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Notice of Appeal.

NOTICE OF APPEAL.

Filed September 13, 1922.

ESSEX COUNTY CIRCUIT COURT.

ANNA A HAMILTON, Admx. of WILLIAM H. ARMSTRONG, de- ceased, <i>Plaintiff,</i> <i>vs.</i> ORANGE SAVINGS BANK, <i>Defendant.</i>	}	<i>Action at Law. Notice of Appeal</i>	10
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*To William A. Lord, Esq., attorney for the
above-named defendant, or whom it may con- 20
cern:*

SIR:

TAKE NOTICE, that the plaintiff appeals to the
Court of Errors and Appeals of New Jersey
from the whole of the judgment entered in this
case, and from each and every part thereof.

Respectfully, &c.,

JOHN D. ANDERSON, 30
Attorney for Plaintiff.

Dated September 11, 1922.

Endorsed.

Service of the within notice of appeal is hereby
acknowledged this September 12, 1922.

WILLIAM A. LORD,
Attorney of Defendant.

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Summons.

SUMMONS.

Filed February 24, 1921.

10 The State of New Jersey to
 (SEAL) Orange Savings Bank. YOU ARE
 SUMMONED to answer the annexed
 10 complaint of William H. Armstrong in an action
 at law in the Essex County Circuit Court. AND
 TAKE NOTICE that unless you file your answer to
 said complaint with the Clerk of the Essex
 County Circuit Court, at Newark, within twenty
 days after service upon you of this writ and
 the annexed complaint, the plaintiff may pro-
 ceed in the suit and judgment may be entered
 against you.

20 WITNESS, Nelson Y. Dungan, Judge of the
 Essex County Circuit Court, at Newark, this
 24th day of February, nineteen hundred and
 twenty-one.

JOHN H. SCOTT,
 Clerk.

JOHN D. ANDERSON,
 Attorney.

30

40

Complaint.

COMPLAINT.

Filed February 24, 1921.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM H. ARMSTRONG,

Plaintiff,

vs.

ORANGE SAVINGS BANK,

Defendant.

*Action at
Law.*

Complaint.

10

Plaintiff, residing at Rathdooney, Ballymote, County Sligo, Ireland, Kingdom of Great Britain, for a cause of action says:

1. Defendant is and was on the dates herein-
after named a corporation of the State of New
Jersey engaged among other things in the busi-
ness of conducting a savings bank in the City
of Orange, Essex County, New Jersey.

20

2. On June 18, 1894, plaintiff opened an ac-
count with defendant and deposited with defend-
ant the sum of seven hundred dollars (\$700.00),
receiving a book of account, known as a deposit
book, therefor, which book bore the number
18,031. In the month of January, 1896, there
was credited to plaintiff by defendant on said
book the sum of thirty-two dollars (\$32.00) as
interest. On August 10, 1896, plaintiff deposited
with said defendant a further sum of fifteen
dollars (\$15.00). In the month of July, 1897,
there was credited to plaintiff by defendant on
said book the sum of twenty-four dollars and
twenty-eight cents (\$24.28) as interest to July 1,
1897.

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40

Complaint.

On March 23, 1896, plaintiff withdrew from said account the sum of two hundred dollars (\$200.00).

10 No further withdrawals have been made by plaintiff nor anyone for him, and on October 18, 1920, there was due to plaintiff from defendant on said account the sum of five hundred seventy-one dollars and twenty-eight cents (\$571.28) with interest from July 1, 1897, or in all a sum of twelve hundred ninety dollars and fifty-one cents (\$1,290.51).

20 3. On October 18, 1920, plaintiff caused to be presented to defendant the said pass book No. 18,031, and made a demand for payment of the amount of principal and interest due on said account, which demand was then and there refused.

4. Defendant has ever since refused to pay plaintiff the amount due on said account. Plaintiff demands as damages the amount of twelve hundred ninety dollars and fifty-one cents, with interest from October 18, 1920.

JOHN D. ANDERSON,
Attorney for Plaintiff.

30

40

Answer.

ANSWER.

Filed April 15, 1921.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM H. ARMSTRONG,

Plaintiff,

vs.

ORANGE SAVINGS BANK, *et al.*,

Defendants.

10

Answer.

The answer of Orange Savings Bank, a corporation of the State of New Jersey, having its principal office for the transaction of business in the City of Orange, County of Essex and State of New Jersey, says: 20

1. It admits the allegations of paragraph 1 of the complaint.

2. It admits that on June 18, 1894, the plaintiff opened an account with this defendant and deposited with this defendant the sum of \$700.00, receiving a book of account, known as a deposit book, therefor, which book bore the number 18,031. It admits that in the month of January, 1896, there was credited to the plaintiff by this defendant on said book the sum of \$32.00 as interest. It admits that on August 10, 1897, the plaintiff deposited with this defendant a further sum of \$15.00. It admits that in the month of July, 1897, there was credited to the plaintiff by this defendant on said book the sum of \$24.28 as interest to July 1, 1897. It admits that on March 23, 1896, the plaintiff withdrew from said account the sum of \$200.00. But it denies that 30
40

Answer.

no further withdrawals have been made by the plaintiff, or by any one for him; and it denies that on October 18, 1920, there was due to the plaintiff from this defendant on said account the sum of \$571.28, with interest from July 1, 1897, or in all the sum of \$1,290.51, or any other
10 sum.

3. It has no knowledge or information sufficient to form a belief as to the matters and things alleged in paragraph 3 of the complaint.

4. It admits the allegations contained in paragraph 4 of the complaint.

SECOND DEFENSE.

This defendant says:

On August 17, 1917, the Prerogative Court of
20 New Jersey, having jurisdiction of the matter, upon the petition of one William P. McMichael and the affidavits thereto annexed, adjudicated and decreed that said William H. Armstrong, the plaintiff, had departed this life, and thereupon ordered that said William P. McMichael be and he was thereupon duly appointed as administrator of the goods and chattels, rights and credits which were of William H. Armstrong,
30 deceased. A copy of the letters of administration issued to him as such administrator is hereto annexed and made a part hereof, as Schedule "A." Thereafter said William P. McMichael, as such administrator, having duly qualified, filed with this defendant a copy of his said order of appointment, certified under the hand and seal of the said Prerogative Court, by the Register thereof (a true copy of which said order of appointment is hereto annexed and made a part hereof, as Schedule "B"), together with
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Answer.

said certified copy of letters of administration, and proved that said bank or deposit book No. 18,031, showing the account of the said William H. Armstrong, deceased, with this defendant, had been lost, and made a demand for payment of the amount of principal and interest then due on said account; and thereupon this defendant paid over to said William P. McMichael, as administrator aforesaid, all the moneys, with the interest thereon accrued, on deposit to the credit of the said William H. Armstrong, deceased. 10

SCHEDULE "A."

PREROGATIVE COURT.

STATE OF NEW JERSEY.

I, Thomas F. Martin, Register of the Prerogative Court of the State of New Jersey, do CERTIFY that on the 17th day of August, in the year of our Lord one thousand nine hundred and seventeen, administration of the goods and chattels, rights and credits which were of William H. Armstrong, late of the County of Essex, who died intestate, was granted by Edwin Robert Walker, Ordinary or Surrogate General and Judge of the Prerogative Court of the State of New Jersey, to William P. McMichael, of the County of Monmouth, who is duly authorized to administer the same agreeably to law. 20 30

Witness my hand and the seal of the Prerogative Court, at
(SEAL) Trenton, this twentieth day of August, in the year of our Lord one thousand nine hundred and seventeen.

THOMAS F. MARTIN,

Register. 40

Answer.

SCHEDULE "B."

PREROGATIVE COURT OF NEW JERSEY,

10	In the matter of the Estate of WILLIAM H. ARMSTRONG, deceased.	}	Order Appointing Adminis- trator.
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20 Upon reading and filing the petition and affi-
davit thereto annexed and it appearing that Wil-
liam H. Armstrong has departed this life and
that he was a single man, of mature age, and
that he lived on Railroad place, East Orange,
New Jersey, about the year 1894, and that about
seventeen years ago he left to visit his parents
in Ireland, where he was born, and that they
both died there, and that William H. Armstrong
died there thereafter, and it further appearing
that William H. Armstrong was a driver and
that he had moneys held in trust for his benefit
amounting to about the sum of \$817.51, it is on
this 17th day of August, 1917, ORDERED that Wil-
liam P. McMichael, of Asbury Park, New Jersey,
a fit person and a resident of New Jersey, be
30 appointed administrator of the goods, chattels,
rights and credits which were of William H.
Armstrong, deceased, and that the said adminis-
trator file a bond with the Registrar of this
Court in the sum of \$1,650, as required by the
statute, for the faithful performance of his duties
as such administrator; and it is further ordered
that the said administrator be permitted to em-
ploy T. F. Bedle to aid him in the collection

Answer.

of the assets of the said estate and that he is
to be paid for his services as therein stated.

E. R. WALKER,
Ordinary.

Respectfully advised,

JOHN H. BACKES, V.-O.

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Endorsed:

“Filed Aug. 17, 1917.

THOMAS F. MARTIN,
Register.”

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Notice.

NOTICE.

Filed November 7, 1921.

ESSEX COUNTY CIRCUIT COURT.

10	WILLIAM H. ARMSTRONG, <i>Plaintiff,</i> <i>vs.</i> ORANGE SAVINGS BANK, <i>Defendant.</i>	}	<i>Action at Law. Notice.</i>
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*To William A. Lord, Esq., and Charles B. Storrs,
Esq., attorneys for the above-named defendant,
or whom it may concern:*

20 TAKE NOTICE that on Wednesday, the 14th day
of December, 1921, pursuant to an order of this
Court, dated the 29th day of September, 1921, I
shall take the depositions *de bene esse* of Wil-
liam H. Armstrong, the plaintiff, and a material
witness in this cause, before William Hunter,
Esq., Commissioner specially appointed by this
Court, between the hours of ten in the forenoon
and four in the afternoon of said day, at the
30 office of said William Hunter, in the City of
Belfast, Ireland, Great Britain, and you are
hereby notified to be present at the taking of such
depositions, and to put questions and cross ex-
amination, if you shall see fit.

Yours, etc.,

JOHN D. ANDERSON,
Attorney for Plaintiff.

Affidavit.

AFFIDAVIT.

Filed November 7, 1921.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM H. ARMSTRONG,

Plaintiff,

vs.

ORANGE SAVINGS BANK,

Defendant.

*Action at
Law.*

Affidavit.

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

Edward Roesken, of full age, being duly sworn, on his oath deposes and says that on Saturday, November 5, 1921, at 10 o'clock in the forenoon he served a true copy of the annexed notice upon William A. Lord, Esq., attorney for the defendant in the above-stated cause, by handing said copy to the said William A. Lord at his law office, No. 288 Main street, Orange, New Jersey, and exhibiting at the same time the original of said notice, which is annexed hereto.

20

EDWARD ROESKEN.

30

Sworn to and subscribed before
me this 7th day of November,
1921.

WILLARD S. MUCHMORE,

A Master in Chancery of N. J.

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Amended Notice.

AMENDED NOTICE.

Filed November 21, 1921.

ESSEX COUNTY CIRCUIT COURT.

10	WILLIAM H. ARMSTRONG,	}	Action at Law.
	<i>Plaintiff,</i>		
	vs.		
	ORANGE SAVINGS BANK,	}	Amended Notice.
	<i>Defendant.</i>		

*To William A. Lord, Esq., attorney for the
above-named defendant, or whom it may con-
cern:*

20 SIR:

TAKE NOTICE, that on Wednesday, the 14th day
of December, 1921, I shall take the depositions
de bene esse of William H. Armstrong, the plain-
tiff and a material witness in this cause, before
William Hunter, Esq., Commissioner especially
appointed by this Court, between the hours of
ten in the forenoon and four in the afternoon
of said day, who will take said testimony at the
30 office of William J. O'Reilly, in the Town or City
of Sligo, in the County of Sligo, Ireland, King-
dom of Great Britain; and this notice is given
to you to call your attention to the fact that the
testimony will not be taken in the City of Bel-
fast, but as before noted in the office of William
J. O'Reilly, in the Town or City of Sligo afore-
said.

Yours, etc.

JOHN D. ANDERSON,
Attorney for Plaintiff.

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Affidavit.

AFFIDAVIT.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM H. ARMSTRONG,	} <i>Action at</i>	10	
<i>Plaintiff,</i>			} <i>Law.</i>
<i>vs.</i>			
ORANGE SAVINGS BANK,	} <i>Affidavit.</i>		
<i>Defendant.</i>			

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

Edward Roesken, of full age, being duly sworn, on his oath deposes and says that on Friday, November 18, 1921, at 2:45 o'clock in the afternoon he served a true copy of the annexed amended notice upon William A. Lord, Esq., attorney for the defendant in the above-stated cause, by handing said copy to the said William A. Lord at his law office, No. 288 Main street, Orange, New Jersey, and exhibiting at the same time the original of said notice, which is annexed hereto. 20

EDWARD ROESKEN. 30

Sworn to and subscribed before me this 19th day of November, 1921.

JAMES LEO MCKENNA,
Attorney at Law of New Jersey.

Notice to Strike Out Answer.

NOTICE TO STRIKE OUT ANSWER.

Filed January 7, 1922.

ESSEX COUNTY CIRCUIT COURT.

10	WILLIAM H. ARMSTRONG, <i>Plaintiff,</i> <i>vs.</i> ORANGE SAVINGS BANK, <i>Defendant.</i>	} <i>Action at</i> } <i>Law.</i> } <i>Notice.</i>
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To William A. Lord, Esq., attorney of the above-named defendant, or whom it may concern:

20 TAKE NOTICE that on Friday, January 13, 1922, at two o'clock in the afternoon of said day, or as soon thereafter as counsel can be heard, in the Court House at Newark, New Jersey, pursuant to the oral directions of the Honorable Nelson Y. Dungan on the previous argument of this matter, I shall renew my motion to strike out the following portion of paragraph 2 of the answer herein: "But it denies that no further withdrawals have been made by the plaintiff, or by any

30 one for him; and it denies that on October 18, 1920, there was due to the plaintiff from this defendant on said account the sum of \$571.28, with interest from July 1, 1897, or in all the sum of \$1,290.51, or any other sum," on the ground that the denial contained therein is false and frivolous and intended to prejudice, embarrass and delay a fair trial of this action, and is made without reasonable cause.

40 At the same time and place I shall apply to the above-entitled Court, in the Court House at

Notice to Strike Out Answer.

Newark, New Jersey, to strike out the second defense of defendant's answer on the ground that said second defense does not set up any legal grounds of defense to the complaint.

At the same time and place I shall also move to strike out the counter-claim filed by said defendant on the ground that said counter-claim does not set up any cause of action against the plaintiff. 10

At the same time and place I shall move the Court for leave to enter summary judgment on the pleadings in favor of the plaintiff and against the defendant for the amount demanded in the complaint.

Yours respectfully,

JOHN D. ANDERSON,
Attorney for Plaintiff. 20

Service of a copy of the within Notice is hereby acknowledged this 6th day of January, 1922.

WILLIAM A. LORD
Attorney for Defendant.

Order.

ORDER.

Filed March 31, 1922.

ESSEX COUNTY CIRCUIT COURT.

10	WILLIAM H. ARMSTRONG,	}	<i>Action at Law. Order.</i>
	<i>Plaintiff,</i>		
	<i>vs.</i>		
	ORANGE SAVINGS BANK,		
	<i>Defendant.</i>		

It appearing to the Court that William H. Armstrong, the above-named plaintiff, departed this life at Rathdooney, Ballymote, County Sligo, Ireland, Kingdom of Great Britain, on January 5, 1922, and that subsequently and on March 29, 1922, that letters of administration on the estate of the said Armstrong, within the State of New Jersey, were granted by the Surrogate of Essex County to Anna Armstrong Hamilton, of 328 Main street, Orange, New Jersey; and that said administratrix should be substituted in the place and stead of the said Armstrong, as plaintiff in the above-entitled action, and the defendant herein consenting thereto, it is on this 31st day of March, 1922, on motion of John D. Anderson, attorney for plaintiff,

ORDERED, that Anna Armstrong Hamilton, administratrix of the estate of William H. Armstrong within the State of New Jersey, be and she is hereby substituted as plaintiff in this action in the place and stead of William H. Arm-

Order.

strong, deceased; and that the record and proceedings in this case be amended accordingly.

NELSON Y. DUNGAN,
Circuit Court Judge.

I consent to the entry of the above order.

WILLIAM A. LORD,
Attorney for Defendant.

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30

40

Decision.

DECISION.

Filed July 15, 1922.

ESSEX COUNTY CIRCUIT COURT.

10	ANNA A HAMILTON, Administra- trix of WILLIAM H. ARM- STRONG, deceased,	) <i>Plaintiff,</i>	<i>Decision.</i>
	<i>vs.</i>		
	ORANGE SAVINGS BANK, <i>Defendant.</i>	)	

John D. Anderson, attorney of plaintiff.

20 William A. Lord, attorney of defendant.

DUNGAN, J.

This matter originally came before the Court upon a motion made by the plaintiff to strike out the answer of the defendant. When the motion came on for argument it was agreed that the facts were not in dispute, and that the Court should hear and determine the case upon the pleadings, the arguments of counsel and the
 30 agreed facts.

These facts are that on June 18, 1894, William H. Armstrong, plaintiff's intestate, opened an account in the bank of defendant, that thereafter there were sundry transactions involving deposits and withdrawals, the last being a withdrawal in March, 1896, after which there were no transactions with Armstrong until October 18, 1920, when he made a demand on the defendant for payment of principal and interest
 40 due on said account, which was refused; that in

Decision.

the year 1897 Armstrong left America and went to Ireland, where he remained up to the time of the commencement of this suit; that on August 17, 1917, more than twenty-one years after the last transaction with the defendant, the Prerogative Court of this State decreed that William H. Armstrong had departed this life, and issued letters of administration on his estate to William P. McMichael, who qualified as such administrator and who filed with the defendant a certified copy of his letters of administration, gave satisfactory evidence to the bank that the deposit book had been lost and demanded payment to him of the account of the deposit with interest, and this amount was paid to him by the defendant. 10

During the pendency of this suit Armstrong died and the present plaintiff was appointed administratrix of his estate. 20

Upon these facts the plaintiff claims the right to recover against the bank under the authority of *Jochumsen v. Suffolk Savings Bank*, 3 Allen (Mass.) 87; *Scott v. McNeal*, 154 U. S. 34, and *Griffity v. Frazier*, 8 Cranch 24; and criticises or distinguishes the cases of *Roderigas v. East River Savings Institution*, 63 N. Y. 460, and *Plume v. Howard Savings Institution*, 17 Vr. 211, upon which the defendant relies. 30

The latter case was in the New Jersey Supreme Court and the opinion of the Court was written by Chief Justice Beasley, in which he holds that a decree of the Orphans' Court, granting letters of administration on a petition and proofs, cannot be called in question in a collateral proceeding, and the same reasoning is applicable where the letters are granted by the Prerogative Court, as in the case in hand. 40

Decision.

Although the decision in *Roderigas v. East River Savings Institution*, which is a case substantially similar to this one, is criticised by other courts, Chief Justice Beasley in the Plume case speaks of it as a "carefully considered case," and refers, apparently with approval, to the argument and decision in that case. He says that "its reasoning, notwithstanding the adverse criticism to which it has been subjected appears to be of great weight." "That a conclusive efficacy should be given to letters of administration by whatever tribunal issued, so far as merely collateral impeachment is concerned, is a plain dictate of sound public policy, for few things can be more oppressive than to require the debtors of a person who chooses so to absent himself as to give rise to a judicial conclusion that he is dead, to bear the burden of paying the debts they owe to such absentee, to his representative duly appointed according to legal forms, and at the same time to assume the risk of such payment being afterwards declared to be invalid, on the ground that such absentee was still alive. The doctrine of the nullity of such grants of administration would also be attended by the further disastrous result of rendering the surrogate or other court of limited jurisdiction liable to be treated as wrongdoers for everything that should be done by virtue of such letters, and which might prove detrimental to the interests of the person supposed to be dead."

Although the Plume case is not exactly like this, in that it did not appear in that case that plaintiff's intestate was actually alive when administration was granted, my view is that the favorable comment of Chief Justice Beasley

Decision.

upon the Roderigas case is an indication of the policy of the courts of this State upon the precise question here involved, which is, "Whether payment to an administrator, duly appointed by the Prerogative Court, of a person supposed to be dead, upon due proof of death and intestacy, but who, it afterward develops, was living at the time such letters were granted, is an absolute discharge of the debt, and valid and conclusive against an administratrix appointed after the decease of such person, in a suit brought by the administratrix to recover the same debt." 10

I think this question must be answered in the affirmative and I decide that the payment by the defendant to William P. McMichael, administrator appointed by the Prerogative Court in 1917, was a discharge of its debt to William H. Armstrong and that the plaintiff in this suit is not now entitled to recover that debt. I therefore give judgment against the plaintiff and in favor of the defendant. 20

NELSON Y. DUNGAN,
Circuit Court Judge.

30

40

Rule for Judgment.

RULE FOR JUDGMENT.

Entered August 7, 1922.

ESSEX COUNTY CIRCUIT COURT.

10	ANNA A HAMILTON, Administra- trix of WILLIAM H. ARM- STRONG, deceased,	}	<i>Plaintiff,</i> <i>vs.</i> <i>Defendant.</i>	<i>Rule for Judgment.</i>
	ORANGE SAVINGS BANK,			

20 This action was tried before Judge Nelson Y. Dungan, without a jury, upon an agreed state of facts, in the Essex Circuit, and the cause having been heard and submitted to the Court, I do find the facts to be that on June 18, 1894, William H. Armstrong, plaintiff's intestate, opened an account in the bank of defendant, that thereafter there were sundry transactions involving deposits and withdrawals, the last being a withdrawal in March, 1896, after which there were

30 no transactions with Armstrong until October 18, 1920, when he made a demand on the defendant for payment of principal and interest due on said account, which was refused; that in the year 1897 Armstrong left America and went to Ireland, where he remained up to the time of the commencement of this suit; that on August 17, 1917, more than twenty-one years after the last transaction with the defendant, the Prerogative Court of this State decreed that William

40 H. Armstrong had departed this life, and issued

Rule for Judgment.

letters of administration on his estate to William P. McMichael, who qualified as such administrator and who filed with the defendant a certified copy of his letters of administration, gave satisfactory evidence to the bank that the deposit book had been lost and demanded payment to him of the amount of the deposit with interest, and this amount was paid to him by the defendant. During the pendency of this suit Armstrong died and the present plaintiff was appointed administratrix of his estate. 10

Whereupon it is ADJUDGED that defendant have judgment against the plaintiff and that the defendant recover from the plaintiff its costs to be taxed.

(Signed) NELSON Y. DUNGAN,
Circuit Court Judge. 20

Judgment.

JUDGMENT.

Entered August 8, 1922.

ESSEX COUNTY CIRCUIT COURT.

10	31048 ANNA A HAMILTON, Admx. of WILLIAM H. ARMSTRONG, de- ceased, <i>Plaintiff,</i> <i>vs.</i> ORANGE SAVINGS BANK, <i>Defendant.</i>	}	<i>Action at Law. By the Court. Judgment entered August 8, 1922. Costs, \$56.28.</i>
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20 William A. Lord, attorney of defendant.

Judgment by the Court in the above-entitled action at law was rendered on the 8th day of August, A. D. nineteen hundred and twenty-two, in favor of the said defendant, Orange Savings Bank, and against the said plaintiff, Anna J. Hamilton, Admx. of William H. Armstrong, deceased, for the sum of fifty-six dollars and twenty-eight cents, cost of suit.

30 Judgment entered and signed August 8, 1922.

WILLIAM S. GUMMERE,
Judge.

Book 97, Circuit Court Judgments, page 251.

Stipulation.

STIPULATION.

Filed September 13, 1922.

ESSEX COUNTY CIRCUIT COURT.

ANNA A HAMILTON, Admx. of WILLIAM H. ARMSTRONG, de- ceased, vs. ORANGE SAVINGS BANK, Defendant.	}	Action at Law. Stipulation.	10
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It is hereby stipulated by and between the parties hereto, by their respective attorneys, that for the purpose of appeal in this cause, the following transactions were entered of record: 20

Demand for security for costs.

Bond for costs.

Order prescribing length of time of notice for the taking of depositions in Ireland.

Depositions of William H. Armstrong, plaintiff, taken in Ireland, before a Commissioner appointed by the above-entitled Court, showing that the plaintiff was alive and was the person who instituted suit; was the person who opened an account in the Orange Savings Bank June 18, 1894; who received pass book No. 18,031, which pass book showed a balance on July 1897 of \$571.28. 30

Order substituting Anna Armstrong Hamilton, administratrix of the estate of William H. Armstrong, deceased, in the place and stead of William H. Armstrong, plaintiff. 40

Certificate of Clerk.

That all the foregoing were duly served and filed.

JOHN D. ANDERSON,
Attorney for Plaintiff.

WILLIAM A. LORD,
Attorney for Defendant.

10

CLERK'S CERTIFICATE.

ESSEX COUNTY CLERK'S OFFICE.

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

20 I, John H. Scott, Clerk of the Circuit Court, in and for the County of Essex, in the State of New Jersey, DO HEREBY CERTIFY that the foregoing is a true and correct copy of all the records and proceedings in the matter of William H. Armstrong *v.* Orange Savings Bank, *et al.*, and the same is taken from and compared with records of Essex Circuit Court and as the same now remains on the files of said office.

30

(SEAL)

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said Court and County at Newark, N. J., this 14th day of September, A. D. 1922.

JOHN H. SCOTT,
Clerk.

40

*Grounds of Appeal.***GROUND OF APPEAL.**

Filed September , 1922.

NEW JERSEY SUPREME COURT.

ANNA A HAMILTON, admx., etc., Plaintiff-Appellant,	} Action at Law.	10
vs.		
ORANGE SAVINGS BANK, Defendant-Respondent.	} Grounds of Appeal.	

The appellant states the following grounds of appeal:

1. The trial judge erroneously refused to strike out the following portion of paragraph two of the defendant's answer, to wit: 20

"But it denies that no further withdrawals have been made by the plaintiff or by any one for him; and it denies that on October 18, 1920, there was due to the plaintiff from this defendant on said account, the sum of \$571.28, with interest from July 1, 1897, or in all the sum of \$1290.51, or any other sum."

2. The trial judge erroneously refused to strike out the Second Defense of defendant's answer. 30

3. The trial judge erroneously refused to enter summary judgment on behalf of the plaintiff and against the defendant.

4. The trial judge erroneously rendered judgment in favor of the defendant and against the plaintiff.

Grounds of Appeal.

5. The judgment entered in this cause is erroneous and contrary to law and not justified by the facts in the case.

6. The judgment in this cause is a deprivation of plaintiff's property without due process of law.

10 7. The judgment or decree of the Prerogative Court, set up in the answer of the defendant, presented no defense to the complaint herein.

8. The judgment or decree of the said Prerogative Court is invalid and of no force as against the plaintiff herein or the plaintiff's intestate, because the same was made and entered without notice to plaintiff or her intestate.

20 9. Neither plaintiff nor her intestate is barred from maintaining the present action by reason of the said decree of the Prerogative Court, and the same is wholly ineffectual and void as to either.

10. Defendant was bound by its contract with plaintiff's intestate to re-pay to him only, such sums with interest remaining on deposit with defendant after withdrawals, as said intestate had deposited in defendant's bank, and its action in paying to a third person was a wrong against plaintiff's intestate, for which defendant must answer.

30 11. The judgment of the Circuit Court in this cause is erroneous and contrary to law in divers other respects.

JOHN D. ANDERSON,
Attorney for Plaintiff-Appellant.

Endorsed:

"Service of the within grounds of appeal is hereby acknowledged this September 12, 1922.

40 WILLIAM A. LORD,
Attorney of Defendant-Respondent."

New Jersey Court of Errors and Appeals

ANNA A. HAMILTON, Admx, etc.,
Plaintiff-Appellant,

vs.

ORANGE SAVINGS BANK,
Defendant-Appellee.

*On Appeal from
the Essex
Circuit Court.*

BRIEF OF PLAINTIFF-APPELLANT.

Facts.

The facts as disclosed by the pleadings, depositions and admissions of counsel at the oral argument of this matter, before the Trial Court, are as follows: On June 18, 1894, plaintiff's intestate opened an account in the bank of defendant, receiving a deposit book numbered 18031; that sometime in the year 1897 plaintiff left America and went to Ireland, where he remained until his death in January, 1922 (Case, p. 16). On October 18, 1920, he caused a demand to be made upon defendant for payment of the balance due him, with interest, presenting the above-mentioned deposit book; this demand was refused; on August 17, 1917, the Prerogative Court issued letters of administration on the estate of plaintiff's intestate, to William McMichael, which letters were based on an affidavit that plaintiff was dead (Case, p. 8), that subsequent to the grant of letters of administration, defendant paid to said McMichael, without suit and without the production of the pass book and upon his demand alone, the balance then appearing to be due plaintiff on defendant's books (Case, p. 7); that plaintiff was not dead at the time of the granting of such letters, and was living until after suit was begun (Case, pp. 3, 5, 16, 19).

Pending the litigation, Armstrong, the original plaintiff, died, and his administratrix, the present appellant, was substituted in his stead (Case, p. 16).

The motion to strike out the answer was based on the ground that the portion moved to be stricken out was false and frivolous and intended to prejudice, embarrass and delay a fair trial of the action, and was made without reasonable cause.

The motion to strike out the second defense of the answer was based on the ground that said defense did not set up any legal grounds of defense to the complaint.

The question now to be considered is whether on these facts, plaintiff should have had judgment below.

ARGUMENT.

Before passing to the cases which have been decided bearing on this point, it might be of assistance to the Court to consider the constitution, jurisdiction and powers of the Prerogative Court, which granted the letters, and the *two kinds* of administration which may be granted in this State.

Constitution and Powers of Prerogative Court.

The Prerogative Court is a constitutional court, though no limitation nor definition of its powers is found in the Constitution. Art. VI, Sec. IV, Par. 2 of the Constitution provides: "The Chancellor shall be the ordinary or *surrogate-general*, and judge of the Prerogative Court."

The Act relating to Courts (Revision 1900) 2 C. S. 1722, Sec. 76, defines the powers of the Ordinary, *inter alia*, as follows:

"The authority of the ordinary shall extend only to the granting of * * * letters of administration * * * and to the hearing of all disputes that may arise thereon."

By P. L. 1913, p. 81, the Vice-Chancellors are made Vice-Ordinaries. The power of the Ordinary as to the grant of administration is similar to that of a surrogate, but not limited within county lines.

The power of surrogates to grant administration is shown below:

"26. The surrogate of the county in which the *deceased* shall be resident at the time of his *death* shall have the power and authority to grant letters of administration on the estate of such deceased in all cases where administration may be *legally* granted thereon * * *."

Orphan's Court Act, 3 C. S. 3822, Sec. 26.

This is the extent of the statute law in this State dealing with an original grant of administration in cases of *actual* death. The right to grant, and the method of obtaining administration in cases of presumptive death will be taken up subsequently.

Death is a jurisdictional prerequisite to power of Probate Court to grant administration in cases of alleged actual death.

The absolute jurisdictional prerequisite to a valid grant of administration in cases where actual death is charged, is in fact death itself. WITHOUT DEATH, THE GRANT IS VOID.

"The only question that can be made is whether he" (the surrogate) "had jurisdiction. If the supposed intestate *was not dead*. * * *, the grant would be void." *Quidort v. Pergeaux*, 18 N. J. Eq. 472.

"It is absolutely essential to the validity of a grant of administration, that the person upon whose estate the administration is granted should be *dead*. Any administration upon the estate of a living person is void." 18 Cyc. 65.

ADMINISTRATION BASED ON ABSENCE.

The law of New Jersey provides for obtaining administration on the estate of a person not known to be dead, but who has been absent from the State for more than seven years. This is found in Sections 30, 31 and 32 of the Orphan's Court Act, 3 C. S. 3823. It requires an application in writing to the Ordinary, or to the surrogate of the county in which such person formerly resided; *the making of an order to show cause why administration should not be granted; the publication of such order; and proof to the satisfaction of the surrogate that such person has absented himself for seven years last past.*

This was the ^{rule}~~statute~~ dealt with in the Plume case, 46 N. J. Law, 216, which we will discuss hereafter; but this statute was not invoked in obtaining the administration under discussion. Here a direct charge of death, and a finding of death were made, not a proof of absence; *nor was there an order to show cause and publication.* The order of the Prerogative Court contains a finding of the fact of death (Case, p. 8), and the letters were granted on the estate of a person as though actually dead, but without any rule to show cause or publication, or taking of testimony. The statute was not followed in what should have been a statutory proceeding.

The case of *Plume v. Howard Savings Institution, supra*, on which defendant's counsel so strongly relies, was a case absolutely unlike the one at bar, and is properly discussed as coming within the purview of Sec. 30, *et seq.*, above referred to. In that case, the facts were that the administrator had been appointed on a petition to the surrogate, setting forth that the alleged decedent was believed to be dead, intestate, and that he had been absent from the State since 1858. The petition was not presented until 1883. On that petition the Surrogate ordered a notice setting forth that the alleged intestate, Philip McMahon, was presumed to be dead, intestate, and that it was necessary to have letters of administration of his

estate granted, and directing all persons to show cause, at a stated time, why the same should not be issued, and ordering such notice to be published. The decree issued in this cause recited among other things, that it appeared that said Philip McMahon had absented himself from this State for seven years last past, successively, and *no proof being made that he was alive within said seven years*, granted letters to Plume. The recitations in this decree show that substantially the same practice was followed as is outlined in Sec. 30 above cited, although there appears to have been no statute providing for that class of administration prior to P. L. 1885, p. 116. This belief is sustained by the fact that the present Chief Justice, in his argument, relies on the statute of 1797, authorizing the appointment of an administrator, upon proof of seven years absence, without, in his argument, referring to the statutory procedure which is now established.

The statute of 1797, which is still on our books, in Sec. 1 of Death Act 2-C. S., p. 1904, and to which a considerable portion of Mr. Justice Gummere's argument is addressed, provides that where a person shall be absent from his last known residence in the State, for seven years successively, he "shall be presumed to be dead, in any case wherein his or her death shall come in question, unless *proof be made that or she were alive within that time.*"

The lack of proof in the Plume case, that the alleged intestate was alive within seven years prior to the decree, was the basis for that decree, and no parallel exists between that case and the one at bar. While a presumption of death arises from such absence, it needs no argument to demonstrate that the presumption must collapse in the face of the incontrovertible fact that the alleged intestate was living at the time of the grant, and the Plume case, while at present the law in this State, where administration is granted on proof of seven years absence, cannot control in a case where administration is granted on affidavits of alleged death, when the alleged intestate is in fact alive.

COLLATERAL ATTACK ON VOID JUDGMENT.

What the Court says in the Plume case (*supra*), on the question of collateral attack, is beyond question the law where the Court has jurisdiction. To hold otherwise would be, in effect, to nullify the action of the courts, but, where the Court is *without jurisdiction*, as was the case here, *its judgment is a nullity ab initio, and its act is coram non judice, and may be attacked in any court, by any person affected and at any time.*

“A collateral attack upon a judgment has been defined to mean any proceeding in which the integrity of a judgment is challenged, except those made in the action wherein the judgment is rendered or by appeal, and except those brought to obtain decrees declaring judgments to be void *ab initio*.” 15 R. C. L. Sec. 311, and cases cited.

“In every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and it is a fundamental rule that a judgment or decree which the Court *has no jurisdiction to pronounce is void*. It is, in legal effect no judgment, and has no force either by way of evidence or estoppel, but leaves the parties litigant in the same position they were in before the trial. Unless jurisdiction exists, the judgment is not due process of law, and is ineffectual for any purpose. No rights are in any way affected by it, and from it no rights can be derived. A decision of a Court not having jurisdiction, being thus *ipso facto* void, may be attacked in any proceedings, direct or collateral, in which a person seeks to assert a right under such pretended adjudication.” 15 R. C. L. Sec. 316.

See also

Grover, etc., v. Radcliffe, 137 U. S. 287, 34 L. E.

670.

THERE CAN BE NO LAWFUL ADMINISTRATION
BASED ON DEATH, WHERE ALLEGED INTESTATE
IS ALIVE.

A case on which plaintiff relies to support his contention that the bank is liable, is *Jochumsen v. Suffolk Savings Bank*, 3 Allen (Mass.) 87.

The facts, briefly, in this case are that the plaintiff was a sailor, and in 1848 opened an account in the defendant's bank. Thereafter he went to California and was not heard from until June, 1860, a period of twelve years and one month. In May, 1860, a month before the plaintiff returned, an administrator of his estate was appointed by the Probate Judge. This administrator obtained plaintiff's deposit book, which had been left with a friend, presented it to the bank, and received the amount of the deposit with interest.

Plaintiff, having returned, demanded his money of defendant, and though defendant was satisfied of his identity, the demand was refused. Thereupon the plaintiff brought suit. The defendant resisted the suit upon practically the same grounds urged by the defendant in this case: that the decree of the Probate Judge was conclusive, and that the person appointed under the decree as administrator was competent to do all acts that a lawful administrator may do, and that the decree of the Probate Judge could not be attacked collaterally.

The Court, in a very well-considered opinion, decided that the plaintiff was entitled to recover; that the proceedings before the Probate Judge were unauthorized for *want of jurisdiction*, and that payment to the alleged administrator was no defense to the action brought by the depositor. The Court said, in part, at page 89:

“* * * that the appointment of the administrator, Rolfe, was in derogation of the legal rights of Jochumsen, is very clear, and admits of no question.”

Referring to the case of *Griffith v. Frazier*, 8 Cranch 24, the Court quoted Chief Justice Marshall as follows:

“Suppose administration be granted on the estate of a person not really dead. The act, all would admit, is wholly void. Yet the Ordinary must always inquire whether the person whose estate is to be committed to the care of others be dead or alive. Yet the decree of the Ordinary, that the person on whose estate he acts is dead, *if the fact be otherwise*, does not invest the person he appoints with the character or power of an administrator. The case, in truth, was not within his jurisdiction. It was not one on which he had a right to deliberate.”

In discussing the argument of the defendant, that seven years' absence authorizes the Court to treat the case as though the party were dead, the Court said:

“The error consists in this: that those facts are only presumptive evidence of death, and may always be controlled by other evidence showing that the fact was otherwise. The only jurisdiction is over the estate of the dead man. When the presumption arising from the absence of seven years is overthrown by the actual personal presence of the supposed dead man, it leaves no ground for sustaining the jurisdiction.”

THE DECREE OF THE PREROGATIVE COURT WAS VOID FOR WANT OF JURISDICTION.

The case of *Roderigas v. East River Savings Institution*, 63 N. Y. 460, which is also relied on by the defendant in this case, was a case where similar facts were involved; that is, that the depositor had disappeared, and payment was made to an administrator appointed by the Surrogate; and the depositor subsequently appeared and claimed his money. It was held by the Court of Appeals of New York, a divided Court rendering the opinion, the votes being four to three, that the payment by the bank was a bar to the demand by the depositor. The Court, however, in a subsequent unreported opinion, held that to sustain such a defense, there must have been competent proof

before the Surrogate that the person was dead, that the Surrogate himself must have passed on the question judicially; and, as it appeared in the case that he had not done so, the judgment was reversed and the payment disallowed. This, of course, merely went to the competency of the proceedings before the Surrogate, and did not deal with the vital principles involved.

The Roderigas case, as an authority, has been very greatly shaken by subsequent decisions, and its authority denied by no less eminent a jurist than the late Justice Choate, who wrote the opinion in the case of

Lavin v. The Emigrant Industrial Savings Bank,
1 Fed. 641.

In the Lavin case, the facts were that administration had been obtained in Rhode Island under a statute which authorized the grant of letters of administration on the estate of persons who leave the State and remain absent for three years; and the letters issued did not purport to be issued on the estate of a dead person. These letters, however, were presented to the Surrogate of New York County, and ancillary letters issued by him. Justice Choate collated a great number of authorities dealing with due process of law, and decided that the proceedings taken under the laws of New York were void as to the plaintiff (the alleged dead man), because it would deprive him of his property without due process of law. In discussing the question, the Court dealt with the argument raised by defendant's counsel in the case at bar, of the injury done to innocent third persons by denying them the right to rely on the acts of the Court, and on that phase of the matter, said:

“There can be no question, also, that it is within the power and is the duty of the State to provide all proper safeguards for the protection of innocent persons who have been led into mistake, to their injury, by the action of the Surrogate, or otherwise; but, as it seems to me, this laudible and proper legislation must stop where it will operate

to deprive another innocent person of his property for their benefit. *There are some misfortunes that even the most innocent cannot be protected against by the power of the State.* Such is the case of persons who are innocently misled into a belief that void judgments are valid. * * *

Further dealing with this subject of hardship to innocent persons, the Court said:

“But these” (constitutional) “restrictions upon legislation and judicial power are imposed because whatever hardship may attend their application in particular instances, the principle of personal liberty embodied in them—the preservation of private rights against infringement, except with the consent of the owner, or ‘by due process of law’—is of paramount importance and vital to the welfare of the community.”

The United States Supreme Court has pronounced the last word on this whole subject of administration on the estate of a man who is not dead, in the case of

Scott v. McNeal, 154 U. S. 34.

This was a writ of error to the Supreme Court of the State of Washington. The facts were that in 1888, Mary Scott obtained administration on the estate of Moses H. Scott, alleging in the proceedings that he had disappeared in 1881, more than seven years previous. Notice of the petition was given by posting in three public places, as required by the law of Washington, and an order was made, on the day designated in such notice, which recited that as it appeared that Scott had disappeared over seven years previously, and nothing had been heard of him, and that he was believed to be dead, and that he had left an estate; therefore the Court found that Scott was dead “to all legal intents and purposes.” An order was made for the sale of the real estate, and sale was had under said order to one Ward, in 1888. In 1889, Ward conveyed to the defendants for \$1,800. Plaintiff (the alleged dead man), brought ejectment to recover his land, and objected at the trial to evidence of the proceedings in the

Probate Court, upon the ground that they were absolutely void. The objection was overruled, and the jury was directed to find for the defendants.

Appeal was taken to the Supreme Court of the State, and the judgment was affirmed, whereupon the case was brought before the United States Supreme Court by writ of error. Mr. Justice Gray wrote the opinion for the Court and gave a long and careful review of the cases considering the proposition discussed in this brief. He said:

“The fundamental question in the case is whether letters of administration upon the estate of a person who is in fact alive have any validity or effect as against him.”

The Justice said that for almost a century after the Declaration of Independence, the absolute nullity of such letters was treated as beyond dispute. He quotes Chief Justice Marshall as cited in the *Jochumsen* case, *supra*.

The Court also says, on p. 43 (154 U. S.):

“The absolute nullity of administration granted upon the estate of a living person has been directly adjudged or distinctly recognized in the courts of many other States.

French v. Frazier (1832) 7 J. J. Marsh, 425, 427;

State v. White (1846) 7 Iredell, 116;

Duncan v. Stewart (1854) 25 Alabama, 408;

Moore v. Smith (1858) 11 Richardson, 569;

Morgan v. Dodge (1862) 44 N. H. 255, 259;

Withers v. Patterson (1864) 27 Texas, 491, 497;

Johnson v. Beazley (1877) 65 Missouri, 250, 264;

Melia v. Simmons (1878) 45 Wisconsin, 334;

D'Arusement v. Jones (1880) 4 Lea. (Tenn.) 251;

Stevenson v. Superior Court (1882) 62 California, 60;

Perry v. St. Joseph & Western Railroad (1882) 29 Kansas, 420, 423;

Thomas v. People (1883) 107 Illinois, 517.

Let us consider what has been decided in the above-cited cases.

KENTUCKY (1832) *French v. Frazier*, 7 J. J. Marshall 425-7. Syllabus, p. 427. "Plea to *scire facias* to revive in the name of plaintiff as administrator, that he was not administrator, good bar. Plea to same, that original plaintiff was not dead, good. Defendant not estopped by administration granted by county court, nor by order of revivor in circuit court. Judgment on *scire facias* to be for or against administrator."

From case, p. 427. "If Frazier was still alive, as averred in plea No. 2, he could have no administrator, and a grant of letters of administration would, in that event, *be void*."

P. 432. "We regard the grant of letters of administration by the county court, as *prima facie* evidence of the death of the party, and that an administrator had been legally appointed. If the act of the county court is impeached the burden of the proof lies on the assailant to show its invalidity.

NORTH CAROLINA (1846) *State v. White*. 7 Iredell 116 (at p. 94). Syllabus: "When a suit is brought upon an administration bond, the defendants have a right under the plea of the general issue, to show that the supposed intestate was alive at the date of the letters of administration and of the bond, the county court in such case having no jurisdiction.

In a like manner the relator of the plaintiff can show that the person alleged to have been dead, intestate, was not the person whom the defendants offered to prove was then alive, but some other person of the same name, who was then actually dead."

ALABAMA (1854) *Duncan & Hooper v. Stewart*, 25 Ala. 408. From Syllabus: 1. "A grant of letters of ad-

ministration on the estate of a living man, who is supposed to be dead, is absolutely void; and if the administrator sells the personal property, under an order of the Court regularly made, he is a trespasser."

(Cited in *Bradley v. Broughton*, 34 Ala. 707, 73 Am. Dec. 474; *Bean v. Chapman*, 73 Ala. 144.)

(See 22 Cent. Dig. Executors and Administrators, Sec. 15.)

Williams on Executors, 440-1-2 and cases there cited from opinion.

SOUTH CAROLINA. *Moore v. Smith* 11, Richardson 569.

Syllabus: Trover by A against B for the conversion of a slave. It appeared that A had been absent from the State for more than seven years unheard of; that thereupon letters of administration of his goods and chattels were granted; that his estate was distributed, and the slave allotted to a distributee whose agent sold her to B: *Held* that plaintiff was entitled to recover, the supposed letters of administration being null and void."

(Editor's Note—Cited in *Blakely and Copeland v. Frazier*, 20 S. C. 155.) For these cases see Executors and Administrators. Cent. Dig. secs. 15, 16; Dec. Dig. Key. 4.

Letters of administration on the estate of a living person are null and void *ab initio*—the application upon which they were granted based upon positive testimony, or the presumption arising from an absence unheard of, of seven years, being *coram non judice*, and no one claiming under the administrator can be protected against the title of the living owner.

(Editor's note—Cited in *Marvin v. Fowler*, 51 S. C. 172, 28 S. E. 312; in re Estate of Mears, 75 S. C. 485, 56 S. E. 7.)

From decision itself: "Wardlaw, *J.* Many dicta may be found to sustain the proposition that administration granted of the goods of a living person is entirely void. (Williams on Executors, 461; 15 Sergt. & Rawl, 42; 5 Monroe 46), but all of these rest upon a dictum of Buller, *J.*; in *Allen v. Sundas*, 3 T. R. 129, and that so far as I can find upon general principles and the unquestioned opinion prevailing in both the civil and ecclesiastical courts of England. 1 Phil. 83 cited.

NEW HAMPSHIRE (1862). *Morgan v. Dodge*, 44 N. H. 255, p. 259: "So where a will is proved or letters of administration are granted, where the person supposed to be dead is still living, the powers of the Court being limited to the estates of deceased persons. *Hooper v. Stewart*, 25 Ala. 508; *Goods of Napier*, 1 Phill. 83.

TEXAS (1864). *Withers v. Patterson*, 27 Texas 491. Orders and judgments which the Court has not the power to make or render, are, of course, null; and being null, their nullity may be asserted in any collateral proceeding where they are relied on in support of a claim of right.

Note—*Trammel v. Philleo*, 33 Texas 395; *Marks v. Hill*, 46 Tex. 345.

WISCONSIN (1878). *Melia v. Simmons & another*, 45 Wisc. 334. The only jurisdiction which the county court has in respect to the administration of estates, is over those of *dead* persons.

2. Proceedings in administering, settling and assigning the estate of a person who, though represented to have deceased, was and still is alive, are absolutely void for all purposes, and an entry, and continuous occupation for 10 years under a claim of title exclusive of any other right, founded upon the judgment

of the county court in such a case, would not bar an action to recover the land.

Cases cited—*Jochumsen v. Suffolk*, 3 Allen 87; *Wales v. Willard*, 2 Mass. 120; *Smith v. Rice*, 11 *id.* 507; *Griffith v. Frazier*, 8 Cranch 9; *Allen v. Dundas*, 3 Term., 125.

TENNESSEE (1880). *D. Arusemert v. Jones*, 4 Lea 251. Administration upon the estate of a person alive—void—Administration upon the estate of a living person is absolutely void.

(Cited in 9 Lea 605; 14 Lea 289; 5 Pickel 319, 589; 7 Pickel 131.)

Cases cited—*Roderigas case*, *supra*, *Griffith v. Frazier*, 8 Cranch; *Bunson v. Ivey*, 1 Yer. 306; *Allen v. Dundas*, 3 Term. R 125; *Wilson v. Frazier*, 2 Hun. 30; *Jochumsen case*; *Taylor on Evidence*, vol. 2, sec. 1490, 1523.

CALIFORNIA (1882). *Stevenson v. Superior Court*, 62 Cal. 60. Jurisdiction of Probate Court. Administration upon estate of living person. After administration had been granted upon the estate of a supposed deceased person and the administration closed and the administrator discharged, the supposed decedent appeared in person and filed his petition to vacate and annul the proceedings; and an order was made granting the motion.

Held—There is no doubt of the correctness of the action of the Court. Administration upon the estate of a living person is totally void.

Cases cited—Sec. 1 Williams on Executors, p. 632, *Jochumsen case*; *Fisk v. Norvel*, 9 Tex. 12; *Duncan v. Stewart*, 25 Ala. 408, *Allen v. Dundas*; *Beckett v. Selover*, 7 Cal. 226; *State v. McGlyn*, 20 Cal. 233; *Hamberlin v. Terry*, 1 S. and M. ch. 589. *McPherson v. Cunliff*, 11 S. & R. 422; S. C., 14 Am. Dec. 642; *Appeal of Peebles*, 15 S & R 42; *Wales v. Willard*,

2 Mass. 120; *Smith v. Rice*, 11, *id.* 507. *Bolton v. Jacks*, 6 Robt. 166; *Morgan v. Dodge*, *Melia v. Simmons*; *D v. Jones*; *Roderigas* case cited and disapproved of and *Lavin v. Emigrant*, Ind. Savings Bank, 18 Blatch 1, Circuit Ct. of U. S. for State of New York mentioned as deciding that *Roderigas* case had no support elsewhere in English or American courts.

KANSAS (1882). *Perry v. St. Joseph & W. Railroad*, 29 Kan. 420, where a Probate Court has no jurisdiction to issue letters of administration on the estate of an intestate, its acts in doing so are void for all purposes.

Cited cases—*Stevenson v. Superior*, and *Griffith v. Frazier*, *supra*.

ILLINOIS (1883). *Thomas v. People*, 107 Ill. 517. Syllabus: 1. Administration on live man's estate is null and void. A grant of administration on the estate of a person who is living, together with all acts done under such grant, is absolutely null and void. The only jurisdiction the county court has in respect to the administration of estates is over the estate of deceased persons. In this case, moneys which were the proceeds of a sale in partition came into the hands of the master in chancery. Prior to that time, one of the parties in interest had absented himself from home, and not having been heard from by his relatives or acquaintances for more than seven years, administration was granted on his estate, on the hypothesis he was dead. The master in chancery thereupon paid over to the administrator the portion of the money belonging to his supposed intestate. It turned out that the person supposed to be dead was still alive and it was held he was entitled to recover from the master the money which had come into his hands, and which he had improperly paid over under the void grant of administration.

Cited cases:

Thompson v. Whitman, 18 Wall. 457; Wheelwright v. Depeyster, 1 Johns. 471; Rose v. Hunsley, 4 Cranch 269. Gilmour v. Sapp, 100 Ill. 297; Campbell v. Campbell, 63 *id.* 462.

Mr. Justice Gray also passes (in *Scott v. McNeil*) upon the Roderigas case and the Plume case, and has this to say of the Roderigas case:

“That decision was much criticized as soon as it appeared * * *. And in a subsequent case between the same parties in 1879, the same Court unanimously reached a different conclusion, because evidence was produced that the surrogate never in fact considered the question of death, or had any evidence thereof—*thus making the validity of the letters of administration to depend not upon the question whether the man was dead, but upon the question whether the surrogate thought so.*”

A decree for administration upon the estate of a living person is a decree without due process of law, and the payment of the plaintiff's money to McMichael was a deprivation of plaintiff's property without due process of law, under the decision in the *Scott v. McNeil* case, with which we are dealing. The opinion reads in part as follows:

“A Court of probate must, indeed, inquire into and be satisfied of the fact of the death of the person whose will is sought to be proved or whose estate is sought to be administered, because, without that fact, the Court has no jurisdiction over his estate; and not because its decision upon the question whether he is living or dead can in anywise bind or estop him, or deprive him, while alive, of the title or control of his property.

“As the jurisdiction to issue letters of administration upon his estate rests upon the fact of his death, so the notice given before issuing such letters, assumes that fact, and is addressed, not to him, but to those who after his death may be interested in his estate, as next of kin, legatees, creditors or otherwise. Notice to them cannot be

notice to him, because all their interests are adverse to his. The whole thing, so far as he is concerned, is *res inter alios acta*.

“Next of kin or legatees have no rights in the estate of a living person. His creditors indeed, may, upon proper proceedings, and due notice to him, in a court of law or of equity, have specific portions of his property applied in satisfaction of their debts. But neither creditors nor purchasers can acquire any rights in his property through the action of a court of probate, or of an administrator appointed by that Court, dealing without any notice to him, with his whole estate as if he were dead.

“The appointment by the probate court of an administrator of the estate of a living person, without notice to him, being without jurisdiction, and wholly void as against him, all acts of the administrator, whether approved by that Court or not, are equally void; the receipt of money by the administrator is no discharge of a debt; and a conveyance of property by the administrator passes no title.

“The fact that a person has been absent and not heard from for seven years may create such a presumption of his death as, if not overcome by other proof, is such *prima facie* evidence of his death, that the probate court may assume him to be dead and appoint an administrator of his estate, and that such administrator may sue upon a debt due to him. But proof, under proper pleadings, even in a collateral suit, that he was alive at the time of the appointment of the administrator, controls and overthrows the *prima facie* evidence of his death, and establishes that the Court had no jurisdiction, and the administrator no authority; and he is not bound, either by the order appointing the administrator, or by a judgment in any suit brought by the administrator, or by a judgment in any suit brought by the administrator against a third person, because he was not a party to and had no notice of either.

“On the other hand, if administration is granted upon the estate of a living person, supposed to be dead, and there is a decree for the sale of his land, such decree may be objected to by either the sup-

posed decedent or his heirs, since the decree is *absolutely void*, for want of power in the court to exercise jurisdiction over the estate of a live man, and, being void, it works no estoppel." 15 R. C. L. Sec. 343.

See also *Springer v. Shavender*, 116 N. C. 12.

Other cases, not heretofore discussed in this brief follow:

Clapp v. Houg, 98 N. W. 710 (N. D.) (1904), holds that the appointment of a special administrator in a case where "the death of the person in question is not satisfactorily proved, but is showed to have disappeared * * * is invalid as depriving the person of his property and its possession *without notice or due process of law, when applied to the property of a person living* * * *."

This case cites with approval *Scott v. McNeil*, *supra*.

The case of *Carr v. Brown*, 38 Atl. 9, Rhode Island case decided in 1897, is well worth serious study and consideration. There the Court held that a statute providing for administration of the estate of one who has been absent "* * * as if he were dead" violates Const. Art. 1, Sec. 10, and U. S. Constitution, Art. XIV. The action of the probate court in granting administration was held void as the plaintiff was living. This case also cites, with approval, *Scott v. McNeil*, *supra*. On page 11 of *Carr v. Brown*, are grouped many of the State cases upholding the plaintiff's position. Also on the same page is reference to the Roderigas case, *supra*, and a criticism of it, which, by the way, is much along the lines found in nearly every case where we find it referred to. This case also quotes the *Clapp* case, *supra*, as follows: "*He is not a party to the notice, nor to the proceedings. No hearing is afforded him on any question.*" Such was the precise position of the plaintiff in the case at bar.

In the Pennsylvania case of *Develin v. Commonwealth*, 101 Pa. State, 273 (1882), it is held that administration on the estate of a living person is void. The case also

holds: "A *voluntary* payment to the administrator under such appointment is no defense to a subsequent action by the *supposed* decedent." This case also contains a forceful criticism, on p. 267, of the Roderigas case, *supra*. The cases cited in the opinion, other than those mentioned in this brief, are found on pages 276 and 278.

We have not in the arrangement of this brief, followed the points raised in the grounds of appeal, but have, nevertheless, covered them in our argument.

We urge upon the Court that the gist of this case is in a nut shell; that the judgment below was erroneous, because it was in effect, based upon another judgment which was void; that the Prerogative Court could not lawfully grant administration upon the estate of a living person without notice to him; that it could not declare such person to be dead, when he was in fact alive; it might have declared that he was presumed to be dead, in a proceeding which followed the statute, but that was not done; that to adjudge the plaintiff's intestate dead while he was yet living, and to grant administration on his estate, so that the same might be collected and dissipated, was to deprive the plaintiff's intestate of his property without due process of law; that the judgment of the Prerogative Court was void *ab initio* for want of jurisdiction, and all proceedings taken thereunder are likewise void; that such void judgment is no protection to persons relying on it; and that the plaintiff has an indisputable right to attack that judgment in any court of competent jurisdiction.

We respectfully submit that the judgment of the Trial Court was erroneous and should be reversed, and since there is and can be no dispute as to the facts, the Trial Court should be instructed to enter judgment in favor of the plaintiff and against the defendant.

Respectfully submitted,

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W. R. CROSSON,
Of Counsel.

New Jersey Court of Errors and Appeals

ANNA A. HAMILTON, Administratrix,
etc.,

Plaintiff-Appellant,

vs.

ORANGE SAVINGS BANK,

Defendant-Appellee.

*On Appeal from
Essex Circuit
Court.*

BRIEF FOR DEFENDANT-APPELLEE.

General Statement.

The facts are not in dispute.

Defendant bank paid on demand of William P. McMichael, administrator of the goods and chattels, rights and credits, which were of William H. Armstrong, *late* of the County of Essex, the balance on the books of the bank to the credit of said William H. Armstrong, the administrator's intestate.

The letters of administration were issued by the Pre-rogative Court on August 17, 1917, and are in usual form (see copy, Record, p. 7).

The letters were issued by the Register, following a decree of the Court, entered on the same day, reciting a finding as follows:

“ * * * and it appearing that William H. Armstrong has departed this life and that he was a single man, of mature age, and that he lived on Railroad Place, East Orange, New Jersey, about the year 1894, and that about seventeen years ago he left to visit his parents in Ireland, where he was born, and that they both died there, and that William H. Armstrong died there thereafter, and it further appearing that William H. Armstrong was a driver and that he had moneys held in trust for his benefit amounting to about the sum of \$817.51.”

Defendant paid the amount of the deposit voluntarily, but cannot be prejudiced thereby, as, at the time of demand by administrator of Armstrong and payment to him, defendant could have made no defense to an action by the administrator to receive the amount.

The decree of the Prerogative Court was by a court of competent original jurisdiction, and remains of record undisturbed to this day.

The decree involved findings of fact as to death, residence and property.

The good faith of defendant in payment to McMichael, administrator, is not questioned.

Armstrong, found by the decree of the Prerogative Court to have departed this life prior to the decree ~~of the Orphans' Court~~, was in fact alive and brought the present action against the bank without any attempt to vacate or otherwise attack the decree of the Prerogative Court.

The defendant has once, in good faith, paid the debt on which this suit is predicated, and if judgment for the plaintiff in this suit goes against the defendant, the defendant must pay the same debt a second time, plus additional interest and costs.

The judgment below in this suit was for defendant and plaintiff appeals. (See opinion of Judge Dungan, Record, pp. 18 to 21.)

ARGUMENT.

I.

The Prerogative Court had jurisdiction, its decree was based on findings of fact appropriate to the exercise of jurisdiction, and payment to the administrator of Armstrong, appointed by that Court, was an absolute discharge of defendant's liability on the Armstrong deposit.

The Judge of the Court below accepted and followed the case of *Plume v. Howard Savings Bank*, 46 N. J. L.

211, and the case of *Roderigas v. East River Savings Institution*, 63 N. Y. 460, strongly supported by the opinion of Chief Justice Beasley in the *Plume* case.

The jurisdictional doctrine of the *Plume* case was expressly approved by this Court in subsequent cases.

Clark v. Costello, 59 N. J. L. 234, 237;

Newby v. Blakely, 85 N. J. L. 728;

Shearman v. Cameron, 78 N. J. E. 532, 536;

Assets Development Co. v. Wall, 119 Atl. 10, 12 (not yet officially reported).

The Prerogative Court and the Court of Chancery have frequently followed the *Plume* case.

Russell's Case, 64 N. J. E. 313, 317;

Young's Case, 67 N. J. E. 553, 559;

Vincent v. Vincent, 70 N. J. E. 272, 275;

Crawford v. Lees, 84 N. J. E. 324, 329, 337, 338;

Brown v. Wencher, 120 Atl. 637, 638 (not yet officially reported).

Before more specific attention to the *Plume* case, reference to the *Roderigas* case, because of its likeness to the instant case in its facts, is appropriate.

In *Roderigas v. East River Savings Institution*, 63 N. Y. 460 (New York Court of Appeals, 1875, opinions by Earl, J., and Miller, J.), the depositor made a deposit with the defendant bank in 1857, and soon thereafter went to Cuba with his wife, leaving his wife's mother, one Isabella McNeil, residing in the City of New York. In 1869, Mrs. McNeil presented to the Surrogate of New York County evidence that the depositor, her son-in-law, had died intestate, and that his wife had also died, and the Surrogate thereupon granted to Mrs. McNeil letters of administration. She thereupon demanded payment of the deposit by the bank and it was paid to her.

In 1872, the wife of the supposed dead man returned from Cuba to New York, presented evidence that her husband the depositor had lived in Cuba until 1871, when

he died intestate, and thereupon the Surrogate revoked the letters which had been issued to Mrs. McNeil and granted letters to the depositor's widow. She demanded of the defendant a second payment of the deposit and upon refusal by the bank to pay, brought the suit.

The sole question considered by the Court of Appeals was whether the payment to the first administratrix was a defense to the action, and it was held that it was.

At the outset the Court met the suggestion that actual death is a jurisdictional prerequisite to the power of the Probate Court to grant administration. This point is made by counsel for the appellant in the present case on pages 3 and 8 of his brief. On the latter page he discusses and criticizes the *Roderigas case*, but without stating the reasoning of the New York Court of Appeals, Earl, J., says in that case (63 N. Y. at p. 463):

"Surrogates' Courts are courts of limited and special jurisdiction, and yet their jurisdiction to grant administration upon the estates of deceased persons is general and exclusive. No other courts can act and discharge the same functions. Before their proceedings can have any validity or confer any authority, they must have jurisdiction to act, and this is true of all courts. No court, no matter how general its jurisdiction may be, which proceeds without jurisdiction in the particular case, can make a valid record, or confer any rights.

"When a statute prescribes that some fact must exist before jurisdiction can attach in any court such fact must exist before there can be jurisdiction, and the court cannot acquire jurisdiction by erroneously deciding that the fact exists, and that it has jurisdiction. But where general jurisdiction is given to a court over any subject, and that jurisdiction depends, in the particular case, upon the facts which must be brought before the court for its determination upon evidence, and where it is required to act upon such evidence, its decision upon the question of its jurisdiction is conclusive until reversed, revoked or vacated, so far as to protect its officers and all other innocent persons who act

upon the faith of it." Citing authorities. (Italics ours.)

* * * *

"This rule as to the jurisdiction of officers and courts of limited and special jurisdiction has many illustrations in the cases cited. In *Staples v. Fairchild*, 3 N. Y. 41, the rule is announced as follows: 'Where certain facts are to be proved before a court or officer of special and limited jurisdiction as a ground for issuing process, and there is a total defect of evidence, the process will be void; but where the proof has a legal tendency to make out a proper case, in all its parts, for the jurisdiction of the court or officer, although such proof may be slight and inconclusive, the process will be valid until set aside on a direct proceeding for that purpose. In one case the court acts without authority, in the other it only errs in judgment upon a question properly before it for adjudication. In the one case there is a defect of jurisdiction; in the other there is only error of judgment.' In *Porter v. Purdy*, 29 N. Y. 106, the following language is used: 'When, in special proceedings in courts or before officers of limited jurisdiction, they are required to ascertain a particular fact, or to appoint persons to act in such proceedings, having particular qualifications or occupying some peculiar relation to the parties or the subject: such acts, when done, are in the nature of adjudications, which, if erroneous, must be corrected by a direct proceeding for that purpose: and if not so corrected, the subsequent proceedings which rest upon them are not affected, however erroneous such adjudications may be.' In *Grignon's Lessee v. Astor*, 2 How. (U. S.) 319; 11 L. Ed. 283, where, by a law of Michigan, the County Courts have power under certain circumstances, to order the sale of the real estate of a deceased person for the payment of debts and legacies, it was held that it was for that court to decide upon the existence of the facts which gave jurisdiction. In *Brittain v. Kinnaird*, 1 Brod. & Bing. 432, Dallas, *Ch. J.*, said: 'The magistrate, it is urged, could not give himself jurisdiction by finding that to be a fact which did not exist and he was bound to inquire as to the fact, and when he has inquired his conviction is conclusive of it.' "

At page 466, Earl, *J.*, continues:

“While the statute gives him (the Surrogate) no jurisdiction to administer upon the estate of a living person, it imposes upon him the duty of inquiry as to the death of any person upon whose estate letters of administration are applied for, and the inquiry is a judicial inquiry. In discharging that duty, he may examine the person applying for letters and examine other witnesses, and in making such examination he is discharging his judicial functions and exercising his rightful jurisdiction. He can compel the attendance of witnesses before him by attachment; and false swearing would be perjury under our statutes upon that subject. When proof has been produced to his satisfaction, the other conditions of the statute being complied with, he must issue letters. The inquiry may be a difficult one. In many cases in the time of war, in the cases of absence upon the seas, or in foreign lands, and in the case of long absence unheard from, death cannot be proved with infallible certainty. Witnesses may be untruthful or mistaken, and the surrogate may thus be led into error, yet he must act; the statute makes it his duty to do so. He must decide upon the fact of death as best he can upon the evidence produced, exercising a judgment not infallible. Does he decide it at his peril? If he decides one way, has he jurisdiction? And if he decides the other, has he no jurisdiction, and has he had none?

“The claim is, that if death has not occurred, although the surrogate may have been satisfied by the clearest proof before him that death had occurred, his proceedings are a nullity for want of any jurisdiction to act. The consequence is that they furnish no protection to any one. The surrogate, who has in good faith ordered the sale of property and the distribution of money, may, in after years, be made liable for the whole estate.”

The Court then goes on to note that if the surrogate's proceedings are to be held null and void in case he errs as to the fact of death, the same result would follow if he errs as to the place of death. At page 467 it is said:

“The fact of inhabitancy is frequently one difficult to be determined. It is one the surrogate

must determine before he can issue letters, and its determination frequently depends upon disputed and fallible evidence; and if error as to the fact of death will leave him with no jurisdiction, so will error as to the fact of inhabitancy, and the consequence will be that in such a case his proceedings will give no protection to any one. A construction of the statutes which will lead to such results will make the laws as to the jurisdiction and proceedings of Surrogates' Courts difficult and hazardous to execute, and should not be tolerated unless the language used will admit of no other construction. I am of opinion, taking into consideration the various provisions of the statutes, that it was the intention of the legislature to confer upon Surrogates' Courts sole and exclusive jurisdiction over the subject of granting letters of administration; and as part of that jurisdiction to determine the facts, upon sufficient evidence, upon which their action must rest."

At the bottom of page 468, Earl, *J.*, continues:

"Taking all these provisions together it is apparent that it would be rare that a living person would be seriously harmed by administration upon his estate. But it is otherwise with persons who deal with those who are thus clothed as administrators with the conclusive evidence of authority. This defendant, when called upon by the first administrator, could not resist payment, even if it had been practicable for it to ascertain that Devine was then living; and whether he was dead or alive was an issue which it would not have been permitted to litigate," citing authorities.

Earl, *J.*, then goes on to discuss the conflict in the authorities and in particular he criticizes the adverse dictum in *Allen v. Dundas*, 3 T. R. 125; 100 Reprint 490, *Griffith v. Frasier*, 8 Cranch. 9 and *Jochumsen v. Suffolk Savings Bank*, 3 Allen (Mass.) 87, referred to in appellant's brief several times on page 15 and in other places.

A further opinion was delivered in the *Roderigas case*, 63 N. Y. 460, by Miller, *J.* He says at page 470:

"The foundation upon which the proceedings rest are death and intestacy, and both of these must be

satisfactorily established. Sufficient evidence must be furnished to afford a reasonable presumption and to satisfy the officer of these essential facts. When this is done according to the rules applicable to such cases, the surrogate is legally bound to grant the letters applied for. * * * He has no alternative but to issue the letters demanded, and upon a refusal to do so, his decision would be the subject of review in an appellate tribunal and, if adverse to the plain proof, liable to reversal.

* * * *

“The power and the duty of the surrogate to issue the letters upon satisfactory proof being furnished, is very clear, and the point to be determined is, whether he had no jurisdiction because it subsequently turned out that the alleged intestate was living. It is, no doubt, true that the surrogate has no jurisdiction to grant letters upon the estate of a living person; but a mode has been provided by law to test the fact whether a person is deceased, and as the legislature has enacted how this shall be done, and as the adjudication of a competent tribunal must stand when jurisdiction is acquired until reversed or superseded, as the law requires, it is not apparent that such a determination is invalid and without jurisdiction.”

Miller, *J.*, continues at page 473:

“And even after the avails are distributed among creditors by virtue of a judgment of a competent court, and payment of debts made by a legally authorized representative, the parties receiving the same may be compelled to refund, discharges of liens on real estate set aside to the detriment of innocent parties, the title to real estate sold by order of the surrogate vacated, and the most inextricable confusion ensue. It cannot well be claimed that the legislature has not the power to provide safeguards for the protection of innocent third parties who act under the decree of a competent court, and thus remedy the evils which would flow from a want of such power. Enactments to guard against such consequences cannot be regarded as divesting a person of his property, or interfering with rights, without due process of law, in violation of a constitutional right. At most, such laws are

but regulations in regard to a subject of general interest to the entire community, and are essential for the welfare of society, the promotion of justice, and the proper administration of estates. In the case at bar it was no fault of the defendants that they paid the demand to an administrator duly qualified, and the blame, if any, rests with the party who, by a long absence, placed himself in a position where he was supposed to be dead. At common law absentees, not heard from within seven years, are presumed to be dead."

At page 474, Miller, J., continues:

"The letters were ample authority to receive the money and justify the payment; and had the defendant refused to pay, no defence could successfully be interposed to a suit brought. The decision of the surrogate, with sufficient evidence to establish death, was a judicial determination, and is a protection to all persons acting in good faith by virtue of the letters issued by him. In *Porter v. Purdy*, (29 N. Y. 106), it was held, that the proceedings in courts, or before officers of limited jurisdiction, in regard to a particular fact, and which are in the nature of adjudications, if erroneous, must be corrected by a direct proceeding for that purpose, and if not so corrected, the subsequent proceedings which rest upon them are not affected, however erroneous such adjudications may be. This doctrine was applied to freeholders appointed to assess the expense of a sewer, and may be especially invoked in a case where a competent tribunal has acted judically in reference to a subject by virtue of authority expressly conferred by law. (See, also, 2 Harr. & Gill, 42; *Noell v. Wells*, 1 Lev. 235.) In *Allen v. Dundas* (3 T. R. 125; 100 Rep. 490), it was held that payment of money to an executor under a forged will was valid, although the probate was afterwards declared null, and administration granted. Some remarks are made to the effect that the ecclesiastical court has no jurisdiction during the life of a party. This doctrine, however, has no application to cases for which provision is made by a statutory enactment."

The Court then criticizes the *Jochumsen case*, *supra*.

Both the judges whose opinions are quoted above noted that the question was not free from difficulty, and the decision itself was by a four to three vote of the Court of Appeals.

In supposed deference to a ruling of the Supreme Court of the United States, the Court of Appeals of New York (curiously enough by a four to three vote), announced the *Roderigas* case as no longer law in *In re Killan's Estate*, 172 N. Y. 547; 65 N. E. Rep. 561. This in no way detracts from the endorsement of the *Roderigas* case by Chief Justice Beasley in the opinion in the *Plume* case now to be referred to, as such endorsement was originally made in full recognition of adverse criticism.

The difficulties in this question were fully recognized by the late Chief Justice Beasley in his opinion delivered for the Supreme Court in the case of *Joseph W. Plume, Admr., v. Howard Savings Institution*, 46 N. J. L. 211 (1884).

The *Plume* case was similar to the *Roderigas* case and to the present case, except that the test in court came on the demand for payment by the first administrator.

Two questions were certified by the Judge of the Circuit Court to the Supreme Court for decision, namely, first, whether payment by the defendant to the plaintiff would be a bar to the future recovery of the same by the depositor himself or any other person claiming under him; and second, whether upon the proofs the plaintiff was entitled to recovery. Both questions were answered by the Supreme Court in the affirmative. See the end of the opinion at page 231, where the Court says (*italics ours*):

"The defendant will be put in no danger by paying the money in question to the plaintiff, for such payment will be an absolute discharge of the debt.

"Let judgment be given for the plaintiff."

While McMahon, the depositor in the *Plume* case, was not actually known to be alive and thus able to cause future difficulty, the decision of the Supreme Court that the payment to the plaintiff administrator would be an absolute discharge of the debt makes the case a practical parallel to our own.

Counsel for the plaintiff *Plume* was the present Chief Justice, and counsel for the defendant savings bank was the late Vice-Chancellor John R. Emery. Abstracts of their briefs are given in the report and it is apparent that the case was most fully argued, including the point of jurisdiction.

The branch of the Supreme Court which heard the case consisted of Chief Justice Beasley and Justices Depue, Scudder and VanSyckel, there being no dissenting vote.

Chief Justice Beasley said at page 227:

“Looking at the foregoing statement of facts, it is manifest that the Orphans’ Court, on the occasion in question, had jurisdiction of the subject involved in the application for authority to administer the estate of Philip McMahon as that of a deceased intestate. Such matter was as actually before that tribunal for its adjudication as it was possible for it to be. We might perhaps have doubt whether the court deduced the correct conclusion from the testimony before it as to the fact of the death of the alleged decedent, or as to its right to grant administration, under the conditions of the case, to the plaintiff, but it seems illogical to deny the power of the court to take cognizance of the affair and to proceed to judgment. In the case of *Grove v. Van Duyne*, 15 Vroom 654, the test of jurisdiction, so far as relates to courts having a general cognizance over a class of cases, was declared by the Court of Errors to be the colorable presentation before it of the facts necessary to constitute the case a member of such class. In the present case there was plainly some proof of the death of the supposed intestate, and likewise of the fact that he was not, at the time of his decease, a resident of this state, and therefore, even if the court fell into

error, which I do not intend to indicate, such error might have led, in a proper course of law, to a reversal of the judgment, but it can have no bearing against the right of the court to adjudicate upon the facts before it. Upon this assumption, that this power of judicature existed, it is apparent that the defendant in this instance must stand on the proposition that he has a right to show that the Orphans' Court decided incorrectly with respect to the evidence relating to jurisdictional facts. But such a contention is opposed to fundamental rules of law. If its correctness were admitted, it would at once degrade the judgments of the higher courts of the state to the subordinate rank of official procedures of a special character by statutory authority. For example, on such a theory a judgment of this court might be overthrown when put to the touch in a collateral proceeding, on the ground that the court erred in deciding on the fact before it that the defendant in the suit had been summoned, when in point of fact he had not received any notice of the action. Notice of a suit to a defendant in an action is as indispensable to the power of the court to take cognizance of the case, as is the fact of the decease of an alleged intestate, to the jurisdictional authority of the Orphans' Court to act in the matter of administration, and no reason can be urged while, if one of such subjects be opened to incidental attack, the other should not be equally so. In such a particular, the highest court of this state cannot be discriminated from the Orphans' Court, for it is entirely settled by repeated judgments that this latter tribunal is a superior court of general jurisdiction, and that its proceedings and judgments are, in no respect, more contestable than those of common law courts of the highest order. Such is the doctrine declared in *Hess v. Cole*, 3 Zab. 116, 121, the court saying: 'The jurisdiction of the Orphans' Court, though limited, is not special. It does not exercise a mere delegated authority for special purposes. It is a regularly constituted tribunal of justice, with broad and comprehensive powers. Its decrees upon all subjects within the scope of its jurisdiction are entitled to every presumption in favor of their reg-

ularity that the judgments of this court are entitled to. While they remain in force they are equally binding.' The following cases assert the same principle in its application to various circumstances: *Den v. Hammel*, 3 Harr. 73; *Den v. O'Hanlon*, 1 Zab. 582; *Quidort's Administrator v. Pergeaux*, 3 C. E. Green. 472.

"And in view of these principles it appears to me incontestable that the defense in this case cannot prevail. Courts of general jurisdiction need not set forth in their records the facts upon which their right to adjudicate depends, but such facts will be presumed, and no evidence can be received to contradict them, as such intendments are *presumptiones juris et de jure*. It is, indeed, this quality that constitutes the principal distinction between courts of superior and general jurisdiction, and those of limited and special jurisdiction. This doctrine is unquestionable, and is too rudimentary to justify discussion. The authorities will be found copiously collected in the notes to *Crepps v. Durdan*, 1 Smith's L. C. 978.

"Consequently, when the Orphans' Court of the County of Essex, having the matter by the requisite proceedings before it, awarded letters of administration in the present case, it will be intended, by force of the rule of law just stated, that it decided all the facts requisite to validate its action. If it had not been deemed to be satisfactorily shown that the alleged intestate was dead, and that he was not resident at the time of his death in this state, and that the plaintiff, although not the original petitioner, could be legally appointed the administrator, the decree which was made could not have been lawfully made, and the consequence is, it must be held in this incidental proceeding that such matters were passed upon by the court. To such a procedure the maxim '*omnia praesumuntur rite esse acta*' is applicable. And with respect to the present inquiry it matters not at all whether the clause of the statute that regulates the proceedings on applications for authority to administer the estates of non-resident decedents, was rightly construed by the Orphans' Court, inasmuch if an error exists

in that particular it cannot be corrected except in a direct appellate review."

Chief Justice Beasley notes that the authorities on the subject are conflicting and concludes by giving full approval to the *Roderigas case*, *supra*, remarking that notwithstanding the adverse criticism to which it has been subjected, the decision appears to be of great weight.

Chief Justice Beasley says at page 230:

"On the other hand, an authority to administer granted even by such a court, was declared to be invulnerable to all collateral attacks in the carefully considered case of *Roderigas v. East River Savings Institution*, 63 N. Y. 464. The point decided was that a payment by a debtor to an administrator duly appointed was valid, and a bar to a second action, although the supposed intestate was alive at the time, and the letters of administration were subsequently revoked for that reason. As we are dealing in the present case with the decree of a court of general jurisdiction, it is not necessary to affirm the doctrine of this reported case, though in passing it may not be out of place to remark that its reasoning, notwithstanding the adverse criticism to which it has been subjected, appears to be of great weight. That a conclusive efficacy should be given to letters of administration by whatever tribunal issued, so far as merely collateral impeachment is concerned, is a plain dictate of sound public policy, for a few things can be more oppressive than to require the debtors of a person who chooses so to absent himself as to give rise to a judicial conclusion that he is dead, to bear the burden of paying the debts they owe to such absentee, to his representative duly appointed according to legal forms, and at the same time to assume the risk of such payment being afterwards declared to be invalid, on the ground that such absentee was still alive. The doctrine of the nullity of such grants of administration would also be attended by the further disastrous result of rendering the surrogate or other court of limited jurisdiction liable to be treated as wrong-doers for everything that should be done by virtue of such

letters, and which might prove detrimental to the interests of the person supposed to be dead. But this question is not now before the court; for all that we are now called upon to declare is the doctrine already stated, that this decree of the Orphans' Court is not contestable in this collateral way."

Plume v. Howard Savings Institution has never been later challenged in this state, and while no later case in our courts has presented the exact facts there involved, the opinion has later been repeatedly followed and approved on the jurisdictional point involved, in the decisions of our courts, including this Court, as hereinbefore noted.

The Prerogative Court made the order granting administration in the present case. This is a constitutional court and of general jurisdiction in its field. The maxim "*Omnia praesumuntur rite esse acta*" applies.

In *Coursen's case*, 4 N. J. E. 408, at page 415, it was said:

"I have, therefore, no doubt at all that the Ordinary's original jurisdiction over the probate of wills, and the granting of letters of administration, is general and full, and not limited and special."

Our act relating to courts, 2 C. S. 1722, Sec. 76, provides as follows:

"The authority of the Ordinary shall extend only to the granting of probates of wills, letters of administration, letters of guardianship, and to the hearing and finally determining of all disputes that may arise thereon."

The letters of administration in this case were granted by a court having general and full jurisdiction in probate matters. It chose the administrator; it issued to its chosen representative its certificate of authority to act; and persons dealing in good faith with such representative should be protected and not made to suffer.

Presentation of letters testamentary or of administration by the legal representative to a debtor of the decedent, coupled with a demand by him upon the debtor for the payment of a just debt, must be followed by payment of the debt when the debtor has the means to do so. There is absolutely no defense that can be set up by the debtor. It would be foolish to refuse payment, because the legal representative could immediately sue at law to recover and the debtor would be without defense, as was pointed out by this Court in *Ryno's Executor v. Ryno's Administrator*, 27 N. J. E. 522.

It appeared in that case that a will was admitted to probate by the Hudson County Surrogate and that two years afterwards the Surrogate of the same county granted administration upon the same estate. The controversy arose from conflicting claims made by the executor and the administrator to the same funds, and Green, J., speaking for this Court, said at page 524:

"All the books lay it down as a legal consequence of the exclusive jurisdiction of the ecclesiastical courts in granting probate and administration, that the sentence pronounced in the exercise of such exclusive jurisdiction should be conclusive evidence of the right determined. The probate of this will was granted immediately after the death of the wife, by the officer upon whom the law has conferred the exclusive power of granting probate and administration. It was a judicial act of a tribunal having competent authority, and is conclusive until repealed. So long as a probate remains unrevoked, the seal of the Ordinary cannot be contradicted; neither can evidence be admitted to impeach it in a temporal court. Toller on Executors 76; 1 William on Executors 450; 4 Burns' Eccl. Law 209."

* * * *

"So universal and well settled in its application is this principle, that it has been decided that payments of money by an executor upon probate of a forged will is a discharge to the debtor of the decedent, notwithstanding the probate be afterwards

declared void and administration be granted to the intestate's next of kin, for if the executor had brought an action against the debtor, the latter could not have controverted the title of the executor so long as the probate was unrepealed, and the debtor was not obliged to wait for a suit when no defense could be made against it. *Allen v. Dundas*, 3 T. R. 125; *Peeble's Case*, 15 Serg. & Rawle 42."

Judge Green refers to the dictum in *Quidort's Admrx. v. Pergeaux*, 18 N. J. E. 472, decided by Chancellor Zabriskie, in which the latter said that if the supposed intestate were not dead, the grant of letters testamentary would be void. This case is relied upon by counsel for the appellant at the bottom of page 3 of his brief. Judge Green, however, makes the quotation for the purpose of emphasizing other language of the Chancellor to the effect that "the grant of administration constitutes the person to whom it is granted, the administrator, whether rightfully or wrongfully granted; like the acts of all other regularly constituted tribunals, the acts of the Surrogate cannot be impeached collaterally, they can only be reviewed by appeal."

Judge Green made no comment on the dictum of the Chancellor as to what would happen in the suppositious case if the alleged intestate were not dead. This Court, of course, expressed no opinion on the subject, since facts of that nature were not before it.

In the *Plume case* the grant of administration was made by the Orphans' Court of the County of Essex. One of the arguments made by counsel for the defendant was that the alleged decedent was not a resident of the County of Essex, but, on the contrary, resided at the time of his alleged death in the County of Sussex. The Supreme Court held, in addition to the other points already mentioned, that this suggestion could not be considered as

a ground of collateral attack upon the grant of administration.

If it were otherwise no grant of administration by any surrogate's court or orphans' court in this state, the jurisdiction of which depends upon residence of the decedent in the county, as well as upon the death of the decedent, would be safe at any time from collateral attack on the ground of alleged non-residence. The fact of residence is equally jurisdictional with the fact of death. The Probate Court must be able to make decisions upon these points which are final. This was pointed out in the *Roderigas case, supra*, 63 N. Y. at 467:

"If error as to the fact of death will leave him with no jurisdiction, so will error as to the fact of inhabitancy, and the consequence will be that in such a case his proceedings will give no protection to any one."

Allen v. Dundas, 3 T. R. 125; 100 Rep. 490, referred to in several of the opinions *supra*, aside from the dictum criticized in the *Roderigas case*, is a strong authority supporting the position of the defendant in the present case. It will be recalled that it was there held that payment of money to an executor under a forged will was valid although the probate was afterwards declared void. *Allen v. Dundas* was approved by this Court on this point in *Ryno's Executor v. Ryno's Administrator, supra*, and it has also been approved on the same point by the Court of Kings Bench as recently as 1906 in the case of *Martin v. Nadel* (1906), 2 K. B. 26 at 29. It was here held in a garnishment proceeding, not, however, involving death or administration, that the law will never compel a man to pay a sum of money a second time which he has paid once under the sanction of a court.

II.

The Analogy to the Absentee Doctrine.

In the case at bar the attention of the Court is respectfully called to the fact that Armstrong had no dealings with the bank between March, 1896, when he made his final withdrawal, and October 18, 1920, when he made demand for the amount of his deposit. In other words, for nearly twenty-four years, or more than three times the period giving rise to the presumption of death, the plaintiff permitted his deposit to lie dormant.

This is not a case involving any action under the statutes of this State referring to the presumption of death, 2 C. S. 1904; 1st Supp. to N. J. C. S., page 474, where the 1911 act is printed; and sections 30 to 32 of the *Orphans' Court Act*.

The order of the Prerogative Court appointing the administrator and the letters of administration in no way indicated to the defendant or anyone else that administration was granted except in the ordinary way, and administration was in fact granted in the ordinary way upon evidence to the Prerogative Court that death had occurred.

While it is true that irrespective of statute there was and is a presumption at common law that a person who has been absent without being heard from for a period of seven years has died (see *Sternkopf's case*, 72 N. J. E. 356, and the brief of counsel in *Plume v. Howard Savings Institution*, 46 N. J. L., at 215), and while the various arguments as to the beneficial character of the doctrine might be made here as were made by the Court in *Roderigas v. East River Savings Institution*, 63 N. Y. 460, *supra*, the majority of the absentee cases are not in point in the present discussion. There are now statutes in all the states on this subject and the cases turn on the peculiar provisions obtaining in each jurisdiction.

Counsel for the appellant, however, goes too far in arguing that the case of *Plume v. Howard Savings In-*

stitution is not a precedent here because that happened to be a case where there was no proof of the death before the Court and the presumption of death from seven years' absence was entertained by the Court. *All the more, when the Probate Court, as here, has proof satisfactory to it of the death and of the intestacy, is it the duty of the Court to order administration. The jurisdiction of the Probate Court in such a case must equally be immune from collateral attack.*

III.

There was no deprivation of plaintiff's property without due process of law.

Scott v. McNeal, 154 U. S. 34; 38 L. Ed. 896; 14 S. Ct. 1108, one of the absentee cases, which is much relied upon by counsel for the appellant, held that by an act of the Territory of Washington, the Probate Court was not authorized to conclusively decide as against a living person, who had been absent for more than seven years, that he was dead.

While this case contains some general dicta which are adverse to our contention, we would point out that what was construed there was a death presumption statute, and we would further point out that the effect of *Scott v. McNeal* has been considerably limited by the later decision of the same Court in *Cunnius v. Reading School District*, 198 U. S. 458; 49 L. Ed. 1125. In the latter case the Pennsylvania statute permitting administration on the estate of a person presumed to be dead was upheld, against the claims of that very person who later proved to be living; and there was held to be no conflict between the Pennsylvania statute and the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

In the *Cunnius case*, *supra*, 198 U. S. 458; 49 L. Ed. 1125, at page 1130, Judge White in upholding the absentee

statute of the State of Pennsylvania, quotes as follows from a work by one Demolombe upon the code of Napoleon, book 1, title 4, art. 112, *et seq.*:

“Three characters of interest invoke a necessity for legislation concerning this difficult and important subject. *First.* The interest of the person himself who has disappeared. If it is true that, generally speaking, every person is held, at his own peril, to watch over his own property, nevertheless the law owes a duty to protect those who, from incapacity, are unable to direct their affairs. It is upon this principle of public order that the appointment of tutors to minors or curators to the insane rests. It is indeed natural to presume that a person who has disappeared, if he continues to exist, is prevented from returning by some obstacle stronger than his own will, and which, therefore, places him in the category of an incapable person, whose interest it is the duty of the law to protect. And it is for this reason that the provisions as to absence in the Code are placed in the chapter treating of the status of persons, because the absentee, in the legal sense, is a person occupying a peculiar legal status. *Second.* The duty of the law-maker to consider the rights of third parties against the absentee, especially those who have rights which would depend upon the death of the absentee. *Third.* Finally, the general interest of society which may require that property does not remain abandoned without some one representing it, and without an owner. * * *

While the discussion by Demolombe and by Judge White is of absentee status, the matter is pertinent as indicating the evils that would arise if a grant of administration, either of the ordinary sort, or where a person had been absent over a long period of years, should be held to be open to collateral attack. The rights of third parties who may be interested, and of the general public require that confusion be avoided in this matter.

Both the statute of Washington Territory and the statute of Pennsylvania required the publication of notice, and such notice was published in each case. See the

fourth paragraph of the statement of Mr. Justice Gray prefixed to his opinion in *Scott v. McNeal*, and see the opinion of Mr. Justice White in *Cunnius v. Reading School District*, 49 L. Ed. at 1128, second column. The Court in *Scott v. McNeal* held that the notice published was a notice to the next of kin of the decedent, and not to the decedent, and that it was a nullity as to him. In the *Cunnius* case the Court held that the publication of a notice in a newspaper that evidence would be heard by the Court "concerning the alleged absence of the supposed decedent, and the circumstances and duration thereof" was sufficient, even though the alleged decedent, who, as later appeared, was living, knew nothing of the notice, or of the proceedings.

In *Scott v. McNeal*, 38 L. Ed. at 902, the Court took the position that the granting of administration is not a proceeding *in rem* or in the nature of a proceeding *in rem*.

In the *Cunnius* case the Court decided that the granting of administration was *in rem*. This is in accordance with the usual view.

In re Queen, 82 N. J. E. 583 at 586. The Prerogative Court in an opinion by Backes, V. O., holding that the Orphans' Court has no jurisdiction to revoke letters of administration granted by the Surrogate except on appeal, and that the order of the Surrogate cannot be impeached collaterally, says:

"A grant of letters testamentary (or of administration) by a surrogate is a proceeding *in rem*."

Thorburn v. Gates, 225 Fed. 613 (District Court S. D. of New York). Hand, D. J., says at page 616:

"I therefore regard the doctrine as having for its necessary corollary that the whole subject of administration is *in rem*."

Michigan Trust Co. v. Ferry, 175 Fed. 667 (Circuit Court of Appeals, 8th Circuit). Sanborn, C. J., says at page 674:

"A proceeding in a Probate Court to administer upon the estate of a deceased person is a proceed-

ing *in rem* and not *in personam*. The property of the estate within the jurisdiction of the court is the defendant, the executor or administrator is its representative, all claiming any interest in that property under the deceased are parties to the proceeding,"

citing authorities.

The above case was reversed by the Supreme Court, 228 U. S. 346, 57 L. Ed. 867, but the reversal was on grounds in no wise involving the correctness of the statement of the law which we have above quoted from the opinion of the Court below.

See also the opinion of Mr. Justice White in *Goodrich v. Ferris*, 214 U. S. 71, 53 Law Ed. 914 at 918:

"It is elementary that probate proceeding by which jurisdiction of a probate court is asserted over the estate of a decedent for the purpose of administering the same is in the nature of a proceeding *in rem*, and is therefore one as to which all the world is charged with notice."

Several of the cases involved an executorship under a will. Of course, administration of an intestate's estate by the Court itself through its own representative is even more clearly a proceeding with reference to certain assets or a *res* within the Court's jurisdiction.

It seems unnecessary here to go into the distinctions between actions *in rem* and actions *quasi in rem* (see the opinion of Vice-Chancellor Stevens in *Andrews v. Guayaquil & Quito Railway Co.*, 69 N. J. Equity 211; affirmed *per curiam* by this Court, 71 N. J. Equity 768; *Amparo Mining Co. v. Fidelity Trust Co.*, 74 N. J. Equity 197; affirmed by this Court, 75 N. J. Equity 555; and *Cona v. Henry Hudson Co.*, 86 N. J. L. 154, decided by this Court). Suffice it to say that administration is in its essence a dealing by the Court with property within its jurisdiction as against all the world. The action is with respect to the *res* itself.

In the present case there was property within the jurisdiction of the Prerogative Court of New Jersey, namely, the deposit of money in the defendant bank.

The *Cunnius* case proceeds on the theory of constructive notice. There was newspaper publication provided for by the Pennsylvania statute.

However, constructive notice may be a legal inference from the seizure of property by attachment, or other equivalent act, into the grasp of the Court; for the law assumes that property is always in the possession of its owner, in person or by agent, and it proceeds on the theory that its seizure will inform him, not only that it is taken into the custody of the Court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale.

See *Pennoyer v. Neff*, 95 U. S. 727; 24 L. Ed. 570.

The administrator in our practice is the officer of the Probate Court and is acting for the Court in taking control of the property of the decedent.

The order appointing the administrator in this case, after reciting Armstrong's death, referred to the bank deposit herein sued as "moneys held in trust for his benefit amounting to about the sum of \$817.50" (Case, p. 8, ll. 24 and 25), and gave directions as to the collection of the assets of the estate (Case, p. 8, l. 40, and p. 9, l. 1).

Some of the cases make the point that after jurisdiction has attached by seizure, the defendant may be entitled to some further constructive notice in order to enable the Court properly to control the disposition of the property so seized. However, in *Pennoyer v. Neff*, *supra*, at the bottom of page 570, Mr. Justice Field said that the jurisdiction of the Court to inquire into and determine the defendant's obligations at all is only incidental to the Court's jurisdiction over the property. He continues:

"Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment.

* * * *

“Even if the position assumed were confined to cases where the non-resident defendant possessed property of the state at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If, before the levy, the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law; the validity of every judgment *depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently.*” (Italics ours.)

In the instant case the paying out of the money by the defendant to the administrator under circumstances which were the equivalent of court compulsion, under the ruling of this Court referred to, *supra*, in *Ryno's Executor v. Ryno's Administrator*, constituted merely a part of the machinery of judicial seizure by the administrator, an officer of the court. If thereafter notice should have been given in order to make legal as against Armstrong any disposal or distribution of the fund, that notice should have been given by the administrator, and the bank should not be held accountable for any omission. If there was any deprivation of the property of the plaintiff without due process of law, it was by some separate step of the administrator after the seizure of the *res* by him.

If the administrator in disposing of the money has acted without due regard for the lawful rights of any person, the remedy is against the administrator or his bondsmen and not against the bank.

In *Williams v. Kiernan*, 25 Hun. (N. Y.) 355, it appeared that administration had been granted on a person not then dead. Proceedings to recover the money paid over were brought by the person for whom the administrator had been appointed, not against the debtors who had discharged their debts by paying them to the administrator, but against the sureties on the bond given by the

administrator. The Court upheld the right to sue on the bond.

This case is cited in support of the text in 24 C. J. 1059 on the subject of executors' and administrators' bonds:

"The fact that the issuance of the letters of administration was irregular or invalid does not as a rule affect the liability of either principal or sureties on the administration bond. In such a case a bond may be upheld as a *common-law bond*, and the sureties are estopped to question the regularity of the letters."

IV.

As against Armstrong the bank should not in this case be required to pay its debt to him the second time.

As between defendant and Armstrong, defendant acting in good faith and making payment to an administrator clothed with authority which it could not dispute, is free from all blame, while Armstrong was by reason of his long absence and silence not free from blame. Armstrong was, under the circumstances of this case, the more negligent of two innocent persons.

Some of the cases which take the view that a debtor under the circumstances like the present must pay twice, point out that there is a hardship here upon someone which the law is powerless to prevent. The doctrine seems to be that one of two innocent persons must suffer, and that it may as well be the debtor, and that he should be compelled to pay his debt twice.

It is the universal policy of the law in cases like this that if there is any differing degree of negligence or innocence on the part of the two parties one of whom must suffer, he who is the more negligent of the two, if only by a hair's breadth, or he who has in any way even inadvertently contributed substantially to the difficulty which has arisen, without any corresponding fault on the part of the other party, must bear the loss.

The three following cases decided by this Court illustrate the principle.

Heyder v. Excelsior Building Loan Association, 42 N. J. E. 403;

Sterling Leather Works v. Frank Schwarzwaelder, 88 N. J. E. 378;

Parkview B. & L. Ass'n of Newark v. Rose, 90 N. J. L. 614.

Are the judgment rolls of the Prerogative Court less sacred from question than the records of deeds and mortgages, the integrity of which has been supported in the application of this doctrine?

The law merchant in its daily operation works many hardships on innocent persons: but the policy of the law has deemed the integrity of innocent ownership of commercial paper as of greater consequence. May a bank buy a note with entire confidence, and yet be required to distrust the great seal of the Prerogative Court, even as against an absence of twenty years?

The debtor who pays to an administrator appointed by the Prerogative Court of New Jersey, it seems to us, should have a better position and standing before the Court than a man who absented himself from the country for twenty years, maintaining a silence justifying a presumption of death.

V.

The judgment of the Essex Circuit Court should be affirmed.

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