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(Filed May 28, 1929)

NEW JERSEY PREROGATIVE COURT

In the matter of the estate of THOMAS BROOKS, DECEASED.	On Petition for Approval of Sale of Lands by Administrators c.t.a.

NOTICE OF APPEAL

JESSE P. EVERNHAM, one of the parties to the above entitled proceedings, hereby appeals from the Final Decree made in the above entitled cause by the New Jersey Prerogative Court on May 21, 1929, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated: May 25, 1929.

HOWARD EWART,
Solicitor for and of Counsel with
Jesse P. Evernham.

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

HOWARD EWART,
Of Counsel with Jesse P. Evernham.

(Filed June 20, 1929)

NEW JERSEY COURT OF ERRORS AND APPEALS

In the matter of the estate of THOMAS BROOKS, DECEASED.	On Appeal from the Prerogative Court.

PETITION OF APPEAL

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

The petition of JESSE P. EVERNHAM, appellant in the above entitled cause, respectfully shows that:

Petitioner finds himself aggrieved by a final decree made in the Prerogative Court by his Honor Edwin Robert Walker, Ordinary of the State of New Jersey, on the advice of Honorable Malcolm G. Buchanan, Vice Ordinary, bearing date May 21, 1929, in a certain cause in said Prerogative Court, on appeal from decree of the Orphan's Court of the County of Ocean, in this respect, to wit:

That the said decree adjudged and decreed that a certain decree of the Orphan's Court of

the County of Ocean made in this matter February 15, 1926, be reversed, and the said Orphan's Court directed to enter a decree disapproving the sale of certain lands by the administrators c. t. a. of the Estate of Thomas Brooks to Jesse P. Evernham and confirming the sale by said administrators to Fred T. Walters and further ordering that said Jesse P. Evernham pay unto the appellants in the Prerogative Court; namely: to the administrators aforesaid and to said Fred T. Walters, their costs in the Prerogative Court to be taxed, including therein a counsel fee of Five Hundred Dollars to the said Walters, one of the appellants in the Prerogative Court.

And your petitioner appeals from the decree of the Ordinary upon the grounds following; namely:

1. The Prerogative Court was without jurisdiction to order and decree the appellant Jesse P. Evernham to pay to the said Fred T. Walters, as a part of the taxed costs in the Prerogative Court, a counsel fee of Five Hundred Dollars or a counsel fee in any sum whatsoever.

2. The decree of the Prerogative Court was erroneous in that it disapproved and reversed the order of the Orphans' Court of Ocean County, made February 15, 1926, approving the sale of certain lands by the administrators aforesaid to Jesse P. Evernham.

3. The decree of the Prerogative Court was erroneous in that it reversed the decree of the Orphans' Court of Ocean County, made on February 15, 1926, and directed the said Orphans' Court to enter a decree confirming and approv-

ing the sale of said lands, made by the administrators aforesaid, to Fred T. Walters.

4. The decree of the Prerogative Court was erroneous in that it should have affirmed the decree of the Orphans' Court of the County of Ocean made on February 15, 1926, approving and confirming the sale of said lands made by said administrators to Jesse P. Evernham, this appellant.

Your petitioner therefore prays that the said decree of the Ordinary may be wholly reversed, set aside and for nothing holden; that the order and decree of the Orphans' Court of the County of Ocean made in this cause February 15, 1926, be approved and affirmed; and that petitioner may be given such other relief in the premises as to this Court shall seem proper.

HOWARD EWART,
Solicitor for and of Counsel with Appellant.

(Filed June 20, 1929)

NEW JERSEY COURT OF ERRORS AND APPEALS

In the matter of the estate of THOMAS BROOKS, DECEASED.

ANSWER TO PETITION OF APPEAL OF JESSE P. EVERNHAM

The answer of Fred T. Walters, respondent to the petition of appeal of the above named appellant, Jesse P. Evernham.

This respondent, not acknowledging all or any of the matters and things which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that a final decree was, on the 21st day of May, 1929, made and entered in the Prerogative Court, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes, that the said decree is agreeable to law, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

MERRITT LANE,
Solicitor for and of counsel with Fred T. Walters.

(Filed June 29, 1929)

NEW JERSEY COURT OF ERRORS AND APPEALS

In the matter of the estate of THOMAS BROOKS, DECEASED.	On Appeal from the Prerogative Court.

ANSWER TO PETITION OF APPEAL

The answer of Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, administrators c. t. a., d. b. n. of the estate of Thomas Brooks, deceased, to the petition of appeal of Jesse P. Evernham.

These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit that a decree was, on the twenty-first day of May, 1929, made and entered in the Prerogative Court in the cause for that purpose mentioned in the said petition as therein stated, but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe, that the said decree is agreeable to equity, and they pray that the same may be affirmed with costs to be adjudged to these respondents.

JNO. D. McMULLIN,
Solicitor for and of counsel with Elizabeth P. Shetzline, et als. respondents.

Opinion, Buchanan, Vice Ordinary 7

(Filed June 15, 1928)

NEW JERSEY PREROGATIVE COURT

In re Estate of THOMAS BROOKS, DECEASED. } Conclusions. 10

ON APPEALS FROM OCEAN COUNTY ORPHANS' COURT 20

MR. MERRITT LANE, for Appellant Walters.

MR. JOHN D. McMULLIN, for Appellant Administrators.

30

MR. HOWARD EWART, for Respondent Evernham.

BUCHANAN, V. O.

Thomas Brooks, a resident of Philadelphia, died in 1906 seized of a tract of land of about one hundred acres situate in Ocean County, New Jersey. He left a will, duly probated in Pennsylvania, a copy whereof was duly filed with the Ocean County Surrogate under our statute, together with a copy of the letters of administration c. t. a., issued by the Pennsylvania Court to the appellant administrators on the death of the executors named in the will.

Under the will the executors were given a power of sale over decedent's real estate.

On July 7th, 1925, the administrators executed a contract for the sale of the tract to respondent Evernham, for $19,000.00 "subject to the approval of a competent court of record of New Jersey."

On September 17th, 1925, the administrators executed a contract for the sale of the tract to the appellant Walters for $30,000.00, "subject to the court's approval", and "contingent upon the court's disapproval of the prior agreement."

Shortly thereafter the administrators filed a petition with the Ocean County Orphans' Court, setting out both sales, as well as an intermediate offer of $25,000.00, praying the disapproval of the sale to Evernham and the approval of the sale to Walters.

All the parties in interest being brought in, a hearing was had, and the Orphans' Court entered an order approving and confirming the sale to Evernham, adjudging that the Evernham sale price of $19,000.00 was the full and fair market value of the lands at the date of the Evernham contract, and disapproving the sale to Walters.

From this order both the administrators and Walters have appealed.

The matter came before the Orphans' Court under the Act of 1888, (P. L. 1888, p. 395), supplementing the legislation concerning executors and administrators, which gives to administrators c. t. a. the same power and authority to sell real estate as is given by the will to the executors named therein but provides that

> "no sale of lands made by "any such administrator c. t. a." shall be valid until the terms thereof shall have been submitted to the Orphans' Court of the County in which the lands proposed to be sold lie, and approved by said court."

The Court below (as is apparent both from the order itself and the memorandum filed) determined as matter of fact that $19,000.00 (the sale price to Evernham) was the "full and fair market value" of the lands in question at the date of the Evernham contract, and further determined as matter of law, that in view of that fact the Court must approve and confirm the sale and that any increase in the value of the lands subsequent to the date of the contract ought not to be considered on such a hearing.

These points were the main subjects of contract below, and are again in issue on this appeal.

As to the question of law, forceful arguments are put forward by both sides. It is urged by the respondent Evernham, and it was the view of the Orphans' Court, that the province of that Court on the matter **sub judice** was essentially similar to the province of the Court on an application to confirm a judicial sale; that the Court

should confirm the sale unless facts were shown which would justify the annulling of a judicial sale; that no such facts were shown or attempted to be shown in the case at bar, except inadequacy of price; that mere inadequacy of price does not justify the setting aside of a judicial sale and does not justify the refusal of approval of the sale by the administrators; that moreover the facts in the present case showed no inadequacy of price at the time of sale but an increase in value **after** the sale and before the hearing, and that since the price was adequate at the time of sale the sale must be approved; that the Court could not be justified in withholding approval because of an increase in value (no matter how great) subsequent to the sale; that a sale of this land is made under power given by the testator in his will and hence the sale is different from a sale of lands by an administrator to pay debts, under Section 85 of the Orphans' Court Act, where the power of the administrator to sell is derived from an order of the Court.

On the other hand the appellants contend that the power of an administrator c. t. a. to sell lands is not derived from the testator but is given only by the State through the statute heretofore quoted, just as is the case in a sale by an administrator to pay debts; that the Court is charged with the duty of seeing that the sale is for the best interests of the beneficiaries of the estate, especially where as in the instant case, some of those beneficiaries are minors; that the sale should not be approved unless the price is adequate; that the sale is not a perfect sale until approved by the Court; that the Court should not approve the sale where it appears that a bet-

ter price can be obtained at the time of the hearing, even if that be due to increase in value subsequent to the sale.

It would seem clear that a sale of the kind **sub judice** is not made by the administrators given by the testator was to named executors under power granted by the testator: the power and not to any one else. The administrators c. t. a. have the power of sale only by statute,—just as the power of an administrator to sell lands to pay debts is given by the statute.

The present sale therefore, if not precisely similar in nature to a sale of lands to pay debts, is certainly closely akin thereto,—and markedly different from the ordinary public judicial sale. It is a private sale, by a fiduciary. The reasons which lead to the rule that a public judicial sale will not be set aside for mere inadequacy of price (unless grossly inadequate) do not exist or apply to sales of this kind: on the other hand the Court is interested to see that adequate prices are obtained by administrators, and to that end the legislature has limited the authority of the administrator and provided that sales made by them shall not be valid and complete sales unless and until the provisions of such sale shall have been submitted to and approved by the Orphans' Court.

Whether the Court should approve or disapprove a sale submitted to it, when the price was fair and adequate at the time the administrator and the purchaser agreed on it but has since become inadequate because of a subsequent increase in value prior to the hearing, is a more difficult question, but one which needs not here

to be decided. It does not appear that the Evernham price was adequate at the time of that contract.

The circumstances are peculiar. The administrators presented the Evernham sale to the Court but did not ask its approval. They asked its disapproval and the approval of the Walters sale. It is Evernham, the purchaser, who asked to have the sale to himself approved. It may well be questioned whether Evernham had any right to ask its approval or whether the Court had jurisdiction to order approval in the absence of request by the administrators. The statute is barren of any provision giving a purchaser such right. The statute quite evidently is not one dealing with a question of a right to specific performance of a contract of sale: the situation contemplated by it is judicial supervision over the acts of a fiduciary.

Assuming, however, that Evernham had such right, it is obvious that the burden of proof was upon him to show that the price was adequate.

He offered the testimony of eight witnesses as to the value of the property,—Brooks, Kiefaber, Driscoll, Then, Holman, Haag, Fischer and Schwarz. (Brooks was a witness produced by the administrators, but used by Evernham on cross examination). The valuations specified by them, as of the time preceding the sale to Evernham range from $19,000.00,—(the Evernham price), —to $25,000.00.

A consideration of their respective testimony shows that not much of it is entitled to much weight. Some were clearly without qualification as experts; some were jointly interested with Evernham in the purchase; some were part

owners of a competing development tract and were obviously endeavoring to lower the value of the Brooks tract by comparison; a good deal of the testimony is confused and self contradictory. Details need not be specified: they are obvious to any one who reads the testimony. The witnesses most worthy of consideration from a reading of the record are Brooks, who testifies that the property was sold in 1920 for $25,000.00, but the sale fell through because of the death of the purchaser and that there had been offers "within recent times" of $22,000.00 and $25,000.00; and Holman, who puts the value at $21,000.00. He is a bank president and appraising director and his estimate would naturally be extremely conservative.

The significant thing about all this testimony, is that it is all offered by Evernham, in an effort to prove that $19,000 was an adequate price, and that instead of sustaining the burden of proof in that behalf, it is quite convincing to the effect that the property was in fact worth considerably more than that sum.

Moreover, the valuations made by these witnesses were as of a date which they said was prior to the increase in value of the property which they testified as having occurred as the result of the determination and public announcement by the State Highway Commission to take over and improve an abutting road as a state highway route.

It is established and not contradicted that there was an increase in value subsequent to, and because of, that determination and announcement. It seems clear that the actual increase in value occurred **immediately** upon the

determination and announcement, although there would naturally be some little lapse of time before that increase in value would be reflected in increased offers for the property,—for the knowledge to spread and be duly considered by possible purchasers, and for the latter to make arrangements and take action. (Indeed the witness Holman says that immediately after that meeting of the State Highway Commission "there began to be a bid for property along that line." The date of that determination and announcement is definitely and positively fixed by one of Evernham's witnesses as June 18th, 1925, nearly three weeks before the date of the Evernham contract.

Consequently at the date of the Evernham contract the property was in fact worth considerably more than the values placed upon it by the Evernham witnesses as of a date prior to that determination and announcement.

There would seem therefore no doubt but that the Evernham price of $19,000.00 was not an adequate price at the time of the contract, and that the Orphans' Court should have disapproved that sale. **Cf. Ryan v. Wilson, 64 N. J. Eq. 804,**— a case involving a sale under the 85th section of the Orphans' Court Act instead of under the 14th section of the Act concerning Executors and Administrators. The language and intent of the two statutes however is deemed analogous, under the aspect of the present inquiry, in view of the failure of proof of the allegation that the price was adequate at the time of the sale and became inadequate only by reason of increase in value subsequent to the sale.

Reference may be made to some contentions on the part of Evernham which apparently were accepted, erroneously, by the Court below. First: that the administrators conceded that $19,000.00 was a fair price at the time of the sale. The record shows explicitly that the administrators distinctly did not make any such admission, but took the opposite position.

Second: that the administrators who executed the Evernham contract are substantially the sale beneficiaries of the Thomas Brooks will, and are estopped from opposing the confirmation of the sale. It may be true that the administrators are also the major beneficiaries, but there are substantial interests of beneficiaries, including some minors, who did not execute nor approve the Evernham contract. It must be remembered that, as hereinbefore pointed out, the administrators are fiduciaries exercising a power of sale in trust for others as well as themselves. Moreover there was no offer by Evernham (assuming that such offer would have been of any avail) to make up any loss to the other beneficiaries. Apparently the administrators, who are non residents, did not know the pending situation as to values, and though acting in good faith, were over anxious to wind up the estate. It is just such a situation which the statute was designed to cover.

Now as to that portion of the decree which disapproves the sale to Walters at $30,000.00—

Two of Evernham's witnesses place a valuation on the property as of the date of the hearing, greater than $30,000.00,—one says "around $35,000.00", the other says it "would be worth

$40,000.00" based on other sales "some of which I consider quite excessive."

The hearing was on December 8th, 1925. In the interim there may have been some sales at excessive prices, later repented: that usually occurs in real estate booms. There is no evidence as to what such sales were, whether for acreage or for single lots,—nothing to indicate their worth as as index to the value of the Brooks property.

Obviously, however, no one had offered more than $30,000.00 for the Brooks property up to December 8th, 1925; and there is no intimation that any one has since offered any more.

Moreover there was not, nor is, any opposition to the sale at $30,000.00 from any of the beneficiaries or their representatives whatever. From the consideration which must have been given to the matter by all of them, as an incident to this litigation, it must be concluded that they all believe $30,000.00 to be an adequate price; and they are the ones to be considered.

The decree of the Orphans' Court will be reversed with direction to enter decree disapproving the sale to Evernham and confirming the sale to Walters.

(Filed May 22, 1929)

NEW JERSEY PREROGATIVE COURT

IN THE MATTER OF APPEAL from the Order of the Orphans' Court of the County of Ocean, disapproving a sale of lands by Administrators to Fred T. Walters, and approving a sale by them to Jesse P. Evernham, in the Estate of Thomas Brooks, Deceased.

On separate Appeals of Elizabeth P. Shetzline, et als., Administrators and Fred T. Walters.

DECREE

Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, Administrators with the Will annexed, de bonis non, of the Estate of Thomas Brooks, Deceased, and Fred T. Walters, having filed their separate appeals from an Order of the Orphans' Court of the County of Ocean, dated February 15, 1926, disapproving a sale of lands in Ocean County particularly described in said Order, to Fred T. Walters, and approving and confirming a sale of said lands to Jesse P. Evernham; and said Jesse P. Evernham having filed his answer to said petition and the appeal having come on for final hearing, and Counsel for all parties having been heard;

It is, thereupon, on this twenty-first day of May, nineteen hundred and twenty-nine, ORDERED, ADJUDGED and DECREED that the decree of the Orphans' Court of Ocean County made in this matter February 15, 1926, be and the same is hereby reversed, and the said Orphans' Court is directed to enter a decree disapproving the sale by the Administrators of the Estate of Thomas Brooks, as aforesaid, of the lands in question to Jesse P. Evernham, and confirming the sale by said Administrators to Fred T. Walters, at the price of Thirty Thousand ($30,000.00) Dollars;

And it is further ordered that the said Jesse P. Evernham do pay unto the separate appellants or their proctors their costs in this court to be taxed; in which shall be included a counsel fee of five hundred dollars hereby allowed to the appellant Walters (the appellant executors asking no allowance);

And it is further ordered that the record be remitted to the Orphans' Court of Ocean County to proceed further thereon, according to law and the practice of said Court.

Respectfully Advised:

MALCOLM G. BUCHANAN,
V. O.

E. R. WALKER,
Ordinary.

New Jersey Prerogative Court

In the Matter of the Appeal from the Order of the Orphans' Court of the County of Ocean Disapproving a Sale of Lands by Administrators to Fred T. Walters and Approving a Sale by Them to Jesse P. Evernham in the Estate of Thomas Brooks, Deceased.

PETITION OF APPEAL

(Filed May 7, 1926.)

To the Ordinary of the State of New Jersey:

The petition of Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, respectively shows:

1. On the fifteenth day of February, 1926, your petitioners having presented their petition under the statute for the approval of a proposed sale of lands owned by deceased made by them to Fred T. Walters for the sum of $30,000.00 and for the disapproval of a previous proposed sale made by them to Jesse P. Evernham of the same land for $19,000.00, the Orphans' Court of Ocean County on that day made its order approving the Evernham offer and disapproving the Walt-

ers offer and directing said administrators to convey the lands unto the said Evernham.

2. Your petitioners hereby appeal from the following portions of the aforesaid order:

(a) From that part of said order in the recital thereof which states the proposed sale to Evernham for $19,000.00 represented the full and fair market value of said property at the time of making said contract in that an increase in value in said lands occurred after July 7, 1925, and that such increase should not be considered in determining whether or not to approve or disapprove said contract of sale to Evernham.

(b) That part of said order which disapproves the contract of sale between said administrators and Walters at $30,000.00.

(c) From that part of said order which approves the proposed sale by the administrators to said Evernham for $19,000.00.

(d) Because said order does not disapprove the Evernham sale and approve the Walters sale.

3. Your petitioners complain and allege that the aforesaid order of the Orphans' Court is erroneous, improper and illegal; and that your petitioners are aggrieved thereby.

Dated Toms River, May 6, 1926.

JNO. D. McMULLIN,
Proctor for and of Counsel with Appellants.

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Appeal from the Order of the Orphans' Court of the County of Ocean Disapproving a Sale of Lands by Administrators to Fred T. Walters and Approving a Sale by Them to Jesse P. Evernham in the Estate of Thomas Brooks, Deceased.	On Petition of Appeal.

ANSWER

(Filed May 22, 1926.)

The answer of Jesse P. Evernham, respondent, to the petition of appeal of Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, appellants:

1. This respondent answering, admits the allegations contained in the first paragraph of appellants' petition of appeal filed herein.

2. This respondent is advised, believes, and submits that the portions of said decree complained of by appellants are just and lawful, and this respondent denies that the aforesaid portions of the said decree or any parts thereof are erroneous, improper or illegal, and alleges that said portions of said decree are legal, proper and correct.

He therefore prays that the said petition of appeal may be dismissed with costs against appellants.

HOWARD EWART,
Proctor for and of Counsel with Respondent.

NEW JERSEY PREROGATIVE COURT

In the Matter of the Estate of Thomas Brooks, Deceased.	On Petition for Approval of Sale of Lands by Administrators with the Will Annexed.

PETITION

(Filed May 7, 1926.)

To the Orphans' Court of the County of Ocean:

The petition of Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, all of the City of Philadelphia and State of Pennsylvania, respectfully shows that:

1. Thomas Brooks, late of the City and County of Philadelphia and State of Pennsylvania, departed this life January 31, 1906, leaving a last will and testament wherein he appointed John T. Brooks, Harry P. Brooks and Thomas Brooks, Jr., executors thereof which will was duly admitted to probate by the Register of Wills of Philadelphia County, on February 10, 1906, and letters testamentary thereon duly issued unto the said John T. Brooks, Harry P. Brooks and Thomas Brooks, Jr., by said Register.

2. On or about June 2, 1919, Harry P. Brooks, one of the executors above named died. On or about February 9, 1920, John T. Brooks, another of said executors, died, and Thomas Brooks, Jr., the survivor of the original executors, died July 30, 1921.

3. On December 14, 1921, upon petition of the parties in interest, the Register of Wills of Phila-

delphia County granted Letters of Administration with the will annexed unto your petitioners, Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks who duly qualified as such administrators and have taken upon themselves the burden of completing the administration of the Estate of Thomas Brooks. A duly exemplified copy of the original will of Thomas Brooks as well as an exemplification of the letters of administration issued to your petitioners are on file in the office of the Surrogate of Ocean County.

4. The said Thomas Brooks in and by his said will vested his executors therein named with power and authority to sell and convey any and all of the lands of which testator died seized, in manner and form as follows:

"I hereby authorize, empower and direct my executors hereinafter named to make any and all necessary, or in their judgment, proper sale, transfer, trade, exchange or conveyance of any part, parts, parcels, portion or portions or all of my said estate whether real, personal or mixed, and to make, execute and deliver to the purchaser or purchasers thereof, any and all necessary deeds, indentures, conveyances, receipts or acquittances therefor, without any obligation on the part of said purchaser or purchasers to look to the application of the purchase money."

5. Said Thomas Brooks died seized of a certain tract of land in the Township of Dover, Ocean County, New Jersey, to wit:

All that certain tract or parcel of land with the buildings thereon erected situate in the Township of Dover, County of Ocean and State of New Jersey, bounded and described (the

courses and distances being from a survey thereof made May 1923, by Arthur C. King, C. E.) as follows:

Beginning at a stone the third corner of acres thirty-six and thirty-four one-hundredths returned to John Rattoone and formerly belonging to S. H. Shreve, also the beginning corner to acres twenty-nine and sixty-six one-hundredths returned to Jacob R. Hardenburgh, recorded June 12, 1817, in Book S 18, page 83, etc., also beginning corner to acres six and ninety-six one-hundredths conveyed by F. W. Brinley to Benjamin L. Irons, also the beginning corner to acres four, more or less, conveyed by Daniel Applegate and John Layton, November 23, 1866, recorded in Ocean County Clerk's Office in Book 37 of Deeds, page 300, etc., and the beginning corner of acres ninety-five, more or less, conveyed by Benjamin L. Irons to Samuel B. Parsons by deed dated September 28, 1864, recorded in said County Clerk's Office in Book 31 of Deeds, page 259, etc., thence running (1) South fifty-six degrees and four minutes east eleven hundred fifty-one and four one-hundredths feet, more or less, to a stone on the north side of a road the second corner of said acres ninety-five, more or less; thence (2) along the second corner of said acres ninety-five, more or less, south thirteen degrees twenty-six minutes west thirty-four hundred eight and nine-tenths feet to a locust post in the line of Island Heights property and a third corner of said acres ninety-five, more or less; thence (3) along Island Heights line also the third line of said acres ninety-five, more or less, north seventy-eight degrees forty-nine minutes west three hundred sixty-one and sixty-eight one-hundredths feet to a stone corner to land be-

longing to John G. Page, later Hardy, said stone being also the fourth corner to said acres ninety-five, more or less; thence (4) along the fourth line of said acres ninety-five, more or less, north thirteen degrees twenty-six minutes east five hundred seventy-nine and forty-nine one-hundredths feet to a stone in the fifth corner of said acres ninety-five, more or less, to the northeast corner of said John C. Page or Hardy's lot; thence (5) along the fifth line of said acres ninety-five, more or less, north seventy-six degrees and four minutes west four hundred seventy-one and nine-tenths feet to a stone the sixth corner of said acres ninety-five, more or less, to the northwest corner of said John C. Page or Hardy's lot; thence (6) along the line of John C. Page or Hardy's lot and partly by the line of Island Heights property being also the sixth line of said acres ninety-five, more or less, south nineteen degrees twenty-seven minutes west eleven hundred sixty and twenty-nine one-hundredths feet to a stone near the north shore of Toms River; thence following the shore of Toms River the several courses and distances thereof, the specific corners and distances being (7) north twenty-one degrees twenty-six minutes west two hundred thirty-six and fifty-four one-hundredths feet; thence (8) north fifty-eight twelve minutes west two hundred ninety-nine and sixty-four one-hundredths feet to a stone the southeast corner of what was formerly the Shinn farm later the Manolt farm, the eighth corner of said acres ninety-five, more or less, also the beginning corner of a lot conveyed by L. Shinn to Benjamin L. Irons; thence (9) along the line of said acres ninety-five, more or less, north nineteen degrees eleven minutes east twenty-eight hundred eighty-one and fifty-six one-hundredths feet to

a stone which is the northeast corner of said Manolt farm and the ninth corner of said acres ninety-five, more or less, to the southeast corner of a lot formerly belonging to Joseph Page; thence (10) along the ninth line of said acres ninety-five, more or less, north forty degrees thirty-five minutes east five hundred ninety and four-tenths feet to a stone standing south thirty-seven degrees fifty-one minutes west ninety-two links from a stone the tenth corner of said acres ninety-five, more or less, said stone being the second corner of a lot of land conveyed by Charles M. Johnson and wife to Mary C. Acey by deed dated July 17, 1885, and recorded in the Clerk's Office, in Book 159 of Deeds, page 154, etc., also corner of acres five and eight one-thousandths conveyed by Charles M. Johnson and wife to said Eugene Maurioc by deed dated February 2, 1889; thence (11) along said Mary C. Acey's line north seventy-four degrees ten minutes west nine hundred fifty-seven feet to a stone corner to said acres five and eight one-thousandths; thence (12) north fifteen degrees forty-four minutes east four hundred eleven and eighty-four one-hundredths feet to a stone corner to Charles M. Johnson and also corner to land of John P. Haines; thence (13) north eighty-three degrees twenty-four minutes east one hundred fifty-one and eight-tenths feet to a stone corner to land of heirs of John Layton, deceased; thence (14) south fifty-four degrees fifty-one minutes east four hundred forty-five and five-tenths feet to a stone corner to land of heirs of John Layton, deceased and in the crossing line of said acres ninety-five, more or less, thence (15) along said crossing line north thirty degrees forty-one minutes east three hundred ninety-nine and twenty-one hundredths feet to the place of beginning.

Containing ninety-nine and twenty-two one-hundredths acres after excepting from the lands above described eighty-six one-hundredths of an acre conveyed by Samuel Parsons and wife to School District No. 32, by deed dated October 7, 1871, and recorded August 5, 1874, in Ocean County Clerk's Office, in Book 79 of Deeds, page 16, etc., and being all the tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the Township of Dover, in the County of Ocean and State of New Jersey.

Beginning at a stone at the southeast and second corner of a lot of acres eighteen and fifty-three one-hundredths conveyed by Joseph Johnson to Charles M. Johnson by deed dated February 26, 1859, recorded in Book 16 of Deeds, page 152 in Ocean County Clerk's Office. Also the ninth corner of a tract of acres ninety-five more or less conveyed by Benjamin L. Irons to said Samuel B. Parsons by deed dated September 28, 1864, recorded in Book 31 of Deeds, page 259, of which the lot hereby conveyed is a part, thence running as the magnetic needle pointed A. D. 1864; first, south seventy-four degrees forty-five minutes east two hundred feet to the west side of a road to be opened to Toms River; second, north fifteen degrees east two hundred and forty-seven feet six inches along the west side of said road to a stake; third, north seventy-four degrees forty-five minutes west one hundred and four feet three inches to the fourth corner of a lot of acres one and six one-hundredths conveyed by Charles M. Johnson and wife to Joseph Page by deed dated March 13, 1865, and part of the aforesaid acres eighteen and fifty-three one-hundredths; fourth, south thirty-six degrees twenty-seven minutes west two hundred and

sixty-four feet along the fourth and last line of said acres one and six one-hundredths and the east line of said acres eighteen and fifty-three one-hundredths to the beginning.

6. Jesse P. Evernham, of Toms River, New Jersey, on or about July 6, 1925, offered your petitioners the sum of $19,000.00 for the premises hereinabove described, of which $9,000.00 was to be paid in cash and $10,000.00 by purchase-money mortgage payable within three years with interest at six per cent., and he has made a deposit of $1,900.00 on account of same; that your petitioners entered into an agreement with said Evernham, selling him said property subject to the approval of a competent court of New Jersey.

6½. On August 18, 1925, John Stahl and George Hill, of White Plains, New York, offered your petitioner the sum of $25,000.00 for said premises, of which $12,500.00 was to be paid in cash and the balance by purchase-money mortgage payable within three years with interest at six per cent. As earnest of the good faith of his offer on the last-named date, he deposited with your petitioners $1,000.00 and was to make a further deposit of $1,000.00 upon the signing of an agreement. For reasons set forth in the following paragraph, no agreement was made between the parties and the $1,000.00 of said Stahl and Hill has been returned to them.

6¾. On September 13, 1925, Fred T. Walters, of Trenton, New Jersey, offered your petitioners the sum of $30,000.00 for said premises, of which $15,000.00 is to be paid in cash and $15,000.00 by purchase-money mortgage payable within one year with interest at six per cent., and has made

a deposit of $3,000.00 on account of the same and your petitioners have accepted his offer subject to the prior agreement made by them with Evernham and subject also to the approval of the court of Evernham's agreement and its approval of the Walters' agreement.

7. Your petitioners after having made diligent inquiry among persons familiar with real estate in the vicinity and being advised that the sum of $19,000.00 offered by said Jesse P. Evernham is insufficient for the premises and that the sum of $30,000.00 offered by the said Fred T. Walters is a fair and full price for the premises, have accepted the latter offer subject to the approval of the court and ask for the disapproval of the $19,000.00 offer made by said Evernham as insufficient.

7. Under the will of Thomas Brooks his entire residuary estate including the premises in question was divisible among his six children, namely, John T. Brooks, Harry P. Brooks, Elizabeth P. Shetzline, William D. G. Brooks, Thomas Brooks, Jr., and George W. Brooks.

8. Harry P. Brooks died a resident of Philadelphia, June 2, 1919, leaving a will under which he appointed his son Henry P. Brooks, Jr., who is also one of your petitioners herein, and Pennsylvania Company for Insurance on Lives and Granting Annuities, both of whom have duly qualified and are acting as such, executors and trustees, and in and by his will he devised his residuary estate which included his interest in the premises in question unto his above-named executors upon certain trusts. His will was duly probated in the office of the Register of Wills of Philadelphia County, at Philadelphia,

Pa., and a duly authenticated copy thereof is in petitioners' possession and will be produced and proven if the court shall direct.

9. Said John T. Brooks, one of the devisees of Thomas Brooks, died a resident of Philadelphia, Pennsylvania, on February 9, 1920, testate of a will duly proven in the office of the Register of Wills of Philadelphia County, at Philadelphia, Pa., by which he appointed his son, John T. Brooks, Jr., who is one of your petitioners herein, and John W. Shisler, executors and trustees, both of whom have duly qualified and are acting as such. In said will John T. Brooks left his residuary estate, including his interest in the premises in question, unto his executors and trustees, in trust. A duly authenticated copy of the will of John T. Brooks is in petitioner's possession, and will be produced and proven if the Court shall so direct.

10. Said William D. Brooks, called in the will of Thomas Brooks William D. G. Brooks, another of the devisees under the will of Thomas Brooks, died March 25, 1921, a resident of Philadelphia, Pennsylvania, testate of a will duly proven in the office of the Register of Wills of Philadelphia County, at Philadelphia, Pa., wherein and whereby he appointed his three daughters, namely Phoebe Ann Brooks, Ella Dubbs Williams and Bessie Irene Miller, executrices and trustees of his will. A duly authenticated copy of the will of William D. G. Brooks is in petitioner's possession and will be produced and proven if the Court shall so direct.

11. Thomas Brooks, Jr., the remaining of the six devisees under the will of Thomas Brooks, died a resident of Philadelphia on or about July 30, 1921, testate of a last will duly proven in the

office of the Register of Wills of Philadelphia County, wherein and whereby he appointed his son Albert Brooks, who is one of the petitioners herein, and Provident Life Insurance and Trust Company of Philadelphia for which Provident Trust Company has since been substituted and said Albert Brooks and Provident Trust Company of Philadelphia have duly qualified and are now acting as executors and trustees under said will. In said will Thomas Brooks, Jr., devised his residuary estate which included his interest in the premises in question, in trust, as will appear from said will which was duly probated in the office of the Register of Wills of Philadelphia County at Philadelphia, Pa., a duly authenticated copy thereof is in petitioner's possession and will be produced and proven if the Court shall so direct.

12. The names of all persons interested in the above described lands are as follows:

Elizabeth P. Shetzline, who resides at 2227 South Broad Street, Philadelphia, Pa.

John T. Brooks, Jr., who resides at 1634 Porter Street, Philadelphia, Pa., and John W. Shisler, who resides at 400 East Northeast Boulevard, Philadelphia, Pa., executors and trustees under the will of John T. Brooks, deceased.

Henry P. Brooks, Jr., Twenty-third Street and Penrose Ferry Road and Pennsylvania Company for Insurance on Lives and Granting Annuities, S. W. Cor. 15th and Chestnut Streets, executors and trustees under the will of Harry P. Brooks, deceased.

Phoebe Ann Brooks, Ella Dubbs Williams and Bessie Irene Miller, who addresses are 125 East Ontario Street, 3667 Frankford Avenue and 3526 Jasper Street, Philadelphia, Pa., executrices and trustees under the will of William D. G. Brooks, deceased.

Albert Brooks, who resides at 1122 Wakeling Street, Frankford, Philadelphia, Pa., and Provident Trust Company of Philadelphia, who are the executors and trustees under the will of Thomas Brooks, Jr., deceased.

George W. Brooks, who resides at Hunting Park Avenue and C Street, Philadelphia, Pa.

All of the aforesaid persons in interest are of full age and have consented to the sale to Fred T. Walters as by their writings hereto annexed will more fully appear.

13. Petitioners, as administrators with the will annexed, have in their hands in the jurisdiction of the domicile $65,000.00 or thereabouts and are under bond in the jurisdiction of their appointment as such administrators in the sum of $140,000.00. There is no property other than the lands described in the petition belonging to the Estate of Thomas Brooks within the State of New Jersey.

14. Petitioners therefore submit the sale to Jesse P. Evernham and the sale to Walters as above recited to the Court and pray for an order disapproving a sale to Evernham and approving the sale to Walters and authorizing them as substitutionary administrators with the will annex-

ed of the said Thomas Brooks, deceased, to execute a deed of conveyance to the said Fred T. Walters or, if nominated by him, to Arbor Terrace, Inc., a corporation of the State of New Jersey.

Dated at Philadelphia, Pa., September 28th, 1925.

ELIZABETH P. SHETZLINE,
HENRY P. BROOKS, JR.,
JOHN T. BROOKS, JR.,
ALBERT BROOKS,
Administrators d. b. n. c. t. a.,
Estate of Thomas Brooks, Dec'd.

State of Pennsylvania, }
County of Philadelphia. } ss.

Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, being duly sworn according to law on their respective oaths depose and say that they are petitioners in the foregoing petition named and that the matters and things contained therein are true to the best of their respective knowledge and belief.

Deponents further say that the value of the personal estate of Thomas Brooks, now in their hands, does not exceed the sum of $65,000.00.

ELIZABETH P. SHETZLINE,
HENRY P. BROOKS, JR.,
JOHN T. BROOKS, JR.,
ALBERT BROOKS,
Administrators d. b. n. c. t. a.,
Estate of Thomas Brooks, Dec'd.

Sworn to and subscribed before me, this 28th days of September, A. D. 1925.

HENRY C. SINEX,
[L. S.] Notary Public.

Commission Expires March 7th, 1929.
1616 Passyunk Ave.

We, the undersigned, being all the parties interested in the Estate of Thomas Brooks, Deceased, and entitled to receive from the administrators with the will annexed of said estate, the proceeds of the sale of land in the foregoing petition set forth, hereby disapprove and protest against the confirmation of the sale by said administrators to Jesse P. Evernham on the terms set forth in the foregoing petition and we do hereby consent to the proposed sale by said administrators to Fred T. Walters at the price and terms in the foregoing petition set forth, namely, a gross price of thirty thousand dollars, and pray the Court's approval of said latter sale.

We do waive all notice required by the statute or rules of the court on application to the Court for confirmation of such latter sale.

ESTATE OF JOHN T. BROOKS, DEC'D.
JOHN T. BROOKS, JR.,
JOHN W. SHISLER,
Executors and Trustees;

ESTATE OF HENRY P. BROOKS, DEC'D.
HENRY P. BROOKS, JR.,
THE PENNSYLVANIA COMPANY,
Insurance on Lives and Granting Annuities,
FRANCES SAYRE, Vice-President,
Executors and Trustees;

ESTATE OF WM. D. G. BROOKS, DEC'D.
ELIZABETH P. SHETZLINE,
PHOEBE ANN BROOKS,
ELLA DUBBS WILLIAMS,
BESSIE IRENE MILLER,
Executrices and Trustees;

ESTATE OF THOMAS BROOKS, JR., DEC'D.
ALBERT BROOKS,
PROVIDENT TRUST COMPANY OF PHILADELPHIA,
ROBERT MAYER,
Assistant Trust Officer;
GEORGE W. BROOKS,
Trustees.

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

Fred G. Stanwood, being duly sworn according to law on his oath says:

I am now and for thirty years last past have been in the real estate business at Island Heights in the County of Ocean aforesaid. I have inspected the property described in the petition of the substitutionary administrators of Thomas Brooks, deceased.

I am familiar with the value of the property in the neighborhood wherein said lands are located and in my opinion the sum of $30,000.00 is a fair market value of said lands and should not be sold for less at this time.

FRED G. STANWOOD,

Sworn and subscribed to before me, this 26th days of September, A. D. 1925.

[L. S.] JAMES H. BOGART,
Commissioner of Deeds for N. J.

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

Oren E. Payne, being duly sworn according to law on his oath says:

I am now and for fourteen years last past been in the real estate business at Toms River, N. J., in the County of Ocean aforesaid. I have inspected the property described in the petition of the substitutionary administrators of Thomas Brooks, deceased.

I am familiar with the value of the property in the neighborhood wherein said lands are located and in my opinion the sum of $30,000.00. Thirty thousand dollars is a fair market value of said lands and should not be sold for less at this time.

O. E. PAYNE,

Sworn and subscribed to before me, this 29th day of September, A. D. 1925.

JOS. B. WILLITS,
[L. S.] Notary Public.

Ocean County Orphan's Court.

In the Matter of the Estate of Thomas Brooks, Deceased.	On Petition for Approval of Sale of Lands.

ORDER OF CONTINUANCE

This matter being opened to the court by John D. McMullin, proctor for Elizabeth P. Shetzline and others, substitutionary administrators with the will annexed of Thomas Brooks, Deceased, petitioners, upon petition for the approval of the sale of lands and disapproval of another sale and application being made on behalf of Jesse P. Evernham for a continuance:

It is, on this seventh day of October, 1925, Ordered, that the hearing upon petition be contin-

ued until Wednesday, October 28th, 1925, at ten A. M., in the Court House, at Toms River;

And, it is further ordered, that said Jesse P. Evernham, if he desires to file any answer to the petition, shall file same and serve a copy upon the proctor for petitioner within ten days from the date of this order.

HARRY E. NEWMAN,
Judge of Ocean County Orphans' Court.

Ocean County Orphans' Court.

In the Matter of the Estate of Thomas Brooks, Deceased.

PROOF OF SERVICE

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

T. Fernley Brooks, being duly sworn on his oath says that on the first day of October, 1925, he served the attached notice upon Jesse P. Evernham to whom it is addressed by delivering to him personally a true copy thereof together with a true copy of the petition in this cause at Toms River, New Jersey.

T. FERNLEY BROOKS.

Sworn to and subscribed before me, this second day of October, A. D. 1925.

NORMAN W. HARKER,
A Master in Chancery of New Jersey.

Ocean County Orphan's Court.

In the Matter of the Estate of Thomas Brooks, Deceased.	On Petition of Administrators with the Will Annexed for Disapproval of Sale of Lands to Jesse P. Evernham and for Approval of Sale of Same to Fred T. Walters.

NOTICE OF APPLICATION FOR DISAPPROVAL OF THE FORMER SALE AND APPROVAL OF THE LATTER SALE

To Jesse P. Evernham, Toms River, New Jersey:

You are hereby notified that application will be made to the Orphans' Court of Ocean County, at the Court House, Toms River, New Jersey, on Wednesday, the seventh day of October, 1925, at ten o'clock in the forenoon, for an order approving the sale of the lands described in the above referred to petition to Fred T. Walters for the sum of $30,000.00 and disapproving the sale to you of said lands for $19,000.00, a copy of the petition which will be presented to the Court upon such application is herewith served upon you.

JNO. D. McMULLIN,
Proctors for Petitioners.

Ocean County Orphans' Court.

In the Matter of the Estate of Thomas Brooks Deceased.	On Petition for Approval of Sale of Lands by Administrators with the Will Annexed

ANSWER AND CROSS-PETITION OF JESSE P. EVERNHAM

The answer of Jesse P. Evernham, residing in Toms River, New Jersey, to the petition filed in the above entitled matter shows that:

1. Paragraphs 1 to 6 of said petition are admitted.

2. He is without sufficient knowledge or information of the matters alleged in paragraphs numbered "6½" and "6¾" of said petition to be able to form a belief as to their truth and therefore leaves petitioners to make such proof thereof as they may be advised.

3. Paragraph 7 of said petition is denied.

4. He is without sufficient knowledge or information as to be able to form a belief as to the truth of the allegations in paragraphs 7 to 12, inclusive, of said petition and therefore leaves petitioners to make such proof thereof as they may be advised.

5. He opposes the prayer contained in paragraph 14 of said petition.

Cross-Petition

By way of cross-petition, the said Evernham shows that:

1. He is a party in interest in this proceeding in that on July 6, 1925, he entered into a written contract with said petitioners for the sale to him at the price of $19,000.00 of the lands and premises in said petition mentioned and described.

2. As an evidence of his good faith in the premises, he at that time paid to said petitioners the sum of $1,900.00 on account of the agreed purchase price.

3. Said petitioners had been endeavoring for a long time prior to July 6, 1925, to sell said premises; had listed said property for sale with several agents; had exposed said property at public auction on more than one occasion, but had never received, up to July 6, 1925, a bona fide bid as high as $19,000.00.

4. The said price of $19,000.00 was, on July 6, 1925, the full value of the said premises, and was, at that time, the best price that could have been obtained therefor.

Wherefore, said Jesse P. Evernham prays that said sale to him may be confirmed and that the said petitioners may by order of this Honorable Court be authorized and directed to execute to him a deeed for said premises at the price and upon the terms in said contract of July 6, 1925, mentioned and provided.

Date Toms River, N. J., October 31, 1925.

JESSE P. EVERNHAM,

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

Jesse P. Evernham, of full age, being duly sworn on his oath according to law deposes and says that he signed the foregoing Answer and

Cross-Petition; that he has read the same and that the matters and things therein set forth are true to the best of his knowledge and belief.

JESSE P. EVERNHAM,

Sworn and subscribed to before me this 31st day of October, A. D. 1925.

PERCY CAMP,
[L. S.] Notary Public of New Jersey,
My commission expires November 6, 1929.

In the Matter of the Estate of Thomas Brooks, Deceased.	On Petition for Approval of Sale of Lands, Etc.

ANSWER OF ADMINISTRATORS OF THOMAS BROOKS, DECEASED, TO CROSS-PETITION OF JESSE P. EVERNHAM

Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, substituted administrators, answering the cross-petition of Jesse P. Evernham, in this cause say:

1. Paragraphs 1 and 2 of said cross-petition are admitted.

2. Paragraph 3 is admitted excepting averment that no bona fide bid as high as $19.000.00 had been received for the property up to July 6, 1925, which averment is denied.

3. Paragraph 4 is denied.

ALBERT BROOKS,
Administrator;
JNO. D. McMULLIN,
Attorney for Petitioners.

State of Pennsylvania, }
County of Philadelphia. } ss.:

Albert Brooks, being duly sworn according to law, deposes and says that he is one of the administrators with the will annexed of Thomas Brooks, deceased, and that he has read the foregoing answer and the matters and things therein contained are true.

ALBERT BROOKS.

Sworn and subscribed to before me, this 6th day of November, A. D. 1925.

NORMAN W. HARKER,
[L. S.] A Master in Chancery of New Jersey.

Ocean County Orphans' Court.

In the Matter of the Estate of Thomas Brooks, Deceased.	On Petition for Approval for Sale of Lands by Administrators C. T. A. D. B. N.

MEMORANDUM

This matter comes before the Court on the petition of the Administrators C. T. A. D. B. N. of the last will and testament of Thomas Brooks, deceased, under authority of the statutes (2 C. S. 1912, pp. 2262, etc., Sections 13 and 14).

The petitioners ask to have a certain contract between them and one Jesse P. Evernham, dated July 7th, 1925, disapproved and a contract for the sale of the same premises, to one, Fred T. Walters, dated September 13, 1925, approved.

It appears that said Thomas Brooks died testate in the year .... ; that his will was duly probated in the County of Philadelphia and State of Pennsylvania; that an exemplified copy thereof filed and recorded in the Surrogate's Office of the County of Ocean. The will vested in the executors, therein named, a power of sale of the decedent's real estate; the executors named in said will are all deceased; that substituted administrators have from time to time been appointed and qualified to act on behalf of the estate during the times covered by the present controversy and that exemplified copies of their respective appointment filed in the Surrogate's office of Ocean County, prior to time covered by the present proceedings.

On July 7th, 1925, the substituted administrators C. T. A., etc., entered into a contract with Jesse P. Evernham for the sale of a parcel of about ninety-nine (99) acres of land near Island Heights, Ocean County, for the sum of $19,000.00 to be paid; $9,000.00 cash and a ten thousand dollar mortgage, payable in three years, interest at six per cent., with certain release clauses. This contract was a result of negotiations carried on for some time between the administrators and the purchaser. It was made subject to the approval of a competent court of New Jersey, having jurisdiction thereover. $1,900. was paid on account of contract at date of same.

On August 18th, 1925, another contract was made by administrators with Stahl and Hill, for sale of same land for $25,000.00 and on September 13th, 1925, another for $30,000.00 to one F. T. Walters. This contract was made subject to disapproval of first contract.

The respondent has filed an answer and cross-petition asking that the Evernham contract be approved. It appears from the petition and the testimony offered in this case that after the execution of the above agreement with the respondent Evernham, on July 7th, 1925, the petitioners on or about August 18th, 1925, received an offer of $25,000.00 for the same property from John Stahl and George Hill and that on or about September 13th, 1925, a further offer was made from one Fred T. Walters, to purchase the said property at the price of $30,000.00; that further negotiations led to the execution of another contract for the sale of said property between the several administrators and said Walter, for the sum of $30,000.00.

Since it appears that the Stahl and Hill con-

tract has not been executed by the purchasers and they are not parties of the present proceedings, the sole question remaining to be determined is:

1. Shall the Evernham contract be disapproved or approved by this Court, and if disapproved shall the contract of Walters be approved?

The petitioners' contention is that the contract entered into between the administrators and Evernham does not become a binding contract until same has been confirmed by the Orphans' Court.

The respondent Evernham contends that the only matter of inquiry by the Court is as to the adequacy and fairness of the price agreed to be paid on the date of the making of the contract and if the price is found fair, as of the date of contract, and in the absence of fraud, collusion or error, the sale should be confirmed and approved.

I am convinced from the testimony (and in fact it is admitted by the petitioners) that $19,000.00 was a fair price for the premises in question, as of July 7th, 1925; that all parties acted in good faith in making the Evernham contract on that date.

The petitioners, Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, are each beneficiaries of the estate of Thomas Brooks, deceased, and in fact the principal persons to profit by the disapproval of the Evernham contract and approval of the Walters contract.

Two witnesses were produced by the administrators, C. T. A., etc., who testified that minors

had an interest in the estate. I find the minors mentioned by the first witness, Robert Mayer, Assistant Trust Officer, Provident Trust Company, to be the children of John T. Brooks, Jr., and Albert Brooks, both of whom joined in the contract with Evernham; that the minors mentioned by the other witness, a Mr. Shields, Trust Officer in the Pennsylvania Company for Insurance, etc., explained that the portion of Thomas Brooks estate which went to Henry P. Brooks, who is now deceased, goes to decedent's widow during her life, and at her death, one-half to Henry P. Brooks, Jr., who is also one of the signers, one-fourth to a daughter, and the other fourth in trust for same daughter for her life, with the remainder to her children. It would seem, therefore, that those who joined in the Evernham agreement on July 7th, 1925, and are now asking that that agreement be disapproved, are substantially the sole beneficiaries of Thomas Brooks, deceased.

With the exception of Thomas Fernley Brooks, no witness were produced before the Court by the petitioners to show the value of the premises in question.

The respondent produced a number of witnesses among which there seemed to be no substantial disagreement that the property in question was worth from $19,000.00 to $20,000.00 on the date of the making of the Evernham contract.

Counsel for petitioners in fact, made the statement that there was no question or doubt but that the administrators, C. T. A., etc., and Evernham entered into a fair, honest contract on the date in question, and that there was no suspicion of fraud, error or mistake between the parties.

The testimony discloses that for a period of at least several years, there had been an endeavor by the petitioners to sell the premises in question. During which time two public sales had been held by them in an endeavor to dispose of the land. One of these public sales had been held in 1923, but for some reason which did not clearly appear, no bids had been received. That at another public sale held in April, 1925, the property was knocked down for the price of $15,000.00. This sale failed to go through because of some error in proceedings, details of which were not disclosed.

Soon after the date of this last-mentioned sale negotiations between Evernham and the administrators, C. T. A., etc., through the Brooks attorney, were begun and culminated in the contract above mentioned.

After this date two other negotiations were indulged in, culminating in a contract dated September 13th, 1925, between the administrators, C. T. A., etc., and Fred T. Walters, for the sale of the same land for the price of $30,000.00, which last-mentioned contract the administrators, C. T. A., etc., are asking to have approved and the Evernham contract disapproved.

It is admitted that no effort was made by the administrators, C. T. A., etc., to have the Evernham contract promptly confirmed and approved. The attorney of the estate gave as a reason, that the court was not in session during July and August. The court was in session, however, during the month of July and first half of August, 1925, although it was not shown that the attorney knew of this fact.

Petitioners' counsel has brought to the Courts'

attention the fact that he had failed to call F. T. Walters for the purpose of proving by him his willingness and ability to carry out and fulfill the terms on his part of the contract between him and the petitioners. The Court assumes for the purpose of disposing of this matter, that said Walters would have so testified had he been called.

Where a sale is conducted by an officer pursuant to an order of the Court, mere inadequacy in the price bid, at a fair and regularly conducted sale, will not justify refusal to confirm the sale, even though other persons after the sale offer to bid more for the property. Morrise v. Inglis, 46 N. J. Eq. 306; Bethlehem Iron Co. v. Philadelphia and Seashore R. R., 49 N. J. Eq. 356, and other cases therein cited.

The petitioners, however, urge that the Walters contract be approved and Evernham contract disapproved, and cite as the legal authority therefore the case of Ryan v. Wilson, 64 Eq. 797, and Campbell v. Hough, 73 Eq. 601, at page 609. Both of these cases are controlled by Section 85 of the Orphans Court Act (P. L. 1898, p. 715) and in the case of Ryan v. Wilson, confirmation was withheld because the bid reported was far below the estimated value of the property and the property not offered for sale in a manner, which, in view of all the known circumstances, seemed likely to bring the best price.

In the case of Campbell v. Hough, the Vice-Chancellor expressed a doubt that the Orphans' Court would confirm a prior sale because $600.00 more had been offered than the contract under consideration. The Vice-Chancellor stating, "that such sale was affected by Section 85 of the

Orphans' Court Act, P. L. 1898, p. 745, which commits the question of confirmation or rejection without limitation to judicial discretion as construed by Ryan v. Wilson, 64 Eq. 797."

Respondent contends that the Court has no right to consider the value of the property after the day of the date of the making of the contract and cite as their authority the case, In Re Devine Administration, 62 Eq., page 703, etc. This last case came to the Court on an application to an Orphans' Court by an administrator C. T. A., etc., for approval of a sale of testator's lands, being a case like the one in question, except that approval was asked by the administrator, C. T. A., etc. Approval was contested by heirs-at-law, of the testator. The proceedings were under supplement of an act entitled, "An act concerning executors and the administration of intestate's estates" (Revision 1898) (being the same law that is herein invoked). In that case, in an opinion by Magie, Ordinary, which was decided on other grounds, the Court proceeded to make this statement, "They assert that the sale was below the fair market value of the land on August 5th, 1889, when the contract was made. Upon this contention evidence of market value after that date was not admissible, except, so far as it tended to show the value at that date. Increase of value afterwards should have no effect in inducing disapproval of the contract of sale, if it was one proper to be made at the time."

It will be noted that the Courts have expressed differing opinions, as to confirming by the Orphans' Court of sales, under Section 85 of the Orphans' Court Act and under Section 14 of the act concerning "administration of intestate's estate." While neither of the Courts above cit-

ed the reason of the distinction between the two acts I would venture to suggest there is a distinction which this Court should take cognizance.

Section 85 of the Orphans' Court Act is the concluding section of several sections, providing for the sale under certain circumstances of real estate of which a testator or intestate died seized. In the case of an intestate, the administrator does not administer or have control of the real estate of the intestate in an estate that is solvent, neither does an executor have control of the real estate unless same is given him by the terms of the will.

Under these sections then, the representative of the estate contemplated by Section 85 and preceding sections of that act, has the authority to dispose of the real estate only by virtue of an order of Court; that the Court's authorization is strictly limited to the satisfying of creditors from real estate, the title to which is vested in the heirs-at-law, that the authority only proceeds to the extent of satisfying creditors of the decedent. The court then seems primarily charged (while handling this property vested in others) with the duty of exercising the very highest care and only allowing to be sold so much thereof as will satisfy the creditors and pay the expense of administration. For that reason the officer ordered by the Court to make such sale acts as the Court's agent for the purpose of receiving offers and reporting same for confirmation. If the sale is made in an approved regular public manner, as above stated, the Court would not question the mere inadequacy of price. Unless so inadequate as to suggest fraud. If the sale, however, was in the nature of a private sale the Court would feel bound to procure the high-

est possible bid and to accept only the highest and best price and until the Court was satisfied it had such best terms would feel in duty bound not to confirm a report made. This is all upon the theory that the Court takes control and is charged with the duty of obtaining the best terms up till the actual confirmation.

Under Section 13 and 14 of the act concerning "administration of intestate's estates" a different situation is presented. The testator does not rely upon the assistance of the courts, but himself named executors, clothed them with power to sell the lands of which he died seized. The title to the real estate for that purpose vested in the executors and their powers were only limited by the terms of the will.

The Legislature by various acts culminating in the supplement of 1898, page 395, clothed administrators C. T. A., etc., in certain cases with the same powers as to sale of real estate of the testator that the executors originally had. Providing, however (Section 14 of said act), that no sale made by such administrators C. T. A., etc., shall be valid till the terms have been submitted to the Orphans' Court, etc., and approved by said court.

There is no specific direction to the Court contained in this act, except to provide and direct the administrators, C. T. A., etc., to give additional security at the Court's discretion.

Upon the death, resignation or removal of such executors, the beneficiaries of the estate have the first and paramount right of naming

themselves or others to continue the administration of the estate under the terms of the will.

In this case it happens that the beneficiaries themselves are the persons named as administrators C. T. A., etc., to deal with their own property. Administrators C. T. A., etc., whom the Legislature had clothed with authority to dispose of their own property acting in the capacity of representatives of the estate. Under such circumstances there is not the same duty cast upon the Court to see that only necessary limited amount of real estate shall be sold or that the property brings the highest possible dollar. The Court has the duty of providing security from the funds derived from the sale of real estate and certainly the duty to see that no fraud or irregularity is perpetrated and that the sale was fair as to price.

In the present case the clear and convincing testimony indicates that the property was contracted to be sold by the administrators, C. T. A., after two months' negotiations between the parties; that the price obtained was reasonable and fair on the date alleged; that being free of irregularities, error or fraud and for a fair value there can be no valid objection to the sale to Evernham being approved.

Evernham was entitled to have his contract submitted to the Court for its approval by the administrators, C. T. A., etc., promptly after its execution and testimony as to increased value after that date would be inadmissible except as to show the actual value as of the date of the contract.

I will, therefore, deny the prayer of the petitioners to have the Evernham contract disapproved and grant the prayer of the cross-petitioners and approve the terms of the contract for sale between the administrators C. T. A., etc., and Jesse P. Evernham for the sum of $19,000.00 and bearing date July 7th, 1925.

HARRY E. NEWMAN,
Judge.

Ocean County Orphans' Court.

In the Matter of the Estate of Thomas Brooks, Deceased.	On Petition for Approval of Sale of Lands by Administrators c. t. a. d. b. n.

ORDER CONFIRMING SALE

A petition having been presented to this Court by Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, all of the City of Philadelphia, in the state of Pennsylvania, administrators C. T. A. D. B. N. of the last will and testament of Thomas Brooks, late of Philadelphia, deceased, wherein the petitioning administrators submit for the consideration of this Court two contracts for the sale of land entered into by said petitioners, which land is hereinafter described, the first contract entered into between the petitioners and Jesse P. Evernham, of Toms River, New Jersey, on July 7, 1925, for the sale of said land at the price of $19,000.00, and the second of said contracts entered into between the petitioners and Fred T. Walters, of Trenton, New Jersey, on September 13, 1925, for the sale of said lands to said Walters at the price of $30,000.00, and it appearing by said petition that the said petitioning administrators pray for the disapproval of said contract of sale to said Evernham and pray for the approval of this Court of the contract of sale to said Walters;

And it appearing that an answer and cross-petition has been filed in this proceeding on behalf of Jesse P. Evernham, wherein he prays that the sale of said lands to him may be confirm-

ed by the order of this Court and that the contract of sale to said Walters may be disapproved.

And it appearing that due notice of this application has been given to all persons interested in said lands;

And testimony on the issues raised by the petition and cross-petition having been submitted in open Court, and the Court having received and considered briefs of John D. McMullin, Esquire, proctor for the petitioners, and of Howard Ewart, Esquire, proctor for said Evernham; and this Court being satisfied from a consideration of the evidence and the briefs submitted that the contract of sale entered into July 7, 1925, between the said petitioners and the said Evernham for the sale of said lands at the price of $19,000.00 represented the full and fair market value of said property at the time of making said contract and that the said contract was free from irregularities, fraud or error, and the Court having found from an examination of the evidence that a considerable increase in the value of said lands occurred after July 7, 1925, and being of the opinion that the increase in the value of said lands subsequent to the making of said contract on July 7, 1925, ought not to be considered in determining whether or not to approve or disapprove of the said contract of said to Evernham;

It is thereupon, on this fifteenth day of February, nineteen hundred and twenty-six, Ordered that the aforesaid sale of lands and premises in said petition described, to wit:

All that certain tract or parcel of land with the buildings thereon erected situate in the Township of Dover, County of Ocean and State

of New Jersey, bounded and described (the courses and distances being from a survey thereof made May, 1923, by Arthur C. King, C. E.) as follows:

Beginning at a stone the third corner of acres thirty-six and thirty-four one-hundredths returned to John Ratoone and formerly belonging to S. H. Shreve, also the beginning corner to acres twenty-nine and sixty-six one-hundredths returned to Jacob R. Hardenburgh, recorded June 12, 1817, in Book S 18, page 83, etc., also beginning corner to acres six and ninety-six one-hundredths conveyed by F. W. Brinley to Benjamin L. Irons, also the beginning corner to acres four, more or less, conveyed by Daniel Applegate and John Layton, November 23, 1866, recorded in Ocean County Clerk's Office in Book 37 of Deeds, page 300, etc., and the beginning corner of acres ninety-five more or less, conveyed by Benjamin L. Irons to Samuel B. Parsons by deed dated September 28, 1864, recorded in said County Clerk's office in Book 31 of Deeds, page 259, et seq., thence running (1) south fifty-six degrees and four minutes east eleven hundred fifty-one and four one-hundredths feet, more or less, to a stone on the north side of a road the second corner of said acres ninety-five, more or less; thence (2) along the second line of said acres ninety-five, more or less, south thirteen degrees twenty-six minutes west thirty-four hundred eight and nine-tenths feet to a locust post in the line of Island Heights property and a third corner of said acres ninety-five, more or less; thence (3) along Island Height line also the third line of said acres ninety-five, more or less, north seventy-eight degrees forty-nine minutes west three hundred sixty-one and sixty-eight one-

hundredths feet to a stone corner to land belonging to John S. Page, later Hardy, said stone being also the fourth corner to said acres ninety-five, more or less; thence (4) along the fourth line of said acres ninety-five, more or less, north thirteen degrees twenty-six minutes east five hundred seventy-nine and forty-nine one-hundredths feet to a stone in the fifth corner of said acres ninety-five, more or less, to the northeast corner of said John C. Page or Hardy's lot; thence (5) along the fifth line of said acres ninety-five, more or less, north seventy-six degrees and four minutes west four hundred seventy-one and nine tenths feet to a stone the sixth corner of said acres ninety-five, more or less, to the northwest corner of said John C. Page or Hardy's lot; thence (6) along the line of John C. Page or Hardy's lot and partly by the line of Island Heights property being also the sixth line of said acres ninety-five, more or less, south nineteen degrees twenty-seven minutes west eleven hundred sixty and twenty-nine one-hundredths feet to a stone near the north shore of Toms River; thence following the shore of Toms River the several courses and distances thereof, the specific courses and distances being (7) north twenty-one degrees twenty-six minutes west two hundred thirty-six and fifty-four one-hundredths feet; thence (8) north fifty-eight degrees twelve minutes west two hundred ninety-nine and sixty-four one-hundredths feet to a stone the southeast corner of what was formerly the Shinn farm, later the Manolt farm, the eighth corner of said acres ninety-five, more or less, also the beginning corner of a lot conveyed by L. Shinn to Benjamin L. Irons; thence (9) along the line of said acres ninety-five, more or less,

north nineteen degrees eleven minutes east twenty-eight hundred eighty-one and fifty-six one-hundredths feet to a stone which is the northeast corner of said Manolt farm and the ninth corner of said acres ninety-five, more or less, to the southeast corner of a lot formerly belonging to Joseph Page; thence (10) along the ninth line of said acres ninety-five, more or less, north forty degrees thirty-five minutes east five hundred ninety and four-tenths feet to a stone standing south thirty-seven degrees fifty-one minutes west ninety-two links from a stone the tenth corner of said acres ninety-five, more or less, said stone being the second corner of a lot of land conveyed by Charles M. Johnson and wife to Mary C. Acey by deed dated July 17, 1885, and recorded in the Clerk's office in Book 159 of Deeds, page 154, etc., also corner of acres five and eight one-thousandths conveyed by Charles M. Johnson and wife to said Eugene A. Maurice by deed dated February 2, 1889; thence (11) along said Mary C. Acey's line north seventy-four degrees ten minutes west nine hundred fifty-seven feet to a stone corner to said acres five and eight one-thousandths; thence (12) north fifteen degrees forty-four minutes east four hundred eleven and eighty-four one-hundredths feet to a stone corner to Charles M. Johnson and also corner to land of John P. Haines; thence (13) north eighty-three degrees twenty-four minutes east one hundred fifty-one and eight-tenths feet to a stone corner to land of heirs of John Layton, deceased; thence (14) south fifty-four degrees fifty-one minutes east four hundred forty-five and five-tenths feet to a stone corner to land of heirs of John Layton, deceased, and in the closing line of said acres ninety-five, more or less,

thence (15) along said closing line north thirty degrees forty-one minutes east three hundred ninety-nine and twenty one-hundredths feet to the place of beginning. Containing ninety-nine and twenty-two one-hundredths acres after excepting from the lands above described eighty-six one-hundredths of an acre conveyed by Samuel Parsons and wife to School District No. 32 by deed dated October 7, 1871, and recorded August 5, 1874, in Ocean County Clerk's office in Book 79 of Deeds, page 16, etc., and being all the tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the Township of Dover in the County of Ocean and State of New Jersey. Beginning at a stone at the southeast and second corner of a lot of acres eighteen and fifty-three one-hundredths conveyed by Joseph Johnson to Charles M. Johnson by deed dated February 26, 1859, recorded in Book 16 of Deeds, page 152, in Ocean County Clerk's office. Also the ninth corner of a tract of acres ninety-five, more or less, conveyed by Benjamin L. Irons to Samuel B. Parsons by deed dated September 28th. 1864, recorded in Book 31 of Deeds, page 250, of which the lot hereby conveyed is a part, thence running as the magnetic needle pointed A. D. 1864, first, south seventy-four degrees forty-five minutes east two hundred feet to the west side of a road to be opened to Toms River; second, north fifteen degrees east two hundred and forty-seven feet six inches along the west side of said road to a stake; third, north seventy-four degrees forty-five minutes west one hundred and four feet three inches to the fourth corner of a lot of acres one and six one-hundredths conveyed by Charles M. Johnson and wife to Joseph Page by deed dated March 13,

1865, and part of the aforesaid acres eighteen and fifty-three one-hundredths; fourth, south thirty-six degrees twenty-seven minutes west two hundred and sixty-four feet along the fourth and last line of said acres one and six one-hundredths and the east line of said acres eighteen and fifty-three one-hundredths to the beginning; made by the said administrators, petitioners herein, to Jesse P. Evernham for the sum of $19,000.00, be and the same is hereby approved and confirmed, pursuant to the statute in such case made and provided.

And it is further ordered that the contract of sale made between petitioning administrators and said Walters on September 12, 1925, be and the same is hereby disapproved.

And the Court having examined into the amount of the bond given by said petitioning administrators, and it appearing that bond in the sum of $140,000.00 has been given and that said bond is sufficient to secure the proceeds of sale of the aforesaid lands, it is Further Ordered that no additional bond be required in connection with the sale of the lands hereinbefore mentioned.

HARRY E. NEWMAN,
Judge.

Ocean County Orphans' Court.

In the Matter of the Estate of Thomas Brooks, Deceased. } On confirmation of Sale.

TESTIMONY

(Filed May 7th, 1926.)

Toms River, N. J., December 8, 1925.
Testimony before Honorable Harry E. Newman, Judge.

Appearances—For Petitioners—John D. McMullin and Thomas Fernley Brooks, Esqs.

For Respondent Jesse P. Evernham—Howard Ewart, Esq.

For Respondent Fred T. Walters—Alexander Trapp, Esq.

Mr. McMullin—If the Court please, I have associated with me Mr. Brooks, of the Philadelphia bar. This is the estate of Thomas Brooks. Shall I open?

The Court—Yes.

Mr. McMullin—If the Court please, Thomas Brooks, a resident of Philadelphia, died in 1906 leaving a will under which he gave a power of sale, or rather, a direction of sale, of his real estate to his executors. Among the assets of the estate was a tract of about 100 acres of land in this county at Island Heights. It was an old farm. During the

course of years the executors died and from time to time administrators were substituted in their stead in Philadelphia, until at the present time the representatives of Thomas Brooks' estate are three substituted administrators, we call them up there—four of them; and those four are the petitioners here. They filed their exemplification of the will in the surrogate's office here and also of their proceedings as to their appointment and under the statute are here to-day.

Now, in July, about July 6th of this year, these substitutionary administrators entered into an agreement of sale in the regular form with Mr. Evernham under which they agreed to sell this property in this county to him for the sum of $19,000., part cash and part mortgage, with a more or less complicated release clause joined. In this agreement it was provided that the agreement was subject to the approval of a competent court.

In August the administrators received an offer of $25,000 for the property from another party and they took a deposit from this second party and were about to enter into an agreement with him, subject to the disapproval of the first offer and to the approval of that offer, when along came a third man with a third offer, and they got an offer the last time for $30,000., which was received in September.

The Court—What was the first one?

Mr. McMullin—The first one was $19,000.

The Court—The second one?

Mr. McMullin—The second one was $25,000., and the third was $30,000. They took up this third offer with both the first and the second parties and advising them of it, whereupon the second party withdrew, took down his deposit and no agreement was made, because he could not see that he would have any possible standing at all; he was between Scylla and Charybdis.

So we then presented our petition, in which we set forth these facts as I have told them to your Honor, and asked the Court for the disapproval of the first sale and for the approval of the last sale at $30,000. Now, I might say that I have here the officers of two of the title companies who are interested in this question of the funds. You see, every one concerned in the matter of the original ones, practically, is dead. The children of Thomas Brooks, who were recipients of his estate, are all practically dead, with the exception of Mrs. Shetzline and one other son. Four out of six are dead. And the Provident Life, of Philadelphia, is trustee under the estate of one of the sons and is therefore interested in this property, and among those beneficiaries are a number of infants; and as to another son the same condition exists, only it is the Pennsylvania Company for Insurance on Lives and Granting Annuities. So, ultimately, the ones interested here are in quite a large measure minors.

Now, to this petition the consent to the prayer is—service is acknowledged by the parties themselves and they have joined their consent to the prayer of the petition,

that is, by all of the beneficiaries. I gave notice to both of the purchasers. The first purchaser, Mr. Evernham, filed an answer in which he raises the question as to the adequacy of the price at the time the sale was made. The last purchaser is here represented by Mr. Trapp, of the New Jersey bar, and who will speak for himself.

Mr. Ewart—Does the Court desire a statement of the position of Mr. Evernham?

The Court—Yes.

Mr. Ewart—It is this. That this property has been on the market for years; that after negotiations running over some period of time an agreement was finally reached whereby Mr. Evernham agreed to buy, and the administrators, C. T. A., of the Brooks' estate to sell, at the price of $19,000. That agreement was reached in June. The agreement with the executor was signed and dated July 6th, I think it is.

Our position is that at that time that was a full and fair market value of that property. We were bound under the contract, if the market had gone down, we would have had to pay the $19,000. If the market went up, that is to our advantage and not to the advantage of the estate, and that the thing that ought to govern this Court in the decision of this issue is the fair market value at the time this agreement was made and not some other time. We expect to show that there has been a very decided change in the values of real estate very similar to this property since that date.

The Court—When was the contract to be consummated, the one made first?

Mr. Ewart—On settlement, which was supposed to take place with sixty days.

Mr. McMullin—Ninety days.

Mr. Ewart—Of course, the obligation was binding as of the time it was signed.

The Court—And they were to get the approval of the Court?

Mr. Ewart—It was to be subject to the approval of the Court, yes. This we admit.

The Court—The duty is that the executors or their representatives should get the highest price as the representatives of the estate?

Mr. McMullin—In other words, that the Court is not simply a rubber stamp, but has a voice in the matter; otherwise there would be no necessity of the Court. If the Court had to approve the action of the executors—

Mr. Ewart—Perhaps we can avoid this testimony if Mr. McMullin is willing to admit that $19,000 was a fair price for the property at the date of the contract, I see no necessity for taking testimony.

Mr. McMullin—Nothing has been admitted as yet, has there?

Mr. Ewart—Well, if that be your position.

Mr. McMullin—No, it is absurd to say that $19,000 was a fair price for the property when they paid $30,000. for it.

Mr. Trapp—If your Honor please, I repre-

sent Mr. Walters, the gentleman who made the offer of $30,000. Our position is rather unique in one fact, that we had no knowledge of what the other people had offered for it. We filed our petition and learned that the first bid was $19,000, the second $25,000 and some hundred, and we have since learned that the agreement between the party that bid $19,000 and our people are practically identical in the fact that it is subject to the approval of a competent Court of this State. And our agreement, I might further say, is subject to the approval of this Court accepting our $30,000 over and above the $19,000.

Mr. McMullin—I was going to add that the original estate left to the defendants, children of Thomas Brooks, four of them died. Each of them left their estate in trust, each of those dying; so that there are two of the original beneficiaries and four trusts benefiting from this; each of which four trusts is arising from the beneficiaries. So when you trace on down I suppose there are ultimately entitled twenty-five or thirty individuals.

The Court—Are there substituted administrators?

Mr. McMullin—Two of them.

The Court—Who are they?

Mr. Brooks—One of them is a beneficiary under the will and the others are beneficiaries under will of their fathers, coming from the grandfather.

Mr. McMullin—All of them ultimately benefited. If the Court please, there is an answer filed here and there are certain admissions in the answer, which I do not imagine you want us to prove. It is admitted the death of Thomas Brooks and the granting of letters and the appointment of executors, and so forth. The second paragraph is admitted, as to the death of the executors, and the third paragraph, as to the substitution therefor by the Philadelphia court of the present petitioners as administrators. The contents of the will are admitted. The ownership of the real estate and the correctness of the description is admitted. The fact of the offer of Jesse P. Evernham of $19,000 for the premises is admitted. That is about all. So Mr. Brooks, I think I will call you to the stand.

THOMAS FERNLEY BROOKS, sworn for petitioner.

Direct examination, by Mr. McMullin.

Q. Mr. Brooks, what is your relation to the estate of Thomas Brooks?

A. I am the attorney for the estate of Thomas Brooks, Sr., estate.

Q. Have you in your possession the agreement made with Jesse P. Evernham for the sale of this property?

A. I have. (Produces paper.)

Mr. McMullin—I will offer the agreement in evidence.

(Agreement marked Exhibit P1.)

Q. When was that agreement made?

The Court— I suppose you might read it. Read the agreement, if it is not too long.

(Mr. McMullin reads agreement as follows):

Agreement made the seventh day of July, A. D. 1925, between Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, administrator D. B. N. C. T. A. of the estate of Thomas Brooks, deceased, of the first part, and Jesse P. Evernham, of Toms River, New Jersey, of the second part, as follows, to wit: The said party of the first part agrees to sell and convey to the said party of the second part, who agrees to purchase all that certain tract of land situate partly in the Township of Dover and partly in the Borough of Island Heights, Ocean County, State of New Jersey, known as the Brooks Farm and described in accordance to a survey thereof made May, 1923, by Arthur C. King, Civil Engineer, Toms River, N. J., containing ninety-nine acres more or less, on the terms and conditions following, wit: The said party of the second part agrees to pay for the said property the sum of nineteen thousand dollars, as follows: Nineteen hundred dollars on the signing of this agrement (which deposit shall be forfeited to the said party of the first part as liquidated damages in case of the default by the said party of the second part in the performance of the terms of this agreement) and the balance of the purchase money as follows: Cash, seventy-one hund-

red dollars at the time of settlement and a mortgage on said property for $10,000, payable within three years at six per cent., with privilege to purchaser to have released from the lien of said mortgage parts as follows:

Tract No. 1 on plan of 33-64/100 acres upon payment of $7,000.

Tract No. 2 on plan of 13-86/100 acres upon payment of $3,000.

Tract No. 3 on plan of 4-64/100 acres upon payment of $1,000.

Tract No. 4 on plan of 47-8/100 acres upon payment of $5,000.

A policy of fire insurance for $5,000.00 to be transferred to said party of the second part upon payment of the premium, less the discount named in policy.

The premises are to be conveyed free and clear of incumbrance and easements.

The gas and electric fixtures, heaters, ranges, etc., annexed to the said building are included in the sale, as also any water pipe laid on any street bounding said lot.

Possession to be given at the time of settlement. Settlement in ninety days unless further time is required to perfect title.

Taxes, water rent, house rent and interest on incumbrance (if any) to be apportioned for the current term.

Gas bills, if any, to be paid by the seller.

The title is to be such as will be insured by West Jersey Title & Guaranty Company of Camden, N. J.

And the said parties hereby bind themselves their heirs, executors, administrators

and assigns for the faithful performance of the above agreement within ninety days (as above) from the date hereof, said time to be the essence of this agreement, unless extended by mutual consent in writing endorsed hereon, said sale to be subject to the approval of a competent Court of record of New Jersey.

This agreement is not to be recorded or entered of record.

In witness Whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

Sealed and delivered in the presence of
T. FERNLEY BROOKS,
ARTHUR B. KIEFABER.

ELIZABETH P. SHETZLINE, (Seal)
HENRY P. BROOKS, JR., (Seal)
JOHN T. BROOKS, Jr., (Seal)
ALBERT BROOKS, (Seal)
Administrators, D. B. N. C. T. A., Estate of Thomas Brooks, deceased.

JESSE P. EVERNHAM. (Seal)

Q. Did you receive the $1,900 payment called for?

A. It passed through my hands. It was not drawn to my order, it was drawn to the order of the estate.

Q. Before the signing of that agreement was the offer submitted to the parties other than those who signed it?

A. No.

Q. After the execution of that agreement did you have a further offer for the property?

A. Yes.
Q. Tell the Court what that was.
A. In the early part of August, 1925, a gentleman by the name of Mr. Stahl and Mr. Klein called at my house—I have a summer home at Island Heights— and asked about the property, and I told them that the property had been sold under an agreement but if they chose to make an offer, which we would have to submit to the Court, I would be willing to consider any offer they chose to make. In furtherance of that, on the 18th of August they paid me $1,000 and I gave them a receipt.
Q. Have you the receipt there?
A. I have the receipt here. Shall I read it?
Q. No, I want to show it to counsel.

(Paper submitted to Mr. Ewart.)

Mr. Ewart—I object to the admission of this paper.

The Court—On what ground, Mr. Ewart?

Mr. Ewart—It is a self-serving declaration by the witness, who says he is the attorney for the petitioners of the estate. It cannot bind us. We are not interested in what this property was worth a month and half after an agreement of sale was made.

The Court—I will admit it.

(Objection noted for respondent Evernham as ground of appeal.)

(Paper marked Exhibit P. 2.)

Mr. McMullin—Shall I read it?

The Court—No, just state what it was.

The Witness—Partly it is an offer of $25,000 for the property.

Mr. McMullin—With a little better mortgage terms.

Island Heights, N. J., August 18, 1925.

Received from George Hill, of White Plains, N. Y., by check for one thousand dollars, paid to show good faith in firm offer of John Stahl and George Hill of twenty-five thousand dollars for the Brooks farm of about 100 acres near Island Heights, New Jersey. Said money is paid upon the understanding that an agreement of sale will be entered into between the administrators of the Estate of Thomas Brooks, deceased, and John Stahl and George Hill within ten days from date, at which time an additional sum of one thousand dollars shall be paid and both amounts shall be credited on account of purchase price of property. Said sale will be made subject to the approval of a competent Court of New Jersey having jurisdiction thereover. In the event that John Stahl and George Hill does not enter into a binding agreement to purchase said property and pay the down or deposit money, then said sum now paid shall be forfeited as liquidated damages and not as a penalty, and in case the agreement is made but the sale is not approved by the Court, then the entire sum paid as down or deposit money shall be returned to John Stahl and George Hill, and all negotiations and agreements shall end and become null and void as if the same has never been entered into and all rights thereunder shall cease and determine.

Approved

JOHN STAHL.
GEORGE HILL by JOHN C. STAHL.

T. FERNLEY BROOKS,
Attorney for Estate of Thomas Brooks, deceased.

The Witness—In consequence of that I prepared an agreement of sale between the parties and the terms of the agreement—

Q. Is that the agreement?

(Paper shown witness.)

A. That is the agreement.

Q. Was that last agreement of which you speak executed by Mr. Stahl?

A. It was not.

Q. Was it submitted to him?

A. It was.

Q. Why wasn't it executed by him?

A. Because he said that—

Mr. Ewart—I object, if the Court please, to what he said.

Mr. McMullin—I will withdraw that question.

Q. It was submitted to him and not executed by him?

A. I submitted it to him and he did not execute it.

Q. How long did he have it?

A. When I informed him that we had a higher bid.

(Objected to)

The Court—The question has not been asked.

Mr. Ewart—The witness was answering nevertheless.

Q. How long did he have the paper in his possession?

Mr. Ewart—I object.

The Court—I will admit it.

(Objection noted for respondent Evernham as ground of appeal.)

A. This agreement?

Q. Yes.

A. I don't suppose more than a half hour.

Q. Did you get any further money from him besides the $1,000 deposit?

A. No, at the time I was—

Q. No, answer the question, Mr. Brooks. Did you subsequently return the $1,000 to him?

A. I did.

Q. When did you return the $1,000?

A. The next day after he said that he would not sign the agreement.

Q. Was it before or after the offer from Mr. Walters was received?

A. It was after the offer had been made by Mr. Walters.

Mr. McMullin—I will ask that that agreement be marked for identification.

(Agreement Exhibit A for identification.)

Q. What was the next offer you had for this

property?
A. $30,000.
Q. When?
A. In the latter part of August.

Mr. Ewart—Isn't there an agreement on it?

Q. Never mind; go ahead and answer my question. Counsel will have a chance to ask questions.

Mr. Ewart—If the Court please, I object to the verbal testimony of anything contained in the written agreement.

The Court—He merely asked him what the time was.

Mr. Ewart—Didn't he ask him the date? I understood that he did.

The Court—Yes, the date.

Mr. Ewart—I think that is a matter of record.

The Court—I don't know whether it is or not.

Mr. Ewart—The petition says it is.

Q. When was you next agreement made, the agreement itself?
A. On September 1st I received from—

The Court—He asked you when the next agreement was made. That is the question, isn't it?

A. This is preliminary to the agreement, the acceptance there of the amount of the—

The Court—Well, put that another way.

Q. Mr. Brooks, when did you get a check on the property again?
A. September 1, 1925.
Q. From whom did you get it?
A. From Mr. Walters.
Q. And how much was the check?
A. $2,000.
Q. And is this the receipt which you gave Mr. Walters for that check? (Paper shown witness.)
A. That is.

Mr. Ewart—I object to the admission, if the Court please, because it is signed by the petitioners here in court and is a self-serving declaration.

Mr. McMullin—It is the same situation as the prior one.

The Court—Have you the contract?

Mr. McMullin—That is followed by the contract.

The Court—Why don't you offer the contract?

Mr. McMullin—Excepting as to the date when the matter was closed.

The Court—How much later is the contract?

Mr. McMullin—The contract is the 17th of September.

The Court—I will receive it. Have it marked.

(Agreement marked Exhibit P 3.)

(The copy of the agreement is as follows):

Agreement made the seventeenth day of September, A. D. 1925, between Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, Administrators D. B. N. C. T. A. of the Estate of Thomas Brooks, late of the City of Philadelphia, Penna., deceased, party of the first part, and Fred T. Walters, of Trenton, New Jersey, party of the second part, as follows, to wit: The said party of the first part agrees to sell and convey to the said party of the second part, who agrees to purchase all that certain tract of land with the buildings there erected, situate partly in the Township of Dover, and partly in the Borough of Island Heights, Ocean County and State of New Jersey, located on the north shore of Toms River and known as the Brooks Farm and described according to a survey thereof made May, 1923, by Arthur C. King, Civil Engineer, Toms River, New Jersey, and containing ninety-nine acres, more or less, on the terms and conditions following, to wit: The said party of the second part agrees to pay for the said property the sum of thirty thousand dollars, as follows: Three thousand dollars on the signing of this agreement (which deposit shall be forfeited to the said party of the first part as liquidated damages in case of the default by the said party of the second part in the performance of the terms of this agreement) and the balance of the purchase

money as follows: Twelve thousand dollars at the time of settlement and the balance of fifteen thousand dollars in the purchase money mortgage payable within one year from its date, at six per cent. interest, with a release clause as follows:

Releases to be as follows:

On tract No. 1, of 33.64/100 acres, house and river tract, $9,000.00.

On tract No. 2, of 13.86/100 acres, $3,000.00.

On tract No. 3, of 4.64/100 acres, $1,000.00.

On tract No. 4, of 47.8/100 acres, $6,000.00.

A policy of fire insurance for $5,000.00 to be transferred to said party of the second part upon payment of the premium, less the discount named in policy.

The premises are to be conveyed free and clear of incumbrances and easements. Title to be taken in name of said Fred T. Walters or Arbor Terrace, Inc., of New Jersey.

Any water pipe laid on any street bounding said property is included in the sale.

Possession is to be given at time of settlement.

The sale is made subject to the approval of a competent Court of New Jersey having jurisdiction thereover.

Taxes, water rent, house rent and interest on incumbrance (if any) to be apportioned for the current term.

The title is to be such as will be insured by the West Jersey Title and Guaranty Co., of Camden, N. J. This agreement is not to be recorded or filed or entered of record.

And the said parties hereby bind themsel-

ves, their heirs, executors, administrators and assigns for the faithful performance of the above agreement within ninety days from the date hereof, said time to be the essence of this agreement, unless extended by mutual consent in writing endorsed hereon. It is understood that there are existing prior agreements to sell above-mentioned property, subject to the Court's approval, and that this agreement is contingent upon the Court's disapproval of said prior agreements.

In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

ELIZABETH P. SHETZLINE, (Seal)
HENRY P. BROOKS, JR., (Seal)
JOHN T. BROOKS, JR., (Seal)
ALBERT BROOKS, (Seal)
Administrators D. B. N. C. T. A. of Estate of Thomas Brooks, deceased.
FRED T. WALTERS. (Seal)

Sealed and delivered in the presence of T. Fernley Brooks, as to administrators. As to Fred T. Walters, Alexander Trapp.

Q. Was this check and receipt followed by a formal agreement of sale?
A. It was.

Mr. McMullin—I offer the agreement of sale, dated September 17, 1925, between the administrators of Thomas Brooks, deceased, and Fred T. Walters.

Mr. Ewart—I object to the admission of the agreement of sale dated September 17th,

because we are not interested in that date. It is immaterial to this issue.

The Court—I will receive it.

(Agreement marked Exhibit P 4.)

Mr. McMullin—At this point may I call the Court's attention to a paragraph there? (Shows paper to Court.)

Mr. Trapp—Do you wish to read that into the record?

Mr. McMullin—No, I think we had better let Mr. Kelly put it in where it belongs, not take the time of the Court.

Island Heights, N. J., September 1, 1925.

Received from Fred T. Walters, of Trenton, N. J., checks for $1,000, paid by him to show good faith in firm offer of thirty thousand dollars ($30,000.00) for the Brooks Farm of about one hundred acres at and near Island Heights, N. J. The said money is paid upon the understanding that an agreement of sale will be entered into between the proper parties interested in said property and said Fred T. Walters within twenty days from date, at which time an addtional sum of two thousand ($2,000.00) dollars shall be paid and both amounts shall be credited on account of the purchase price of said property in the event that said Fred T. Walters receives title thereto.

Said sale will be made subject to the approval of a competent court of New Jersey having jurisdiction thereover.

It is further understood that this agreement, and any sale thereunder, entered into between the parties hereto is with the understanding that there are prior existing agreements outstanding and that this sale is made contingent upon the Court's disapproval of said prior agreements.

In the event that said Fred T. Walters does not enter into a binding agreement to purchase said property and pay the down or deposit money above mentioned, then said sum now paid shall be forfeited as liquidated damages and not as a penalty, and in case the agreement is made but the sale is not approved by the Court, then the entire sum paid as down or deposit money shall be returned to the said Fred T. Walters and all negotiations and agreements shall end and become null and void as if the same had never been entered into and all rights thereunder shall cease and determine. The terms to be as follows: one-half cash at the time of settlement within ninety days from date of agreement and the balance in purchase-money mortgage payable within one year from its date, with a release clause for certain parts of the property to be mutually agreed upon.

T. FERNLEY BROOKS,
Attorney for Estate of Thomas Brooks,
Deceased.

Approved.
FRED T. WALTERS.

Q. Now, Mr. Brooks, have you the certified copy in your possession of the will of Harry P. Brooks?

Mr. McMullin—This has been formally

proved. In order to bring the parties who are entitled to notice I set out the decease of the original various beneficiaries. I don't know whether counsel wants me to go ahead and prove it all. You say you don't know anything about it and ask for proof.

Mr. Ewart—Exemplified copies of wills?

Mr. McMullin—Yes.

Mr. Ewart—I won't offer any objection to them. I am going to suggest that I think an exemplified copy of the last will and testament of Thomas Brooks ought to be formally offered in evidence before the Court.

Mr. McMullin—Well, it is part of a foreign court.

Mr. Ewart—Well, there is a case apparently in New Jersey which states that it is necessary to give the Court jurisdiction.

Mr. McMullin—Shall we cumber the record with putting in this thing?

Mr. Ewart—Yes, I have no objection to this.

Mr. McMullin—Why put it in? Why not admit a fact like that? They all admit it.

The Court—You may do that at recess time, if you can do all that.

Mr. Ewart—Yes, we suggest that counsel put then in with this. I have no objection to the admission of any of them then.

The Court—Make the direct statement that the parties in interest are all before the Court and have all been properly served. That is sufficient, isn't it?

Mr. McMullin—Yes. Attached to the petition are the consent of various persons, consents and approvals of various persons, waiving notice and representing the estate of John T. Brooks, estate of Henry P. Brooks, estate of William D. G. Brooks and Thomas Brooks, Jr., deceased.

Q. The parties whose names are signed to that petition, do they represent the parties in interest in this matter?

A. They do.

Q. And you have here certified copies of the wills of those four gentlemen whose names are just mentioned?

A. John T. Brooks, Henry P. Brooks, Jr., Thomas Brooks, Jr., and William D. G. Brooks.

Cross-examination, by Mr. Ewart.

Q. You have been acting as attorney for the petitioners in this matter up to the point where this case came before the Court, have you not?

A. Yes.

Q. Prior to the inception of these proceedings you have been general counsel for the estate of the petitioners in this particular proceeding?

A. Yes.

Q. You say you live at Island Heights?

A. I have a summer home there.

Q. How much time do you spend there?

A. About three months.

Q. How long have you been coming there?
A. Well, probably thirty some odd years.
Q. You are very familiar with this property in question.
A. Yes.
Q. I show you what purports to be a map of a survey by Mr. King in 1923. Is that a true delineation of the property?
A. I have a map there, a blueprint.
Q. Well, that shows it too, does it not?
A. That shows it, yes.
Q. It is a correct delineation of it?
A. I won't say how correct it is. It shows the map. Here is the blueprint.

Mr. McMullin—Here is the blueprint. That probably shows it better.

Mr. Ewart—Well, it is the same thing.

Mr. McMullin—You can use this and offer this instead of that if you want to.

Q. You have been the man actively in charge of this property, have you not, Mr. Brooks, for the administrators?
A. Well, only incidentally as representing the estate.
Q. Well, whether that is incidental or not it is a fact, isn't it?
A. No, there are other people interested, probably, besides me.
Q. I know, but you have been living down here, haven't you; been negotiating for the sale of this property for some years?
A. We have had it for sale for some years, yes.
Q. How many years?

A. Well—
Q. Twenty?
A. No.
Q. Fifteen?
A. No, it hasn't been that long.
Q. Ten?
A. Up until the time—we lost a tenant about three or four years ago. Well, it was Mr. Maisch.
Q. Well—
A. When Mr. Maisch was a tenant on the place, and last couple years he was a tenant, then we wanted to get rid of it, at least, the estate wanted to get rid of it.
Q. There have been for sale signs on it for a number of years past, have there not?
A. Yes.
Q. As many as ten years past?
A. I wouldn't say that long, but for a number of years there has been a for sale sign on it.
Q. Are you prepared to say it is not ten?
A. No, I won't say it is not over ten years.
Q. You won't say that it has not been?
A. No.
Q. Have you made various efforts to sell it during that period of time?
A. Yes.
Q. You have had it in the hands of a number of agents, have you not?
A. Personally, no.
Q. Did the estate?
A. Yes.
Q. Did you put it in the hands of any agent?
A. I don't think any.
Q. Did you put it in the hands of Orrin Payne in Toms River?
A. No.

Q. Mr. Faby, in Toms River?

A. No.

Q. Mr. Haag, of Seaside Park?

A. No.

Q. Mr. Grover, of Toms River?

A. No.

Q. The deputy surrogate? Did you not ask him to try and find a buyer for it?

A. No.

Q. How many auction sales of this property have you held?

A. There hasn't ever been an auction sale. It never was sold.

Q. Well, you have held auctions, have you not, in an endeavor to sell it?

A. Two.

Q. One in 1923?

A. Yes, I think that is the year; I am not sure about that.

Q. And one in 1925?

A. Yes.

Q. I show you what purports to be a notice of sale over the name of Samuel T. Freeman & Co., auctioneers, of Philadelphia, advertising the property for sale at auction for April 15, 1925.

A. That is correct.

Q. You authorized that auction to be held?

A. I had nothing to do with the authorization. It was the administrators ordered the sale, this administrators' sale, it says so.

Q. Well, they acted through you, didn't they?

A. No.

Q. Aren't you the gentleman who conducted the negotiations?

A. No, they conducted them themselves.

Q. These various administrators, including

Mrs. Shetzline and others, all went to Mr. Freeman?

A. They had their representatives there, either two or three of the men of the administrators; either Henry P. Brooks or John T. Brooks or Albert Brooks, administrators, went there to Freeman's. Sometimes I was with them and sometimes not.

Q. You attended the sale?

A. I was there.

Q. You were there representing the estate?

A. Yes, representing the estate.

Q. You didn't make the original agreement with Freeman for the sale?

A. No.

Q. This is one of the bills you used? (Paper shown witness.)

A. I can't answer that question.

Q. Have you ever seen one like that before?

A. Yes.

Q. Very similar in appearance?

A. Yes.

Q. What kind of a sale was this held on April 15th at Freeman's? Can you tell us the terms of the sale?

A. No, I can't. They are sent out in a—

Q. Will you admit that that correctly states the terms of sale at that time?

A. No, I can't admit it. I don't know whether it is or not.

Q. Will you look at this and see if you can refresh your recollection as to what the terms of the sale were, how much was to be paid in cash and how much on mortgage?

Adjourned till 2 P. M.

Trial of the cause resumed at 2 P. M.

THOMAS FERNLEY BROOKS, resumed.
By Mr. Ewart.

Q. Mr. Brooks, when court adjourned we were talking about the auction sale of this property in Philadelphia on April 15, 1925, at Samuel T. Freeman's. I asked you if you would not tell us what the terms of that sale were respecting the payment of cash or mortgage remaining.

A. I can't answer that question offhand, because I didn't make the arrangements personally.

Q. You mailed this bill of sale to Mr. Fisher, did you not?

A. I can't answer that. I may have done so.

Q. Will you look at the terms stated there and tell me whether they are the terms upon which the property was offered?

A. I can't say that it is, but I have no reason to believe that it is not. I didn't make the terms myself, as I said before.

Q. You say you attended the sale?

A. Yes.

Q. As attorney for the estate? Was the sale made there that day?

A. The property was cried and it was knocked down, but the sale was not consummated, because—

Q. Who was it knocked down to?

A. I think to a man named Lush. I don't know whether that is the name or not.

Q. And at what price was it knocked down?

A. $15,000.

Q. And did Mr. Lush give you his check on account of the purchase price?

A. He didn't give it to me, no.

Q. Did he give a check to someone represent-

ing the estate?

A. I don't know. He didn't give one to the representative of the estate. He may have given one to the auctioneer.

Q. Do you know that he did?

A. I don't know, I never saw the check.

Q. Don't you know without having seen the check that he gave a check for ten per cent?

A. I was told that he gave a check.

Q. What happened to the check?

A. The check didn't go through, as I understood it.

Q. What was the reason?

A. I understood that the check was protested —no not protested but payment on the check was stopped.

Q. Do you know why the sale didn't go through?

A. I don't know of my own personal knowledge, except what came through hearsay.

Q. Who else was representing the estate that day besides yourself?

A. All the administrators were there.

Q. The $15,000 at which the property was knocked down was the highest price offered that day, was it?

A. I believe it was, but the sale in any event would not have gone through, because it was not, according to the version of the administrators, put up according to the instruction given to the auctioneer.

Q. Is that the reason payment on the check was stopped?

A. That is one of the reasons why the sale did not go through.

Q. If you had told us that before we would have saved some time. Did you meet Mr. Kief-

aber there that day?

A. After the sale, yes.

Q. You know Mr. Kiefaber?

A. Very well.

Q. You negotiated with him for the sale of this property to Mr. Evernham, did you not?

A. We discussed the matter and he said he thought he would get a purchaser.

Q. Well, you discussed it on several different occasions?

A. Yes.

Q. You discussed it that day with him in Philadelphia, did you not?

A. My memory is that after the sale Mr. Kiefaber said that "If I had known it could be bought for any such price as this I could have brought you a purchaser who would have paid you more money than this brings here."

Q. Did you tell him that day that he could have it for $17,000?

A. No.

Q. Did you invite him up to your office?

A. No, I wouldn't do that because Mr. Kiefaber had been to my office before this time and had gotten from me the plan of this property.

Q. Well, he came to your office with you, did he not?

A. He came to my office, yes.

Q. You offered the property to him some days later at a price, didn't you?

A. No, I told him I would submit any offer he wanted to make; I was not qualified to fix any price on the property, it had to be submitted to other people.

Q. You say you didn't offer it to him at $17,000.?

A. No, I didn't.

Q. Did you tell him he could buy it at $17,000.?
A. I did not.

Q. Did you afterwards raise the price to $20,000, tell him it could be bought for $20,000?

A. I told him that if he wanted to submit an offer at $20,000 I would submit it. At no time in the negotiations did I say we would not take this or that or any other sum of money.

Q. Did he make an offer of $17,000 that day?

A. No, because I told him $17,000 would not be considered.

Q. Now, at the time you were having this conversation with Mr. Kiefaber you were negotiating for the sale of the property with other people weren't you?

A. Wherever we had a lead we would try and find if we could get someone to buy the property.

Q. You did yourself? Were you negotiating with other people for the sale of this property?

A. I probably was.

Q. You told Mr. Kiefaber that you had a party at New York and a party at Ocean Gate who were negotiating with you for it?

A. Mr. Ewart, I have had a number of inquiries about the property, corresponded a great deal about the property.

Q. You have?

A. Yes, I have inquiries as representing the estate.

Q. Did you ever tell Mr. Kiefaber that he could have the property at $18,000?

A. No.

Q. Did you tell Mr. Kiefabor that if you could raise the $18,000 that he could not have it at $18,000?

A. No.

Q. Didn't you tell him if you could raise the $18,000 you would take it yourself?

A. No.

Q. Now, where did these negotiations take place with Mr. Kiefaber?

A. Well, he was at my office several times, I met him on the train a number of times; I was commuting to Island Heights, and I saw him on the train and we had conversations about the property. I was in no position myself to handle this property as purchasing for my own behalf, because I would not purchase as representing an estate a property which I felt was worth more than the amount we were negotiating for.

Q. When did you finally reach an agreement with Mr. Kiefaber?

A. Mr. Kiefaber asked me if $18,000 would be acceptable. I said no. Then he said would $19,000? I said, "I don't know. If you want to submit it I will submit $19,000."

Q. Well, now as a matter of fact didn't you and he agree upon $19,000 subject, of course, to a contract to be signed by the administrators?

A. No, I said I would submit the offer, which I did do.

Q. Did you tell him that you would not have the contract for the sale of the property until you had a writing from the administrators agreeing to pay you a commission?

A. Mr. Kiefaber said he would be entitled to a commission in case any sale went through.

Q. That is not the question, Mr. Brooks.

A. I am going to answer. And I said, "Well, I will see that no contract it entered into until the question of commission is arranged for."

Q. My question is directed to your statement that you would have no contract made or a-

greement at all until you had a contract for commissions yourself.

A. No.

Q. You didn't make such a statement?

A. No.

Q. Now, who prepared the contract of sale which has been placed in evidence between the administrators and Mr. Evernham?

A. I did.

Q. You are a member of the Philadelphia bar, you say?

A. Yes.

Q. You took this paper to your clients for their signatures?

A. No, I sent it to them.

Q. By mail?

A. Yes.

Q. How long a time elapsed between the sending of it and the time you got it back?

A. You are talking about the contract now?

Q. Yes.

A. I can't answer that; a matter of several days.

Q. When you sent the contract to them, didn't you advise them whether or not the contract ought to be made?

A. I left it entirely to them, whether they wanted to accept it or not.

Q. Well, did any of those people live down here?

A. No.

Q. You are the only one who lives here?

A. I am only here in the summertime.

Q. Didn't you advise them to accept the offer?

A. No.

Q. Did you advise them not to accept it?

A. No, I left it up to their judgment entirely.

In point of fact I thought the offer was too low and I said to them, "If it was my property I would not sell it at this stage in the game because you will get more money for it a little later on."

Q. But they did sign the contract, nevertheless?

A. They signed the contract. I didn't want them to sign the contract.

Q. Did you have their consent to signing it before you prepared the contract or afterwards?

A. I had their consent to it before I drew up the contract. I would not have drawn it up unless they said yes.

Q. Who signed first, Mr. Evernham or the administrators?

A. I think Mr. Evernham signed first and his signature was accompanied with a check for, I think, the $1,900. And after he had signed them the other people signed; that is my recollection. I may not be right.

Q. That check was handed to you, wasn't it?

A. Handed to me?

Q. Yes.

A. Yes, it was handed to me.

Q. This is the check here which I show you for $1,900?

A. Well, I presume it is. It is the only check I know connected with this matter. I never heard of any other check.

Q. You are unwilling to acknowledge this check?

A. I don't remember the check. It didn't go through my hands, except a matter of business with us.

Q. You received it from Mr. Evernham?

A. I received it from Mr. Kiefaber, not Evern-

ham.

Q. Has that money ever been returned to him?

A. No. It was offered to be returned.

Q. Now, there was another auction sale of this property held in the year 1923, was there not?

A. I am not sure as to date. I may be right as to date.

Q. Practically two years ago?

A. I am not sure of the date; a little over two years ago.

Q. Well, was there another auction sale?

A. There was another auction sale, yes.

Mr. McMullin—If the Court please, I have been willing to let everything in, whether I thought it had any bearing or not. I submit that the value of the property in 1923 has little if any bearing on the question before the Court at this time; therefor whether or not there was an auction sale conducted in 1923 or not I can't see has any bearing on the issue. It is too remote.

The Court—What is the purpose, Mr. Ewart?

Mr. Ewart—Well, the petitioner has submitted evidence of value on other dates and it seems to me I will start and put also before the Court as to what this property was worth. Our contention is if we agreed at a certain time to pay a fair price for the property we ought to be allowed to complete the sale.

The Court—Suppose an auction sale was

made in 1923; what bearing has it?

Mr. Ewart—It shows the efforts for a long period of time of the administrators to sell the property both at private sale and public sale; the property was in the hands of the agents for private sale and numerous people were approached to buy it. It was put up in Philadelphia at auction on two different occasions, and I think the Court ought to know what the result of those efforts were and what offer was obtained. It tends to show whether this price of $19,000 was a fair consideration at this time.

The Court—Be as brief as you can with it.

By the Court.

Q. You said there was an auction sale in 1923 or thereabouts?

A. It was put up at auction.

Q. It was put up at auction?

A. Yes.

Q. What was the result of the auction sale in 1923?

A. It was not consummated because it was withdrawn from sale.

By Mr. Ewart.

Q. Was it cried?

A. Oh, it was cried and simply withdrawn there at the auction room.

Q. Were there any bids?

A. Yes, there were bids.

Q. How high did the bids run?

A. I don't know just how high the bids ran.

Q. You were there at the sale?

A. Yes, I was there at the sale but I don't know just how high the bids ran.

Q. Were there any other auctions besides those two?

A. No, not that I know of.

Q. As I understand you, you don't pretend to be an expert on real estate values yourself?

A. In this locality?

Q. Yes.

A. Except in a general way, that I have been coming here for very nearly forty years.

Q. That is not the question, Mr. Brooks.

A. I know generally the values of property. I have bought and sold in this neighborhood somewhat.

Q. You have been in the real estate business yourself?

A. Oh, I have handled a great deal of real estate in Philadelphia and vicinity, and Florida.

Q. And in this locality, too?

A. Not very much, no.

Q. Then you don't pretend to be an expert on real estate here?

A. No, I do not.

Q. I want to go back just a moment. Your uncle, the decedent, whose estate is now before the court, died, I believe, in 1906; is that correct?

A. Yes.

Q. The property remained vacant for a number of years after that, did it not?

A. No, I don't think it ever remained vacant. We have always had someone on the place until we dispossessed the tenant who was the last on there?

Q. Well, that was about two years ago?

A. I hardly think it has been two years.

Q. It has remained since then, hasn't it?

A. It has remained since then, yes, because we have had oceans of people on there. We didn't

want them.

Q. Now, up until July 6th of this year what higher offer had you obtained than $19,000 for the property?

A. In 1923, I think it was—if you will allow me to look at the date here.

Q. Yes. (Witness refers to paper.)

A. In 1920 we had an offer of $25,000 cash or $28,000 on terms.

Q. Who make that offer?

A. A man named Parker.

Q. Where from?

A. New York.

Q. Was the offer made to you?

A. The offer was made to me and submitted and the negotiations would have carried through to a finality if it had not been that the gentlemen whom he represented was taken ill, went up to the Adirondacks and died and we had to let the matter go through.

Q. He never paid over any money?

A. What say?

Q. He never paid over any money to the estate?

A. No, the agreement was drawn and it was sent to the person he represented and then that happened and the sale didn't go through.

Q. What other offers had you had within recent times for the property?

A. Well, I have had one or two offers at $22,000 which were not acceptable. The administrator told me that he had an offer—

Mr. Ewart—I object. You have been in charge of the property. I want to know what you know about it.

A. Well, as attorney for the estate they gen-

erally reported those things to me. I am willing to tell you that.

Q. You say you had an offer of $22,000?

A. Not to me direct.

The Court—No, he said the administrator told him.

A. That they had an offer of $25,000.

Q. Have you had any offers yourself for the property other than the one you spoke of?

A. Yes.

Q. $19,000?

A. Yes.

Q. From whom?

A. Well, I can't name the people who made it, because I submitted it and they refused to accept them. They felt that they would not let the property go for anything less than $25,000 until this was accepted.

Q. Now, you say on August 18th you took the $1,000 for the sale of the property at $25,000, subject to the approval of the Court.

A. Yes, on September 1st that check was paid, I think.

Q. Yes, the agreement, I believed, was August 18th.

A. Yes.

Q. Was a contract signed for that sale?

A. That is on the $25,000?

Q. Yes.

A. The contract was signed on behalf of the administrators but was not signed on behalf of the purchaser.

Q. That was notwithstanding this contract with Mr. Evernham?

A. It was not notwithstanding. I put it in the

contract that this sale is subject to the disapproval of the prior contract and subject to the approval of the Court to the present contract.

Q. And then it was after that that you made another sale of the property at $30,000?

A. That is right. Pardon me. Before I took up with him the question of the signing of the contract for $25,000 I then had negotiations with Mr. Walters regarding the $30,000. and I informed him then that "Another party has offered $30,000, which the administrators have agreed to accept. Now, it is up to you whether you want to go ahead with this or pay the full price or not."

Q. Now, have you had any more offers since you signed the last contract with Walters?

A. I haven't had any specific offer, but I have had several inquiries about the property and one man said he was prepared, if he had known it, to pay more money than $30,000.

Q. Are you asking the Court to approve the sale at $30,000 notwithstanding you have a higher offer now?

A. The higher offer is not in such shape that I can submit it to the Court.

Q. Notwithstanding the sale to Mr. Walters?

A. Yes.

Q. Where do you think this thing will end, Mr. Brooks?

Mr. McMullin—That is objected to as entirely improper. That is immaterial.

Q. The administrators of this estate depended upon you, did they not, to bring the necessary proceedings in court to effectuate and carry out the sale?

A. We discussed the method—

Q. Will you answer that question?

The Court—Repeat the question.

(Question repeated.)

A. As far as I possibly could, yes.

Q. Did you initiate any proceedings looking to the confirmation of the sale to Mr. Evernham?

A. Only as it is stated in this petition which is the matter of question to-day, that is all. We prepared a petition setting out all the different offers made and presented to the Court and asked for its approval.

Q. Now, I will repeat the question if you will try and answer it for me. The petition you now present to the Court asks for the disapproval of the sale to Mr. Evernham?

A. Yes.

Q. I want to know when, if ever, after July 6th, 1925, you initiated any proceedings looking to the confirmation of the sale of this property to Mr. Evernham.

A. We discussed that matter. I took it up with Mr.—

Q. Well, did you or didn't you?

A. I can say yes or no, either way, to that question. I am trying to answer it.

Q. Well, that is what I want, is a real answer to it.

By the Court.

Q. Well, did you file any petition in court?

A. No, sir.

By Mr. Ewart.

Q. Your petition here, Mr. Brooks, paragraph 6½, says that on August 18th Mr. Hill, of White Plains, offered $25,000 for the property. That offer was made to you?

A. Yes.

Q. Had you negotiated with those people prior to the sale to Evernham.

A. I think so.

Q. Now, evidently the time from July 6th or 7th to August 18th elapsed without your having taken any steps looking to the confirmation of this first sale. What did you do after the sale to Evernham, keep right on endeavoring to sell the properties for whatever price you could get?

A. We had ninetv days in which to make title, and at that time no Court was sitting.

Q. What did you do after the sale to Evernham, keep right on trying to sell the property to whomever you could?

A. No, I didn't make any efforts at all to sell to anybody. In all negotiations, people came to see me. I never tried to sell the property after we closed with Mr. Evernham.

Q. And had you also had negotiations with Mr. Walters prior to the sale to Evernham?

A. No.

Q. Had you spoken to him or had he spoken to you about the property?

A. No, he came to see me at my house.

Q. When?

A. Well, it was several days before the execution of that agreement in which he agreed to purchase, or when I gave him the receipt. I never saw Mr. Walters till he came to my house.

Redirect examination, by Mr. McMullin.

Q. Mr. Brooks, counsel suggested that you were a son of Thomas Brooks, deceased. What relation are you?

A. He is my uncle.

Q. And you have no beneficial interest at all in this estate, have you?

A. Not a cent.

Mr. Ewart—I have one or two other questions after Mr. McMullin has finished.

Mr. McMullin—Go ahead.

Further cross-examination, by Mr. Ewart.

Q. You secured the signing of those affidavits, did you, that are annexed to the petition, fixing the value of the property at $30,000?

A. Under the advice of Mr. McMullin, the counsel in the matter, I did.

Q. Did you go to Henry J. Faby, of Toms River, to sign an affidavit?

A. And sign an affidavit?

Q. About signing an affidavit; did you present one of these affidavits to him to sign?

A. I asked him if he would be willing to make an affidavit, yes, as to values.

Q. And what did he say?

A. He said no; while he thought the property was worth that much money he said that his business relations were such with Mr. Evernham he did not care about doing it.

Q. And did you offer to pay him any money to sign an affidavit?

A. I told him that I would employ him as any other real estate man who was competent to give values in a matter of this kind, which is our usual custom.

Q. And you also went to Mr. Leming down there at Island Heights, did you?

A. Mr. who?

Q. Leming.

A. Yes, I asked Mr. Leming.

Q. And did he refuse to sign an affidavit?

A. Yes, he refused to sign it because he said his relations with the people here were such he did not care to do it, though he thought the property was worth the amount.

Q. Be sure you put in the latter part.

A. You asked me to give you the facts.

The Court—Now, this isn't any of it proper; it is all hearsay.

Q. Did you offer to pay him for signing an affidavit?

A. Under the same conditions, yes.

The Court—Mr. Ewart, this conversation with him is not relevant or competent.

ROBERT MAYER, sworn for petitioner.

Direct examination, by Mr. McMullin.

Q. Mr. Mayer, what is your position with the Provident Trust Company?

A. One of the assistant trust officers.

Q. Are you familiar with the parties interested in the estate of—which branch of the estate of Thomas Brooks does your company represent?

A. Thomas Brooks, Jr., the son of the decedent named in the petition before this Court.

Q. And in what capacity does your company act?

A. One of the trustees. We are trustees with Albert Brooks.

Q. Are all of the parties beneficially interested in this estate of Thomas Brooks, Jr., of full age?

A. No.

Q. How many of them are?

A. We are trustees for the widow, who, of course, is of full age, two of the sons, Albert Brooks and Thomas Brooks, they are of age; Albert Brooks has two children who have a contingent interest; they are both minors. Thomas Brooks has four children, all of whom are minors and who have a contingent interest.

Q. Did your company as one of the trustees of Thomas Brooks, Jr., approve the proposed sale made by the administrators to Evernham of this property for $19,000?

A. As far as I recall, that sale was never submitted to us for approval. We certainly never approved it.

Mr. Ewart—If the Court please, I don't see what difference it makes whether the people having a beneficial interest in this approved the sale or not. The power of this Court does not rest upon their approval, it rests, as I understand it, on the statute and on the power of sale given the original executors by the will, which has been transferred to the administrators now acting. If the people having a beneficial interest disapproved an advantageous sale certainly it would not affect the action of this Court.

The Court—No, it would not have any effect of that kind. If they were all competent, of full age, and did approve, it might have some effect. That evidently is what

Mr. McMullin is endeavoring to show. You are probably getting the wrong basis of answering the questions.

Mr. McMullin—That is all the questions I will ask.

No cross-examination.

FRANK H. SHIELDS, sworn for the petitioner.

Direct examination, by Mr. McMullin.

Q. Mr. Shields, what is your connection with the Pennsylvania Company for Insurance on Lives and Granting Annuities?

A. Assistant trust officer.

Q. And which one of these Brooks' estates is your company interested in?

A. Henry P. Brooks.

Q. In what capacity?

A. Coexecutor and cotrustee with Henry P Brooks, Jr.

Q. Are all the parties beneficially interested in the estate of Henry P. Brooks of full age?

A. No.

Q. How many are minors?

A. Four. I might say that under the will of Henry C. Brooks the entire estate is held by the trustees to pay the income to the widow for life. She is living. On her death one-half goes to Henry P. Brooks, Jr., outright. One-fourth goes to a daughter, Emma Hoskins, outright. The other quarter is held by the trustees in trust for the daughter, Emma Hoskins, for life, with the remainder to her children, all of whom are minors under the age of fourteen.

Q. Was the proposition of the sale of this

Ocean County property for $19,000 submitted to your company?

A. So far as I know it was not.

Q. Your company has joined in the prayer of this petition praying for the disapproval of the $19,000 sale and the approval of the $30,000 sale?

A. Yes, sir.

Cross-examination, by Mr. Ewart.

Q. Are you an officer who signed the petition?

A. No, sir; I didn't sign it.

Q. Do you know the circumstances under which it was signed?

A. No; I am not familiar with the circumstances.

Q. Do you know whether the officers of your company passed upon the value of this property before signing this petition?

A. I can't tell you with reference to this particular case.

Mr. McMullin—If the Court please, I renew my offer of the agreement marked for identification, the agreement with John Stahl and George Hill, marked for identification A, as having been used by counsel in cross-examination and referred to in his examination of Mr. Brooks.

The Court—It may be admitted.

(Agreement marked Exhibit P 5.)

(Copy of the agreement.)

Agreement, made the day of A. D. 1925. Between Elizabeth P. Shetz-

line, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, administrators d.b.n.c.t.a. of the estate of Thomas Brooks, late of the City of Philadelphia, Penna., deceased, a party of the first part, and John Stahl and George Hill, of White Plains, Bronx, New York, party of the second part, as follows, to wit: The said party of the first part agree to sell and convey to the said party of the second part, who agree to purchase all that certain tract of land with the buildings thereon erected, situate partly in the Township of Dover and partly in the Borough of Island Heights, Ocean County, and State of New Jersey, located on the north shore of Toms River, and known as the Brooks Farm, and described in accordance with a survey thereof made May, 1923, by Walter C. King, Civil Engineer, Toms River, New Jersey, and containing ninety-nine acres more or less on the terms and conditions following, to wit: The said party of the second part agree to pay for the said property the sum of twenty-five thousand dollars, as follows: Two thousand dollars on the signing of this agreement (which deposit shall be forfeited to the said party of the first part as liquidating damages in case of the default by the said party of the second part in the performance of the terms of this agreement), and the balance of the purchase money as follows: Ten thousand five hundred dollars at the time of settlement and the balance of twelve thousand five hundred dollars in a purchase money mortgage payable within two years from its date at six per cent interest.

A policy of fire insurance for $5,000.00 to be transferred to said party of the second part upon payment of the premium, less the discount named in policy.

The premises are to be conveyed free and clear of incumbrance and easements.

Any water pipe laid on any street bounding said property are included in the sale.

Possession is to be given at time of settlement.

The sale is made subject to the approval of a competent court of New Jersey having jurisdiction thereover.

Taxes, water rent, interest on incumbrance (if any) to be apportioned for the current term.

The title is to be such as will be insured by the West Jersey Title and Guaranty Company of Camden, New Jersey.

This agreement is not to be recorded or filed or entered of record.

And the said parties hereby bind themselves, their heirs, executors, administrators, or assigns, for the faithful performance of the above agreement within ninety days, from the date hereof, said time to be the essence of this agreement, unless extended by mutual consent in writing endorsed hereon.

It is understood that there is an existing prior agreement to sell above mentioned property subject to the Court's approval, and that this agreement is contingent upon

the Court's disapproval of said prior agreement.

In Witness Whereof, The said parties have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in the presence of

ELIZABETH P. SHETZLINE,
HENRY P. BROOKS, JR.,
JOHN T. BROOKS, JR.,
ALBERT BROOKS,
Administrators D. B. N. C. T. A. of Estate of Thomas Brooks, Deceased.

Mr. McMullin—I also offer a blueprint map of the property made by Arthur C. King, dated May, 1923.

(Blueprint market Exhibit P 6.)

Also an exemplification of the will of Thomas Brooks and the appointment of those administrators who are the present petitioners. It is not actually here but I would like to offer it and if you wish I will send for it.

The Court—It may be admitted.

Mr. McMullin—We rest.

RESPONDENTS TESTIMONY.

ARTHUR B. KIEFABER, sworn for respondent.

Direct examination, by Mr. Ewart.

Q. Mr. Kiefaber, where do you live?
A. Merchantville, New Jersey.
Q. Do you also live in Island Heights?
A. Island Heights and Toms River, between those places, in the summer time.
Q. What is your business?
A. Real estate business.
Q. How long have you been engaged in that business?
A. Since 1909.
Q. Did you have anything to do with the sale of the Brooks property to Mr. Evernham?
A. I negotiated the sale with Mr. Brooks, T. Fernley Brooks, who represented the Thomas Brooks estate.
Q. You were representing Mr. Evernham?
A. I was representing Mr. Evernham.
Q. And he was representing the estate?
A. He was representing the estate.
Q. When did you first have negotiations with him about this matter.
A. The negotiations started just prior to the sale at Freeman's.
Q. What was the date?
A. In April 1925.
Q. And what were those negotiations?
A. As to the price of this property. I went to the sale, attended the sale at Freeman's.
Q. What happened at the sale?
A. At the sale the property was knocked down

by the auctioneer at $15,000 to a party by the name of Lush.

Q. Were you there?

A. I was there.

Q. Now, let me fix this. Are you referring to the sale of 1923 or 1925?

A. April 1925.

Q. Did you have any conversation with Mr. Brooks about the matter that day?

A. After the sale.

Q. What was the conversation?

A. The conversation was if I knew the property would have sold at that price—

Mr. McMullin—I object.

A. I offered Mr.—

Mr. McMullin—I object. The witness can't apparently understand the question or he would not answer in that way. He asked him to state what was said, but the conversation couldn't be, "If I knew the property—"

The Court—What was that?

Mr. McMullin—The witness' answer is not responsive. Counsel asked him what the conversation was and the witness says, "If I knew the property—"

Q. Well, did you have a conversation with Mr. T. Fernley Brooks that day?

A. Immediately after the sale.

Q. At the salesrooms?

A. No, in the hall. He was talking to the ad-

ministrators.

Q. Were you there?

A. I called him aside and offered him $2,000 more for the property if the sale didn't go through; and he told me to come to his office, that he would talk business with me.

Q. And did you go to his office?

A. I went to his office the next day after that and offered him $17,000.

Q. Was that offer accepted or rejected?

A. It was rejected.

Q. What was said by Mr. Brooks about the matter?

A. Mr. Brooks said that a $17,000 offer would not purchase the place, I would have to make a better offer.

Q. Did he name a figure?

A. He didn't name a figure at that time.

Q. Did you raise the offer at that time?

A. Not at that time. I went about three weeks after that and offered him $18,000.

Q. And where was that?

A. At his office.

Q. In Philadelphia?

A. In Philadelphia, in the Lincoln Building.

The Court—What has this to do with the value of the property? You asked certain questions of this witness for the purpose of discrediting him. You might ask in some questions of the witness where his answer was no.

Mr. Ewart—Well, I want to show, if the Court please, for one thing by this testimony, that the man—to see what man to make the agreement with when the sale was to take

place was T. Fernley Brooks. That is in contradiction of the testimony that he gave.

Mr. McMullin—How could it possibly be T. Fernley Brooks? He is not the administrator of the estate. The administrators can't deal with an agent.

Mr. Ewart—No, but I expect to show that this property had been in the hands of Mr. Brooks for years and that whatever sale he could find and make the administrators would O. K. I want the whole transaction to appear before the Court.

Mr. McMullin—How can you bind him?

Mr. Ewart—He says that is not true. Now, I would like to find out whether it is true. These were negotiations, if the Court please, leading up to this present sale which is in controversy.

The Court—How would it help the Court? Suppose all that proof be true in this case.

Mr. Ewart—Well, of course, the real pith of this whole controversy is what was the value of the property.

The Court—Yes.

Mr. Ewart—I have testimony on that but I think the Court ought to know what offer was made to sell the property and what negotiations were made, if it was the snap judgment of somebody that didn't know the value of the property.

The Court—I would like to know that.

Q. You say at a later date you offered Mr. Brooks $18,000 for the property?

A. $18,000.

Q. Did he accept or reject that offer?

A. Mr. Brooks rejected the offer and stated that no less than $20,000 would take the property.

Q. Did he make any statement to you about his buying the property?

A. I went back to him and offered him $1,000 more, $19,000, and he submitted it to the administrators.

Q. Now, you haven't answered my question yet.

A. Well, I will come up to that. It was at this time when he let me have it through the administrators, after seeing the administrators and they agreed to $19,000, Mr. Brooks—

Q. Now, I want you to be a little more definite. When did you make him the offer of $19,000?

A. Several days after I made the offer of $18,000.

Q. Well, was it in April, May or June?

A. It was the early part of June.

Q. Was that offer made in Philadelphia?

A. At his office, Philadelphia.

Q. That was the offer, $19,000?

A. $19,000.

Q. What did he say to that?

A. He would submit it to the administrators for their approval. They approved of it and after they approved of it he stated that if he could raise—he was waiting for some commissions from prior sales and that if he could raise $18,000 that I couldn't have the property.

Q. That you couldn't have it?
A. Couldn't have the property.
Q. Did he say why you couldn't have it?
A. That he wanted it; he thought it was worth every bit of that if not more and he would grab it for $18,000.
Q. How long after you made the $19,000 offer? Was it before you heard from him?
A. It took him about two weeks to get all the heirs to sign. After I made the offer of $19,000 he said, "I will get the approval of the heirs," and he had the approval of the heirs immediately after that.
Q. Well, did you hear from him to know whether he had obtained the approval of the heirs?

By the Court.

Q. What do you mean by the approval of the heirs?
A. Before Mr. Brooks could prepare an agreement or sell this property he had to get the approval of all the administrators.

The Court—Oh.

By Mr. Ewart.

Q. Well, did you hear whether or not he had obtained that approval after you made the offer?
A. A few days after that he had the approval.
Q. How do you know that?
A. He told me so.
Q. Then, what was done after that?
A. He asked me whether I would prepare the agreement or he would prepare the agreement;

and he said he would like to prepare it because represented the administrators and he drew all their papers.

Q. Was anything said about commissions?

A. While these negotiations—when I first went to Mr. Brooks he says, "If there is a sale," he says, "half the commission comes to me on five per cent; five per cent commission, half comes to me;" before any negotiations were entered into.

Q. Was there anything said about his getting an agreement for commissions from the administrators?

A. That is what held up—

(Objected to.)

Q. What did he say or do?

The Court—That is material. He was asked directly if he hadn't said that and he denied it.

Mr. McMullin—His answer was not responsive.

A. Yes.

Q. What did he say?

A. He said there were prior sales of this estate where he lost commissions, and that no negotiations would be entered into until he had the written consent—or not written consent, a statement from the administrators that they would pay him five per cent commission, and then he would prepare the agreement and not before. That held it up for a week.

Q. Did you ever hear whether or not he obtained that agreement?

A. He told me he obtained the agreement and showed me the letter.

Q. Then, how long after that, how long a time elapsed before the agreement was signed?

A. Three administrators signed immediately, as soon as he could get the agreement to them, and one was holding out; and after five or six days he had one to sign up.

Q. Well, was it a week, or two weeks, or three weeks, or four weeks? How long a time between the time the $19,000 offer was submitted and the time the agreement was signed?

A. At least two weeks. One reason I—

Mr. McMullin—I object. There is no question pending.

Q. Did Mr. Brooks express to you any objection to the sale at $19,000 or say anything about advising the administrators not to take it?

The Court—He has covered that, Mr. Ewart.

Mr. Ewart—I didn't remember that he had. Mr. Brooks testified, as I remember, that he didn't want the administrators to take the $19,000 offer.

The Court—This witness has corroborated it. He said twenty.

Mr. Ewart—Eighteen, I understood him to say.

The Court—No, he said twenty.

Mr. Ewart—I would like to find out if the

witness understands that testimony.

Q. Is it your testimony that Mr. Brooks said the property was worth $20,000 and ought to bring that?

A. According to Mr. Brooks' statement at that time all he could get for it was the fair value While these negotiations were going on—

By the Court.

Q. Wait a minute. Didn't you state in your testimony a little while ago that Mr. Brooks told you the property was worth $20,000—that was at the time you were offering $18,000—and you suggested $19,000 and he stated he would submit the offer? Isn't that what you said?

A. Yes; I guess I did.

Mr. Ewart—Well, I understand that. What I would like to get, if the Court please, is whether Brooks expressed an idea to him whether or not the property ought not to be sold for $18,000.

Mr. McMullin—He has already stated that. He is his own witness.

Mr. Ewart—Mr. Brooks on cross-examination said that was a fact. Now, as far as my recollection goes—

The Court—Well, Mr. Brooks' opinion of the value here is not conclusive; he is only one witness.

Mr. Ewart—I want to find out whether

that is a fact. It affects the credibility of Mr. Brooks on that point.

The Court—How?

Mr. Ewart—Well, his testimony would indicate to the Court that this sale was made over his objection.

The Court—No, I didn't get that. He testified he submitted offers to the administrators, that is all he did.

By Mr. Ewart.

Q. Were you present when the agreement was executed by Mr. Evernham?

A. I was present; yes.

Q. And you accepted a check from him?

A. I accepted a check from him.

Q. Turned it over to Mr. Brooks?

A. Turned it over to Mr. Brooks.

Q. Did you have any subsequent conversation with Mr. Brooks about this property?

A. Prior to when?

Q. After July 6th, when the contract was signed up.

A. Yes, I had other conversations with him in reference to putting through this sale. Mr. Brooks went with me to the title officer of the West Jersey Title Company and submitted all the facts to them, that they should pass on this title; and not only did he go there but he went to the surveyor who surveyed the property, went to Mr. King, here in Toms River, and there was a question there of the line. He took me around

the property and showed me all the bench marks and stones, and while we went around the property there were some people taking gravel out of the gravel pit, and while we was there Mr. Brooks questioned as to why they were taking it and who they were paying for it, if anybody. He wanted to know if I wanted to collect the money for Mr. Evernham. I said no, we didn't have title, we didn't have the deed and therefore it was up to him as agent—

Q. Well, I don't think we are interested in that. Are you familiar with the value of real estate in Ocean County?

A. Yes.

Q. In this particular section of Ocean County?

A. I am.

Q. How long have you been familiar with this territory down here?

A. Since 1909.

Q. Have you seen other properties sold in this vicinity?

A. Yes.

Q. Know the values of them?

A. Know the values of them.

Q. Are you familiar generally with the market value of property as it goes along?

A. Yes.

Q. On the market, the real estate?

A. Yes.

Q. What in your opinion was the fair market value of this property on July 6, 1925?

Mr. McMullin—I object unless I have an opportunity to cross- examine a little further as to his qualifications as an expert.

The Court—Yes.

Cross-examination, by Mr. McMullin.

Q. What sales of property in Ocean County recently?

A. The sales that have been made have been all at Island Heights.

Q. And what character of property?

A. All land and dwellings.

Q. What acreage tract have you sold or bought?

A. They were individual lots.

Q. What size lots?

A. 100 by 200.

Q. Feet?

A. 100 by 200 feet.

Q. This tract is 100 acres, about?

A. 100 acres.

Q. Have you ever bought or sold an acreage tract in Ocean County?

A. Not previous to this in Ocean County.

Mr. McMullin—I object to the qualifications of this witness. It is a question of whether he bought and sold land of this character. There is no use trying to qualify him as an expert unless he knows the sales.

Mr. Ewart—As I understand the qualifications of an expert, it is whether he knows the thing. He may have known of dozens of sales and be familiar with the market, what other property brought, without having actually been connected with the sales himself.

By the Court.

Q. Do you maintain an office?

A. Yes, Merchantville and Philadelphia.
Q. But not in Ocean County?
A. Not in Ocean County.
Q. Have you any properties listed with you for sale of this character?
A. Not in Ocean County.
Q. How do you acquire knowledge about what this or any other tract is worth?
A. For sale?
Q. Yes.
A. This property had a sign on it for a number of years and that is how I knew it was for sale.
Q. No, how do you claim that you have a knowledge of its value?
A. How I acquire a knowledge of its value? At that time there was another tract for sale in the immediate vicinity which was offered to me, as I had a number of men who were to buy this property. It was a large acreage.
Q. Did they buy it?
A. They bought it.
Q. And how much per acre was paid for that?
A. A little less than $190 an acre.
Q. How near this particular property was it.
A. I should judge about a little over a mile, on bay, on the water, water-front, at Toms River.
Q. Well, was it a similar kind of property?
A. Similar property.
Q. Do you know of any other sales that have taken place?
A. Not down in this vicinity.
By Mr. Ewart.
Q. Well, when you say that time, do you know of any sales near that time?
A. They were the only sales made on acreage—
Q. Well, let me ask you, do you know of the

sale of the Brackenridge tract?

(Objected to as leading.)

Mr. Ewart—Trying to qualify him. We want to do it. There were a number of sales that I think the witness does know and I want to ask him if he knows about them and where the property is.

The Court—To refresh his memory?

Mr. Ewart—Yes, sir. We want to qualify him.

Q. Do you know of the sale of the Brackenridge tract?

A. I do. That was the property I was referring to.

Q. The property in question is situated, a large part of it, between Washington Street and Toms River, is it not?

(Objected to.)

Q. Where is the Brackenridge property situated with reference to the Brooks property?

A. About a mile and a half from it, on the road, and between Washington Street and Toms River.

Q. How is it situated with reference to Washington Street and Toms River?

A. It is situated the same, runs from Washington Street to the bay.

Q. Do you know of the sale of the Guilford Park tract?

A. Yes, sir; I knew of that.

Q. How is that situated with reference to Washington Street and Toms River?

A. It is located the same.
Q. How far away from the Brooks property is it?
A. Not quite a mile.
Q. You say not quite a mile?
A. About three-quarters of a mile, I should judge.
Q. Was that acreage or lots?
A. It was acreage. It is divided into lots now. It was acreage.
Q. Has there been any other sales up and down Washington Street within the last few years of acreage?
A. No other that I know of.

By the Court.

Q. Do you know what these were sold for, the prices paid for this property?
A. I know the Brackenridge tract, I know what it was sold for.
Q. That is what you told me; and is that the only one you know of?
A. That is the only one I know of. The others are all through hearsay.

By Mr. Ewart.

Q. Well, how did you acquire the knowledge? Did it come to you in your business or how did you get it?
A. I visited the Brackenridge tract with one of the agents and he said this property could be bought for $25,000. 132 acres.

Mr. McMullin—I ask that that be stricken out as simply hearsay.

The Court—Yes.

Mr. Ewart—It seem to me, if the Court please—

The Court—All right. I will receive this testimony.

By Mr. McMullin.

Q. What is the character of the Brackenridge tract?

A. The Brackenridge tract is woodland and partly cleared.

Q. How much swamp?

A. I should judge about two or three acres.

Q. How much meadowland?

A. There is no meadowland.

Q. Sure?

A. Yes.

Q. How high above tidewater is that land?

A. I should judge about two or three feet.

Q. How high above tidewater is the Brooks land?

A. I should judge that is about five feet at Washington Street.

Q. That is the lowest part of it. How high is it on an average?

A. The lowest part?

Q. I say that is the lowest, Washington Street. How high is it on the average?

A. About five feet.

Q. How much of it is swamp?

A. Two or three acres.

Q. The Brooks tract?

A. Yes.

Q. The same as the Brackenridge tract?

A. Well, there is a stream of water runs through it.

Q. When was the Brackenridge tract sold?
A. The early part of June.
Q. This year?
A. This year.
Q. What were the terms of sale?
A. $25,000 was the price. I don't know what the terms of sale was. I was not familiar with the terms of sale.
Q. How do you know that $25,000 was the price?
A. I was asked to go in on the sale as one of a party of ten, $2,500 each.
Q. Who asked you?
A. Mr. James Lillie.
Q. And he told you the price was $25,000?
A. He told me the price was $25,000.
Q. And that is the only knowledge you have of the price of any land that has been sold down here in this vicinity; that is so, isn't it?
A. Yes, that is so.
Q. Just what Mr. James Lillie told you?
A. Yes.
Q. How many acres in the Brackenridge tract?
A. 132 acres.

Mr. McMullin—I renew my objection.

The Court—I will take his testimony.

Further direct examination, by Mr. Ewart.
Q. The question originally asked, I believe, was what was the fair value of this Brooks property on July 6, 1925, to the best of your knowledge or in your opinion.
A. Was a fair price?
Q. What was fair price?

A. $19,000.

Further cross-examination, by Mr. McMullin.

Q. How big is your interest in this agreement of purchase of Mr. Evernham?

A. My interest is one-fourth.

By the Court.

Q. You mean you are interested in this property?

A. Yes, sir.

By Mr. McMullin.

Q. In case Mr. Evernham succeeds in this litigation you get a quarter of the property do you?

A. I do.

Q. And you also get a commission out of the administrators on the sale if the sale is confirmed by the Court, don't you?

A. I only get one commission.

(Question repeated.)

A. If the sale is confirmed by the Court I get a part of the commission.

Q. How much?

A. One-half.

Q. How much percentage is that?

A. Five per cent. Or no, I don't get one-half.

Q. Well, what do you get?

A. Mr. Brooks gets a half from one of the administrators and one of the administrators gets some money.

Q. Which one?

A. I don't know which one it is.

Q. How much do you get?

By the Court.

Q. Two and one-half per cent, don't you?
A. Less $50.00, which goes to one of the administrators.

By Mr. McMullin.

Q. Which one?
A. I couldn't say which one it is.
Q. Who told you that?
A. Mr. Brooks.
Q. When did he tell you?
A. Told me when I negotiated the sale.
Q. Did he tell vou what for?
A. There was one of the administrators who wouldn't sign unless he got something.
Q. Did he tell you what for?
A. Why, he wanted something out of the sale, part of the commission.
Q. We will go into that later. Did you represent to Mr. Brooks or to any of the administrators that you were taking a one-fourth interest in this property which you were buying?
A. One of the administrators, Mrs. Shetzline.
Q. When did you tell her that?
A. I told her after I heard of another sale.
Q. At the time that you were dickering with them for commission on this sale did you tell them that you were one of the buyers?
A. I did not, because I didn't talk with the administrators at that time.
Q. Did you tell Mr. Brooks, Fernley Brooks, you were one of the buyers?
A. No; he wasn't interested.

Q. Did you tell anybody concerned in the case that you were one of the buyers until I asked you this question here in the courtroom, anybody concerned in the case?

A. Yes.

Q. Who?

A. One of the administrators, Mrs. Shetzline.

Q. When did you tell her that?

A. I told her after this $30,000 agreement was made, and she stated had she known that I was in it she would never have signed the $30,000 agreement.

Q. Yes; she wanted you to buy the property?

A. Yes.

Q. Where was she when she told you that?

A. In her own home.

Q. What was the object of your going to see her?

A. The object for me in going down there, if I could get through my agreement. I wanted to give her the facts of the thing, which she didn't seem to know.

Q. In that conversation you told her you would collect from the sale two and one-half per cent commission less $50 and at the same time were a buyer to the extent of a one-fourth interest, did you?

A. I told her that.

Q. It was then she said she hoped you would get it?

A. Yes, she said "I hope you will get it and I hope you will win out on your rights."

Q. How old is Mrs. Shetzline?

A. Mrs. Shetzline is between sixty and seventy years, I should judge. I told her at that time—

Q. That is all right; there is no question pending. Have you an agreement regarding

this property in writing with Mr. Evernham?
A. No; I haven't in writing.
Q. You just trust one another, do you?
A. Yes; the same as I trusted Mr. Brooks.
Q. Are you dividing the commission of two and one-half per cent with Mr. Evernham in case the deal goes through?
A. No.
Q. How much are you paying for your twenty-five per cent interest?
A. I am paying one-fourth of the price of the place.
Q. I ask you how much money.
A. Enough cash to put the sale through.
Q. How much money are you paying for your twenty-five per cent interest in this property which you expect to get?
A. One-fourth of $7,100.
Q. And you have no agreement in writing?
A. No agreement in writing.
Q. Who are the other two partners?
A. Is that necessary?

The Court—I don't know that it is.

Q. If you don't want to disclose that—

Mr. Ewart—I don't see that it is pertinent to this proceeding.

Mr. McMullin—He has called one of his partners as a witness, as an expert on valuation. He might do it with some others.

Mr. Ewart—If you ask that question I think they will answer truthfully.

The Court—I am not interested in knowing unless they are called.

MAX LEET, sworn for respondent.

Direct examination, by Mr. Ewart.

Q. Mr. Leet, where do you live?
A. Toms River.
Q. What is your business?
A. I was in the dry goods business and sold and I have no business now.
Q. How long have you lived in Ocean County?
A. Twenty years.
Q. Do you own any property in Ocean County?
A. Yes.
Q. Have you bought and sold any properties?
A. Yes.
Q. Have you bought any farm properties and sold them?
A. Yes.
Q. Are you familiar with the value of property in general around Toms River?
A. Well, I have got my opinion about some property, but whether I am right about it or not I couldn't say.
Q. Are you familiar with this Brooks property?
A. I know the Brooks property, yes.
Q. Have you been over the ground?
A. I have been over some of it.
Q. You are not interested in this present agreement? I mean, you have no financial interest in it?
A. No.
Q. You are not one of the people who have a share in the purchase of it?
A. No, I have not.
Q. How many farm properties have you

bought and sold around Ocean County?

A. About four or five.

Q. Have you had to do with the sale of others?

A. Not as I remember of only one in Lakewood. I sold that Anthony George property.

Q. Are you familiar with the prices paid for other properties in the county recently in this vicinity?

A. Yes, there has been quite a rise in the value of property now.

Q. No, I don't think you understood the question. Besides the properties you have bought and sold yourself do you know of other sales and what prices have been paid?

A. Well, I know of some.

Q. You said you had been over this Brooks property. How long ago have you been over it?

A. Not all the way through. I go there every week, sometimes three or four times a week.

Q. Do you know the value of the property, the market value of it?

A. Well, no; I wouldn't say that I know the market value of it. I know what I would like to give for it.

Mr. Ewart—I will withdraw the witness.

The Court—You withdraw the witness?

Mr. Ewart—Yes.

By the Court.

Q. Wait a minute. Come back, Mr. Leet.

Have you been engaged in the real estate business?

A. Yes.

Q. How long?

A. That is, I have been buying and selling property.

Q. How long?

A. For the last eight or ten years.

Q. Been buying and selling properties?

A. Yes.

Q. How many have you bought and sold in that time?

A. Well, I have sold as high as $60,000 and $70,000 worth of property in that time.

Q. What did it consist of?

A. Consisted of farms and town property. The town property I owned in front of A. B. Newbury Company.

Q. What kind of land is the Brooks land? Is it a farm or what?

A. Well, I was thinking one time of buying it as a farm property?

Q. I asked you what it was. Is it a farm?

A. It is a farm, yes.

Q. Any improved streets in it?

A. Not that I know of.

Q. Buildings on it?

A. Yes.

Q. What kind?

A. It has a house and some barns on it.

Q. How much is the land worth per acre, if you know?

A. That I don't know.

ORIS M. DRISCOLL, sworn for respondent.

Direct examination, by Mr. Ewart.

Q. Where do you live, Mr. Driscoll?
A. Trenton.
Q. Did you ever live in Ocean County?
A. Yes.
Q. Where in Ocean County?
A. Guilford Park.
Q. How recently did you live there?
A. I left there on September 15th.
Q. Of this year?
A. This year.
Q. What is your business?
A. Real estate.
Q. How long have you been in that business?
A. About four years altogether.
Q. Have you been engaged in that business in Ocean County?
A. Yes.
Q. Are you familiar with the Brooks property near Island Heights?
A. Fairly well, yes.
Q. Have you ever been over the property?
A. Yes.
Q. Did you walk over it?
A. Walked over it.
Q. How long ago?
A. I think it was in the first of July or the latter part of June.
Q. Of what year?
A. This year.
Q. Have you bought and sold properties either as principal or agent in that vicinity within the last year or two?
A. Yes.

Q. Do you know of other sales that took place down there?

A. Yes.

Q. What, in your opinion, was the fair market value—

The Court—Do you want to cross-examine as to his qualifications?

Mr. McMullin—Yes, I would like to.

Cross-examination, by Mr. McMullin.

Q. As a matter of fact, Mr. Driscoll, aren't you a lot salesman?

A. Lot salesman?

Q. Yes.

A. No, not altogether.

Q. Who are you working for?

A. Myself.

Q. And don't you sell lots on installments?

A. I do not.

Q. Didn't you in the last summer?

A. Yes, I was sales manager for the Bay Bridge Development Company.

Q. What was their business?

A. There business was developing the tract down here called Guilford Park.

Q. And what work did you do for them?

A. I was assistant sales manager.

Q. And had charge of the sale of these small lots to the general public?

A. Yes.

Q. Did you have anything to do with the buying of land for that company?

A. No, I didn't have anything to do with the buying of it.

Q. How long did you work for them?
A. About a year.
Q. And when did you leave?
A. Left them November a year ago; a year ago last November.
Q. November of 1923?
A. Yes.
Q. Since that time what have you been doing?
A. I have been buying and selling real estate.
Q. Whereabouts?
A. I have bought real estate in Seaside Park and Pelican Island.
Q. Where else?
A. Point Pleasant, Brielle.
Q. What acreage tracts have you bought or sold?
A. The only acreage we have bought or sold was the Pelican Island. That is the only one we have bought. We have sold other acreage over on the beach.
Q. Where is Pelican Island?
A. Pelican Island is half way between Toms River and Seaside Heights, or right close to Seaside Heights.
Q. How many acres were there in Pelican Island?
A. Thirty-four acres.
Q. What did you pay for it, $30,000?
A. No, sir.
A. No, sir; $5,000 less than that?
Q. $25,000?
A. Yes, sir.
Q. What is the character of this Brooks Farm?
A. Well, part of it lies fairly good on the front end. The rear end of it is kind of low, swampy, except the little streaks that cross there, of

course, near the river, little sandspit across there.

Q. What is it available for at the present time?

A. Well, I looked at it with the idea of buying it for a party for a tract to develop.

Q. That is the only possible purpose to which it can be put—

Mr. Ewart—I object to this examination. Mr. McMullin started out to cross-examine this man on his qualifications. I would like to conduct the direct examination.

Mr. McMullin—All right. I will withdraw that question.

The Court—All right.

Q. You say you tried to buy the Brooks tract once?

A. Yes.

Q. When was that?

A. It was in May, 1925.

Q. Who did you see about it?

A. Mr. Smith.

Q. Who is he?

Mr. Ewart—I object, if the Court please, to this examination. I had not finished my direct examination. Mr. McMullin was only given an opportunity to cross-examine on the man's qualifications.

Mr. McMullin—I think I am still going into his qualifications. I am asking his familiarity with this property.

The Court—He has covered that. I am satisfied he knows the property. Go ahead, Mr. Ewart.

Further direct examination, by Mr. Ewart.

Q. Let me ask you, do you know at what price the Guilford Park property was bought?
A. I do.
Q. How many acres are there in that?
A. 940.
Q. How is that situated with reference to Washington Street and Toms River?
A. Why, it is between the river and Washington Street?
Q. And the same thing is true of this Brooks property?
A. About the same as the Brooks; there was half and half. There was some on one side of the road, the same with the Brooks, half on one side of the road and half on the other.
Q. How far from the Brooks property is the Guilford Park property?
A. The first line, I would say, wasn't quite half a mile.
Q. What was paid for the Brooks property on an acreage basis, if you know?
A. Just how was that?

By the Court.
Q. How much did you pay an acre for the Guilford Park property?

Mr. McMullin—I object. He has not told us where he got his information. He didn't buy or sell it. He hasn't any right to an-

swer the question unless he tells where it comes from. He said he was manager for selling lots and I asked him if he had anything to do with the purchase of the property and he said no.

Q. Do you know what was paid for the Gilford Park property or do you not?

A. One of the company showed me what he paid for it, and we had reason to examine the record here in Toms River, of course, and we know how much mortgage there was against it and how much cash there was paid. I know all about what was paid for it because it was paid by one of the members of the firm.

(Objected to.)

The Court—From all the information he has I think he is qualified.

Q. How much was it?

A. $55,000.

Q. And when was that?

A. That was in 1923, April, I think, the deal closed.

By Mr. Ewart.

Q. Now, the so-called Brackenridge property, are you familiar with that property?

A. Very well.

Q. How far is that from the Brooks property?

A. Well, that is adjoining the Guilford Park tract. I would say that was a mile and a quarter down from the line.

Q. And how is it situated with reference to Washington Street and the river?

A. Considerably better, because it is all on the

bay side. I would say it is about—

Q. Is it situated between Washington Street and the river?

A. Yes.

Q. Do you know the acreage or approximate acreage?

A. I know exactly.

Q. How many acres are there?

A. 134.

Q. Have you been all over the property?

A. All over it.

Q. Do you know anything about the sale of that property?

A. Yes.

Q. When was the sale made?

A. It was made in June, I think, in June, completed in June. It was bargained for sometime around the 1st of May.

Q. Now what in your opinion, Mr. Driscoll, was the fair market value of this Brooks property the latter part of June or the first part of July, 1925?

Mr. McMullin—That is objected to on the ground of lack of qualification.

The Court—It is admitted.

(Objection noted for petitioners as ground of appeal.)

A. I placed a value on it at that time of $20,000.

Q. Well, is that your opinion as to what is was?

A. Yes; that was my opinion for the man I was looking over the property for. I told him

I wouldn't give any more than $20,000.

Q. That was your top price, in other words?

A. Our best.

Q. Are you familiar with the course of the markets on real estate in this vicinity during the past summer and fall?

A. Fairly well.

Q. Has the market on property since July 6th gone up or down?

A. Gone up.

Q. Materially or slightly?

A. Why, quite a bit.

Q. What did you say?

A. A whole lot since that time.

Q. Has there been what is commonly known as a speculative boom in real estate?

A. There has.

Q. In that section?

A. Yes.

Q. Do you know of any sales at materially higher prices that happened since then which were bought shortly before then?

A. Yes; I know of two or three.

Mr. Trapp—On behalf of Mr. Walters I would like to cross-examine him.

Cross-examination, by Mr. Trapp.

Q. This Guilford property consisted of 940 acres, did it not?

A. Yes.

Q. For which you paid how much?

A. $55,000.

Q. The Brackenridge property spoken of, was that ever part of the Guilford tract?

A. Yes, it was a long time ago, but not since

the Guilford people had it.

Q. This Guilford property, have you sold any parcels off in acre tracts or more than one acre?

A. No, don't sell it by acreage at all.

Q. What have you been doing with it?

A. Why, as long as I was with them they were selling it off in lots.

Q. How many lots to an acre?

A. 40 by 150.

Q. Well, how many would that be? You are a real estate dealer.

The Court—Five, wouldn't there?

Mr. McMullin—Seven and a half to eight.

Q. And what would you get for those lots along Washington Street?

A. $300.

Q. So if there were six lots to the acre and you got $300 a lot you would get $1,800 an acre, would you not?

A. Yes, figuring that way.

Q. Well, that is the way you sold them, is it not?

A. That is the way we sold them, was in lots, but you wouldn't get as many in the acreage, you wouldn't get as many lots out if you figured all the streets out of that, because there are quite a number of streets there.

Q. But figuring six lots to an acre you are allowing sufficient land for streets, are you not?

A. Yes.

Q. Then you would receive $1,800 an acre, allowing sufficient land for the streets; isn't that true?

A. Well, what you had left in lots you would

receive $1,800 an acre.

Q. The Brackenridge tract has not been sold by your company, has it?

A. No.

Q. Did your company acquire the title to what is spoken of as the Brackenridge tract at any time?

A. They did not.

Q. Were you involved in the sale of the Brackenridge tract of 132 acres?

A. 134 acres.

Q. 134 acres; were you involved in the sale of that?

A. I started the thing and later on it was taken over by ten men from around here somewhere, ten or twelve.

Q. And how much has that been sold for?

A. $25,000.

Q. How much of that is lowland?

A. Why, there is quite a little of it along toward the meadow there.

Q. How many acres?

A. How many acres?

Q. Yes.

A. I figure about nine acres was lowland that didn't need filling.

Q. How much of the tract is covered with water?

A. None of it.

Q. Doesn't the tide ever wash over it?

A. No, sir.

Q. What is the average height of that tract?

A. Do you mean above sea level or water level?

Q. Oh, water level. Now, don't let's get technical.

A. I should say it was about five feet.

Q. Five feet?

A. Yes.

Q. Would you say that the average of that tract is as high as the average of the Brooks tract?

A. No, it is not as high.

Q. And there is considerably more lowland on the Guilford tract than there is on the Brooks tract, isn't there?

A. The Guilford tract?

Q. Yes, or rather, the Brackenridge tract.

A. Very little difference, I think, in the amount of lowland.

Q. Is there any swampland on the Guilford tract?

A. Yes, on the Guilford tract.

Q. How much?

A. Oh, I don't know exactly how much. There is a considerable swamp over on that side. I suppose it takes in in the neighborhood of about twelve to fifteen acres, maybe twenty.

Q. How much swampland on the Brackenridge tract?

A. About two acres.

Q. Two acres.

A. Yes.

Q. That is outside of what I speak of, the marshland?

A. Yes. Now, that is what I mean by that, is a little vein through the road there, about two acres, in that three-cornered piece.

Q. Then, all together there are about eight or nine acres which are not available for development purposes at this time unless they are filled in on the Brackenridge tract; is that right?

A. A little bit needs filling in.

Q. A little piece about eight or nine acres?

A. Yes, I would say about eight or nine that needs filling.

By the Court.

Q. Has the Brooks tract a water frontage?

A. Very little water frontage, yes; just comes down to a narrow point, not very much.

Q. About how much?

A. I would say about 350, may 300 feet.

Mr. Trapp—The map will speak for that, your Honor.

By Mr. McMullin.

Q. If you were told there was 500 feet or more would that have any bearing on your estimate of valuation?

Mr. Ewart—How many attorneys are we going to have cross-examine this man?

The Court—Well, is there a map here?

Mr. Ewart—Yes, there is a map.

The Court—Does it show that tract that you have been examining on? That is what I want to determine.

(Map submitted to the Court.)

The Court—The Brackenridge tract, 134 acres, you said that that had more acreage than the Brooks tract?

Mr. Ewart—If the Court please, we will have a witness who will be able to give all those figures.

The Court—All right. I will withdraw my question.

By Mr. McMullin.

Q. In arriving at your valuation on this tract how many feet of waterfront did you figure on?
A. Well, we don't go for the waterfront, we figure more on the roadfronts. There were two fairly good roadfronts but waterfront don't amount to anything; in fact, we don't figure it very much because there in an awful fill down there before it can be used for any purpose.
Q. How much was the roadfront?
A. We didn't figure—
Q. How much did you figure it was worth.
A. $300, 40 by 150.
Q. How many front feet along the road did you figure?
A. We didn't figure the front.
Q. How did you arrive at your valuation for the balance of the tract after you eliminated this strip along the road 150 feet wide?
A. Running straight down through there opening it up.
Q. What valuation did you put on a lot there?
A. We don't allow much difference in the price, because the land ought to be about the same, $200 apiece.
Q. Now, I understand, in arriving at your valuation of the Brooks property you figure $200 for a 40 by 150-foot lot?
A. Yes.
Q. How many lots do you figure per acre?
A. I don't remember how I figured that up.

Of course, it would be the same as the others, 40 by 150, seven or eight lots, something like that.

Q. You figured $200 apiece?

A. That is the figure we would get for them, after the work done on the place.

Q. And what did you figure it would cost to do the work on the place?

A. Well, we didn't estimate that exactly; that is, we didn't figure exactly; we just estimated it.

Q. What did you estimate it?

A. Figured to spend about $5,000 in streets.

Q. On the entire property?

A. Yes.

Q. And you figured that you would be able, with the expenditure of about $5,000 on the property, you would be able to sell it all off in lots at the rate of $200 for a lot of 40 by 150?

A. That is about what I figured. Of course, we didn't figure it very much.

Q. I mean in arriving at your valuation.

A. Yes, in arriving at my valuation.

Q. That is how you did it?

A. Yes.

Q. What was the result of that valuation?

A. Well, there was money to be made there by developing the thing, but we found some other places that was better suited for our purposes.

Q. Would you have paid $50,000 for it?

(Objected to.)

Mr. McMullin—If your Honor please, the question is—you called this gentleman as an expert on valuation of this property. I am asking how he arrives at the valuation. He

says he puts a valuation on lots 40 by 150 feet which brings a most remarkable result, a valuation of over $200,000 for the property.

The Court—Which is not of much benefit to the Court.

Mr. Ewart—Counsel must not lose sight of the fact that it costs something to develop the property.

The Court—Of course, providing it doesn't cost you anything to develop, that is what you would get. I am not much interested in this fact.

Redirect examination.

Q. Mr. Driscoll, is the Brackenridge tract a more valuable property or less valuable property than the Brooks property.

A. A very much more valuable property, in my estimation.

Q. What are the things that give it greater value?

A. Well, it is all on the waterfront side, the whole 134 acres, and Washington Street; it is not back in the woods and it is high, and nice trees and all that sort of thing.

Q. Do you know how much river frontage it has, whether it has as much as the Brooks property?

A. I wouldn't say exactly. I don't know whether there is any difference or not. There is very little difference, I would say, by looking at the two, walking over it, very little, if any.

ANTHONY THEN, sworn for respondent.

Direct examination, by Mr. Ewart.

Q. You live in Toms River?
A. Yes.
Q. What is your occupation?
A. President of the Ocean County Title Company.
Q. How long have you been engaged in title work in this county?
A. In this county?
Q. Yes.
A. Twelve years.
Q. Is your title company located at Toms River?
A. It is.
Q. Do you have occasion to be familiar with the sales of real estate in this vicinity?
A. I do.
Q. Are settlements made in your office?
A. Every day.
Q. Are you familiar with this Brooks property?
A. I am.
Q. Do you know of sales of other property in that vicinity?
A. Yes, quite a few; the Brackenridge tract, the Guilford Park tract, Pelican Island.
Q. Are you the representative here of any company which is buying land in the county?
A. I am.
Q. What company?
A. B. W. Sangor Company.
Q. What development do they have?
A. Pinewald.
Q. Do you know how much water frontage

there is on this Brooks property, approximately?

The Court—The map shows a little over 500 feet.

The Witness—537 feet.

Q. About 500 feet, I was going to say. Are you familiar with the sale of the Brackenridge tract?

A. I am. I closed the title.

Q. Who was that property purchased from?

A. From Brackenridge.

Q. When?

A. June 28th.

Q. 1925?

A. 1925.

Q. How many acres were there in that tract?

A. 132.

Q. What was the price paid Brackenridge?

A. $25,000.

Q. How much water frontage has that property?

A. 1,830 feet.

Q. And how much is the frontage on Washington Street?

A. 3,500.

Q. Feet?

A. Feet.

Q. How far is that from this Brooks property?

A. About three-quarters of a mile.

Q. Is that property more valuable, in your opinion, or less valuable than the Brooks property?

A. Much more valuable.

Q. What, in your opinion, was the fair mark-

et value of the Brooks property in the latter part of June or the first part of July of this year?

A. I think they paid the fair value of $19,000.

Q. Have you been familiar during the past summer and fall with the trend of market values of real estate in this vicinity?

A. I have.

Q. Do you know whether that trend has been upward or downward?

A. Upward.

Q. Has there been a marked advance or a slight advance?

A. Oh, it is a decided advance.

Q. Can you fix with any degree of certainty or fix approximately the date when such advance began?

A. Around the middle of July.

Q. Do you know any illustrations of such an advance in value?

A. Why, yes. I am also the treasurer of the New Jersey Development Company, which purchased the Brackenridge tract. We paid $25,000 for the property and we have turned down an offer for $80,000.

Q. When was that offer made?

A. About the first of October, this year.

Q. When did you say you bought the property?

A. June 28th.

Q. Has the Brooks property, in your opinion, advanced in value since July 6th?

A. Decidedly.

Q. In market value, that is?

A. Decidedly so.

Cross examination, by Mr. McMullin.

Q. What is the value at the present time of

this Brooks property?

Mr. Ewart—I object. It is the whole point at issue as to whether the value is determined as of this time or that time.

The Court—All right. What is the value of the Brooks property now, in your opinion?

The Witness—I would say around $35,000.

Q. And yet you are refusing to sell the Brackenridge property for $80,000?

A. Yes.

Q. Do you thing the Brackenridge property is worth twice the amount of the Brooks property?

A. Three times.

GEORGE H. HOLMAN, sworn for respondent Direct examination, by Mr. Ewart.

Q. Mr. Holman, you live in Toms River?

A. I do.

Q. And you are a former sheriff and former county clerk of this county?

A. I was.

Q. Have you ever been engaged in the real estate business in the county?

A. I have, years ago.

Q. Have you bought and sold properties?

A. Yes.

Q. And owned properties of your own?

A. Yes.

Q. Are you familiar generally with the market values of property in this vicinity?

A. Fairly so, try to keep posted.

Q. Are you familiar with the market values of farm properties and acreage?

A. Yes.

Q. Do you know the Brooks property?

A. Generally, in a general way.

Q. You live on Washington Street, too, do you not?

A. I do.

Q. This Brooks property is some two or three miles down the road from you?

A. About two miles, two and a half.

Q. How frequently have you seen this property, Mr. Holman?

A. Oh, I see it very often. I drive by it very often.

Q. You know what part of it is cleared and what part woods?

A. The part south of Washington Street, part of it is cleared, that is, I think the larger part of it is cleared, and part of it is a tract of woodland; and on the north side of Washington Street there is one cleared field and the balance of it is woodland and gravel pits.

Q. What in your opinion, Mr. Holman, was the fair market value of this piece of property the latter part of June or the first part of July of this year?

Mr. McMullin—May I ask a question?

The Court—Yes.

Cross-examination, by Mr. McMullin.

Q. Have you bought and sold any acreage properties this summer, Mr. Holman?

A. How is that?

Q. When was the last acreage property that you bought and sold?

A. Last month.

Q. Where was that?

A. Down in Manahawken.

Q. How far away from this Brooks property is that?

A. That is about thirty miles.

Q. What property near the Brooks property have you bought and sold recently?

A. Well, not within the past two years. I bought a tract, I think, sixty some acres, about four miles from there, between here and Lakehurst.

Q. Do you know what the Brackenridge tract was sold for?

A. I heard what it was sold for; I don't know.

Q. Don't know of your own knowledge?

A. No.

Q. Do you know what the Guilford Park tract sold for?

A. I heard but I don't know from my own knowledge.

Q. Have you bought or sold any acreage within thirty miles of this property for two years?

A. I sold a tract within a mile of that about —I guess it is two years ago.

Q. And that is all.

Mr. McMullin—I object to this witness.

By the Court.

Q. You have also been connected with a bank here at Toms River?

A. Yes.
Q. What was your connection?
A. Well, at the present time?
Q. No. Do you have any connection at the present time?
A. Yes.
Q. What?
A. Director of Ocean County Trust Company, member of the Real Estate Appraisement Committee.
Q. And how long have you held that position in that bank?
A. Well, I have been a director since its organization in 1907 and been on the appraisal committee for the last five years.
Q. Were you president of the bank?
A. I was president of the bank for thirteen years.
Q. You have been a large property owner in Ocean County all your life?
A. Yes.

The Court—I am satisfied with his qualifications, Mr. McMullin.

Mr. McMullin—You know him better than I do.

The Court—Yes.

Further direct examination, by Mr. Ewart.

Q. Mr. Holman, what was, in your opinion, the fair market value of this Brooks property the latter part of June or the first part of July of this year?
A. Well, I will have to know the acreage.

Mr. McMullin—100 acres.

The Court—99 acres and a fraction.

A. How much south of the road and how much north, can you tell me that?

Mr. Ewart—Is there any objection to offering this map in evidence? I think it illustrates better, perhaps, the layout, because it is colored.

Mr. Brooks—You can't get the figures as well as you can from this map, because you can hardly read that.

The Court—According to my map—you had better make sure this is so—there is 47½ acres south of Washington Street and the frontage on the river, Toms River, 536.18 feet; and the acreage north of Washington Street is 47.08. What does "School property" mean?

Mr. Brooks—There is another small piece there, Judge, that triangle.

The Court—That is right, 47.08 plus 4.59.

Mr. Brooks—Those figures are exclusive of the schoolhouse.

The Witness—Who does that belong to, the property?

Mr. Brooks—The schoolhouse belongs to the county.

The Court—51.67 acres north of Washington Street. Washington Street, it seems to have a frontage of 797 feet.

Mr. Brooks—Of which north of it is about five acres of cleared land fronting on Washington Street and about five acres in the rear pretty well back.

Mr. Ewart—You may except that by saying on the south there are about thirteen acre of woods; is that correct?

Mr. Brooks—Yes, that is woodland.

The Witness—Quite a piece of that property has been dug out for gravel purposes, hasn't there, gravel taken out?

Mr. Brooks—Oh, probably an acre and a half. That is about the extreme northern end of it. But we have taken a good bit of money out of that gravel pit.

Mr. Ewart—Might I call the attention of the witness to this map? This line is Washington Street, going toward the bridge, the bay. This is the road leading down to Island Heights. This is the road leading over towards Cedar Grove. This is the forty-seven and a fraction acre tract stretching here; this is the four and a fraction acre tract north of the road. This is south of the road where buildings are, stretches down to the river.

The Witness—530 feet to the river.

Mr. Ewart—And this tract, there is thirteen acres of woods in there.

The Witness—Yes, I understand the lay of the land there pretty generally.

By Mr. Ewart.

Q. The question is, what was the fair market value of that property at the end of June or the first of July of this year?
A. I would consider $21,000.
Q. How do you arrive at that value, Mr. Holman?
A. By the acreage.
Q. Has there been any change of market values of property in this vicinity?
A. Most decidedly.
Q. Since that date?
A. Most decidedly.
Q. How has it been, up or down?
A. Most decidedly upward.

Cross-examination, by Mr. McMullin.

Q. What is that property worth to-day?
A. Well, basing my opinion on the sales of other tracts, some of which I consider quite excessive, the property to-day would be worth $40,000.
Q. When did that tremendous value start down here?
A. About the time the State Highway Commission, at a meeting at Browns Mills, stated that the road from Camden to the seashore by way of Browns Mills was number four on the list to be constructed. Immediately there began

to be a bid for property along that line.

Q. Immediately after that statement?

A. Yes.

Q. When was that made?

A. Sometime in the summer, I forget. I know I attended it, but I don't recall the date. I perhaps could find out by looking in my memorandum.

CARL HAAG, sworn for respondents.

Direct examination, by Mr. Ewart.

Q. Mr. Haag, you live in Seaside Park?

A. Yes.

Q. You are in the real estate business?

A. Yes.

Q. How long have you lived at Seaside Park?

A. Twenty-six years.

Q. Have you bought and sold any properties in Ocean County?

A. I have.

Q. Have you bought and sold any within the last two years?

A. Yes, sir.

Q. Acreage?

A. Yes, sir.

Q. Are you familiar with the value of properties in the vicinity of the Brooks Farm property, vicinity of Toms River and bay?

A. Yes, sir.

Q. Do you know this particular property?

A. I do.

Q. Do you know the approximate acreage of it, the lowland?

A. Yes, sir.

Q. What, in your opinion, was the fair market

value of the property the latter part of June or the first part of July?

Mr. McMullin—May I cross-examine?
The Court—Yes.

Cross-examination, by Mr. McMullin.

Q. Aren't you a baker by trade?
A. Yes, sir.
Q. How long have you been posing as a real estate expert?
A. A long while.
Q. How long?
A. If a man pioneers in a town twenty-seven years that is long enough?
Q. As an expert?
A. Not necessarily.
Q. How long have you been an expert?
A. I don't pose as an expert.
Q. Do you think you know more about value of real estate at Island Heights than any other man down here knows?
A. No, but good common sense tells me something.
Q. Just what an ordinary good common sense person would know?
A. Yes.
Q. That is all you claim to know about it?
A. That is about it.
Q. What is land like the Brooks estate worth an acre?
A. The Brooks estate is worth $20,000.
Q. An acre?
A. The Brooks?
Q. Yes.
A. It was offered to me at $25,000.

Q. I say, what is land like the Brooks estate worth per acre?

The Court—You don't notice the question. He has asked you two or three times how much it is worth per acre, the Brooks property.

A. About $175 an acre.
Q. Or $25,000 for the whole piece?
A. Yes.
Q. As of what time?
A. What time?
Q. It is worth that to-day or was it a year ago or when was it?
A. It is worth more to-day.
Q. When was it worth $25,000?
A. Possibly in May, when Mr. Brooks offered it to me.
Q. You think, then, it was worth $25,000?
A. No, sir; I would have come back with a counter-proposition not exceeding $20,000.
Q. But you thought it was worth $25,000 in May?
A. What say?
Q. I understood you to say it was worth $25,000 in May.
A. It was offered to me at $25,000.
Q. What was it worth then? It wasn't over $22,000?
A. No, sir; I didn't make a counter-proposition of $22,000.
Q. What was it worth in June?
A. Well, the same thing.
Q. What was it worth in July?
A. The latter part of July and the beginning of August the influx of activity took place here

in the entire county, not only down here but all over on the beach the same way, and property has increased considerably.

Q. What part of July? You say the latter part of July the increase came?

A. Well, the most noticeable thing was in Seaside Park, we held a tax sale August 7th and that sent them all up. They brought good prices, and the whole county was talking about values, and that is what started the boom, so they say.

Q. About August 7th?

A. Yes.

Q. Don't you now—you heard the testimony of Mr. Holman, the last witness, didn't you?

A. Yes.

Q. You heard him testify that the thing which caused the increase in prices was the meeting of the State Highway Commissioners and it becoming known that Route 4 was adopted?

A. Yes.

Q. You know that meeting was held in June, don't you?

A. No, sir; it wasn't in June.

Q. When was it?

A. It was later than June.

Q. Did you attend it?

A. Yes.

Q. When was it?

A. Well, I am quite sure it was later than June.

Q. When?

A. I can't tell—

Q. Was it after the 4th of July?

A. No, sir; it wasn't after the 4th of July.

Q. It was before the 4th, wasn't it?

A. It was just about around that time. I can't recollect.

Q. Wasn't it June 14th?

A. What?
Q. Wasn't it June 18th?
A. That I can't answer, because there were some words—

Mr. Ewart—You are changing the date on the witness. Give him a chance to answer before you change it.

Mr. McMullin—He has had plenty of chance to answer.

Q. What day of the week was it?
A. I don't remember that.
Q. Where was it?
A. At Browns Mills. Hot as cotton and plenty of it.
Q. You know it was later than June?
A. The latter part of June, yes, I would say.
Q. And as soon as that became public property the boom was on down here?
A. Well, that is, it was noticeable in August.
Q. Well, you heard the last witness testify that that was what caused the boom?
A. Yes, sir.
Q. He was right, wasn't he?
A. Possibly so.
Q. You don't pretend to differ from what he said?
A. Well, why should I?
Q. Do you?
A. Sometimes I do, yes.
Q. Do you agree with what he said, that the boom in property was caused by the road?
A. We didn't notice it until August 7th.
Q. I say, do you agree with what the last witness said, that the boom in real estate was caus-

ed in this county by that road?

A. Not particularly so, we didn't notice it.

Mr. McMullin—I haven't any objection to this man testifying, in fact, because I have asked him all you want.

Mr. Ewart—Yes; he has testified pretty fully.

Further direct examination, by Mr. Ewart.

Q. Do you know of any decided increase in value that has taken place since the first of July, this year?

A. Yes; considerably so.

Q. You say you fixed the time of that boom as of the first part of August?

A. Yes; in fact, the 7th of August, when we had a general tax sale over there; people came from all over.

Q. When you say a tax sale, you refer to the selling of lands acquired by the borough at foreclosure, don't you?

A. That is true.

Q. So that it was an absolute sale?

A. Yes.

Q. Was the increase in value since the first of July a slight increase or a big increase?

A. No; it was a great increase.

Q. Do you know whether that had been true generally in this county or at any particular place?

A. Yes; noticeable everywheres.

Q. Can you cite any illustrations of such increases?

A. Yes, sir. My company we bought acreage at $179 an acre.

Q. What is your company?

A. Ortley Beach Company; about nineteen months ago at $178 an acre. I have just now for sale acreage on the ocean front at $125 a foot.

Q. Do you know of any sales at that price?

A. No; the offer has been $85 a foot.

Q. You are not interested in this particular sale?

A. No.

Q. Of the Brooks property?

A. Not whatever.

Q. Not whatever?

A. No.

Q. Did you know about the sale of the Brackenridge property?

A. I heard about it; yes.

Q. Is that more or less valuable than the Brooks property?

A. Physically it is better than the Brooks property.

Q. Is it more valuable or less?

A. It has more river front, has four times the river front. That is what counts.

Q. Your answer is, it is more valuable?

A. Yes.

No cross-examination.

WILLIAM H. FISCHER, sworn for respondent.

Direct examination, by Mr. Ewart.

Q. Mr. Fischer, you live in Toms River.
A. I do.
Q. You are the editor of the New Jersey Courier?
A. I am.
Q. You have lived here a great many years, a large number of years?
A. Yes.
Q. Do you know this Brooks property?
A. I do.
Q. Have you ever been over it.
A. Quite a little.
Q. I would like you to tell us if you know the character of the land of the different sections delineated on this map that has been offered in evidence.
A. This tract running from Washington Street to the river is high, nice-lying ground, west of the road to Island Heights. This tract of 33.64 acres until you get down in here. Down in here there is quite a—

The Court—Indicating near the river?

A. Near the river. On the river itself there is a sand-bar beach. Right in back of that sand-bar beach there is a sink or slough with a little stream running through it, grown up a little over head high, I should say, with brush, grass and so forth. That would leave a place in there that would have to be filled in to the river front to be utilized. On this side of the road—
Q. This side of what road?

A. On this side of the road leading from Washington Street into Island Heights.

Q. That is the east side of that road?

A. That is the east side of that road, 13.86 acres, slopes down rapidly from the street into a gully or ravine.

Q. Is it cleared land or woodland?

A. It is woodland. The frontage on the road leading into Island Heights from Washington Street is good land; not as high as on the west side of the same road, because the slope begins over there, but still it is good land. The back of that is low and would be valueless; a gully that runs down there and back of the 13.86 acres east of the road into Island Heights heads up on the north side of Washington Street and on the west side of the road to Cedar Grove. Across there that road runs down a little jib, 4.59 acres, so that of that piece the corner of Washington Street and the Cedar Grove road is fairly high, but from there it slopes both to the northeast and to the east down into the ravine. That is not woodland. On the Washington Street end of the north tract, north of Washington Street, next to the Cedar Grove road, is a tract of woodland. Following that on Washington Street, going to the westward, is a cleared tract and beyond that, on the west line, is another wooded tract.

Q. How deep is the cleared tract on the north side of Washington Street?

A. On the north side of Washington Street there is a fair-sized field in there that has been cultivated, if I remember right, has had an apple orchard in it at one time, of which there are a few apple trees left.

Q. Is it one, five ten, fifteen or what?

A. My sense of proportion is not good enough to allow me to speak. I should say perhaps five acres and perhaps more. There is also a little cleared spot along this road in here that runs in and joins that. The rest of this is practically all woodland. There is a hollow runs through it up this way; all up in this corner up here there are gravel pits. I think that is a fair description of the land. That is the northwest end that the gravel pit is. I have never been in there far enough to see those gravel pits, but I know they come from out there.

Q. Are you familiar with the buildings on that property?

A. Fairly.

Q. Have you ever been in them?

A. No, not recently.

Q. Do you know whether they are occupied now or not, have been occupied?

A. Not occupied; haven't been since Charlie Maisch moved out, and I think he moved out about two years ago, I am not sure. The buildings at the present time have very little value. They have been left open to the weather and anything that came along.

Q. How long have you known that property, Mr. Fischer.

A. Oh, since Island Heights was started. That is 1878.

Q. Do you know it twenty-five years?

A. Yes, thirty-five years.

Q. Has it stood vacant prior to the occupancy of Maisch, do you know?

A. Yes, at different times. I wouldn't say as long as this time. The property was kept up in pretty good shape until Maisch's occupancy.

There were spots in there before Maisch when it was vacant and there have been a number of times when it was vacant.

Q. And the buildings were in better condition in 1920 than they are now?

A. Oh, they were much better condition than they are now. They were in better condition six months ago than they are now. They were in a better condition a year ago than they were six months ago.

Q. Do you know how long this property has been on the market for sale?

A. No, I couldn't tell you that. The sign "For Sale" on there is so familiar it seems as though it had been on there a good while.

Q. Can you say whether it was on there five years, ten years or fifteen years?

A. No, I couldn't say accurately or absolutely. My own judgment would be that the property has been advertised—my recollection is that the property has been advertised for sale for probably five years, probably longer, but I couldn't go definitely, assuredly back of the time when it was posted up with notices of a sale at auction at Freeman's, which has been testified to here by Mr. Brooks as being two years ago this summer or fall. I couldn't go definitely back of that.

Mr. McMullin—No cross-examination.

The Witness—There is one question you didn't ask me.

Mr. McMullin—That is all right.

The Witness—You want to hear this question.

Mr. McMullin—No.

By Mr. Ewart.

Q. Did you ever see this before? (Paper shown witness.)
A. Yes.
Q. Where did you get this?
A. From Mr. Brooks.
Q. From Mr. Brooks?
A. Yes, that and this both. (Showing another paper.) Mr. Brooks sent me one.
Q. When you say Mr. Brooks you mean—
A. Mr. T. Fernley Brooks. Mr. Brooks sent me one and his representative, while he was in Florida, sent me the other.
Q. Do you know what they are supposed to represent?
A. The map is supposed to represent this property under discussion.
Q. Did Mr. Brooks send you a bill of sale prior to the date of the sale?
A. Yes.

Mr. Ewart—I want to offer these two papers in evidence.

The Court—They will be admitted.

(Papers marked Exhibits R 1 and R 2.)

Q. Was that property ever offered to you?
A. In one sense, yes. I wrote Mr. Brooks about it and he wrote me back and we had some correspondence back and forth about it, yes.
Q. Did he fix the price?
A. The price he put on it in his first letter was $25,000.

Q. About when was that, do you know?

A. That was about, I should think, in January or February of this year. Mr. Brooks can fix that better, because it was just before he went to Florida.

Q. Did any agents in this vicinity offer it to you after that?

A. I can't say that they offered it to me. They came to me and wanted to know if I didn't want to buy it. You can call that offering it if you want to.

Q. Did they name a price for it?

A. Twenty-two.

Mr. McMullin—I object and ask to strike out the answer as not responsive. What agents chose to do has nothing to do with the case unless you show that they were authorized.

Mr. Ewart—Well, the property was on the market in the hands of the agent for sale.

The Court—Well, the agent would be the one, if there is an authorized agent. That is the one.

Q. Mr. Fischer, you are familiar with the controversy about the abandonment of the railroad into Island Heights?

A. Yes.

Q. Do you know when that controversy was before the courts, the Utility Commission?

A. Yes.

Q. Was it before the commission this last spring?

A Why, the last summing up of that was at

sometime during the spring. The date I can't tell you.

Q. Do you know when the decision was handed down on it?

A. I can't tell you that either. Sometime during the summer.

Q. Do you know with reference to July 6th whether it was before or after July 6th?

A. No, I can't tell you that.

Cross-examination, by Mr. McMullin.

Q. Do you know the date of the meeting of the road commission when they agreed to put Route 4 through this summer?

A. No, the road commission never agreed to put Route 4 through this summer.

Q. Wasn't that what Mr. Holman testified to?

A. At least they haven't put it through this summer. It is not there yet.

Q. Agreed to give priority?

A. I was not at that meeting. I was in the west at that time.

Q. When was it?

A. The day of that meeting was the 18th of June.

Q. You are quite sure about that?

A. I am positive about it because Mr. Evernham and I started west on the 15th and that was on Monday and the meeting at Browns Mills was on Thursday of the same week and we couldn't get to it.

Q. That is all.

A. You are not going to let me answer that other question?

The Court—Yes, I will permit it.

The Witness—That other question I wanted to answer was that I was supposed to have a one-fourth interest in this property.

Mr. McMullin—You stated to this Court this afternoon that you would call no other witness who had an interest without disclosing it.

Mr. Ewart—That is not true.

Mr. McMullin—The testimony will speak for itself.

Mr. Ewart—I certainly think it will.

MARTIN SCHWARZ, JR., sworn for respondent.

Direct examination, by Mr. Ewart.

Q. Mr. Schwarz, you live in Toms River?
A. Yes, sir.
Q. What is your business?
A. Secretary of the Dover Mutual Loan.
Q. How long have you held that position?
A. Five years.
Q. You are a real estate broker also?
A. Yes, sir.
Q. Do you have occasion to see the values passing on the sale of properties in this vicinity?
A. Yes, sir; every day.
Q. You also have occasion to see the appraised value of property for mortgage purposes?
A. Yes, sir.

Q. Are you familiar with this Brooks property?
A. Yes, sir.
Q. Are you also familiar with the Brackenridge property?
A. I am secretary of that corporation, treasurer of the company.
Q. You are financially interested in that Brackenridge property, are you not?
A. Yes, sir.
Q. Do you know what the property sold for?
A. Yes, sir.
Q. Are you familiar with the Guilford Park property?
A. Yes, sir.
Q. You knew of that sale?
A. I heard of it.
Q. Well, it was common knowledge, wasn't it, about the sale?
A. Common talk, yes.
Q. At the time it took place?
A. Yes.
Q. I want to ask you, subject to cross-examination by Mr. McMullin, what, in your opinion, the fair market value of this Brooks property was at the end of June or the first part of July of this year.

Cross-examination, by Mr. McMullin.

Q. How long have you known the Brooks property?
A. Practically all my life.
Q. You are acquainted with the conditions of the Brackenridge property and the other properties in that immediate vicinity, you say?
A. Yes, sir.

Q. Is that correct?
A. Yes, sir.
Q. To what purpose would a purchaser put the Brooks property at the present time?
A. I suppose it would be bought for development purposes.
Q. That is the only use to which it could be put?
A. Not necessarily. Somebody could buy it for a farm.
Q. Well, are you acquainted with the value of properties for farm purposes?
A. Yes.
Q. Did you ever sell a farm to be used as a farm?
A. Never sold any myself, no, sir.
Q. What farm have you known to be sold for use as a farm in the vicinity of this Brooks property in the last five years?
A. Well, I see those values every day. I can't recall them.
Q. Can't recall one either?
A. No.
Q. Have you bought or sold any acreage tracts in the vicinity of this property during the last two years?
A. A member of the corporation of the New Jersey Building Company bought the Brackenridge tract.
Q. That is the only one?
A. That is the only one at that time.
Q. What did you pay for that?
A. $25,000 cash.
Q. How much was that an acre?
A. About $190.
Q. When did you pay that price for it?
A. June 25th. The deed was drawn on the

25th.

Q. When did you agree to buy it?

A. Sometime in May, I just forget the date.

Q. You mean to say that you got your agreement in May and settled in June?

A. Yes.

Q. Sure of that.

A. Yes.

Q. Had a settlement within two months of the time you sold your property—the time you bought it, I mean?

A. Yes.

Q. How many acres were there in this tract?

A. 134.

Q. What is it worth an acre?

A. At that time?

Q. Yes.

A. About $190.

Q. What was the Brooks land worth an acre at that time?

A. The same price.

Q. Then you don't agree with those witnesses who consider that the Brackenridge land was worth two or three times as much as the Brooks land?

A. It is now, yes, sir.

Q. It was not then?

A. For development purposes it was, yes.

Q. Now, tell me, please, for development purposes, what kind of values you are putting on the Brooks land; value for development purposes or value for farm purposes?

A. Development purposes.

Q. Then, do you mean to tell me that the value of the Brooks land for development purposes last June was $190, while the value of the Brackenridge land at the same time was $190 an acre?

Mr. Ewart—I object to the question. I think the counsel has gone far enough beyond the cross- examination of this witness to determine his qualifications to give an opinion as to values here. He is rather seizing the initiative and making the man his own witness.

Mr. McMullin—You ought not to object to that, surely.

Mr. Ewart—Well, I would like to conduct my own examination.

The Court—What is the question?

(Question repeated.)

The Court—That is not proper. I will sustain the objection. It is cross-examination now as to his qualifications only.

Mr. Ewart—Yes, I haven't asked him yet—

The Court—Are you satisfied with his qualifications?

Mr. McMullin—I am not, sir.

By the Court.

Q. How large is your building loan which you are secretary of? How many loans have you?
A. We pass 150 loans a year, about.
Q. How many are outstanding now?
A. About a million and a half.

Q. Dollars, a million and a half?
A. A million and a half dollars.
Q. Are they represented in small loans?
A. Some land, dwellings on them, and farm acreages.
Q. What character is the property?
A. All characters.
Q. Do you have full knowledge of all loans which have been made in the past five years?
A. Yes.

The Court—I am satisfied.

By Mr. McMullin.

Q. Are you another one of those folks that have got an interest in this property?
A. I am not.

By Mr. Ewart.

Q. The question, Mr. Schwarz, which I asked sometime ago was what in your opinion was the fair market value of the Brooks property the latter part of June or the first part of July of this year?

Mr. McMullin—I renew my objection. Your Honor overrules it?

The Court—Yes, I overrule it.

(Objection noted for petitioner as ground for appeal.)

A. $190 an acre.
Q. Have you figured that out, what that would mean in the total value?

A. 99 acres and a fraction, I believe, in the property; $19,000.

Q. Approximately that. A fraction less. You say $190 an acre?

A. Yes.

Q. Is that the average price for the whole tract through?

A. Yes.

By Mr. McMullin.

Q. Why do you say $190 instead of $195 or $185, any reason?

A. No.

Q. Just a guess, isn't it?

A. Yes.

By Mr. Ewart.

Q. Is there any such thing as fixing with mathematical certainty the value of any piece of property?

(Objected to. Objection sustained.)

The Court—These are opinions, of course.

Mr. Ewart—These are opinions, not to put the words "guess" into the mouth of the witness. He can estimate that, of course.

Mr. McMullin—He understands the English language. Anybody that qualifies as an expert ought to know what the word "guess" means.

JESSE EVERNHAM, sworn for respondent.

Direct Examination, by Mr. Ewart.

Q. Mr. Evernham, you are the Jesse P. Evernham mentioned in this petition?
A. Yes.
Q. And are the person who signed a contract agreeing to buy this property for $19,000?
A. I am.
Q. Did you make any payment on account of the purchase price?
A. Ten per cent.
Q. I show you a check for $1,900 made out to Thomas Brooks estate, dated July 6th. Is that the check?
A. That is the check; yes, sir.
Q. Has that check been through the bank?
A. Yes, sir.

Mr. Ewart—I offer it in evidence.

(Check marked Exhibit R 3.)

(COPY OF EXHIBIT R 3.)

JESSE P. EVERNHAM

This check is in full payment of the following bills. No receipt necessary. % -- property purchase

No. 421 Toms River, N. J. July 6, 1925.

Pay to the order of

Thomas Brooks Estate $1900.00

Nineteen hundred ..... Dollars

Collectible at par through Federal Reserve Bank of Philadelphia.

To
The First National Bank,
55-353 Toms River, N. J.

JESSE P. EVERNHAM.

Q. Has any of that money been returned to you?

A. None.

Q. Has any one offered to return any of it to you?

A. No, sir.

Q. When were you first notified, if you recollect that the Brooks estate's representatives were not prepared to go through with their agreement?

A. I couldn't give you the date. I think you have a letter that I received the same day that Mr. Brooks called on me.

Q. I show you a letter dated August 24, 1925, addressed to Mr. Jesse P. Evernham, Toms River, N. J., signed "T. Fernley Brooks, Attorney for the estate of Thomas Brooks, deceased." Is that the letter to which you referred?

A. That is the letter; yes, sir.

Q. Did you have any notice before that time of the unwillingness of the estate to proceed with their agreement?

A. I did not.

Mr. Ewart—I offer this letter in evidence.

Mr. McMullin—No objection.

(Letter marked Exhibit R 4.)

(COPY OF EXHIBIT R 4.)

August 24, 1925.

Mr. Jesse P. Everham,
Toms River, N. J.

DEAR MR. EVERNHAM:

I beg to advise you that we have received an offer of $25,000.00, one-half cash and the balance in a straight mortgage payable within two years with no release clause, for the one-hundred-acre tract belonging to the Brooks Estate at Island Heights which you agreed to purchase a short time ago for $19,000.00, one-half cash and the balance payable within three years at six per cent with a release clause for certain parts of the tract therein set out.

As any sale made of this property must be subject to the approval of the Orphans Court, or any Court having jurisdiction in New Jersey, and as the present offer and terms are considerably higher and better than your offer and agreement, the administrators would be bound to accept the higher and better offer under the law, but at the same time, it is only fair to you that you have a chance to meet this or make a better offer than the above offer of $25,000.00 and its terms, and we therefore ask you to let us know before Friday of this week whether or not you will be prepared to meet this offer or make a better one, so that the administrators will be advised as to what you intend to do.

I expect to be in Island Heights the next three days of this week, where you can see me if you so desire.

Very truly yours,
T. FERNLEY BROOKS,
Attorney for the Estate of
Thomas Brooks, Deceased.

Q. Are you ready and able to go through this agreement on your part?
A. I am; yes, sir.

No cross-examination.

Both sides rest.

New Jersey Prerogative Court.

In the Matter of the Appeal of Frederick T. Walters From the Order of the Orphans' Court, &c.,
and
In the Matter of the Appeal from the Order of the Orphan's Court, &c.

ORDER.

(Filed May 29, 1926.)

This matter being opened to the Court by Merritt Lane, of counsel with the appellant, Frederick T. Walters,

It is, on this 28th day of May, 1926, Ordered, that the time for the filing of the transcript in the appeals in the above-entitled matter be extended until the 15th day of June, 1926.

Respectfully advised

VIVIAN M. LEWIS,
V. O.

E. R. WALKER,
Ordinary.

EXHIBITS.

AGREEMENT, made the seventh day of July, A. D. 1925, between Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, Administrators D. B. N. C. T. A. of the estate of Thomas Brooks, deceased, of the first part, and Jesse P. Evernham, of Toms River, New Jersey, of the second part, as follows, to wit: The said party of the first part agrees to sell and convey to the said party of the second part, who agrees to purchase all that certain tract of land situate partly in the Township of Dover and partly in the Borough of Island Heights, Ocean County, State of New Jersey, known as the Brooks Farm and described in accordance to a survey thereof made May. 1923, by Arthur C. King, Civil Engineer, Toms River, N. J., containing ninety-nine acres, more or less, on the terms and conditions following, to wit: The said party of the second part agrees to pay for the said property the sum of nineteen thousand dollars, as follows: Nineteen hundred dollars on the signing of this agreement (which deposit shall be forfeited to the said party of the first part as liquidated damages in case of the default by the said party of the second part in the performance of the terms of this agreement) and the balance of the purchase money as follow: Cash seventy-one hundred dollars at time of settlement and a mortgage on said property for $10.000.00 payable within three years at six per cent., with privilege to purchaser to have released from the lien of said mortgage parts as follows:

Tract No. 1 on plan of 33-64/100 acres upon payment of $7,000.

Tract No. 2 on plan of 13-86/100 acres upon payment of $3,000.

Tract No. 3 on plan of 4-64/100 acres upon payment of $1,000.

Tract No. 4 on plan of 47-8/100 acres upon payment of $5,000.

A policy of fire insurance for $5,000.00 to be transferred to said party of the second part upon payment of the premium, less the discount named in policy.

The premises are to be conveyed free and clear of incumbrances and easements.

The gas and electric fixtures, heaters, ranges, etc., annexed to the said building are included in the sale, as also any water pipe laid on any street bounding said lot.

Possession is to be given at time of settlement. Settlement in ninety day unless further time is required to perfect title.

Taxes, water rent, house rent and interest on incumbrance (if any) to be aportioned for the current term.

Gas bills, if any, to be paid by the seller.

The title is to be such as will be insured by West Jersey Title & Guaranty Company, of Camden, N. J.

And the said parties hereby bind themselves, their heirs, executors, administrators and assigns for the faithful performance of the above agreement within ninety day (as above) from the date hereof, said time to be the essence of this agreement, unless extended by mutual consent in writing endorsed hereon, said sale to be subject to the approval of a competent court of record of New Jersey.

This agreement is not to be recorded or entered of record.

In Witness Whereof, The said parties have hereunto set their hands and seals, the day and year first above written.

ELIZABETH P. SHETZLINE, [Seal]
HENRY P. BROOKS, JR., [Seal]
JOHN T. BROOKS, JR., [Seal]
ALBERT BROOKS, [Seal]
Administrators B. D. N. C. T. A., Est. of Thomas Brooks, Jr.

JESSE P. EVERNHAM, [Seal]

Sealed and delivered in the presence of
T. FERNLEY BROOKS,
ARTHUR B. KEIFABER.

Agreement, made the ..... day of ..... A. D. 1925, Between Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, administrators D. B. N. C. T. A. of the estate of Thomas Brooks, late of the City of Philadelphia, Penna., deceased, party of the first part and John Stahl and George Hill, of White Plains, Bronx, New York, party of the second part, as follows, to wit: The said party of the first part agrees to sell and convey to the said party of the second part, who agrees to purchase all that certain tract of land with the buildings thereon erected, situate partly in the Township of Dover and partly in the Borough of Island Heights, Ocean County, and State of New Jersey, located on the north shore of Toms River, and known as the Brooks Farm, and described in accordance with a survey thereof made May, 1923, by Walter C. King, Civil Engineer, Toms River, New Jersey, and containing ninety-nine acres more or less on the terms and conditions

following, to wit: The said party of the second part agrees to pay for the said property the sum of twenty-five thousand dollars, as follows: Two thousand dollars on the signing of this agreement (which deposit shall be forfeited to the said party of the first part as liquidating damages in case of the default by the said party of the second part in the performance of the terms of this agreement), and the balance of the purchase money as follows: Ten thousand five hundred dollars at the time of settlement and the balance of twelve thousand five hundred dollars in a purchase money mortgage payable within two years from its date at six per cent interest.

A policy of fire insurance for $5,000.00 to be transferred to said party of the second part upon payment of the premium, less the discount named in policy. The premises are to be conveyed free and clear of incumbrance and easements. Any water pipe laid on any street bounding said property are included in the sale. Possession is to be given at time of settlement.

The sale is made subject to the approval of a competent court of New Jersey having jurisdiction thereover.

Taxes, water rent, interest on incumbrance (if any) to be apportioned for the current term.

The title is to be such as will be insured by the West Jersey Title and Guaranty Company of Camden, New Jersey.

This agreement is not to be recorded or filed or entered of record. And the said parties hereby bind themselves, their heirs, executors, administrators or assigns, for the faithful performance of the above agreement within ninety days from the date hereof, said time to be the essence of this agreement, unless extended by mutual con-

sent in writing endorsed hereon.

It is understood that there is an existing prior agreement to sell above mentioned property subject to the Court's approval, and that this agreement is contingent upon the Court's disapproval of said prior agreement.

In Witness Whereof, The said parties have hereunto set their hands and seals the day and year first above written.

ELIZABETH P. SHETZLINE, (Seal)
HENRY P. BROOKS, JR., (Seal)
JOHN T. BROOKS, JR., (Seal)
ALBERT BROOKS (Seal)
Administrators D. B. N. C. T. A. of Est. of Thomas Brooks, Deceased.

Sealed and delivered in the presence of

Agreement, made the seventeenth day of September, 1925, between Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, Administrators d. b. n. c. t. a. of the Estate of Thomas Brooks, late of the City of Philadelphia, Penna., deceased, party of the first part, and Fred T. Walters, of Trenton, New Jersey, party of the second part, as follows, to wit: The said party of the first part agree to sell and convey to the said party of the second part, who agrees to purchase all that certain tract of land with the buildings thereon erected, situate partly in the township of Dover and partly in the Borough of Island Heights, Ocean County, and State of New Jersey, located on the North shore of Toms River and known as the Brooks Farm and described according to a survey thereof made

May, 1923, by Arthur C. King, Civil Engineer, Toms River, New Jersey, and containing ninety-nine acres, more or less, on the terms and conditions following, to wit:

The said party of the second part agrees to pay for the said property the sum of thirty thousand dollars, as follows: Three thousand dollars on the signing of this agreement (which deposit shall be forfeited to the said party of the first part as liquidated damages in case of the default by the said party of the second part in the performance of the terms of this agreement) and the balance of the purchase money as follows: Twelve thousand dollars at the time of settlement and the balance of fifteen thousand dollars in a purchase money mortgage payable within one year from its date, at six per cent interest, with a release clause, as follows:

Releases to be as follows:

On Tract No. 1, of 33.64/100 acres. House and River tract.	$9,000.00
On Tract No. 2, of 13.86/100 acres	3,000.00
On Tract No. 3, of 4.64/100 acres	1,000.00
On Tract No. 4, of 47.8/100 acres	6,000.00

A policy of Fire Insurance for $5000.00 to be transferred to said party of the second part upon payment of the premium, less the discount named in policy.

The premises are to be conveyed free and clear of incumbrance and easements. Title to be taken in name of said Fred T. Walters or Arbor Terrace, Inc., of New Jersey.

Any water pipe laid on any street bounding said property is included in the sale.

Possession is to be given at time of settlement.

The sale is made subject to the approval of a competent Court of New Jersey having juris-

diction thereover.

Taxes, water rent, house rent and interest on incumbrance (if any) to be apportioned for the current term.

The title to be such as will be insured by the West Jersey Title and Guaranty Co. of Camden, N. J. This agreement is not to be recorded or filed or entered of record.

And the said parties hereby bind themselves, their heirs, executors, administrators and assigns for the faithful performance of the above agreement within ninety days from the date hereof, said time to be the essence of this agreement, unless extended by mutual consent in writing endorsed hereon. It is understood that there are existing prior agreements to sell above mentioned property, subject, to the Court's approval, and that this agreement is contingent upon the Court's disapproval of said prior agreements.

In Witness Whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

ELIZABETH P. SHETZLINE, (Seal)
HENRY P. BROOKS, (Seal)
JOHN T. BROOKS, JR., (Seal)
ALBERT BROOKS (Seal)
Administrators D. B. N. C. T. A. of Est.
of Thomas Brooks, Deceased.
FRED T. WALTERS (Seal)

Sealed and delivered in the presence of
T. FERNLEY BROOKS,
As to Administrators.

As to FRED T. WALTERS,
ALEXANDER TRAPP.

ISLAND HEIGHTS, N. J.
August 18, 1925.

Received from Geo. Hill of White Plains, N. Y., by check for one thousand dollars, paid to show good faith in firm offer of John Stahl and Geo. Hill of twenty-five thousand dollars for the Brooks farm of about 100 acres near Island Heights, New Jersey. Said money is paid upon the understanding that an agreement of sale will be entered into between the Administrators of the Estate of Thomas Brooks, deceased, and John Stahl and Geo. Hill within ten days from date, at which time an additional sum of one thousand dollars shall be paid and both amounts shall be credited on account of purchase price of property. Said sale will be made subject to the approval of a competent court of New Jersey having jurisdiction thereover. In the event that John Stahl and Geo. Hill does not enter into a binding agreement to purchase said property and pay the down or deposit money, then said sum now paid shall be forfeited as liquidated damages and not as a penalty, and in case the agreement is made but the sale is not approved by the Court, then the entire sum paid as down or deposit money shall be returned to John Stahl and Geo. Hill and all negotiations and agreements shall end and become null and void as if the same has never been entered into and all rights thereunder shall cease and determine.

T. FERNLEY BROOKS,
Attorney for Estate of
Thomas Brooks
Deceased.

Approved
JOHN STAHL—GEO. HILL
by JOHN C. STAHL
Ex P a
12/8/25

ISLAND HEIGHTS, N. J.
September 1, 1925.

Received from Fred T. Walters, of Trenton, N. J., checks for $1000.00 paid by him to show good faith in firm offer of Thirty Thousand Dollars ($30,000.00) for the Brooks Farm of about one hundred acres at and near Island Heights, N. J. The said money is paid upon the understanding that an agreement of sale will be entered into between the proper parties interested in said property and said Fred T. Walters within Twenty days from date, at which time an additional sum of Two Thousand Dollars ($2,000.00) shall be paid and both amounts shall be credited on account of the purchase price of said property in the event that said Fred T. Walters receives title thereto.

Said sale will be made subject to the approval of a competent Court of New Jersey having jurisdiction thereover.

It is further understood that this agreement, and any sale thereunder, entered into between the parties hereto is with the understanding that there are prior existing agreements outstanding and that this sale is made contingent upon the Court's disapproval of said prior agreements.

In the event that said Fred T. Walters does not enter into a binding agreement to purchase said property and pay the down or deposit money above mentioned, then said sum now paid shall be forfeited as liquidated damages and not as a penalty, and in case the agreement is made but the sale is not approved by the Court, then the entire sum paid as down or deposit money shall be returned to the said Fred T. Walters

and all negotiations and agreements shall end and become null and void as if the same had never been entered into and all rights thereunder shall cease and determine. The terms to be as follows: one half cash at the time of settlement within ninety days from date of agreement and the balance in purchase money mortgage payable within one year from its date, with a release clause for certain parts of the property to be mutually agreed upon.

T. FERNLEY BROOKS,
Attorney for Estate of
Thomas Brooks,
Deceased.

Approved
FRED T. WALTERS
Ex. P. 3. 12/8/25

Commonwealth of Pennsylvania, }
City and County of Philadelphia, } ss.

LETTERS OF ADMINISTRATION

De bonis non cum testamento annexo.

[Seal] By the tenor of these present, I, James B. Sheehan, Register for the Probate of Wills and Granting Letters of Administration in and for the City and County of Philadelphia, in the Commonwealth of Pennsylvania.

Do Make Known to All Men, That on the tenth day of February, A. D. 1906, at Philadelphia, was proved and approved the last Will and Testament of Thomas Brooks, deceased (a true copy

whereof is to these present annexed), having whilst he lived, at the time of his death, divers Goods, Chattels, Right and Credits, within the said Commonwealth; by reason whereof the approbation and insinuation of said last Will and Testament, and the committing administration of all and singular the Goods, Chattels, Rights and Credits, which were of the said deceased; and also the auditing the accounts, calculations and reckonings of the said administration and absolute care of the same, to me are manifestly known to belong; and that administration of all and singular the Goods, Chattels, Rights and Credits of said deceased any way concerning his last Will and Testament is committed on the 14th day of December, A. D. 1921, unto Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, Administrators de bonis non cum testamento annexo; they having first given security well and truly to administer the Goods, Chattels, Rights and Credits of the deceased, and make a true and perfect inventory thereof and exhibit the same into the Register's Office of Philadelphia, within thirty days from the date hereof, and to render a just and true account, calculation and reckoning of the said administration at the expiration of six months from the date hereof, or when thereunto required by the Orphans' Court; and also diligently and faithfully to regard and well and truly comply with the provisions of the acts relating to Inheritance Taxes.

In Testimony Whereof, I have hereunto set my hand and seal of office, at Philadelphia, this 14th day of December, in the year of our Lord one thousand nine hundred and twenty-one.

The said testator died on the 31st day of Jan-

uary, 1906, at 6.35 o'clock A. M., as per affidavit filed.

WM. J. HAMILTON,
Deputy Register.

LETTERS OF ADMINISTRATION.
De bonis non cum testamento annexo.

Fees for,	$50	50
" Filing Renunciation,		50
" Certificate,	1	00
Paid,	$52	00

To JAMES B. SHEEHAN, Esq.,
Register of Wills and ex-officio Clerk of the Orphans' Court for the City and County of Philadelphia, in the Commonwealth of Pennsylvania.

In the Matter of Granting Letters of Administration de bonis non cum testamento annexo on the Estate of Thomas Brooks, Deceased, Citizen of the United States. } Petition.

The Petition of Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, respectfully showeth that John T.

Brooks, Henry P. Brooks, and Thomas Brooks, Jr., the Executors of the last Will and Testament of Thomas Brooks, deceased, whose will was admitted to Probate February 10, 1906, they having departed this life, and that the testator left Goods, Chattels, Rights and Credits, etc., unadministered by the said Executors to the value of $35,000.00 and Real Estate as to which power of sale was given to the Executor to the value of $109,000.00.

Therefore, the said Elizabeth P. Shetzline et al. respectfully applies for Letters of Administration de bonis non cum testamento annexo upon the Goods, Chattels, Rights and Credits, etc., of which the said Thomas Brooks died possessed.

Dated December 8, A. D. 1921.

Philadelphia County—ss.

ELIZABETH P. SHETZLINE,
HENRY P. BROOKS, JR.,
23d & Penrose Ave.,
JOHN T. BROOKS, JR.,
1634 Porter St.,
ALBERT BROOKS,
Richmond St. & Erie,
Residuary Legatees.

Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, named in the above application, being duly sworn according to law, depose and say that the matter and things set forth in the within Petition are true to the best of their knowledge and belief.

ELIZABETH P. SHETZLINE,
HENRY P. BROOKS, JR.,
JOHN T. BROOKS, JR.,
ALBERT BROOKS.

Sworn and subscribed before me, at Philadelphia, December 8, A. D. 1921.

WM. J. HAMILTON,
Deputy Register.

Know All Men By These Presents, That we, Elizabeth P. Shetzline, 2027 S. Broad St.; Henry P. Brooks, Jr., 23d and Penrose Ave.; John T. Brooks, Jr., 1634 Porter St., and Albert Brooks, Richmond and Erie Ave., and Indemnity Insurance Company of North America, are held and firmly bound unto the Commonwealth of Pennsylvania, in the sum of one hundred forty thousand dollars, to be paid to the said Commonwealth: To which payment well and truly to be made, we bind ourselves, jointly and severally, for and in the whole, our heirs, executors and administrators, and each and every of them, firmly by these presents.

Sealed with our seals. Dated the 14th day of December, in the year of our Lord one thousand nine hundred and twenty-one (1921).

The condition of this Obligation is, That if the above bounden Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, Administrators de bonis non cum testamento annexo of all and singular the Goods, Chattels and Credits of Thomas Brooks, deceased, do immediately publish for creditors, &c., and make, or cause to be made, a true and perfect inventory and inventories according to law, of all and singular the Goods, Chattels and Credits of the said deceased, which shall have come, or shall

come, to the hands, possession or knowledge of the said Administrators, as aforesaid, or unto the hands or possession of any other person or persons for them and the same so made do exhibit, or cause to be exhibited, in the Register's Office, in the County of Philadelphia, within thirty days from the date hereof, and the same Goods, Chattels and Credits, and all other the Goods, Chattels and Credits of the said deceased at the time of his death, which at any time after shall come to the hands or possession of said Administrators as aforesaid, or unto the hand or possession of any other person or persons for them, do well and truly administer according to law. And further do make or cause to be made, a just and true account of their said administration, at the expiration of six months of the date hereof, or when thereunto legally required. And all the rest and residue of the said Goods, Chattels and Credits, together with the proceeds of any sales of real estate the said Administrators may make under the will of decedent, which shall be found remaining upon said Administrators' account (the same being first examined and allowed by the Orphans' Court of the City and County of Philadelphia), shall deliver and pay unto such person or persons, respectively, as the said Orphans' Court, by their decree and sentence pursuant to the true intent and meaning of the last Will and Testament of the said deceased, and the law now in force in this Commonwealth, shall limit and appoint, and shall well and truly comply with the laws of this Commonwealth relating to Collateral Inheritances. And if it shall hereafter appear that any later Will and Testament was made by the said deceased, and the same shall be proved according to law, if the said

Administrators as aforesaid, being thereunto required, do surrender the said Letters of Administration in the Register's Office aforesaid, then this obligation is to be void—otherwise to be and remain in full force.

ELIZABETH P. SHETZLINE, [Seal]
HENRY P. BROOKS, JR., [Seal]
JOHN T. BROOKS, JR., [Seal]
ALBERT BROOKS, [Seal]

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

WILLIAM G. MILLER,
Attorney-in-fact. [Seal]

LEO H. CARPENTER,
Attorney-in-fact.

Signed, sealed and delivered in the presence of

WILLIAM J. HAMILTON,
T. FERNLEY BROOKS,
S. T. HOLDER.

Register's Office,
City and County of Philadelphia, } ss.

December 14, A. D. 1921. Then personally came the within named Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, and on their solemn oath did de-

pose, declare and say, That the within named decedent died on the 31st day of January, A. D. 1906, at 1:35 o'clock A. M., and that they will as Administrators aforesaid well and truly administer the said Estate agreeably to the true intent and meaning of the last Will and Testament of the said deceased in the law now in force in this Commonwealth. That they will immediately publish for creditors once a week, for six successive weeks, and render unto the Register's Office, within thirty days of this date, a just and true inventory and appraisement of the personal estate of said deceased, and additional inventories when necessary. Also a just and true account, calculation and reckoning of their said administration in one year from this date, or when thereunto legally required. That they will well and truly comply with the provisions of law relating to Collateral Inheritance. And also that they are the nominees of all parties in interest.

And also that the Whole Estate he died possessed of unadministered does not in value exceed the sum of one hundred forty-four thousand dollars to the best of their knowledge and belief.

ELIZABETH P. SHETZLINE,
HENRY P. BROOKS, JR.,
JOHN T. BROOKS, JR.,
ALBERT BROOKS.

Sworn and subscribed before me the day and year aforesaid, and letters de bonis non granted unto them.

WM. J. HAMILTON,
Deputy Register.

Commonwealth of Pennsylvania,
City and County of Philadelphia, } ss.:

Register's Office, Oct. 5, 1925:

I, William F. Campbell, Register of Wills and ex-officio Clerk of the Orphans' Court for the City and County of Philadelphia, in the Commonwealth of Pennsylvania, do hereby certify the foregoing to be a full and complete copy of Petition in the Estate of Thomas Brooks, deceased, for Letters of Administration **de bonis non cum testamento annexo,** were granted unto Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks, on the 14th day of December, A. D. 1921. Also copy of Bond as the same remains on file and of record in this office.

In Testimony Whereof, I have hereunto set my hand and official seal at Philadelphia the date above.

[L. S.] WM. F. CAMPBELL,
Register of Wills and Ex-officio Clerk of the Orphans' Court.

State of Pennsylvania,
Philadelphia County, } ss.:

I, Joseph F. Lamorelle, President Judge of the Orphans' Court of Philadelphia County, Do Certify, that the foregoing Certificate and Attestation, made by William F. Campbell, Esq., Register of Wills and ex-officio Clerk of said Orphans'

Court, whose name is thereto subscribed and seal of his office affixed, are in due form and made by the proper officer.

In Testimony Whereof, I have hereunto set my hand this 5th day of October, in the year of our Lord one thousand nine hundred and twenty-five (1925).

LAMORELLE [L. S.]
President Judge.

State of Pennsylvania, }
Philadelphia County, } ss.:

I, William F. Campbell, Esq., Register of Wills and ex-officio Clerk of the Orphans' Court of Philadelphia County, Do Certify, That the Honorable Joseph F. Lamorelle, by whom the foregoing Attestation was made, and who has thereunto subscribed his name, was, at the time of making thereof, and still is President Judge of the Orphans' Court of Philadelphia County, duly commissioned and sworn; to all whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, this 5th day of October, in the year of our Lord one thousand nine hundred and twenty-five (1925).

[L. S.] WM. F. CAMPBELL,
Register of Wills and Ex-officio Clerk of the Orphans' Court.

Commonwealth of Pennsylvania, }
City and County of Philadelphia, } ss.:

LETTERS TESTAMENTARY.

By the tenor of these presents, I, Joseph H. Klemmer, Register for the Probate of Wills and Granting Letters of
[Seal] Administration in and for the City and County of Philadelphia, in the Commonwealth of Pennsylvania.

Do Make Known to All Men That on the Tenth day of February, A. D. 1906, at Philadelphia, before me, was proved and approved the last Will and Testament of Thomas Brooks deceased (a true copy whereof is to these presents annexed), having whilst he lived and at the time of his death, divers Goods, Chattels, Rights and Credits which were of the said deceased; and also the auditing the accounts, calculations and reckonings of the said administration and absolute care of the same, to me are manifestly known to belong; and that administration of all and singular the Goods, Chattels, Right and Credits of said deceased any way concerning his last Will and Testament, is committed to John T. Brooks, Henry P. Brooks and Thomas Brooks, Jr., . . . Executors in the said Testament named; they having first been duly sworn well and truly to administer the Goods, Chattels and Credits of the deceased, and make a true and perfect inventory thereof and exhibit the same into the Register's Office of Philadelphia, on or before the 10" day of March next, and to render a just and true account, calculation and reckoning of the said administration, on or before the 10" day

of February one thousand nine hundred and seven (1907) or when thereunto legally required; and also diligently and faithfully regard and well and truly comply with the provisions of the Act relating to Collateral Inheritance.

In Testimony Whereof, I have hereunto set my hand and seal of Office, at Philadelphia, this 10" day of February, in the year of our Lord one thousand nine hundred and six.

The said testator died on the 31" day of January, 1906, at 6:35 o'clock A. M. as per affidavit.

Fees for		Letters Testamentary,	$25.50
"	"	Filing Renunciation	.....
"	"	Certificates	2.00
		Paid	$27.50

CHAS. IRWIN,
Deputy Register.

I, Thomas Brooks of the City of Philadelphia Market Gardner being of sound and disposing mind memory and understanding do hereby make and publish this as and for my last will and testament hereby revoking any and all wills by me at any time heretofore made.

And first, I direct that all my just debts and funeral expenses be paid by my Executors hereinafter named as soon after my decease as conveniently may be.

I give devise and bequeath inperpecuity to the Trustees of the Evangical Trinity Church now worshipping at 18" and Wolf Street Philadelphia the sum of Five Hundred ($500.00) in trust nevertheless to apply the income thereof to the care repair and maintenance of my burial lot in the cemetery of said church wherein my beloved

wife Pheobe Ann Brooks and our four daughters now repose and wherein I direct that my own body shall be interred after my demise.

All the rest residue and remainder of my estate wether real personal or mixed whatsoever and wheresover the same may be found at or after my decease I give devise and bequeath the same and every part thereof unto my beloved and affectionate children to wit John T. Brooks, Harry P. Brooks, Elizabeth P. Shetzline (nee Brooks) and now the wife of Harry Shetzline) William D. Brooks Jr. and George W. Brooks in full and equal shares or portions share and share alike and their heirs absolutely and in fee simple.

I hereby authorize empower and direct my executor hereinafter named to make any and all necessary or in their judgment proper sale transfer trade exchange or conveyance of any part parts parcels portion, portions or all of my said estate wether real personal or mixed and to make execute and deliver to the purchaser or purchasers thereof any and all necessary deeds indentures conveyances receipts or acquittances therefor without any obligation on the part of said purchaser or purchasers to look to the application of the purchase money.

Lastly, I nominate constitute and appoint my beloved Sons John T. Brooks, Harry P. Brooks, and Thomas Brooks Jr. executors of this my last Will and testament and direct that no security shall be required of them.

In Witness Whereof I have hereunto set my hand and seal to this my last will and testament written on two sides of one sheet of paper this Seventeenth day of August Anno Domini One

thousand nine hundred and two (1902).

THOMAS BROOKS [L. S.]

Signed sealed published and declared by Thomas Brooks the above named Testator as and for his last will and testament in our presence who at his request have hereunto subscribed our names as witnesses thereto and in the presence of each other.

EUGENE RAYMOND 1427 So. Broad St.
HENRY SHETZLINE 2227 Sth Broad St.

City and County of Philadelphia, ss.
Register's Office, February 10" 1906.

Then personally appeared Eugene Raymond and Henry Shetzline the subscribing witnesses to the foregoing last will (dated August 17 1902) of Thomas Brooks deceased, and on their solemn oaths did say that they were present and did see and hear Thomas Brooks deceased, the Testator therein named, sign, seal, publish and declare the same as and for his last Will and testament and that at the doing thereof he was of sound disposing mind, memory and understanding, to the best of their knowledge and belief. And further, that the said Testator so signed the same in their presence, and at his request they the said deponents in his presence and in the presence of each other subscribed their own proper signatures and handwriting as witnesses thereto, all being present at the same time at the execution of said will.

EUGENE RAYMOND
HENRY P. SHETZLINE.

Sworn and subscribed before me, the date above.

CHAS. IRWIN,
Deputy Register.

City and County of Philadelphia, ss.

Register's Office, Feb. 10, 1906.

We do swear that as the Executors of the foregoing last Will and Testament of Thomas Brooks deceased, we will well and truly administer the goods and chattels, rights and credits of said deceased, according to law and that..... will diligently and faithfully regard and well and truly comply with the provisions of the law relating to Collateral Inheritances. That the said Testator died on the 31" day of January A. D. 1906 at 6:35 o'clock A. M.

JOHN T. BROOKS
18 and Oregon Ave.
HENRY P. BROOKS
18 and Oregon Ave.
THOMAS BROOKS, JR.
Richard St. and Erie Ave.

Sworn and subscribed before me, the date above, and letters testamentary granted unto.

CHAS. IRWIN,
Deputy Register.

State of Pennsylvania, }
City and County of Philadelphia, } ss.:

Be it remembered That, on the 10" day of February A. D. 1909, before me, Joseph H. Klemmer,

Register of Wills for the City and County aforesaid, after due proof and hearing had, according to the Laws of the said State, It is Ordered and Decreed, that the last Will and Testament (dated August 17" 1902) of Thomas Brooks late of said City and County, deceased, be duly admitted to probate and filed of record in the office of the Register of Wills of the said City and County.

In Testimony Whereof, I have hereunto set my hand, the day and year above written.

JOS. H. KLEMMER,
Register.

Commonwealth of Pennsylvania, }
City and County of Philadelphia, } ss.:

Register's Office, December 23, 1909.

I, Charles Irwin, Register of Wills and ex-officio Clerk of the Orphans' Court for the City and County of Philadelphia, in the Commonwealth of Pennsylvania, do hereby certify the foregoing to be a full and complete copy of the last Will and Testament of Thomas Brooks deceased together with the probate thereof upon which letters testamentary were granted unto John T. Brooks, Henry P. Brooks and Thomas Brooks, Jr., on the 10th day of February 1906. Also copy of Letters Testamentary as the same remains on file in this office.

In Testamony Whereof, I have hereunto

set my hand and official seal at Philadelphia the date above.

CHAS. IRWIN,
[L. S.] Register of Wills and Ex-Officio Clerk of the Orphans' Court.

State of Pennsylvania, } ss.:
Philadelphia County, }

I. Clement B. Penrose, Acting President Judge of the Orphans' Court of Philadelphia County, Do Certify, that the foregoing Certificate and Attestation, made by Charles Irwin, Esq., Register of Wills and ex-officio Clerk of said Orphans' Court, whose name is thereto subscribed and seal of his office affixed, are in due form and made by the proper officer.

In Testimony Whereof, I have hereunto set my hand, this 23" day of December, in the year of our Lord one thousand nine hundred and nine (1909).

C. B. PENROSE, [L. S.]
Acting President Judge.

State of Pennsylvania, } ss.:
Philadelphia County, }

I, Charles Irwin, Esq., Register of Wills and ex-officio Clerk of the Orphans' Court of Philadelphia County, Do Certify, that the Honorable Clement B. Penrose, by whom the foregoing At-

testation was made, and who has thereunto subscribed his name, was, at the time of making thereof, and still is, Acting President Judge of the Orphans' Court of Philadelphia County, duly commissioned and sworn; to all whose acts, as such, full faith and credit, are and ought to be given, as well in Courts of Judicature as elsewhere.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, this 23" day of December, in the year of our Lord one thousand nine hundred and nine (1909).

CHAS. IRWIN,
Register of Wills and Ex-Officio
Clerk of the Orphans' Court.

[L. S.]

NEW JERSEY COURT OF ERRORS AND APPEALS

In the Matter of the Estate of THOMAS BROOKS, deceased.	On Appeal from Decree of the Prerogative Court

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BRIEF FOR APPELLANT JESSE P. EVERNHAM

I

PREFATORY STATEMENT

This is an appeal from a decree entered in the Prerogative Court on May 22, 1929 (Case 17) reversing an Order Confirming Sale of lands by Administrators c. t. a. made by the Orphans' Court of Ocean County on February 15, 1926 (Case 54.).

Thomas P. Brooks died a resident of Phil-

adelphia January 31, 1906, leaving a last will and testament wherein he appointed three executors; the Will was duly probated in Philadelphia and all of the executors qualified; thereafter each of the executors named died, the last of them on July 30, 1921 (Case 22). On December 14, 1921, the Register of Wills of Philadelphia County granted Letters of Administration c. t. a. upon the estate of Thomas Brooks to Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr. and Albert Brooks (Case 23 & 203).

Thomas Brooks died seized of a certain 99 acre farm property near Island Heights in Ocean County, N. J. (the subject matter of this litigation) and by his last will and testament gave to his executors full power and authority to sell and dispose of any and all of his real estate (Case 23 & 206). Thereafter a duly exemplified copy of the last will of Thomas Brooks together with the Letters of Administration c. t. a. as aforesaid were filed and recorded in the office of the Surrogate of Ocean County, New Jersey (Case 23).

II

THE PROOFS

Under date of July 7, 1925, the aforesaid Administrators c. t. a. of the estate of Thomas Brooks entered into a contract in writing with Jesse P. Evernham of Toms River for the sale of the said farm property to him at a price of $19,000. (Case 186) and he paid them $1900. on account of the purchase price (Case 181, 182). The Administrators still have the $1900, nor have

they offered to return it (Case 182). By the terms of the contract, settlement was to have been made within ninety days and the agreement provided that the $1900. paid on account should be forfeited to the Administrators if Evernham defaulted in performance (Case 186).

Under date of August 24, 1925, T. Fernley Brooks, attorney for the administrators, wrote Evernham saying that the estate had received an offer of $25,000. for the property and inviting Evernham to equal or better that offer (Case 183).

Under date of September 17, 1925, the administrators entered into a contract of sale in writing with Fred T. Walters for the sale of the same property to him at a price of $30,000. (Exhibit P-3, Case 77). This contract with Walters expressly provided that:

> "* * * and that this agreement is contingent upon the Court's disapproval of said prior agreements." (Case 79).

By a petition dated September 28, 1925, (Case 22, 23) the administrators petitioned the Orphans' Court of Ocean County for an Order disapproving the sale to Evernham and approving the sale to Walters (Case 22, 33). Notice of the filing of said petition and of the application to the Orphans' Court was thereupon served upon Evernham (Case 38) who filed in the Orphans' Court an Answer to the Petition and a Cross-Petition asking approval of the contract of sale made with him (Case 39, 40).

Thereafter a hearing was held in the Orphans'

Court and the Judge thereof filed an opinion approving the sale to Evernham and disapproving the sale to Walters (Case 43-53) and by an Order of the Orphans' Court made February 15, 1926, (Case 54-60) the sale to Evernham was formally approved and confirmed (Case 54). From that order both the administrators aforesaid and Fred T. Walters appealed to the Prerogative Court. On May 22, 1929, there was entered in the Prerogative Court a Final Decree (Case 17), advised by Vice Ordinary Buchanan, reversing the Order of the Ocean County Orphans' Court; approving the sale to Walters; and by the terms of which a counsel fee of $500. was allowed to the appellant Walters and to be paid by Evernham, the respondent in that Court, as part of the taxed costs. From that decree this appeal has been taken.

The farm property described in the contract with Evernham (Case 186) had been vacant at various times and the buildings were in bad condition (Case 85 and 169). There had been "for sale" signs erected on the property for a number of years (Case 85, 123 & 170). Various efforts had been made to sell the property during the several years preceding 1925 and the property had been in the hands of a number of agents during that time (Case 85). Two attempts had been made to sell the property at public auction sale, one in the year 1923 and the other on April 15, 1925, when the property was cried for sale at auction in the salesrooms of Samuel T. Freeman & Company of Philadelphia, Pa. (Case 86 and Exhibit R-2). At the auction sale on April 15, 1925, the terms of sale as set forth in the auctioneer's advertisement (Exhibit R-2) were fifty

per cent. of the purchase price down with the balance payable in three years from that date with interest at six per cent. At that sale the property was knocked down to one Lush at a price of $15,000 (Case 88 and 111, 112). That sale, however, was not completed (Case 88). The sale was attended by all of the administrators and by the attorney for the estate (Case 88, 89).

Prior to the auction sale in Philadelphia in April 1925, one Kiefaber, representing the purchaser Evernham, negotiated with representatives of the estate for the purchase of the property (Case 111). Finally, after considerable negotiation, and in the early part of June 1925, Evernham, through Kiefaber, made an offer of $19,000. and the offer was approved by the Administrators (Case 115). It took about two weeks after that to get the agreement signed by the various people in interest (Case 116), so that the contract was not finally signed by all parties until July 7, 1925 (Case 186). Prior to and during the negotiations for the sale to Evernham, through Kiefaber, T. Fernley Brooks, representing the administrators, had been negotiating for the sale of the property to a number of other people and had had a good deal of correspondence respecting it (Case 91). Notwithstanding the making of the contract to Evernham on July 7, 1925, T. Fernley Brooks, representing the administrators, continued in endeavoring to negotiate sales of the same property to other people (Case 99—Exhibit P-2 on page 72). On September 1, 1925, he cashed a check for $1000. as a deposit on account of the sale of the property at $25,000 to Stahl and Hill (Case 72 and 99) and later on, under date of September 17th, he nego-

tiated a sale of the property to the respondent Walters at a price of $30,000 (Case 100, and see Exhibit P-3 on page 77).

The administrators looked to T. Fernley Brooks as their attorney to bring the necessary proceedings in court to have the sale approved (Case 100, 101). Nevertheless, the administrators never filed any petition in court asking for the approval of the contract of sale to Evernham, although they continued to hold his $1900. (Case 101).

At the hearing in this cause before the Ocean County Orphans' Court, the contest primarily went to the question of the fair market value of the farm in question on the date of the contract of sale to Evernham July 7, 1925). Neither the petitioning administrators nor the respondent Walters offered any evidence whatever as to the fair market value of the property at that date, as an examination of the record will disclose. There were annexed to the petition filed by the administrators in Court ex parte affidavits, one by Stanwood and the other by Payne, executed September 29, 1925, purporting to fix the fair market value of the property at $30,000., but those affidavits did not disclose as of what date such value was fixed; presumably they meant at the date of the affidavit. Neither of these affiants, however, appeared in court. In behalf of the present appellant, Evernham, evidence as to the fair market value of the property on the date of the contract; namely, July 7, 1925, and of the subsequent land boom and increase in values, was submitted to the court as follows:

1. Arthur B. Kiefaber, real estate dealer,

Merchantville, Philadelphia and Island Heights (Case 111) value $19,000. (Case 128).

2. Oris M. Driscoll, real estate dealer in Ocean County and Trenton (Case 135), value not more than $20,000 (Case 141 and 142).

3. Anthony M. Then, President Ocean County Title Company (Case 150), value $19,000. (Case 152).

4. George H. Holman, former Sheriff and County Clerk of the County of Ocean, former real estate broker (Case 153), member Real Estate Appraisement Committee of Ocean County Trust Company, and a Director of the Trust Company since 1907 (Case 156) value $21,000. (Case 159).

5. A. Carl Haag, real estate business Seaside Park (Case 160) value $20,000., or "not exceeding $20,000." (Case 161, 162).

6. Martin Schwarz, Jr., Secretary Dover Mutual Loan and Building Association, real estate broker Toms River (Case 174), value $190.00 per acre or $19,000. (Case 179, 180).

Neither the petitioning administrators nor Walters submitted any testimony as to the value of the property on the day of the hearing in the Orphans' Court; namely, December 8th, except that T. Fernley Brooks, attorney for the administrators, testified that since the signing of the contract with Walters he had had several inquiries about the property and one man had offered more than $30,000. (Case 100). Witnesses on behalf of Evernham testified the value to be as of

the date of hearing, December 8, 1925, as follows:

Anthony M. Then, $35,000 (Case 153).

George H. Holman, $40,000. (Case 159).

Almost immediately after the sale to Evernham on July 7, 1925 and before the Stahl offer of $25,000 on August 18th and prior to the Walters offer of $30,000 on September 1st, a great speculative boom occurred in real estate prices on property located in the neighborhood of the Brooks estate farm (Driscoll, Case 142—Then, Case 152—Holman, Case 159 and 160—Haag, Case 163-165 incl.). The witnesses fixed the beginning of this boom (as nearly as such a thing can be fixed) as follows:

Driscoll, after July 6th (Case 142).

Then, around the middle of July (Case 152).

Holman, Summer of 1925 (Case 159, 160).

Haag says the increase started around the 1st or 7th of August (Case 164).

In the matter now before the Court, the estate of the testator Thomas Brooks is not insolvent. The petitioning administrators had in their hands as of the date of the petition (September 28, 1925, Case 33) about the sum of $65,000 (Case 32) which is approximately nineteen years after the death of the testator, and there is no allegation in the petition (Case 22-23 inclusive) of any insolvency or necessity of selling the property to pay debts.

ARGUMENT

Point 1

By the force of Sections 1 and 2 P. L. 1888, page 395 (2 Compiled Statutes, 1910, pp. 2262 et seq., sections 13 and 14) administrators c. t. a. are given power to sell and convey real estate where a power of sale was originally contained in the will, subject however, to confirmation by the Orphans' Court of the County in which the lands lie. The statute gives no such power to the Prerogative Court and the matter came before the Prerogative Court on appeal and not by virtue of any original jurisdiction in that court. IN RE. DEVINE, 62 N. J. Equity, 703 at 708.

Section 2 of the Act aforesaid imposes no conditions upon which a sale may be made; requires no authority or order of court to negotiate a sale but merely requires the approval of the court to validate the sale after the same has been negotiated and arranged by the administrator. Accordingly, it would see that the court is given wide powers of discretion in confirming or withholding confirmation of a sale in any particular case. While the proceeding under Section 85 of the Orphans' Court Act for sale of lands by administrators or by executors where there is no power of sale in the will is an entirely different proceeding, exercised under entirely different circumstances and for different purposes, yet the language of Section 85 is very nearly the same as Section 2 of the Act of 1888 in that the sale merely requires the approval of the court. In construing Section 85, the Court of Errors and Appeals

in RYAN v. WILSON, 64 N. J. Equity, p. 797, at p. 805, said:—

> "Here the power of confirmation or rejection is untrammeled by the proviso which was supposed to narrow the scope of inquiry in the cases cited, and is committed without limitation to judicial discretion."

Hence, it may be said that:—

(a) Whether a particular sale should be confirmed or disapproved by the court is a matter resting in the sound discretion of the Orphans' Court; and

(b) The Prerogative Court having appellate and not original jurisdiction should not disturb the finding of the Orphans' Court, unless it can be said that there has been an abuse of the discretion by the statute vested in the latter court.

POINT 2

The record in this case, we submit, discloses that Evernham agreed to pay a fair price for the property at the time the sale to him was negotiated and the contract signed. The appellants offered no testimony whatever upon that subject. the question of the fair value of the premises on the date of the contract to Evernham was a matter squarely in issue before the Orphans' Court. Paragraph 4 of the cross-petition (Case 40) alleges that $19,000 was the full value of the premises on the date in question. Paragraph 3 of the answer to the cross-petition (Case 42) denies that al-

legation. Yet neither the petitioning administrators nor the appellant Walters offered any testimony whatever in contravention of the allegation in the cross-petition. They did not even call to the stand Stanwood and Payne, whose affidavits of title were annexed to the petition (Case 35-36).

On the other hand, on behalf of cross-petitioner Evernham, six competent witnesses were produced to testify to the value of the property. All of them engaged to a greater or less extent in real estate operations; one of them President of a Title Company; one of them a director and former president of the Ocean County Trust Company; and another Secretary of a large Building and Loan Association. One of the witnesses (Driscoll) testified to a value not exceeding $20,000; another, Holman, testified to a value of $21,000; another, Haag, testified to a value "not exceeding $20,000;" and three of them; namely, Kiefaber, Then and Schwarz testified to a value of $19,000., the same price named in the contract of sale. And this valuation of $19,000 was supported by the sale on June 28, 1925, of a property within three-quarters of a mile of the Brooks property, located in the same manner between the highway and the River, at a valuation of $25,000 for 132 acres—or at a price of slightly less than $190.00 per acre (Case 151).

This evidence, we submit, uncontradicted as it is, fairly establishes that an adequate price was named in the contract with Evernham at the time the contract was made. True, the witnesses did not all testify to the exact figure named in the contract. It were a suspicious circumstance

if they had. That the testimony was well founded to the effect that a fair value was $19,000. will be disclosed by a reading of the evidence and a comparison of other sales in the immediate vicinity and at approximately the same time of similar property, which were testified to by the foregoing witnesses (Case 140 and 141; 151; 176 and 177). The slight variation in the testimony from the contract price of $19,000. is not sufficient, we submit, to even indicate that $19,000. was not a fair price. On the contrary, we think it clearly and satisfactorily appears that the contract price of $19,000. to Evernham was the fair value of the property at the time that contract was negotiated and entered into.

POINT 3

In re: DEVINE, decided by Chancellor Magie in 1901 and reported 62 N. J. Eq. p. 703, is a case, we submit, entirely in point with the case now before the Court. In that case, as in this, sale was made by an administrator c. t. a. d. b. n. under a power of sale contained in testator's will. At pages 708, 709, the Court said:

> "They assert that the sale was below the fair market value of the land on August 5th, 1899, when the contract was made.
>
> Upon this contention, evidence of market value after that date was not admissable, except so far as it tended to show the value at that date. Increase in value afterwards should have no effect in inducing disapproval of the contract of sale, if it was one proper to be made at the time."

In the case now before the court, the evidence discloses that a great boom in real estate values in the neighborhood of the location of the property now in dispute took place shortly after the contract of sale to Evernham was made (Case, 142; 152; 159-160; 164).

Indeed, on the day of the hearing, on December 8, 1925, the evidence showed the property to have an even greater value than the $30,000, named in the Walters contract. T. Fernley Brooks, attorney for the administrators, testified that since the signing of the Walters contract, he had offers higher than the $30,000, therein named. The witness Then testified to a value of $35,000 for the land on the date of the hearing (Case 153) and the witness Holman to a value of $40,000 as of that date (Case 159).

But nothing, we submit, under the rule in the Devine case, that took place after the date of the contract should influence the court or even be considered by the court in refusing to confirm a sale at a fair price when the contract was made. The subscriber has been able to find no case in this state in contradiction of the rule laid down by Chancellor Magie in the Devine case. The cases relied upon by counsel for respondent Walters in the Prerogative Court do not contradict that principle. RYAN v WILSON, 64 N. J. Eq. 797, was a sale under Section 85 of the Orphans' Court Act and not under Sections 1 and 2 of the Act of 1888. In that case, the Court refused to confirm a sale at $30,300. where the property had a value, according to testimony of appraisers, in excess of $150,000 (p. 806). The sale was at a grossly inadequate price and the court also held

that the sale was not properly conducted. At no place in that opinion will it appear that the property increased in value between the date of the offer and the date the matter came before the court for confirmation. There is nothing in RYAN v WILSON contradictory of nor inconsistent with the opinion in re: DEVINE. CAMPBELL v HOUGH, 73 N. J. Eq. 601, was a case before the court on suit for specific performance and not for the confirmation of sale by an administrator. The court refused a decree against the administrator because it failed to appear that the administrator's sale had been confirmed by the Orphans' Court. In that case, the administrator had been ordered to sell to pay creditors under Section 85 of the Orphans' Court Act. The estate was insolvent. The Chancellor expressed a doubt whether the sale would be confirmed by the Orphans' Court because another offer had been received $600. in excess of the offer made by complainant in the specific performance suit. While the court's remark in that case was dictum, yet there is nothing inconsistent in that case with the DEVINE case. It did not appear in that case that there had been any increase or change in value between the date of the sale and the time the matter was presented to the court for confirmation. Of course, if two offers were made at the same time, one $600. in excess of the other, the Court would no doubt compel the administrator to accept the higher of the two offers.

In NEW JERSEY REFRIGERATING COMPANY, 96 N. J. Eq. 431, there was there involved no question of change in value between the date of the offer and the time when the matter

came before the Court. That was a receiver's sale made by order of the Court of Chancery; the Receiver was acting as agent for the Court; he negotiated a sale at $550,000. gross under the terms of which the purchaser would have paid $191,750 cash for the equity, as against a later offer made in open court before confirmation at a price that would have shown $293,000 cash for the equity in the property, a difference of over $100,000 or more than fifty-two per cent. increase. The court refused to confirm the sale at the lower price, expressly holding that the first offer was grossly inadequate (p. 436) and also because the first bidder had not been diligent in applying for confirmation of the sale to him. Nowhere did it appear, however, that there had been any change in value after the original offer.

In PORCH v AGNEW, 66 N. J. Eq. 232, decided by Vice Chancellor Grey in 1904 and subsequently affirmed by the Court of Errors and Appeals, a Receiver of an insolvent corporation, under an order of the court, sold a large hotel property in Atlantic City at the price of $33,000. for the equity, whereas it satisfactorily appeared that the fair value of the property at that time was from $60,000 to $100,000. While recognizing the rule that inadequacy of price alone is an insufficient reason for refusing to confirm, yet the court held that the property was worth three or four times the amount of the bid; that this particular sale was not like a judicial sale after judgment entered, but was made by order of the court; that large lien holders would be embarrassed and might suffer if the sale at $33,000. were confirmed, and that:

> "it would be unconscionable to confirm the sale."

In other words, the price was grossly inadequate at the time the offer was made and there appears no question in the case as to a change in value after the bid was in.

In all of the foregoing cases (excepting the Devine case), it appears that the property sold was fairly worth at the time of sale, or rather at the time of the contract of sale, greatly in excess of the amount offered, and most of them were set aside or confirmation refused because of gross inadequacy in price. In none of them does it appear that the price named was fair at the date of the contract of sale or that subsequent to such contract prices greatly advanced, as in the case now before the court. None of these cases, as we read them, are in opposition to the opinion of Chancellor Magie in the Devine case to the effect that the question to be determined in confirming or refusing to confirm a sale is the fair value of the property at the time of the contract and not at some other or different time.

The courts of New Jersey have often ruled that a judicial sale fairly conducted, without fraud, and for the best price obtainable at the time, will not be disturbed because of a subsequent offer of a larger sum. Hurley v Pottash, 93 N. J. Eq. 167; Hoffman v Godfrey, 79 N. J. Eq. 617; Morrisse v Inglis, 46 N. J. Eq. 306, Henderson v Henderson, 97 N. J. Eq. 161.

POINT 4

There is a marked distinction between the sale of land by an administrator under Section 85 of

the Orphans' Court Act, which was involved in the cases of CAMPBELL v HOUGH and RYAN v WILSON, supra, and the sale and conveyance of land by an administrator c. t. a. under Section 1 and 2 of the Act of 1888, under which the present case comes.

Under the Orphans' Court Act, title to the real estate is vested in the heirs-at-law or in the devisees with no power of sale to the executors. Under the Act of 1888, title to the real estate for the purposes of sale is vested in the administrator c. t. a. Under the Act of 1888, the administrator himself negotiates the sale, makes the bargain and the agreement and only needs the confirming order of the Court to make the sale effectual. Under the Orphans' Court Act (Sec. 85), the administrator has no power to make a bargain. Upon showing of insolvency, he may obtain an order to sell and later the court directs him to sell. It is the court acting through the administrator and the latter has no power of his own. And even the power of the court to order sales is limited to selling sufficient only to satisfy the creditors. Under these circumstances, it may well be said that the Court should scrutinize much more closely and guard more jealously the rights of the heirs and devisees, whom it is divesting of title, and the rights of creditors for whom it seeks to raise sufficient money to satisfy their claims. There are no such considerations involved in the exercise of a power of sale by an administrator c. t. a. A sale by an administrator c. t. a. under the Act of 1888 does not divest heirs or devisees of title to land nor is the power based upon the necessity of satisfying creditors of an insolvent estate.

POINT 5

In the Prerogative Court, the present Respondent Walters made a point of the requirement of the statute that the application for confirmation should be made by the administrators and that there is no provision in the statute for an application being made by any other person for confirmation of sale. The administrators, however, in paragraph 14 of their petition (Case 32) state that:

> "Petitioners therefore submit the sale to Jesse P. Evernham and the sale to Walters as above recited to the Court."

Evernham filed an answer and cross-petition in which he expressly asked for the confirmation of the sale to him. If there be any merit to the contention that only the administrators can submit the sale, under the statute (which we doubt), then certainly the statute was complied with when the administrators in their petition submitted to the court for its action not only the sale to Walters but also the sale to Evernham, so that the Orphans' Court did fairly obtain jurisdiction under the petition and answer.

POINT 6

Before the Prerogative Court, the present respondent Walters contended that the contract entered into with Evernham amounted in law to nothing more than an offer on the part of Evernham and that it had no efficacy before confirmation. He cited as authority for that proposition RYAN v WILSON, 64 N. J. Eq. 797, where the court said:

> "By force of the statute the 'sale' reported to the court is not a perfect contract made by competent parties, but is a bargain dependent upon the approval of the court to render it 'valid and effectual in law.'" (p. 805)

In the first place, it is to be noted that RYAN v WILSON was a case under Section 85 of the Orphans' Court Act, where the court itself ordered the sale; the administrator was merely acting as agent of the court in negotiating the sale; and the statute required him to report back his negotiations to the court for confirmation. We submit, as heretofore argued, that that is quite a different situation than exists under the Act of 1888 where an administrator c. t. a. by virtue of a will and the statute has full power to initiate and negotiate a sale, subject only to the condition subsequent of confirmation by the court. In the former case, the administrator is merely acting as agent of the Court, while in the latter case he is acting by virtue of the power in him vested, subject only to guidance and approval by the court.

If the appellant's contention in this respect be correct to the effect that the contract merely amounts to an offer before confirmation, then Evernham at any time prior to actual confirmation could have withdrawn the offer because the same had not been accepted. And that, notwithstanding the provision in the contract itself that upon failure on his part to carry out its terms, he should forfeit the $1900. deposit. That, we submit, is not the law under the Act of 1888. On the contrary, we contend that under the latter Act the administrators on the one part and Ev-

ernham on the other had full power and authority to make binding contracts, one with the other, subject only to the condition subsequent that the court would approve the contract as being fair and reasonable.

POINT 7

Before the Prerogative Court, the present Respondent Walters made a point that after the decision of Vice Chancellor Byrd in GIBERSON v GIBERSON, 43 N. J. Eq. 116, the Legislature deemed it necessary to intervene by the passage of the Act of 1888, page 395, and provided in Section 2 that the court should have control over such sales by administrators c. t. a. The argument is then advanced in appellant's brief that it would be a dangerous thing to permit sales by administrators c. t. a. without control by the court. But we submit that at that time and at this time, independent of that statute, the Court of Chancery has full power and adequate authority to protect estates from any fraudulent conduct on the part of either executors or administrators c. t. a. and that such power, independent of the statute, would be exercised where a sale were made or attempted to be made by either an executor or administrator c. t. a. at a price less than the fair market value of the property. If, as the appelants contend, the intent of the Legislature by the passage of the Act of 1888 was to "add something to the control which the courts had already determined they possessed" then, we submit that the Legislature clearly evidenced a departure from that intent when it enacted Chapter 2, P. L. 1916 and by statute con-

firmed and approved all sales and conveyances theretofore made by administrators c. t. a. etc. without the same having been approved by the court. If the intent of the Legislature is to be gained from a reading of the statute, then certainly the latter statute would not indicate that the minds of our legislators were greatly exercised over this dangerous power conferred by the statute upon administrators c. t. a. As said by Vice Chancellor Green in GRIGGS v VEGHTE, 47 N. J. Eq. 179, in speaking of the power of administrators c. t. a. to sell lands under power of sale contained in the will:—

> "If any doubt could have existed as to the power of the complainant to sell the real estate, either at public or private sale, as directed by the will, under the general rule referred to, none can arise since the Act of 1888, P. L. 1888, p. 395."

Or, as said by Vice Chancellor Backes in CRANSTOUN v WESTENDORF, 91 N. J. Eq. p. 34, the statute, (P. L. 1888) transmits to an administrator c. t. a. the power of sale vested in an executor under the terms of a will.

POINT 8

We submit that the record in this case fairly establishes that the contract in question between the administrators and Evernham was a bona-fide contract; that there was no fraud, mistake, advantage or other illegality; and that the price of $19,000. in the contract named was the fair price and value of the property at the time of the negotiating and making of the contract. If the

rule in the Devine case be applied, as we respectfully contend it should be, then the action of the Orphans' Court in approving the contract to Evernham should be affirmed. There is nothing in the cases of Ryan v Wilson; Campbell v Hough; Porch v Agnew; or in re: New Jersey Refrigerating Company that is inconsistent with the Devine case or that even indicates or suggests that a contract for the sale of real estate made by an administrator c. t. a., at a price fair at the time of the making of the contract should be disapproved by the court because of subsequent speculative increase in the value of the property. That is what happened in the case now before the court.

The real contention of the respondents would appear to be that the sale to Evernham should be disapproved, not because the price named in the contract was unfair, at the time the contract was made, but because subsequent unforseen events resulted in a considerable increase in the value of the property and that the court is, therefore, bound to disapprove the prior fair contract and approve the latter, merely because more money would be realized from the latter than from the former. But if that be a sound argument, then neither should the court approve the contract of sale to Walters because it fairly appears from the testimony that at the time this matter came before the Orphans' Court in December, 1925, the property was worth more money than Walters had agreed to pay. The attorney for the administrators admitted having received a higher offer and the only witnesses who testified to the then value of the property fixed it at $35,000 to $40,000. But such an argu-

ment is absurd. If because of subsequent increases in value, a contract, fair at the time it was made, is not to be approved, then the court would be following a speculative real estate market in perhaps refusing to confirm not only the first contract of sale, but the second, third, fourth, fifth and sixth, if the boom in the market continued, and in the meantime values might descend as rapidly as they had before ascended and the advantage sought to be gained lost altogether. Such, we submit, is not the policy of the law.

The appellant in good faith entered into a binding contract, met his obligation by paying the $1900.00 and stood ready to complete it. It was a fair bargain. The whole structure of modern business and social relations is based upon the obligations contained in contracts and they are not lightly to be disregarded or ignored by the courts and such is not the policy of the law. Certainly Evernham would have been bound by his contract if, through unforseen causes, the market value of the property suddenly descended. This court would give no consideration to a plea that he be excused from his obligation because while the property was worth $19,000. when he agreed to buy it, values had gone down so that it was not worth nearly that sum. And that being so, if the contract was fair in its origin, as we contend, then he is equally entitled to any advantage that may accrue to him through an advance in market values after the making of the contract. The administrators, after negotiations extending over a considerable period of time, finally entered into the contract of sale in question on July 7, 1925. On September 28th they came into court and attempted to repudiate their prior bargain. They offered no evidence what-

ever to indicate the first bargain was unfair or improper. For the sake of a small gain in dollars, they attempt to altogether ignore and repudiate their prior obligation and now seek the aid of this court to accomplish that end. Surely the court ought to be reluctant to render any decision that would in effect aid in the accomplishment of such an unworthy object.

In the Prerogative Court, only the respondent Walters made an argument or submitted a brief to the court as an examination of the records in that Court will reveal. And, as to Walters, he, we submit, is entitled to no consideration as against the rights of the appellant Evernham. The contract by which he became a party in interest expressly provided (Case 79) that the agreement with him was tentative subject to the disapproval by the court of prior agreements of sale.

POINT 9

The Prerogative Court was without power or jurisdiction to impose upon the appellant (respondent below) a counsel fee of Five Hundred ($500) Dollars, or any other sum, to be included in the taxed costs and paid by appellant to the respondent Walters. In this cause, involving the sale of lands by administrators c. t. a., original jurisdiction is vested in the Orphans' Court. The Prerogative Court has appellate but no original jurisdiction.

> Sections 1 and 2, P. L. 1888, p. 395 (2 Comp. Stats. p. 2262) in re: Devine, 62 N. J. Eq. 703 at 708.

In re: QUEEN, 82 N. J. Eq. 588, Vice-Ordinary Backes, in speaking of the propriety of allowing a counsel fee in the Prerogative Court, said:

> "The proceeding were solely to review the propriety of the dismissing order. The jurisdiction was strictly appellate. The appeal did not concern the funds of the estate. On such review, this court is without authority to impose upon the defeated suitor counsel fees as part of the costs and expenses, unless authorized by statute or the settled practice of the court. There is no statute which permits it. Such practice does not obtain in our Court of Errors and Appeals, nor does it exist here. The costs which the prevailing party, on appeal of this kind, is entitled to, are only those specifically provided for in the fee bill, and are not to be increased or diminished at the discretion of the court. APPERSON vs MUTUAL BENEFIT LIFE INSURANCE COMPANY, 38 N. J. L. 388."

> "It required an act of the Legislature to impower the Court of Chancery to award counsel fees to a successful complainant (P. L. 1902, p. 540), and another to permit that Court to grant such allowance to a successful defendant. (P. L. 1910, p. 427.)"

See also Vol. 1, Kocher's Probate Practice pp. 92-95.

In conclusion, we respectfully contend:

A. The Prerogative Court had no original

but only appellate jurisdiction over this cause.

B. The Prerogative Court was wholly without jurisdiction or power to decree that the appellant pay to the respondent Walters, as part of the taxed costs, the sum of Five Hundred dollars.

C. That on the record from the Orphans' Court of Ocean County, the Prerogative Court should have affirmed the order of the Orphans' Court confirming the sale of lands to the appellant and that the Prerogative Court erred in reversing the order of the Orphans' Court and ordering the confirmation of the sale of the aforesaid lands to the respondent Walters.

For all of the foregoing reasons, we pray that the decree of the Prerogative Court may be reversed and set aside.

Respectfully submitted,

HOWARD EWART,
Proctor for and of Counsel with
the appellant, Jesse P. Evernham

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

IN THE MATTER OF THE ESTATE OF THOMAS BROOKS, deceased.	*On Appeal from Decree of the Prerogative Court.*

Sat below BUCHANAN, *V.-O.*

Decree reversing Order of the Orphans' Court, Ocean County, HARRY E. NEWMAN, *J.*

BRIEF FOR RESPONDENT, FRED T. WALTERS.

(Italics, etc., mine except where otherwise noted.)

Statement of the Case.

The Orphans' Court of Ocean County made an order (p. 54) confirming a contract of sale made by the administrators c. t. a. of the last will and testament of Thomas Brooks, with appellant, Evernham, July 7, 1925, concerning lands in Ocean County, N. J., for a consideration of $19,000, and refusing to confirm a contract made by such administrators c. t. a. with respondent Walters, on September 12, 1925, concerning the same lands for a conclusion of $30,000.

The will of Thomas Brooks was probated in Philadelphia and the proceedings before the Orphans' Court were brought under arbitrary sections 13 and 14, 2 C. S. of N. J., p. 2262, title

"Executors and Administrators," which read in part as follows:

> "13. That any deed of conveyance * * * which may hereafter be made and delivered, by any administrator or administrators with the will annexed, * * * for real estate sold pursuant to any power or direction in the said will annexed, given to or vested in the executor or executors named therein, shall be as * * * effectual as if the same * * * were made * * * by the executor or executors named in said will; and such administrator or administrators with the will annexed, * * * shall have the same powers and authority with respect to the sale of the lands of the testator as were given to or vested in the executor or executors named in said will, whether such powers and authority constitute or shall constitute a naked power to sell lands or constitute or shall constitute a special continuing trust, and whether the discharge of the duties of such trust involves or shall involve the exercise by said executors or executor of any discretion either in point of time or method, or not, unless where such will does now or shall hereafter provide by express designation that, in any contingency, some persons or person other than the persons or person named as executors or executor therein, shall exercise such powers and authority; * * *."
>
> "14. That no sale of lands hereafter made by an administrator or administrators with the will annexed, or by an administrator or administrators de bonis non with the will annexed, shall be valid *until the terms thereof shall have been submitted to the orphans' court of the county in which the lands proposed to be sold lie or shall lie, and approved by said court,* and it shall be the duty of such court, *upon any application by an administrator or administrators* with the will annexed, or the survivors or survivor of them, or by an administrator or administrators de bonis non with the will

annexed, or the survivors or survivor of them, *for an order confirming the terms of any sale* made or to be made by him or them under any power of sale contained in such will, *before confirming such sale, in their discretion*, to require such administrator or administrators with the will annexed, and such administrator or administrators de bonis non with the will annexed, to give such additional security, by bond to the ordinary, as said court shall deem advisable, having regard to the value of the real estate ordered, directed or authorized to be sold in said will, for the proper distribution of the proceeds of the sale of such real estate."

The proceedings were initiated by the petition of the administrators c. t. a. (p. 22), which prayed "for an order *disapproving* a sale to Evernham and approving the sale to Walters and authorizing them as substitutionary administrators with the will annexed of the said Thomas Brooks, deceased, to execute a deed of conveyance to the said Fred T. Walters, * * *."

Evernham filed an answer and cross petition (p. 39) and prayed for the confirmation of the contract with him. (There is no provision in the statute for any such pleading.) The administrators c. t. a. answered denying the allegation, contained in the 4th paragraph of the cross petition of Evernham, that the sale price of $19,000 was, on the day the contract was made, i. e., July 7, 1925, the best price that could have been obtained for the property (p. 41). Testimony was taken (p. 61). The Orphans' Court filed a memorandum (p. 43) which resulted in the order of February 15, 1926 (p. 54).

The administrators c. t. a. appealed to the Prerogative Court (Petition of Appeal, p. 19), as did respondent Walters. His petition of appeal

is not printed in the state of case. It is printed as an addendum to this brief.

Vice-Ordinary Buchanan filed an opinion (p. 8) which resulted in a decree (p. 17) reversing the order of the Orphans' Court and directing that court to approve the contract of sale to the respondent Walters, at the price of $30,000 and ordering that appellant, Evernham, pay the costs of appellees, in which should be included a counsel fee of $500, to appellant Wolters.

From that decree Evernham appeals to this court (Notice, p. 1; Petition, p. 2).

The Prerogative Court differed with the Orphans' Court both upon the law and the facts (p. 8). The Prerogative Court, after a full consideration of all the testimony, held (p. 13) that the evidence offered by *Evernham,* the appellant here, was quite convincing "to the effect that the property was in fact, *worth considerably more than that sum,*" that is, the sum of $19,000, at the time of the contract * * *. "Consequently, at the date of the Evernham contract the property was, in fact, worth considerably more than the values placed upon it by the Evernham witnesses as of a date prior to that determination and announcement" (p. 14).

The Prerogative Court also pointed out certain contentions of Evernham, which were erroneously accepted by the Orphans' Court (p. 15).

In his brief in this court Evernham points to the fact (pp. 6, 7, 11) that no testimony was offered by the administrators c. t. a. or by Walters to show that the property was worth more than $19,000 at the time of making of the contract of sale to Evernham on July 7, 1925. There was no necessity for them to offer such

testimony when, as appears from the opinion of the Vice-Ordinary, the testimony offered by Evernham himself showed that the property was worth considerably more than $19,000 at that time.

The Facts.

Thomas Brooks died January 31, 1906, in Pennsylvania, leaving a last will and testament, which was probated in Philadelphia on February 10, 1906; letters testamentary were issued to the three executors therein named; all are deceased; on December 14, 1921, the Registrar of Wills of Philadelphia County granted letters of administration c. t. a. to Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr., and Albert Brooks; they duly qualified and, since that time, have been acting as such administrators; an exemplified copy of the will and of the letters of administration were filed in the office of the Surrogate of Ocean County, New Jersey, in which lie the lands, the subject matter of this dispute.

The executors were granted a power of sale (p. 23).

Under the will of Brooks his residuary estate was divided among his six children. One of these children, Henry P. Brooks, died June 2, 1919, leaving a will under which he appointed Henry P. Brooks, Jr., one of the administrators c. t. a. of Thomas Brooks, and the Pennsylvania Company for Insurance on Lives and Granting Annuities as executors and trustees. He devised his residuary estate, including his estate in the property, the subject matter of this suit, upon certain trusts in such a way as that minors are interested (106).

John T. Brooks, one of the devisees of Thomas Brooks, died in 1920, leaving a will by which he appointed John T. Brooks, Jr. and John W. Shisler, executors and trustees. He left his estate, including his interest in the premises in question, to his executors and trustees in trust (p. 30).

William D. Brooks, another of the devisees under the will of Thomas Brooks, died March 25, 1921, leaving a will, by which he appointed his three daughters, Phoebe Ann Brooks, Ella Dubbs Williams and Bessie Irene Miller executrices and trustees (p. 30).

Thomas Brooks, Jr., one of the devisees under the will of Thomas Brooks, died in 1921, leaving a will appointing his son Albert Brooks and Provident Life Insurance Trust Company of Philadelphia, for which the Provident Trust Company has since been substituted, as executors and trustees. By his will Thomas Brooks, Jr. devised his property in such a way as that *minor children of Albert Brooks and Thomas Brooks have interests* (p. 105).

On July 7, 1925, Elizabeth P. Shetzline, Henry P. Brooks, Jr., John T. Brooks, Jr. and Albert Brooks, administrators c. t. a. of the Estate of Thomas Brooks, made the contract (p. 186) for the sale of the property, to Evernham for an aggregate price of $19,000 which was approved by the Orphans' Court. That court said (p. 46)—

> "It would seem, therefore, that those who joined in the Evernham agreement of July 7, 1925, and are now asking that that agreement be disapproved, are substantially the sole beneficiaries of Thomas Brooks, deceased."

The Prerogative Court pointed out (p. 15) that this was an improper assumption.

It is true that Mayer, Assistant Trust Officer of the Provident Trust Company, stated that the minors, interested in the trust established under the will of Thomas Brooks, Jr., are the children of Albert Brooks and Thomas Brooks, and that Albert Brooks, as one of the administrators c. t. a. of Thomas Brooks, deceased, joined in the Evernham contract. But Thomas Brooks, the children of whom have an interest in the property under the will of Thomas Brooks, Jr., did *not* join and the Provident Trust Company, trustee under the will of Thomas Brooks, Jr., did *not* approve the sale (p. 105).

Mayer testified (p. 105)—"We certainly never approved it."

It is likewise true that, under the will of Henry P. Brooks, his widow is interested in his estate for life and Henry P. Brooks, Jr., upon the death of the widow, gets one-half of the estate, and that *he* is one of the signers of the Evernham contract as administrator c. t. a. of the estate of Thomas Brooks. *But*, the other one-half of the estate of Henry T. Brooks is divided one-half thereof to a daughter and the other one-half thereof in trust for the same daughter for life, with remainder to her minor children (p. 106). The Pennsylvania Company for Insurance on Lives and Granting Annuities, one of the trustees of the Henry P. Brooks Estate, *never* approved the Evernham contract (p. 106).

Nor did Phoebe Ann Brooks, Ella Dubbs Williams and Bessie Irene Miller, executors and trustees under the will of William D. Brooks (p. 30), one of the beneficiaries under the will of Thomas Brooks, ever approve the Evernham contract.

There were, therefore, not only minors involved, who *could* not approve the contract but there are adults also who never approved.

It would make little difference if *substantially* the sole beneficiaries did approve. *Any* beneficiary, particularly a minor, is entitled to have his rights protected.

The contract with Evernham provided for the payment of the consideration of $19,000 as follows: $1,900 payable on the signing of the agreement and $7,100 at time of settlement, and a mortgage of $10,000 payable in three years, at six per cent., with privilege of release. The contract further provided—*said sale to be subject to the approval of a competent court of record of New Jersey''* (p. 187).

In the early part of August, 1925, the administrators c. t. a. received an offer of $25,000 from Stahl and Hill (p. 71).

On August 18th Hill and Stahl paid a deposit of $1,000, for which a receipt was given, which provided (p. 72)—''Said sale will be made subject to the approval of a competent Court of New Jersey having jurisdiction thereover.'' A contract was signed by the administrators c. t. a. of Thomas Brooks (p. 188). Before it had been signed by Stahl the administrators c. t. a. received an offer from respondent Walters of $30,000. Stahl was advised by Thomas Fernley Brooks, who represented the administrators, that a higher offer had been obtained. Stahl refused to pay the higher price (pp. 73, 74, 100).

On September 1st Thomas Fernley Brooks, representing the administrators c. t. a., received from respondent Walters a check for $2,000 as deposit on the purchase of the property for a

price of $30,000, and, on September 17, 1925, a contract was made between the administrators and respondent Walters, under the terms of which the property was to be sold for a gross sum of $30,000, $3,000 on the signing of the agreeemnt, $12,000 at the time of settlement, and the balance of $15,000 represented by a purchase money mortgage payable within one year from its date, at six per cent. interest, with a release clause (pp. 76, 79, 80, 190).

The contract contained the following provision—"It is understood that there are existing prior agreements to sell above mentioned property, subject to the Court's approval and that this agreement is contingent upon the Court's disapproval of said prior agreements" (p. 192).

The administrators c. t. a. on September 28, 1925, filed their petition in the Orphans' Court of Ocean County setting up substantially the facts aforesaid and submitting to the court the contracts of Evernham and of Walters and praying for an order *disapproving* the sale to Evernham and approving the sale to Walters.

There is annexed to the petition a protest signed by all of the adults interested in the estate of Thomas Brooks, by the representatives of the estates of John T. Brooks, deceased, Henry P. Brooks, deceased, William D. G. Brooks, deceased, and Thomas Brooks, Jr., deceased, the deceased devisees of the estate of Thomas Brooks, against the confirmation of the sale by the administrators c. t. a. to Evernham, and consenting to the proposed sale by such administrators to respondent Walters, at the price and terms in the petition set forth (p. 34).

The Decree of the Orphans' Court.

The Orphans' Court, construing the statute arbitrary sections 13 and 14, 2 C. S. of N. J. p. 2262, title "Executors and Administrators," seemed to be of opinion that the *only* duty resting upon it was to direct the administrators c. t. a. to give additional security at the court's discretion. It seems to have considered that there was little or no duty cast upon it with respect to the amount that the property brought, or as to the advisability of sale (p. 51).

The Orphans' Court erred as to many assumed facts which it relied on as justifying its approval of a contract for $19,000 when there was before it a contract for $30,000 for the same property. It said (p. 52)—

> "In this case it happens that the beneficiaries themselves are the persons named as administrators c. t. a. etc. to deal with their own property."

It is true that *certain of* the beneficiaries were administrators c. t. a. It is likewise true that adult beneficiaries were not consulted with respect to this sale for $19,000, did not approve it, and protested against its confirmation, and that there were minor beneficiaries who could not consent, if they would, and whose representatives did not consent.

The court held that $19,000 was a fair price for the premises in question as of July 7, 1925 (p. 52).

In support of its conclusion it said (p. 45):

> "I am convinced from the testimony (and in fact it is admitted by the petitioners) that $19,000 was a fair price for the premises in question, as of July 7th, 1925; that all parties acted in good faith in making the Evernham contract on that date."

There was no such admission. On the contrary, there is the following (p. 65):

> "Mr. Ewart (representing Evernham): Perhaps we can avoid this testimony if Mr. McMullin is willing to admit that $19,000 was a fair price for the property at the date of the contract, I see no necessity for taking testimony."

(Mr. McMullin representing the administrators c. t. a., etc.)

> Mr. McMullin: Nothing has been admitted as yet, has there?
>
> Mr. Ewart: Well, if that be your position.
>
> Mr. McMullin: *No, it is absurd to say that $19,000 was a fair price for the property when they paid $30,000 for it.*"

And Thomas Fernley Brooks, who represented the estate, testifying, on p. 92, with respect to his negotiations with Kiefaber, who represented Evernham, said:

> "I was in no position myself to handle this property as purchasing for my own behalf, *because I would not purchase as representing an estate a property which I felt was worth more than the amount we were negotiating for.*"

And p. 94:

> "A *No, I left it up to their judgment entirely. In point of fact, I thought the offer was too low and said to them, 'If it was my property I would not sell it at this stage in the game, because you will get more money for it a little later on.'* "

I only recite here sufficient of the testimony to indicate that there is no justification whatever for the statement of the Orphans' Court that it was *admitted* that $19,000 was a fair price for the premises as of July 7, 1925, and that the Prerogative Court was right in holding that the Orphans' Court erroneously so assumed (p. 15).

Three of the grounds relied upon by the Orphans' Court in reaching its conclusion, *i. e.*, that: it was *admitted* that $19,000 was a fair price for the premises as of July 7, 1925; the beneficiaries themselves are the persons named as administrators c. t. a., to deal with their own property; those asking that the Evernham agreement of July 7, 1925, be disapproved are substantially the sole beneficiaries of Thomas Brooks, deceased; are without support in the record. And the Orphans' Court paid no attention to the rights of the beneficiaries who were minors.

The result of the decree of the Orphans' Court, which decree appellant now asks this Court to revive, was an approval of a contract of sale for $19,000, made on July 7, 1925, by the administrators c. t. a., without the approval of beneficiaries, among whom are minors, when there was before the court a contract for the sale of the same property made on September 17, 1925, for $30,000, approved by the adult beneficiaries, and when it appeared to the court by proof that: there had been an offer of $25,000 for this same property in the early part of August, 1925 (p. 72), payment of deposit made August 18, 1925; before that contract could be executed, and prior to September 1, 1925, the offer of $30,000, which resulted in the contract of September 17, 1925, had been made, deposit paid September 1, 1925; *Thomas Fernley Brooks, who dealt for the estate, thought, at the time the contract for $19,000 was made, that the price was too low, and that the property was worth more and advised the administrators c. t. a. not to sell.*

The decree of the Orphans' Court deprived the beneficiaries of this estate, including the minors,

of $11,000 in money. The court had approved a contract which was grossly improvident, notwithstanding the fact that the statute provides that no sale of lands * * * shall be valid until the *terms thereof* shall have been submitted to the Orphans' Court of the county in which the lands proposed to be sold lie or shall lie, and *approved by said court.*

ARGUMENT.

I.

The Orphans' Court took too narrow a view of its duty under the statute. The Prerogative Court was right.

Arbitrary sections 13, "Executors and Administrators," 2 Comp. Statutes of New Jersey 2262-2263, confers upon administrators with the will annexed

> "the same powers and authority with respect to the sale of lands of the testator as were given to or vested in the executor or executors named in said will, whether such powers and authority constitute or shall constitute a naked power to sell lands or constitute or shall constitute a special continuing trust, etc. * * *"

Section 14 provides that:

> "No sale of lands hereafter made by an administrator or administrators with the will annexed, * * * shall be valid *until the terms thereof shall have been submitted to the orphans' court of the county in which the lands proposed to be sold lie or shall lie and approved by said court,* and it shall be the duty of such court, *upon any application by an administrator or administrators with the will annexed,* * * * for an order confirming the terms of any sale made or to be made by him or them under any power of sale contained in such will,

> before confirming such sale, in their discretion, to require such administrator * * * to give such additional security, * * *."

The Orphans' Court in the instant case said on p. 52:

> "The court has the duty of providing security from the funds derived from the sale of real estate and certainly the duty to see that no fraud or irregularity is perpetrated and that the sale was fair as to price."

The court considered, and it is argued here, that its duty was not similar to the duty imposed upon it by section 85 of the Orphans' Court Act, 3 Comp. Stat. of New Jersey, title "Orphans' Court," p. 3842, which is the section providing for confirmation of sales made by executor, and administrators, etc., under an order of the Orphans' Court, to pay debts, which section provides that, after making the sale, the executor, administrator, etc., shall report the same to the Orphans' Court and, if the said court shall approve of such sale, it shall confirm the same as valid and effectual in law.

The Orphans' Court conceded (p. 51) that, under section 85, if the sale was in the nature of a private sale

> "the court would feel bound to procure the highest possible bid and to accept only the highest and best price and until the court was satisfied it had such best terms would feel in duty bound not to confirm a report made. This is all upon the theory that the court takes control and is charged with the duty of obtaining the best terms up till the actual confirmation."

It then referred to sections 13 and 14 and said:

> "The testator does not rely upon the assistance of the courts, but himself named

executors, clothed them with power to sell the lands of which he died seized."

In effect, what the court did was to treat the power of the administrator, c. t. a., *as springing solely from the will.* It considered that administrators, c. t. a., have precisely the same rights as executors would have with respect to sale and that the court should confirm the sale unless such facts were shown as would nullify a judicial sale that did not need confirmation by the court to render it valid. And the same argument is made here by appellant (17 of his brief).

Did the legislature intend that there should be any such restriction upon the power of the court or did it intend that there should be vested in the court a discretion to approve or disapprove a sale as it appeared to the court, upon the date fixed for confirmation, would be the advantageous thing to do?

At common law, administrators c. t. a. could not exercise a power of sale given to an executor. 1 N. J. L. p. 494. The original statute provided that any deed or conveyance made by an administrator with the will annexed for any land sold pursuant to any power or direction in the will annexed given to the executors should be as effectual as if the same were made or delivered by the executors. Sec. 20, p. 279, title "Executors and Administrators"; Nixon's Digest; Section 11, Revision of N. J. 1877, p. 398. By its terms this statute *would seem* to have conferred upon administrators with the will annexed the same power with respect to sale that the executor might have. *Howell* v. *Sebring,* 14 N. J. E. 84 at p. 89. Even so, the power sprang from the statute, not the will.

It soon become apparent, however, that it was a dangerous thing to give administrators with

the will annexed any such unlimited power. The testator had personally selected his executors and he had granted the power to sell to them *personally;* administrators with the will annexed, however, were appointed by the Court. The reason why, at common law, they were not deemed to have the power conferred upon the executor to sell lands was that the grant of the power to sell the lands by the testator was conceived to be *a personal trust* to the executor. As a conseqence, the Court of Chancery circumscribed the operation of the statute and held that, if there were *any* words in the will indicating that the testator intended a personal trust, the statute would not be applicable. *Naundorf* v. *Schumann,* 41 N. J. E. 14. *Lanning* v. *Sisters of St. Francis,* 35 N. J. E. 392.

And the Chancellor in *Naundorf* v. *Schumann,* 41 N. J. E. 14 went so far as to say that, where the will contained a provision authorizing the executors to sell as "may seem best to them," *there* was a personal trust indicated and the statute did not apply.

Bird, Vice-Chancellor, however, in *Giberson* v. *Giberson,* 43 N. J. E. 116, at the May term, 1887, in a case in which the executors were directed to sell the land at such time and "in such manner as they think advisable," held that *this* language did *not* imply a personal trust and attempted to distinguish *Naundorf* v. *Schumann,* at p. 118.

The result of this decision, if followed to its logical conclusion, would have been to construe the statute in such a way as to vest in administrators c. t. a. the same power as possessed by executors in *all* cases and to overrule the doctrine of *Naundorf* v. *Schumann* and *Lanning* v. *Sisters of St. Francis.*

The legislature then intervened by the act of 1888, p. 395, which is now the law. By section 1 of that act, Arbitrary Section 13, 2 Comp. Stat. of N. J., p. 2262, it made it clear that it intended that the power of sale given to the executor might be exercised by the administrator c. t. a. whether the power constitued a naked power or a special continuing trust or whether the discharge of the duties involved the exercise by the executor of any discretion either in point of time or method, etc. And, to *that* extent, it announced that the law was to be as it had been held to be by the decision in *Giberson* v. *Giberson.*

But, obviously to meet the evil which had resulted in the Court of Chancery circumscribing the powers of administrators c. t. a. in *Naundorf* v. *Schumann* and *Lanning* v. *Sisters of St. Francis*, it *added* Section 2, now arbitrary Section 14, 2 Comp. Stat. of N. J. title "Executors and Administrators," 2263, which provides that no such sale should be valid "until the *terms* thereof shall have been submitted to the Orphans' Court of the county in which the lands proposed to be sold lie or shall lie, and *approved* by said court." *There had been no such control vested in the court before the adoption of this section.*

The legislature intended some real control by the court of these sales.

Under the old statute the Court of Chancery had held that *it would intervene* and set aside a sale where it had been conducted in a manner that the court thought was not designed to bring the best price and that such a method of sale amounted to fraud within the meaning of the law. See 14 N. J. E. 91-92-93.

The intent of the legislature clearly was to *add something to the control* which the courts had already determined they possessed.

The legislature recognized the advisability of continuing the power of sale granted to executors in *all* cases but it likewise recognized that this would be a dangerous thing to do without some restriction other than the power of a court of equity to set aside sales when made by trustees or executors, having power derived from the testator, upon the ground of fraud or such conduct as might be called fraud (and the court had stretched this to mean *any* conduct which resulted in the lands being sold for less than what they might have been sold for) and it therefore provided that no such sale should be valid until the *terms thereof* should have been submitted to the Orphans' Court and approved.

It did not merely provide, as in the case of judicial sales, that the *report of sale* should be confirmed by the court. On the contrary, it provided that the sale *should not be valid until approved by the court.*

It did not merely provide that the *sale* should be *reported* to the court. Not only the *sale* but the *terms thereof* must be, not reported, but *submitted.* And the sale is not valid until the *terms* thereof are approved. If the purpose of the bringing the court's attention to the sale is merely to permit the court to require a bond, it would not have been required that the *terms of the sale* must be approved. Not only must the purchase price, one of the terms, but *all terms* must meet with the court's approval.

Appellant attempts to answer the argument based upon a consideration of these statutes as to the intent of the legislature by the statement

that (p. 21) the passing of Chapter 2, P. L. 1916 validating sales theretofore made by administrators c. t. a. without the same having been approved by the court indicates a departure from that intent. Not so. This act, like so many of similar nature, was passed because errors had been made in matters of procedure by administrators c. t. a. and titles might be disturbed. It is a curative act, pure and simple, and indicates only that the legislature believed that, with respect to past acts, it was for the general good that titles should be secure.

A judicial sale is made under an order of the Court. It is made at auction. There is notice to everyone. Public policy requires that the sale should not be set aside unless cogent reasons appear therefor.

A sale made by an administrator c. t. a. is *not* a judicial sale. No notice is given even to those beneficially interested. In the case at bar there was a private contract. A sale by an administrator c. t. a. is not protected by the safeguards surrounding judicial sales.

Even in the case of judicial sales, although it has sometimes been stated that *mere* inadequacy of price is not sufficient for the court to refuse to confirm, *Morrisse* v. *Inglis,* 46 N. J. E. 306; *Rogers* v. *Rogers Locomotive Co.,* 62 N. J. E. 111; *Bethlehem Iron Co.* v. *Philadelphia and Sea Shore Railway Co.,* 49 N. J. E. 356; there is also *Porch* v. *Agnew Co.,* 66 N. J. E. 232, affirmed 67 N. J. E. 727, to the contrary. And the present Chancellor refused to apply the rule to a sale made by receivers under an order of the court, as a result of the reception of sealed bids, *in re New Jersey Refrigerating Co.,* 96 N. J. E. 431, at p. 435.

Section 85 of the Orphans' Court Act, 3 Comp. Stat. of N. J. p. 3842, provides that, where an executor or administrator shall have been ordered to sell any lands by the Orphans' Court and shall have sold them, a report of the sa shall be made to the Orphans' Court and, if the said court shall approve of said sale, it shall con firm the same as valid and effectual in law.

Vice-Ordinary Reed held in *Ryan* v. *Wilson,* 64 N. J. E. 797, in a case in which the Orphans' Court had directed a sale of lands at auction and an auction had been held, that the rule to be applied was that announced in *Morrisse* v. *Inglis,* 46 N. J. E. 306.

But this court, speaking by Mr. Justice Dixon, in 64 N. J. E. 804, said:

> "In the opinion delivered in the prerogative court, this requirement of confirmation was regarded *as having no substantial effect, the view being that the court should confirm the sale, unless facts were shown which would justify the annulling of a judicial sale that did not need confirmation by a court to render it valid.*"

This court then considered *Delaware, Lackawanna and Western R. R. Co.* v. *Scranton,* 34 N. J. E. 429 and *Bethlehem Iron Co.* v. *Philadelphia & Seashore Railroad Co.,* 49 N. J. E. 356 and the construction put upon those cases by the Court of Chancery as affecting proceedings under statutes which enacted that certain judicial sales should be reported to the court and confirmed and then this court said:

> "Without passing upon the correctness of that construction, we deem it inapplicable to the case now before us. *Here the power of confirmation or rejection is untrammelled by the proviso which was supposed to narrow the scope of inquiry in the cases cited, and is committed without limitation to judicial dis-*

cretion. By force of the statute the 'sale' reported to the court *is not a perfect contract* made by competent parties, *but is a bargain dependent upon the approval of the court to render it 'valid and effectual in law.'* Such approval should, in our judgment, be given or withheld upon consideration, *not merely of matters pertinent to the avoidance of a complete contract, but of all matters pertinent to the question of accepting the proposal presented.''*

There is no reason for putting any narrower construction upon the power of the court under section 14, 2 C. S. of N. J., p. 2263, than is put upon the power of the court under section 85, 3 Comp. Stat. of N. J. 3842. On the contrary the power of the court under the conditions covered by sections 13 and 14, 2 C. S. of N. J. 2262, should, if anything, be *greater* in extent than those conferred upon the court under section 85, 3 C. S. of N. J. 3842, for the reason that, under section 85, no sale can be made until directed by the court and the sale is then made at public auction upon notice to everyone and partakes of the nature of a judicial sale. And yet this court held that the court, to whom the sale must be reported for approval, is *not* circumscribed as to its action as in the case of judicial sales.

And the court, under section 85, has precisely the same control, *whether the sale be made by an executor who is selected by the testator or by an administrator.*

Under sections 13 and 14 the sale is *not* made by an order of the court. There is no public advertisement. There is no opportunity for the beneficiaries to be heard. Th testator has *not* selected the instrument of sale, *i. e.*, the administrator c. t. a. It would seem, upon reason, that the control of the court under such circumstances

should be greater than the control of the court under the conditions to which section 85 applies. The language of section 85 is that after the sale, it shall be submitted to the court and if the court "shall approve of such sale, it shall confirm the same as valid and effectual in the law." The language of section 14 is that "*no sale shall be valid until the terms thereof shall have been submitted to the Orphans' Court * * * and approved by said court.*" If anything, the language of section 14 is stronger than that of section 85 and certainly what Mr. Justice Dixon said in *Ryan* v. *Wilson*, 64 N. J. E. 797 at p. 805, if applicable to the language of section 85, is applicable to that used in section 14.

It is true that Magie, Ordinary, said obiter in *re Devine*, 62 N. J. E. 703, that:

> "Upon this contention evidence of market value after that date (that is the date of the contract) was not admissible, except so far as it tended to show the value at that date. Increase of value afterwards should have no effect in inducing disapproval of the contract of sale, if it was one proper to be made at the time."

But this obiter was prior to the decision of this court in *Ryan* v. *Wilson*, 64 N. J. E. 797.

The present Chancellor, sitting as Vice Ordinary, in *Campbell* v. *Hough*, 73 N. J. E. 601 in considering a sale under section 85, said, at p. 609:

> "It is urged that the orphans' court may confirm the sale before final hearing in this cause, but I doubt it, as the sale to Mr. Donald, disclosed by the answer and affidavits of the defendants, is for about $600 more than that called for in the agreement under consideration; and a sale by Mrs. Hough, as administratrix, does not fall within that class of cases of which Morrisse *v.* Inglis, 46 N. J. E. 306, is one example, and

> in which the court of errors and appeals held that judicial sales made without irregularity or fraud and not affected by accident or mistake will not be set aside for mere inadequacy of price; but such sale is affected by section 85 of the Orphans' Court act (P. L. 1898, p. 745), which commits the question *of confirmation or rejection without limitation to judicial discretion*, as construed by Ryan *v.* Wilson, 64 N. J. E. 797."

The Orphans' Court made no attempt to distinguish between the language used in section 65 and section 14 but suggested a distinction upon principle (pp. 50 and 51). It is submitted that the court overlooked the fact that the authority of the administrator c. t. a. comes *from the statute*. While the testator has given the authority to the *executor* in the will, it is transmitted to the administrator c. t. a. not by force of the will but by force of the statute. The source of the power of the administrator c. t. a. is therefore no higher than the source of the power of an executor or administrator directed to sell lands to pay debts, which power comes from the order of the court made in pursuance of the statute. And it is significant that even an executor must come to the court for approval and the same rules apply whether the sale be made by an executor or an administrator.

The Orphans' Court admitted (p. 50) that under section 85, if there had been a private sale, the court would feel bound to procure the highest possible bid and to accept only the highest and best price and, until the court was satisfied it had such best terms, would feel in duty bound not to confirm a sale made.

The language of this court in *Ryan* v. *Wilson*, 64 N. J. E. 797, at p. 805:

> "By force of the statute the 'sale' reported to the court *is not a perfect contract* made by competent parties, *but is a bargain dependent upon the approval of the court* to render it 'valid and effectual in law.' "

may be applied to sections 13 and 14. A sale made under sections 13 and 14 is not "valid" until its terms have been approved by the court. *It is not, therefore, a "sale" until approved by the court.*

If, therefore, prior to confirmation a better offer is made, it is the duty of the court to refuse to confirm the sale.

In the case at bar, the property was contracted to be sold on July 7, 1925, for $19,000. In the early part of August $25,000 was offered for it. Prior to the 1st of September $30,000 was offered and, on the 17th day of September, the administrators c. t. a. made another contract to sell for $30,000.

When the matter came up for confirmation before the Orphans' Court there were an offer before the court for $19,000 and one for $30,000. There were minor children involved; many of those who were beneficially interested in the estate had not been consulted in any wise with respect to the sale at $19,000; those beneficially interested protested against the offer of $19,000 and urged the acceptance of the offer of $30,000.

If, under the provisions of section 85, where the sale is directed by an order of the court and is held with all the safeguards of a judicial sale, the court would not, under such circumstances, approve the sale, can it be that the court, under

these conditions where a private sale was made without consultation with some of those beneficially interested, will approve the sale at the lesser price at the expense of beneficiaries, including minors, to the extent of $11,000? To put the question is to answer it, I submit.

There is no "sale" until the court approves.

II.

The Prerogative Court had ample power to make the decree it did, so far as it affected the approval of the sale, notwithstanding that its jurisdiction is appellant.

It is true that, *in the first instance*, the legislature has conferred upon the Orphans' Court the duty of approving or disapproving a sale made by an administrator c. t. a. and that, in some respects, this is an exercise of discretion but *this means a judicial discretion.*

The legislature has also provided that there should be an appeal from *any* order of the Orphans' Court to the Prerogative Court,—and likewise there is an appeal from the Prerogative Court to this court. Neither the Prerogative Court nor this court has hesitated to reverse orders of the Orphans' Court where judicial discretion has been confided to it with respect to matters analogous to that at bar, and with respect to proceedings under the provisions of the statute, referring to sales by administrators c. t. a.

In re Devine, 62 N. J. E. 702, involved an approval by the Orphans' Court of a sale made by an administrator c. t. a. The Prerogative Court reversed the Orphans' Court.

In *Ryan* v. *Wilson,* 64 N. J. E. 707, this court, in a proceeding under section 85, considered the order of the Prerogative Court, which had affirmed an order of the Orphans' Court refusing to confirm a sale, upon the merits of the case.

And the approval by the Orphans' Court of the sale to appellant Evernham was an abuse of the judicial discretion confided to that court and as such reviewable. Which brings me to

III.

The contract price of $19,000 did not represent the fair value of the property at the time of the making of appellant Evernham's contract.

Even if the rule be as stated by the Orphans' Court and as contended here and as indicated by the obiter of Magie, Ordinary, *in re Devine,* 62 N. J. E. 703, the burden is on those attempting to have the sale confirmed to show that a fair price has been obtained. The Ordinary says in 62 N. J. E. 709:

> "But as to the fair market value at the time of the contract, the evidence is extremely contradictory and unsatisfactory. * * * Since the court is to adjudge whether the terms of sale should be approved, the administrator seeking confirmation and approval of the sale, *should make it appear that the consideration of the sale is fair.*"

We start out with the admitted facts that: on July 7, 1925, this property was contracted to be sold for $19,000.00; less than a month later in the early part of August, 1925, $25,000.00 was offered for it; before a contract could be made for the $25,000.00 offer, an offer of $30,000.00 was made and a deposit paid on that offer on the 1st of September, 1925.

Even under the obiter in the Devine case, 62 N. J. E. 709, these latter offers are proper to be considered as bearing upon the fair value at the time the contract was made. The answer of appellant Evernham is that, subsequent to July 7, 1925, there were increases in value.

Thomas Fernley Brooks is the attorney for the Thomas Brooks Estate. He is *not* one of the administrators c. t. a. nor is he interested in the estate (pp. 67, 84). He says that: the property has been for sale for some time although not in the hands of agents (p. 85); the negotiations for the sale, which resulted in the $19,000.00 contract, were taken up with him by Kiefaber; there were a number of inquiries with respect to the property (pp. 90, 91); he was not in a position to handle the property, purchasing in his own behalf because "I would not purchase as representing an estate a property which *I felt was worth more than the amount we were negotiating for*" (p. 92); Kiefaber offered $19,000.00 which Brooks said he would submit; he thought "the offer was too low and said to them (administrators c. t. a.) 'If it was my property I would not sell it at this stage in the game because you will get more money for it a little later on'" (p. 94); they had an offer in 1920 for the property of $25,000.00 in cash or $28,000.00 on terms; he had had two offers of $22,000.00, which were not acceptable; these offers were submitted but the administrators refused to accept them as "they felt that they would not let the property go for anything less than $25,000.00 until this (referring to the $19,000 contract) was accepted."

There were, therefore, offers *preceding the acceptance of the $19,000* offer, largely in excess of that offer. The property had been put up for

auction in 1923 and 1925 (p. 86). At the auction in 1923 it was withdrawn (p. 96) and at the auction in 1925 the sale did not go through because it had not been put up according to instructions (p. 89).

Kiefaber was produced by appellant Evernham. He was in the real estate business and said that: he had offered Brooks in the early part of June, $18,000.00; Brooks rejected the offer and stated that he would not take less than $20,000.00 (p. 115); Kiefaber finally made the offer of $19,000.00, which offer Brooks said he would submit to the administrators (p. 115); Brooks said, *"If there is a sale, he says, half the commission comes to me on five per cent."*; before any negotiations were entered into "Brooks told him that the property was worth $20,000.00 (p. 119). Kiefaber was then asked what the fair market value of the property was on July 6, 1925. He was cross examined as to his qualifications; he had never bought or sold acreage in Ocean County (p. 121) nor had he an office in Ocean County or properties listed yet he was permitted to testify that the fair price on July 6, 1925, was $19,000 which is the *exact* contract price and it then immediately appears that *he has a one-fourth interest in the contract* (p. 128). He was not qualified as a skilled witness (*Ross* v. *Commissioners of Palisade Interstate Park,* 90 N. J. L. 461, 464; *Ringwood Company* v. *North Jersey District Water Supply Commission,* 6 N. J. Advance Reports 1401). He said that: he gets half of the commission, Brooks gets half, less $50.00, *"which goes to one of the administrators"* (p. 129); one of the administrators would not sign unless he got something (p. 129); at the time of the sale neither Brooks nor the administrators knew that

Kiefaber, who was negotiating for the property, had any personal interest therein (p. 130).

This testimony, produced by appellant Evernham, shows that: Kiefaber, acting as agent, negotiated this contract with Brooks; an agreement was made whereby Brooks and Kiefaber would share the commissions, less $50.00 to be paid one of the administrators for signing; he concealed the fact that he was interested in the property (p. 129).

If this testimony be true (and I do not think it is) is there any wonder that this property was sold at a price less than what Brooks, who was representing the estate, thought it was worth?

The next witness produced by appellant Evernham was Max Leet, who was in the dry goods business but had sold out and has no business now (p. 132). He has sold four or five farm properties in Ocean County, about $60,000.00 or $70,000.00 worth. Counsel asked him how much he thought the land was worth per acre and the witness said he did not know (p. 133).

Cris M. Driscoll, who had been four years in the real estate business in Ocean County, was produced. He was assistant sales manager of a development and had charge of the sale of lots to the general public (p. 136). He was permitted to testify as to the fair market value of the Brooks property and said it was worth $20,000.00 (p. 142). He based his value on figures for development. According to *his* figures the property could be sold after development at $1,800.00 an acre or a total of approximately $180,000.00 (p. 143). *It is clear from his examination that, if his method of valuation is to be adopted and worked out* (pp. 147, 148), *the property was worth over $50,000. He* was not qualified.

Anthony Then, president of the Ocean County Title Company, was produced. He said that: the Brooks property was worth, at the time of the trial, about $35,000.00 (p. 153); it had increased in value since July 6, at which time "I think they paid the fair value, of $19,000.00" (p. 152); the advance in price began about the middle of July.

George H. Holman, a former sheriff and former county clerk, said that: he is a director of the Ocean County Trust Company, president of the bank and a large property owner. The court permitted him to testify, although I submit he was in no wise qualified (p. 154). He stated that: the fair market value of the property was $21,000.00 as of July 6, 1925 (p. 159); there had been an increase in value and he fixes the time of the beginning of the increase in value as "*about the time the State Highway Commission, at a meeting at Browns Mills, stated that the road from Camden to the seashore by way of Browns Mills was number four on the list to be constructed. Immediately* there began to be a bid for property along that line."

Carl Haag, who stated that he was in the real estate business at Seaside Park, first said that the property was worth *$25,000.00* in *May,* 1925 and more at the time of the trial, then that it was offered to him for $25,000.00 in May and that he was willing to pay $20,000.00, then that it was worth $22,000.00 in June and July (p. 161, 162).

The meeting of the State Highway Commission, which, according to the testimony of the witness, Holman, started the increase, the witness, Holman, stating that "*immediately* there began to be a bid for property along that line" (p. 160), *WAS HELD IN THE MONTH OF*

JUNE AND PRIOR TO THE MAKING OF THE $19,000.00 CONTRACT, (p. 164).

William H. Fischer, the editor of the New Jersey Courier, was produced and testified that: the property was offered to him in *January* or February, 1925 for *$25,000.00,* (p. 171).

He made certain the date of the meeting of the State Highway Commission as *June 18th,* (p. 173). This was *three weeks before* the contract was made to sell this property for $19,000.00. The witness Holman testified that the increase in value began *immediately* after that meeting, (p. 160) and yet appellant Evernham and some of his witnesses attempted to show that, during these three weeks, there was *no* increase in value of this *particular* property. This editor is also interested in this purchase to the extent of one-fourth, (p. 174).

Martin Schwarz, Jr., secretary of the Dover Mutual Loan Association, was produced and testified that: the property was worth $190.00 an acre or $19,000.00 for the whole piece, (p. 177). Cross examined, he said (p. 180):

"Q Why do you say $190.00 instead of $193 or $185, any reason? A No.
Q *Just a guess, isn't it?* A *Yes.*"

In other words, exactly the amount paid for the property.

To summarize this testimony—three witnesses produced by appellant Evernham, *i. e.,* Kiefaber, Then and Schwartz, testified that the property was worth $19,000.00, *exactly the amount of appellant Evernham's contract*—Kiefaber was the representative of appellant Evernham and had a one-fourth interest in the purchase, which interest he did not disclose either to Thomas Fernley Brooks, the person representing the admin-

istrators c. t. a. or to the administrators c. t. a. and he had an agreement, so he said, by which he was to get one-half of the commission paid by the administrators c. t. a. a part of the commission also to go to one of the administrators c. t. a. as he said, (p. 128)—Then is the president of the Ocean County Title Company and he said that, although the property was worth $19,000.00 in June or July, it was worth $35,000.-00 at the time of the trial (pp. 152, 153)—Schwarz is a building and loan man and it was he who said that his estimate of $19,000.00 as the value was a *mere guess*—Driscoll said the property was worth $20,000.00 (p. 141) but, when his method of calculation was considered, it was apparent that it would be worth much more upon his own figures (p. 148)—Holman said it was worth $21,000.00 (p. 159) in July but worth $40,-000.00 at the time of the trial (p. 159)—Haag, as I read the testimony, said it was worth $25,000.00 in *May,* 1925; at any rate, his testimony cannot be made to read that it was worth less than $22,-000.00 (p. 162)—the property had been held as early as January or February of 1925 by the administrators c. t. a., represented by Thomas Fernley Brooks, at $25,000.00; Fischer so states, although Fischer was interested in the Evernham purchase to the extent of a one-fourth, (p. 174)—$25,000.00 or $28,000.00 on terms had been offered for the property as early as 1920 (p. 98)—$22,000.00 had also been offered (p. 98)—within less than a month of the making of appellant Evernham's contract $25,000.00 was offered and, prior to the 1st day of September, $30,000.00 was offered which resulted in the making of the Walters contract.

Holman testified that, *immediately* after the time the State Highway Commission at Browns

Mills stated that the shore road by way of Browns Mills was number four on the list to be constructed, the property began to go up in value (p. 160) and Fischer fixes this date as *June 18, 1925,* (p. 173) yet according to the testimony produced by the appellant Evernham, *this* property did *not* rise in value in the three weeks which elapsed between June 18th, 1925 and the date of the Evernham contract, July 7, 1925, although it increased immediately *after that date* and although *all other property began to increase immediately after the meeting of the State Highway Comimssion on June 18th.*

The administrators c. t. a., prior to the making of the Evernham contract, had never consented to accept any offer for the property less than $25,000.00 and they had had offers for $22,000.00, $25,000.00 and $28,000.00 on terms. Yet, for *some* reason, they agreed to sell the property on July 7, 1925 for $19,000.00, *after the meeting of the State Highway Commission which resulted in the increase in value of all properties in the neighborhood.*

And three of the witnesses produced by appellant Evernham place a value of *more* than $19,000.00 upon this property as of the date of the Evernham contract.

Even if we assume that the obiter of Magie, Ordinary, in *re Devine,* 62 N. J. E. 703, is to be applied, *where is the proof that the consideration of the sale was fair?*

The Ordinary said:

> "Since the Court is to adjudge whether the terms of sale should be approved, the *administrator, seeking confirmation and approval of the sale,* should make it appear that the consideration of the sale is fair."

Of course, if the rule of *Ryan* v. *Wilson,* 64 N. J. E. 797 and the reasoning of Chancellor Walker, then Vice-Chancellor, in *Campbell* v. *Hough,* 73 N. J. E. 601, is to be applied, there is no question but that the Orphans' Court was wrong and the Prerogative Court right.

The Court may be curious as to why no expert testimony was produced by the administrators c. t. a. I think the reason is clear from the testimony of Mr. Thomas Fernley Brooks, on p. 103.

> "Q Did you go to Henry J. Faby, of Toms River, to sign an affidavit? A Sign an affidavit?
>
> Q About signing an affidavit; did you present one of these affidavits to him to sign? A I asked him if he would be willing to make an affidavit, yes, as to values.
>
> Q And what did he say? A He said no; while he thought the property was worth that much money he said that his business relations were such with Mr. Evernham he did not care about doing it.
>
> Q And you also went to Mr. Leming down there at Island Heights, did you? A Mr. Who?
>
> Q Leming. A Yes, I asked Mr. Leming.
>
> Q And did he refuse to sign an affidavit? A Yes, he refused to sign it because he said his relations with the people here were such he did not care to do it; though he thought the property was worth the amount."

And there were produced for appellant Evernham the witness Then (p. 150) President of the Ocean County Title Company; the witness Holman, who was a former Sheriff and County Clerk of the county (p. 153); the witness Fischer, who is the editor of the New Jersey Courier (p 167) and who is interested in the Evernham contract to the extent of one-quarter; the wit-

ness Schwartz, who is the secretary of the Building and Loan Association (p. 174). It is quite clear from the record that certain persons in the locality immediately realized, after the meeting of the Highway Commission on *June 18, 1925,* at which meeting it was determined that the road from Camden to the sea shore by way of Browns Mills would be number four on the list to be constructed, that property in the vicinity would immediately increase in value and, thereupon, caused the witness Kiefaber to negotiate, for appellant Evernham, for the purchase of the property from the Brooks Estate and that the administrators c. t. a., who resided in Philadelphia, did not know what had happened and did not realize the increased value and that they improvidently made the contract.

But they were *trustees* acting not only for adults but for minor beneficiaries and it was their duty to know. It was their duty to investigate. If the rule applied by this court in *Ryan* v. *Wilson,* 64 N. J. E. 795, at p. 805: "By force of the statute the 'sale' reported to the court *is not a perfect contract made by competent parties, but is a bargain dependent upon the approval of the court to render it 'valid and effectual in law,'* " is to be applied, the contract was imperfect until approved by the court, and, before approval by the court, *the Orphans Court knew what the real condition was and knew that the bargain was improvident.*

I submit that it was the duty of the Orphans Court under the circumstances to refrain from making perfect this imperfect agreement. The Orphans Court knew what the administrators c. t. a. should have known, and I submit that it was beyond the power of the Orphans Court to permit itself to be made the means by which

the innocent beneficiaries, including minors, would be deprived of $11,000, or more than fifty per cent. of the contract price of $19,000.

The Prerogative Court was right upon this testimony in holding that it did not appear that the purchase price of $19,000 was a fair and adequate price.

IV.

Even if the rule with respect to judicial sales is to be applied, the Orphans Court should not have confirmed the contract of appellant Evernham.

Where a sale was judicial in character and made under the order of the court, Chancellor Walker, in *In re New Jersey Refrigerating Company,* 96 N. J. E. 431, refused to confirm it there being an increased offer of fifty-two per cent. and he cited the action of Vice-Chancellor Grey in *Porch* v. *Agnew Co.,* 66 N. J. Eq. 232, affirmed 67 N. J. E. 727, in which case the Vice-Chancellor had refused to approve a sale where the property was worth double what had been offered.

He directed attention to the fact that in *Morrissee* v. *Inglis,* 46 N. J. E. 306, the excess offered was only approximately ten per cent.; in *Rogers* v. *Rogers Locomotive Co.,* 62 N. J. E. 111, approximately ten per cent. and in *Bethlehem Iron Co.* v. *Philadelphia Seashore R. R. Co.,* 49 N. J. E. 356, approximately twenty per cent., in which cases the courts had refused to disturb the sales.

He said that the case then before him, *In re New Jersey Refrigerating Company,* where the increased offer was approximately fifty-two per cent., was more nearly like *Porch* v. *Agnew Com-*

pany, 66 N. J. E. 232, affirmed 67 N. J. E. 727, than it was like *Morrissee* v. *Inglis*, 46 N. J. Eq. 306, and the other cases referred to.

In the case at bar the increased offer is approximately the same percentage as was the increase in *In re New Jersey Refrigerating Company.*

V.

There was no application by any proper party for the approval of the contract of sale of appellant Evernham.

The statute provides that application shall be made by the administrators c. t. a. There is no provision for application being made by any other person. The utmost extent of any right a purchaser may have is to be relieved of his bargain if the administrator c. t. a. waits too long to ask the approval of the court. He cannot substitute his act for an act which is required under the statute to be performed by the administrator c. t. a. Nor can the court approve the sale merely because it knows of it, if the administrators do not apply to confirm. The court is given no authority unless the administrator c. t. a. apply to the court for an order of confirmation. The legislature has not empowered the court, which exercises no authority except under the statute, to direct the administrator c. t. a. against his will. Any legislation conferring any power of direction to the administrator c. t. a. would be unconstitutional. The will of the court and that of the administrator c. t. a. must coincide or there is no sale.

It is no answer to say, as appellant does in his brief (p. 18), that, because the administrator c. t. a. submitted the Evernham sale to the court,

the court acquired jurisdiction to confirm it. The statute contemplates that the application of the administrator c. t. a. *shall be an application for an order of confirmation.* The administrators c. t. a. did not ask for the approval of the Evernham contract, on the contrary they asked for the approval of the Walters contract.

The proceedings are purely statutory and if the legislature desired to permit a contract of sale to be made with a purchaser which could not become effective unless the administrator c. t. a. moved to confirm it, the legislature had that right. The *only* authority of the administrator c. t. a. is under the statute. The purchaser cannot complain for he made the contract with knowledge of the statute and if he desires to make a contract which will not become effective except at the will of the other party he may do so. *Hinds* v. *Henry*, 36 N. J. L. 328. *Leschziner* v. *Bauman*, 83 N. J. L. 743. The administrators c. t. a. in the case at bar did *not* ask for confirmation of the sale which was confirmed by the Orphans' Court. On the contrary, they asked for the confirmation of the sale to respondent Walters.

VI.

There is no merit in the contention of appellant Evernham that the Prerogative Court should not have directed the confirmation of the Walter's sale nor is there any merit in the contention that, if the Decree of the Prerogative Court be affirmed, it will mean that a policy will be adopted which will require the courts to follow a "speculative real estate market."

The Vice-Ordinary disposes of the contention that the property was worth more than $30,000

at the time of the making of the contract to sell to Walters for $30,000 and at the time of the trial in his opinion at p. 15 of the state of case. He holds that the price of $30,000 was fair and adequate and the testimony clearly indicates that it was. And Evernham has no interest in this phase of the case. *All* those interested *are* asking for the approval of that contract.

As to the second phase of counsel's suggestion (p. 23 of his brief) almost every rule can be proven to be wrong by *reductio ad absurdum*. Of course, a court is not to follow, as a general rule, a speculative market. But each case must be considered as it arises and each case is to be determined upon its own facts. And the purchaser cannot complain for he made his agreement with full knowledge of the statute.

The facts in the case at bar justified the decree of the Prerogative Court with respect to the disapproval of the contract of sale of appellant Evernham and the approval of the contract of respondent Walters.

VII.

The Matter of Counsel Fee.

Under the decision of Vice Ordinary Backes *in re Queen*, 82 N. J. E. 588, and *in re Welsh*, 93 N. J. E. 303, the Prerogative Court was without authority to make the allowance of counsel fees which was made in this case.

Undoubtedly the case was treated as an ordinary case in the Prerogative Court where the practice has uniformly been to allow counsel fees.

Dickinson's Probate Court Practice, Revised Edition of 1896, p. 127.

Moreover the case was a litigated case within the meaning of the Orphans' Court Act, section 196, C. S. of N. J., p. 3885 and the Orphans' Court had power to allow costs and expenses which would include a counsel fee.

Helmers Executors v. *Yardley*, Essex County Orphans' Court, Judge Martin, 42 N. J. L. J. p. 234.

It was apparently assumed in the Prerogative Court either that a counsel fee could properly be allowed under the practice of the court or that, on appeal, the Prerogative Court might exercise the power conferred upon the Orphans' Court under section 196. Vice Ordinary Backes based his conclusion upon the analogy between the practice upon appeal to the Prerogative Court, where there is no original jurisdiction in the Prerogative Court, and the practice of this court on error and appeal. It is inconceivable that these cases should have been called to the attention of the Vice Ordinary in the case at bar, and that he should have, notwithstanding the cases, allowed the counsel fee and not referred to them. There is nothing in his opinion upon the subject. If counsel fees have been erroneously allowed in this case, it is as much due to the failure of counsel for appellant here to direct the attention of the court below to the cases which he now directs the attention of this court to, as it was for respondent Walters to apply for and take the order which includes counsel fees.

Respectfully submitted,

MERRITT LANE,
Of Counsel Respondent Walters.

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the matter of the Estate of THOMAS BROOKS, Deceased.

ON APPEAL FROM PREROGATIVE COURT.

BRIEF FOR ELIZABETH P. SHETZLINE, ET AL., SUBSTITUTED ADMINISTRATORS WITH THE WILL ANNEXED, OF THOMAS BROOKS, DECEASED, RESPONDENTS.

Decedent, a resident of Philadelphia, died in 1906, leaving his estate in trust. July 7, 1925, his administrators, d. b. n. c. t. a., entered into an agreement with appellant, Evernham, for the sale to him of a tract of land of ninety-nine and fraction acres, partly in Borough of Island Heights and partly in Dover Township, Ocean County, for $19,000.00 (Case, 186), "Said sale to be subject to the approval of a competent court of record of New Jersey."

September 17, 1925, the administrators entered into an agreement with respondent Walters for the sale to him of the same land for $30,000.00 (Case, 190), reciting (192): "It is understood that there

are existing prior agreements to sell above-mentioned property, subject to the Court's approval and that this agreement is contingent upon the Court's disapproval of said prior agreements," and also (at 191): "The sale is made subject to the approval of a competent Court of New Jersey having jurisdiction thereover."

There was both a power and direction to executors to sell real estate by testator's will (Case, 207).

Of the persons beneficially interested in the Brooks Estate, ten were under age (Case, 105, 106).

September 28, 1925, administrators petitioned Ocean County Orphans' Court for disapproval of sale to Evernham and approval of sale to Walters (Case, 22), which Court approved the former sale.

On appeal to the Prerogative Court the Orphans' Court was reversed (Case, 17). See opinion of Buchanan, V. O. (Case, 7).

Point One.

The sale is governed by Section 13 and 14, page 2262, Compiled Statutes, and by Section 24 of the Orphans' Court Act, Compiled Statutes, 3821.

The section particularly in point is Section 14, page 2263, Compiled Statutes, viz.:

> "14. Administrator with will annexed; sale to be approved by Orphans' Court; additional security.—Sec. 2. That no sale of lands hereafter made by an administrator or administrators with the will annexed, or by an administrator or administrators *de bonis non* with the will annexed, shall be valid until the terms thereof shall have been submitted to the Or-

> phans' Court of the county in which the lands proposed to be sold lie or shall lie, and approved by said Court, and it shall be the duty of such Court, upon any application by an administrator or administrators with the will annexed, or the survivors or survivor of them, or by an administrator or administrators *de bonis non* with the will annexed, or the survivors or survivor of them, for an order confirming the terms of any sale made or to be made by him or them under any power of sale contained in such will, before confirming such sale, in their discretion, to require such administrator or administrators with the will annexed, and such administrator or administrators *de bonis non* with the will annexed, to give such additional security, by bond to the Ordinary, as said Court shall deem advisable, having regard to the value of the real estate ordered, directed or authorized to be sold in said will, for the proper distribution of the proceeds of the sale of such real estate (P. L. 1888, p. 396).

It is conceded that were this a public sale ordered by the Court and what is ordinarily called a judicial sale, the mere inadequacy of the price would not justify the disapproval of the first sale. The statute providing for the confirmation of public sales requires that sales be reported to the Court and, if approved by the Court should be confirmed, contains a proviso that no sale shall be confirmed until the Court is satisfied that the property has been sold at the highest and best price, the same would then bring in cash. The Courts have held universally, because of that proviso, that such sales in the absence of fraud, mistake, etc., would not be

set aside if the lands brought the highest and best price obtainable at the auction. The purpose of the decisions being to encourage bidders at public sales.

Morrisse v. Ingles, 46 Eq. 306;
Rogers v. Rogers, 62 Eq. 111;
Ryan v. Wilson, 64 Eq. 797;
Hoffman v. Godfrey, 79 Eq. 617;
Hurley v. Potash, 93 Eq. 167.

All the above are public sales, and have no application here.

Under the statutes which govern us, no sale shall be valid until the terms thereof be reported to the Orphans' Court, and if the Court shall approve the sale, it shall confirm the same as valid and effectual. There is no proviso in this Act.

The Court of Errors, in *Ryan v. Wilson,* 64 Equity, 797, Court of Errors, page 805, discusses this distinction and states the rule that the power of confirmation or rejection (which governs our case) is untrammeled by the proviso and is committed without limitation to judicial discretion. Until the sale is reported to and approved by the Court, it is not a perfect contract made by competent parties, but is a bargain dependent on the approval of the Court which should regard the interest of the parties whose property it undertakes to sell.

This distinction is again remarked by the present Chancellor, then Vice-Chancellor, in *Campbell v. Hough,* 75 Equity, 601, at page 609, where he expressly states that such an attempted sale as ours, is not such a sale as will not be set aside for mere inadequacy of price, but is affected by Section 85 of the Orphans' Court Act, which commits the question of confirmation of the executors' act without limitation to judicial discretion. In the Campbell

case, the administratrix had petitioned the Orphans' Court for leave to sell the deceased's land in payment of debts and an order had been made directing her to make such sale and she had joined in an agreement for private sale which subsequently she refused to carry out. Whereupon the bill for specific performance was filed against her and the Court of Chancery held that they would not grant relief, for the reason that the administratrix had received an offer $600.00 better than that which she had accepted, and it was patent that the Orphans' Court would ratify her sale at the higher figures and disapprove the earlier sale.

See also *Porch v. Agnew,* 66 Eq. 232.

In re *N. J. Refrigerating Co.,* 96 Eq. 431.

This was a receiver's sale and set aside by the Chancellor for inadequacy of price.

It is submitted that in the instant case, there is no sale until the approval of the Court; and that one agreeing to purchase lands from an administrator makes such agreement with the knowledge that he has no enforceable contract; that the purpose of the statute requiring confirmation of such proposed sales is the protection only of those beneficially interested in the estates; that the time of sale is that of the Court's hearing and approval of the application, and finally, that the Court having two offers before it, one of $19,000.00, the other of $30,000.00, should confirm the one producing the greater sum; especially where there are, as here, infants *cestui que trustent.*

Point Two.

THE PRICE OFFERED BY EVERNHAM WAS GROSSLY INADEQUATE AT THE TIME IT WAS OFFERED.

The learned Vice-Chancellor sums up the testimony on this point (Case, 12 to 15).

This property bounded upon a highway known as Washington Street. On the eighteenth day of June, 1925, the State Highway Commission, at a meeting at Browns Mills, announced that the road from Camden to the seashore was number four on the list to be permanently constructed (Case, 159-173); of which route Washington Street, upon which the property fronted, formed a part; and immediately after such pronouncement on the part of the State Highway Commission, there was a most decided upward turn in the value of property along the route (Case, 159—appellant's witness Holman).

Nearly all of the appellant's witnesses testify to a value of approximately $19,000.00 prior to this meeting of the Commission, and of a tremendous increase immediately following it, but they overlook the fact that this action of the Commission was held three weeks prior to the date of the Evernham contract. Most of these witnesses were incompetent as experts, either by ignorance of the subject or personal interest in the transaction; but taking them up in order, we have:

1. Kiefaber (Case, 111), who negotiated the sale, representing Evernham. Has an office in Merchantville and Philadelphia; no Ocean County properties listed; knew of the sale of only two other proper-

ties in the neighborhood, and after his testimony was nearly closed and he had been allowed to testify that $19,000.00 was a fair price on July 6, 1925, on a cross-examination admitted (Case, 128) that he had a one-fourth interest in the purchase and a claim for two and one-half per cent commission on the sale against the administrators.

2. Leet (Case, 132), has no business; formerly in dry goods business.

3. Driscoll (Case, 135), been over the property once (Case, 136); is a lot salesman; never bought but one acreage tract; values the property latter part of June or first of July at $20,000.00 (Case, 141). Knows of two or three sales since, materially higher prices.

4. Then—President Ocean County Title Company. Thinks that $19,000.00 was a fair value (Case, 152). Thinks there has been a decided advance in values starting about the middle of July.

5. Holman, former sheriff—not in the real estate business (Case, 153). Doesn't know what the other properties in the neighborhood sold for; market value as of June or first of July, $21,000.00 (Case, 159). This is the witness who testified that there had been a decided upward change of market values of property in the vicinity, starting from the State Highway Commission's actions, which action he places as later than the Evernham offer.

6. Haag—a baker of Seaside Park, values the property at $20,000.00 (Case, 161-162); $25,000.00 as of May, in July worth more (Case, 163); places the State Highway Commission meeting as being

later than June but before the Fourth of July; big increase caused by the road; didn't start until August 7th (Case, 164).

7. Fischer—newspaper editor, Toms River—fixes the meeting of the State Highway Commission definitely, June 18th (Case, 173); said the property was offered to him for $22,000.00 (Case, 172); then volunteers the information that he also has a one-fourth interest in the Evernham purchase (Case, 174).

8. Schwartz—was interested in a neighboring tract; no real estate experience; valued the property at $19,000.00 (Case, 180).

Nearly all of these witnesses, it will be noted, figured the value which they placed upon the land, as being the value of the property prior to the publication of the news that the road would be shortly improved; and any of them who was asked, testified that the increase in value came with such news.

It is submitted, that at the date of the Evernham contract, the property was worth considerably more than the amount of his offer.

Appellant's Point.

(3) The Devine case, decided by Chancellor Magie, as Ordinary.

The application for confirmation in this case was dismissed for lack of jurisdiction; and having dismissed the case, the Ordinary went on to say, "Increase in value after date of sale would have no effect in inducing the approval of the contract." This pronouncement had no bearing on the disposi-

tion of the case, the question does not seem to have been argued; and it is submitted that the learned Ordinary erred.

Appellant contends (Brief, 10b) that the finding of the Orphnas' Court should not be disturbed, unless it could be said to be abuse of discretion.

We contend, that the testimony in this case, coupled with the fact that there were infant beneficiaries before the Court; that there was an increase of over fifty per cent in last offer, and with the fact that the purpose of the statute must have been to protect such beneficiaries and not the general public or parties dealing with the administrators; shows an abuse of discretion.

It is submitted, that the whole duty of the Orphans' Court was to consider the situation as it was at the time the matter was presented to it; that its first duty was to see to it that the recipients of the estate were protected; that Evernham in making his deposit and taking a contract subject to the approval of the Court, must be held to have known that it was only an offer, that dealing with administrators, he was bound to take notice of disability to sell without approval, and that the action of the Court required by the statute before a sale could be consummated, did not mean that the Court should act as a mere rubber stamp without discretion, and did not mean that the Court would look after his, the buyer's interest, but would first of all look to the interest of the parties interested in the estate, and intended to be protected by the statute.

Respectfully submitted,

JOHN D. McMULLIN,
Proctor for and of Counsel with the Administrators of the Brooks Estate.