asked me if we had sufficient assets to pay Mr. Burton's account.

Q. Did he ask you anything concerning the ability of the company to pay the claim of Burton?

A. At what time? Previous to the receivership?

Q. After the death of Mr. Nice and previous to the receivership.

A. I only recall one instance in which there was a question of Mr. Burton's account coming up, and that I have just mentioned.

Q. What is that? When was it and what was it?

A. I do not know when it was.

Q. Was it between the death ——

A. I should say it was nearing the end—toward the receivership.

Q. What do you recall that Mr. Freeman asked you?

A. I think—well, you only want what I know?

Q. I want what you know.

A. What I know?

Q. Yes.

A. Well, I have an idea that Mr. Burton at one time ——

Q. Please—no idea—only what you know?
A. How am I going to tell?
Q. If you do not know a thing, do not tell us. If you know, tell us.
A. What is your question again?

(Record read as follows:
"Q. Now I will ask you again, did Mr. Freeman ever ask you whether or not the company had sufficient assets to pay the claim of Harvey Burton?")

A. I should say no.
Q. Then your answer now is that Mr. Freeman never asked you concerning the financial ability of the Nice and Schreiber Company to pay Mr. Burton's claim?

Judge Starr: That is objected to as leading, irrelevant and improper.

A. He certainly never asked me that.

By Mr. Morris:

Q. Do you know whether or not prior to the appointment of the receivers—whether or not the company had sufficient money to pay the claim of Mr. Burton?

Judge Starr: That is objected to as immaterial, irrelevant and calling for a conclusion.

A. The company had sufficient assets to pay all its liabilities.

By Mr. Morris:

Q. And more particularly isn't it true that on the date of the appointment of the receivers the Nice and Schreiber Company had over $41,000 cash in bank?

Judge Starr: That is objected to as leading.

A. That I do not know, what their balance was.

By Mr. Morris:

Q. You know that the company had a book balance —that the Nice and Schreiber Company had a book balance?

Judge Starr: That is objected to on the same ground.

A. I do not know.

By Mr. Morris:

Q. You do not recall?
A. No.
Q. According to the receivership records it shows cash in banks, as of April 28, 1926, Union National Bank, $41,045.01. Do you recall that?

Judge Starr: That is objected to as leading, irrelevant, immaterial and improper.

A. Put your question again.

By Mr. Morris:

Q. Do you recall—do you know whether or not it is true that the receivers had—that the Nice and Schreiber Company had cash in the Union National Bank, $41,045.01?

Judge Starr: The same objection.

By Mr. Morris:

Q. On April 28, 1926?

Judge Starr: The same objection.

A. I do not know whether they had or not.

By Mr. Morris:

Q. Do you know anything concerning the transfer of a large sum of money from the Union National Bank to the Corn Exchange National Bank on the date of the appointment of the receivers?

A. Personally I do not; no. Not that I recall.

Q. Were you ever consulted concerning the transfer of funds from the Union National to the Corn Exchange?

A. Not after it was in the hands of the receiver. Of course I had nothing to do with it.

Q. Do you recall now whether or not on April 28, 1926 the Nice and Schreiber Company was able to pay Mr. Burton's claim?

Judge Starr: That is objected to as calling for a conclusion.

A. That was before the receivership.

By Mr. Morris:

Q. Yes.
A. Yes; it was able to pay it.

Cross-examined.

By Judge Starr:

Q. May I ask your age?
A. 70 years.

By Mr. Morris:

Q. 70?
A. Yes.

By Judge Starr:

Q. And you were secretary of the Nice and Schreiber Company, weren't you?
A. Yes.
Q. How long had you been secretary?
A. Since the forming of the company, 1903.
Q. About how many years ago is that?
A. 1903—twenty-six years ago.
Q. What had you to do with respect to the conduct of the business?
A. Well, I attended to the financial part only.
Q. Do you remember receiving, at the store, a letter from Mr. Herbert Salus, in relation to the Burton claim, demanding the payment of the claim?
A. I do not think that was received at the store.
Q. Where was it received?
A. I think at Mr. Freeman's office.
Q. You knew of the fact that such a letter had been received, didn't you?

A. At the time of the receivership?

Q. Before the receivership?

A. Not before; I recollect no letter before that, sent by Mr. Salus.

Q. A day or so before the application was made for the receivers?

A. I recollect only the one letter.

Q. Don't you remember seeing a letter that was sent by Mr. Salus in relation to the Burton Claim?

A. The one that was received on the day of the receivership.

Q. What do you mean, by the day of the receivership?

A. After receiving that letter it was decided to ask for the appointment of a receiver.

Q. That was the time.

A. That is the only letter that I recall.

Q. That is the letter I am asking you about.

A. Yes.

Q. You think that letter came to Mr. Freeman?

A. I believe so.

Q. And Mr. Freeman then consulted you about that claim, didn't he?

A. He did.

Q. And he asked you whether or not the Nice and Schreiber Company had sufficient moneys in bank at that time to pay that claim, didn't he?

A. I don't recall that, that he did.

Q. Did you have any talk with him about the payment of the claim?

A. I believe at the meeting in Mr. Davis' office I asked him what about payment.

Q. Yes; what happened then?

A. He said we could not pay.

Q. Who said?

A. Mr. Freeman. That is my recollection. That

was because, I understood, we were in liquidation and could not pay out.

Q. Don't you remember his asking you the question whether or not there was enough cash in bank?

A. I do not.

Q. Will you say that that question was not asked you, or that you have no recollection?

A. I have no recollection of the specific question being asked.

Q. And don't you remember when you had the conference in Mr. Davis' office, the same question was asked by some of the gentlemen there present, as to whether there was sufficient money in bank to pay the Burton Claim?

A. I do not.

Q. A moment ago you started to say that upon one or two occasions—and you were interrupted by Mr. Morris. What were you going to say then?

A. It depends upon what was before it.

Q. I don't know. You had something in your mind, and you were interrupted—he interrupted you. Now what were you going to say?

A. That of course I cannot recall without knowing what it followed. That is what it was in reference to.

Q. Mr. Freeman came down to the store of the Nice and Schreiber Company quite frequently, didn't he?

A. He did.

Q. After Mr. Nice's death. And he was in touch with you all the time with relation to the financial condition of the company, wasn't he?

A. I don't think he had anything to do with that part of it.

Q. Did he ask you any questions about it?

A. I don't think he asked me any questions about it. He had a statement of March 2nd.

Q. You mean to say there was no conversation between you and Mr. Freeman in relation to the financial condition of the company after Mr. Nice's death until the time the receivers were appointed?

A. Just what do you mean by in regard to the financial ——

Q. Any talk in regard to the financial condition of the company?

A. I do not recall any talk we had in relation to the financial condition of the company.

Q. Did you ask him about paying off some bank loans?

A. I don't think he was consulted about paying off any bank loans.

Q. He was not consulted at all?

A. I don't think so.

Q. Are you sure of that, or are you merely guessing at it?

A. It don't seem to me as if he would be consulted. I cannot recall. We had some notes due at the Corn Exchange. He might have come into contact with the financial condition until they were paid off.

Q. I am asking you about contact with you. Were those loans paid off?

A. The notes in the Union and Corn Exchange were paid.

Q. Do you mean to say you paid those off without talking to Mr. Freeman about it?

A. I believe so. I don't know just when they were paid off.

Q. Who signed checks?

A. I signed checks.

Q. You were treasurer also?

A. Treasurer. Notes came on in the regular order of business.

Q. What say?

A. The notes were in the regular order of business. They were naturally paid.

By Mr. Morris:

Q. You said something to the effect that in the course of the liquidation the bills could not be paid out,—Mr. Burton's claim could not be paid out because the company was liquidating.

Judge Starr: That is objected to as leading.

By Mr. Morris:

Q. I just wanted you to explain that statement.
A. We could not—after we went into liquidation, as I understand it,—we were not allowed to pay them.
Q. What do you mean by going into liquidation?
A. A resolution was passed by the directors, or executors, that we should liquidate and pay off the obligations of the company.
Q. Was that before the appointment of the receivers?
A. Before the appointment.
Q. And then, pursuant to that, what happened?
A. That is all that happened. We could not pay anything out.
Q. Did Mr. Freeman say you could not pay anything out?
A. I think so.
Q. Mr. Freeman said you could not pay any bills?
A. He said we could not pay any bills.

By Judge Starr:

Q. What did Mr. Freeman actually say to you about that?

A. You mean personally?

Q. Yes; what did he say to you personally about it?

A. We had a meeting in the office of the company, consisting of Mr. Gaskell, Mr. Freeman and myself, and there was a resolution to liquidate the company and pay off the obligations, but in the meantime we were not to pay anything out.

Q. Is that what was said?

A. As I understand it; yes.

GEORGE H. BEDDALL, sworn.

By Mr. Morris:

Q. You were an officer of the—or you were employed by the Nice and Schreiber Company?

A. Yes.

Q. In 1926?

A. Yes.

Q. Do you recall the financial condition of the Nice and Schreiber Company on—what was your employment?

A. Bookkeeper.

Q. With Nice and Schreiber Company?

A. Bookkeeper.

Q. You had charge of the books?

A. Yes.

Q. And Mr. Weston was over you?

A. Yes.

Q. And do you recall the financial condition of the Nice and Schreiber Company on April 28, 1926, the date of the appointment of the receivers?

Judge Starr: That is objected to as calling for a conclusion.

By Mr. Morris:

Q. Do you recall?

A. Only from the statement of the auditor. I cannot recall now what the statement said.

Q. Do you recall whether or not the company had about $41,000 cash in bank?

Judge Starr: That is objected to as a conclusion.

By Mr. Morris:

Q. On or about the date of the appointment of the receivers?

A. Yes.

Q. Did the company have any such large sum?

A. They had that in the Union Bank when the receivers were appointed.

Q. And do you know whether or not those funds were transferred to the Corn Exchange National Bank?

A. Yes.

Q. Do you know about when?

A. I should imagine when the receivers were appointed.

Judge Starr: I move to strike out the answer because it is evident that the witness has no distinct knowledge of it.

By Mr. Morris:

Q. Did you ever have a conversation with the receivers as to the transfer of those funds?

Judge Starr: That is objected to as not binding upon the executors.

A. $41,000?

By Mr. Morris:

Q. Yes.
A. Yes.
Q. What was that conversation—when and where was it?

Judge Starr: The same objection—not binding upon the executors.

A. In Mr. Davis' office.

By Mr. Morris:

Q. When?
A. On—when I was through with working for the receivers.

By Judge Starr:

Q. What is that?
A. When the receivers told me they had no further use for me.

By Mr. Morris:

Q. When was it?

Judge Starr: Objected to on the same ground.

A. The latter part of July.

By Mr. Morris:

Q. The same year?
A. The same year.
Q. 1926?
A. 1926.
Q. What was the conversation?
A. When I was through, and had all the accounts receivable collected, I balanced up my cash book, and what I had in the bank—there was a difference of $41,000—I asked Mr. Davis how the difference came in. He said that was the $41,000. I drew out of the Union Bank and transferred to the Corn Exchange when they were appointed receivers—or when he was appointed attorney for the receivers.
Q. Did he tell you why he transferred those funds to the Corn Exchange?
A. No; he did not.
Q. Do you know whether or not Mr. Freeman advised the transfer of those funds?
A. I do not.
Q. Do you know whether or not Mr. Freeman knew of the existence of the fund of $41,000?
A. I do not know whether Mr. Freeman knew it or not.

Cross-examined.

By Judge Starr:

Q. You testified in Mays Landing, didn't you?
A. Yes.
Q. You continued with the receivers how long after they were appointed?
A. I think that was up to the last week in July—either the third or fourth—no—I beg your pardon—the last week in June I think it was.

Q. You acted for the receivers in making collections, didn't you?

A. Yes.

Q. You identified the bank book, didn't you, that was being used by the Nice and Schreiber Company when you were in Mays Landing testifying as a witness?

A. The bank book?

Q. Yes.

A. Yes.

Q. I don't mean the bank book, I mean the check book?

A. The check book; yes.

Q. Do you recall what checks were outstanding as against that bank balance of some forty-two thousand dollars on the 28th of April 1926?

A. They were checks that were sent out to our western shippers—I could not give you the amount.

Q. How much were they? What was the aggregate of those checks? Do you know?

A. I could not tell you.

Q. Have you any distinct recollection except as may be disclosed by the check book of the exact amount on deposit for the various days for say four days before the receiver was appointed?

A. No; I haven't got it in mind. I could only tell by looking at the check books and stubs.

Q. And you have already testified as to that, down at Mays Landing?

A. Yes.

Q. And the testimony you gave there was correct, wasn't it?

A. Yes.

Q. You know as a fact, don't you, that after the receiver was appointed they stopped payment on all those checks that had been sent to the western shippers?

A. Yes.

Q. And if those checks had been paid in due course there would not have been anything like $42,000 on deposit?

A. No.

Q. What?

A. There would not be $42,000—there might have been half of it or a little more than half of it.

Q. Do you know how much there would have been?

A. I could not tell you; no.

ADJOURNED.

NEW JERSEY PREROGATIVE COURT.

IN RE
NICE ESTATE } On Appeal.

Atlantic City, N. J., January 14, 1930.

TESTIMONY.

Before Hon. R. H. Ingersoll, Vice-Ordinary.

Appearances:
For the Appellant, Lewis Starr, Esq.
For the Appellee, Samuel Morris, Esq.

Mr. Starr: After the appeal was taken Mr. Morris amended the exceptions alleging that there had been connivance in the opening of an account in the Corn Exchange immediately after the appointment of receivers and a very large sum of money transferred from the Union to the Corn Exchange, and this within a few days after the appointment of the receivers, the inference being that that was done by reason of some connivance between the Corn Ex-

change Bank and the Receivers. He took some testimony in Philadelphia and I desire to put on the stand a couple of witnesses to refute any idea at all that the transfer of that bank account had anything to do with the appointment of the receivers.

Mr. Morris: If your Honor please, my purpose in bringing out that testimony as to the transfer of the funds was not so much to show any connivance on the part of the executors with the receiver for the appointment of the receiver but for the purpose of showing that the bank knew on the date it applied for the receiver that such fund did exist.

Aloysius J. Davis, sworn.

Direct examination.

By Mr. Starr:

Q. Mr. Davis, are you a member of the Philadelphia Bar?

A. I am, sir.

Q. Did you act as one of the counsel for John Weaver and Sidney E. Smith the receivers appointed in the Federal Court in Philadelphia with respect to the Nice and Shriber Company?

A. I did, sir.

Q. Had you had anything to do with representing Nice and Shriber Company prior to the appointment of the receivers?

A. I had, sir.

Q. What was your connection with reference to them?

A. I was counsel for Nice and Shriber Company, at least Philadelphia counsel.

Q. Now after the appointment of the receivers on the twenty-eighth of April, 1926,—I think that is the date—did you have anything to do with reference to the transfer of the bank account from the Union Bank and Trust Company to the Corn Exchange National Bank in Philadelphia?

A. Yes, in that I participated in the conference with the receivers and myself.

Q. As the result of the conference what was done with respect to the bank account in the Union National Bank?

A. The bank account in the Union National was closed out and the balance at that time, whatever it happened to be, was transferred to the Corn Exchange.

Q. That was done as the result of conference with whom?

A. Sidney E. Smyth and John Weaver and myself.

Q. And they were the receivers and you were acting as counsel?

A. Exactly, sir.

Q. Was any arrangement made with anybody connected with the Corn Exchange with reference to that transfer?

A. Absolutely no. I even questioned whether or not they knew about it until the transfer was actually made.

Q. Was that transfer made by virtue of any agreement between the receivers and anybody connected with the Corn Exchange National Bank?

A. Positively no.

Cross-examination.

By Mr. Morris:

Q. Mr. Davis, you were appointed on April 28, 1926?

A. I was never appointed at all. I wasn't the receiver.

Q. Pardon me, you are counsel for the receiver?

A. Counsel for the receiver.

Q. Your appearance was entered as counsel for the receiver on April twenty-ninth, the day after the appointment of the receiver, isn't that right?

A. I suppose a formal appearance was entered on that date, yes, sir.

Q. There was $41045.11 in the Union National Bank on April 28th, wasn't there, to the credit of the Nice and Shriber Company?

A. As was subsequently developed and found that was the amount, although it wasn't known that was the amount at that time.

Q. When did you first learn that such a sum was on deposit in the Corn Exchange to the credit of the Nice and Shriber Company?

A. Quite some time afterwards.

The Court: Do you mean that? Do you mean that that amount was in the Corn Exchange National Bank?

Mr. Morris: Pardon me; I thought I said the Union National.

The Court: You said Corn Exchange.

Q. When did you first learn that the sum of

New Jersey State Library

$45045.01 was on deposit in the Union National Bank to the credit of the Nice and Shriber Company?

A. I will have to make just a little bit of a statement to answer that question. At the time that the receivership came along on the twenty-eighth of April, 1926, a notice of the appointment of receiver was served upon the Union National Bank there were quite a number of checks to western shippers which we did not know whether or not they had been cashed. Quite a few of them had not come through for collection yet, so that the notification of the appointment of the receivers stopped the payment of those checks and, therefore, it was not until those checks had been returned uncollected or unpaid, rather, by the bank that we knew the balance to be $41,000; in point of fact if the checks had been paid the balance would have been considerably less.

Q. As a matter of fact on May third, 1926, this transfer of the $41,000 was made from the Union National to the Corn Exchange, wasn't it?

A. I don't know the date.

Q. And it was about three or four days after your appointment, wasn't it?

A. Yes, I would say so.

Q. Now after the actual transfer was made on May the third of this $41,000 from the Union National to the Corn Exchange when did you first learn about the existence of that fund?

A. Of which fund?

Q. Of that $41,000 fund in the Union National?

A. As a matter of fact the way the thing was worked was this ——

Q. When did you first learn about it?

A. That particular fund?

Q. Yes.

A. I never learned of that particular fund until

we were given the bank balance by the Union National Bank.

Q. You mean to say you transferred $41,000 from the Union National to the Corn Exchange on May third if you didn't know this money existed?

A. I knew all along ——

Q. That is what I want to know.

A. For the simple reason I always knew there was a balance in the Union National Bank but the express balance we did not know, therefore we had to take up with the Union National and find what was the correct balance.

Q. On May third, 1926, $41,000 was deposited in the Corn Exchange, wasn't it?

A. If that is the correct date, yes.

Q. That was withdrawn from the Union National?

A. Yes, sir.

Q. What I want to know is if that was withdrawn on May third when did you first know that such a fund existed? Was it on April 28th or April 29th, May the second or May the third?

A. I will say May the third is the date on which I knew that particular fund in that amount existed. I always knew there was an account there, the size of it precisely I did not know.

Q. Do you know who actually made the deposit?

A. In the Corn Exchange?

Q. Yes, $41,000?

A. Yes, I will say that I did.

Q. You made the deposit?

A. I made the deposit.

Q. You drew a check?

A. Signed by the receivers.

Q. But you drew it?

A. Yes, sir.

Q. Do you know what time of the day on May the third you deposited that check?

A. I don't have recollection of it.

Q. You mean to say you didn't have any knowledge of the existence in the Union National Bank of $41,000 to the credit of the Corn Exchange until the date that you actually made the transfer, is that right?

A. Yes, I will say that.

The Court: Technically that question would require the banks here. Your question is were on deposit in the Union National Bank to the credit of the Corn Exchange bank, Mr. Morris.

Mr. Morris: I will withdraw the question.

Q. On May the third, 1926, you drew a check for about $41,000 on the Union National?

A. Yes.

Q. And you deposited that in the Corn Exchange, is that right?

A. Yes.

Q. Now I would like to know what was the first moment that you actually knew that you had the right to draw such a check?

A. All right, I will go further and say this, I can't tell you the very first moment.

Q. As near as you can recall.

A. You see, only having spent three or four days work in a business four years ago, but I will say this much, through an error on the part of the Union National Bank they honored several checks for collection, for payment, after the notice of the receivership had been served upon them and therefore it required some little bookkeeping on the part of the Corn Exchange bank to let us know the precise balance to the credit of the Nice and Shriber Company.

Q. You are not answering.

A. If you are asking me what particular date it was, I can't tell you whether it was the third or the second, it was in there some time.

Q. You wouldn't have drawn a check for $41,000 on May third if you didn't think there was $41,000 in the Union National, would you?

A. Unquestionably not, Mr. Morris. That was the figure that was given to us by the Unoin National Bank as to the balance.

Q. So on May third you drew the check for $41,000 and you certainly knew on May third, didn't you?

A. There is no question about it.

Q. Did you know on May second?

A. I don't know. I may have draw the check the very day the information was given to me or I may have waited until the next day.

Q. Who told you that this fund did exist?

A. I always knew there was an account there, I am telling you, Mr. Morris.

Q. You did know there was $41,000?

A. Absolutely not because I didn't know how many checks were called for payment.

Q. When did you first have the first intimation that large sum was in existence?

A. I would say either May second or May third.

Q. Until May third you didn't know that a large sum was in existence?

A. Absolutely not.

Q. Did you know on May the twenty-eighth ——

A. May twenty-eighth?

Q. April twenty-eighth that a large sum was on deposit in the Union National?

A. Positively no. My information was to the contrary.

Q. What did you believe was the amount of the Union ——

Mr. Starr: I object, your Honor.

The Court: Sustain the objection.

Q. Of course, as a matter of fact, the $41,000 was on deposit on April 28th in the Union National Bank, wasn't it?

A. Yes, that was on deposit. Let me go ahead with that please ——

Q. You have answered yes?

A. My answer is yes, but there were checks drawn against it which had not called for collection.

Q. Those checks had not been paid?

A. Those checks had not been paid.

Q. Did you or anyone to your knowledge talk to Mr. Morgan about the transfer of $41,000 from the Union National to the Corn Exchange prior to the time of the deposit?

A. I feel quite positive in saying there was no such conversation.

Q. Did you have any conversation?

A. Positively no.

Q. With any officer of the Corn Exchange concerning the transfer of this fund from the Union National to the Corn Exchange?

A. No, sir, the only conversation I had was with the two receivers.

Q. Do you know why the transfer was made?

A. I suppose I know as much about it as anybody and it is just simply this, there was no reason at all, of course, for the money to remain in the Union National Bank, the Corn Exchange Bank was the executor of the Nice Estate, they had previously had an account, Nice Estate had previously had an account with the Corn Exchange Bank and the receivers on their own motion decided it would be best to favor the Corn Exchange Bank with this business.

Q. How did you find out, Mr. Davis, that there was on deposit $41,000 in the Union National Bank to the credit of the Nice and Shriber Company? How did you find that out?

A. By information from the Union National Bank.

Q. You asked them?

A. Naturally.

Q. Whom did you ask?

A. I didn't ask any particular officer that I can tell you, Mr. Morris, I think Mr. Link the cashier.

Q. There was no difficulty finding out such a fund did exist, was there? There was no difficulty finding it out?

A. No.

Q. Mr. Freeman is the executor could have found out just as well as you, couldn't he?

A. Exactly.

Q. Didn't involve any expensive bookkeeping, anything like that to find out?

A. No, the books of the Nice and Shriber Company showed a considerable amount less, of course.

Q. If anybody looked at the books it would have shown that this money was on deposit in the Corn Exchange, I mean the Union National?

A. They checked out against that, of course.

Q. Checks outstanding amounted to about $14,000, didn't they?

A. I know was reduced considerably. I can't recall the exact amount. In other words the credit balance of Nice and Shriber Company in the Union National Bank was a fund only in the neighborhood of two or three or four thousand dollars, somewhere there some place.

Mr. Morris: I would like that answer to be stricken. There was no question.

The Court: It is not responsive. It will be stricken.

Q. On the day after you were appointed ——

A. I wasn't appointed, sir.

Q. The day after the receivers were appointed they immediately transferred their account, the company's account in the Corn Exchange from the company's account to the receivers' account, is that right?

A. That is the proper practice.

Q. And that fund amounted to about $111?

A. Something like that.

Q. Now that was on April twenty-ninth?

A. Yes, sir.

Q. Can you tell me why, if the transfer was made of the account in the Corn Exchange from the receivers' account, from the company's account to the receivers' account, why wasn't the money in the Union National Bank also transferred that same date? Can you tell me?

A. For two reasons, there are two reasons, Mr. Morris, the first reason being that the amount in the Corn Exchange account was determined, that was a definite amount, we knew exactly what that was, therefore that had to be turned over to the receivership account, and secondly it wasn't known the amount due of the credit balance in the Union National Bank because of these outstanding checks, and secondly we had another trust account, we couldn't turn the account over generally, we had to turn over a specific amount because we were going to draw a check against it to deposit in the Corn Exchange bank.

Q. So that you did know that there was a large sum?

A. No, absolutely not. I knew there was an account.

Q. Can you tell me to the best of your knowledge the amount of those outstanding checks?

A. No, but, as I say, the amount of the outstanding checks reduced, according to my best recollection at this time, the credit balance was in the neighborhood of three or four thousand, upwards of five thousand, I don't think any higher than that.

Q. As a matter of fact it amounted to $41,000 and the outstanding checks amounted to $14,000, isn't that true?

Mr. Starr: My record isn't that. The record is $23,000 checks outstanding.

The Court: If that is the situation, of course the objection is sustained.

Mr. Morris: Of course I have reference to the record, it shows that the amount of the outstanding checks amounted to about $14,000; that sum was drawn against the fund of $41,000. I can give you the reference to the record if you want it.

Mr. Starr: We have the check book here showing checks, as I figure, $23,000 outstanding checks, some of those may have been paid prior to the receivership, I don't know about that.

EDGAR W. FREEMAN, sworn.

Direct examination.

By Mr. Starr:

Q. Mr. Freeman, in 1926, were you the trust officer of the Corn Exchange National Bank?

A. Yes, sir.

Q. Did you have to do with the Nice Estate?

A. Yes, sir.

Q. As such trust officer?

A. Yes, sir.

Q. There has a stipulation been filed showing that on May third, 1926, there was a deposit to the account of the receiver appointed for the Nice and Shriber Company amounting to $41,045.01, having been drawn from the Nice and Shriber account at the Union National Bank in Philadelphia. Were you in any way instrumental in having that amount transferred from the Union to the Corn Exchange?

A. No, sir.

Q. Was that done by virtue of any arrangement or agreement between you representing the Corn Exchange National Bank and either the receivers or the receivers' counsel of the Nice and Shriber Company?

A. No, sir.

Q. Did you make any request that that fund be transferred from the Union National Bank to the Corn Exchange National Bank?

A. No, sir.

Q. To your knowledge did anybody connected with your institution, the Corn Exchange Bank, make such a request?

A. No, sir.

Cross-examination.

By Mr. Morris:

Q. You are the Vice-President of the Corn Exchange who was in active charge of the administration of the Nice Estate?

A. Yes, sir.

Q. Now it appears that a fund of about $41,000 was on deposit in the Union National Bank and that the fund was withdrawn on May third, 1926 and deposited to the receivers' account in the Corn Exchange. When did you first learn of the existence of that fund?

Mr. Starr: I object to that unless the question is made a little more definite, if it has reference to the fund in the Union National Bank a certain situation arises, if it has reference to the transfer to the Corn Exchange National Bank another situation arises and I think the question should be more definite.

The Court: Yes.

Q. When did you first learn that there was over $41,045.01 on deposit in the Union National Bank to the credit of the Nice and Shriber Company?

A. Rather difficult to answer directly. I knew there was an account in the Union Natoinal Bank at all times.

Q. When did you ——

A. The amount from day to day I did not know.

(Question repeated.)

Mr. Starr: There is another objection, if your

Honor please, this is not cross-examination. I simply put Mr. Freeman on the stand to prove the negative.

The Court: Sustain the objection.

Mr. Starr: It isn't cross-examination and the whole matter was gone into in the Court below and I object to it on that ground.

Mr. Morris: If your Honor please, if I may be permitted to say one word, Mr. Freeman says that he denies word for word that he ever had anything to do with the transfer of this fund by the Union National to the Corn Exchange and he knew nothing about it and I would like to find out when he first did find out about the existence of the fund.

The Court: I will sustain the objection.

Q. When did you first learn that the transfer was made of the sum of $41,000 from the Union National to the Corn Exchange?

A. I don't recall the exact date, but I remember Mr. Davis came to me saying that he had transferred the Nice and Shriber account from the Union and put it in the receivers' account in the Corn Exchange.

Q. About when did you first learn of that?

A. About May third when the transfer was made.

Q. About when, was it the same day?

A. It may have been the same day or the day after.

Q. On or about May third you knew of the existence of this sum of $41,000 is that right?

A. Where?

Q. In the Union National Bank to the credit of the Nice and Shriber Company?

A. I knew about it in the Corn Exchange at that time.

Q. Pardon me?

A. I knew about it after being transferred to the Corn Exchange.

Q. You didn't know about it before the transfer?

A. I didn't know of the exact amount, no.

Q. But you knew it was a large sum?

A. Yes, sir.

Q. About how much did you think it was?

Mr. Starr: I object to that, if your Honor please, not cross-examination.

The Court: Sustain the objection.

Mr. Morris: If Judge Starr is through with the witness I will make him my own witness for the purpose of examining him on that, if your Honor please.

Mr. Starr: If your Honor please, I object to that because it seems to me there ought to be an ending to this litigation sometime.

Mr. Morris: I will withdraw it, your Honor.

STIPULATION.

NEW JERSEY PREROGATIVE COURT.

In the matter of the Estate of Winfield S. Nice, deceased. } Stipulation.

The following facts are hereby stipulated by and between counsel for the petitioners-respondents and defendant-appellant:

1. On April 29, 1926, the receivers of the Nice & Schreiber Company, to wit, John Weaver and Sydney E. Smith, opened an account at the Corn Exchange National Bank, the defendant-appellant, as follows: "Nice & Schreiber Co., Bankrupt, John Weaver and Sydney E. Smith, Receivers."

2. The initial deposit on April 29, 1926, was $111.38. On May 3, 1926, another deposit was made in the receivers' account, amounting to $41,045.01, which sum was withdrawn from the Nice & Schreiber account at the Union National Bank. Two per cent was paid on this account until June, 1926, when $100,000.00 was checked out and the moneys placed in another bank at four per cent.

Dated:

Samuel Morris,
Proctor for Petitioners-Respondents.

Starr, Summerill & Lloyd,
Proctor for Defendant-Appellant.

EXHIBIT.

By consent the following is printed to show the entries in the check book introduced in evidence, Exhibit No. 1 covering deposits and withdrawals by check:

Balance April 26, 1926	$2064.96	
Deposits:		
April 26, 1926	14728.38	
" " "	5932.65	
" 27, "	5604.36	
" " "	741.90	
" 28, "	13272.27	$42,344.52
Checks were drawn as follows:		
Nos. 20625 to 20653 on April 24, 1926 amounting to	$17,515.61	
Nos. 20654 to 20658, drawn on April 26, 1926, amounting to	5,950.28	
No. 20659, drawn on April 27, 1926 for	7.25	23,473.14
		$18,871.38
Carried forward		$18,871.38
April 28, 1926—deposit		2,418.08
		$21,289.46
List of checks, payment stopped		14,094.12
		$35,383.58

The check book showed, from April 24, 1926 to April 27, 1926, checks Nos. 20625 to 20659 had been drawn.

There was introduced in evidence an exemplified copy of the proceedings against the Nice and Schreiber Company in the District Court of the United States for the Eastern District of Pennsylvania, and by consent the following papers were taken from said record and copied for the benefit of the Vice-Ordinary, and are printed, by stipulation, as showing those portions which the parties desire to have considered on this appeal:

IN THE
DISTRICT COURT OF THE UNITED STATES.
FOR THE EASTERN DISTRICT OF PENNYLVANIA.

No. 3701. March Term, 1926.

CORN EXCHANGE NATIONAL BANK, Trustee under the Will of Winfield S. Nice, Deceased, and CHARLES N. WESTON, v. NICE & SCHREIBER COMPANY.	A. J. Davis, Esq. A. J. Brian, Esq.

DOCKET ENTRIES.

Apr. 28th, 1926. Bill of Complant, filed.
Apr. 28th, 1926. Answer filed.

Apr. 28th, 1926. Decree appointing Sidney E. Smith and John Weaver Receivers, filed.

Apr. 28th, 1926. Bond of Receivers with Independence Indemnity Company, In $25,000 and Order of Court approving same, filed.

Apr. 29th, 1926. Appearance of A. J. Brian for Defendant, filed.

Apr. 30th, 1926. Appearance of A. J. Davis for Receivers, filed.

Apr. 30th, 1926. Petition of Receivers for Decree directing delivery of certain property, filed.

May 5th, 1926. Decree appointing Appraisers, filed.

May 7th, 1926. Petition of Receivers for Order on H. L. Burton, et al., to deliver certain goods, filed.

May 7th, 1926. Answer of H. L. Burton to Petition of Receivers, filed.

June 7th, 1926. Printed copy of Bill, Answer and Decree, filed.

June 24th, 1926. Report of Appraisers, filed.

July 16th, 1926. First Report of Receivers, filed.

July 16th, 1926. Decree appointing M. Z. Paul, Master, filed.

Aug. 25th, 1926. Affidavit of service of Notice sur private sale filed.

Aug. 25th, 1926. Petition for, and Order directing Receiver to assign all interest in certain lease and sell certain property, to Wm. M. Lippincott, etc., filed.

Oct. 11th, 1926. Supplemental Account of Receivers, filed.

Oct. 11th, 1926. Testimony before Master, filed.

Oct. 11th, 1926. Report of Master, filed.

Nov. 1st, 1926. Decree confirming Report of Master, filed.

Jan. 28th, 1927. Petition of Pennsylvania Railroad Company for Decree granting lease to institute suit in the name of Sidney E. Smith and John Weaver, Receivers of Nice & Schreiber Company, to use of Pennsylvania Railroad Company in C. P. of Philadelphia County, against Edson Brothers, etc., and Decree granting prayer of petition, filed.

Feb. 26th, 1927. Decree directing Deed of Conveyance of certain property be made to Joseph W. Campbell, filed.

Feb. 26th, 1927. Petition of Receivers for leave to join in conveyance for sale of real estate at private sale, filed.

Feb. 26th, 1927. Affidavit as to Mailing of Notices, filed.

Apr. 2nd, 1927. Second Report of Receivers, filed.

Apr. 2nd, 1927. Decree appointing M. Z. Paul, Master, filed.

June 10th, 1927. Second Report of Master, filed.

June 11th, 1927. Supplemental Report of Master sur exceptions to Report on Second Account of Receivers, filed.

July 2nd, 1927. Decree Confirming Report of Master, filed.

Jan. 23rd, 1928. Petition of Receivers for authority to compromise claims against H. H. Brown, etc., and Decree granting prayer of petition, filed.

Jan. 23rd, 1928. Proof of Mailing Notices, filed.

May 23rd, 1928. Third and Final Account of Receivers, filed.

May 23rd, 1928. Decree appointing M. Z. Paul, Jr., Special Master, filed.

July 10th, 1928. Report of Special Master, filed.

July 31st, 1928. Decree confirming Report of Master, filed.

Dec. 11th, 1928. Affidavit as to Mailing of Notices, filed.

Dec. 11th, 1928. Petition of Receiver for leave to turn over the remaining assets and for his discharge and Decree granting prayer of petition, filed.

IN THE

DISTRICT COURT OF THE UNITED STATES.

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

IN EQUITY.

No. 3701. March, 1926.

CORN EXCHANGE NATIONAL BANK, Trustee under the Will of Winfield S. Nice, Deceased, and CHARLES N. WESTON,
Complainants,

vs.

NICE & SCHREIBER COMPANY, a Corporation,
Respondent.

ENTRY OF APPEARANCE FOR RECEIVERS.

Enter my appearance for Sidney E. Smith, Esquire, and John Weaver, Esquire, receivers.

(Sgd.) A. J. Davis,
Att'y. for Receivers.

To the clerk of U. S. D. C.
April 29th, 1926.

Filed
Apr. 30, 1926.
George Brodbeck,
Clerk,
By J.
Deputy Clerk.

IN THE
DISTRICT COURT OF THE UNITED STATES.
For the Eastern District of Pennsylvania.

Corn Exchange National Bank, Trustee under the Will of Winfield S. Nice, Deceased, and Charles N. Weston, *Complainants,* vs. Nice & Schreiber Company, a Corporation, *Respondent.*	In Equity. No. 3701.

We, the undersigned, W. A. Rex Schultze, William P. Rowland and John P. Hill, having been notified

that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a strict examination and careful inquiry, we do estimate and appraise the same as of Apr. 28th, 1926.

W. A. Rex Schultze,
Wm. P. Rowland,
John P. Hill.

REMARKS.

Your appraisers have estimated materials and supplies at cost; other equipment at market and replacement value.

From their investigation of the accounts receivable, the most important asset of this estate, and from the history of the collection of these accounts, the entire appraisal is estimated on the basis of a "going concern."

SUMMARY.

Schedule (A)	Cash in Banks	$41,156.39
Schedule (B)	Stocks, Bonds & Other Investments	1,100.00
Schedule (C)	Drafts on Merchandise in Transit	6,240.00
Schedule (D)	Accounts Receivable	77,302.66
Schedule (E)	Real Estate	1,000.00
Schedule (F)	Finished & Unfinished business	6,395.22

Schedule (G) Machinery & Equipment	4,383.55
Schedule (H) Supplies	903.00
Schedule (I) Office Furniture & Fixtures	204.85
Schedule (J) Automobiles	800.00
Schedule (K) Insurance	87.55
Total	$139,573.22

SCHEDULE A.

CASH IN BANKS as of April 28th, 1926

Corn Exchange National Bank	$111.38
Union National Bank	$41,045.01
	$41,156.39

NOTE: There is a claim against the Union National Bank, for the sum of $5,661.43 covering checks honored for payment after appointment of Receivers.
The Receivers are assured that this claim will be paid by the bank.

SCHEDULE B.

STOCKS, BONDS AND OTHER INVESTMENTS

Stocks

5 Shares Delaware Freezing Co.
Pfd. Par value ($100.00) $500.00

5 Shares Girard Family Stores Co. (No par value)		
5 Shares Girard Family Stores Co. Pfd. ($100.00)—carried name of W. S. Nice	500.00	$1,000.00
Exchange Membership		
1 Philadelphia Produce Exchange	100.00	100.00
		$1,100.00

SCHEDULE C.

DRAFTS on merchandise

Ogema Cry.Company	$580.00
Perham Co.-Op. Cry. Company	2380.00
Remer Cry. Company	360.00
Urbank Cry. Company	920.00
Vergas Cry. Co.	900.00
Waubun Creamery	700.00
Wellens, W. H. Creameries	400.00
	$6,240.00

BAD AND DOUBTFUL OVERDRAFTS

Grant Produce Company	$6,720.50
Griffis Produce Company	740.98
Nelson Bros. Poultry Company	1,097.59
Northern Produce Company	2,480.99
H. M. Rose Company	4,037.24
Shotwell & Company	34,236.90
Vilas & Company	1,230.29
Wilson Poultry Company	4,616.42
	$55,160.91

320 *Exhibit 13, Preliminary Report of Receivers, in the District Court of the United States*

SCHEDULE D.

SUMMARY OF ACCOUNTS RECEIVABLE

Good		$72,738.62
Possible (appraised at 50%)		4,564.04
		$77,302.66
Doubtful	$28,135.15	

IN THE
DISTRICT COURT OF THE UNITED STATES.
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 3701. March Term, 1926.

CORN EXCHANGE NATIONAL BANK, Trustee under the Will of Winfield S. Nice, Deceased, and CHARLES N. WESTON,
Complainants,
vs.
NICE AND SCHREIBER COMPANY, a Corporation,
Respondent.

FILED.
July 16, 1926.
GEORGE BRODBECK,
Clerk.
By J.
Deputy Clerk.

PRELIMINARY REPORT AND ACCOUNT OF SIDNEY E. SMITH AND JOHN WEAVER, RECEIVERS.

To the Honorable the Judges of the said Court:

The report of Sidney E. Smith and John Weaver, receivers of Nice and Schreiber Company, a corporation, respectfully represents:

1. That your receivers were appointed by your Honorable Court, on the 28th day of April, 1926, as receivers of the said Nice & Schreiber Company, a corporation, and having duly entered their bond, and qualified, they entered upon the performance of their duties, as such receivers.

2. In the decree of appointment of your receivers, your Honorable Court made an order, directing your receivers to take immediate possession of the assets of the said company, and authorized the receivers to continue the business of the said company, during a period of sixty days, or until further order of the Court.

3. Upon assuming their duties, the receivers began immediately the collection of the book accounts and an investigation of the condition of the said Nice & Schreiber Company, a corporation, and directed their attention towards the carrying out of transactions already entered into prior to the appointment of the receivers.

4. That your receivers have collected a substantial amount of the book accounts, and have on hand, in cash, the sum of $134,481.78.

5. That your receivers report that the known debts of the corporation amount to the sum of $116,[illegible] so near as can be ascertained by the receivers. That attached hereto, and made a part hereof, is a list of the names and addresses of all parties who are known to the receivers to have claims against the estate.

6. That the appraisers appointed by your Honorable Court have filed their report, appraising the assets of the corporation, in the sum of $139,573.22.

7. That your receivers still have on hand certain certificates of stock and membership, as set forth in Schedule "B" of the inventory; and that the real estate, set forth in Schedule "E" of the inventory, which is in the name of C. N. Weston, has as yet been undisposed of; and the machinery and equipment, supplies and office fixtures and furnishings set forth in Schedules "G," "H," and "I" are practically all in the possession of the receivers; and the Buick automobile, set forth in Schedule "J" has not as yet been disposed of by the receivers; and there are still outstanding certain book accounts and unliquidated claims, some of which are in the process of suit, and in others of which negotiations are pending, looking towards a proper and satisfactor compromise.

8. That the defendant corporatioin is a tenant of Armour & Company, of the premises #23 S. Water

Street, Philadelphia, where the business was conducted under a lease, which still has upwards of two years to run, and your receivers are negotiating, looking to the assignment of the said lease upon terms which will be most advantageous to the estate.

9. That your receivers are of the opinion that after the payment of debts there will not be sufficient assets and capital remaining to enable the defendant corporation to continue the operation of its business, with advantage to itself or to its stockholders.

10. There is considerable work yet to be done by the receivers; there are several accounts, which are disputed, and suits have already been brought or will have to be brought, to recover the same, but as the receivers have succeeded in collecting in a large amount of money, to wit, upwards of one hundred thousand dollars ($100,000.00), they have thought it wise to file a preliminary report and an account (which is attached hereto), in order that the Court may be informed of the progress of the case; and that an auditor may be appointed, if the Court shall so order, to audit this account, and distribute the funds thus far collected, while the receivers are continuing their work of collecting in the balance of the assets of the estate.

Respectfully submitted,
(Sgd.) A. J. Davis,
(Sgd.) Russell Conwell Cooney,
Attorneys for Receivers.

 Exhibit 13, Appointment of Special Master, in the District Court of the United States

Filed.
July 16th, 1926.
GEORGE BRODBECK,
Clerk.
By J.
Deputy Clerk.

IN THE
DISTRICT COURT OF THE UNITED STATES.

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CORN EXCHANGE NATIONAL BANK, Trustee under the Will of Winfield S. Nice, Deceased, and CHARLES N. WESTON, *Complainants,* vs. NICE & SCHREIBER COMPANY, a Corporation, *Respondent.*	No. 3701. In Equity.

BEFORE DICKINSON, J.:

And now, to wit: this sixteenth day of July A. D. 1926, it is ordered, adjudged and decreed that Morton Z. Paul, Esq., be and he hereby is appointed by this Court Special Master to audit and pass upon

the first account of the receiver in the above entitled matter, filed July 16, 1926, and report upon the same to the Court, and he is hereby authorized and directed to give public notice of the time and place of the hearing thereon by advertisement to be made weekly for three consecutive weeks in a daily newspaper published at Philadelphia, and once a week for three consecutive weeks in the Legal Intelligencer published in Philadelphia. A written or printed notice of the time and place of hearing shall be sent to all known creditors, stockholders, and other parties in interest, and shall also be posted in the office of the clerk of this court at least ten days before the hearing. All persons shall be required to make and prove their claims before said Special Master or be forever debarred from coming in upon said fund, and the notice shall so state.

By the Court,

Attest:

GEORGE BRODBECK,
Clerk.

IN THE
DISTRICT COURT OF THE UNITED STATES.

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CORN EXCHANGE NATIONAL BANK, Trustee under the Will of Winfield S. Nice, Deceased, and CHARLES N. WESTON,
Complainants,
vs.
NICE & SCHREIBER COMPANY, a Corporation,
Respondents.

No. 3701.
March Term, 1926.
In Equity.
(Filed Aug. 25, 1926.)

CITY AND COUNTY OF PHILADELPHIA, *ss.*

EMMA FELDMAN being duly sworn according to law, deposes and says: That she mailed this day, notices in the above-entitled cause, a copy of which is hereto attached, to the persons and at the addresses set forth in the list herewith attached.

(S) EMMA FELDMAN.

Sworn to and subscribed before me this 19th day of August, A. D. 1926.

(S) K. F. SELLERS,
Notary Public.

My commission expires Feb. 27, 1929.

IN THE
DISTRICT COURT OF THE UNITED STATES.

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CORN EXCHANGE NATIONAL BANK, Trustee under the Will of Winfield S. Nice, Deceased, and CHARLES N. WESTON,
Complainants,
vs.
NICE & SCHREIBER COMPANY, a Corporation,
Respondents.

No. 3701.
March Term, 1926.
In Equity.

Philadelphia, Pa., August 19, 1926.

To the creditors of Nice & Schreiber Company:

You are hereby notified that application will be made to the United States District Court for the Eastern District of Pennsylvania, Post Office Building, Philadelphia, Pennsylvania, at 9 o'clock A. M. (Eastern Standard Time), Wednesday, August 25, 1926, for leave to sell at private sale, certain machinery, equipment, supplies, furniture and fixtures, and one second-hand automobile, and assign the lease for the premises No. 23 S. Water Street, Philadelphia, Pa., and the compromising of a claim of $778, for the sum of $2400 in cash and the withdrawing of a claim

against the estate of upwards of $13,000, in accordance with the terms of the petition.

The receivers believe that this is for the best interest of the estate, and if you have any objection you may be present in court and state your objection to the Court, at the above mentioned time and place.

Yours very truly,

SIDNEY E. SMITH,
JOHN WEAVER,
Receivers.

LIST OF KNOWN CREDITORS.

Name	Address
Mrs. Agnes Golden	Melrose Park, Pa.
W. S. Nice Est.	Corn Exchange Natl. Bank Executor
Federal Reserve Income Tax	
Mrs. George Schreiber	Buffalo Ave., Ventor, N. J.
Chas N. Weston	3708 Baring Street, Phila.
Baltimore & Philadelphia Steamboat Company	Pier #3 S. Delaware Ave.
The Bell Telephone Co.	1230 Arch St., Phila.
H. L. Burton	6029 Nassau St.
Butter Cheese & Egg Journal	
Great Bear Spring Company	W. Shawmont Ave.

Industrial Cold Storage & Warehouse Company	American & Berks Sts.
Philadelphia Electric Co.	10th & Chestnut Sts.
The Philadelphia Assn. of Credit Men	1015 Chestnut Street.
Philadelphia Produce Exchange	3rd and Walnut Sts.
Pottstown Cold Storage Co.	Pottstown, Pa.
Wm. L. Prouse	308 S. Front St.
N. Savage & Son	225 Callowhill Street.
Sheoffer & Marvel	106 N. Delaware Ave.
S. S. Sorensen & Son	Clerkfield, Minn.
State of New Jersey	Trenton, N. J.
Elmer J. Turner	Glassboro, N. J.
Universal Carloading & Distributing Co.	
The United Gas Improvement Co.	Broad and Arch Sts.
Geo. K. Watson & Co.	Real Estate Trust Bldg.
Bedford Creamery Co.	Bedford, Iowa.
Carloson Creamery Co.	Rush City, Minn.
Cottonwood Creamery Co.	Cottonwood, Minn.
Day Co-operative Creamery Co.	Ogilvie, Minn.
Fairfax Co-operative Creamery	Fairfax, Minn.
Farmers Co-operative Creamery	Clarkfield, Minn.
Farmers Co-operative Creamery	St. Cloud, Minn.
Harry H. Field & Co.	212 North Wells St. Chicago, Ill.
Flom Co-operative Creamery Asson.	Flom, Minn.

Klossner Creamery Co.	Klossner, Minn.
New Model	Bonifacias, Minn.
Ogenia Creamery	Ogenia, Minn.
Perham Co-operative Creamery Asson.	Perham, Minn.
The Reading Company	Philadelphia.
Remer Creamery Co.	Remer, Minn.
J. W. Reekins	St. Cloud, Minn.
Rice Lake Creamery Co.	Onantanna, Minn.
Saint Francis Co-operative Creamery Association	Freeport, Minn.
Twin City Creamery	Breckenridge, Minn.
Urbank Creamery Co.	Parkers Prairie, Minn.
Vergas Creamery Company	Vergas, Minn.
Wauburn Creamery Co.	Wauburn, Minn.
Welch Creamery Co.	Welch, Minn.
W. R. Wellins Creameries	McGrath, Minn.
Wood Lake Creamery Co.	Wood Lake, Minn.
The Dairy Record	Grandy, Minn.
Cloverdale Creamery	St. Paul, Minn.

STOCKHOLDERS OF NICE & SCHREIBER CO.

Estate of Winfield S. Nice	
William M. Lippincott	23 South Water St.
Charles N. Weston	3708 Baring St.
A. J. Minnaugh	Kirkwood, N. J.

LIST OF KNOWN CREDITORS (Continued).

Wm. M. Lippincott	23 S. Water St.
Fred W. Aiken	18 South Water St.
Droste & Snyder Inc.	177 Duane St. N. Y.

Natl. Poultry, Butter & Egg Asson.	160 North LaSalle St. Chicago, Ill.
Olsen Publishing Company	5th and Cherry Sts., Milwaukee, Wis.
Theodore Aaron	216 North Wells St., Chicago, Ill.
Comptroller of the State of New Jersey	Trenton, N. J.
Minneapolis Co-operative Creameries Association	2201 Kennedy St. N. E. Minneapolis, Minn.
Pennsylvania Railroad Merchantile Tax for Pa.	Philadelphia

IN THE
DISTRICT COURT OF THE UNITED STATES.
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 3701. March Term, 1926.

IN EQUITY.

CORN EXCHANGE NATIONAL BANK, Trustee under the Will of Winfield S. Nice, Deceased, and CHARLES N. WESTON,
Complainants,
vs.
NICE AND SCHREIBER COMPANY, a Corporation,
Respondent.

SUPPLEMENTAL ACCOUNT OF RECEIVERS OF NICE & SCHREIBER COMPANY OF RECEIPTS AND DISBURSEMENTS FROM FILING OF PRELIMINARY REPORT AND ACCOUNT TO OCTOBER 7th, 1926.

Accountants charge themselves with receipts as follows:

Exhibit 13, Supplemental Account of Receivers, in the District Court of the United States

DR.

1926	Balance as per Preliminary Account	$134,481.78	
Sept.	18—Delaware Cold Storage & Freezing Co.—Dividend	17.50	
	J. Howard Brown—Cancellation of Ins. Pol	101.21	
	Wm. M. Lippincott & Co. Rent	333.33	10
	American Stores Co.—Excess Freight Claims	28.23	
	28—Joseph Buschel—Open Account	100.00	
	Girard Family Stores Co.—Surrender of Stock	400.00	
	Wm. M. Lippincott & Co. Sale of Fixtures	2,400.00	
	30—Delaware Cold Storage & Freezing Co.—Sale of Stock	300.00	
	Interest on Deposits—Corn Exchange Nat'l. Bank	377.21	20
	Interest on Deposits—West End Trust Co	1,211.10	
Oct.	2 Grant Produce Co.—a/c of Overdraft	1,500.00	
	2 Joseph A. Brady—Cancellation of Ins. Policies	66.30	
	Total	141,316.66	

CR.

Accountants claims credits for payment as follows:

1926			
Aug.	9 Commonwealth Addressing & Multo. Co.	2.65	
	10 Armour & Co. Rent	333.33	

12	Legal Intelligencer—Advertising	9.90
12	Curtis Martin Newspaper Co. Advertising	12.60

Filed
Oct. 11th, 1926
GEORGE BRODBECK,
Clerk,
By J.
Deputy Clerk.

Sept.	29	Treasurer of State of New Jersey—Tax	104.65
	29	Sidney E. Smith—Sundry Expenses	9.00
	29	A. J. Davis—Sundry Expenses	12.89
	29	John Weaver—Sundry Expenses	2.00
Oct.	4	Sidney E. Smith Sundry Expenses	4.75
	4	Collector of Internal Revenue —Income Tax 1925	522.11
	4	Geo. K. Watson Co.—Tax Returns	241.75
	4	Elmer J. Turner—Taxes Glassboro	30.66

5—Geo. H. Bedall—Services....	100.00
Total	1,386.29
Balance of Cash in Bank..	139,930.37
Total	141,316.66

(S) John Weaver,
(S) Sidney E. Smith,
Receivers.

United States of America, }
State of Pennsylvania, } *ss.*

Sidney E. Smith and John Weaver, being duly sworn according to law, depose and says that the forgoing account, both as to items of charge and discharge, is true and correct.

(S) John Weaver,
(S) Sidney E. Smith.

Sworn to and subscribed before me this 7th day of October, 1926.

Alexander R. Staples,
(Seal) *Notary Public.*
Commission expires March 10, 1927.

SUPPLEMENTAL REPORT OF THE SPECIAL MASTER SUR EXCEPTIONS TO HIS REPORT ON THE SECOND ACCOUNT OF THE RECEIVERS.

IN THE
UNITED STATES DISTRICT COURT.

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CORN EXCHANGE NATIONAL BANK, trustee under the will of Winfield S. Nice, deceased, and CHARLES N. WESTON, vs. NICE & SCHREIBER COMPANY, a corporation.	March Term, 1926. Filed June 11, 1927. George Brodbeck, Clerk. By J., Deputy Clerk. No. 3701.

To the Honorable, the Judges of Said Court:

The Master reports that after finishing his report on the second account of the receivers, he sent notice to all the parties in interest that he would file his report on the 23rd day of May, 1927, unless exceptions were filed thereto before that time.

No exceptions were filed by any of the many creditors, but on May 19th, 1927, the Corn Exchange National Bank, executor of Winfield S. Nice, de-

ceased, representing the heirs of the deceased defendant, filed exceptions to the Master's report on the second account of the receivers, which are attached hereto, complaining the fees charged by the receivers, their attorneys and the Master should not have been allowed, as they were all paid sufficient on the first account. They were represented by Thomas L. Gaskill, of the Camden Bar.

No exceptions were filed by any of the creditors.

The above exceptants asked for a hearing and the Master fixed June 3, 1927.

At this meeting, there were present: Thomas L. Gaskill, attorney for said exceptant; Mr. Edgar W. Freeman, trust officer of the Corn Exchange National Bank, the executor; Sidney E. Smith, receiver; Russell Conwell Cooney, one of counsel for receivers; H. L. Burton and James A. Mooney, creditors.

Mr. John Weaver, one of the receivers, was unable to be present, and A. J. Davis, one of the counsel for receivers, was sick in the hospital.

As none of the creditors had filed exceptions, and all those at the meeting of the Master when the charges were fixed seemed satisfied with the charges, the Master did not notify the creditors of the meeting to hear this one exceptant, but the creditors were apparently sent word of the hearing by the exceptant, but only two of them came to the meeting.

While no exceptions were filed to the fees charged on the first account of the receivers, and a decree was entered November 1, 1926, confirming the Master's report, and under the U. S. Court Equity Rules and Decisions thereunder, this report cannot be excepted to at this time, yet it is necessary for the

Master to refer to those charges in dealing with these exceptions.

The first account of the receivers showed a total of $138,141.48.

On this account a distribution of 75% was made to all the creditors whose claims were allowed.

The two receivers and their counsel showed that a great deal of work had been done, and a substantial dividend paid the creditors, and they asked for $10,000 apiece.

Some of the creditors objected to these fees, and after numerous conferences the two receivers and their two counsel agreed to reduce these charges by $10,000.00.

The Master rested the whole question with the creditors. The reduction of $10,000.00 satisfied the creditors, so the Master allowed it.

As to the Master fee, the Master consulted a Delaware County lawyer, of Chester, who has had much experience in Masterships in this court and he suggested the Master's fee should not be less than $5,000.00. Some other attorneys with experience said it SHOULD be $10,000.00. One other attorney who was present at these meetings before the Master, as counsel for twenty of the creditors of Nice & Schreiber, said the Master's fees should be $5,000.00.

Notwithstanding these suggestions, the Master asked for $3,500.00, which was agreeable to the creditors, one of them commenting it was not enough.

After making this first distribution of seventy-five (75%) to the creditors, six months rolled by, the receivers and their counsel kept working to collect other outstanding accounts and when they found

they had a balance of $30,515.53, thought it should also be paid the creditors, and so filed their second account, which was referred to the same Master as the first account.

When it came to fixing fees in this account, the receivers and their counsel asked for the balance of $10,000.00 which they gave up under objections on the first account. Some of the creditors objected. A lengthy discussion was entered into before all the creditors present, including one lawyer who represented twenty of them, and finally the receivers and their counsel cut their claim in half, reducing it to $5,000.00, or $1,250.00 apiece.

This satisfied the creditors, ended the discussion, and as the creditors were satisfied, the Master approved it.

As to the Master's fees on this second account, the Master also asked the creditors at this meeting for an expression of opinion. One of the creditors suggested $750.00, another said he did not think that was sufficient. The Master accepted the suggestion of $750 00.

None of the creditors filed any exceptions.

The Master does not believe these exceptions are well founded.

The charge of the Master of $750.00 for auditing an account of $30,515.53 is very small.

The Master had to secure and examine the papers, prepare notices and send them to forty-nine (49) creditors, besides the receivers and their counsel, prepare and insert advertisements in three (3) newspapers, arrange for stenographer, and consult counsel and receivers as to agreeable time for a meeting when they could all be present, post notice

in United States Court, time of the hearings, and time spent in calculating a dividend of .210182% on forty-nine claims, the writing of his report and notices to creditors, the report would be filed within ten (10) days. Time consumed in interviews with numerous creditors who called to examine the report, and who, by the way, raised no objection thereto.

The Master does not feel he is under obligations to reduce the small charge of $750.00. Especially since the exceptant has obliged him to hold another meeting to hear objections and write this report upon that hearing.

As to the fees of $1,250.00 apiece for each of the receivers and their counsel, the Master has gone over the work which has been done by them since filing their first account in July, 1926, and believes he is not warranted in reducing these charges.

What impresses the Master forcibly in this case is: That these exceptions come from the executor of the deceased defendant, and not from a creditor.

The obvious object is to conserve something for defendant's estate which, of course, is laudable and proper.

In receiverships, however, the defendant is not entitled to distribution until the creditors are paid in full. And if the estate should turn out solvent, then the creditors are entitled to interest on their claims.

The total claims amount to $117,058.64.

Interest on these claims would amount to more than the $5,000 charged by receivers and their counsel. Even if this item was dropped, the balance would first have to be applied to creditors for .039818

per cent of their claims not yet paid, which would take $4,661.00, and any balance over 100% of the claims would have to be paid on account of interest to the creditors on their total claims of $117,058.64 and this exceptant would not receive anything even if the whole $5,000.00 charges were canceled.

The Master cannot conceive any foundation for the request taken by the exceptant in which it asks the receivers and their counsel not to make any charge for their services, since filing their first account in July, 1926. The Master has not heard of such a request.

Creditors are besieging the Master for checks on the second account, which should be paid, but this exceptant has held them back. The law has always guarded and protected the fees of people acting in a fiduciary capacity.

The law will not allow a judgment creditor to attach the fees of an executor or other fiduciary, under the theory he is acting in a representative capacity and if not allowed compensation for his services, he will not be as disposed to do his work as when remunerated, and the interests of those he represents may suffer.

Counsel for exceptant stated in his evidence before the Master that the exceptant objected to any further allowance to either receivers or their counsel. This the Master is unwilling to concede.

From the facts these charges were thoroughly aired before the creditors, the fees reduced by being cut in half, and as this satisfied the creditors, none of whom filed objections, and since further, even if the requests of the exceptant were allowed, the balance due creditors, with interest, would more than

consume such a saving and the exceptant could not profit, the Master dismisses the exceptions.

(Sgd.) MORTON Z. PAUL,
Special Master.

June 9, 1927.

IN THE
UNITED STATES DISTRICT COURT.

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CORN EXCHANGE NATIONAL BANK, trustee under the will of Winfield S. Nice, deceased, and CHARLES N. WESTON, vs. NICE & SCHREIBER COMPANY, a corporation.	March Term, 1926. No. 3701.

Meeting held at the office of MORTON Z. PAUL, ESQ., Special Master, June 3, 1927, at 3.15 o'clock P. M., to take action upon exceptions filed by the Corn Exchange National Bank of Philadelphia, executor of the will of Winfield S. Nice, deceased, by its attorney, Thomas L. Gaskill, Esq., said exceptions being to the compensation received by the receivers, their counsel, and the Special Master. These exceptions are filed to the second report of the Master.

PRESENT:

The Special Master.

THOMAS L. GASKILL, ESQ., representing the Corn Exchange National Bank.

EDGAR W. FREEMAN, ESQ., trust officer of the Corn Exchange National Bank.

SIDNEY E. SMITH, ESQ., one of the receivers.

RUSSEL CONWELL COONEY, ESQ., attorney for the receivers.

HARVEY L. BURTON, ESQ., a creditor.

JAMES A. MOONEY, ESQ., representing the Industrial Cold Storage Company, a creditor.

(Mr. Smith states that Mr. A. J. Davis, of counsel for the receivers, is ill and unable to be present at the meeting.)

THE PROCEEDINGS.

Mr. Gaskill: Mr. Master, we have a preliminary account filed in the Orphans' Court of Atlantic County, New Jersey, that comes up for a hearing in the latter part of this month. Some of the beneficiaries under Mr. Nice's will have communicated to Mr. Freeman their very decided objection to the allowances which has already been made in this court, which are supposed to be made according to the present Special Master's report. Their objections are or were so vigorously pressed that we felt it was our duty to appear here and make opposition to further allowances.

Of course, I realize that the receivers have had

a very difficult task, and I can see from the report filed that they have done very good work and very successful work. However, the estate which they have handled is not very large, only about $100,000, and they have already had $30,000 for their services, commissions and fees to counsel. That seems like a very large sum of money and a very heavy percentage out of the principal of the estate. If the equity courts followed out the lines which those Judges sitting, also as Judges in the bankrupt court have followed, they would, I think, feel that the allowance already made was quite sufficient, and that receivers are very strongly impressed by these Judges with the necessity of keeping down the allowances, and that the total per cent of administration should be a very little figure out of the total sum; that $30,000 has been allowed to the two receivers and their counsel, and the executor of the estate of Mr. Nice feels very much impressed with the necessity of opposing any further allowance.

As far as the receivers are concerned, of course, the Courts take into consideration the fact that they bear the burden of responsibility in addition to the burden of performing a very essential service, and their compensation is to be considered the basis of the responsibility which they bear. They are paid officers of the court. However, counsel are in a different position. They are rendering only service which counsel do render, and with respect to it there is very little risk attached. The fees already allowed counsel were equal to the allowance made to the receivers. The executor passed that by at the time the original allowances were made, in view of the fact that a substantial concession of $10,000 was

made by the receivers and their counsel from the sum which they originally proposed to ask your Honor to report to the Court.

I am here, I think, performing a duty to the Orphans' Court of Atlantic County, New Jersey, in opposing further allowance at this time. Of course, I do not oppose an additional allowance to the Special Master, because the Special Master has not been compensated, I think, to any extravagant extent in the amount already allowed; but I would think that $500 would be a sufficient additional compensation for the Special Master; but as to the receivers and their counsel, I am instructed to oppose any compensation additional to that which they have already received.

The Master: Do you think the receivers and their counsel should have done the work of trying to wind up the estate since the filing of the last account, sometime last August, up until the filing of this account, in April of this year, without any compensation at all?

Mr. Gaskill: I am instructed to take that position, that in view of the allowance already made the executor feels, very much prompted by the feeling of the beneficiaries under the will of Mr. Nice, that the allowance made already is sufficient to cover the additional services they have rendered, and if these allowances are made with the small possibility of additional funds being received by these receivers, then there will be nothing additional for the stockholders. Mr. Nice was a very heavy stockholder, and all his stock remains unliquidated in

the hands of the executor, and the executor is very desirous of being able to report to the Orphans' Court that some fund has been received on that stock.

Mr. Burton: I think Mr. Gaskill's talk is very much in line with my objection at the last meeting. I thought that the counsel fees that were already allowed were quite sufficient. I made objection at that time, at the last meeting, although I do not believe it went into the record.

The Master: At the last meeting Mr. Burton and Mr. Mooney were here when the counsel and receivers asked for the balance of the $10,000 which they reserved after the reducing of fees at the first meeting. The matter was thoroughly discussed before all present, and finally the receivers and counsel agreed to throw $5,000 off of their demand. The Master was under the impression that that deduction was agreeable to all the creditors present, and that is why he allowed it in his report.

Mr. Mooney: I did not quite fully comprehend the situation until I went downstairs; otherwise I would have raised objection, although I did agree to it. The Pottstown Cold Storage Company, another heavy creditor, also objected to it. I did not fully understand at the time; otherwise I would have raised objection. After we had gotten downstairs and rehearsed the matter again, I was of the same opinion as Mr. Burton. While the Pottstown Cold Storage Company is not represented here, I have been in correspondence with them, and they are

also against this additional compensation for counsel.

Mr. Freeman: There is one point that Mr. Gaskill mentioned that I would like to impress. As executor of Mr. Nice's estate, we are both a creditor and stockholder of the Nice & Schreiber Company. We represent the residuary legatees of his estate. A very large portion of the estate was composed of the Nice & Schreiber stockholdings. As fiduciary, it is our clear duty to attempt to realize something out of the stock for the beneficiaries. In our inventory we carried the stock at $35 a share, which then was a very low value, because the books show a book value of some $80 a share. If the present allowances to the receivers and counsel are confirmed, there is very little possibility of anything being realized for the stockholders. It is up to us to do everything in our power to try to get something for the stock. We have no personal feeling in the matter at all, but are acting purely as a fiduciary.

Mr. Smith: There are about $50,000 worth of assets still unrealized?

Mr. Freeman: Paper assets.

Mr. Smith: They enter into the $35 value?

Mr. Freeman: Yes.

Mr. Smith: We have a $35,000 judgment presumed to be secured by real estate.

Mr. Freeman: It is worth about $6,000, I believe.

Mr. Smith: In other words, the assets are still there as when the receivers took possession; we did not waste $80 of the assets?

Mr. Freeman: No. In the Orphans' Court inventory we carried the stock at $35.

Mr. Smith: Including the $35,000 indebtedness?

Mr. Freeman: No.

Mr. Smith: When you reduced it to $35 a share?

Mr. Freeman: Yes, sir.

Mr. Smith: You included about $15,000 advanced to western shippers?

Mr. Freeman: No, sir.

Mr. Smith: Did you make that value at the time of the receivership appraisement?

Mr. Freeman: No.

Mr. Smith: The receivership appraisement did not agree.

Mr. Freeman: The $35 a share, with some thousand shares, would just about make up the allowances to the receivers and counsel.

Mr. Smith: If you realized on the assets still remaining?

Mr. Freeman: It would be all right. I feel very strongly that the compensation already allowed is adequate.

Mr. Smith: As far as I am concerned, I think it has already been stated that we hold a judgment for $35,000 against Herbert Brown. To obtain it it was necessary to enter into litigation, which was defended. At the time of the first allowance I had an interview with Mr. Freeman, and Mr. Burtt, representing Charles N. Weston, a stockholder and creditor. We had one or more conferences, and then my understanding of the agreement entered into between us was we should then receive $10,000 and reserve to ourselves the right to apply for the balance at a subsequent accounting, without prejudice on the part of Mr. Freeman or Mr. Burtt to object to any further allowance. At the meeting a couple of weeks ago we felt that we were entitled to ask for the amount of the deferred payment, at least. As a matter of deference to those present, who felt that it was too large, we agreed to cut it in half. I left the meeting with the understanding that every one who was present agreed to it, including Mr. Burton and other counsel present, and creditors. Even with those allowances we are able to pay a further dividend, which will mean that the creditors will receive 97%. I feel in fairness that the labor and time warrants the request that we made.

I think I ought to say, for those who may not know it, that the receivership came very suddenly.

Mr. Freeman is aware of the situation, because of the demand by one creditor of a large indebtedness. That demand was made about three o'clock in the afternoon. Mr. Nice had been dead a very short time, and there were hurried consultations between, I think, Mr. Davis and Mr. Freeman, consultations about what could be done. As a result of that meeting the office force was at work, I think, until about 8 o'clock that night in order to avoid the bankruptcy. We felt that the western accounts would be more productive than they have been to date. I think that we were busy until half-past one that morning, until we got the papers in such shape that we could stave off the bankruptcy by the appointment of a receiver the following morning, which was done. The rest of the time was put in benefiting those interested. I do not want to be put in the position of begging for the allowance; I rather maintain the position that I think I am entitled to it, not as a matter of grace, but as a matter of compensation earned.

Mr. Cooney: I think it from Mr. Freeman's remarks that he does not mean that he feels that he ought to exert every possible means of obtaining money at the expense of a fair compensation to the receivers or their counsel, for the estate, although that is practically what he said. The difference of opinion as to the value of the services rendered, it seems to me, is a matter to be decided by the Master as to what the value of the services rendered really is worth. I think at the time we had the previous conference with Mr. Freeman and Mr. Burtt, it was unquestionably agreed that we should be entitled

to have an additional compensation based on the amount of work we should do in the future. That, at least, was my understanding; if Mr. Freeman had a different understanding, it did not coincide with mine. Since that time we have done a great deal of detail work and we have spent considerable time in trying the question of title to real estate, which was Mr. Nice's matter, which he received from Mr. Brown, with the hope that we might be able to realize something on the judgment of nearly $35,000, which we obtained after a trial in the Common Pleas Court.

It seems to me that the compensation has been earned, and the judgment of the receivers and their counsel, the amount now asked to be allowed is not an unwarranted amount, taking into consideration the work done, the time spent and all the other factors in the case. If we do not agree with the gentlemen present objecting, it is purely a matter of difference of opinion as to the value of the services rendered.

Mr. Smith: At the last meeting the receivers reported that they obtained this verdict on the judgment against Herbert Brown of approximately $35,000. Mr. Nice obtained from Mr. Brown the conveyance of three properties, two in Philadelphia, and one in Bucks County. The deed and the title were made in the name of Mr. Nice individually. The declaration of trust in the corporation which came into the hands of the receivers, of course, was safe. Whether Mr. Brown had a copy of that signed with Mr. Nice, we never did know. The properties were subject to a first mortgage, I think one of them,

and a building association mortgage, and we were approached at the trial with an offer by the attorney for Mr. Brown to settle the case for $5,000, giving Mr. Brown a release in full. My recollection is that as the creditors felt that the offer should be accepted, you will recall at the time I suggested the stockholders should be consulted, in view of the fact that a $5,000 settlement of a $35,000 claim is a rather small percentage, and the matter was left open so that we could take it up with the Corn Exchange Bank. As I understand, Mr. Davis got in touch with Mr. Freeman and advised him of the situation. Since then we have had an increase of the offer to $6,000. The situation, as I understand it, is that Mr. Brown has been paying interest on the mortgages and occupying the properties. He claims that that conveyance was made only for the purpose of securing the then indebtedness, and it was not intended to secure a continuing indebtedness. Mr. Nice stated that he would cut off his credit unless the amount then due was paid or secured. As a result of Mr. Nice's position, this conveyance was made. Therefore, it was an ordinary account without security. Counsel for Mr. Brown informed Mr. Davis that one or more of the properties were in foreclosure for failure to pay the interest. As far as the inquire that Mr. Davis was able to make, inquiries of the holders of the encumbrances, that is not true, no foreclosure proceeding has been brought. But if we turn down the offer, Mr. Brown will probably stop paying the interest, and permit the properties to go by default. The receivers felt that they would like the instruction of all the parties in interest as to the action they should take concerning disposition of the matter,

because we understand that the $6,000 offer is sufficient to pay the creditors 100% on their claim, without interest. Therefore, there is a possible equity in the claim to the Nice Estate and other stockholders of Nice & Schreiber. We are willing to do whatever the parties in interest want done.

The Master: The Master states that at the first meeting of the audit of the second account, the receivers explain this matter before a large number of creditors, and at which meeting Mr. Joseph H. Shoemaker, representing most of the creditors, was present, and it being his opinion that it would be wise for the receivers to accept the $5,000 compromise, made a motion to that effect, which seemed to meet with the approval of the other creditors. While this is not a matter to be passed upon by the Master, the Master would ask those present to either approve or disapprove the suggestion of the $6,000 offer, for the benefit of a guide to the receivers in closing this item. It seems to the Master that if there is danger of losing this $6,000 through foreclosure proceedings, it would be wise to authorize its acceptance.

ADJOURNED.

IN THE
UNITED STATES DISTRICT COURT.

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 3701. March Term, 1928.

CORN EXCHANGE NATIONAL BANK, Trustee under the Will of Winfield S. Nice, Deceased, and CHARLES N. WESTON,
Complainants,

VS.

NICE AND SCHREIBER COMPANY, a corporation.

THIRD AND FINAL REPORT AND ACCOUNT OF RECEIVERS.

(Filed May 23, 1928.)

To the Honorable, the Judges of Said Court:

Sidney E. Smith, one of the receivers appointed by your Honorable Court in the above matter, herewith makes his third and final report account.

In pursuance of the report of the Special Master, appointed by your Honoralbe Court to audit the second account of the receivers, distribution of the

entire balance in the hands of the receivers was made. The only remaining unliquidated assets consisted of two open accounts, one from Charles Meier and the other from Herbert H. Brown, trading as P. F. Brown & Co., and overdrafts due by western shippers.

Charles Meier had made an assignment of all of his assets for the benefit of creditors to one Benjamin D. White, who proceeded to realize upon the same. A dividend amounting to $278.53 has been received and your petitioner has been advised that it is very unlikely that any further will be received.

With the approval of your Honorable Court, after notice to creditors and stockholders, a compromise of the judgments against Herbert H. Brown, trading as P. F. Brown & Co., was made for the sum of six thousand dollars ($6,000.00), in consideration of which sum the judgments against him were satisfied and deeds for the real estate held as security were delivered, in which the receivers and all of the residuary devisees of the estate of Winfield S. Nice, deceased, joined.

On March 18, 1928, John Weaver, one of the receivers, died, and your petitioner continued in the performance of his duties thenceforth.

The only known remaining unliquidated assets consist of overdrafts from western shippers which, as has been previously reported, appeared to be valueless, and were so appraised.

Your petitioner has in hand a balance of principal of fifty-seven hundred twelve dollars and ninety-nine cents ($5,712.99), together with interest on that balance as of this date in the sum of four hundred twenty dollars and fifty-six cents ($420.56),

and prays your Honorable Court to appoint a Special Master to audit the same and report thereon to your Honorable Court.

And your petitioner will ever pray.

(Sgd.) SIDNEY E. SMITH.

IN THE
DISTRICT COURT OF THE UNITED STATES.
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 3701. March Term, 1926.

CORN EXCHANGE NATIONAL BANK, Trustee under the Will of Winfield S. Nice, Deceased, and CHARLES N. WESTON,
Complainants,
vs.
NICE & SCHREIBER COMPANY,
Respondents.

PETITION OF RECEIVER FOR LEAVE TO TURN OVER THE REMAINING ASSETS AND FOR HIS DISCHARGE.

(Filed Dec. 11, 1928.)

To the Honorable, the Judges of Said Court:

The petition of Sidney E. Smith respectfully represents:

1. On the 28th day of April, 1926, your Honorable Court appointed John Weaver and petitioner as receivers of Nice & Schreiber Company. Said John Weaver and your petitioner forthwith duly qualified and entered upon the discharge of their duties.

2. The said John Weaver, one of receivers, died on the 18th day of March, 1928, and petitioner has continued as surviving receiver.

3. Reports have been made to your Honorable Court of the progress of the receivership. Three accounts have been filed, which accounts were referred to a Special Master, were audited, and dividends thereon paid to the creditors of Nice & Schreiber Company.

4. Upon the third account, which was filed by petitioner, as surviving receiver, the creditors insisted upon distribution of all monies in the hands of petitioner, and on July 30, 1928, on the filing and confirmation of the report of the Special Master on said third account, a final dividend was paid to the creditors. Said dividend constituted a payment to creditors of 100% of the face value of their claims and .005262% on account of interest thereon, creditors maintaining their demand for the payment of interest on their respective claims.

5. No objection was made by any person on behalf of Nice and Schreiber Company, or anyone interested therein, to the demand of the creditors as aforesaid and to the distribution of all funds in the hands of petitioner.

6. As a result of the realizations by the receivers and of the distribution by petitioner, as aforesaid, no assets of Nice and Schreiber Company remain in the hands of petitioner except a number of claims against certain persons in the Middle West part of the United States, arising out of overdrafts by such persons which had been honored by Nice and Schreiber Company, in anticipation of shipments by said persons of butter and eggs. Considerable effort has been sustained throughout the entire receivership to liquidate these claims. From the beginning of the receivership, it has been realized that the value of the claims was very doubtful and it is now demonstrated that in order to collect them, costly and protracted litigation would be necessary.

7. There are no funds in the hands of petitioner with which to carry on said litigation, nor is there any known source from which funds could be obtained in order to maintain litigation or make further effort to collect these claims.

8. In the opinion of petitioner, there are no other assets and there is nothing else to be done in the matter or receivership.

Wherefore, petitioner prays your Honorable Court to enter an order terminating said receivership and discharging petitioner as receiver of Nice & Schreiber Company, and to enter a further order that he turn over to the proper officers of Nice & Schreiber Company such books, records and documents as are in the possession of petitioner, at this time, and that thereupon, petitioner and the estate of John Weaver, and Independence Indemnity Company, surety on the bond filed herein by said John

Weaver and petitioner, be discharged from any and all further liability in connection with the said receivership and under the bond.

And he will ever pray, &c.

(Sgd.) SIDNEY E. SMITH.

ORDER.

And now, to wit, December 11th, 1928, upon consideration of the foregoing petition, and upon motion of A. J. Davis and Russell Conwell Cooney, Esquires, attorneys for petitioner, it is ordered and decreed that the receivership of Nice and Schreiber Company be and the same is hereby terminated and that Sidney E. Smith, surviving receiver of Nice and Schreiber Company, forthwith turn over to the proper officers of Nice and Schreiber Company such books, records and documents as are now in his possession, and that upon so doing, Sidney E. Smith and the estate of John Weaver be and they are hereby discharged from any and all further future liability in connection with the said receivership and under the said bond.

By the Court:

(Sgd.) DICKINSON, *J.*

Filed
Dec. 11, 1928.
George Brodbeck,
Clerk.
By J.
Deputy Clerk.

The following is a list of the exhibits and shows the places in the record where the same may be found:

EXHIBITS:	PAGE COPIED
No. 1—Check Book	(Not copied)
Excerpts from Check Book	311
No. 2—Power of Attorney	117, 244
No. 3—Salus Letter	129
No. 3½—Petition by Grubb, Vetterlein and Schreiber	250
No. 4—Receivers' Answer to Grubb, et al., Petition	143
No. 5—Brief Summary of Receivership	156
No. 6—Judge O. B. Dickinson Letter	186
No. 7—Release	190
No. 8—Letter re Burton Appointment as General Manager	127
No. 9—Letter, Burton to Corn Exchange Bank	211
No. 10—Letter, Burton, Withdrawing Offer, &c.	212
No. 11—Letter, Freeman to Weaver	213
No. 12—Letter, Freeman to Weaver, Enclosing Draft of Agreement, &c.	214
No. 13—Exemplified Copy Record in Federal Court in Phila. Excerpts Printed	312-359

No. 14—Letter, April 23, 1926, Weaver to Bank 262

No. 15—Letter, May 13, 1926, Freeman to Weaver 220

No. 16—Letter, Oct. 14, 1926, Weaver to Freeman 263

No. 17—Letter, Oct. 16, 1926 264

No. 18—Letter, Dec. 15, 1926, Weaver to Freeman 264

No. 19—Letter, Weaver to Freeman, May 10, 1927 265

No. 20—Letter, Dec. 21, 1926, C. M. Grubb to Freeman 266

No. 21—Letter, May 25, 1927, Weaver to Freeman 266

No. 22—Letter, Dec. 13, 1927, Furst to Freeman 267

No. 23—Letter, Nov. 28, 1928, Freeman to Furst 268

No. 24—Letter, December 18, 1928, Furst to Bank 269

No. 25—Letter, Dec. 8, 1928, Freeman to Furst 270

IN THE

DISTRICT COURT OF THE UNITED STATES.

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 3701. March Term, 1926.

IN EQUITY.

CORN EXCHANGE NATIONAL BANK, TRUSTEE UNDER THE WILL OF WINFIELD S. NICE, DECEASED, and CHARLES N. WESTON,

Complainants,

v.

NICE AND SCHREIBER COMPANY, a Corporation,

Respondent.

BILL OF COMPLAINT.

To the Honorable the Judges of said Court:

Corn Exchange National Bank, trustee under the will of Winfield S. Nice, deceased, and Charles N. Weston bring this, their bill of complaint, and complain as follows:

1. Your complainant, Corn Exchange National Bank, is a corporation chartered under the laws of the United States (National Bank), with its principal place of business in the City of Philadelphia.

2. Winfield S. Nice, late of Atlantic City, State of New Jersey, by his last will and testament duly probated after the decease of said Winfield S. Nice, constituted and appointed your complainant trustee under said last will and testament.

3. Your complainant, Corn Exchange National Bank, thereafter duly qualified as such trustee and entered upon the performance of its duties and is at present engaged in such performance.

4. Charles N. Weston is a citizen of Philadelphia, State of Pennsylvania.

5. The amount involved in this controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000).

6. Nice and Schreiber Company is a corporation chartered under the laws of the State of New Jersey, having a place of business in the City of Philadelphia, State of Pennsylvania.

7. Corn Exchange National Bank, as trustee under the will of Winfield S. Nice, deceased, is a creditor of said defendant for money due and owing in a sum in excess of ten thousand dollars ($10,000).

8. Charles N. Weston, one of the complainants, is holder of four (4) shares of the capital stock of defendant of the par value of one hundred dollars ($100).

9. Said respondent has outstanding capital stock of the par value of one hundred two thousand six hundred dollars ($102,600), and is engaged in the business of wholesale butter, eggs and poultry and kindred merchandise, on its own behalf and on commission for other persons.

10. On or about March 2, 1926, said respondents owned assets worth, according to its books, the sum of two hundred eighty-five thousand dollars ($285,000), which assets your complainants aver are, making allowance for reasonable and probable deductions and depreciations, of a just and fair valuation of not less than two hundred fifty thousand dollars ($250,000.00), and had actual liabilities approximating but not exceeding, as your complainants are informed and believe and therefore aver, the sum of two hundred five thousand dollars ($205,000), and was then and there solvent in that its assets greatly exceed its liabilities at a fair valuation. Your complainants are informed and believe and therefore aver that the condition of said company is approximately the same at this time. A statement of the condition of said company as of March 2, 1926, is attached hereto and made part hereof and marked "Exhibit A."

11. Complainants aver that the indebtedness of the respondent is represented by open accounts and unsecured obligations in writing, some of which have matured and the others of which are about to mature, and that because of the foregoing said respondent, while amply solvent is temporarily embarrassed and if its business can be maintained and continued respondent will be able to pay in full all indebtedness and the business saved for the stockholders.

12. Complainants aver that a part of creditors to whom respondent is indebted are pressing for immediate payment of their claims, and threatening to enter suit and levy attachments and executions on the property of respondent; that such actions if pursued will result in the sale of the assets of the corporation so that the plant and property thereof will be disintegrated with the consequent impossibility of conducting the business of the respondent.

13. Complainants aver that this action is not brought about by any collusion on the part of your complainants or either of them, either to confer upon this Court jurisdiction of a case of which it would not otherwise have recognizance, or otherwise.

14. Complainants therefore aver, and charge the fact to be that there is great and immediate danger that the assets and property of said respondent corporation will be attached, or levied upon and sold separately by various creditors; that if through any such execution or foreclosure the assets and property of the respondent are sold, a large part of such assets will inevitably be lost and the business and

good-will of the respondent will be ruined; whereas, the business of said respondent can be continued and its assets and property protected from levies and execution and interferences, the net proceeds which will be present for distribution among creditors of the respondent corporation will be greatly increased, the moneys and properties of the stockholders protected and the best interests of all concerned thereby conserved; that unless the relief hereinafter prayed for be granted, great and irrevocable injury and damage will be caused to complainants and to all the creditors of said respondent, as well as to said respondent and its stockholders, and great and unnecessary sacrifice, injury and loss to the rights of the creditors and stockholders result.

15. In consideration whereof and for as much as your complainants are without adequate remedy at law in the premises and therefore require the assistance of a court of equity, where matters of this nature are particularly cognizable and relievable; and your complainants pray that a receiver or receivers be appointed according to the form of the statutes in such case made and provided for and of all and singular the business, property and assets of every nature, wheresoever situated, held, owned and controlled by the respondent corporation, with the full power to take into their possession, hold, manage and operate the same under the direction of this Court, with such powers as the Court may, from time to time, grant; to incur such expenses as may be necessary or advisable in connection therewith; to purchase for cash or on credit such supplies, materials or other property as may be necessary or advisable in connection with the administration of

the business and assets of the respondent corporation; to sell the merchandise of the respondent corporation, either for cash or credit as said receiver or receivers may deem advisable; to bring suit, or collect, receive and take into their possession all of the property and assets, real or personal, goods, chattels, credits, rights, claims and effects, books, paper and all other property whatsoever, and wheresoever situate of the respondent corporation, to institute, prosecute, become parties to, intervene in, compromise, or defend such suits and actions at law or in equity, for the recovery of or the protection or maintenance of any of the property and assets of the respondent corporation as they may deem necessary or proper, to settle or compound all or any debts that may be due or owing to said company, as they may deem advisable or proper; subject to the further authorization of this Honorable Court, to pay any such claims for wages or otherwise, as may be decreed by this Court to be entitled to priority; and with the other usual powers of receivers in such cases; and that the officers, managers, superintendents, agents and employees of the said respondent corporation be required forthwith to deliver up to the said receiver or receivers possession of all or every part of the several properties of the respondent corporation, wherever situate, and also the several books, vouchers and papers in any way relating to the business of the said respondent corporation; and that your complainants may have such further or other relief in the premises as the nature of the case may require, and as may be agreeable to equity and good conscience.

May it please this Honorable Court, the premises considered, to grant unto your complainants the writ

of injunction issuing out of and under the seal of this Honorable Court, directed to Nice and Schreiber Company, its officers, servants and agents, enjoining and restraining them and each of them from exercising any of the privileges or franchises granted by the Act incorporating said company and from collecting or receiving any debts due said corporation and from paying out, selling, assigning or transferring any of the assets, moneys, funds, lands, tenements or effects of said corporation, and also the writ of subpoena of the United States of America likewise issuing out of and under the seal of this Honorable Court to be directed to Nice and Schreiber Company therein and thereby commanding it to appear before this Honorable Court, according to law and the course of this Court, at a certain day and under certain penalty therein to be expressed, then and there to answer the premises and to stand to, abide and perform such decrees as your Honorable Court shall seem meet.

May it please this Honorable Court, the premises considered to grant an order enjoining and restraining all persons, firms and corporations from suing the defendant, levying execution upon, attaching, seizing, intermettling with or taking possession of any of the property of defendant, without the leave of your Honorable Court.

16. Such other and further relief as your Honorable Court may deem proper.

And your complainants will ever pray, etc.

A. J. Davis,
Solicitor for Complainants.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.*

EDGAR W. FREEMAN, being duly sworn according to law, deposes and says that he is trust officer of the Corn Exchange National Bank, one of the complainants above named, and is authorized to make this affidavit on behalf of said complainant; that the facts set forth in the foregoing bill of complaint are true and correct to the best of his knowledge, information and belief.

EDGAR W. FREEMAN.

Sworn to and subscribed before me this 28th day of April, A. D. 1926.

FLORENCE E. JOHNSON,
(Seal) *Notary Public.*
My commission expires March 6, 1927.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.*

CHARLES N. WESTON, being duly sworn according to law, deposes and says that he is one of the complainants above named, that the facts set forth in the foregoing bill of complaint are true and correct to the best of his knowledge, information and belief.

CHARLES N. WESTON.

Sworn to and subscribed before me this 28th day of April, A. D. 1926.

FLORENCE E. JOHNSON,
(Seal) *Notary Public.*

My commission expires March 6, 1927.

EXHIBIT "A." 10

ASSETS.

CURRENT ASSETS			
Cash on hand	350.00		
Accounts Receivable	186,178.91		
Advances to Shippers for Merchandise in Transit	18,973.00		
Advances to Employees	1,987.72		
Inventories—Merchandise & Supplies	67,561.99		20
Total Current Assets		275,051.62	
OUTSIDE INVESTMENTS			
Delaware Storage & Freezing Co. stocks	500.00		
Girard Family Stores Co. stock	500.00		
Real Estate—Glassboro, N. J.	1,456.15		
Total Outside Investments		2,456.15	30
FIXED ASSETS			
Machinery and Fixtures	6,171.92		
Automobiles	3,627.00		
Improvements to Leased Property	9,753.05		
Total Fixed Assets	19,551.97		

Less—Reserves for Depreciation	8,309.80	
Net Book Value of Fixed Assets		11,242.17
DEFERRED CHARGES		
Prepaid Insurance	732.32	
Prepaid Interest	64.24	
Total Deferred Charges		796.56
Total Assets		$289,546.50

LIABILITIES.

CURRENT LIABILITIES	
Bank Overdrafts	15,743.20
Collateral Loans	30,878.30
Notes Payable	52,549.00
Loans Payable	12,395.67
Accounts Payable	34,822.48
Freight Bills Payable	1,765.31
Due Warehouses—Storage Chgs., etc.,	37,872.44
Due to Officers	16,913.12
Accrued Payroll	306.43
Accrued Rent	22.22
Reserve for Fed Income Tax 1925	654.98
Total Current Liabilities	203,923.15

CAPITAL STOCK & DEFICIT

Common Stock—authorized	150,000.
Common Stock—unissued	47,400.

Common Stock— Issued & outstndg.	102,600.		
Deficit		16,976.65	
Capital stock less deficit		85,623.35	
Total liabilities, capital & defic.		$289,546.50	$289,546.50

IN THE
DISTRICT COURT OF THE UNITED STATES.
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 3701. March Term, 1926.

IN EQUITY.

CORN EXCHANGE NATIONAL BANK, TRUSTEE UNDER THE WILL OF WINFIELD S. NICE, DECEASED, and CHARLES N. WESTON,

Complainants,

v.

NICE AND SCHREIBER COMPANY, a Corporation,

Respondent.

ANSWER.

To the Honorable, the Judges of said Court:

The answer of Nice and Schreiber Company to the bill of complaint filed in the above case respectfully represents:

1. The respondent admits the averments contained in the aforesaid bill.

2. The respondent therefore joins in the prayer of the complainant, that a receiver or receivers be appointed for it, and further submits itself to such order and decree as your Honorable Court may deem meet and proper to enter in the premises.

NICE AND SCHREIBER COMPANY,
BY CHARLES N. WESTON,
(Seal) *Secretary and Treasurer.*

UNITED STATES OF AMERICA
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.*

CHARLES N. WESTON, being duly sworn according to law, deposes and says that he is secretary and treasurer of the foregoing corporatioin, to wit, Nice and Schreiber Company, and that the facts set forth in the foregoing answer are true and correct.

CHARLES N. WESTON.

Sworn to and subscribed before me this 28th day of April, A. D. 1926.

FLORENCE E. JOHNSON,
(Seal) *Notary Public.*
My commission expires March 6, 1927.

CERTIFIED COPY OF RESOLUTION ADOPTED AT MEETING OF THE BOARD OF DIRECTORS OF NICE AND SCHREIBER COMPANY.

April 28th, 1926.

WHEREAS, NICE AND SCHREIBER COMPANY is being pressed by current merchandise creditors whose claims said corporation although solvent is unable by reason of absence of quick assets to meet,

AND WHEREAS, the Directors of said corporation have been informed that a Bill in Equity praying for the appointment of a Receiver is about to be applied for in the United States District Court for the Eastern District of Pennsylvania.

Upon motion duly seconded and carried, the officers of the said corporation are hereby authorized and empowered to execute an Answer to said Bill in Equity, and join in the prayer for a Receiver.

CHARLES N. WESTON,
Secretary and Treasurer.

I hereby certify the foregoing to be a true and accurate copy of Resolution this day passed by the Board of Directors of NICE AND SCHREIBER COMPANY.

(Seal) CHARLES N. WESTON.

IN THE
DISTRICT COURT OF THE UNITED STATES.
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 3701. March Term, 1926.

IN EQUITY.

CORN EXCHANGE NATIONAL BANK, TRUSTEE UNDER THE WILL OF WINFIELD S. NICE, DECEASED, and CHARLES N. WESTON,

Complainants,

v.

NICE AND SCHREIBER COMPANY, a corporation,

Respondent.

ORDER.

Before DICKINSON, J.

And now, to wit, April 28, 1926, on consideration of the facts set forth in the bill filed in the above-

entitled cause, and in the answer thereto filed by the respondent, admitting the truth of the facts set forth in the said bill and assenting to the appointment of receivers, it is ordered that Sidney E. Smith, Esq., and John Weaver, Esq., be and they are hereby appointed receivers of Nice and Schreiber Company, and the said receivers are hereby authorized and directed to take immediate possession of the books, papers, moneys, choses in actions, assets and all other property, real and personal, of the said company, within the jurisdiction of this Court, for the purpose of conserving the assets of the said company; and it is further ordered that the said receivers shall have and they are hereby given authority to continue the business of the said company with all the powers usual in such cases for and during the period of sixty days or until further order of the Court in the premises;

It is further ordered that Nice and Schreiber Company, its officers, servants and agents, and each of them, shall be and they are hereby enjoined and restrained from exercising any of the privileges of franchises granted by the Act incorporating the said company, and from collecting or receiving any debts due said corporation, and from paying out, selling, assigning or transferring any of the assets, moneys, funds, lands, tenements or effects of said corporation. It is hereby further ordered that all persons, firms and corporations and each and every of them shall be and they are hereby enjoined and restrained from suing said defendant corporation, levying execution upon, attaching, seizing, intermettling with, or taking possession of any of the property of defendant, without leave of this Court first had and obtained.

Such receivers to enter security in the sum of $25,000.00.

By the Court,
Attest:
GEORGE BRODBECK,
Clerk.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

In the matter of the Appeal of the Corn Exchange National Bank and Trust Company from the decree of the Prerogative Court affirming an order of the Orphans' Court of the County of Atlantic allowing the account of the Corn Exchange National Bank and Trust Company, Executor of the estate of Winfield S. Nice, deceased, and adjudicating the exceptions filed thereto.

On Appeal from the New Jersey Prerogative Court.

BRIEF OF PETITIONERS-RESPONDENTS.

FACTS.

The petitioners-respondents are next of kin of Winfield S. Nice, who died testate on March 3, 1926, at his home in Ventnor City, New Jersey. At the time of his death, he was the owner of 1019 of the 1026 outstanding shares of the Nice & Schreiber

Company (S. C. 108, bot., 109 top). He had for a long time prior thereto been president of said company (S. C., p. 95, l. 24).

On March 27, 1926, the testator's will was probated by the Surrogate of Atlantic County (S. C., p. 126, l. 30), and the Corn Exchange National Bank, the appellant herein, was appointed executor (S. C., p. 5, l. 22; p. 228, l. 33).

In the course of its administration of the estate, on April 28, 1926, the Corn Exchange National Bank, executor, as a creditor, together with a stockholder in the company, filed a bill in the United States District Court for the District of Pennsylvania, asking for the appointment of a receiver (S. C., p. 363). Said bill falsely alleged that a receiver was necessary because the assets of the company were in danger of attachment by the creditors and that the company had only $350.00 cash in bank (S. C., p. 371, l. 12), and that the financial condition of the company was substantially the same at the time of the filing of the said bill, as on March 3, 1926, the date of the death of the testator (S. C., p. 365, l. 33). The complainants attached to the bill the March 2, 1926, financial statement (S. C. addendum).

As a matter of fact, the company had not only $350.00 cash in bank but had $41,156.39 cash in banks on April 28, 1926, the date the petition was filed (S. C., p. 310, p. 318, l. 18). This sum was amply sufficient to satisfy the claim of one Burton, who, the executor contended, was pressing for payment (S. C., p. 104, l. 24).

The Nice & Schreiber Company had $111.38 in the Corn Exchange National Bank and $41,045.01 in the Union National Bank (S. C., p. 318, l. 18). On Wed-

nesday, April 28th, 1926, the receivers were appointed and on the following Monday, the aforesaid sum of $41,045.01 was withdrawn from the Union National Bank and deposited in the Corn Exchange National Bank to the credit of the receivers (S. C. p. 310).

John Weaver had represented the heirs and had procured a general power of attorney to represent the heirs and "direct the affairs of the estate of Winfield S. Nice until business is settled and until such time as the authority may be withdrawn" (S. C., p. 244, l. 10). The executor never saw this power of attorney until the date of the hearing, but contented itself as to the authority of Weaver under said letter by assuming that the said letter was a power for all purposes (S. C., p. 229, l. 26; p. 230, l. 4).

On April 28, 1926, two lawyers, the aforesaid late John Weaver, former mayor of Philadelphia and Sidney E. Smith, were appointed receivers (S. C., p. 313, l. 1). Another attorney, A. J. Davis, was the only one who entered an appearance for them (S. C., p. 313, l. 8; p. 316, l. 5), although he and another attorney, Russell C. Cooney, were given equal fees for acting as attorneys for the receivers (S. C., p. 338, l. 10).

The receivers collected a total of $160,137.95. Of this sum, $138,141.60 was collected within three months after the appointment of the receivers (S. C., p. 338, l. 4). From this amount, the creditors received $117,058.64 (S. C., p. 340, l. 32, p. 341 top). The receivers and counsel were allowed $35,000.00 (S. C., p. 338, l. 13; p. 339, l. 15), while other fees

and sundry expenses of the receivership amounted to $5,953.00 (S. C., pp. 255, 256).

On August 19, 1926, and on divers other dates thereafter, certain notices of the receivership proceedings were mailed to all creditors, including only one of the petitioners, to wit, Mrs. George Schreiber, now deceased, and then very aged and infirm (S. C., p. 328, l. 25).

Notwithstanding that the petitioners-respondents were vitally interested in the conservation of the assets of the Nice & Schreiber, they were not advised (except Mrs. Schreiber, through the notice alleged to be mailed to her as alleged in the preceding paragraph) by the executor, John Weaver, or anyone else, of the institution of the receivership proceedings. They did not learn of the Master's reports until after the confirmation (S. C., p. 258, l. 30, p. 259 top).

The executor filed no exceptions to the allowance of $30,000.00 to receivers and attorneys on the first report (S. C., p. 337, l. 31) nor did it appeal from further allowance on the second report (S. C., p. 314). It apparently abandoned exceptions filed to second report, p. 337, l. 2.

Not only did the executor not oppose allowance of aforesaid fees, *but it actually agreed that counsel and receivers should get* $40,000.00 *to wit,* $30,000.00, *on the first account and the balance on the subsequent account* (S. C., p. 349, ll. 14 to 30). Through the "mercy" of the receivers, they and their counsel took "only" $35,000.00.

The petitioners, on hearing the facts, filed a bill in the United States District Court for the District of Pennsylvania, for leave to file objections to the

allowance of said fees (S. C., pp. 250, 260). The Corn Exchange National Bank was not a party to said proceedings.

The Federal Judge advised a settlement (S. C., pp. 186, 189) and, as a result thereof, the heirs settled with the receivers, their attorneys and master for $10,000.00, executing a release unto them alone (S. C., p. 190). The Corn Exchange National Bank was not a party to said proceedings or release (S. C., pp. 190, 191).

The executor filed its account in the Atlantic County Orphans' Court. The petitioners filed exceptions and amended exceptions thereto, asking that the executor be surcharged for the loss they sustained by reason of the executor's fraud, bad faith, carelessness and maladministration of the estate, principally by reason of the fraud, bad faith, gross carelessness, indifference and wantonness of the executor in petitioning for the receivership of a solvent company and in fraudulently alleging that it had $350.00 cash in bank, when, as a matter of fact, it had $41,156.39 cash in banks.

The Atlantic County Orphans' Court surcharged the executor with the sum of $30,953.00 and refused to grant the executor further commissions (S. C., p. 40, l. 32). On appeal, the Prerogative Court affirmed the decree of the Orphans' Court.

POINTS.

1. The executor was guilty of *breach of its duty* to the Orphans' Court in wasting the estate by:

(a) Filing a petition in the Federal Court for the appointment of receivers for the Nice & Schreiber Company. It falsely alleged therein that the company had only $350.00 cash in bank when it had over $41,000.00 cash in bank, this sum being more than sufficient to pay any required claim.

(b) Consenting to exorbitant and excessive receivership fees in Federal Court.

2. It was guilty of *fraud,* bad faith and negligence by reason of its misconduct as set forth in Point 1.

3. The question of the propriety of the receivership is not *res adjudicata,* because:

(a) Fraud of the executor in filing false petition for receivers precludes such a defense.

(b) Not the same subject-matter and parties involved here as in receivership proceedings.

4. Weaver did not represent the heirs when the petition for the receivers was filed.

5. Advice of counsel in this instance is no defense.

6. The release of the receivers and counsel does not inure to the benefit of the executor.

ARGUMENT.

1. (a) Executor's waste and breach of duty—False petition.

There can be no dispute as to the facts in this case. The defendant-appellant can but feebly and faintly argue against the inevitable inferences to be drawn.

It appears that one, Burton, with an uncertain claim, sent a letter, on April 27, 1926, through his attorney, Salus, demanding payment (S. C., p. 129, l. 11). Freeman, for some unknown reason, became confused and almost hysterical. Judge Dickinson says: "The purpose of the receivership, we assume, was to save the consequence of a possible bankruptcy. So far as we can see there was undue alarm from the threat of this" (S. C., p. 188, l. 34). Freeman says he was not sure whether the claim was proper or not (S. C., p. 215, l. 27). He did not know whether the company was solvent or not. He was "concerned" as to its solvency (S. C., p. 215, l. 30). He says, "We were not sure." On April 27, 1926, he received Salus' letter. On April 28, 1926, he petitioned for and obtained the appointment of receivers. He took no prudent steps to alleviate his concern as to the company's solvency. He thought he could shift the responsibility on the Federal Court.

It appears that Freeman never asked Weston, the treasurer, about the condition of the company, but told him not to pay Burton's claim or any other

claim because the company was liquidating (S. C., p. 275, l. 22; p. 287, l. 32). Freeman never asked Weston whether the company was able to pay Burton's claim (S. C., p. 280, ll. 10, 12). In fact, the company was able to pay the claim before the receivership (S. C., p. 283, l. 3).

Freeman filed a petition alleging that creditors were pressing for payment and threatened to enter suits and levy attachments.

Witness, Bedell, the bookkeeper, testified that there were no pressing obligations (S. C., p. 103 bot., p. 104 top). He also testified that the company had enough on April 28, 1926 (the date of the filing of the petition for the receivers) to pay Burton (S. C., p. 104, ll. 20, 24). Obviously with over $41,000.00 cash in bank the company was able to pay Burton's fourteen thousand dollar claim.

But admit, for the purpose of argument, that there were pressing claims. Is that ground for a receivership? Certainly it is not reason for a bankruptcy, for under the Bankruptcy Act in order to put one into bankruptcy he must have committed an act of bankruptcy or be insolvent. A person is deemed insolvent, under the Bankruptcy Act, Section 1, whenever the credit of his property, exclusive of any property which he may have conveyed or transferred, shall not, at a fair valuation, be sufficient to pay his debts.

Therefore, the company could not have been put into bankruptcy. The plea of solvency would have been a defense.

The company's financial condition was excellent. It had, on April 28, 1926, $41,045.01 cash in bank. Within three months after the appointment of the

receivers, the said receivers had collected over $141,000.00. The accounts receivable were high grade (S. C., p. 106, l. 14). The provable debts were $117,058.64 (S. C., p. 340, l. 32).

Yet, with the company in this excellent financial condition, the executor, with a peculiar phobia of pressing creditors, filed the petition for the appointment of receivers on April 28, 1926, alleging that the company had only $350.00 cash in bank, and annexing the March 2nd financial statement of the company, when, as a matter of fact, as aforesaid, the company had over $41,000.00 cash in banks.

True, it appeared that checks (unpaid) in the sum of $23,473.14 (S. C, p. 311, l. 22), had been drawn against the total sum in the bank of $42,344.52 (S. C., p. 311, l. 15). The receivers did not permit the aforesaid checks to be paid but stopped payment on same, thus retaining $44,762.60 (S. C., p. 311), (which includes deposit of $2,418.08 on April 28, 1926).

Yet, there remained ample funds to care for what purported to be the pressing claim of Burton in the sum of $14,000.00 (S. C., p. 104, l. 10).

Freeman's Reliance on Weston?

But the executor says that it relied on the said two-month-old financial statement as being true because Weston, the secretary and treasurer of the company, so informed it.

Mr. Freeman had knowledge of the falsity of the allegations in the petition as to financial condition of the company. He admitted that he knew this

financial statement was prepared almost two months before the petition for the receivership (S. C., p. 230, ll. 14, 15); that he knew that the company was in process of liquidation (S. C., p. 230, ll. 16, 18); that the company had been collecting cash during this period (S. C., p. 230, ll. 18, 20); that he never opened a book of account of the Nice & Schreiber Company to investigate the condition of the company (S. C., p. 237, ll. 4, 5); that he never asked Bedell, the bookkeeper (S. C., p. 236, bot., 237 top) about the condition of the company although Bedell knew and could have told Freeman of the solvency of the company (p. 208, l. 14). His knowledge of the company's liquidation after the rendition of the financial statement was enough to put him on inquiry and he must have known that if the company had $350.00 on March 2, 1926, and the company was liquidating and collecting cash, certainly the company could not be in the same financial condition on April 28, 1926, as it was on March 2nd of the same year. Certainly there was some change. If there was some change he was not justified in taking such a direful step as to cause the disastrous receivership. Besides, Weston says Freeman told him not to pay any creditors (S. C., p. 275, l. 22, p. 287, l. 32). With money being collected and no creditors being paid, the company's cash must have increased.

Weston denies that Freeman ever asked him before the receivership as to the financial condition of the company (S. C., p. 280, ll. 14, 17). But, admitting, for the sake of argument, that Freeman did ask Weston as to same and admitting further, for the sake of argument, that Freeman relied on Weston when the latter is supposed to have told him that

the company was, on April 28, 1926, in substantially the same financial condition as it was on March 2, 1926, Freeman was not justified in relying on same for he knew that the company had been liquidating its assets from the date of Mr. Nice's death, to wit, March 3, 1926.

Had the executor, with any degree of prudence, audited the accounts before applying for a receivership and endeavored itself to liquidate the company, it could have avoided this receivership. The receivers did practically nothing except collect the debts.

If the executor closed its eyes and refused to see what, with diligence, it could have seen; if the executor chose to make an allegation of the financial condition of the company, under the aforesaid circumstances, and it was false, it must bear the burden. On the death of Winfield S. Nice, the executor stood in his place with all power and authority over the business. There was no excuse for the executor's misconduct.

> "In the case of an expert stating to a non-expert his opinion of matters requiring peculiar skill or knowledge * * * it is difficult to see why a plaintiff who acts reasonably in relying on the statement may not recover against one who negligently volunteers an erroneous opinion intending the plaintiff to act on it, and know that substantial loss is likely to follow if the opinion proves incorrect * * *. Negligent misstatement exists just the same whether it be due to carelessness in forming a belief or to carelessness in the mode of expressing one's belief."
>
> 14 *Harv. Law Rev.* 197, 198.

> "A person who wilfully closes his eyes to avoid seeing what he believes he would see if he left them open, must be considered to have seen what any man with his eyes open would see."
>
> *Dewitt v. VanSycle,* 29 N. J. Equity 209.

> "Lord Cairns held in Reese River Silver Mining Co. v. Smith, L. R. 4 H. of L. Cas. 64, that if persons make assertions of facts of which they are ignorant, whether such assertions are true or untrue, they become in civil point of view, as responsible as if they had asserted that which they knew to be untrue."

A Proceeding to Surcharge for Waste.

Regardless of the jurisdiction of the Federal Court in the appointment of a receiver; regardless of the right of that Court to appoint a receiver when none of the legatees were notified of the proceedings or when the executor did not disclose to the Court the $41,156.39 cash item, for in the petition it said the company had only $350.00 cash; regardless of all these things, the executor is liable, for it did not fulfill its duty to the Orphans' Court of Atlantic County and to the legatees in procuring the appointment of a receiver under the aforementioned conditions.

This is a proceeding to surcharge the executor for its misconduct and waste. It became possessed of stock having a book value of about $85,000.00 (S. C., p. 34, l. 24). In its inventory it valued the stock at $30,000.00 (S. C., p. 11, l. 20). A few days prior

to the receivership, it refused two bona fide offers for the stock, one for $40,000.00 and the other for $42,000.00 (S. C., p. 122, ll. 14 to 18). He would consider no offer for the stock for less than $70,000.00 (122, bot., 123, top). It procured a receivership that cost $40,953.00. Now, the stock is admittedly worthless (S. C., p. 355, l. 30). It became possessed of valuable stock. It now turns it over to the heirs valueless (S. C., p. 355, l. 30). It and it alone wasted the stock. It was the cause and the moving cause of the receivership. The Federal Court became the means of the waste.

Thus, in *Hurlburt v. Hutton,* 44 N. J. Equity 302, the Court held that if the executor, in bad faith, allows a judgment to be recovered against the estate it represents, for the purpose of unduly charging it, it will not be allowed credit for the payment of the judgment in its account. The Court, under the circumstances, will presume bad faith from the making of such assertions by the Corn Exchange National Bank in its petition for the appointment of receivers.

In the above Hurlburt case it was not necessary to attack the jurisdiction or right of the Court in allowing the default judgment, but yet the Court held that by reason of the improper conduct of executors in allowing the judgment to go by default, the executors should be surcharged therefor. The executors were not allowed credit for payment of the judgment and thus they were surcharged therewith.

They did not argue that because the Court had rendered a default judgment that everyone was precluded from thereafter questioning the right of the

executors to permit the default judgment; that the Court having spoken, no one could question the executors.

The situation is analogous to the instant case.

We do not complain that the Court had no right to appoint a receiver on the petition as presented by the executor. We say that regardless of the Court's action, we complain that the executor, whose duty it was to conserve the estate, should not have fraudulently misrepresented or carelessly misstated to the Court the financial condition of the company. If it did not know the financial condition it should have acquainted itself with same. It should have known that there was $41,156.39 cash on hand; should have utilized same in paying off, fully or partly, creditors who demanded payment, and should have liquidated the business as the receivers did.

Surrogate Slater, in West Chester County Court, in the matter of the *Estate of Elizabeth C. McCormack* (N. Y. Daily Law, J., June 25, 1930, Vol. 80, No. 73), said:

> *"In trust relations these days when trust companies have entered the business, much more is expected from a corporate trustee than from the old-fashioned individual executor or trustee. Trust companies seek this character of business claiming that they are specially qualified and financially responsible. They make a specialty of trust matters and claim to be familiar with the authority of executors and trustees as to trust investments. They have claimed that each estate and trust will receive the personal attention of one trust executive whose life work is*

the administration of estates and trusts, and decisions with regard to the purchase and sale of securities will be independently arrived at by these officers in consultation with investment experts (Matter of Hurlburt, supra, p. 459). The Courts, and particularly the Surrogate's Court, vigilantly enforce the highest standard of fidelity of trustees and zealously guard the rights of beneficiaries (In re Knower, Foley, S. 121 *Misc.* 208; *Matter of Jarvis,* 110 *Misc.* 5)."

"It is the opinion of the Court that the trustee did not exercise that active diligence, prudence and high standard of care which the law exacts when it continued to hold certain of said stocks beyond the time when they should have been sold. It did not exercise the solicitude for the rights of all interested in the estate which the law imposes on trustees. Reasonable diligence, intelligence and prudence on its part in the care of this trust has not been shown, the lack of which amounts to negligence. The objectors have sustained their burden of proof."

"The Orphans' Court, through the medium of exceptions to an account, may impose upon a trustee an obligation to the estate for losses that have occurred through the negligence or other wrongful conduct of the trustee."

Summerill v. Summerill, 99 N. J. E. 502.

"An executor must act in good faith and use ordinary discretion. He is liable for fraud, gross carelessness, or indifference to duty."

Smith v. Jones, 89 N. J. E. 506.

"Watchfulness and faithfulness ought ever to be brought to the fulfillment of the trust."
Voorhees v. , 11 N. J. Law 148.

1 (b). Executor's waste—Breach of duty—Consent to exorbitant fees.

The following is the cost of the receivership:

First Account (S. C., p. 225 top).		
Receivers John Weaver	$7,500.00	
Sidney E. Smith	7,500.00	
Attorneys Russell C. Cooney	7,500.00	
A. J. Davis	7,500.00	
Three Appraisers	1,000.00	
Incidentals, Clerk, etc.	203.00	
Master (p. 273, l. 8).	3,500.00	
		$34,703.00
Second Account (S. C., p. 256)		
Receivers John Weaver	$1,250.00	
Sidney E. Smith	1,250.00	
Attorneys Russell C. Cooney	1,250.00	
A. J. Davis	1,250.00	
Master (Rec. Record, p. 228)	750.00	
		5,750.00
Third Account		
Master	500.00	500.00
Total		$40,953.00

Thus, on the first account, the receivers were allowed to take $30,000.00 in fees. As the *proctor*

for the Corn Exchange National Bank told the Master of the Federal Court, "*That seems like a very large sum of money and a very heavy percentage out of the principal of the estate*" (S. C., p. 344, l. 6).

No exceptions were filed by the Corn Exchange National Bank or anyone else to the Master's first report, wherein $30,000.00 in receivership fees was allowed to the receivers and counsel (S. C., p. 337, l. 31).

Neither did the Corn Exchange National Bank appeal from allowance of $5,000.00 made to the receivers and counsel on the second report (S. C., pp. 313, 314).

On the first account, the receivers showed a total of $138,141.48 (S. C., p. 338, l. 4), and took with counsel fees, the sum of $30,000.00.

Not only did the executor not oppose the excessive allowances to receivers and counsel of the first account or appeal from their allowance on the second account, *but it actually agreed that counsel and receivers should receive $10,000.00 each, $30,000.00 being taken on the first account* and the balance to be taken on the subsequent account (S. C., p. 339, ll. 14 to 30). However, after taking $30,000.00, the receivers and counsel became conscience-stricken and then took only $5,000.00 more.

The receivers did practically nothing more than collect accounts receivable.

With bad grace does the defendant cite the case of *New Jersey Trust Co.*, 732. In the latter case the Court said not only would the Court presume that the Court of Chancery would not permit excessive receivership fees, but there was evidence of the

consent of the *heirs* to the allowance of the fees.

In our case, however, not only is there no evidence of consent by the heirs to the allowance of the unconscionable fees, but the Federal Court itself remarks of the imposition practiced on it and the executor's own attorney remarked as to the fees being excessive (S. C., p. 344, l. 6).

Judge Dickinson, abashed and exercising subdued indignation, said, "*The real fact of the situation is now known to be that those who were then thought to be paying these fees were paying them not with their own money, but with moneys of the present petitioner. It is a proverb that liberality with the money of others is always to be mistrusted*" (S. C., p. 187, ll. 10-14). The Judge advised a settlement. "Failing agreement, we will fix the fees" (p. 189, l. 14). Certainly this does not indicate that the Federal Court approved the fees. It was imposed upon and deceived by the executor, thinking that it truly represented the heirs in consenting to the allowance of the fees. What imposition! What a betrayal of Court and *cestui que* trust!

Certainly such conduct indicates a breach of duty to the Orphans' Court. The executor cannot hide behind the cloak of the Federal Court, for Judge Dickinson wrapped it closely about his body, exposing to the light of truth, the executor's misconduct.

2. Executor's fraud—False petition.

We charge that the executor was guilty of fraud in misrepresenting to the Federal Court the financial condition of the Nice & Schreiber Company,

thereby causing a needless receivership. Of course, the proof to establish fraud in law differs from the proof required to establish fraud in equity. Story defines fraud as follows: "Fraud, in the sense of a Court of Equity, properly includes all acts, omissions or concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed and are injurious to another, or by which an undue and unconscientious advantage is taken of another" (Perry on Trusts). In a law court, moral fraud, *i. e.,* an intent to deceive, must be shown, in addition to the other elements of fraud, whereas in a Court of Equity, proof of moral fraud is not necessary. Equity looks at the harm done and not at the moral delinquency or good intent.

Eibel v. Von Fell, 55 N. J. E. 670;
Commercial Co. v. Southern Surety Co.,
100 E. 92, 96.

Legal Fraud.

Looking at the facts from the aspect of the legal definition of fraud, *i. e.,* where bad faith and fraudulent intent must be shown, it is submitted that the executor was properly surcharged.

In the instant case, with proof that the Nice & Schreiber stock was worth, at the time the executor took charge thereof, not less than $30,570.00 and possibly $80,000.00 (inventory—first accounting, S. C., p. 11, l. 20), with proof that the executor caused a needless receivership; with proof that the executor misrepresented to the Federal Court the financial condition of the company; with proof that

the executor knew or should have known of the financial condition of the company (S. C., p. 230, ll. 14, 15, 16, 18, 20); with proof that there was, on the date of the appointment of the receivers, $41,-156.39 (S. C., p. 318, l. 12) or even $21,289.46 (S. C., p. 311, l. 30), after deducting the amount of all the checks drawn, but not paid, on deposit in the Union National Bank; with proof that there was deposited in the Corn Exchange National Bank $41,045.01 within three secular days after the appointment of the receivers (S. C., p. 310), can it not be said the complainants have made out a case of lack of good faith on the part of the executor? Viewing all the evidence, can it be said that Freeman honestly believed his representations of the financial condition of the company to be true? How can he be given such a clean slate in view of the aforesaid facts?

Equitable Fraud.

However, we submit that the equitable definition of fraud, *i. e.*, that which does not require actual proof of bad faith but mere proof of misrepresentation, should be adopted in this case.

The Orphans' Court (or the Prerogative Court) partakes of the powers of the Court of Chancery and, therefore, in the instant case, should adopt the equitable definition of fraud.

> "The Orphans' Court is a court of general jurisdiction over the subjects committed to its cognizance. Den v. Hammel, 3 Harr. 73. It partakes of the powers of a chancery and prerogative jurisdiction, being instituted to

> remedy and supply the defects in the powers of the Prerogative Court with administrators and guardians, and such construction should be given to the statutes establishing and regulating its authority, as consistently with the obvious intentions of the Legislature, will advance and extend remedial provisions."
>
> *Pyatt v. Pyatt,* 46 E. 288.

In *Beams v. Patterson Co.,* 81 Equity, 195, hereinbefore referred to, the Court held that where securities in the hands of the trustee depreciate nine-tenths in value, same makes out a *prima facie* case of lack of good faith.

Clearly, the subject-matter, to wit, the financial condition of the company, concerning which representation was made to the Federal Court, was susceptible of exact knowledge. The subject-matter aforesaid was such that the affirmation of the condition of the company, to wit, that it was the same on April 28th as on March 2nd, must be taken in a strict sense. The falsehood lay in the executor's affirmation that the condition was the same. As a matter of fact, the condition was not the same. As aforementioned, Mr. Freeman, the Vice-President of the Corn Exchange, and the one in charge of the estate, knew that the company was liquidating and must have known that the statement was untrue (S. C., p. 230, ll. 16, 18).

The very fact that the $41,045.01 was transferred from the Union National Bank to the Corn Exchange within three secular days after the appointment of the receivers is practically conclusive of the

executor's knowledge of the existence of the fund on April 28, 1926.

The receivership report shows that on April 28, 1926, the Nice & Schreiber Company had to its credit $111.38 in the Corn Exchange National Bank and $41,045.01 in the Union National Bank. Why was the $111.38 withdrawn from the company's account in the Corn Exchange and deposited in the receivers' account without likewise withdrawing, on the same date, the $41,045.01 from the Union National Bank? Was it to make it appear that the huge sum was not discovered until a few days later? Would it look better for posterity if the receivership record showed that the existence of the forty-one thousand fund was not known or discovered until three secular days after the appointment of the receivers when the transfer was made? Perhaps this *modus operandi* would create a less morbid appearance.

In view of these facts, the burden of proof in this case is on the defendant to show its freedom from fraud in causing such a needless receivership.

> "Whenever the existence of any fact is necessary in order that a party may make out his case or establish a defense, the burden is on such party to show the existence of such facts, and if he desires any Court to give judgment as to any legal right or liability, dependent on the existence or non-existence of facts which he asserts or denies to exist, he must prove that those facts do not exist in order to be entitled to relief."
>
> *Collins Realty Co. v. Sale,* 7 N. J. Advance Reports, 173.

Continued Concealment of Huge Fund.

If it is true that the executor did not know of the existence of the sum of $41,156.39 in the Corn Exchange and Union National Banks on the date the receivers were appointed, then why did it not notify the Federal Court of the existence of said fund, when on May 3, 1926, there was transferred the sum of $41,045.01 from the Union National to the Corn Exchange?

Certainly, if the executor had notified the Federal Court so soon after the appointment of the receivers as to the falsity of its petition, the disastrous results could have been avoided. The receivers could have been immediately discharged and the company saved from the cost of such excessive and unwarranted receivers' fees as were allowed.

Assuming it to be true that the executor did not know of the existence of the aforesaid fund on the date of the appointment of the receivers, did its silence on learning of the existence of said fund evidence its good faith in the procurement of the receivership?

"Information and Belief."

The executor cannot preclude liability by making the allegation as to the financial condition of the company on information and belief. An affidavit on information and belief may be the subject of perjury (*U. S. v. Patterson,* 172 Federal, 291).

Clearly, the affidavit that the company was in

approximately the same condition on April 28, 1926, as on March 2, 1926, was false.

If we adopt the equitable definition of fraud, then the good intent of the executor in making the false statement matters not.

If we adopt the legal definition of fraud, then the question is one of good faith. The representation that the company was in approximately the same condition on April 28, 1926, as on March 2, 1926, was susceptible of exact knowledge. An auditor's report could have determined same. If it had no information as to the financial condition, then its statement that same is based on information and belief is false.

If it had information as to the financial condition of the company it did not disclose same to the Court, and therefore did not act in good faith. It knew that the company was liquidating and had been collecting cash since March 2nd; it knew that $41,045.01 was on deposit on April 28th in the Union National Bank. It told Weston not to pay any debts during the liquidation. At least the executor knew, three secular days after the appointment of the receivers, that $41,045.01 was deposited in its own bank to the account of the company. It should have then reported same to the Court.

3. The question of the propriety of the receivership is not res adjudicata.

(a) The executor's fraud in misrepresenting the financial condition of the Nice & Schreiber Co. as hereinabove particularly set forth, vitiates any plea

of *res adjudicata.* This proposition is fundamental and needs no citation of authorities. A man cannot profit by his own wrong.

3 (b) The receivership did not involve the same parties and the same subject-matter as are involved in this litigation.

The heirs were not parties to the original receivership proceedings. The corporation was the party thereto. The heirs had no notice of the proceedings and knew nothing thereof until after the Master's report was confirmed (S. C., p. 258, l. 30; p. 259 top). As before stated, only one of the heirs received some notice of the subsequent proceedings in the receivership.

> "Says Chancellor Kent, in Neafie v. Neafie, 7 Johns, Ch. 1: 'To make the dismission of the former suit to a technical bar, it must be an absolute decision upon the same point or matter, and the new bill, it is said, must be by the same plaintiff or his representatives, against the same defendant or his representatives. A decree cannot be pleaded in bar of a new bill unless it is conclusive of the rights of the complainant in that bill or of those under whom he claims. Mitf. Plead. 238; 2 Madd. Ch. Pr. 312.'" *Gardner v. Raisbeck,* 28 E. 71, 75.

The subject-matter is not the same here as it was in the receivership proceeding. The subject-matter here is the care of the estate, the executor and the legatees being the parties in interest. In the re-

ceivership proceeding the creditors and the company were the parties in interest.

> "Jacob K. Hiler devised to his son and executor, William J. Hiler, a certain farm during the lifetime of his daughter, Phebe Ann Bartles, in trust nevertheless, that he would, during the lifetime of said daughter, pay the income therefrom to the said daughter, and after her decease, he devised said farm to such persons as should be her heirs-at-law. William J. Hiler died two days after the death of his father and the defendant, Philip Hiler, became the administrator C. T. A. of the said Jacob K. Hiler, and as such took possession of certain crops on said farm. The crops were claimed as belonging to Mrs. Bartles by virtue of the devise in trust for her, and by the widow of Jacob K. Hiler, and by the administrators of William J. Hiler. Upon petition of Mrs. Bartles, the Orphans' Court appointed the plaintiff, Budd, to execute and perform the trust in behalf of Bartles. The plaintiff, Budd, demanded the crops of the defendant, and being refused, sued in assumpsit for the value thereof. Bartles and also the administrator of William J. Hiler cited the defendant to account as administrator of Jacob K. Hiler, and the defendant rendered an account, including therein the proceeds of the aforesaid crops. This account was reported to the Orphans' Court, excepted to by the administrators of William J. Hiler and a decree made thereon."
>
> *Budd v. Hiler,* 27 N. J. Law, 43, at 49.

"Did the account and settlement in the Orphans' Court and Prerogative Courts preclude the plaintiff's right to this suit? I think not. Those courts had jurisdiction to decide what were or were not assets, as between the administrator and the parties interested in the estate in his hands. But the trustee had no such interest, *was no party to those proceedings* and in nowise affected by them. An administrator is undoubtedly liable in trespass or trover, if he takes goods not belonging to the estate; and if it happens that the true owner is also entitled to a legacy or a distributive share, that circumstances will not affect his right of action unless by some act he should render it unjust that he should recover, and thus create an estoppel *in pais*. That is not alleged in this case."

Id., page 54.

The stock being personalty became, on the death of the testator, the property of the executor. The heirs had no standing before the Federal Court. The executor had all the rights to vote and deal with said stock.

"An executor taking title under a grant of letters of probate, at testator's domicile, is holder of stock belonging to the testator within the meaning of Section 37 of the Corporation Act and is entitled to vote as such."

In the matter of the Election of Directors of Cape May and Delaware Bay Nav. Co., 51 N. J. Law, 78.

"All goods and chattels, actions and commodities which were of the testator in right of action or possession, as his own, at the time of his death, pass, on his death, to his executor. 3 Wms. Ex. 1656 Shoul. Ex. Sec. 199. It is a general rule of law and equity that an executor has an absolute power of disposal over the whole of his testator's personal effects, including such things as are given by way of specific legacy. 2 Wms. Ex. 932. It is his duty to get in the whole of his testator's personal estate, as well as those things which are specifically given as all other parts of his estate, but he should preserve and keep such things as are specifically given, so that they may be delivered to the legatees in kind, unless their conversion into money for the payment of his testator's debt is absolutely necessary, 2 Wms. Ex. 1440."

4. Weaver's authority.

Coming to the question of Weaver's authority, we contend that Weaver was retained in the matter of a will contest and did not represent the heirs in consenting to a receivership as the executor contends. The power of attorney to represent the heirs must be construed in the light of the surrounding circumstances.

Originally, Freeman conferred with Weaver about the contest of the will (S. C., p. 207, l. 6). He says that later he understood that he represented all of the four legatees and conferred with Weaver as to the disposition of the Nice & Schreiber Company

(S. C., p. 207, l. 15), but he did not know the extent of Weaver's powers (S. C., p. 230, top). Freeman wanted Weaver's consent to the sale of the Nice & Schreiber Company stock (S. C., p. 207, l. 20), but all of Weaver's letters show that not only did he refuse to pass on the offers for the sale of the stock, but that his authority concerned only matters pertaining to the contest of the codicil (S. C., pp. 262 to 271).

It was only after the receipt of the letter from Burton's attorney, Salus (S. C., p. 215), on April 27, 1926, that it was decided to have receivers appointed.

Let us assume, for the purpose of argument, that Weaver was the agent for the heirs. Was the power of attorney all-embracing? Was Weaver authorized to consent to the receivership; to consent to pay himself and his cohorts $35,000.00 in fees? Did he still represent the heirs when he became receiver, when he took $35,000.00? Can the Corn Exchange National Bank say, even when it was the executor and represented all of the estate, that Weaver had a power of attorney and that he could take $35,000.00 in fees and leave nothing for the estate? *Weaver's powers as agent were similar to those of a president of a corporation.* In the absence of specific authority, does the president of a corporation have authority to consent to a receivership? Certainly not. Nor has a general agent, with a general power of attorney to conduct the principal's business, authority to transfer to a trustee all of the principal's property for the payment of debts.

> "A general agent for the management of the principal's business has implied authority to

do *customary* acts in the business and cannot bind the principal by acts beyond the barren scope of his authority."

Kentucky River Coal Co. v. Williams (Kentucky), 10 S. W. 2, 617.

"The president of a corporation has no authority, by virtue of his office as president, to execute a *cognovit*. The cognovit is, in terms, a confession of the action."

Raub v. Blairstown Creamery Assn., 56 N. J. Law, 262.

"The powers of a president of a corporation *virtute officii*, over its business and property, are strictly the powers of an agent—powers delegated to him by the directors, who are the managers of the corporation, and the persons in whom, as its representative, the control of its business and property is vested."

Stokes v. N. J. Pottery Co., 46 N. J. Law, 237, 240.

"If the corporation be organized for business purposes, the president is its chief executive officer. He may, without any special authority from the board of directors, perform all acts of an ordinary nature, which, by usage or necessity, are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of its business. To this extent, the president, in virtue of his election as such, becomes the agent of the corporation. Beyond

the powers which usage and custom and the necessities and convenience of business require in the executive officer of a corporation, he has no more control over the corporation property and funds than any other officer."

Stokes v. N. J. Pottery Co., 46 N. J. Law, 237, 240.

"A power of attorney is a written authorization to an agent to perform specified acts in behalf of his principal. It is not for most purposes, required by absolute provision of law."

21 R. C. L. 876.

"A power of attorney to transact all of the principal's business in New York City of whatsoever name, nature or description, does not confer on the attorney the right to transfer all of the principal's property to trustee for the payment of his debts."

Ferreira v. Depew, 17 Howard Practice, 418.

"Authority to Manage Business—Authority to manage the principal's business does not imply power to make negotiable papers; or to sell the business; or to borrow money unless absolutely necessary; to pledge or mortgage the principal's property; or to make any contract not within the usual scope of the business."

Outlines of Agency (Mechem), page 84.

"Power of attorney—assignment for benefit of creditors may be executed by an agent or

an attorney *in fact especially authorized thereto,* but the power must, in express terms, grant the authority."

"Power of attorney—construction—the authority derived from a general power of attorney is limited to the exercise of the acts authorized by the language employed in granting the special powers."

"Authority conferred by power of attorney will be construed strictly, so as to exclude the exercise of any power which is not warranted, either by the actual terms used or as a necessary means of executing the authority with effect."

Gouldy v. Metcalf, 75 Texas, 455;
American State Reports 16, Headnotes, page 912.

"We think it clear from the foregoing quotations that an assignment for the benefit of creditors may be made by any agent or attorney in fact *authorized* thereto. The instrument under which the power was exercised in this case does not in terms grant the authority. The language used in the grant of general power is certainly very comprehensive, but the established rule of construction limits the authority derived by the general grant of power to the acts authorized by the language employed in granting the special powers."

"When an authority is conferred upon an agent by a formal instrument, as by a power of attorney, there are two rules of construction to be carefully attended to: 1. The meaning of

general words in the instrument will be restricted by the context, and construed accordingly; 2. The authority will be construed strictly, so as to exclude the exercise of any power which is not warranted, either by the actual terms used, or as a necessary means of executing the authority with effect. Ewell's Evans on Agency, 204, 205; Reese v. Medlock, 27 Tex. 123; 84 Am. Dec. 611."

16 *American State Reports,* 914.

"(1). Powers actually conferred.—The principal is, of course, bound by what he expressly authorizes. On the other hand, he is bound by no more than he actually authorizes in cases where the third party knows the exact terms of the authority. This is especially true of authority conferred in a formal power of attorney. Such powers of attorney are construed as giving only the authority actually expressed and such medium powers as are necessary for the effective execution of those so expressed. 'It is as fundamental as it is elementary in the law of agency that a formal instrument conferring authority will be construed strictly and can be held to include only those powers which are necessary and essential to carry into effect those which are expressed.' "

Huffcut on Agency, page 135.

4 (a). If it be assumed that Weaver was authorized to consent to the receivership, would this be a blanket authority to estop the heirs under all cir-

cumstances? Would not the consent be based on the truth of the assertions of the executor in the petition to the Federal Court? Certainly it must be presumed that Weaver's consent, if any, was based on the truth of the allegations in the petition of the executor for the receivers. Suppose the executor had obtained from the aged heirs their direct and immediate consent to the bill, informing them the contents thereof. Would not such consent be based on the truth of the allegations of the executor in said bill for the appointment of receivers? The consent, in both instances, would be dependent on the truth of the allegations and representations of the executor in the bill. If these were false, the consent would fall.

If Weaver had authority to consent to the receivership; if Weaver did consent to the receivership, the executor still owed a duty to the heirs to act in good faith and to exercise due care. It certainly did not exercise such duty in hastily preparing a bill for the appointment of receivers (S. C., p. 215, bot. 216, l. 18) without making certain of the truth of the allegations of said bill and in consenting to such exorbitant receivers' fees.

5. The executor cannot defend itself on the ground of advice of counsel in case of manifest error.

> "The executor insists, however, that he has acted in good faith, and under the advice of counsel, and therefore he ought not be made to pay this interest out of his own pocket. To my mind, there is no reason to doubt the honest and

good intention of the executor. The money was kept in hand, but for no benefit to himself. He believed that he was acting in accordance with his duty, and kept the amount in his desk. He thought he was acting right in following the verbal directions of the testator as he understood them; and that he acted according to the advice of counsel is made very plainly to appear.

It is the privilege of executors and trustees to take counsel when any difficulty occurs as to their duty. It is a safety at all times. *It will not excuse them in cases of manifest error;* but in doubtful cases, it is a circumstance entitled to great weight in favor of counsel. Seeing that in the execution of this trust it may not always be easy to perceive the exact line of duty, and that the executor has acted in good faith and under the advice of experienced counsel, and has not attempted to make any profit to himself, I am inclined, under the special circumstances, to say that interest ought not to be charged against him until the year eighteen hundred and thirty-one. The first exception is therefore allowed."

King v. Berry, et als, 3 N. J. Equity 265.

The officer of the executor in charge of the management of this estate, Edgar W. Freeman, is a lawyer himself (S. C., p. 227 bot., 228 top). Why should he be entitled to hide beneath the protection of another lawyer's advice? This provision, affording in certain cases protection on advice of counsel,

was meant to protect the layman acting in good faith as an executor, and not knowing the prudent thing honestly seeks the advice of counsel. But Freeman, as a lawyer and as Vice-President of the Corn Exchange National Bank, certainly cannot be said to have acted prudently under the circumstances aforementioned in causing the receivership.

6. Another question presents itself. Are the exceptants barred from prosecuting their exceptions to the executor's final account because they released the receivers, their counsel and Master in the Nice & Schreiber Company receivership from any claim or liability which they may have against said receivers, counsel and Master?

It is submitted that the said release does not constitute a bar, for the following reasons:

a. There was no joint obligation on the part of the receivers and the executor.

b. There was no joint tort.

c. There was no intent to release.

d. The obligations of the receivers and the executor are separate and distinct.

e. The executor cannot complain that it now has no recourse against the receivers.

f. The release was not in statutory form.

6 (a). There is no application, to the instant case, of the general rule, that if there be two men jointly and severally bound by one *obligation,* and the obligee releases one of them, both are released. *There was no joint obligations on the part of the receiver and executor.* The receivers were liable for receiving excessive fees. The executor was liable for filing a false financial statement and thus causing a needless receivership. The executor knew that the report was false for it knew that same was about two months old and that the company had been liquidating since the date of said report. For example, suppose A, driving his automobile, runs over and severely injures X, leaving him in the roadway. B comes along the next day, finds X in the roadway, robs him of his money and jewels. X recovers and releases A for the injury he has sustained, in being run over by the automobile and then sues B. Could it be well said that B could set up a release that X gave A?

Suppose, as a further and closer example, that A in January, 1925, was in financial difficulties, and in January, 1926, has recovered sufficiently financially to enable him to take a trip to Europe. He entrusts L, his lawyer, with the management and care of his business. In January, 1927, in A's absence, L is handed a financial statement of the business as of January, 1925, and he, in January, 1927, without further inquiry, reasonable or otherwise, files a petition in bankruptcy, based on the 1925 financial statement. A's company is liquidated and after paying all debts there is a surplus of $50,000.00 which R, the referee in bankruptcy, contrary to the rules and regulations of the Bankruptcy Court, appropriates for himself as his fee. L, his lawyer, makes no ob-

jection in Court to this. A, returning from Europe takes the matter up with the Bankruptcy Court and the Court is about to reprimand R for taking such excessive fees when R and A get together, compromise the claim and R is given a release by A. Then A sues L, his lawyer, for causing a needless bankruptcy, for L had used a two-year-old financial report in order to effect the bankruptcy. Can it be said that R and L, the referee and lawyer, are *joint* obligors so that the release of one releases both?

> "The general rule is that if two men be jointly and severally bound by one obligation and the obligee releases one of them, the both are discharged."
>
> *Coke Littleton,* 232a;
> *Crane v. Alling,* 15 N. J. Law 423, 425.

> "The reason why it is a discharge to both is a cogent one; a release is a legal formal admission by the creditor that the *bond* is all paid (Bank v. Messenger, 9 Conn. 38); it is tantamount to a receipt in full; the bondsmen are all discharged."
>
> *Crane v. Alling,* 15 N. J. Law 424, 425.

6 (b). There is no application to the instant case of the general rule that the release of one joint *tort* feasor, releases both, *for there was no joint tort.* The obligation and duties of the receivers and of the executor are separate and distinct. The receivers were officers and agents of the Federal Court. The executor represented the estate. The executor's

misconduct occurred when it presented a false petition to the Federal Court; the receivers' misconduct occurred when they took excessive fees—two distinct forms of misconduct.

> "So, in the case of a joint tort, the general rule is that a release of one joint tort feasor releases both.
>
> But if the *wrong* consists not of one tort alone for which the parties are severally liable, *but of separate and distinct although connected torts, for which the parties* are *respectively liable,* then the acceptance of satisfaction from one in respect to his part in the wrongdoing *does not discharge* the others from liability for their respective shares in the transaction."
>
> 34 *Cyc.,* 1089.

> "Insured steamers having been driven ashore, a wrecking company contracted with underwriters to release vessels for special sum and to commence work, and guaranteed to commence the work before a certain time. * * * Held: Owners not being parties to contract the underwriters had power to release wrecking company from any liability for damage sustained by reason of the failure to comply with agreement."
>
> *Klauck v. Federal Ins. Co.,* 60 Misc. N. Y. 170, cited in 34 Cyc., 1079 N. 70.

> "The defendants' liability, therefore, began with the act on their own land, and they were

responsible for their consequences; and as the negligent act was separate and independent of the other miners and it was several when committed and did not become joint because the general consequences were united. 'Without concert of action,' said this Court, 'no joint suit could be brought against owners of all the collieries and clearly this must be the test.' "

Gallagher v. Kemmerer, 144 Pa. 509, 518.

"Where several upper owners of land bordering on a stream of water contaminate it or so use it that a lower abutter is damaged, such wrongdoers, if not acting in concert, are several and not joint tort feasors."

34 *Cyc.,* 1088;
Maryland, 54;
American State Reports, 522;
144 Pa., *State,* 509;
27 *American State Reports.*

"The directors of an insurance company who used corporation assets to purchase an interest in a mutual insurance company of the surviving directors thereof, although it had no assets or good will, are not joint wrongdoers with the directors of a selling corporation who divided the proceeds among themselves as to waste thus committed by the purchasing directors."

34 *Cyc.,* 1088;
Gilbert v. Finch, 72 New York Appellate Div. Affirmed, 173 New York 455.

How can it be said that the obligation of the receivers and executor were joint or joint *and* several? There was no *joint bond.* There was no *joint obligation.* Their duties and obligations were separate and distinct. The receivers owed their obligation to the Court appointing them. The executor owed its obligation to the estate which it represented. As is shown herein, the heirs seek to hold the Bank liable for breach of duty and fraudulently and in bad faith *causing* a disastrous and unnecessary receivership on a false financial statement, for which the receivers were not to blame. The heirs complained against the receivers for charging excessive fees,—two distinct grounds of liability.

6 (c). It was not the intention of the parties to the release to release anyone except those parties to the release.

> "The Court in construing a release looks to the design and intention of the parties."
>
> *Veazie v. Williams,* (U. S.) 8 Howard 134;
> *Crane v. Alling,* 15 N. J. Law 423.

How can it be said that it was the design or intention of the parties to the release, to wit, the heirs, receivers and counsel, to release the Corn Exchange National Bank? It is not mentioned therein; it is not a party thereto; and it paid nothing therefor.

Manifestly the release does not, on its face, release the executor. It contributed nothing to obtain the release and why should it have the benefit without its burdens? To give the Corn Exchange National Bank the benefits of the release would be

making a new contract between different parties.

The proceedings that the heirs instituted in the Federal Court and which culminated in the release of the receivers, counsel and Master alone, were brought as the petition prays, for leave to file exceptions to the Master's account and for leave to except to the Master's allowance of fees.

The *answer* to said proceedings was made by the receivers and their counsel.

Let us examine the opinion of Judge Dickinson, which opinion was offered in evidence by the accountants over the objection of the exceptants (S. C., p. 186).

He says:

> "The broad question is one of the allowance of fees to receivers, their counsel and Master appointed by the Court" (S. C., p. 186, l. 32).

Thus, immediately, the Court limits the parties to the proceedings and the nature of its inquiry into the proceedings which the exceptants brought in that court, to wit, the allowance of excessive counsel fees.

The Court concludes its opinion with these words:

> "The net conclusion we have reached is that this controversy is one which can best be adjusted by the parties themselves and that they should be given an opportunity to do so. Failing agreement, *we will fix the fees*" (S. C., p. 189).

The Court did not make or contemplate an inquiry as to the necessity or propriety of the re-

ceivership. It limited the scope of the matter to *fixing the fees.* Were excessive fees allowed? That was the only question before the Court. *The interested parties in this proceeding were the receivers, their counsel and Master.*

The Court was not asked to hold the Corn Exchange National Bank liable by reason of the fact that the petition for the receivership alleged that the company had only $350.00, when, as a matter of fact, it had $41,000.00 in cash.

The Court did not know that the company had $41,000.00 cash in bank at the time the receivers were appointed. This fact was first disclosed in the Atlantic County Orphans' Court.

The inference from the Court's opinion must be that it felt that the fees of the receivers and counsel were grossly excessive and that unless those who received said fees made some adjustment of the matter, the Court, as it said, would fix the fees.

6 (d). The obligations of the receivers and of the executor were separate and distinct.

The exceptants released the receivers, their counsel and Master because they were indebted to them. There could be no debtor without something due. They were indebted to the exceptants for charging and receiving excessive fees.

The bank, on the other hand, was indebted to the exceptants not for charging and receiving excessive fees, but for bringing about a needless receivership in bad faith and fraudulently.

> "The release of an auctioneer who used fraud to enhance the price of property sold at auction

does not discharge the vendors, for their accountability was separate and rests on different grounds; his (the auctioneer's) on falsehood; theirs (the vendors') on the adoption of the benefit of it and the accountability arising from it."

Veazie v. Williams (U. S.), 8 Howard 134.

"Where a workman is injured by an accident in the course of his employment and a tort feasor other than his employer is also responsible therefor, the right to compensation under the Act of 1911, is not lost by settlement of the tort feasor and his release."

Newark Paving Co. v. Klotz, 85 N. J. Law 432 (affirmed 86 N. J. Law 690).

Justice Swayze, in the Court opinion in the Newark Paving Co. case, *supra,* said:

"These considerations suffice to show that the right to recover damages of the tort feasor are so different that the rule appealed to by the prosecutor (the release of one tort feasor releases all), is inapplicable. The release, therefore, of the claim against the street railway could not be a bar to the right of compensation under the statute."

Where did the bank enter into this controversy as to the excessiveness of the fees? Its liability arose by reason of fraudulently bringing about a needless receivership. As Judge Dickinson says, in the opinion (S. C., p. 188, l. 26):

"No one can review this record without feeling that the affairs of this company were wound up in a way most unfortunate in its results. There is no question on the part of anyone of the good faith of the receivers and their counsel. We assume and are persuaded that they did their best. The purpose of the receivership, we assume, was to save the consequences of a possible bankruptcy. *So far as we can see there was undue alarm from the threat of this, but what concerns us is that if bankruptcy had intervened, the administration expenses would have been notably less than they have been.*"

POINTS IN APPELLANT'S BRIEF.

1. The appellant devotes much space in his brief to criticism of the opinion of Judge Smathers. Of course, this Court is not concerned with the reasons set forth in said opinion. If the facts in the case justify a decree, then there should be an affirmance. This Court cannot be bound by the findings or opinion of the lower Court. If the facts as set forth in the record indicate that the appellant was guilty of breach of trust, fraud and misconduct, regardless of the phraseology used by the lower Court, this Court should sustain the decree surcharging the defendant.

2. The appellant insists "that the statement contained in the petition of the financial condition of the company was approximately the same as when the audit was made, is absolutely correct." This

insistence is astonishing in view of the record. In addition to the references made in this brief, reference is again made to page 318 of the State of the Case to indicate the true financial condition of the company at the time the petition for the receivership was filed.

3. The appellant is inaccurate when he states in his brief on page 28, line 6, that the check book shows certain statements therein set forth. The *check book* does not show the hour of the deposit. It only shows the date of the deposit (S. C., p. 311).

4. To minimize the executor's misconduct in the matter, the appellant represents, on page 28 of his brief, that, at the time the bill of complaint in the receivership was *prepared,* there was only a book balance of $5,599.11. He does not indicate the exact balance when the petition was filed. It would appear that, from the appellant's own figures, at the time the petition was filed, there was at least $5,599.11 plus $13,272.27 or more than sufficient to satisfy the uncertain claim of Burton.

It is respectfully submitted that the decree of the lower Court should be affirmed.

SAMUEL MORRIS,
Solicitor for and of Counsel with Petitioners-Respondents.

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the matter of the Appeal of the Corn Exchange National Bank and Trust Company from the decree of the Prerogative Court affirming an order of the Orphans' Court of the County of Atlantic allowing the account of the Corn Exchange National Bank and Trust Company, executor of the Estate of Winfield S. Nice, deceased, and adjudicating the exceptions filed thereto.

On Appeal from the New Jersey Prerogative Court.

BRIEF ON BEHALF OF CORN EXCHANGE NATIONAL BANK AND TRUST COMPANY, APPELLANT.

STATEMENT OF THE CASE.

This appeal is for the review of the final decree, in the Prerogative Court, advised by Vice-Ordinary Ingersoll, sustaining a decree of the Atlantic County Orphans' Court, surcharging the appellant, as ex-

ecutor of the last will and testament of Winfield S. Nice, deceased, for the sum of $30,953, with respect to the final accounting, of the appellant, as executor.

Exceptions were filed to the account by persons who were beneficially interested in the residuary estate under the will of the testator. The exceptions were heard on testimony produced before the Orphans' Court and exhibits presented.

The Orphans' Court sustained exceptions, which had for their object the surcharging of the appellant, arising, as it was claimed by the exceptants, by reason of the manner in which the executor had handled the estate, and particularly with regard to an application made in the United States District Court, for the Eastern District of Pennsylvania, in conjunction with one stockholder, for the appointment of a receiver of the Nice & Schreiber Company, in which practically all of the stock was owned by the estate.

The Orphans' Court held that the executor was grossly negligent and indifferent in the management of the estate, when it participated in the application for the appointment of a receiver, in Pennsylvania, and surcharged it in an amount which represented the administration expenses of the receivership, based upon receiver's fees and receiver's counsel's allowances, etc., made by the Federal Court. On the appeal to the Prerogative Court, the action of the Orphans' Court was sustained, for the reasons given by the Orphans' Court Judge.

The Orphans' Court further held that, by reason of the conduct of the appellant, it should not be paid further commissions or receive any allowance for counsel fees.

GROUNDS OF APPEAL.

The petition of appeal filed in this court is based upon the contention that the Prerogative Court should have reversed the decree of the Orphans' Court, for the reason that the proofs did not justify a finding by the latter Court that the appellant had been negligent in the conduct of the affairs of the estate, nor indifferent in the management thereof, and that the participation, by the appellant, in the proceedings, which resulted in the appointment of a receiver in the Federal Court in Pennsylvania, was not sufficient ground for surcharging the appellant, as executor, in any sum of money whatever.

Four fundamental questions were involved in the litigation in the Orphans' Court, which are here subject to review on this appeal:

1. Can the appellant be properly surcharged with the alleged loss resulting to the estate of the testator, occasioned by any matter or thing connected with the application, in Pennsylvania, for a receiver for the Nice & Schreiber Company?

2. Did not the executor exercise sound discretion in the management of the estate and act with care and caution in adopting the best method in liquidating the affairs of the corporation under the circumstances, there being no evidence of any abuse of such discretion?

3. Is not the general release given by the beneficiaries, who were the exceptants in the proceeding below, to the receivers of Nice and Schreiber Company and their counsel, in the Pennsylvania receivership proceeding, a bar to the claim now made on the part of such beneficiaries, to surcharge the accountants by reason of any matter connected with the conduct of the receivers or their counsel?

4. Should the Orphans' Court, in the settlement of the estate of the testator, have reviewed any of the acts of the Federal Court in Pennsylvania, in the receivership, and surcharge the accountant, by reason of the conduct of the receivers or their counsel, which conduct received the approval and sanction of such Court?

The decree of the Orphans' Court contained the following recital and finding:

> "And the Court being satisfied that the ex-
> "ecutor was grossly negligent and indifferent
> "in the management of the estate in that it
> "presented a petition to the United States
> "District Court for the Eastern District of
> "Pennsylvania, for the appointment of re-
> "ceivers of the Nice & Schreiber Company, in
> "which company the estate owned 1019 of the
> "1026 outstanding shares of stock of the com-
> "pany, and which company was admittedly sol-
> "vent; that it alleged in said petition that the
> "Nice & Schreiber Company had only $350.00
> "cash in bank, when, as a matter of fact, it had

"$41,156.39 cash in bank; that the receivers "were appointed for said company as a result "of said petition and allegation; that said re- "ceivership was needless and disastrous to the "interests of the estate; that the fees and ex- "penses of said receivership amounted to "40,953.00, of which sum $35,000.00 was paid "to the receivers and counsel, and $3,500.00 to "the Master, for fees; that the estate sustained "a loss of $30,953.00 as a result of said needless "receivership, which was caused by the gross "carelessness, negligence and indifference of "the executor, and with which loss the executor "should be surcharged, and that there should "be no further allowance of fees to the execu- "tor or proctor;

"It is, on this 22nd day of March, 1929, "ordered, adjudged and decreed that the excep- "tion first submitted be and the same is hereby "allowed and that the accountant be sur- "charged with the sum of $30,953.00; that the "exception secondly submitted be and the same "is hereby overruled, except as to the request "that no further executor's commission or "counsel fee be allowed; that the exception "thirdly submitted be and the same is hereby "allowed, except insofar as same is inconsis- "tent with the rulings on the first exception; "that the exception fourthly submitted be and "the same is hereby overruled; that the excep- "tion fifthly submitted be and the same is "hereby overruled; that the exception sixthly "submitted be and the same is hereby over- "ruled."

From an opinion filed by Judge Smathers, Orphans' Court Judge, as a basis for the decree subsequently entered, the following is an excerpt:

> "In March of 1926, and at the time of the "death of the deceased, the Nice & Schreiber "Company, of which the deceased was the pres- "ident and majority stockholder, had assets of "$289,546.23. The liabilities of the said com- "pany were placed at $207,761.46. On the 28th "day of April, 1926, the date of the filing of "the bill for the receivers, the financial condi- "tion of the corporation remained practically "unchanged from its condition as stated on "March 2, 1926, with the exception that it had "in cash in banks the sum of $41,156.39, which "said sum, through the executor's gross negli- "gence and indifference to duty, was omitted, "and the executor in the said bill praying for "the receivership, failed to disclose the true "sum of cash on hand, amounting to $41,156.39, "but erroneously and improperly stated in the "said bill praying for the receivership, that the "company had cash on hand in banks amount- "ing only to $350.00.
>
> "It appears from the testimony taken that "the said sum of $41,156.39 was more than suf- "ficient to pay the pressing obligations then "outstanding against the company of the de- "ceased. Notwithstanding the solvency of the "company of the deceased, which solvency is "admitted in the petition for the receivers, the "executor, in its bill of complaint in the United "States District Court for the District of Penn-

"sylvania, did allege that there was only $350.00 "in cash on hand and obtained the appointment "of receivers.

"From an examination of the receivership "records and the testimony taken, it appears "that the receivers did nothing more than to "liquidate the assets of the said company by "collecting the bills of account and paying the "liabilities of the company.

"This duty, in the opinion of the Court, was "clearly the duty of the executor. Had the "executor, prior to the filing of the bill for "receivers, caused the books of the company "of the deceased to be audited, such an audit "would have revealed to the executor that the "company of the deceased had $41,156.39 in "cash. As a result of the receivership, the ex- "ecutor, the Corn Exchange National Bank & "Trust Company, was required to pay receiver- "ship fees and counsel fees in connection with "the receivership in the sum of $30,953.00, "which rightly belonged and should have gone "to the next of kin.

"In the opinion of the Court, the executor "was grossly careless and negligent in the ad- "ministration of the said estate, and by reason "of such negligence the executor should, and is "hereby surcharged with the loss sustained by "the exceptants, by reason of the said receiver- "ship, in the sum of $30,953.00.

"There will be no allowance of commission "made to the executor for the reasons set forth "in the above opinion."

MAIN FACTS.

The testator, in his lifetime, was the sole owner of the Nice & Schreiber Company, which conducted a provision business in Philadelphia. Practically all of the shares of stock were owned by the testator, who held 1019 shares out of a total issue of 1026.

He died on March 2, 1926. His will, after creating a few specific legacies, gave the residue of his estate to his four sisters, who filed the exceptions which were the subject-matter of the litigation in the Orphans' Court (C., p. 55).

A codicil, dated December 29, 1923, left directions as to the conduct of his business (C., p. 56).

The residuary legatees employed John Weaver, Esquire, ex-Mayor of Philadelphia, to represent them and gave him a power of attorney, of which the following is a copy (C., p. 118):

March 22, 1926.

We the undersigned give Mr. John Weaver, Attorney, power to represent the heirs and direct the affairs of the Estate of W. S. Nice until the business is settled or until such time as this authority may be withdrawn.

Mary E. Vetterline (Seal)
Isabella F. Schreiber (Seal)
Kathryn A. Grubb (Seal)
Emma D. Seal (Seal)

Witness: George W. H. Potter.

State of New Jersey —
County of Atlantic — ss.

BE it remembered that on this 22nd of March 1926 before me a Notary Public in and for the State of New Jersey personally appeared Mary E. Vetterline, Isabella F. Schreiber, Kathryn A. Grubb and Emma D. Seal, who I am satisfied are the signers who acknowledged and signed the above document.
Notary Public. George W. J. Potter.

The executor caused an examination of the financial condition of Nice & Schreiber to be made as of March 2, 1926, the date of the testator's death, as a result of which the expert accountants rendered to the estate the following statement (C., p. 371):

ASSETS.

CURRENT ASSETS		
Cash on hand	$350.00	
Accounts Receivable	186,178.91	
Advances to Shippers for Merchandise in Transit	18,973.00	
Advances to employees	1,987.72	
Inventories—Merchandise & supplies	67,561.99	
Total Current Assets		$275,051.62
OUTSIDE INVESTMENTS		
Delaware Storage & Freezing Co. stocks	$500.00	

Girard Family Stores Co. stock	500.00	
Real Estate—Glassboro, N. J.	1,456.15	
Total Outside Investments		2,456.15
FIXED ASSETS		
Machinery and Fixtures	$6,171.92	
Automobiles	3,627.00	
Improvements to Leased Property	9,753.05	
Total Fixed Assets	$19,551.97	
Less—Reserves for Depreciation	8,309.80	
Net Book Value of Fixed Assets		11,242.17
DEFERRED CHARGES		
Prepaid Insurance	$732.32	
Prepaid Interest	64.24	
Total Deferred Charges		796.56
TOTAL ASSETS		$289,546.50

LIABILITIES.

CURRENT LIABILITES	
Bank Overdrafts	$15,743.20
Collateral Loans	30,878.30
Notes Payable	52,549.00
Loans Payable	12,395.67
Accounts Payable	34,822.48
Freight Bills Payable	1,765.31
Due Warehouses — Storage Charges, etc.	37,872.44
Due to Officers	16,913.12
Accrued Payroll	306.43

Accrued Rent		22.22	
Reserve for Fed. Income Tax, 1925		654.98	
Total Current Liabilities		$203,923.15	
CAPITAL STOCK & DEFICIT			
Common Stock—authorized	$150,000		
Common Stock—unissued	47,400		
Common Stock—issued & outstanding	102,600		
Deficit		16,976.65	
Capital stock less deficit		85,623.35	
Total liabilities, capital & deficit		$289,546.50	$289,546.50

By letter dated March 16, 1926, the beneficiaries requested that Harvey L. Burton be appointed general manager of the business of Nice & Schreiber Company and that he also be elected president. The direction contained in the letter was that Mr. Lippincott should sever his connections with the firm immediately. This is shown by Accountant's Exhibit No. 8 (C., p. 127).

Efforts were made by the executor to dispose of the business as a going concern to both Mr. Burton and Mr. Lippincott, but it was impossible to consummate the bargain because of inability to agree

on terms satisfactory to either or both of these gentlemen, and the persons interested in the estate. Burton's offer was accepted by the executor but the former, however, repudiated the same (C., p. 210).

After all efforts to dispose of the business as a whole had failed, liquidation was begun.

On April 19, 1926, Burton made a demand on the executor for the payment of $10,000 on account of his accumulated poultry profits with the corporation. This will appear by Accountant's Exhibit No. 9, to wit (C., p. 211):

"April 19, 1926.

"Attention of Mr. Freeman.
"Corn Exchange National Bank,
"Executors for the Estate of
"Winfield S. Nice, deceased,
"1510 Chestnut St.,
"Philadelphia, Pa.
"Gentlemen:

"Will you please arrange to pay me at the "very earliest time possible at least $10,000 on "account of my accumulated poultry profits "with the corporation of Nice & Schreiber Com- "pany. Your prompt attention in this matter "will greatly oblige,

"Yours very truly,
"H. L. Burton.

"Dict.—HLB/B"

Many efforts were made to dispose of the business, all without success; during all of which time the executor and the attorney of the company, Mr. Davis, were in constant communication with Mayor

Weaver, the attorney of the beneficiaries. The Mayor knew exactly what was going on. The fact that the executor was unable to dispose of the business as a going concern, together with the receipt of a letter dated April 26, 1926, sent by Herbert W. Salus, the attorney of Burton, Accountant's Exhibit No. 3, precipitated a crisis in the affairs of the corporation and a conference was called between Mr. Freeman, who represented the bank, Mr. Weston, who was the secretary and treasurer, and Mr. Davis, who was the attorney of the corporation, and Mayor Weaver, the attorney of the beneficiaries, together with Mr. Thomas L. Gaskill, as attorney for the estate, both in New Jersey and in Philadelphia, and as a result of this conference, it was unanimously agreed that in order to forestall bankruptcy proceedings, as threatened by Mr. Salus, it would be advisable to have an equity receivership to preserve the assets of the corporation.

This is a copy of the last letter from Salus (C., p. 129):

"April 26, 1926.

"Corn Exchange National Bank,
"1512 Chestnut Street,
"Philadelphia, Penna.

"Attention: Mr. Freeman.

"Dear Sir:

"I represent Mr. Harvey L. Burton, who has "a wage claim against Nice and Schreiber, Inc., "for $17,000.00.

"Our investigation has shown that Nice and "Schreiber, Inc., of which your bank as trustee "for the estate of Winfield S. Nice, is in actual "control, has recently made a preference in

"payment to the Corn Exchange National "Bank. On behalf of Mr. Burton, I hereby "notify you that unless Mr. Burton receives a "substantial check on account of his claim, of "at least 50%, by Wednesday, the 28th instant, "we are going to ask for a Receiver.

"While it is not Mr. Burton's desire to em- "barrass this Company, yet inasmuch as the "Bank has taken care of itself, Mr. Burton, as "one of the creditors, insists that the creditors "be taken care of equally as well. We can see "no reason for any preference to any creditor, "especially the Corn Exchange and Union Na- "tional Banks, and of course, if it will go into "a Receivership, we will have to ask that these "preferences be returned, inasmuch as this "company from its own statement, was insol- "vent on the second of March.

"I would appreciate a reply from you today, "Tuesday, as to what you intend to do.

"Very truly yours,

"H. W. Salus.

"HWS.E."

Everyone acted in good faith, and to protect the interests of the beneficiaries, their personal attorney, Mayor Weaver, was suggested by the executor as one of the receivers.

As a result of the conferences between the executor, the directors of the corporation, and the attorneys and Mayor Weaver representing the beneficiaries, on April 28, 1926, a petition was filed in the

Federal Court in Pennsylvania, in which the appellant, as executor, and Charles N. Weston, a stockholder and secretary of the company, were petitioners. The prayer of the petition was for the appointment of a receiver to preserve the assets of the corporation. Mr. Freeman, the trust officer of the appellant, and Weston, verified the petition. Attached to the latter was a copy of the auditor's report, above referred to (C., p. 363).

The corporation filed an answer, based upon action of the directors, and on April 28, 1926, John Weaver and Sidney E. Smith were appointed receivers by the order of Judge Dickinson (C., p. 374).

The receivers qualified and undertook the administration of the affairs of the corporation, which was finally wound up and practically all of the creditors paid in full.

The administration expenses, approved by the Federal Court, were as follows: Original allowances (C., p. 255):

Receivers—John Weaver	$7,500.00	
Sidney E. Smith	7,500.00	$15,000.00
Counsel—A. J. Davis	7,500.00	
Russell C. Cooney	7,500.00	15,000.00
Appraisers		1,000.00
Master Morton Z. Paul		3,500.00
Sundry		203.00
TOTAL		$34,703.00

Supplemental allowances were made as follows (C., p. 256):

Receivers—John Weaver	1,250.00	
Sidney E. Smith	1,250.00	2,500.00
Counsel—A. J. Davis	1,250.00	
Russell C. Cooney	1,250.00	2,500.00
Master—Morton Z. Paul		750.00
TOTAL		$5,750.00

Mr. Gaskill and Mr. Freeman, representing the estate, appeared at one of the hearings before the Special Master who audited the account. Exceptions were filed by Mr. Gaskill as to the allowances claimed by the receivers, counsel and Special Master (C., p. 342) but, notwithstanding such objections, the Master made the allowances, which were subsequently approved by the Federal Court. The original claim of the receivers was $10,000 each, which was reduced to $7500 apiece.

After the receivership was substantially wound up and on or about June 22, 1927, the beneficiaries, under the will of the testator and exceptants in the Orphans' Court, intervened in the receivership proceedings and filed a petition, the purpose of which was to re-open the adjudications, on the first and second counts of the receivers, in order that objections might be interposed to the allowances to receivers, counsel, Master and appraisers, and the re-

ceivers be directed and ordered to pay over the balances due all creditors of the corporation (C., p. 250).

As a result of the petition and the hearing before Judge Dickinson, the latter presented to the interested parties a finding, of which the following is a copy (C., p. 186):

"IN THE
"DISTRICT COURT OF THE UNITED
"STATES.
"FOR THE EASTERN DISTRICT OF
"PENNSYLVANIA.
"SITTING IN EQUITY.

"C O R N EXCHANGE "NATIONAL BANK "VS. "NICE & SCHREIBER "COMPANY	March Sessions, 1926. No. 3701. Receivership Bill

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"To Counsel:

"We declined to express in this case any "extra judicial opinion. The wisdom of with- "holding one is as a general proposition con- "ceded. The question raised, however, is one "which might well be adjusted by the inter- "ested parties, and upon further reflection we "feel that it is an exception to the general rule, "and that we should perhaps aid the parties to "an agreement by discussing some of its fea- "tures. The broad question is one of the al-

"lowance of fees to Receivers, Counsel and the "Master appointed by the Court. We feel that "we should begin with a comment which will "take out of the case any element of reflection "upon the recipients of these fees because of "any intimation that they are seeking to feather "their own official nests. The comment is that "the complaint of the charges comes doubtless "as a surprise because the fees charged were "not only fixed by those who at the time were "thought to be the interested parties but were "fixed at sums less than in some instances the "recipients were urged to charge. It is this "which we think misled them. The real fact "situation is now known to be that those who "were then thought to be paying these fees "were paying them not with their own money "but with the moneys of the present peti- "tioners. It is a proverb that liberality with "the money of others is always to be mis- "trusted.

"An outline fact statement will make this "situation clear. The defendant is a corpora- "tion but was really Winfield S. Nice Incorpo- "rated, as he owned all the stock of the corpo- "ration except a few shares nominally owned "by others for organization purposes. He died "leaving the petitioners his residuary legatees. "The Corn Exchange Bank is the Executor of "his will. It thus came about that the defen- "dant Company was in real fact unrepresented "in the proceedings and the petitioners were "not formally parties. The shares constituted "after payment of specific legacies the whole

"estate of the decedent. Color is given to the "legal rights of the petitioners by the fact that "they are the sisters of the decedent, are now "getting on in years and their brother in his "lifetime and what they get out of his estate "was and is their chief dependence for support. "It happened that on the eve of the death of "the testator a balance sheet of the financial "condition of the corporation was made out by "skilled accountants which showed, after throw- "ing out doubtful assets, that the stock had a "book value of about $90,000.00. One result of "the Receivership has been to turn over the "business of the corporation to those now con- "ducting it who were concerned with the Re- "ceivership litigation. Another result is that "the estate is barely solvent and those inter- "ested in the stock will receive nothing. An- "other result is that the administration expense "of paying creditors has been over 30% of the "sum paid. The expenses with which we are "now concerned are these items:

"Receivers	$16,250.00
"Counsel	16,250.00
"Master	3,250.00
"Total	$35,750.00

"The balance sheet assets were in round num- "bers valued at $290,000.00 and the liabilities "stated at $200,000.00. At the time of the Re- "ceivership the latter had been reduced to "$116,000.00. Making a corresponding reduc- "tion in the assets, they were at that time about

"$206,000.00. The total sum realized (assuming it to be enough to pay the debts and expenses charged) may be put at $150,000.00.
"No one can review this record without feeling that the affairs of this Company were wound up in a way most unfortunate in its results.
"There is no question on the part of any one of the good faith of the Receivers and their counsel. We assume and are persuaded that they did their best. The purpose of the Receivership, we assume was to save the consequences of a possible bankruptcy. So far as we can see there was undue alarm from the threat of this but what concerns us is that if bankruptcy had intervened, the administration expenses would have been notably less than they have been. The one proceeding is a fair analogue for the other— The Receivers corresponding to the Trustee, the Counsel having about the same relation to the case, and the Master and Referee having much the same duties to perform. In the case of Master and Referee it must be borne in mind, however, that the former has only the one case to which he must give the right of way over his professional work while the latter is doing what to him is routine work.

"The net conclusion we have reached is that this controversy is one which can be best adjusted by the parties themselves, and that they should be given an opportunity to do so. Failing agreement, we will fix the fees.

"Yours truly,

"(Sgd.) O. B. Dickinson."

$10,000 was fixed upon by the receivers and counsel as an amount to be returned to the exceptants and a release from the latter was then given.

The release discharged from all liability Sidney E. Smith, John Weaver, receivers, the estate of John Weaver, deceased, A. J. Davis, Russell Conwell Cooney and Morton Z. Paul, who were the receivers, counsel and Master who acted in the receivership proceeding (C., pp. 190, *et seq.*).

Instead of the fund, represented by this release, being paid to the creditors, the same was given directly to the attorneys of the exceptants; otherwise, it would have been distributed as a dividend on the shares of stock held by the estate and paid to the executors, thus inuring to the benefit of the estate and the beneficiaries thereunder (C., p. 205).

ARGUMENT OF FACTS.

The main claim, by the exceptants, was that the accountants should be surcharged for loss resulting to the estate, by reason of the application for a receiver. This contention was based upon the following statement contained in the petition for such appointment (C., p. 365):

> "On or about March 2, 1926, said respon-
> "dents owned assets worth, according to its
> "books, the sum of two hundred eighty-five
> "thousand dollars ($285,000), which assets
> "your complainants aver are, making allowance
> "for reasonable and probable deductions and
> "depreciations, of a just and fair valuation of

"not less than two hundred fifty thousand dol-
"lars ($250,000), and had actual liabilities ap-
"proximating but not exceeding, as your com-
"plainants are informed and believe and there-
"fore aver, the sum of two hundred five thou-
"sand dollars ($205,000), and was then and
"there solvent in that its assets greatly exceed
"its liabilities at a fair valuation. Your com-
"plainants are informed and believe and there-
"fore aver that the condition of said company
"is approximately the same at this time. A
"statement of the condition of said company
"as of March 2, 1926, is attached hereto and
"made part hereof and marked Exhibit A."

An attempt was made, in the Orphans' Court, to minimize the effect of the communication sent on April 26, 1926, by Mr. Salus. Undoubtedly, the natural inference to be gathered from such a communication was a threat of bankruptcy application, in view of the fact, that reference was made to a preference in favor of the Corn Exchange National Bank. Apparently the alleged preference was the only basis for the appointment of a receiver, which naturally lead to the inference that Burton was contemplating bankruptcy proceedings.

Mr. Weston, the secretary and treasurer of the corporation, advised Mr. Freeman and Mr. Davis, that the company did not have sufficient funds to comply with the demand of Salus, made in his letter of April 26, 1926 (C., p. 215, l. 28).

The affidavit of Weston, the treasurer, is attached to the petition and was sufficient justification for

Freeman to join with him as a co-petitioner for the appointment of a receiver.

The statement of the petition was that the financial condition of the corporation, at the time application for a receiver was made, was substantially the same as that shown by the auditor's report of March 2, 1926. It will be observed that such auditor's report shows accounts receivable of over $186,000 and advances to shippers for merchandise in transit over $18,000.

It further appears, by way of liability, that the corporation had bank overdrafts of over $15,000; collateral loans of over $30,000; notes payable of over $52,000; loans payable of over $12,000; accounts payable of over $34,000; freight bills payable of over $1700; due warehouses, storage charges, etc., of over $37,000 and also nearly $17,000 due to officers (C., p. 371).

Furthermore, the statement contained in the petition that the financial condition of the company was approximately the same as when the audit was made, was absolutely correct. The money collected and on deposit diminished the available assets carried either as accounts receivable or advances to shippers.

Any cash in bank, appropriated to the payment of the Burton claim, would have depleted the sum available for the payment of the other current debts of the corporation, and probably precipitated insolvency.

The whole purpose of the equity receivership was to conserve the assets and to prevent bankruptcy. Nothing was shown in the case, to justify, for an instant, the claim that any loss resulted to the es-

tate, by reason of the appointment of a receiver, except the amount paid to the receivers and their counsel, which, of course, was examined and allowed by a Court of competent jurisdiction in Pennsylvania, and approved by the beneficiaries when release was given.

We contend, therefore, that this Court should not, in any way, supervise or criticize any act which would amount to a reflection upon the propriety of such conduct, by a Court of a sister State, in the allowance of fees.

Furthermore, there is nothing to show that Mr. Freeman, acting for the appellant, had any personal knowledge of the actual amount of money in bank, though he had kept in touch generally with the financial condition of the company. He did know that the amount in bank, at the date of the testator's death, was small, and properly assumed that this amount would not be materially increased during liquidation. He knew that the corporation owed debts, which had to be paid from time to time, that liquidation was going on, and he had a right to assume that the treasurer, being a party to the proceeding, knew all about the financial business of the corporation and that the petition, as verified by the oath of the treasurer, was accurate and correct, and that there was not sufficient available cash to pay Burton with safety.

Particular attention is directed to the established fact that the purpose of the receivership was to save the consequences of a possible adverse bankruptcy, and that the appellant and all concerned acted in

good faith. It may, or may not have been an error of judgment to start the receivership proceedings, but any loss attendant upon this situation cannot be chargeable to appellant in the settlement of the estate. If any error crept into the proceedings, the eminent attorney, who represented the beneficiaries, was a party thereto and he had every opportunity to take or refrain from taking the proceeding which was thought necessary for the protection of his clients' interest. The rights of his clients were protected by having him appointed as receiver. Surely the beneficiaries are now estopped from attempting to surcharge the accountants in view of the fact that they were, in effect, parties to the proceedings, and invoked the action of the Pennsylvania Court.

One very important fact, shown by the testimony and completely ignored by the Judge of the Orphans' Court and the Vice-Ordinary, was the status of the bank account of the corporation, at the time of the institution of the receivership proceedings in Philadelphia.

The entries in the check book introduced in evidence, covering deposits and withdrawals by check, show (Exhibit No. 1, C., p. 311):

Balance April 26, 1926	$2,064.96
Deposits:	
April 26, 1926	14,728.38
" " "	5,932.65

" 27, "	5,604.36	
" " "	741.90	
" 28, "	13,272.27	$42,344.52
Checks were drawn as follows:		
Nos. 20625 to 20653 on April 24, 1926, amounting to	$17,515.61	
Nos. 20654 to 20658, drawn on April 26, 1926, amounting to	5,950.28	
No. 20659, drawn on April 27, 1926, for	7.25	23,473.14
		18,871.38
April 28, 1926—deposit		2,418.08
		21,289.46
List of checks, payment stopped		14,094.12
		$35,383.58

The check book showed, from April 24, 1926, to April 27, 1926, checks Nos. 20625 to 20659 had been drawn.

Judge Smathers unconsciously fell into an error of fact, with respect to the availability of the money in bank for the payment of the Burton claim.

On April 26, 1926, Herbert W. Salus, the attorney of Burton, made demand upon the company for the payment of a very large sum of money. Mr. Freeman, the trust officer of the trust company, was advised by Mr. Weston, the secretary and treasurer of the corporation, that the latter did not have suf-

ficient funds with which to comply with the demand of Mr. Salus. This precipitated a crisis and the attorney of the company in Philadelphia, together with Mr. Gaskill, the attorney in New Jersey, were called in to consider the situation, and it was determined by all concerned, including Mayor Weaver, who was the personal counsel of the beneficiaries, who filed the exceptions in the court below, that an equity receivership was advisable to protect the interest of the company and preserve its assets. Mr. Weston joined with Mr. Freeman in making the necessary affidavits.

The testimony (C., pp. 128, *et seq.*), shows that the bill in equity was dictated on April 27, 1926, and actually sworn to early the following day, and immediately presented to the Federal Judge in Philadelphia, and the receivers were appointed with the consent of the corporation. Attached to the complaint was a copy of an audit made on March 2, 1926, and the statement was made in the complaint as follows:

> "Your complainants are informed and believe "and, therefore, aver that the condition of the "said company is approximately the same at "this time. A statement of the condition of "said company as of March 2, 1926, is attached "hereto and made part hereof and marked Ex- "hibit A."

The statement of Judge Smathers, in his opinion (C., p. 37) that at the time the bill of complaint for a receiver was filed, the corporation had, as cash

in bank, the sum of over $40,000, was possibly accurate technically, but this was wholly beside the point. The important question is not the amount of cash in bank, but how much was available to pay debts.

The check book, introduced in evidence as explained by the testimony (C., pp. 96, *et seq.*), shows the following facts, not disputed:

On the morning of April 26, 1926, there was on deposit in the Union Bank & Trust Company to the credit of the corporation	$2,064.96
Deposits were made April 26th in the morning	14,728.38
Deposits on the same day in the afternoon	5,932.65
Amount on deposit at close of business	22,725.99
Deposited April 27th in the morning	5,604.36
Deposited April 27th in the afternoon	741.90
Total deposits at the close of business April 27, without taking into consideration the checks theretofore drawn	29,072.25
Checks drawn on April 24, 26 and 27, Nos. 20625 to 20659 totaling	23,473.14
Making an available balance at the close of business April 27, after deducting the checks theretofore drawn, of	5,599.11
(This being the time that the bill of complaint in the receivership in Philadelphia was prepared)	
Deposited April 28th in the morning	13,272.27

Deposited April 28th in the afternoon	2,418.08
Making a total, as shown by the check book, after deducting all the checks drawn up to the close of business of April 28, 1926,	$21,289.46

The volume of receipts by checks was because the company was in liquidation.

Immediately upon the appointment of the receivers, they stopped payment on checks amounting to $23,473.14, which had theretofore been sent out and when these checks were presented, they were not paid.

There is no suggestion that the executor was, in any way, responsible for the stopping of payment on the checks. This was done by receivers in proper discharge of their duty. Neither was the executor responsible for the transfer of the account from the Union National Bank to the Corn Exchange National Bank, after the receivers were appointed, which is shown by stipulation (C., p. 310). It also appears that the Corn Exchange paid 2% on the balance until it was withdrawn. When it was deposited in another bank, the receivers were in receipt of 4% on the daily balances.

There is nothing in the case to warrant the assumption that the transfer of the funds from the

Union to the Corn Exchange, by the receivers, was the result of any bargain or arrangement between the receivers and the last named institution. Therefore, it is perfectly apparent that while the corporation had a credit in bank on the evening of April 27, 1926, of a deposit of money over $29,000, checks to the amount of over $23,000 had been theretofore issued and the actual available funds in bank, subject to the payment of the Burton claim, was only about $5,500, which was utterly insufficient to take care of the amount claimed.

The Orphans' Court Judge entirely overlooked the fact that the financial condition of the corporation, so far as an application for receivership in Pennsylvania was concerned, would not have been improved by a disclosure of these facts to the Court, because if any number of these checks, aggregating over $23,000, had been returned and there were insufficient funds in bank to pay them, when presented, adverse receivership or bankruptcy would have been precipitated at once. Therefore, it was decidedly inaccurate for Judge Smathers to state that the corporation had available cash for the payment of the Burton claim, of over $41,000, at the time the complaint was filed.

Therefore, when the complaint was sworn to, the actual book balance in bank, without deducting the checks then drawn, was about $29,000, as against which over $23,000 of checks were outstanding, so that the free balance was about $5,600. Deposits made later in the day of April 28, increased the balance in bank to $21,000 after deducting the checks which had theretofore been drawn. Furthermore,

there is no direct statement, in the bill filed in Pennsylvania, that there was only $350 cash in bank.

Appended to the bill, however, is the audit of March 2, 1926, which shows the fact that the condition generally was approximately the same.

Furthermore, the liabilities, as shown by the statement of March 2, 1926, were the following:

Bank overdrafts	$15,743.20
Collateral loans	30,878.30
Notes payable	52,549.00
Loans payable	12,395.67
Accounts payable	34,822.48
Freight bills payable	1,765.31
Storage charges due warehouses	37,872.44
Due to officers	16,913.12

making a grand total in excess of $200,000 of liabilities, which had to be taken care of, in some way, by the corporation.

In view of this situation, the statement contained in the opinion of Judge Smathers that the money in bank was more than sufficient to pay the pressing obligations, then outstanding against the company, is hardly accurate.

When the executor called to the attention of the Pennsylvania Court the financial condition of the corporation, the obligation of liquidation of the lat-

ter, was imposed upon the receivers, and the executor, as such, was relieved therefrom.

Under this situation, the statement contained in the opinion of Judge Smathers, as to closing out the corporation, that the receivers did no more than liquidate the assets of the company by collecting the bills of account and paying the liabilities of the company, is somewhat remarkable. He says, "This duty," as stated in the opinion of the Court, "was clearly the duty of the executor."

While the estate held a very large majority of the stock, it, as executor, could not have liquidated the assets of the corporation. That could necessarily be done only by the corporation itself or through its board of directors and the board consisted of three persons, of which the trust officer of the executor was one. Liquidation had been started.

The executor had attempted to complete this condition, but was prevented by threat of bankruptcy.

Furthermore, the statement, as made by Judge Smathers, that had the executor, prior to the filing of the bill for receivership in Pennsylvania, caused the books of the company to be audited, such audit would have revealed to the corporation that the company had over $41,000 cash in bank. This is not the fact, because when the bill for receivership was prepared, there was only $29,000 on deposit against which checks were out for over $23,000 and the available amount after the payment of these checks

was about $5,500, an amount insufficient to pay the Burton claim.

The checks, having gone out, would naturally be presented for payment. If the Burton claim was paid, some of these checks could not have been satisfied and that would have brought about a financial crisis in the affairs of the company, which would have resulted in receivership or bankruptcy. If disclosed to the Court in detail, this situation would have been one more potent reason why a receivership in equity was necessary to preserve the assets of the corporation.

Judge Smathers, in his opinion, also overlooked two very important factors which, in our judgment, are controlling in these circumstances.

First. That the duly authorized representative of the exceptants, to wit: John Weaver, participated in the application for the receivership, advised that it be done and accepted an appointment from the Federal Court, under the bill filed. It seems to us that this creates a situation which is precisely similar to one as if the exceptants themselves had participated in the receivership, consented that the bill of complaint be filed, made no objection to the appointment of the receivers, and then subsequently attempted to surcharge the executor by reason of the moneys awarded for receivers' and counsel fees by the Pennsylvania Court.

The exceptants are surely estopped by the participation of their attorney in the entire transaction from the start to the finish.

Second. Judge Smathers entirely ignored the situation which was so perfectly apparent, that the sending out of the checks, amounting to over $23,000, as against the bank balance on the evening of April 27, 1926, of about $29,000, would have resulted in some of the checks being dishonored, if the Burton claim was paid. This would have created a situation which was bound to bring about a receivership or a bankruptcy adversely to the efforts on the part of those interested in the corporation to preserve its assets, of the corporation, for the benefit of creditors and stockholders.

There can be no criticism whatever with respect to the manner in which the receivers conducted themselves and the loss to the estate of the decedent was caused exclusively by the fees which were allowed by the Federal Court to the receivers and their counsel. Certainly this Court ought not to supervise, or in any way, question the justness of these allowances. The record shows that exceptions were filed by the executor and the awards made were approved by the Court after discussion and investigation (C., p. 343).

In his opinion, Judge Smathers does not comment upon the effect of the general release introduced in evidence. The existence of such release, in our judgment, was sufficient to preclude any relief to the exceptants on the issues, as framed in the Orphans' Court.

No opinion was filed by the Vice-Ordinary. He

adopted the expression of opinion by Judge Smathers, without further comment.

After the appeal to the Prerogative Court was entered, the exceptions filed in the Orphans' Court were amended (C., pp. 62, *et seq.*).

Practically the only new question involved, was the allegation of a transfer by the receivers of bank balances from the Union National Bank to the banking department of the appellant (C., p. 69). To meet this allegation, additional testimony was taken in the Prerogative Court (C., p. 294). By this testimony, it appeared that the transfer of the bank balance was the result of a conference between the receivers and receivers' counsel, and not by suggestion of anyone connected with the appellant (C., pp. 296, *et seq.*).

It is established that the only reason for making this transfer was to have all of the bankable funds of the receivership in one institution. They were kept in the bank of the appellant for a short while upon interest at 2%, and subsequently deposited in another institution, upon which 4% was allowed.

ARGUMENT OF THE LAW.

FIRST.

The following is a general statement of law with respect to the standard of duty imposed upon an

executor or trustee in regard to a trust estate placed in his care for administration.

The duties and obligations of an executor are clearly set forth in the opinion of the Vice-Ordinary in *Heisler v. Sharp,* 44 N. J. Eq. 167 at 172:

> "All that the respondents (the executors) "were required to do was simply to do what "any man of ordinary prudence and caution "would, under the circumstances, have done. "So long as the executor acts in good faith, "with ordinary discretion and within the scope "of his powers, his acts cannot be successfully "assailed. No man is infallible, the wisest "make mistakes, that no man is responsible for "the consequences of his mistakes which are the "result of the imperfection of human judgment, "and do not proceed from fraud, gross care- "lessness or indifference to duty.
>
> "The executor may pay a debt which is just "though barred by the statute of limitations.
>
> *Purcell v. Purcell,* 1 McCarter 514.
>
> "He may also buy the peace of the estate "which he represents by compromising a law "suit or a doubtful claim.
>
> *Rodgers v. Hand,* 39 Equity, 270.
>
> "Indeed he may do anything within the scope "of his powers, without the least risk of per- "sonal liability for the consequences of his act "provided he exercises the care and judgment "of a man of ordinary prudence and sagacity. "That is a test which the Courts are required "to apply in all cases."

In *Smith v. Jones,* 89 N. J. Eq. 502, at 505, Vice-Ordinary Backes states the rule to be that:

> "The law exacts of an administrator or trus-
> "tee, in the performance of his duty, only the
> "utmost good faith, ordinary care and pru-
> "dence and reasonable diligence. When these
> "are fairly exercised, he is not responsible,
> "even though loss ensues."

The facts in the last mentioned case were as follows:

Deceased died intestate, survived by a son, daughter, and two grandsons of a deceased son. Before her death she had given to her son and daughter a check for $3,000. This check was given to her by the executor of her brother's estate, and the present administrator. Deceased left a note saying she had given this check to her daughter and son. Grandchildren requested administrator to sue, which he refused to do. They now file exceptions to his account. The Orphans' Court surcharged him with the amount of the check. The upper Court, on appeal, reversed the decision of the lower Court, holding that the administrator is not chargeable with the assets of the estate, which he failed to collect through an honest error of judgment.

Furthermore, an executor is not chargeable with loss sustained by an estate on account of the depreciation in value of the assets of the estate without misconduct or bad faith on his part. In *Dey v. Codmans,* 39 Eq. 259, the executor refused an offer

of $30,000 for certain lots of an estate, which had been valued at $95,000. The lots were afterward sold at public sale in order to close the estate for $1,470. The purchaser held the lots under an agreement of trust to divide the lots among the parties (including the executors). Exceptions to the account of the executors were filed in the Orphans' Court seeking to charge the executors with the losses sustained by the estate by reason of the refusal of the executors to sell. Held: Executors not liable for the loss. Commissions and counsel fees were allowed.

In the case of *New Jersey Trust & Safe Deposit Co.*, 73 Eq. 628, an attempt was made to surcharge the executors because of the latter's consent to alleged extravagant allowances to receiver and counsel. In discussing this question, the Court very carefully points out:

> "It is impossible in this case to review the "action of the Court of Chancery in determin- "ing what is a reasonable compensation to the "receiver and his counsel. It is not to be as- "sumed that that Court and the distinguished "Vice-Chancellor, who settled the case and ad- "vised the decree, made excessive and unwar- "ranted allowances. The presumption is, and "must be, that the allowances were made after "a consideration of the work done by the re- "ceiver and his counsel."

It seems clear that all the remainder of the learned Vice-Chancellor's opinion on this point is inconsis-

tent with the statement just quoted, and may, therefore, be considered as dictum.

In *Joslin v. Williams,* 76 Neb. 594, 112 N. W. 343, the Court, in rendering its opinion in favor of the plaintiff, who was seeking to charge the defendant with the costs of a wrongful receivership, points out in granting the relief asked for, that the case is not one where the appointment of a receiver was acquiesced in or agreed upon by the parties, or where it was finally determined that the appointment was justified. On the contrary, the appointment was resisted and a reversal of the order was procured.

Beach on Receivership, p. 806, Sec. 751, states the rule generally to be:

> "Where a receiver is wrongfully appointed "at the instance of the plaintiff and is later "removed, the receiver is entitled to his com- "pensation and costs out of the fund. Yet the "defendant is entitled to recover costs, etc."

This rule, as well as the case previously cited, lays special emphasis on the receivership having been previously vacated, or the order appointing the receiver reversed. A prerequisite to recovery in such cases, must necessarily be some previous objection, and a vacating of the receivership.

Every element necessary to work an estoppel is present in this case, in view of the fact that the

beneficiaries' attorney was a party to the receivership proceedings, that no protest was ever made; that the beneficiaries participated in the accounting, and that they finally gave a release to the receivers and their attorneys. Such knowledge and acquiescence was sufficient to raise an estoppel against them. See *Bayley's case,* 67 N. J. Eq. 566, setting forth this doctrine. This last case refused to allow the estoppel on the single ground that the party against whom it was desired to apply it, did not have the necessary notice.

In *Tucker v. Tucker,* 29 Eq. 286, it was held, where some of the devisees of an estate approved of, and others acquiesced in, an exchange of property made by the executor, they were, under the circumstances, estopped from afterwards questioning the propriety of the exchange.

SECOND.

Is not the general release given by the beneficiaries, who were the exceptants in the proceeding below, to the receivers of Nice & Schreiber Company and their counsel, in the Pennsylvania receivership proceeding, a bar to claim now made on the part of such beneficiaries to surcharge the accountants by reason of any matter connected with the conduct of the receivers and their counsel?

The facts of this case are such that the relationship between the various parties must necessarily

bring the case within one or more of the following classifications:

(a) The relationship between joint tort feasors, where there has been a release of one, or (b) the relationship between a principal and his surety, where the principal has been discharged, or (c) the relationship between the trustee and a *cestui que,* or (d) the executor acted as an independent agent.

A. In the leading case of the *Administrator of Crane v. Alling,* 15 N. J. Law, 423, it was held, a release of one of two joint and several obligors is a release of both. The Court in its opinion was careful to point out that the reason for this discharge was due to the fact that the formal release is conclusive evidence of a payment in full. In other words, the joint obligor is discharged because of this evidence of payment of any debt which may have been due. See also *Thompson-Houston Electric Company v. Murray,* 60 N. J. Law, 21.

The present case is further similar to a case where, under a death Act, a cause of action for a death is given to the personal representative for the sole benefit of the next of kin and the beneficiaries under this Act, give a release to the tort feasor. In such a case it has been uniformly held that the personal representative cannot maintain suit for the death resulting from the injury.

See

Williams v. Hoyt, 102 Atl. 703 (Me.);
Cogswell v. B. & M. Railroad, 101 Atl. 145 (N. H.);
Mella v. Northern S. S. Company, 127 Federal, 416.

In the case of *McKeering v. Pennsylvania Railroad,* 65 N. J. Law, 57, we have the following facts:

Defendant company maintained a relief fund and deceased, before his death, applied to be admitted to the membership in said fund, and in said application designated that the death benefit in event of his death should be payable to his sister. The deceased thereby agreed that his acceptance in the said membership should operate as a release of all claims for damages against the defendant arising from such injury or death. After the deceased's death, his sister accepted from the relief fund, the sum of $500, and gave a receipt of acquittance for the same. This is a suit brought by deceased's administratrix to recover damages.

Held: That the vested statutory right cannot be defeated by the release of Nora McKeering, the sister, nor by her acceptance of the relief fund. "No act on her part, unauthorized by the other next of kin, can bar their right to recover."

This last New Jersey case, however, does clearly indicate that the New Jersey Courts, when presented with a release by all the beneficiaries, would follow the weight of authority of the cases herebefore cited.

In *Chicago, etc., Railroad Company v. Wilcox,* 116 Federal, 913, the Court held that a valid release as conclusively estops the parties there litigating the claim released as if there had been a final judgment.

Hence, in the present case, under the authorities above cited, the legatees having given a release under seal, are conclusively estopped from questioning the actions of the receivers and the release itself is conclusive evidence of the fact that they have received full payment for any claim which they may have had, due to the receivership.

B. Whenever one person is liable to suffer a loss through failure of another to pay a debt or perform a duty, which the latter should pay or perform, the law extends to the person so liable, the rights and privileges of a surety. In the present case, even assuming, for the sake of argument, that the receiver was appointed for a solvent corporation, nonetheless it is clear that upon his appointment he became the one primarily responsible to those beneficially interested for the management of the estate. In him was placed the powers incident to his position to wind up the business. These powers continue in him until revoked by the Court upon application being made and upon petition showing that the receiver was improperly appointed. As long as this receivership continued, the receiver occupied the position of principal, and the executor merely that of surety. It is perfectly clear that the discharge or release of a principal by the creditor operates as a release of the surety. *In re Flax,*

39 N. J. Law Journal, 107; *Sholes v. Eisner*, 90 N. J. Law, 151.

C. A receiver holds the property of which he is given the care, in trust for all persons interested therein, whether parties to the suit or not. *Dagis v. Gray,* 16 Wall, 203.

His appointment is for the benefit of all parties interested and for the benefit of those ultimately entitled, and not in the first place for the benefit of those at whose instance the appointment was made. His duties, therefore, are substantially those of a trustee. The relationship between the executor and the beneficiary is also similar to the above trust relationship. In the present case, the exceptants, in their position as legatees, held a beneficial interest. Whatever rights the executor had must have arisen as a result of some right or interest accruing to those beneficially interested. In the present case the beneficiaries gave a general release to the receivers. The law seems to be clearly to the effect that any defense which may be raised to a suit by the *cestui que* against a third person may also be raised in a suit by a trustee against the same third person.

In view of the fact that the executor is normally permitted to sue without joining the legatee, the case becomes similar to one where there is a suit by a trustee under a statute allowing him to sue without joining his beneficiaries. In such a case, it has been held that any defense may be made which might have been made, had the beneficiaries been joined. *Central Trust Company v. Burton,* 43 N. W.

141. Clearly, in a suit by the beneficiaries against the receiver, the release would be a complete answer.

D. The executor was an independent agent, acting on behalf of the estate. It, as executor, merely asked for the appointment of receivers. That action, in itself, is not in any sense the approximate cause of the loss sustained by the estate.

THIRD.

Will this Court, in the settlement of the estate of the testator, review any of the acts of the United States District Court in Pennsylvania, in the receivership, and surcharge the accountant by reason of the conduct of the receivers or their counsel, which conduct received the approval and sanction of such Court?

Whenever the Court has jurisdiction of the subject-matter and of the necessary parties, its action in regard to the appointment of a receiver cannot be questioned in a collateral proceeding, whether erroneous or not. However erroneous such an order may be, it is binding not only on the parties, but upon everyone and everywhere until it is vacated in a direct application or reversed by superior authority, and must be regarded as regular in all things.

Lydick v. Neville, 287 Fed. 479;
Neely v. McGehee, et al., 2 Fed. 2nd, 853;
Pipe Company v. Water Company, 245 Fed. 846;
Pacific Coast Pipe Co. v. Conrad Water Co., 237 Fed. 673;
Shields v. Coleman, 157 U. S. 168.

Although a bill which seeks the appointment of a receiver may be defective, or the appointment is based upon an erroneous assumption that the pleading discloses a cause for equitable relief, or on an insufficient showing, or on an erroneous determination that the facts justfied it, everyone is nonetheless concluded by the appointment except in a direct proceeding.

Clark v. Brown, 119 Fed. 130;
Shinney v. North American Sav., etc., Ass'n, 97 Fed. 9.

See also *New Jersey Trust and Safe Deposit Company case, supra.*

In *Clark v. Brown, supra,* the facts were as follows: Upon a petition, receiver was appointed to take possession of a crop of flax. Receiver took over the flax, had it threshed, etc., and paid out considerable sums of money. Upon appeal, the bill to appoint a receiver was dismissed for want of equity. The receiver rendered his account and certain exceptions were taken. It was further held

that, since the bill showed ample averments justifying equitable cognizance, the appointment was not void, though erroneous. And further, since defendant (appellant) acquiesced in the receivership, the receivers' fair compensation and just expenditures should be paid from the fund instead of being charged to the complainant.

In *Riner v. Romey-Milburn Co., et al.,* 265 S. W. 963. It was held, there can be no liability for damages growing out of the appointment of a receiver in the absence of a showing that the appointment was sought and obtained maliciously, or without probable cause. In this case, the Court points out that the exceptants do not allege that they resisted the appointment of the receiver, nor did they allege that they made application to the Court in which the receiver was appointed, at any time to discharge the receiver.

Likewise, in *Joslin v. Williams, supra,* a condition precedent to recovery is an objection by the claimant to the appointment, and a later reversal of the order by the Court granting the same.

In Texas the Courts have gone so far as to hold that the appointment of a receiver being an act of the Court, no right of action can arise, although the appointment is improper.

Saunders v. Kempner, 32 S. W. 585.

Irrespective of the extreme view presented by the Texas case, *supra,* the problem here presented is

analogous to the case where an injunction has been obtained wrongfully.

In *Meyers v. Block,* 120 U. S. 206, it was held:

> "In the United States courts, in the absence "of a bond, protecting the defendant from the "damages of a wrongfully obtained injunction, "damages will not be granted unless malice "can be shown. The plaintiff is required to "make out a case of malicious prosecution in "order to recover. Certainly, in such a case, "the granting of a permanent injunction is con- "clusive as to the question of probable cause. "It is only where the injunction has been "granted *ex parte* and afterward the injunction "is dissolved, that any question of probable "cause arises."

In the present case, the receivership was not attacked in the District Court, in Pennsylvania, nor was the order granting the receivership ever reversed. On the contrary, the beneficiaries accepted the receivership by giving the release.

Since the receivership was not attacked nor the order granting it reversed, the exceptants are now precluded from showing a lack of probable cause. To permit the question of the propriety of the receivership proceedings in Pennsylvania to be now gone into, would be to open all receiverships to a collateral attack of the most dangerous kind.

ABSTRACT OF THE TESTIMONY TAKEN BELOW, SHOWING THE FACTS AND CIRCUMSTANCES HEREIN SET FORTH.

A. J. Davis, a member of the Philadelphia Bar, represented the corporation from about the first of January, 1925, up to the time of the receivership. He knew about the Burton claim (C., p. 128). Had information first on the morning of April 27, 1926, when Weston, who was the secretary and treasurer of the corporation, brought to Mr. Davis a letter which had been received from Herbert W. Salus, a member of the Philadelphia Bar, representing Mr. Burton.

After the letter was received, Davis inquired of Weston, who stated that the company was not in a position to meet the demands of the letter (C., p. 130). The Nice Company was in process of liquidation, by the action of its directors, and because of the situation, explained by Mr. Weston, a conference was had between the latter, Davis, Freeman and Gaskill (C. p. 130).

Subsequently, Mayor Weaver was brought into the discussion, and it was determined to apply for an equity receivership, and the papers were drawn that afternoon, so that the application could be made to the Federal Court in Philadelphia the next morning (C., p. 131). The paper was finally completed on the evening of the 27th of April (C., p. 132).

The next morning, Freeman and Weaver met at Davis' office, and a meeting of the corporation was held to consent to the application. This was on the 28th of April, 1926 (C., p. 132).

Weaver was brought into the matter upon the theory that he represented the beneficiaries and was suggested as co-receiver for that reason.

Smith and Weaver were suggested to the Court as receivers, and application was made on the morning of the 28th (C., p. 133).

The bill was verified by Weston and Freeman on the morning of the 28th and the appointment was made the same day. Davis was of the opinion that a receivership was necessary to preserve the assets. Weaver coincided with this opinion (C., p. 133).

All parties relied upon the judgment, not only the persons above named, but Gaskill and Weaver (C., p. 134).

The petition of the beneficiaries filed in the Federal Court, upon which the $10,000 settlement was subsequently made, was offered in evidence as Exhibit 3½ (C., p. 142), and is copied in the transcript of the Record (C., p. 250).

Mr. Davis, upon being recalled, identified Exhibit 3½ and also identified a copy of an answer filed thereto, which was marked Exhibit 4 (C., p. 143), and the same was copied in the record on page 143.

He also was shown a copy of the brief summary of the conduct of the receivership, which was identified and marked Exhibit 5 (C., p. 156), and the copy is inserted in the transcript of testimony (C., p. 156).

The original of the papers exhibited to Mr. Davis were destroyed after a conference in Judge Dickinson's office, and the papers produced were office copies (C., p. 184).

Mr. Davis also produced Judge Dickinson's letter

(C., p. 186) offered in evidence as Exhibit 6 and copied on page 186.

$10,000 was paid by the receivers and their counsel and a release was executed.

Copy of release is inserted in Record (C., p. 190, marked Exhibit 7).

In the preparation of the bill for the receivership, Davis was acting for the bank and on behalf of Mr. Weston as a stockholder, and that the bank was also a creditor as well as a stockholder (C., p. 196).

On cross-examination, Davis says that one of the reasons which induced him to consent to the receivership, was the fact that the company was in process of liquidation (C., p. 196).

Beginning on page 197, Mr. Davis describes the character of the work done by the receivers and counsel.

Salus, representing Burton, made demand and threatened bankruptcy independently of the letter referred to (C., p. 198). He relied on the word of the secretary and treasurer of the company (C., p. 199). Payment of all checks was stopped (C., p. 201).

Sidney T. Smith, one of the receivers, was called as a witness. He first knew about the proposed receivership on the evening of the 27th of April, 1926 (C., p. 203), and the complaint was sworn to on the morning of the following day and the witness was appointed one of the receivers (C., p. 204).

The witness describes the proceedings which resulted in giving the release for $10,000 (C., p. 205). Such sum was paid to attorneys of exceptants.

The witness, Freeman, described exactly what happened after receipt of Salus' letter, and the conference with Gaskill, Weaver, etc. (C., p. 215). It was determined to have an equity receivership. He got in touch with Gaskill late in the afternoon of the 27th. Explained the situation to Weaver and the latter agreed that the receivership was advisable and he stated that he was willing to act as one of the receivers (C., p. 216).

At 9 o'clock in the morning of April 28th, the petition was signed and verified (C., p. 216).

Explains the apparent inconsistency as to the amount of cash on hand and the allegations in the petition for receiver (C., p. 217).

Acted under the advice of counsel and particularly Mr. Weaver, who is the counsel for the foregoing beneficiaries (C., p. 218).

Always consulted with Mr. Weaver about anything in connection with the estate (C., p. 218).

Received a letter dated April 22, 1926, from Weaver, marked Exhibit 14 and copied on page 262.

Received another letter dated May 13th, Exhibit 15 (C., p. 220, and there copied).

Witness received a letter from Weaver, dated October 14, 1926, marked Exhibit 16 (C., p. 263).

Received another letter dated October 16, 1926, from Weaver (C., p. 264).

Another letter dated December 15, 1926, received from Weaver, Exhibit 18 (C., p. 264).

Letter dated May 10, 1927, received from Weaver, marked Exhibit 19 (C., p. 265).

Mr. Freeman, vice-president and trust officer of appellant, was sworn (C., p. 206).

Will was probated on March 27, 1926. The witness first came in contact with Mayor Weaver a few days after Mr. Nice's death. Conversed about possible contest over the will and subsequently about the disposition of the Nice & Schreiber business (C., p. 207).

Freeman endeavored to sell the business as a going concern (C., pp. 207, *et seq.*).

Efforts to sell the business as a going concern failed (C., p. 210).

The directors of the Nice & Schreiber Company attempted to liquidate the company under the New Jersey laws (C., p. 211), and liquidation was continued until the letter was received from Mr. Burton's attorney as to the immediate threat of bankruptcy proceedings (C., p. 211).

The letter was received from Mr. Burton April 19, 1926, marked Exhibit 9, page 211.

On the same day a letter was received from Burton withdrawing all offers to buy the stock of the corporation, marked Exhibit 10, page 212.

April 21, 1926, witness sent to Weaver a letter in relation to the sale of the stock of the Nice & Schreiber Company, Exhibit 11 (C., p. 213).

On April 22, 1926, witness sent to Weaver another letter with reference to the sale of the stock (C., p. 214), letter marked Exhibit 12.

When the Salus letter, about the Burton claim, was received, he telephoned Weston and told him about the contents and asked whether he had enough money on hand to pay the claim and he said, "No." He then asked for a conference.

Another letter received from Weaver, dated May 25, 1927, marked Exhibit 21 (C., p. 266).

Another letter received from Mr. Furst dated December 13, 1927, admitted as Exhibit 22 (C., p. 267).

Sent a letter to Furst on November 28, 1928, marked as Exhibit 23 (C., p. 268).

Furst wrote to the bank a letter dated December 18, 1928, Exhibit 24 (C., p. 269).

Weaver wrote Furst December 8, 1928, letter Exhibit 25 (C., p. 270).

Weaver told witness he had a power of attorney to represent the heirs in March, 1926 (C., p. 229).

The statement, a copy of which was attached to the complaint for receiver showed $350 in bank as of March 2, 1926, which was the day of Mr. Nice's death.

Inquired of Weston after Salus' letter was received (C., p. 230).

Assumed the company was solvent but was not sure of it. Inquired of Weston from time to time as to the amount of cash on hand while they were trying to liquidate the company (C., p. 230).

Weston told witness from time to time the cash condition of the company (C., p. 230).

Check book on April 26th showed there was a balance of $18,000 (C., p. 233).

There was not $41,000 to the credit of the company at the Union National Bank because checks of $21,000 had been drawn against it C., p. 234).

On April 28th there were outstanding checks of $14,000 and on the 26th or 27th there were $22,000 in checks outstanding (C., p. 233).

There were $14,000 in checks outstanding on the date of the petition.

On the 27th, $14,000 of checks were stopped payment upon by the receivers (C., p. 266).

Describes offers for the sale of the business as a going concern (C., pp. 238, *et seq.*).

Weston was very attentive to the business affairs of the company and while old, he was still active (C., p. 241).

Witness had no reason to believe that Weston would deceive with reference to the financial condition of the company (C., p. 242).

Believed Weston's statement (C., p. 242).

SUMMARY.

Of course, in the last analysis, the question involved here is whether or not good faith and reasonable discretion were exercised by the executor and also whether or not any act of the executor resulted in loss to the estate.

The situation with which the executor was confronted at the time application was made for receiver must, of necessity, control the question of the standard of duty imposed upon it.

The butter and egg business is an extremely hazardous one. In late years, it had not been conducted profitably because of the illness of the testator.

Because of the latter condition, the business had been carried on by subordinates, Burton and Lippincott, and apparently the relations existing between these two gentlemen were not entirely harmonious.

When Mr. Nice died in the early part of March, 1926, the financial condition of the corporation is shown by the inventory, which was taken on March 2nd of that year. Of the current assets shown by the statement to be about $275,000, there was only $350 in cash. The remaining assets were practically made up of accounts receivable, advances to shippers for merchandise in transit and inventories.

As against these current asssets, the current liabilities were over $203,000, consisting principally of collateral loans, notes and accounts payable, storage charges and bank overdrafts of over $15,000. This latter condition was serious.

The assets were not all available apparently because the receivers were unable to collect a very large number of outstanding accounts.

The executor made an effort to turn over the business as a going concern to those gentlemen who had charge of the same during the illness of Mr. Nice, but was unable to do so.

A proposition to purchase, submitted by Burton, had been accepted, after which the former repudiated the offer.

Under these conditions there was no feasible action for the corporation to take, other than liquidation and which was in progress, under the authority of the directors.

In the course of liquidation, collections were being made and the debts were being paid.

Checks to the amount of over $23,000. were drawn and sent out between April 24th, and April 27, 1926.

The demand made by the attorney of Burton for the payment of the latter's claim created a crisis, which resulted in the conference with all concerned,

including the attorney of the beneficiaries, who was fully advised of the situation.

When Burton's demand was made, the corporation did not have sufficient available funds in its bank account to pay the claim; to do which, it would have been necessary to repudiate some of the checks which had been sent out to pay the accounts of Western shippers.

The stopping of payment of any of these checks would have produced a situation inevitably resulting in bankruptcy or insolvency.

In view of this situation, after a full and complete conference, it was decided to apply for an equity receivership to preserve the assets and with this conclusion, the attorney of the beneficiaries agreed and was subsequently made one of the receivers, as their representative.

There was no lack of good faith in the application for the appointment of receivers.

The financial condition of the corporation, when the bill was filed, was substantially the same as when the audit was made on March 2, 1926.

The allegation in the complaint was an absolutely truthful statement.

Furthermore, the loss to the estate, by reason of the receivership, was not occasioned by the action of the executor in making the application. If there was any cause whatever for the loss, it was due entirely to the orders of the Pennsylvania Court in making the allowance to receivers and counsel. Against some of these allowances, the executor protested.

The beneficiaries, in giving a complete and general release to the receivers and their counsel, made it

impossible for the executor to take any proceedings whatever against the receivers and counsel respecting the fees paid.

The result, therefore, is that nothing the executor did was in evidence of bad faith or lack of proper judgment and the loss to the estate was ratified and sanctioned by the beneficiaries in executing the general release.

The executor relied, not upon its own judgment, but consulted with the attorney of the estate, the attorney of Nice & Schreiber Company and particularly the attorney representing all the beneficiaries. What more could be reasonably expected of the executor?

We submit, therefore, that the decree appealed from should be reversed.

STARR, SUMMERILL &
LLOYD,
Proctors of Appellant.
LEWIS STARR,
Of Counsel.