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# New Jersey Court of Errors and Appeals

O. Richard Koehler, Prosecutor-Appellant, vs. Passaic County Orphans Court et al. Defendants-Respondents. No. 1—In re Werner F. G. Koehler, a minor.	10
O. Richard Koehler, Prosecutor-Appellant, vs. Passaic County Orphans Court et al. Defendants-Respondents. No. 2—In re Ella O. E. Koehler, a minor.	20

## STIPULATION.

It is stipulated that the two appeals from the orders dismissing the two writs of certiorari, one relating to the estate of Werner F. G. Koehler, and the other to the estate of Ella O. E. Koehler, be included in the one state of the case and argued together. 30

Humphreys & Sumner,  
*Attorneys of Prosecutor-Appellant*

J. Henry C. Whitehead,  
*Attorney of Defendants-Respondents*

*Notice of Appeal*

NEW JERSEY SUPREME COURT.

(Filed April 15, 1920.)

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O. RICHARD KOEHLER,  
Prosecutor,

vs.

10 THE PASSAIC COUNTY ORPHANS'  
COURT, A. MITCHELL PALMER,  
Alien Property Custodian,  
and THE FARMERS LOAN &  
TRUST COMPANY,

Defendants.

(No. 1—In re Werner F. G.  
Koehler, a minor.)

---

*On Certiorari  
Tested Decem-  
ber 23, 1919.*

20

**NOTICE OF APPEAL**

Take notice that the prosecutor appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals.  
Dated April 12, 1920.

Humphreys & Sumner,  
*Attorneys of Prosecutor.*

30

To: The Passaic County Orphans Court and to Henry C. Whitehead, Esquire, Attorney of A. Mitchell Palmer, Alien Property Custodian, and the Farmers Loan & Trust Co.

Service acknowledged April 13, 1920.

Henry C. Whitehead,  
*Attorney of Defendant.*

*Opinion of Supreme Court*

## NEW JERSEY SUPREME COURT.

(Filed March 29, 1920.)

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O. RICHARD KOEHLER,  
Prosecutor,

vs.

THE PASSAIC COUNTY ORPHANS'  
COURT, A. MITCHELL PALMER,  
Alien Property Custodian,  
and THE FARMERS LOAN &  
TRUST COMPANY,  
Defendants.

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**OPINION OF SUPREME COURT.**

Argued March Term 1920 before Justices Trenchard, Bergen and Kalisch.

Humphreys & Sumner, for Prosecutor.

20

Henry C. Whitehead, for Defendants.

Per Curiam.

O. Richard Koehler is the guardian of two infants, both resident in Germany, and one of them, Ella O. E. Koehler, has now come of age. On the settlement by the guardian of his account, a rule to show cause was allowed why an order should not be made requiring the guardian to deposit the securities making up each fund with the United States Alien Property Custodian. Two orders requiring such deposit were made by the Orphans court. A writ of certiorari was allowed in each case to review the order, and by agreement the cases were argued together.

30

The first point made by the defendant in certiorari is that the only way to review such an order, under the statute, is by appeal to the Perrogative court, and that therefore these writs should be dismissed.

*Opinion of Supreme Court*

We think this is correct. The Orphans court had jurisdiction of the parties, and the subject matter, and the only question is whether these orders, which simply require the guardian to comply with the federal statute is an erroneous exercise of that jurisdiction. If it was wrongly exercised then manifestly  
10 the remedy is by appeal to the Prerogative court, otherwise all erroneous judgments of the Orphans court would be subject to review by certiorari. The writ will be dismissed with costs.

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*Rule dismissing Writ*

## NEW JERSEY SUPREME COURT.

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 Case No. 1.

 O. Richard Koehler,  
                   Prosecutor,  
                   vs.

 The Passaic County Orphans  
 Court and others,

                   Defendants.
 

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 ) On Writ of                   10  
   Certiorari.
**RULE DISMISSING WRIT.**

The Court having inspected the transcript and proceedings of the Orphans Court of the County of Passaic, returned with the Certiorari in this cause, the reasons for reversing the judgment below, and heard the argument of counsel therein, and having duly considered the same, do order that the Writ of Certiorari herein be dismissed with costs.                   20

Entered April 8, 1920,

On motion of,

Henry C. Whitehead,

Attorney for Defendants.

A true copy,

Enoch L. Johnson,

Clerk.

30

*Grounds of Appeal*NEW JERSEY COURT OF ERRORS AND  
APPEALS

(Filed April 17, 1920.)

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 O. Richard Koehler,  
 Prosecutor-Appellant,

vs.

 10 Passaic County Orphans Court,  
 A. Mitchell Palmer, Alien  
 Property Custodian, and the  
 Farmers Loan & Trust Com-  
 pany.  
 Defendants-Respondents.
 

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 ) *On Certiorari*  
 (No. 1 — In  
 re Werner F.  
 G. Koehler, a  
 minor).
**GROUND OF APPEAL.**
 20 The appellant states the following grounds of ap-  
 peal:

 30 The Supreme Court, upon the writ of certiorari  
 in said cause, which removed the order of Passaic  
 County Orphans Court dated December 18, 1919, in  
 a certain preceeding entitled "In the Matter of the  
 Estate of Werner F. G. Koehler, a minor," for re-  
 view, dismissed said writ; whereas for one or more  
 of the reasons filed by the appellant-prosecutor in  
 said court for the reversal of said order, the Supreme  
 Court ought to have allowed said writ and ought to  
 have reversed, vacated and set aside said order; and  
 the appellant here states and alleges each of said rea-  
 sons for reversal so as aforesaid filed in the Supreme  
 Court appearing in this cause as grounds for appeal  
 in this court.

 Humphreys & Sumner,  
*Attorneys of Prosecutor-Appellant.*

Service acknowledged April 16, 1920.

*Writ of Certiorari***WRIT OF CERTIORARI.**

NEW JERSEY, SS.:

*The State of New Jersey to the Passaic*  
L. S. *County Orphans' Court*, GREETING:

We being willing for certain reasons to be certified of a certain order of said Passaic County Orphans' Court, dated December 18, 1919, in a certain proceeding entitled "In the matter of the estate of Werner F. G. Koehler, a minor," by which order O. Richard Koehler, guardian of the estate of Werner F. G. Koehler, a minor, was ordered to forthwith pay and turn over to the United States Alien Property Custodian, or to its depository, the Farmers Loan and Trust Company of 16-22 William St., New York City, certain cash and securities in said order specified, and that the receipt of the United States Alien Property Custodian, or of its said depository therefor, should be deemed and taken to be a full acquaintance and discharge of the said guardian, for and to the extent of said cash and securities so paid and turned over, and whereby it was further ordered that the costs of said application and a counsel fee to Henry C. Whitehead, proctor for the said United States Alien Property Custodian, in the sum of Two Hundred and Fifty Dollars (\$250) should be first paid by said guardian out of the funds of the said estate in his hands, do command you that the said order, together with the rule to show cause therefore granted in said matter, and all other proceedings by or before said Passaic County Orphans' Court concerning the same as fully and entirely as before you they remain, or are in your custody or control, you do certify and send, together with this

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*Writ of Certiorari*

writ, to our Supreme Court at Trenton on the twelfth day of January, Nineteen Hundred and Twenty, that we may cause to be done thereupon what of right and according to law ought to be done.

10 WITNESS, William S. Gummere, Esquire, Chief Justice of our Supreme Court at Trenton, this twenty-third day of December, A. D. Nineteen Hundred and Nineteen.

Enoch L. Johnson,  
Clerk.

Humphreys & Sinner,  
Attorneys.

I allow this writ. Let it be sealed. The writ to operate as a stay.

Dated, Dec. 23, 1919.

20

James F. Minturn,  
*J. S. C.*

Let the Surrogate make return to the within writ.

Wm. W. Watson,  
*Judge.*

30

*Petition.*

## PASSAIC COUNTY ORPHANS' COURT.

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 IN THE MATTER...

OF

 The Guardianship of Werner F.  
 G. KOEHLER, *a minor*.
 

---

 } *On Account-*  
 } *ing.*

10

**PETITION.***To the Orphans' Court of Passaic County:*

The petition of O. Richard Koehler, of the City of New York, in the County of New York, and State of New York, respectfully shows as follows:

1. Your petition is the Guardian of the estate of Werner F. G. Koehler, a minor, and herewith presents his account of his administration of the aforesaid estate.

20

2. The names and addresses of all persons interested in said accounting (specifying which of such persons in interest are minors, and giving the name and address of the Guardian of such minor, or the name and address of the parent or other person standing in *loco parentis* to said minor) are as follows:

30

Werner F. G. Koehler (a minor), whose address is Jena, Germany.

The guardian of the said minor is O. Richard Koehler, whose postoffice address is 230 Fifth Avenue, City, County and State of New York.

The following is a summary of his aforesaid account:

*Petition*

Accountant chargeth himself as follows:

To balance on hand at last A/c Corpus	\$22000.00
Income .....	924.37
Amount collected income.....	3876.33

10 Accountant prays allowance as follows:

Amount of Expenditures:

Income .....	\$ 1669.71
--------------	------------

Balance in the hands of Accountant:

Income .....	2207.62
--------------	---------

Balance in the hands of Accountant:

Corpus .....	22000.00
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20 Your petitioner therefore prays that said account may be allowed, and also for the allowance of commissions and counsel fees.

Dated, Passaic, New Jersey, September 30, 1919.

O. Richard Koehler,  
Petitioner.



*Decree Allowing Account*

## PASSAIC COUNTY ORPHANS' COURT.

SEPTEMBER TERM, A. D. 1919.

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 IN THE MATTER

OF

 10 The Intermediate Account of the  
 Guardian of WERNER F. G.  
 KOEHLER, a minor.
 

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**DECREE ALLOWING ACCOUNT.**

The Surrogate having audited and stated the intermediate account of O. Richard Koshler, the guardian of Werner F. G. Koehler, a minor, and placed the same on the files of his office twenty days
   
 20 previous to the thirteenth day of November, A. D. one thousand nine hundred and nineteen, and having on the day last aforesaid reported the same to this court for allowance and settlement and it having been proved to the satisfaction of the Court that notice of his intention to settle the said account on the thirteenth day of November, A. D. one thousand nine hundred and nineteen, in this court, was given by said accountant according to law; and the Alien
   
 30 Enemy Custodian having been represented in Court by Henry C. Whitehead, Esq., and he having waived notice and the matter having been continued until this day;

And the said account having been examined by the Court and the parties in interest having satisfied the Court that the payments of which no vouchers were filed were proper payments and the other items thereof appearing to be supported and justified by

*Decree Allowing Account*

the vouchers and no exceptions being made there-  
to;

It is, on this fourth day of December, A. D. one  
thousand nine hundred and nineteen, ordered, ad-  
judged and decreed that the said account be entered  
of record.

It is further ordered that the said accountant be  
allowed the sum of One hundred and forty-seven & 10  
60/100 dollars on account of his commissions, and  
that a counsel fee of Fifty Dollars be allowed to  
William F. Gaston, Proctor for said accountant, and  
that the Surrogate be allowed the sum of Thirty and  
67/100 dollars for advertising, posting, etc.

William W. Watson,  
Judge. 20

## PASSAIC COUNTY ORPHANS' COURT

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 IN THE MATTER

OF

The Estate of WERNER F. G.

KOEHLER, a minor.

10

**RULE TO SHOW CAUSE.**

Upon application of Henry C. Whitehead, proctor for the United States Alien Property Custodian, and in the presence of John B. Humphreys, Esquire, Proctor for O. Richard Koehler, Guardian of the above-entitled minor.

20 It is, on this thirteenth day of November, nineteen hundred and nineteen,

30 Hereby Ordered, that said O. Richard Koehler, Guardian as aforesaid, show cause before this Court on Thursday, November 20th, 1919, at ten o'clock in the forenoon, at the Court House in the City of Paterson, Passaic County, New Jersey, why an order should not be made and entered herein requiring said Guardian forthwith upon the allowance of his final account now pending in this Court to turn over such estate, after first paying such costs, counsel fees and guardian's fees as may be awarded upon said final account and the costs of this application, including a proper allowance to the Proctor of the United States Alien Property Custodian, to the said Alien Property Custodian or to his authorized depository, agent or attorney; and it is further

Ordered, that a copy of this rule, which need not be certified, be served upon John B. Humphreys,

*Rule to Show Cause*

Esquire, proctor for said Guardian, by handing the same to him personally, or by leaving the same at his office in the City of Paterson, within two days from the date hereof.

William W. Watson,  
Judge.

Filed: Dec. 4, 1919.

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Frederic Beggs,  
Surrogate.

Recorded in Book Y of Orphans' Ct. R. Page 604  
&c.

Frederic Beggs,  
Surrogate.  
D.

20

30

*Affidavit*

## PASSAIC COUNTY ORPHANS' COURT

IN THE MATTER OF The Estate of WERNER F. G. KOEHLER, a minor.	}	<i>On Rule to          Show Cause.</i>
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**AFFIDAVIT.**

STATE OF NEW YORK, COUNTY OF NEW YORK.	}	ss.:
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O. Richard Koehler, of full age, being duly sworn, deposes and says as follows:

20 I am the guardian of Werner F. G. Koehler, having been so appointed by the Surrogate of the County of Passaic by a decree of guardianship, dated May 2, 1907. The American Surety Company of New York is bondsman for me in the sum of Forty Thousand Dollars (\$40,000) for the due performance of my trust as such guardian.

30 I am a citizen of the United States of America, having procured my naturalization papers on or about the 18th day of January, in the year of our Lord, one thousand nine hundred and eight.

The said Werner F. G. Koehler, who is my nephew, is to my knowledge today a minor of the age of seventeen years.

O. Richard Koehler.

*Affidavit*

Sworn to and subscribed before me  
this 19th day of November, 1919.

HERBERT J. CARROLL,  
Notary Public

in and for the City, County and State of  
New York.

10

(L. S.)

Notary Public,

Kings County Clerk's No. 144

New York County Clerk's No. 360.

New York County Register's No. 10202.

Term expires March 30th, 1920.

Filed: December 4th, 1919.

Frederic Beggs,  
Surrogate.

20

30

## PASSAIC COUNTY ORPHANS' COURT

<p style="text-align: center;">IN THE MATTER</p> <p style="text-align: center;">OF</p> <p style="text-align: center;">The Estate of WERNER F. G.</p> <p style="text-align: center;">KOEHLER, a minor.</p>	}	<p>On Rule to Show Cause.</p>
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**ORDER.**

This matter being opened to the Court by Henry C. Whitehead, Proctor for the United States Alien Property Custodian, John B. Humphreys, Proctor for O. Richard Koehler, Guardian of the above-named minor, appearing in opposition, and it appearing to the Court that service of the Rule to Show Cause heretofore granted in this matter has been duly made, and it further appearing and being undisputed that the said Werner F. G. Koehler is a resident of Jena, Germany, and an enemy alien, and that the intermediate account of O. Richard Koehler, Guardian of the said Werner F. G. Koehler, has been filed and allowed by this Court on December 4th, 1919, which said account shows a balance in the hands of the said Guardian, after deducting Court costs, counsel fees and commissions allowed on said account of \$228.27 made up of the following securities and cash:

20  
30

- 5 New York City 4% bonds at \$1000.
- 4 Cent. R. R. of N. J. 5% bonds at \$1000.
- 5 Union Pacific R. R. 4% bonds at \$1000.
- 5 N. Y. Central R. R. 3½% bonds at \$1000.
- 2 Chicago, Milwaukee & St. Paul 4% bonds at \$1000.

*Order*

2 Balto. & Ohio 4½% bonds at \$500.  
 Cash .....\$1978.35

And it further appearing to the Court, and being undisputed that demand issued upon the above-named Guardian by the United States Alien Property Custodian for the above enemy interest (A. P. C. Form No. 106-E) on July 9th, 1918, and that service thereof was accepted by the said Guardian on June 11th, 1919, and that the signing of the armistice has not operated to nullify or affect the operation of the provisions of the "Trading with the Enemy Act" or of the Executive orders applicable thereto. 10

And the Court having heard and considered the arguments of Counsel and no good reason appearing to the contrary, 20

It is, therefore, on this 18th day of December, 1919, on motion of Henry C. Whitehead, Proctor for the said United States Alien Property Custodian, hereby ordered that the said Guardian forthwith pay and turn over to the said United States Alien Property Custodian, or to its depository, the Farmers Loan & Trust Co. of 16-22 William Street, New York City, the cash and securities above specified, and that the receipt of the United States Alien Property Custodian, or of its said depository therefor, be deemed and taken to be a full acquittance and discharge of the said Guardian for and to the extent of the cash and securities so paid and turned over. 30

It is further ordered that the costs of this application and a counsel fee to Henry C. Whitehead, Proctor for the said United States Alien Property

*Order*

Custodian, in the sum of \$250.00 be first paid by said Guardian out of the funds of the said Estate in his hands.

William W. Watson,  
Judge.

Filed: Dec. 22, 1919.

10

Frederic Beggs,  
Surrogate.

Recorded in Book Z of Orphans' Ct. R. page 15  
&c.

Frederic Beggs,  
Surrogate.

20

In obedience to the command of the writ hereto annexed directed to the Passaic County Orphans' Court, I, Frederic Beggs, Surrogate of Passaic County, Clerk of said court, do hereby certify and send to the Honorable Justices of the New Jersey Supreme Court the order of the said Passaic County Orphans' Court mentioned in said writ dated December 18, 1919, in a certain proceeding entitled "In the Matter of the Estate of Werner F. G. Koehler, a minor," and all other proceedings, by or before said Passaic County Orphans' Court concerning the same as fully and entirely as they remain in my office.

30

IN WITNESS WHEREOF, I have hereto set my hand and official seal, this fifth day of January, in the year of our Lord, one thousand nine hundred and twenty.

Frederic Beggs,  
Surrogate of Passaic County.

*Acknowledgment of Service*

NEW JERSEY SUPREME COURT.

O. RICHARD KOEHLER,  
Prosecutor,

vs.

THE PASSAIC COUNTY ORPHANS'  
COURT, A. MITCHELL PALMER,  
Alien Property Custodian,  
and THE FARMERS LOAN &  
TRUST COMPANY,  
Defendants.

*On Certiorari.*

10

**ACKNOWLEDGMENT OF SERVICE.**

Service of a copy of the writ of certiorari in the  
above-entitled matter is acknowledged January 3rd,  
1920.

20

Henry C. Whitehead,  
Attorney of A. Mitchell Palmer,  
Alien Property Custodian, and  
The Farmers Loan & Trust Com-  
pany.

Filed Jan. 9th, 1920.

30

## NEW JERSEY SUPREME COURT.

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O. RICHARD KOEHLER,  
Prosecutor,

vs.

10 THE PASSAIC COUNTY ORPHANS'  
COURT, A. MITCHELL PALMER,  
Alien Property Custodian,  
and THE FARMERS LOAN &  
TRUST COMPANY,  
Defendants.

---

*On Certiorari.***REASONS.**

20 The presecutor presents the following reasons  
upon which he will rely for the reversal of the pro-  
ceedings under review in this case:

1. The order made by the Passaic County Or-  
phans' Court, dated December 18th, 1919, was in-  
valid, because the Passaic County Orphans' Court  
possessed no statutory power to make such an order,  
and being a court created by statute, and being in-  
vested with special powers and jurisdiction in dero-  
gation of the powers of the courts established by the  
30 Constitution, it should be restrained in the exercise  
of those powers and of that jurisdiction by the words  
of the statute.

2. Said order is invalid because the Passaic  
County Orphans' Court, except in cases of insolvent  
estates of decedents, has no power to settle disputed  
claims with reference to estates.

3. Said order is invalid because the Passaic

*Reasons*

County Orphans' Court had no jurisdiction to determine as between the prosecutor, a citizen of the United States, guardian of a minor, and the Alien Property Custodian, which of them was entitled to the custody of the corpus of said trust estate.

4. Said order is invalid because of the statute upon which the same is based, to wit, the Act of Congress entitled "Trading with the Enemy Act," approved October 6, 1917, Congress has not attempted to confer jurisdiction upon the Passaic County Orphans' Court to make such an order. 10

5. Said order is invalid because Congress is without power to interfere with or control state courts, except in so far as the federal courts have appellate jurisdiction. 20

6. Said order is invalid because Congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and laws of the United States.

7. Said order is invalid because Congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and laws of the United States, although the state courts may exercise jurisdiction in cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the federal courts, and the State of New Jersey has enacted no law conferring upon the Passaic County Orphans' Court jurisdiction to make said order. 30

8. Said order is invalid because it deprives the United States District Court of its exclusive juris-

diction over the enforcement of said Act of Congress given by the 17th section of the Act, which reads as follows:

10           “Sec. 17. That the district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order of decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, en-  
20           titled ‘An Act to codify, revise, and amend the laws relating to the judiciary.’”

9. Said order is invalid because it deprives the prosecutor of the right of appeal allowed him by Sec. 17 of said Act of Congress, which gives a right of appeal from the final order or decree of the United States District Court as provided in Sections 128 and 238 of the Act of March 3, 1911 entitled, “An Act to codify, revise and amend the laws relating to  
30           the judiciary.”

10. Said order made by the Passaic County Orphans’ Court was not justified nor reasonably supported by the facts before said court, upon which said order was based.

11. Said order was invalid because there was no evidence before said Court to support reasonably said order under review.

*Reasons*

12. Said order and the statute upon which the same is based, to wit, the Act of Congress, entitled "Trading with the Enemy Act," approved October 6, 1917, are void, in so far as the said Act was construed by the Passaic County Orphans' Court, to require the possession of property held by a United States citizen as guardian upon trust for an infant alien enemy to be delivered up to the Alien Property Custodian while the infant still remained an infant, and had no right as against his guardian to claim the possession of the property, such a construction of the Act rendering it unconstitutional in that it violates, without any military necessity, the rights of a citizen of the United States secured to him by the Constitution of the United States in the following particulars:

(a) It deprives such citizen of his property without due process of law contrary to the fifth amendment of the Constitution of the United States, reading as follows:

"No person shall be \* \* \* deprived of life, liberty or property without due process of law."

(b) It takes the private property of such citizen for public use without just compensation contrary to the fifth amendment of the said Constitution, reading as follows:

"Nor shall private property be taken for public use without just compensation."

(c) Such construction placed upon said Act by the Passaic County Orphans' Court renders said Act unreasonable, unconstitutional and invalid for the reason that without any military

*Reasons*

necessity it deprives the prosecutor, a citizen of the United States, of his vested property rights.

13. Because said proceedings are in divers other respects irregular, illegal, unjust and oppressive to the prosecutor.

10

Humphreys & Sumner,  
Attorneys of Prosecutor.

Filed Jan. 10, 1920.

20

30

*Notice of Appeal*

## NEW JERSEY SUPREME COURT

Filed April 15, 1920.

---

O. RICHARD KOEHLER,  
Prosecutor,

vs.

THE PASSAIC COUNTY ORPHANS'  
COURT, A. MITCHELL PALMER,  
Alien Property Custodian,  
and THE FARMERS LOAN &  
TRUST COMPANY,  
Defendants.

(No. 2—In re Ella O. E.

Koehler, a minor).

*On Certiorari.*  
Tested Decem-  
ber 23, 1919.

10

20

**NOTICE OF APPEAL**

Take notice that the prosecutor appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals.

Dated April 12, 1920.

Humphreys & Sumner,  
Attorneys of Prosecutor.

To: The Passaic County Orhpans' Court and to 30  
Henry C. Whitehead, Esquire, Attorney of  
A. Mitchell Palmer, Alien Property Custodian,  
and the Farmers Loan & Trust Co.

Service acknowledged April 13, 1920.

Henry C. Whitehead,  
Attorney for Defendants.

For copy of opinion see p. 3 supra.

## NEW JERSEY SUPREME COURT

Case No. 2.

---

 O. Richard Koehler,  
 Prosecutor,

vs.

 10 The Passaic County Orphans  
 Court and others,  
 Defendants.
 

---

 } On Writ of  
 } Certiorari.
**RULE DISMISSING WRIT.**
 20 The Court having inspected the transcript and  
 proceedings of the Orphans Court of the County of  
 Passaic, returned with the Certiorari in this cause,  
 the reasons for reversing the judgment below, and  
 heard the argument of counsel therein, and having  
 duly considered the same, do order that the Writ of  
 Certiorari herein be dismissed with costs.

Entered April 8, 1920,

 On motion of,  
 Henry C. Whitehead,  
 Attorney for Defendants.

 A true copy,  
 Enoch L. Johnson,  
 30 Clerk.

*Grounds of Appeal*NEW JERSEY COURT OF ERRORS AND  
APPEALS

Filed April 17, 1920.

O. RICHARD KOEHLER, Prosecutor-Appellant, vs. THE PASSAIC COUNTY ORPHANS' COURT, A. MITCHELL PALMER, Alien Property Custodian, and THE FARMERS LOAN & TRUST COMPANY, Defendants-Respondents.	}	<i>On Certiorari.</i> (No. 2 — In re Ella O. E. Koehler, a minor).	10
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**GROUND OF APPEAL.**

20

The appellant states the following grounds of appeal:

The Supreme Court, upon the writ of certiorari in said cause, which removed the order of Passaic County Orphans Court dated December 18, 1919, in a certain proceeding entitled "In the Matter of the Estate of Ella O. E. Koehler, a minor," for review, dismissed said writ; whereas for one or more of the reasons filed by the appellant-prosecutor in said court for the reversal of said order, the Supreme Court ought to have allowed said writ and ought to have reversed, vacated and set aside said order; and the appellant here states and alleges each of said reasons for reversal so as aforesaid filed in the Supreme Court appearing in this cause as grounds for appeal in this court. 30

Humphreys & Sumner,  
Attorneys of Prosecutor-Appellant.

Service acknowledged April 16, 1920.

**WRIT OF CERTIORARI.**

NEW JERSEY, SS.:

The State of New Jersey to the Passaic  
L. S. County Orphans' Court, GREETING:

10 We being willing for certain reasons to be certified of a certain order of said Passaic County Orphans' Court, dated December 18, 1919, in a certain proceeding entitled "In the matter of the estate of Ella O. E. Koehler, a minor," by which order O. Richard Koehler, guardian of the estate of Ella O. E. Koehler, a minor, was ordered to forthwith pay and turn over to the United States Alien Property Custodian, or to its depository, the Farmers Loan & Trust Company, of 16-22 William Street, New  
20 York City, certain cash and securities in said order specified, and that the receipt of the United States Alien Property Custodian, or of its said depository therefor, should be deemed and taken to be a full acquittance and discharge of the said guardian, for and to the extent of said cash and securities so paid and turned over, and whereby it was further ordered that the costs of said application and a counsel fee to Henry C. Whitehead, proctor for the said United States Alien Property Custodian, in the sum of Two  
30 Hundred and Fifty Dollars (\$250), should be first paid by said guardian out of the funds of the said estate in his hands, do command you that the said order, together with the rule to show cause theretofore granted in said matter, and all other proceedings by or before said Passaic County Orphans' Court concerning the same, as fully and entirely as before you they remain, or are in your custody or control, you do certify and send, together with this

*Writ of Certiorari*

writ, to our Supreme Court at Trenton on the twelfth day of January, Nineteen Hundred and Twenty, that we may cause to be done thereupon what of right and according to law ought to be done.

Witness, William S. Gummere, Esquire, Chief Justice of our Supreme Court at Trenton, this twenty-third day of December, A. D. Nineteen Hundred and Nineteen. 10

Enoch L. Johnson,  
Clerk.

HUMPHREYS & SUMNER,  
Attorneys.

I allow this writ. Let it be sealed. The writ to operate as a stay. 20

Dated, Dec. 23, 1919.

James F. Minturn,  
J. S. C.

Let the Surrogate make return to the within writ.

Wm. W. Watson,  
Judge.

## PASSAIC COUNTY ORPHANS' COURT

10	<p style="text-align: center;">IN THE MATTER OF The Final Accounting of O. RICHARD KOEHLER, Guardian of Ella O. E. Koehler.</p>	}	On Account- ing.
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**PETITION.**

To the Orphans' Court of the County of Passaic:

The petition of O. Richard Koehler, of the City of New York, County of New York, and State of New York, respectfully shows as follows:

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1. Your petitioner is the guardian of Ella O. E. Koehler, and herewith presents his account as guardian.

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2. The name and address of all persons interested in said accounting is the said ward, Ella O. E. Koehler, who resides with her mother, Olga Koehler, in the City of Greiz, in Empire of Germany, and who became of age on March 18th, nineteen hundred and seventeen, and who is a daughter of E. Gotthold Koehler, late of Passaic, who died intestate.

3. The following is a summary of his aforesaid account:

Accountant charges himself as follows:

Balance in hands of accountant as shown

in last previous account.....	\$99.00
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*Petition*

Amount received during period covered by this account.....	1925.41	
	<hr/>	
Total charges.....	\$2024.41	
Accountant prays allowance as follows:		
Amount of distribution as shown by said account .....	1225.23	10
	<hr/>	
Balance in hands of accountant.....	\$799.18	

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

Dated, Passaic, N. J.

O. RICHARD KOEHLER. 20

*Petition*

STATE OF NEW JERSEY,                    } ss.:  
 COUNTY OF PASSAIC,                    }

O. Richard Koehler, being duly sworn, according  
 to law upon his oath, deposes and says that he is  
 the petitioner in the foregoing petition named, and  
 that the matter and things therein contained are  
 10 true to the best of his knowledge and belief.

O. RICHARD KOEHLER.

Sworn to subscribed to before me  
 this 28th day of March, 1917.

FRED W. GATSON,  
 Master in Chancery of N. J.

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*Decree Allowing Account*

## PASSAIC COUNTY ORPHANS' COURT

In the Matter  
 of  
 The Final Account of the guar-  
 dian of Ella O. E. Koehler,  
 a minor.

10

**DECREE ALLOWING ACCOUNT.**

The Surrogate having audited and stated the final account of O. Richard Koehler, the guardian of Ella O. E. Koehler, a minor, and placed the same on the files of his office twenty days previous to the third day of May, A. D. one thousand nine hundred and seventeen, and having on the day last aforesaid reported the same to this court for allowance and settlement, and it having been proved to the satisfaction of the court that notice of his intention to settle the said account on the Third day of May, A. D. one thousand nine hundred and seventeen, in this court, was given by said accountant according to law;

20

And the said account having been examined by the court and being found to be properly and fairly stated, and the items thereof to be supported and justified by the vouchers, and no exceptions being made thereto,

30

It is, on this third day of May, A. D. one thousand nine hundred and seventeen, ordered, adjudged and decreed that the said account be entered of record.

It is further ordered that the said accountant be allowed the sum of Ninety Six & 27/100 dollars on account of his commissions, and that a counsel fee of Fifty Dollars be allowed to William F. Gaston,

*Decree Allowing Account*

proctor for said accountant, and that the Surrogate be allowed the sum of Twenty-nine and 22/100 dollars for advertising, posting, etc., and three and 05/100 dollars for citations, etc., and nine dollars and fifty-two cents (\$9.50) be allowed the proctor for additional advertising.

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William W. Watson,  
Judge.

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*Rule to Show Cause*

## PASSAIC COUNTY ORPHANS' COURT

IN THE MATTER OF The Estate of ELLA O. E. KOEHLER, a minor.
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**RULE TO SHOW CAUSE.**

Upon application of Henry C. Whitehead, proctor for the United States Alien Property Custodian, and in the presence of John B. Humphreys, Esquire, proctor for O. Richard Koehler, Guardian of the above-entitled minor,

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It is, on this thirteenth day of November, nineteen hundred and nineteen,

Hereby Ordered, that said O. Richard Koehler, Guardian as aforesaid, show cause before this Court on Thursday, November 20th, 1919, at ten o'clock in the forenoon, at the Court House, in the City of Paterson, Passaic County, New Jersey, why an order should not be made and entered herein determining the amount of the estate in the hands of said Guardian belonging to said minor and that was in his hands on June 11th, 1919, and requiring said Guardian forthwith to turn over such estate, after first paying the costs of this application, including a proper allowance to the Proctor of the United States Alien Property Custodian, to the said Alien Property Custodian or to his authorized depository, agent or attorney; and it is further

30

*Rule to Show Cause*

Ordered, that a copy of this rule, which need not be certified, be served upon John B. Humphreys, Esquire, proctor for said Guardian, by handing the same to him personally or by leaving the same at his office in the City of Paterson, within two days from the date hereof.

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William W. Watson,  
Judge.

Filed: Dec. 4th, 1919.

Frederic Beggs,  
Surrogate.

Recorded in Book Y of Orphans' Ct., page 604.

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Frederic Beggs,  
Surrogate.

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*Order*

## PASSAIC COUNTY ORPHANS' COURT

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IN THE MATTER  
OF  
The Estate of ELLA O. E.  
KOEHLER, a minor.

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} Show Cause.

} On Rule to

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**ORDER.**

This matter being opened to the Court by Henry C. Whitehead, Proctor for the United States Alien Property Custodian, John B. Humphreys, Proctor for O. Richard Koehler, Guardian of the above-named minor, appearing in opposition, and it appearing to the Court that service of the Rule to Show Cause heretofore granted in this matter has been duly made, and it further appearing and being undisputed that the said Ella O. E. Koehler is a resident of Jena, Germany, and an enemy alien, and that the final account of O. Richard Koehler, Guardian of the said Ella O. E. Koehler, was duly filed and allowed by this Court on May 3rd, 1917, and that there still remains in the hands of the Guardian \$24,094.58 in cash and securities belonging to the said Ella O. E. Koehler, which cash and securities are as follows:

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30

- 5 New York City 4% bonds at \$1000.
- 5 Chic. R. I. & Pac. 4% bonds at \$1000.
- 5 Union Pac. R. R. 4% bonds at \$1000.
- 5 N. Y. Central 3½% bonds at \$1000.
- 2 Balto. & Ohio 4½% bonds at \$500.
- 2 Chic. Mill. & St. P. 4% bonds at \$1000.
- Savings bank book \$1094.58.

10 And it further appearing to the Court and being undisputed that demand issued upon the above-named Guardian by the United States Alien Property Custodian for the above enemy interest (A. P. C. Form No. 106-E) on July 2nd, 1918, and that service thereof was accepted by the said Guardian on June 11th, 1919, and that the signing of the armistice has not operated to nullify or affect the operation of the provisions of the "Trading with the Enemy Act" or of the Executive orders applicable thereto.

And the Court having heard and considered the arguments of counsel and no good reason appearing to the contrary,

20 It is, therefore, on this 18th day of December, 1919, on motion of Henry C. Whitehead, Proctor for the United States Alien Property Custodian, hereby ordered that the said Guardian forthwith pay and turn over to the said United States Alien Property Custodian, or to its depository, The Farmers Loan & Trust Co. of 16-22 William Street, New York City, the cash and securities above specified, and that the receipt of the United States Alien Property Custodian, or of its said depository therefor be deemed and taken to a full acquittance and discharge of the said Guardian for and to the extent  
30 of the cash and securities so paid and turned over.

It is further ordered that the costs of this application and a counsel fee to Henry C. Whitehead, Proctor for the said United States Alien Property Custodian, in the sum of \$250.00 be first paid by said Guardian out of the funds of the said Estate in his hands.

William W. Watson,  
Judge.

41  
*Order*

Filed: December 22nd, 1919.

Frederic Beggs,  
Surrogate.

Recorded in Book Z of Orphans' Ct. R., page 14,  
&c.

Frederic Beggs, 10  
Surrogate.

In obedience to the command of the writ hereto annexed directed to the Passaic County Orphans' Court, I, Frederic Beggs, Surrogate of Passaic County, Clerk of the said Court, do hereby certify and send to the Honorable Justices of the New Jersey Supreme Court the order of the said Passaic County Orphans' Court mentioned in said writ, dated December 18, 1919, in a certain proceeding entitled "In the Matter of the Estate of Ella O. E. Koehler, a minor," and all other proceedings by or before said Passaic County Orphans' Court concerning the same as fully and entirely as they remain in my office. 20

In witness whereof, I have hereto set my hand and official seal this fifth day of January, in the year of our Lord, one thousand nine hundred and twenty. 30

Frederic Beggs,  
Surrogate of Passaic County.

*Acknowledgment of Service*

NEW JERSEY SUPREME COURT

O. RICHARD KOEHLER,  
Prosecutor,

vs.

THE PASSAIC COUNTY ORPHANS'  
COURT, A. MITCHELL PALMER,  
Alien Property Custodian,  
and THE FARMERS LOAN &  
TRUST COMPANY,  
Defendants.

*On Certiorari.*

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**ACKNOWLEDGMENT OF SERVICE.**

Service of a copy of the writ of certiorari in the  
above-entitled matter is acknowledged January 3rd,  
1920.

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Henry C. Whitehead,  
Attorney of A. Mitchell Palmer,  
Alien Property Custodian, and  
The Farmers Loan & Trust  
Company.

Filed, Jan. 9th, 1920.

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## NEW JERSEY SUPREME COURT

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 G. RICHARD KOEHLER,

Prosecutor,

vs.

THE PASSAIC COUNTY ORPHANS'

COURT, A. MITCHELL PALMER,

Alien Property Custodian,

and THE FARMERS LOAN &amp;

TRUST COMPANY,

Defendants.
 

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**REASONS.**

The prosecutor presents the following reasons upon which he will rely for the reversal of the proceedings under review in this case:

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1. The order made by the Passaic County Orphans' Court, dated December 18th, 1919, was invalid, because the Passaic County Orphans' Court possessed no statutory power to make such an order, and being a court created by statute, and being invested with special powers and jurisdiction in derogation of the powers of the courts established by the Constitution, it should be restrained in the exercise of those powers and of that jurisdiction by the words of the statute.

30

2. Said order is invalid because the Passaic County Orphans' Court, except in cases of insolvent estates of decedents, has no power to settle disputed claims with reference to estates.

3. Said order is invalid because the Passaic County Orphans' Court had no jurisdiction to de-

*Reasons*

termine as between the prosecutor, a citizen of the United States, guardian, and the Alien Property Custodian, which of them was entitled to the custody of the corpus of said trust estate.

10 4. Said order is invalid because by the statute upon which the same is based, to wit, the Act of Congress entitled "Trading with the Enemy Act," approved October 6, 1917, Congress has not attempted to confer jurisdiction upon the Passaic County Orphans' Court to make such an order.

20 5. Said order is invalid because Congress is without power to interfere with or control state courts, except in so far as the federal courts have appellate jurisdiction.

6. Said order is invalid because Congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and laws of the United States.

30 7. Said order is invalid because Congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and laws of the United States, although the state courts may exercise jurisdiction in cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the federal courts, and the State of New Jersey has enacted no law conferring upon the Passaic County Orphans' Court jurisdiction to make said order.

8. Said order is invalid because it deprives the United States District Court of its exclusive jurisdiction over the enforcement of said Act of Con-

*Reasons*

gress given by the 17th section of the Act, which reads as follows:

“Sec. 17. That the district courts of the United States are hereby given jurisdiction to make and enter all such orders and decrees, and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled ‘An Act to codify, revise, and amend the laws relating to the judiciary.’”

9. Said order is invalid because it deprives the prosecutor of the right of appeal allowed him by Sec. 17 of said Act of Congress, which gives a right of appeal from the final order or decrees of the United States District Court as provided in Sections 128 and 238 of the Act of March 3, 1911, entitled “An Act to codify, revise and amend the laws relating to the judiciary.”

10. Said order made by the Passaic County Orphans’ Court was not justified nor reasonably supported by the facts before said court, upon which said order was based.

11. Said order was invalid because there was no evidence before said Court to support reasonably said order under review.

*Reasons*

12. Because said proceedings are in divers other respects irregular, illegal, unjust and oppressive to the prosecutor.

Humphreys & Sumner,  
Attorneys of Prosecutor.

10 Filed, Jan. 10, 1920.

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*Stipulation*

## NEW JERSEY SUPREME COURT

No. 1.

O. RICHARD KOEHLER,  
Prosecutor,

vs.

THE PASSAIC COUNTY ORPHANS  
COURT and others,  
Defendants.

10

On Writ of  
Certiorari.

No. 2.

O. RICHARD KOEHLER,  
Prosecutor,

vs.

THE PASSAIC COUNTY ORPHANS  
COURT and others,  
Defendants.

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**STIPULATION.**

It is stipulated and agreed that the affidavit of O. Richard Koehler, filed in the Passaic County Orphans' Court on December 4, 1919, on the rule to show cause granted by said Orphans' Court in the matter of the estate of Werner F. G. Koehler, a minor, be used on the argument of the writ of certiorari relating to the estate of Werner F. G. Koehler as evidence on behalf of the prosecutor with the same force and effect as if the said affidavit were a deposition of the said O. Richard Koehler taken pursuant to an order granting leave to take depositions, cross-examination of said witness being hereby waived.

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*Stipulation*

And it is hereby stipulated and admitted by the prosecutor that Ella O. E. Koehler became of full age upwards of one year prior to December 18, 1919, the date of the order of the Passaic County Orphans' Court in said proceeding entitled "In the matter of the estate of Ella O. E. Koehler, a minor,"  
10 and that this admission shall be used on the argument of the above writ of certiorari relating to the estate of Ella O. E. Koehler.

And it is further stipulated that the two writs of certiorari, one relating to the estate of Werner F. G. Koehler and the other to the estate of Ella O. E. Koehler be included in the one state of the case and argued together.

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Humphreys & Sumner,  
Attorneys of Prosecutor.

Henry C. Whitehead,  
Attorney of Defendants.

Filed, Jan. 16, 1920.

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# New Jersey Court of Errors and Appeals

No. 1.

O. Richard Koehler,  
Prosecutor-Appellant,

vs.

The Passaic County Orphans  
Court, A. Mitchell Palmer, Alien  
Property Custodian, and the  
Farmers Loan & Trust Com-  
pany,

Defendants-Respondents

(In re Werner F. G. Koehler,  
a minor).

*ON APPEALS  
FROM OR-  
DERS DIS-  
MISSING TWO  
WRITS OF  
CERTIORARI.*

No. 2.

O. Richard Koehler,  
Prosecutor-Appellant,

vs.

The Passaic County Orphans  
Court, A. Mitchell Palmer, Alien  
Property Custodian, and the  
Farmers Loan & Trust Com-  
pany,

Defendants-Respondents.

(In re Ella O. E. Koehler, a  
minor).

## Brief for Appellant

### STATEMENT OF THE CASE

These are appeals from orders dismissing two writs of certiorari, one relating to the Estate of Werner F. G. Koehler, a minor, and the other to the Estate of Ella O. E. Koehler, a minor (who is

now of age). By stipulation these two appeals have been included in the one state of the case, and are to be argued together. (Case p. 1).

The writs of certiorari which were dismissed by the Supreme Court challenged the jurisdiction of the Passaic County Orphans Court to make the two orders dated respectively December 18, 1919, set forth in the state of the case. (Case pp. 18-20; 39-40).

These orders recited that the minors were residents of Jena, Germany, and were alien enemies, and that accounts of the prosecutor (appellant), guardian of said minors, had been filed and allowed by the Passaic County Orphans Court, and stated the balances of cash and securities then in said guardian's hands, and that demands had issued upon said guardian by the United States Alien Property Custodian for said enemy interests on certain dates therein mentioned, and that signing of the armistice had not operated to nullify or affect the operation of the provisions of the "Trading with the Enemy Act" or of the executive orders applicable thereto, and ordered that the prosecutor (appellant) should forthwith pay and turn over to the said custodian (A. Mitchell Palmer), or to its depository, the Farmers Loan & Trust Company of New York, the cash and securities therein specified, and that the receipts of said custodian, or of its said depository therefor, should be deemed and taken to be a full acquittance and discharge of the said guardian for and to the extent of the cash and securities so paid and turned over, and directed that (before said transfers were made) payment should

be made by the guardian out of the funds of said estates in his hands of certain costs and counsel fees to the proctor for said custodian.

It was stipulated into the case that Werner F. G. Koehler was a resident of Germany, and was a minor of the age of 17 years, and that Ella O. E. Koehler was in like manner a resident of Germany, but was of full age, and that the prosecutor (appellant), O. Richard Koehler, the guardian, was an American citizen. (Case pp. 47-48; pp. 16-17).

The only reasons on which the prosecutor-appellant relied, in the Supreme Court, involved the proposition that the Passaic County Orphans Court had no jurisdiction to determine as between the prosecutor (appellant), a citizen of the United States, guardian of a minor, and the Alien Property Custodian, which of them was entitled to the custody of the corpus of said trust estates. These reasons were stated in various forms in the Supreme Court as reasons 1-7, both inclusive. (Case pp. 22-23; pp. 43-44).

The opinion filed by the Supreme Court held that the prosecutor's remedy, if any, was by appeal to the Prerogative Court, and therefore dismissed the writs (Case pp. 3-4), and orders were entered accordingly (Case p. 5; p. 28). It is from these orders that the present appeals are taken.

#### SPECIFICATIONS OF GROUNDS OF APPEAL

The reasons for reversal filed in the Supreme Court under the writs of certiorari (pp. 22-26; pp. 43-46) are stated as, and in fact constitute, the

grounds of appeal upon which the appellant relies in this court (Case p. 6; p. 29) though the argument will necessarily be confined to the claim that the Orphans Court had no jurisdiction to make the orders in question.

#### THE ARGUMENT

THE ORPHANS COURT OF PASSAIC COUNTY HAD NO STATUTORY OR OTHER POWER OR JURISDICTION TO MAKE THE ORDERS DATED DECEMBER 18, 1919, BROUGHT UP BY THESE APPEALS.

(Reasons 1-7, Case pp. 21-23; Reasons 1-7, Case pp. 43-44).

It is true that the Supreme Court, by dismissing the writs of certiorari, has in effect held that *it*, the Supreme Court, possessed no jurisdiction to review the propriety of the orders in question, but the reason it so held was because it held (erroneously as we respectfully claim) that the Orphans Court had jurisdiction over the subject matter of said orders, and that therefore under the constitutional provision in that behalf the only remedy available to the guardian was by appeal to the Prerogative Court. As, however, our whole defense to the validity of said orders is based upon the proposition that the Orphans Court had no jurisdiction over their subject matter, we are clearly, we submit, entitled to have the Supreme Court's determination as to the jurisdiction of the Orphans Court reviewed by this Honorable Court, notwithstanding the circumstance that in so doing this court will be also reviewing the Supreme Court's determination as to its

own lack of jurisdiction. The situation is clearly distinguishable from that treated of in the case of *State vs. Mayor, etc. of Jersey City*, 43 N. J. L., 662. That case held that when a certiorari had been dismissed by the Supreme Court on the ground that in consequence of the laches of the prosecutor it had been improvidently granted, a writ of error would not lie from such order of dismissal. The court in that case said: "If this court should attempt to revise the action of the court below in this case, it is evident that it could find no criterion by which to measure the propriety of such action, except the standard of its own judgment. It might, indeed, declare that, in its opinion, the Supreme Court erred in judgment, but it could not declare that any principle of law had been violated." *No such difficulty presents itself in the instant case.*

In *State, Hoxsey, pros., vs. City of Paterson*, 39 N. J. L., 490, this court held that where discretion was rightly exercised in allowing a writ of certiorari a dismissal, on the ground that the writ was improperly allowed, would be reversed on error.

The following is an excerpt from the opinion filed in the instant Case by the New Jersey Supreme Court. (Case p. 3).

"The first point made by the defendant in certiorari is that the only way to review such an order, under the statute, is by appeal to the Prerogative Court, and that therefore these writs should be dismissed. We think this is correct. The Orphans Court had jurisdiction of the parties and the subject matter, and the only question is whether these orders, which simply require the guardian to comply with the federal

statute, is an erroneous exercise of that jurisdiction. If it was wrongly exercised then manifestly the remedy is by appeal to the Prerogative Court, otherwise all erroneous judgments of the Orphans Court would be subject to review by certiorari. The writ will be dismissed with costs."

It would seem impossible to reconcile this *per curiam* opinion with Judge Dixon's decision in *Potter vs. Berry*, 56 N. J. L., 454. In the latter case the Orphans Court (to adopt the language of the *per curiam* opinion in the instant case) had jurisdiction of the parties and the subject matter construing the words "subject matter" as they must have been construed by the Supreme Court in the instant case, and the only question was whether the order directing the guardian to expend the sum of \$2,000 annually for the support of the lunatic out of his personal estate and the income of his real estate, etc., "was an erroneous exercise of that jurisdiction," yet the Supreme Court set aside the order *on writ of certiorari*.

Our claim is that the real question before the Supreme Court in the instant case was not that stated in the *per curiam* opinion, but was whether the order made by the Orphans Court, having jurisdiction of the parties and the subject matter, viewing the subject matter in its broadest aspect, was nevertheless an order of a character beyond the jurisdiction of the Orphans Court. As Judge Dixon said: "The jurisdiction of the Orphans Court is the creature of statute, and although such construction will be given to the statutes establishing

and regulating the authority of the Court as, consistently with the obvious intentions of the legislature, will advance and extend their remedial provisions, yet the court can exercise only those powers which, on that construction, appear to have been conferred." We confidently assert that there is not a word in the Orphans Court Act (nor is there in any other act), to indicate any intention on the part of the legislature to authorize the Orphans Court to judicially determine a dispute as to property rights existing between a guardian of an infant and a third party—still less existing between a guardian of an infant who has come of age and is therefore entitled to his estate, and a third party claiming title to his estate paramount to the claim of such guardian.

In the *per curiam* opinion we are undertaking to criticize, the court says: "If it was wrongly exercised, then manifestly the remedy is by appeal to the Prerogative Court, *otherwise all erroneous judgments of the Orphans Court would be subject to review by certiorari.*" (Italics ours.) This we respectfully submit contains a palpable "*non sequitur.*"

Let us offer this illustration. There is no doubt as to the jurisdiction of the Orphans Court to pass upon the accounts of executors and trustees. Suppose said Orphans Court erroneously overruled certain exceptions to an account so presented, and erroneously ordered the account to be allowed. That would be a clear case for an appeal to the Prerogative Court, and a *certiorari* would not lie—but the situation there presented is surely distinguishable from that in the instant case.

The illustration so given is one of many others which might be made as to the fallacy underlying the remark in the *per curiam* opinion we are criticizing to the effect that "*otherwise all erroneous judgments of the Orphans Court would be subject to review by certiorari.*" Perhaps the confusion of thought (as such seems to us to exist) lies in the statement "The Orphans Court had jurisdiction of the *subject matter.*" The use of the words "subject matter" throws no light upon the jurisdictional question involved, unless we clearly understand what those words mean. What does "having jurisdiction of the subject matter" mean? In the illustration we have above given the Orphans Court clearly possessed jurisdiction to pass upon the accounts of executors and trustees. The Orphans Court had jurisdiction over that subject matter. Being an institution humanly composed, in passing upon those accounts it was liable occasionally to commit error. The error, if such existed, in its decision did not affect its jurisdiction over the subject matter. Such error had no bearing whatever in showing whether or not it possessed such jurisdiction. The statute gave it its jurisdiction, and having jurisdiction over the subject matter, Article VI, Sec. 4, Par. 3 of the New Jersey Constitution applied where it provides as follows:— "All persons aggrieved by any order, sentence or decree of the Orphans Court may appeal from the same, or from any part thereof to the Prerogative Court; but such order, sentence or decree shall not be removed into the Supreme Court or Circuit Court *if the subject matter thereof be within the jurisdiction of the Orphans Court.*" But the Orphans Court is not given jurisdiction by any statute to de-

termine to whom a fund of money belongs or to whom securities belong which form an estate in the hands of a guardian for an infant, and title to which is claimed adversely to said infant by a third party. The fact that the statute gives the Orphans Court full power and authority to hear and determine all controversies respecting \* \* \* the right of guardianship and the allowance of the accounts of \* \* \* guardians and to issue process to compel all \* \* \* guardians to account for the estates in their hands, (Comp. Stat. of N. J., Vol. 3, p. 3813, sec. 2) cannot by any stretch of the imagination, be construed as giving to the Orphans Court jurisdiction over the *subject matter* of determining a property right between a guardian and a hostile claimant to the estate; and so we respectfully submit that in the *per curiam* opinion we are discussing, the statement by way of mere "*ipsi dixit*" that the Orphans Court had jurisdiction over the *subject matter* does not elucidate any logical conclusion on the subject before the court, but simply amounts to an evasion of the real questions, namely (1) what jurisdiction over the subject matter in fact means and (2) whether the Orphans Court possessed that jurisdiction or not.

Supposing instead of one adverse claimant to the Koehler estates there had been half a dozen claimants; could it with any degree of seriousness be claimed that the Orphans Court could entertain a bill of interpleader filed by the guardian to determine to whom the estate belonged? And yet, according to the opinion of the Supreme Court, the Orphans Court had jurisdiction over the "*subject matter*." The only difference between such a bill and the present summary proceeding, by which the Or-

phans Court has adjudged a fund belonging to a guardian appointed by it no longer to belong to such guardian, but to belong to a third party adverse to the interests of the guardian's wards, is that in the one case the guardian would be seeking from the court, who appointed him, directions to whom he should deliver up the estates, whereas in the latter case the Orphans Court judicially undertook to determine against a guardian appointed by itself and "*in invitum*," as against such guardian, that the demand of a third party to the estate must be yielded to by the guardian, and the estate paid over to such third party in derogation of the duties of the guardian to the wards whom he represents.

Of course the fact that a bill of interpleader would not lie in the Orphans Court under the circumstances above stated, is not necessarily conclusive of the proposition that the Orphans Court did not possess jurisdiction over the "subject matter" within the meaning of the interdiction against removing "orders, sentences or decrees" into the Supreme Court contained in Article VI, Sec. 4, Par. 3 of the New Jersey Constitution. While the Orphans Court possesses no jurisdiction to entertain a bill of interpleader—*assuming that it otherwise would have jurisdiction over the claims of the half dozen claimants to the fund or estate whom we have above conjured into existence*, then the inability of the Orphans Court to grant such relief by interpleader would be due to its lack of jurisdiction over that particular *form of action*, and it may be that if a decree were in fact made by the Orphans Court upon such a bill of interpleader filed by a trustee, the remedy of the person aggrieved thereby might be by appeal to the Prerogative

Court, and not by writ of certiorari to the Supreme Court. Our own view, however, is that the proper remedy in the case we are assuming would be by writ of certiorari, but however that may be—if, as the *per curiam* opinion in the instant case holds, the Orphans Court had “jurisdiction of the subject matter,” then would it not necessarily follow that the Orphans Court would, in like manner, have jurisdiction over a suit brought by a trustee or guardian to recover money or securities which said trustee or guardian claimed to belong to the estate he represented? Let us conceive of a case where a trustee claims that a third party has converted some of the securities belonging to the estate to such third party’s own use. Can it possibly be claimed that the trustee could bring an action of trover in the Orphans Court to recover damages for the conversion and the consequent injury to the estate he represents? Suppose the claim was that the third party had taken unlawful possession of, or unlawfully detained a picture or articles of silver or jewelry belonging to said estate. Would an action of replevin or detinue lie in the Orphans Court at the suit of the trustee to recover possession of such goods and chattels? Clearly not—and why not?—because, while the Orphans Court has in one sense general jurisdiction over the subject matter of the accounts of trustees and guardians, it has no “jurisdiction” in the sense used in the clause of the Constitution above referred to over the subject matter of a disputed property right between a trustee or guardian and a third party.

To make this point quite clear, let us assume that a third party has *in fact* misappropriated prop-

erty belonging to the estate in the hands of a guardian. An action is brought by the guardian in the Orphans Court to recover damages, or to recover the specific goods themselves, it makes no difference which. Testimony is taken, and it is proved conclusively, that on the *merits* the plaintiff is entitled to judgment, and the Orphans Court gives judgment accordingly against the protest, of course, of the defendant that the Court was without jurisdiction. Now, then, according to the *per curiam* opinion in the instant case, the remedy of the defendant would have to be by appeal to the Prerogative Court "otherwise all erroneous judgments of the Orphans Court would be subject to review by certiorari" (such was the conclusion of the Supreme Court)—but when the appeal would come up before the Prerogative Court that court could not allow the appeal on the merits because the plaintiff had won, and was entitled to win, on the merits. The Prerogative Court would nevertheless have to reverse the judgment for the sole and manifest reason that the Orphans Court had no jurisdiction to make the order. Surely this leads to the absurd result that there may be a "general jurisdiction over the *subject matter*" sufficient to compel any aggrieved person to seek his remedy by appeal to the Prerogative Court, and not by certiorari to the Supreme Court, and yet that kind of "*general jurisdiction over the subject matter*" may not be such as will be recognized by the Prerogative Court as in fact giving the Orphans Court any actual jurisdiction over the subject matter at all. We respectfully submit that this cannot be the law.

We have, in aid of our argument, used the illus-

tration of a trustee claiming that a third party had converted some of the securities belonging to the estate to such third party's own use, and have argued that the Orphans Court would have no jurisdiction under those circumstances in an action of trover brought by the trustee against said third party. An apter illustration, however, would be the case of a stranger coming into the Orphans Court claiming that some of the securities shown by the guardian's account to belong to the estate were his (the stranger's) property; that he had lost them, or they had been stolen from him; or perhaps claiming that the guardian himself had sold him the securities. Suppose such party should seek an order in the Orphans' Court directing the guardian to deliver up the securities so claimed. It surely could not be successfully contended that the Orphans Court had any power or jurisdiction, express or implied, to try any such dispute or make any such order; and such order, if made, would surely be set aside on *certiorari* by the Supreme Court, because (to use the language of the Constitution) the subject matter thereof would not be within the jurisdiction of the Orphans Court any more than the subject matter (properly construing those words) of the order which Judge Dixon set aside in *Potter vs. Berry*, 56 N. J. L., 454 *supra*, was within the jurisdiction of that court. And yet that is exactly the nature of the present proceeding. The Alien Property Custodian has come into the Orphans Court asserting that the title to the property in the possession of the guardian, having been entrusted to such guardian as the property of his two wards, is no longer in the wards, but has become vested in him, the Alien Property Custodian.

We submit that the Orphans Court had no more power to direct the guardian to hand over the property to this government official than it would have had to direct him to deliver it up to any other third party.

The proper tribunal for the Alien Property Custodian to go to, to get assistance in getting possession of property claimed to be that of alien enemies, is the United States District Court, upon which has been conferred full power to act in the premises. If the appellant has in his possession property, the title to which has vested in the Alien Property Custodian because of the fact that the two infants, who were the original owners of the property, now reside in Germany, and have consequently lost their title to the property, and if the appellant is improperly withholding such property from this high government official, the latter can get complete redress in the United States Court, but we respectfully submit that the Orphans Court is absolutely without power to aid him.

In *Richardson vs. Smith*, 74 N. J. L., 111, Pitney, J., speaking for the Supreme Court said: "In order to exclude the review by *certiorari* the small cause court must have not merely jurisdiction over the subject matter, *but jurisdiction of the particular cause* (Italics ours) *including* jurisdiction over the person of the defendant. *Ritter vs. Kunkle*, 10 Vroom 259-263; *Williamson vs. Middlesex Common Pleas*, 13 Id., 386, 396; *Barclay vs. Brabston*, 20 Vroom, 629; *Steinlein vs. Folwell*, 24 Id., 176."

We refer also to the following authorities:—  
*Ludlow vs. Ludlow*, 4 N. J. L., 189,\* 191.\*

- Tenbrook vs. M'Colm, 10 N. J. L., 333-334.  
 Miller et al., Administrators of Bassett, vs. Pettit,  
 16 N. J. L., 421.  
 Vreeland vs. Vreeland's Administrator, 16 N. J. Eq.,  
 512-527.  
 Smith vs. Smith, 27 N. J. Eq., 445-446.  
 Middleton vs. Middleton, 35 N. J. Eq., 115-116.  
 Potter vs. Berry, 56 N. J. L., 455.  
 Lawson vs. Acton, 57 N. J. Eq., 107, 113.  
 Mullaney vs. Mullaney, 65 N. J. Eq., 384-386.  
 Lippincott's Case, 68 N. J. Eq., 578-580.  
 Meyers Case, 69 N. J. Eq., 793-795.  
 Re Alexander, 79 N. J. Eq., 226, 228.

The situation presented by these orders differs from that existing in such cases as *Singer v. National Bedstead Manufacturing Co.*, 65 N. J. Eq., 290, and *Kennedy v. American Tanning Co.*, 81 N. J. Eq., 109, where receivers of insolvent corporations appointed by the Court of Chancery of New Jersey were ordered after their accounts were settled, and all expenditures made for the preservation of the properties reimbursed to them, and proper allowances paid to them, to turn over the residue of their estates to trustees in bankruptcy of said corporations. In those cases the Court of Chancery had full jurisdiction over receivers appointed by itself, and might with the strictest propriety, compel such receivers to hand over the estates to Federal trustees in bankruptcy. But the Orphans Court Act may be searched in vain to find any authority vested in that Court authorizing it to determine judicially that property belonging to a ward held by a guardian, who is a citizen of the United States, shall be turned over to someone

other than the guardian before the ward arrives at full age. These wards took their trust estates under the statutes of distribution upon the death intestate of their father. An order of distribution is never made by any authority or power inherent in the Court. The next of kin take exclusively under the statute.

In *re Estate of James Eakin*, 20 N. J. Eq., 481 483, Williamson, Ordinary, said:

“In legislating upon the subject the law making power have seen fit in cases of intestacy to impose upon the court the duty of ascertaining who are entitled as *next of kin* to the residuary estate and to order distribution accordingly.”

The Orphans Court is not empowered by any act of Congress to make the orders in question, nor could Congress so empower it.

In *Rushworth v. The Judges of Hudson Pleas*, 58 N. J. L., 97, the following is the headnote:

1. Congress is without power to interfere with or control state courts, except insofar as the federal courts have appellate jurisdiction.
2. Congress cannot, without the consent of the state, constrain the state courts to entertain or act upon applications for naturalization.

3. It is competent for the state legislature to prescribe and limit the times when and during which such applications may be heard in the state courts.

Mr. Justice Washington, in *Houston v. Moore*, 5 *Wheat.*, 1, 27, said that "he held it to be perfectly clear that congress cannot confer jurisdiction upon any courts but such as exist under the constitution and laws of the United States; although the state courts may exercise jurisdiction in cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the federal courts."

In *Martin v. Hunter*, 1 *Wheat.*, 304-334, the Court said:

"As to cases arising under the Constitution, laws and treaties of the United States, the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the Constitution, and it could not afterwards be directly conferred on them; for the Constitution expressly requires the judicial power to be vested in courts sustained and established by the United States."

On the other hand, while Congress has no authority to confer jurisdiction upon any State Courts, neither have the States any authority to regulate the proceedings in the Courts of the United States, except so far as the State process acts are adopted by Congress or by the Courts of the United States under the authority of Congress.

*Wayman v. Southard*, 5 *Wheat.*, p. 1.

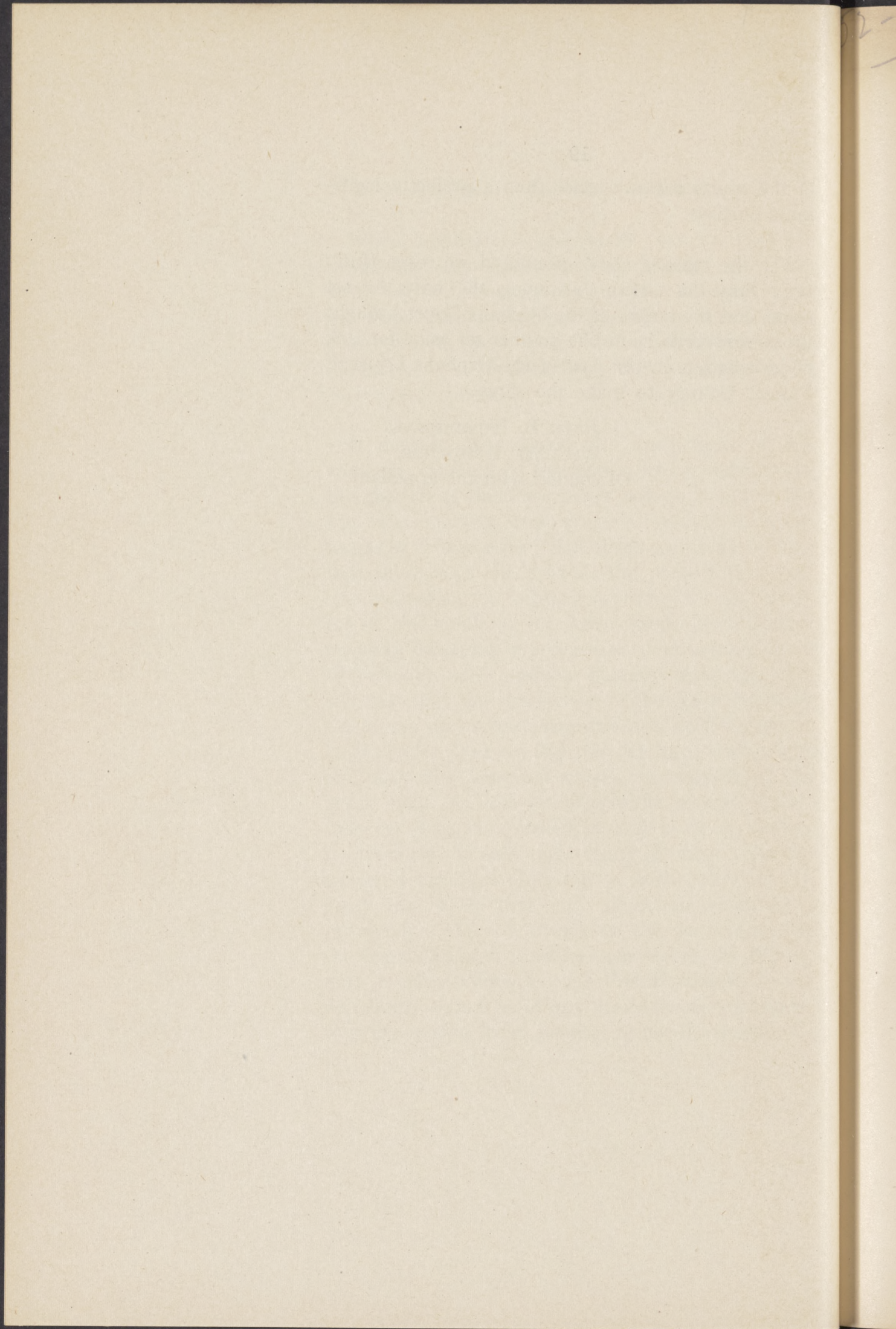
When application was made to the Orphans Court for "stays" pending these appeals, there was some slight insinuation on the part of counsel for the respondent that these appeals were not being prosecuted in good faith, but rather for vexatious purposes. Notwithstanding this suggestion, the stays were granted.

It may be that during the continuance of the war any attempt to interfere with or circumvent the exercise of the Executive's powers in aid of the war was more or less properly treated in every forum as "*chose jugée*," but it is because we believe that there does not exist at the present time any war emergency or military necessity for sequestering in the hands of the Alien Property Custodian property belonging to a guardian of minors, residents of Germany, such guardian being an American citizen, and that the application of the Alien Property Custodian under these conditions is itself vexatious in character, that we feel that we have every right and that this American citizen, the appellant, has every right, to take every possible means of lawfully resisting these orders, and if to do so renders it necessary to take advantage of what may be termed a technical objection to them (although we claim that so to term such objection would be a misnomer), viz., by attacking the jurisdiction of the Orphans Court to make such orders, we submit, with much confidence, that this Honorable Court will surely acquit us of any desire to act vexatiously in the matter, or to attempt to use the machinery

of the courts for any other than a perfectly legitimate purpose.

For the reasons above presented we respectfully pray that the orders dismissing the writs be set aside, and the orders of the Orphans Court brought up by said writs be in like manner set aside for lack of jurisdiction on the part of the Orphans Court of Passaic County to make the same.

JOHN B. HUMPHREYS,  
WILLIAM A. SUMNER,  
Of counsel with the appellant.



## New Jersey Court of Errors and Appeals

No. 1.

O. RICHARD KOEHLER,  
Prosecutor-Appellant,

vs.

THE PASSAIC COUNTY ORPHANS  
COURT, A. MITCHELL PALMER,  
ALIEN PROPERTY CUSTODIAN,  
and the FARMERS LOAN &  
TRUST COMPANY,

Defendants-Respondents.

(In re WERNER F. G. KOEHLER,  
a minor).

10

No. 2.

O. RICHARD KOEHLER,  
Prosecutor-Appellant,

vs.

THE PASSAIC COUNTY ORPHANS  
COURT, A. MITCHELL PALMER,  
ALIEN PROPERTY CUSTODIAN,  
and the FARMERS LOAN &  
TRUST COMPANY,

Defendants-Respondents.

(In re ELLA O. E. KOEHLER,  
a minor).

On Appeals  
from Su-  
preme Court  
Orders dis-  
missing two  
writs of cer-  
tiorari.

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### **BRIEF FOR ALIEN PROPERTY CUS- TODIAN, RESPONDENT.**

The essential difference between the parties,  
which the Supreme Court resolved in favor of the  
respondent, grows out of divergent views taken of  
the relation of the Alien Property Custodian to

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10 property of an enemy for which a proper demand has been made upon the depository. The appellant's brief here, as in the court below, takes the position that the Alien Property Custodian is in the position of a third party, claiming property inventoried and accounted for by the guardian in the Orphans Court, in hostility to the rights of the guardian. It is argued for the appellant that the Orphans Court being without jurisdiction to adjudicate such hostile rights, and having attempted to do so in the orders complained of, whereby the guardian was directed to pay the balances in hand to the Alien Property Custodian or his depository, such excess of jurisdiction was properly complained of by writs of certiorari out of the Supreme Court.

20 The respondent contends that under the authority of the federal "Trading with the Enemy Act," and of the proceeding taken by the Alien Property Custodian to seize the funds in question, there was no question of fact or law to be passed upon by the Orphans Court; that the act in question necessarily overrides rights and laws, or state statutes, which may be in conflict with it, and that all courts will judicially recognize the paramount effect of that statute.

30 The office of certiorari, as applied to an order or decree of the Orphans Court, must be confined to cases where there is a clear usurpation of authority over a subject matter which is not committed to the jurisdiction of that court. This is necessarily so, since the adoption of the Constitution of 1844.

40 *"Appeals from Orphans Court, certiorari.—*  
All persons aggrieved by any order, sentence or decree of the orphans court may appeal from the same, or from any part thereof, to the prerogative court; but such order, sentence

or decree shall not be removed into the supreme court or circuit court, if the subject matter thereof be within the jurisdiction of the orphans court."

(*Const'n of N. J., Article VI, Sec. IV, §3.*)

The Orphans Court in making the orders complained of was dealing with subject matter unquestionably within its jurisdiction, viz, the estates of minors in regular course of administration, on accounts presented for allowance by the appellant himself, as guardian. The character of the Orphans Court sufficiently appears from most of the cases cited on both briefs. It has been thus described:

"But the Orphans Court is not an inferior tribunal of special or limited jurisdiction. \* \* \* On the contrary, as has been frequently declared by the courts of this state, it is a superior court of general jurisdiction, and its proceedings and judgments are entitled to the same presumption in favor of their regularity as those of the highest courts of the common law, and while they remain in force are equally binding."

*Clark vs. Costello*, 59 N. J. L. (30 Vr.), 234 (1896, *E. & A., Gummere, J.*)

"It has been repeatedly held that the Orphans Court is a court of general jurisdiction over the subjects committed to its cognizance; that it partakes of the powers of the chancery and prerogative jurisdictions, and that the statute creating it, being remedial in its nature, is to be liberally construed. See cases cited in *Koch. Orph. Ct., Pr. 1, etc.*"

*In re Cassidy's Will*, 80 N. J. Eq. (10 Buch.), 163 (1912, *Pitney, O.*)

Appellant in his brief (page 6) finds it impossible to reconcile the orders appealed from dismissing the writs of certiorari with the decision of Judge Dixon in *Potter vs. Berry* 56 N. J. L. (27 Vr.) 454, assuming that the Supreme Court in sustaining the writ of certiorari in that instance dealt with a case where the order of the Orphans Court was made in relation to a subject matter within its jurisdiction. But the opinion in *Potter vs. Berry* was expressly predicated upon a finding that the statute under examination showed no sign of a legislative purpose to confer upon the Orphans Court authority to decide in advance what amount of the lunatic's personal property or of the realty should be expended by his guardian for his support. That case was based upon the explicit finding by the Supreme Court that the Orphans Court was without jurisdiction of the subject matter.

**I. Certiorari does not lie to remove to the Supreme Court orders of the Orphans Court when the subject matter is within the jurisdiction of the Orphans Court.**

(a) *The subject matter is within the jurisdiction of the Orphans Court.*

The Orphans Court was dealing with the estates of infants in the hands of their guardian, who had been appointed by that court. The custody and final disposition of these assets so being administered in the Orphans Court was beyond question within the proper scope of the court's power. The appellant's complaint is, in reality, of the making of orders in proceedings of which the court had undoubted jurisdiction, because, in the view of the appellant, such orders were not in accordance with

the practice and procedure of that court. No doubt is suggested of the power of the Prerogative Court, on appeal, to correct errors, if such there were. There was no assumption by the Orphans Court of power to deal with a subject not lawfully committed to it. To uphold the appellant's contention would permit the questioning by certiorari to the Supreme Court of every judicial act of an orphans court which was claimed to be erroneous in law. It is submitted that under the constitutional provision above cited, such is not the proper office of the writ of certiorari. 10

Where the Orphans Court has jurisdiction of the subject matter, the Supreme Court has no power of review.

*Brush vs. Young*, 28 N. J. L. (4 Dutch.),  
237 (1860, S. C., Green, C. J.) 20

So, in the case of *Diament vs. Lore*, 31 N. J. L. (2 Vr.), 220 (1865, S. C., Beasley, C. J.), it is said (page 221):

"It is obvious, therefore, that no objections to these proceedings can be entertained in this court, which are not directed against the jurisdiction of the Orphans Court. For all irregularities or even essential defects in the conduct of the case, the remedy is by an appeal to the Prerogative Court" (page 223). "The prosecutor of this suit has mistaken, therefore, his remedy. If the proceedings below are erroneous, they can be rectified only in the mode prescribed in the constitution—by appeal to the Prerogative Court." 30

To the same point, see

*Carroll vs. Baxter*, 65 N. J. L. (36 Vr.),  
478 (1900, S. C., Dixon, J.),

in which it was sought to review, by certiorari, an order of the Camden County Orphans Court for 10

sale of real estate by an administrator. The court says:

10           ‘It seems manifest, therefore, that the subject matter of the order and decree now assailed, was within the jurisdiction of the Orphans Court, and consequently that the removal of such order and decree into this court for the purpose of review, was contrary to the express mandate of the constitution.’

On behalf of the Alien Property Custodian, it was contended that the Supreme Court is without jurisdiction to review the judicial action of the Passaic Orphans Court complained of.

20           (b) *The Orphans Court, on the settlement of an estate, has power to direct the payment of the fund.*

This court in the case of *Pyatt vs. Pyatt*, 46 N. J. Eq. (1 Dick.), 285 (1889, *Dixon, J.*), states (page 288):

30           “The orphans court is a court of general jurisdiction over the subjects committed to its cognizance. *Den vs. Hammel*, 3 Harr., 73. It partakes of the powers of a chancery and prerogative jurisdiction, being instituted to remedy and supply the defects in the powers of the prerogative court with regard to the accountability of executors, administrators and guardians, and such construction should be given to the statutes establishing and regulating its authority, as consistently with the obvious intentions of the legislature, will advance and extend their remedial provisions. *Wood vs. Tallman*, Coxe, 153; *Seaman vs. Dur-yea*, 11 N. Y., 324. Our present statute (*Rev.*, page 753, §2) invests the orphans court with

40           full power and authority to hear and deter-

mine all controversies respecting the allowance of the accounts of executors, administrators, guardians and trustees under wills, and authorizes it to issue process to compel such persons to account for the estates in their hands. The court may also (Section 160) compel obedience to its process, orders and sentences, by imprisonment or distress, and (Section 161) its decrees or orders, whereby a sum of money is ordered to be paid by one party to another, being properly recorded, have the same liens and priority as judgments of the circuit court, and like executions may issue thereon."

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The court further (pages 289-290) cites with approval the language of the New York Court of Appeals in *Seaman vs. Duryea*, 11 N. Y., 324, speaking of the jurisdiction of the surrogate's courts, holding that payment is part of the accounting, and that the surrogate has authority to compel the guardian to pay over sums in his hands. The court then proceeds in language following (page 290):

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"The good sense of these remarks is conspicuous, and they are as true in regard to our orphans court with its present powers, as to the surrogate's court in New York. A more restricted opinion of the jurisdiction of the orphans court was expressed in *Shepherd vs. Newkirk*, Spen., 343; S. C., 1 Zab., 302; but that was predicated upon a lack of statutory authority to render effective judgments and to enforce decrees, which has been since amply supplied. Under the existing statutes, the court is sufficiently equipped to make and execute whatever decrees justice may dictate."

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**II. The Alien Property Custodian was not a hostile claimant submitting his rights to the Orphans Court for adjudication.**

10 In view of the decision by this court defining the effect of the "Trading with the Enemy Act" in conferring rights upon the Alien Property Custodian, in *Keppelmann vs. Palmer*, 108 *Atl. R.* 432, it would seem that the contention now urged in behalf of the appellant is no longer arguable. The The Federal Supreme Court has refused, upon application for certiorari, to disturb the judgment entered upon the decree of this court in the Keppelmann case, and the paramount authority of the federal statute, and of the rights thereby created, is now established in this jurisdiction beyond question.

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(a) *Under the terms of the Trading with the Enemy Act the Alien Property Custodian, upon demand made, became entitled to the respective funds.*

Section 7 (c) of the Trading with the Enemy Act provides as follows:

30       “(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted

40       by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be con-

veyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian, and all property thus acquired shall be held, administered, and disposed of as elsewhere provided in this act."

Under the power of delegation conferred by the Act, the President has committed the exercise of this power to the Alien Property Custodian. It appears from the recitals of the orders complained of (*Case*, page 19, lines 6, et seq.; page 40, lines 2, et seq.) that such demands were made by the Alien Property Custodian, so that the rights of the Custodian to the respective funds became fixed, and it became the duty of the depositary to comply with the demands and assign and deliver the funds to the Alien Property Custodian.

(b) *This demand divested the rights of the enemies whether adult or infant.*

The Trading with the Enemy Act expressly covers money held for or on account of, or on behalf of an enemy, and the right to exact compliance with the demand is not affected by the infancy of the enemy. Counsel for the appellant seems to be of opinion that the guardian himself has property rights in the fund, which cannot be taken from him by the Alien Property Custodian on demand; but the rights of the guardian are custodial and representative only. For the purpose of protecting the fund as against strangers, he has certain rights over the fund; but he cannot withhold the fund from his ward, when the ward is entitled to possession, nor has he any individual rights as against the Alien Property Custodian.

The decree of the Orphans Court upon the guardian's accounts ascertained the balances of the re-

spective estates with which he was chargeable. The demand upon the guardian by the Alien Property Custodian for the enemy owned money required, by the very terms of the act, that it should be transferred to the Custodian. In view of the recent decision of this court in the Keppelmann case (*supra*), holding that the Trading with the Enemy Act necessarily overrides state statutes in conflict therewith, and that every state law that imposes limitations upon the scope of the Federal legislation must give way to it, there can be no doubt of the propriety of the Orphans Court orders complained of, as a compliance with the demands of the Alien Property Custodian.

Counsel for the appellant (page 14 of brief) appears to regard Section 17 of the Trading with the Enemy Act, which confers jurisdiction upon the Federal District Courts to make rules, orders, decrees, and issue process, as conferring jurisdiction exclusively upon the Federal Courts. There is no provision of the statute giving the District Court exclusive jurisdiction, and in the many cases which have arisen under the act in proceedings instituted in the state courts, no such contention has ever been made to our knowledge. At any rate, in this jurisdiction, the matter is settled by the decision in the Keppelmann case, *supra*.

**III. The appeals should be dismissed.**

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Southey