

INDEX.

	PAGE
Bill of Complaint	1
Schedule A, Will of Marcus Sayre.....	15
Schedule B, Agreement between Com- plainant and Charles E. Cameron, Jr.	26
Amendment to Bill of Complaint	34
Answer and Counterclaim of Dudley O. Sayre	36
Motion to Strike Out Counterclaim	74
Replication	78
Order Disposing of Certain Motions	79
Special Replication of Complainant to Coun- terclaim of Defendant, Dudley O. Sayre	82
Answers to Interrogatories Annexed to Answer of Dudley O. Sayre, Filed Here- in, Addressed to Complainant	91
Final Decree	162
Notice of Appeal	169
Dudley O. Sayre's Petition of Appeal.....	170

COMPLAINANT'S WITNESSES:

John S. Bacheller:

Direct	113
Cross	117

Charles F. Ellery:

Direct	121
Cross	134
(Recalled)	
Direct	143
Cross	144

	PAGE
William J. Dalton:	
Direct	139
Cross	141
Joel L. Schlesinger:	
Direct	148
Cross	153

DEFENDANT'S WITNESS:

Dudley O. Sayre:	
Direct	160

Bill of Complaint.

(Filed July 8, 1943.)

IN CHANCERY OF NEW JERSEY.

*To the Honorable Luther A. Campbell, Chancellor
of the State of New Jersey:* 10

The Complainant, Fidelity Union Trust Company (formerly Fidelity Trust Company), as substituted trustee under the last will and testament of Marcus Sayre, deceased, respectfully shows that:

FIRST CAUSE OF ACTION

1. Marcus Sayre died on March 25, 1909, leaving a last will and testament duly admitted to probate by the Surrogate of Essex County, New Jersey, on April 6, 1906. A true copy of said Will marked Schedule "A" is annexed hereto and made a part hereof. 20

2. Said Marcus Sayre in and by his last will and testament appointed Henrietta M. Sayre, Mary Estelle Sayre, George V. N. Teeter and Frederick R. Pilch, executors thereof and trustees thereunder. Letters Testamentary were issued to them on April 6, 1909. 30

3. By an order of the Essex County Orphans' Court dated September 25, 1914, said executors and trustees were relieved and discharged of and from their duties as executors and trustees under said Will and Complainant was appointed as Administrator cum testamento annexo and as Trustee in their place and stead, to take upon itself the administration of the Estate of said 40

Bill of Complaint.

Marcus Sayre in accordance with the terms of his Will.

10 4. By the "Sixth" clause, testator devised and bequeathed the residue of his estate to his executors, in trust to pay the balance of the net income (after providing for an annual fixed income to his daughter as therein set forth) to his wife, Henrietta M. Sayre, so long as she should remain his widow.

5. The "Eighth" clause of said Will commences as follows:

20 "Eighth: On the death or remarriage of my said wife, whichever shall first occur, I order and direct that my said executors and trustees and the survivors of them, continue to hold the store and premises number Four hundred and ninety (490) Broad Street, in the City of Newark; also the store and premises number Four Hundred and ninety two (492) Broad Street, in said City; and also the premises known as number Five hundred and sixty-one (561) Broad Street in
30 said City, in trust for my daughter Mary Estelle for her sole and separate use, and to permit her to take, receive and enjoy the rents, issues and profits thereof after payment of taxes, insurance, repairs and other legal charges thereon for and during the term of her natural life. * * *"

The remainder of said clause, among other things fixes the valuation of said real estate for the purpose of equalization of the share of the testator's said daughter and contains other equaliza-
40

Bill of Complaint.

tion provisions so as to fix and determine the relationship of shares so set aside with respect to the shares of residue to be held for and paid to the testator's sons, Dudley O. Sayre, Chauncey B. Sayre and Henry N. Sayre. Said clause finally provides that on the death of testator's said daughter, the trust declared for her share shall cease and the share shall be distributed to her lawful issue, their heirs and assigns forever, in equal shares; and if she should die without leaving issue, then said share shall fall into the residue of the Estate and be distributed as is directed with respect to said residue. 10

6. The "Ninth" clause provides that upon the death or remarriage of testator's wife, the residue, with certain equalization provisions shall be held for the use and benefit of his sons, Henry N. Sayre, Chauncey B. Sayre and Dudley O. Sayre. It further provides that the share provided for Henry N. shall be paid to him forthwith and the shares provided for Chauncey B. and Dudley O. shall be paid on their attaining the age of 35 years. 20

7. The "Tenth" clause provides that in case any of the sons of testator should die before the time when under the provisions of said will any of the payments therein should be payable, leaving lawful issue, then such payments should be made upon the death or remarriage of testator's wife to the children of such son; the children of a deceased child to take the same share that the parent would have taken if living. 30

8. Henrietta M. Sayre, widow of the testator, died January 2, 1920, without having remarried. 40

Bill of Complaint.

10 Mary Estelle Sayre is living and unmarried. Chauncey B. Sayre has since died leaving surviving a son Chauncey B. Sayre, Jr. and said Chauncey B. Sayre, Jr. has a son Chauncey Van V. B. Sayre. Dudley O. Sayre is living. His children are Natalie Sayre Dalton; Marjorie Sayre Wallwork; Dorothy Sayre Holthusen; and Dudley O. Sayre, Jr. Marjorie Sayre Wallwork has a child whose name is Barbara Wallwork. Dorothy Sayre Holthusen has a child whose name is Cynthia Holthusen. Henry N. Sayre died March 7, 1928 and the Complainant is informed that he left surviving him a widow Margaret Sayre and a daughter Dorothy Sayre Farcus.

20 9. Under the directions provided by the "Eighth" clause of said Will, the complainant has continued to hold and does now hold the lands and premises known as 561 Broad Street, Newark, New Jersey, in trust for testator's daughter, Mary Estelle Sayre, paying to her the net rents and income from same.

30 10. Said premises are improved by a store and building. From and after the financial and economic depression which commenced in or about the year 1929, the said premises have at various periods failed to produce an income which was either proportionate to their value or sufficient to pay the taxes and other expenses of upkeep. This has been occasioned by the inability to keep the premises rented at all times or the inability to obtain rentals which were commensurate with the carrying charges and by generally unfavorable rental conditions in that part of the City. The complainant has at all
40 times made reasonable efforts to keep the prem-

Bill of Complaint.

ises rented at a rate which would carry same and produce a net income for the benefit of the life tenant, but has been unable to do so. Tax assessments have been and are high.

11. By reason of the foregoing, tax arrears have accumulated and on October 13, 1941, said premises were sold by the City of Newark for non-payment of taxes to Charles E. Cameron, who is now the holder of the tax sale certificate. Furthermore, Charles E. Cameron is the president of the Lauter Humana Company, which was the lessee of the premises at the time of his acquisition of the tax sale certificate, and said Company now holds a lease for a term which will expire on May 30, 1946. The rentals payable under said lease are barely sufficient to pay current taxes and other operating and maintenance charges and are wholly inadequate for the purpose of satisfying the arrears due upon the tax sale which, under the statute, may be foreclosed now at any time; and, complainant says that by reason of the premises said tax lien may be foreclosed. 10
20

12. There is no other income from the trust fund established for Mary Estelle Sayre with which said tax liens might be paid and satisfied and no adequate provision is afforded by the Will or by the testator's estate for the payment of the same and the Trustee has no funds in the trust for such purpose. 30

13. By reason of the foregoing the interests of the life tenant as well as the estate in remainder may be injured, impaired or lost, and complainant further says that an emergency has arisen not contemplated by the testator. 40

Bill of Complaint.

10 14. By the "Sixth" clause of said Will testator provides for the sale of his real estate by the executors and trustees, but the "Eighth" clause purports to restrict the exercise of said power with respect to the premises at 561 Broad Street, Newark, New Jersey, and the Will contains certain other expressions purporting to grant or to restrict the exercise of a power of sale to which reference is hereby specifically made.

20 15. The complainant has by written agreement dated June 11, 1943, a true copy of which is annexed hereto and marked Schedule "B", contracted to sell said premises to Charles E. Cameron, Jr. for the sum of \$16,262. in cash. Said agreement provides, however, that all rents and taxes shall be apportioned between the parties as of the date of closing title and that the Vendor will cause to be discharged existing liens created by tax sales, or in the alternative, will make due allowance from the purchase price therefor, including interest and costs to date of closing. Said contract further provides that the sale of said premises is expressly conditioned upon the authorization and approval thereof by 30 the Court of Chancery. Said contract contains a complete description of said premises. Complainant says that if the sale were consummated, then after making due allowance for tax arrearages and after making the adjustments provided for, complainant would receive the net proceeds of approximately \$5,000.

40 16. Complainant has during the past years sought to find purchasers for said premises without success and prior to the within contract has

Bill of Complaint.

received no bids which in its opinion deserve serious consideration.

17. Complainant is of the opinion that the foregoing sale is advantageous and is for the best interests of the estate, but is in doubt as to its powers and duties in the premises, and, accordingly requests that it be advised: 10

(a) whether the terms of the Will may be construed to authorize and empower it to sell said premises during the lifetime of said Mary Estelle Sayre;

(b) in the event that it is determined that the power to sell said premises does not exist under the terms and provisions thereof, whether, because of an emergency that has arisen, not anticipated by the testator, and in order to prevent the loss of the trust res and the defeat of testator's objects and to promote and protect the interests of the trust beneficiaries, this Court shall not authorize and direct that the premises be sold in accordance with the terms of the contract annexed hereof; and 20

(c) whether in accordance with the provisions of Revised Statutes 3:35-1, which authorize the sale by a fiduciary of any devise in trust or otherwise encumbered among other things with a lien of a tax or assessment or a tax sale where no adequate provisions is afforded by the testator's estate for the payment of the same, the Trustee herein may be authorized by this Court to sell and to convey said premises in accordance with the terms of said contract and to complete the sale thereof. 30
40

Bill of Complaint.

SECOND CAUSE OF ACTION

10 1. Complainant repeats the statements contained in paragraphs 1 to 8 inclusive of the First Cause of Action herein and makes it a part hereof.

20 2. Under the Trusts provided by the "Eighth" clause of said Will, complainant has continued to hold and does now hold the lands and premises known as 490 Broad Street, Newark, New Jersey, and the lands and premises known as 492 Broad Street, Newark, New Jersey, in trust for testator's daughter, Mary Estelle Sayre, paying to her the net rents and income from the same.

30 3. The premises known as 490 Broad Street are particularly bounded and described as follows:

40 BEGINNING on the easterly line of Broad Street at the Northwest corner of land of the party of the second part, which beginning point is distant North eighty-three feet six inches from the Northeast corner of Broad and Bridge Streets; thence along line of land of said party of the second part North eighty-three degrees forty minutes East one hundred and six feet six inches to the line of land of Beach Vanderpool; thence along same North eighteen feet two inches to land of John Landmesser; thence along line of same West twelve feet six inches; thence along same North five feet three inches; thence along line of same West ninety feet to Broad Street; thence South along

Bill of Complaint.

Broad Street twenty-four feet nine inches
to the place of BEGINNING.

4. The premises known as 492 Broad Street
are particularly bounded and described as fol-
lows:

BEGINNING on the Easterly side of Broad
Street sixty feet from the Northeast cor-
ner of same and Bridge Street at the
Northeast corner of land of Silas H.
Kitchell; thence along said line North
eighty three degrees forty minutes East
one hundred and six feet six inches; thence
North along said land of Kitchell twenty-
three feet eight inches; thence South
eighty-three degrees forty minutes West
one hundred and six feet six inches to
Broad Street; thence South along Broad
Street twenty three feet six inches to
place of BEGINNING. Being lots No. 101
(old No.) No. 492 (new No.) Broad St.

5. No. 490 Broad Street has a three-story
building thereon and No. 492 Broad Street has
a four-story building thereon both of which are
of a business or commercial character.

6. Neither of said properties produce an in-
come sufficient to pay the taxes and carrying
charges thereon. The tax assessments have been
and are high and from the inception of the
economic depression both the extent of occu-
pancy as to area and the rental value have
progressively diminished, and both properties
are now completely vacant. Said properties are
in poor condition and are not rentable without
extensive repairs and rehabilitation and the

10

20

30

40

Bill of Complaint.

trustee is without funds to put them in good condition. Complainant has made efforts to rent said properties, but has been unable to do so.

10 7. The property located at 490 Broad Street was sold to the City of Newark for nonpayment of taxes for the years 1933 to 1937 inclusive, and nothing has been paid on account of same, nor have any taxes been paid on this property for any subsequent years to the present time. It is estimated there is due the sum of approximately \$10,700. for unpaid taxes including tax sales, exclusive of interest and costs.

20 8. The property at 492 Broad Street was sold to the City of Newark for nonpayment of taxes for the years 1934 to 1937 inclusive, and nothing has been paid on account of same, nor have any taxes been paid for any subsequent years to the present time. It is estimated that there is due the sum of approximately \$10,600. for unpaid taxes including tax sales, exclusive of interest and costs.

30 9. There are no funds in the trust estate for the payment and discharge of said taxes and tax liens and the Will makes no adequate provision therefor.

40 10. Rental conditions are generally unfavorable in the part of the City of Newark where both said properties are located and, in the judgment of the trustee, even if funds were available from the trust or otherwise, the expense of putting the properties in a rentable condition would be so great that the value of the same as improved would not be equal to the tax liens and other taxes which have ac-

Bill of Complaint.

crued, and the rentals which conceivably might be received would not justify the expense of such rehabilitation.

11. Complainant has made efforts to sell the properties without success and no offers which, in the judgment of complainant were worthy of serious consideration have been received and it is unlikely that any will be received. 10

12. By reason of the foregoing, the interests of the life tenant as well as the estates in remainder may be injured, impaired or lost, and furthermore, the continued retention of the same requires an outlay of funds for insurance and other protection and there is no income from the trust fund sufficient to defray same. Complainant further says that an emergency has arisen not contemplated by the testator. 20

13. By the "Sixth" clause of said Will, testator provides for the sale of his real estate by the executors and trustees but the "Eighth" clause purports to restrict the exercise of said power with respect to the premises at 490 Broad Street, Newark, New Jersey, and 492 Broad Street, Newark, New Jersey, and the Will contains certain other expressions purporting to grant or restrict the exercise of the power of sale to which reference is hereby specifically made. 30

14. Complainant is of the opinion that both of said properties should be sold forthwith at public auction to the highest bidders, such sale to be subject to all unpaid and accrued taxes including tax sales and other tax liens and subject to any other charges which have attached 40

Bill of Complaint.

10 or may attach to the same; and, in the event that it is impossible to dispose of same at public auction, then it should be authorized and directed to abandon both of said properties or such of them as shall not have been sold at public auction pursuant to R. S. 3:17-8.2, 3:17-8.3, and 3:17-8.4 (laws of 1943, Chapter 88, paragraphs 1-3 inclusive).

15. Complainant is in doubt as to its powers and duties in the premises and accordingly requests that it be advised:

20 (a) whether the terms of the Will may be construed to authorize and empower it to sell said premises either at public auction or by private sale during the lifetime of said Mary Estelle Sayre;

30 (b) in the event that it is determined that the power to sell said premises does not exist under the terms and provisions thereof, then whether because of an emergency that has arisen, not anticipated by the testator, and in order to prevent the loss of the trust res or the defeat of the testator's objects and to promote and protect the interest of the beneficiaries, this Court should not authorize and direct that the premises be sold at public auction;

40 (c) whether in accordance with the provisions of R. S. 3:35-1, authorizing the sale by a fiduciary of a devise in trust encumbered by tax liens, the trustee may be authorized by this Court to sell said premises at public auction and to convey the same pursuant thereto; and

Bill of Complaint.

(d) in the event a sale by public auction should be authorized and such sale should be held but that no bids should be made for said properties or either of them, then whether this Court should determine that it would be advisable and for the best interests of those interested in the estate or trust for the Trustee to abandon said properties or such of them as shall not have been sold at public auction. 10

Complainant is without adequate remedy in the courts of law and therefore prays:

1. That Mary Estelle Sayre, Chauncey B. Sayre, Chauncey Van V. B. Sayre, Dudley O. Sayre, Natalie Sayre Dalton, Marjorie Sayre Wallwork, Dorothy Sayre Holthusen, Dudley O. Sayre, Jr., Barbara Wallwork, Margaret Sayre and Dorothy Sayre Farcus, who are the defendants in this suit, may answer this Bill of Complaint and each statement therein made. 20

2. That this Court may construe the said last Will and Testament of Marcus Sayre, deceased, and may advise and instruct complainant whether or not it has the power to sell the lands and premises mentioned in this Bill of Complaint. 30

3. That if the complainant has such power of sale, then this Court may instruct the complainant as to its present duties in the premises and more particularly whether complainant should sell and convey the premises known as 561 Broad Street, Newark, New Jersey, in accordance with the terms and conditions of the contract annexed hereto and whether or not complainant should 40

Bill of Complaint.

sell the properties known at 490 Broad Street and 492 Broad Street, respectively at public auction, or what other course of procedure should be adopted or followed.

- 10 4. That if the complainant has no such power of sale, then that this Court should order and direct that the lands and premises known as 591 Broad Street, Newark, New Jersey, may be sold and conveyed in accordance with the contract hereunto annexed by an order of the Court made under the inherent jurisdiction of this Court where an emergency situation has arisen or by an order of this Court made pursuant to the provisions of R. S. 3:35-1.
- 20 5. That if the complainant has no such power of sale, then that this Court may instruct the complainant whether complainant should sell the properties at 490 Broad Street and 492 Broad Street, respectively, at public auction, pursuant to the inherent powers of this Court where an emergency has arisen or pursuant to the provisions of R. S. 3:35-1, and in the event that this Court should authorize and instruct the complainant to sell the premises at 490 Broad Street and 492 Broad Street, respectively, at public auction and that no bids should be received for same or such bids, if received, or any of them, should not be confirmed by this Court, then that this Court, pursuant to its inherent power or pursuant to R. S. 3:17-8.2 et seq., may authorize and direct the complainant to abandon said properties or such of them, the sale of which is not made or confirmed.
- 30
- 40 6. That complainant may have such other or further instructions as may be requisite or nec-

Schedule A, Annexed to Bill of Complaint.

essary and such other relief as may be agreeable to equity and good conscience.

7. That a Writ of Subpoena may issue demanding the said defendants and each of them to answer this Bill of Complaint and to abide by such decree as this Court may make in the premises. 10

HOOD, LAFFERTY & EMERSON,
HOOD, LAFFERTY & EMERSON,
Solicitors of Complainant.

WALLACE R. CHANDLER, JR.,
Wallace R. Chandler, Jr.,
Of Counsel.

20

SCHEDULE A, ANNEXED TO BILL OF
COMPLAINT.

IN THE NAME OF GOD, AMEN.

I, MARCUS SAYRE, of the Township of South Orange, in the County of Essex and State of New Jersey, being of sound and disposing mind, memory and understanding, do hereby make, publish and declare this to be my last will and testament. 30

FIRST: I order and direct that all my just debts and funeral and testamentary expenses be paid by my executors as soon as practicable after my decease.

SECOND: The provision hereinafter made for my wife Henrietta, is in lieu of her dower in my real estate, and of all other claims on my estate. 40

Schedule A, Annexed to Bill of Complaint.

THIRD: I give and bequeath unto my said wife, Henrietta, the sum of Five thousand dollars, to be paid to her in cash by my executors within thirty days after my decease; also all the household furniture and utensils, jewelry, wearing apparel, books, pictures, ornaments, silver and plated ware, horses, carriages, harness and all other personal chattels that may be in use, in, about, or in connection with the house and premises in the Township of South Orange, where I now reside, to have and to hold said money and personal chattels above bequeathed to her for her absolute property.

FOURTH: I also give and devise to my said wife Henrietta, the use and enjoyment of the said dwelling house and premises in the Township of South Orange, where I now reside as the same is now enjoyed by me, as long as she shall remain my widow. If however, my said wife shall at any time desire to dispose of the said house and premises during her widowhood, then it is my will, and I order my executors on the written request of my said wife, to sell and dispose of the same, and invest the net proceeds thereof along with, and in the manner and for the purposes hereinafter directed, as to the residue of my estate, except that if my said wife shall request in writing that a portion of said proceeds be invested in the purchase or erection of another residence for herself, then I authorize and direct my said executors to appropriate a part of said proceeds not exceeding Twenty-five thousand dollars, in the purchase or erection of such a residence as she may select, to be conveyed to them and held by them as executors and trustees on the same trusts as they

Schedule A, Annexed to Bill of Complaint.

are hereinafter directed to hold the residue of my estate.

FIFTH: I give and bequeath unto my son, Henry N. Sayre, the sum of Ten thousand dollars.

10

SIXTH: The rest and residue of my estate, whatsoever and wheresoever, I give, devise and bequeath unto my executors and the survivors of them, in trust, to sell and convert the same into money as soon as conveniently can be done after my death, saving and reserving however, from such power of sale by my executors of such portion of my real estate as by the fourth paragraph of this will I have provided may be used by my said wife, in respect to which I desire that it shall be clearly understood that it is not my desire or intention that any provision which I have made for my wife in the fourth paragraph hereof, shall be in any manner changed by my executors, unless it shall be done in strict accordance with the written request and consent of my wife first had and obtained. I hereby empower and desire my executors to collect and get in the rents, issues and profits from my estate, and if from such and other sources, a fund may be derived by the sale of any portion of my estate or otherwise, in excess of what may be needed by my executors for the proper management of my estate, then I order and direct that my executors shall invest so much of such excess fund upon bond and mortgage, upon unencumbered real estate worth at least double the amount invested; and from the income from such investment after the payment therefrom of taxes, insurance and other legal and proper charges of my estate, to pay out of

20

30

40

Schedule A, Annexed to Bill of Complaint.

- such income, One thousand dollars a year quarterly to my daughter, Mary Estelle, until the death or remarriage of my wife, and to pay over to my wife so long as she shall remain my widow, all the rest of the net income of the said residue of my estate in semi-annual payments on the first day of January and July in each year, subject, nevertheless to the contingent provision hereinafter made in favor of my sons, Chauncey B. and Dudley O. Sayre. For many years past, I have been engaged, and at the present time, I am still engaged in the conduct of a large and expensive mercantile and manufacturing business in the State of New Jersey, with the financial result that usually follows every such going business. My desire is, to provide for my executors, every proper facility for the continuance of my said business, but for such time only as may be necessary for its earliest possible settlement. A large and valuable part of my estate consists of unimproved real estate in New Jersey, to realize money upon which, by a sale thereof, especially when the same is not in demand, would be an unnecessary sacrifice of a valuable part of the assets of my estate.
- 30 Rather than which, it is my present judgment that it would be better that in case my executors shall concur in my view, that if for any reason of my executors shall have need for money which they have not, and cannot obtain without great sacrifice by the forced sale of unimproved real estate, that it would be wiser and better for the said executors to raise such needed amount of money by giving therefor, a mortgage or mortgages upon my real estate. Therefore, and for that purpose, and in case my said executors
- 40

Schedule A, Annexed to Bill of Complaint.

shall concur in the view that I have expressed, I hereby authorize and empower them to execute upon my real estate, such mortgage or mortgages as I have referred to, for such an amount and upon such terms as in the judgment of my executors would be needed, and to the advantage of my estate. 10

SEVENTH: I authorize and direct my said executors and trustees, and the survivor of them on the request of my said wife expressed in writing, to pay out of said residue of my estate, the sum of Ten thousand dollars to each of my said sons, Chauncey B. and Dudley O. Sayre.

EIGHTH: On the death or remarriage of my said wife, whichever shall first occur, I order and direct that my said executors and trustees and the survivors of them, continue to hold the store and premises number Four hundred and ninety (490) Broad Street, in the City of Newark; also the store and premises number Four hundred and ninety-two (492) Broad Street, in said City; and also the premises known as number Five hundred and sixty-one (561) Broad Street, in said City, in trust for my daughter Mary Estelle for her sole and separate use, and to permit her to take, receive and enjoy the rents, issues and profits thereof after payment of taxes, insurance, repairs and other legal charges thereon for and during the term of her natural life. In making this provision for my said daughter, I order and direct, that if upon the marriage or death of my said wife, there should be any mortgage or mortgages or other liens of any nature upon the property, the use of which I have given to my said daughter, then I direct that my said executors shall discharge 20
30
40

Schedule A, Annexed to Bill of Complaint.

all such liens by the payment thereof out of my estate. And for the purpose of effecting a division of the residue of my estate after the death or remarriage of my wife, as hereinafter directed, I hereby place a valuation on said share

10 so to be held in trust for my said daughter of One hundred thousand dollars, and in case such valuation of said share shall not amount to an equal share of said residue, including therein the amounts paid to my two sons, if any, and the Ten thousand dollars bequeathed as aforesaid to my son, Henry N., and the money charged to him, then and in that case my said trustees shall continue to hold in trust and invested as

20 hereinabove directed for my said daughter, enough more of said residue to make said daughter's share one equal share of my estate, and to pay over to my said daughter semi-annually from the death or remarriage of her mother, the income of the amount so invested for her benefit, for and during her natural life, but in case at the valuation herein placed on said share, said share shall exceed one equal share of my estate, then such share shall continue to be held in trust for said daughter without any abatement or liability on her part, to contribute anything because

30 of such excess; and on the death of my said daughter, the trust herein declared for her share, shall cease, and in that event, I give, devise and bequeath to the lawful issue of my said daughter, the share so held for her, to them, their heirs and assigns forever in equal shares, the children of any deceased child of said daughter, if any, to take the share the parent would have taken, if living. And if said daughter shall die without leaving lawful issue, or the issue of any deceased

40 child, then the share of said daughter shall fall,

Schedule A, Annexed to Bill of Complaint.

into the residue of my estate, and be distributed as said residue is hereby directed to be distributed. I also desire that it shall be clearly understood, that the provision made in the sixth paragraph of this will for the sale by my executors of the rest and residue of my estate, shall not in any respect affect, change or modify the provision which I have made for my daughter Mary Estelle, in the eighth paragraph of this will. 10

NINTH: At the death or remarriage of my said wife, whichever shall first occur, I order and direct that my executors or the survivor of them shall make as accurate and careful a valuation as possible, of my whole estate, including the share of my daughter at the valuation hereinabove placed on her share, and the Ten thousand dollars above given to my son, Henry N., and the amounts paid to my other sons under the provisions of this will, and that they then pay over to my son Henry N., so much of said residue as with the said Ten thousand dollars heretofore given him shall be one equal fourth part of my estate, and I do order and direct that my said son Henry N. shall accept and take as a part of his share, the house and lot belonging to me where he now lives, known as No. 49 Fulton Street, in Newark, and for the purpose of such distribution, I value the said house and lot as Six thousand dollars, and to carry into effect such payment, I give and devise unto said Henry N. Sayre, the said house and lot, to take effect at the death or remarriage of my wife, to him, his heirs and assigns forever, as a payment of Six thousand dollars on his said share. I further direct, that out of the share so to be paid to my 20 30 40

Schedule A, Annexed to Bill of Complaint.

10 son Henry N. in pursuance of this clause of this will, there be deducted any sum or sums of money that have been advanced to him and may at my death stand charged against him, the said Henry N. Sayre, on the books of the Marcus Sayre Company. And on or after the death or
 20 remarriage of my wife, and when either of my said sons Chauncey and Dudley shall have attained the age of thirty-five years, then there shall be paid to each of them, such further sum as shall with the amount previously paid to him, be a full equal one-fourth part of my estate; the amount of each of said shares, and also that of my said son Henry to be computed by the preliminary valuation made of my estate, as hereinbefore directed.

20 TENTH: In case any of my said sons shall die before the time when under the provisions of this will, any of the payments herein directed shall be payable, leaving lawful issue, then such payments shall be made on the death or remarriage of my wife, whichever shall first occur, to the child or children of such son, and the children of any deceased child in equal portions, the children of the deceased child to have the same
 30 share the parent would have taken, if living; but if the death of such sons or any of them shall occur before the time for such payment, without his leaving lawful issue, or the issue of any deceased child, the amount which would have been paid to such son, shall remain in the hands of such executors and trustees as part of said residue.

40 ELEVENTH: I order and direct that after the death or remarriage of my wife, the other executors and trustees shall continue to get in, col-

Schedule A, Annexed to Bill of Complaint.

lect and receive the yearly income of so much of said residue as shall remain in their hands, and not needed for the payments directed in the previous clauses of this will, and not held for my daughter, and shall semi-annually distribute such net income between my sons Chauncey and Dudley, or to either of them who may not have received his equal share in my estate under the provisions hereof, and when from time to time after the death or remarriage of my wife, either of my said two last named sons shall attain the age of thirty-five years, the payment of income which shall thereafter accrue to such son, shall cease, and said executors and trustees shall then pay over to such son, so much of the residue in their hands as added to the amount of principal money previously paid to such son, and of the provisions hereof, shall make up his equal one-fourth of my estate computed at the valuation aforesaid, and to facilitate the making of such payments, I authorize and direct my executors and trustees in their discretion from time to time, as occasion may require, to sell any real estate or any stock or securities in which said residue may be invested.

TWELFTH: If when my youngest son, after attaining the age of thirty-five years, shall have been paid the amount of his equal one-fourth of my estate under the provisions hereof, there shall remain in the hands of my executors and trustees, on or after a settlement of the accounts of said executors and trustees any part of said residue, not held for my daughter, which was not consumed in making the distribution hereinabove directed, it is my will, and I do order and direct that such excess, if any, be equally di-

Schedule A, Annexed to Bill of Complaint.

10 vided among all my children, or the issue of any deceased child, so that on such final division, each child or his or her representative shall receive an equal share of the whole of my estate, and in such case, any share of such excess, which on such final distribution, shall be payable to my said daughter, shall be added to and form a part of the sum to be invested, and held in trust for my said daughter, as hereinbefore provided.

20 THIRTEENTH: I direct my executors and trustees to keep all buildings held by them under this will, insured during the continuance of the trust, in as large amounts as can be obtained thereon in sound and solvent companies, and in case of their destruction or injury by fire, to devote the insurance money to proper and sufficient reparation or rebuilding of said buildings, and if any such insurance money shall be inadequate for that purpose, I direct that as much more as may be required to make such proper and sufficient reparation, shall be added from my estate.

30 FOURTEENTH: In case any of the persons to whom legacies are bequeathed by this will, or for whose benefit provision is made herein, shall file any caveat against the probate thereof, or shall in any manner institute any proceedings in any court or tribunal to contest the validity hereof, or shall set up or interpose to any action or proceeding instituted under the authority or provisions hereof, a defense founded on the invalidity of this will for any cause whatever, then and in such case all provisions made herein, or legacies given hereby to or for such persons, shall thereupon become null and void, and are
40 hereby declared to be in such case revoked.

Schedule A, Annexed to Bill of Complaint.

FIFTEENTH: I hereby annul and declare to be void and of no effect, all former wills, codicils or testamentary writings of whatever nature by me heretofore made, and declare this writing to be my last will and testament, and I hereby nominate, constitute and appoint my wife Henrietta M. Sayre, my daughter Mary Estelle Sayre, my friend George V. N. Teeter, of Newark, New Jersey, and Frederick R. Pilch, of Bloomfield, New Jersey, to be the executors of this my will, and trustees to execute the trusts hereinabove declared and created, and I hereby authorize them, or the survivor of them to make sale of such of my real estate as is hereinabove directed to be sold, either at public or private sale in their discretion, and to make, execute and deliver all necessary and proper conveyance for the same, and it is my will that the remarriage of my wife, if such an event shall occur, shall have the same effect on her connection with my estate, and on her power and authority as executrix or trustee under this will, as her death would have had, and in such case, all such power and authority in her shall cease, and shall pass over to, and be exercised by the other executors hereinabove named, and in the same manner, and to the same extent as if in case of her death they had survived her, subject however, to the duty and obligation on her part to account and pay over to such other executors and trustees, any part of my estate which she may have or hold as such executrix or trustee, at the time of such marriage.

10

20

30

SIXTEENTH: I give to the Managers of the Rosedale Cemetery Company of Orange, for the care of my plot in said cemetery, the sum of Five hundred dollars.

40

Schedule B, Annexed to Bill of Complaint.

SEVENTEENTH: I give to the Managers of the Glendyberry Cemetery at Honesdale, in the State of Pennsylvania, for the purpose of caring for my plot in said cemetery, the sum of Two hundred dollars.

10 IN WITNESS WHEREOF, I have hereunto set my hand and seal this twenty-second day of December, A.D. Nineteen hundred and eight.

MARCUS SAYRE (L. S.)

20 Signed, sealed, published and declared by the said Marcus Sayre, the testator, as and for his last will and testament, in the presence of us (all being present at the same time) who at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

Charles M. Lum, Prudential Building, Newark, N.J.

Egbert J. Tamblyn " " " "

Ralph E. Lum " " " "

30 SCHEDULE B, ANNEXED TO BILL OF COMPLAINT.

40 AGREEMENT, made this day of June, Nineteen Hundred Forty-three, BETWEEN FIDELITY UNION TRUST COMPANY, a corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex and State aforesaid, AS SUBSTITUTED TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF MARCUS SAYRE, DECEASED, herein called the "Vendor", AND CHARLES

Schedule B, Annexed to Bill of Complaint.

E. CAMERON, JR. of the City of Newark, in the County of Essex and State of New Jersey, herein called the "Vendee":

WITNESSETH:

That the Vendor, for and in consideration of the sum of Sixteen Thousand Two Hundred Sixty-two Dollars (\$16,262) to be paid and satisfied as herein provided, does agree that it will, subject to the proviso particularly mentioned and specified hereafter, convey unto the Vendee ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey: 10

BEGINNING on the westerly line of Broad Street twenty-six feet six inches South of Washington Place; thence southerly along Broad Street Twenty-two feet to centre of partition wall between this and lot on the south; thence westerly through the middle of same thirty-four feet; thence westerly along the Estate of Charles F. Smith, sixty-three feet five inches to the easterly line of the Norris property; thence northerly along the same twenty-two feet six and one-half inches; thence easterly fifty-eight feet ten inches to the Northwest corner of the main building on these premises; thence easterly along the north side of the same building thirty-four feet to the place of BEGINNING. 20 30

Being the premises designated as the Tenth Tract in that certain deed dated January 20, 1915 made by Henrietta M. Sayre et als. as executors of and trustees 40

Schedule B, Annexed to Bill of Complaint.

10 under the last will and testament of Marcus Sayre, deceased, to Fidelity Trust Company (now Fidelity Union Trust Company) as substituted administrator with the will annexed and trustee under the last will and testament of Marcus Sayre, deceased.

The purchase price of said property is the sum of Sixteen Thousand Two Hundred Sixty-two Dollars (\$16,262) payable as follows:

20 One Thousand Five Hundred Dollars (\$1,500) in cash to be paid by the Vendee to the Vendor on the execution and delivery of the within agreement the receipt whereof is hereby acknowledged;

And the balance of the purchase price, to wit, the sum of Fourteen Thousand Seven Hundred Sixty-two Dollars (\$14,762) in cash to be paid by the Vendee to the Vendor on the delivery of the deed as hereinafter mentioned.

30 The deed to said property shall be a bargain and sale deed with the proper United States Internal Revenue Stamps affixed and shall be delivered at the office of Hood, Lafferty & Emerson, 744 Broad Street, Newark, New Jersey, ninety-five days from and after the date of the entry of the final decree of the Court of Chancery authorizing and approving the within sale, at which time the balance of the purchase price shall be paid, provided that if an appeal should be taken from the decree authorizing and approving the within sale then the deed shall not be delivered until the affirmance of said decree on appeal.

40

Schedule B, Annexed to Bill of Complaint.

It is understood and agreed that all rents and taxes shall be apportioned between the parties as of the date of closing title and that fire insurance premiums shall also be apportioned as of the time of closing title in the event the Vendee elects to assume the existing policies of insurance. Said premises shall be conveyed subject to the rights of an existing tenancy. 10

It is agreed that the Vendor will either cause to be discharged existing liens created by tax sales covering said premises or in the alternative will make due allowance from the purchase price therefor including interest and costs to date of closing.

The Vendee agrees that upon taking title to said premises pursuant to the terms hereof he will indemnify and save harmless the Vendor for and on account of any liability whatsoever theretofore accrued and which may thereafter accrue by reason of the lease between the Vendor covering said premises with Lauter Humana Company and more particularly by reason of the clause in said lease and renewal thereof with respect to the application of rents to taxes including tax arrearages. 20

If, at the time of closing title, any rents for the current month should be due and uncollected, then all collected rents shall be apportioned as of said time and the Vendee shall give the Vendor credit for all uncollected rents apportioned as aforesaid, except that the Vendee, at his option may, in lieu of crediting the Vendor with such uncollected rents, withhold such credit and authorize the Vendor to collect the entire monthly rents, in which case no apportionment for the same shall be made at said time and the Vendor shall be accountable to the Vendee for his pro- 30 40

Schedule B, Annexed to Bill of Complaint.

rated share only to the extent that such rents are actually collected by the Vendor.

It is agreed that title to said premises is not derived from adverse possession.

10 The Vendee represents that he has inspected said premises and that he will accept same in their present condition.

Risk of loss or damage by fire or from the elements shall be assumed by the Vendor until the passing of title.

Vendee agrees to take title to said premises subject to restrictions of record, if any, which are in force and effect, and to the effect, if any, of municipal ordinances and zoning regulations.

20 The Vendee agrees to take title to said premises subject to such facts as an accurate survey may disclose provided (except as hereinafter particularly specified and set forth) such survey shows that the buildings on said premises are wholly within the boundary lines and that no structures on adjoining lands encroach over and upon said premises. The Vendee further agrees that the following charge, if in fact it does exist, shall not constitute an objection to title, to wit:

30 1. Rights by reason of party walls on the northerly and southerly sides of the premises above described.

40 The Vendor agrees to pay all confirmed assessments and to pay all unconfirmed assessments where the work which is the subject of such assessment or assessments shall be completed at the time of the execution of this contract, provided written notice of any such unconfirmed assessment shall be given to the Vendor by the Vendee prior to the closing of title; the

Schedule B, Annexed to Bill of Complaint.

Vendor, however, has and retains the right to contest in good faith any of such confirmed or unconfirmed assessments in its own name or in the name of the Vendee.

It is understood and agreed that title to said property is marketable, subject to a survey as aforesaid, and that the same is not subject to any lien or encumbrance not specifically mentioned or provided for, and if an examination of title to said premises before the delivery of the deed herein contemplated shall disclose that said title is not marketable or that said property is subject to a lien or encumbrance not specifically mentioned herein which the Vendor shall not promptly remove or shall be unwilling to remove, then and in either of these events, all moneys paid hereunder by the Vendee to the Vendor shall be returned to the Vendee and this contract shall be delivered up and cancelled without further liability of either party to the other.

The within sale is expressly conditioned upon the authorization and approval thereof by the Court of Chancery and the Vendor agrees forthwith by appropriate proceedings to apply to the Court of Chancery for instructions as to whether it should make the within sale in accordance with the terms of this contract. If the Court of Chancery should refuse to authorize or approve the within sale or should fail or refuse to entertain jurisdiction of the subject matter hereof or if a decree authorizing and approving the within sale should be set aside upon an appeal therefrom, then all moneys paid hereunder by the Vendee to the Vendor shall be returned to the Vendee and this contract shall be delivered up and cancelled without further liability of either party to the other.

10

20

30

40

Schedule B, Annexed to Bill of Complaint.

10 The Vendee hereby represents to the Vendor as an inducement to the Vendor to enter into the within agreement, that he has not resided outside the United States, nor has been a citizen of a country other than the United States at any time since January 1, 1940, nor has the Vendee acted as agent, directly or indirectly, for the benefit of any foreign country or citizen or corporation of any foreign country since that date, and that the Vendee in entering into the within agreement is not acting as agent, directly or indirectly, for the benefit of any foreign country or citizen or corporation of any foreign country.

20 In the event the Vendor is prohibited from conveying the above described premises to the Vendee or any assignee of the Vendee, by reason of any executive order of the President of the United States, Act of Congress, or other regulation pertaining to the control of foreign funds, then the Vendor may at its option, cancel this contract and return the moneys deposited hereunder, and the rights of the parties hereunder shall thereupon cease and terminate.

30 The Vendee represents to the Vendor as an inducement to execute the within contract that the sale of the premises above described pursuant to this contract was not made through the efforts of any broker or brokers and agrees to save the Vendor harmless from any claim or demand by any broker or brokers in connection with the sale thereof.

40 The Vendee provided he is not in default under the terms of this agreement, may assign the same to any person or corporation; nothing herein contained, however, shall relieve the Vendee from liability hereunder in the event that title is not closed with the assignee, pursuant to the terms hereof.

Schedule B, Annexed to Bill of Complaint.

And the said Vendee, for himself, and for his heirs, executors, administrators and assigns, does hereby covenant and agree that he will purchase the property herein described and upon the terms herein set forth.

IN WITNESS WHEREOF, the Vendor has caused these presents to be executed by its proper corporate officers and its corporate seal to be hereunto affixed and duly attested, and the Vendee has hereunto set his hand and seal, all the day and year first above written. 10

FIDELITY UNION TRUST COMPANY

By CHARLES F. ELLERY (Signed)
Vice President

As Substituted Trustee under the 20
Last Will and Testament of
Marcus Sayre, deceased.

CHARLES E. CAMERON, JR. (Sgd.) (L. S.)

(Seal)

Attest:

CEDRIC L. BUSH (Signed)
Assistant Secretary 30

Signed, Sealed and Delivered
in the Presence of:

A. UNDERWOOD, JR. (Signed)

40

Amendment to Bill of Complaint.

(Filed August 2, 1943.)

IN CHANCERY OF NEW JERSEY.

149—510

10

Between

FIDELITY UNION TRUST COM-
 PANY (formerly Fidelity
 Company) as substituted
 trustee etc.,

Complainant,

and

20

MARY ESTELLE SAYRE et al.,
 Defendants.

On Bill etc.

No subpoenas having issued in the above en-
 titled matter, Complainant hereby amends its
 Bill of Complaint filed herein as follows:

1. By deleting paragraph 8 thereof and sub-
 stituting in lieu thereof a new paragraph 8 as
 follows:

30

"8. Henrietta M. Sayre, widow of the tes-
 tator, died January 2, 1920, without having re-
 married, Mary Estelle Sayre (also known as
 May Estelle Sayre) is living and unmarried.
 Chauncey B. Sayre has since died leaving sur-
 viving a son Chauncey B. Sayre, Jr., and said
 Chauncey B. Sayre, Jr. has a son Chauncey Van
 V. B. Sayre. Dudley O. Sayre, is living. His
 children are Natalie Sayre Dalton; Marjorie
 Sayre Wallwork; Dorothy Sayre Holthusen; and

40

Amendment to Bill of Complaint.

Dudley O. Sayre, Jr. Marjorie Sayre Wallwork has a child whose name is Barbara Wallwork. Dorothy Sayre Holthusen has a child whose name is Cynthia Holthusen. Henry N. Sayre died March 7, 1928 and the Complainant is informed that he left surviving him a widow Margaret and a daughter Dorothy Sayre Farcus." 10

2. By deleting paragraph 1 of the Prayers of the Bill and substitution in lieu thereof a new paragraph 1 as follows:

"1. That Mary (May) Estelle Sayre, Chauncey B. Sayre, Jr., Chauncey Van V. B. Sayre, Dudley O. Sayre, Natalie Sayre Dalton, Marjorie Sayre Wallwork, Dorothy Sayre Holthusen, Dudley O. Sayre, Jr., Barbara Wallwork, Cynthia Holthusen, Margaret Sayre and Dorothy Sayre Farcus, who are the defendants in this suit, may answer this Bill of Complaint and each statement therein made." 20

HOOD, LAFFERTY & EMERSON,
HOOD, LAFFERTY & EMERSON,
Solicitors of Complainant.

WALLACE R. CHANDLER, JR., 30
Wallace R. Chandler, Jr.,
Of Counsel.

Answer and Counterclaim of Dudley O. Sayre.

(Filed January 8, 1943.)

[SAME TITLE.]

10

The defendant, Dudley O. Sayre, residing at #107 Buckingham Road, Montclair, N. J., answering the amended bill of complaint, says that:

ANSWER TO FIRST CAUSE OF ACTION

1. He admits the allegations of paragraphs 1, 2 and 3 of the First Cause of Action in the Amended Bill of Complaint.
- 20 2. He admits the factual allegations of paragraphs 4, 5, 6 and 7 of the First Cause of Action in the Amended Bill of Complaint. He has no knowledge or information sufficient to form a belief as to, and hence neither admits nor denies, the legal conclusions set forth in said paragraphs 4, 5, 6 and 7 of the First Cause of Action in the Amended Bill of Complaint, but leaves the complainant to make such proof thereof as may be lawfully required.
- 30 3. He admits the allegations of paragraph 8 of the First Cause of Action in the Amended Bill of Complaint, except the allegation made in the last sentence of said paragraph that Henry N. Sayre "left surviving him a widow Margaret Sayre and a daughter Dorothy Sayre Farcus," which quoted allegation is denied. Further answering, this defendant says that the person purporting to be the widow of Henry N. Sayre and
40 the person purporting to be the daughter of

Answer and Counterclaim of Dudley O. Sayre.

Henry N. Sayre have no interest in the property referred to in the amended bill of complaint.

4. He denies the allegations of paragraph 9 of the First Cause of Action in the Amended Bill of Complaint that the complainant has continued to hold and now holds 561 Broad Street, Newark, N. J. in trust for only Mary Estelle Sayre. Further answering, this defendant alleges that the complainant has continued to hold and now holds said 561 Broad Street, Newark, N.J., subject to the trusts mentioned in the will of the testator, the late Marcus Sayre, under the terms of which this defendant, ever since the death of the late Marcus Sayre, has had, and now has, an undivided vested estate in remainder.

5. This defendant admits the following allegation of paragraph 10 of the First Cause of Action in the Amended Bill of Complaint:

“Said premises are improved by a store and building.”

This defendant denies the following allegations of paragraph 10 of the First Cause of Action in the Amended Bill of Complaint:

“From and after the financial and economic depression which commenced in or about the year 1929, the said premises have at various periods failed to produce an income which was either proportionate to their value or sufficient to pay the taxes and other expenses of upkeep. This has been occasioned by the inability to keep the premises rented at all times or the inability to obtain rentals which were

Answer and Counterclaim of Dudley O. Sayre.

10 commensurate with the carrying charges and by generally unfavorable rental conditions in that part of the City. The complainant has at all times made reasonable efforts to keep the premises rented at a rate which would carry same and produce a net income for the benefit of the life tenant, but has been unable to do so."

This defendant admits the following allegation of paragraph 10 of the First Cause of Action in the Amended Bill of Complaint:

"Tax assessments have been and are high."

20 6. He denies the following allegation of paragraph 11 of the First Cause of Action in the Amended Bill of Complaint:

"By reason of the foregoing, tax arrears have accumulated and on October 13, 1941, said premises were sold by the City of Newark for non-payment of taxes to Charles E. Cameron, who is now the holder of the tax sale certificate."

30 He has no knowledge or information sufficient to form a belief as to, and hence neither admits nor denies, the following allegations of paragraph 11 of the First Cause of Action in the Amended Bill of Complaint, to wit,

40 "Furthermore, Charles E. Cameron is the president of the Lauter Humana Company, which was the lessee of the premises at the time of his acquisition of the tax sale certificate, and said Company now holds a lease for a term which will expire on May 30, 1946. The rentals payable

Answer and Counterclaim of Dudley O. Sayre.

under said lease are barely sufficient to pay current taxes and other operating and maintenance charges and are wholly inadequate for the purpose of satisfying the arrears due upon the tax sale which, under the statute, may be foreclosed now at any time; and, complainant says that by reason of the premises said tax lien may be foreclosed." 10

and hence neither admits nor denies said allegations, but leaves the complainant to make such proof thereof as may be lawfully required.

7. He has no knowledge or information sufficient to form a belief as to, and hence neither admits nor denies, the following allegation of paragraph 12 of the First Cause of Action in the amended bill of complaint: 20

"There is no other income from the trust fund established for Mary Estelle Sayre with which said tax liens might be paid and satisfied and no adequate provision is afforded by the Will or by the testator's estate for the payment of the same."

He denies the following allegation of paragraph 12 of the First Cause of Action in the Amended Bill of Complaint: 30

"the Trustee has no funds in the trust for such purpose."

8. He denies the following allegation of paragraph 13 of the First Cause of Action in the Amended Bill of Complaint:

"By reason of the foregoing."

Answer and Counterclaim of Dudley O. Sayre.

He admits the allegation of paragraph 13 of the First Cause of Action in the Amended Bill of Complaint that:

10 “the interests of the life tenant as well as the estate in remainder may be injured, impaired or lost.”

He denies the allegation of paragraph 13 of the First Cause of Action in the Amended Bill of Complaint that:

 “an emergency has arisen not contemplated by the testator.”

20 9. He admits the factual allegations of paragraph 14 of the First Cause of Action in the Amended Bill of Complaint. He has no knowledge or information sufficient to form a belief as to, and hence neither admits nor denies, the legal conclusions set forth in said paragraph 14, but leaves the complainant to make such proof thereof as may be lawfully required.

 10. He admits the allegations of paragraph 15 of the First Cause of Action in the Amended Bill of Complaint.

30 11. He denies the allegations of paragraphs 16 and 17 of the First Cause of Action in the Amended Bill of Complaint.

ANSWER TO SECOND CAUSE OF ACTION

40 1. This defendant repeats, in answer to the allegations by reference embodied in paragraph 1 of the Second Cause of Action in the Amended Bill of Complaint, the answers heretofore made by him in response to the allegations, severally

Answer and Counterclaim of Dudley O. Sayre.

and respectively, of paragraphs 1 to 8, both inclusive, of the First Cause of Action in the Amended Bill of Complaint.

2. He denies the allegations of paragraph 2 of the Second Cause of Action in the Amended Bill of Complaint, that the complainant has continued to hold, and now holds, 490 Broad Street, and 492 Broad Street, Newark, N. J., in trust for only Mary Estelle Sayre. Further answering, this defendant alleges that the complainant has continued to hold and now holds, 490 Broad Street, and 492 Broad Street, Newark, N. J., subject to the trusts mentioned in the will of the testator, the late Marcus Sayre, under the terms of which this defendant, ever since the death of the late Marcus Sayre, has had, and now has, an undivided vested estate in remainder. 10 20

3. He admits the allegations of paragraphs 3, 4 and 5 of the Second Cause of Action in the Amended Bill of Complaint.

4. He admits the allegations of the first two sentences of paragraph 6 of the Second Cause of Action in the Amended Bill of Complaint. He has no knowledge or information sufficient to form a belief as to, and hence neither admits nor denies, the allegations of the third sentence of paragraph 6 of the Second Cause of Action in the Amended Bill of Complaint, but leaves the complainant to make such proof thereof as may be lawfully required. He denies the allegations of the fourth, and last, sentence of paragraph 6 of the Second Cause of Action in the Amended Bill of Complaint. 30

Answer and Counterclaim of Dudley O. Sayre.

5. He admits the allegations of paragraphs 7 and 8 of the Second Cause of Action in the Amended Bill of Complaint.

10 6. He has no knowledge or information sufficient to form a belief as to the allegations of paragraph 10 of the Second Cause of Action in the Amended Bill of Complaint, and hence neither admits nor denies said allegations but leaves the complainant to make such proof thereof as may be lawfully required.

7. He denies the allegations of paragraph 11 of the Second Cause of Action in the Amended Bill of Complaint.

20 8. He denies the following allegation of paragraph 12 of the Second Cause of Action in the Amended Bill of Complaint:

“By reason of the foregoing.”

He admits the following allegation of paragraph 12 of the Second Cause of Action in the Amended Bill of Complaint:

30 “the interests of the life tenant as well as the estates in remainder may be injured, impaired or lost.”

He has no knowledge or information sufficient to form a belief as to, and hence neither admits nor denies, but leaves the complainant to make such proof thereof as may be required, of the following allegation:

40 “furthermore, the continued retention of the same requires an outlay of funds for insurance and other protection and there is no income from the trust fund sufficient to defray same.”

Answer and Counterclaim of Dudley O. Sayre.

He denies the allegation of paragraph 12 of the Second Cause of Action in the Amended Bill of Complaint that:

“an emergency has arisen not contemplated by the testator.”

10

9. He admits the factual allegations of paragraph 13 of the Second Cause of Action in the Amended Bill of Complaint. He has no knowledge or information sufficient to form a belief as to, and hence neither admits nor denies, the legal conclusions set forth in said paragraph 13 but leaves the complainant to make such proof thereof as may be lawfully required.

10. He denies the allegations of paragraphs 14 and 15 of the Second Cause of Action in the Amended Bill of Complaint.

20

COUNTERCLAIM

BY WAY OF COUNTERCLAIM against the complainant, against the defendant Margaret Sayre, against the defendant Dorothy Sayre Farcus, and against Fidelity Union Trust Company, a corporation, said Dudley O. Sayre respectfully shows and alleges:

30

1. Marcus Sayre died on March 25, 1909, leaving a last will and testament duly admitted to probate by the Surrogate of Essex County, New Jersey, on April 6, 1906. A true copy of said Will marked Schedule “A” is annexed to the complainant’s Bill of Complaint herein.

2. Said Marcus Sayre in and by his last will and testament appointed Henrietta M. Sayre,

40

Answer and Counterclaim of Dudley O. Sayre.

Mary Estelle Sayre, George V. N. Teeter and Frederick R. Pilch, executors thereof and trustees thereunder. Letters Testamentary were issued to them on April 6, 1909.

10 3. By an order of the Essex County Orphans' Court dated September 25, 1914, said executors and trustees were relieved and discharged of and from their duties as executors and trustees under said Will, and thereupon Fidelity Union Trust Company (formerly denominated Fidelity Trust Company), a corporation, was appointed as Administrator cum testamento annexo and as Trustee in their place and stead, to take upon itself the administration of the Estate of said Marcus Sayre in accordance with the terms
20 of his Will, entered upon and undertook the administration of the trusts created by said Will and has ever since been, and now is, in charge of the administration thereof.

30 4. At all times up to and including December 31, 1929, the income derived from 561 Broad Street, Newark, N. J. was amply sufficient not only to pay all the expenses—including the annual taxes—attendant upon the operation of said property, but also to produce a surplus income. While said income from the property was of the quantity hereinabove stated, it was not commensurate with the value thereof. The value of said property, at all times hereinabove referred to, was in excess of \$110,000.

40 5. In dereliction of its duties, said complainant—although having the ability to sell said 561 Broad Street, Newark, N. J. for over \$110,000. in 1929—failed and neglected to sell such property and failed to bring any proceeding

Answer and Counterclaim of Dudley O. Sayre.

wherein it might have been counselled as to its proper duties with respect to any sale. From 1930 and until the time of the filing of the bill of complaint in this cause (which bill was filed on July 8, 1943), said complainant knew, or by the exercise of proper care would have known, that the value of said property was diminishing almost constantly. In dereliction of its duties, said complainant—although it had from time to time received various offers for the sale of said 561 Broad Street, Newark, N. J.—failed and neglected to sell such property at a far more advantageous price than now is presented by its bill of complaint and also failed to bring any proceeding wherein it might have been counselled as to its proper duties with respect to any sale. In consequence of the facts here stated, the value of the trust res has been impaired to the extent of over \$100,000. Fidelity Union Trust Company is, in equity and good conscience, bound to restore whatever losses may have been thus sustained.

6. With respect to #561 Broad Street, Newark, N. J., said complainant—in violation of the duties imposed upon it—in 1929 had entered into the practice, and thereafter continued in the practice, of failing to make prompt payment of the annual taxes from each year's receipts of that property. It likewise failed to keep or reserve from each year's receipts of that property a sum that would enable it thereafter to discharge the current tax assessment left unpaid. In consequence of this conduct on the part of the complainant, the complainant in various subsequent years paid both interest and penalties when discharging past due taxes and

Answer and Counterclaim of Dudley O. Sayre.

10 great arrearages accumulated. Since the filing of the bill of complaint in this cause, this defendant has ascertained, and now truly believes, and charges that—in respect to the annual taxes for the years 1928 through 1936, assessed as against 561 Broad Street, Newark, N. J.—said complainant made dilatory payment thereof at the time and in the manner below set forth and did further make payments of interest charged against it because of the dilatory payments as below stated, to wit:

	Annual tax for	Date and amount of payment		Interest
	1928 \$3,669.14	Nov. 8, 1928	\$1,834.57	
		May 7, 1929	1,834.57	\$ 26.24
	1929 \$3,640.40	Jan. 7, 1930	1,820.20	98.30
20		March 21, 1931	895.20	104.80
		April 25, 1931	925.00	116.10
	1930 \$4,200.04	Sept. 5, 1931	1,348.00	152.00
		Oct. 15, 1931	752.02	91.85
		Dec. 4, 1931	1,100.02	99.52
		Feb. 13, 1932	1,000.00	107.00
	1931 \$4,143.18	July 7, 1932	1,071.59	82.00
		Sept. 3, 1932	1,000.00	87.85
		Jan. 25, 1933	555.71	44.29
		Feb. 11, 1933	250.00	20.90
		Apr. 24, 1933	1,000.00	97.25
30		May 17, 1933	265.88	27.07
	1932 \$3,955.80	May 17, 1933	530.00	34.90
		June 27, 1933	326.00	24.00
		July 24, 1933	370.50	29.50
		Aug. 21, 1933	270.40	21.05
		Aug. 21, 1933	55.70	2.85
		Oct. 23, 1933	470.65	29.25
		Jan. 30, 1934	500.00	
		Feb. 13, 1934	494.51	22.99
		Apr. 5, 1934	600.00	
		June 19, 1934	338.04	169.50

Answer and Counterclaim of Dudley O. Sayre.

Annual tax for		Date and amount of payment		Interest		
1933	\$2,781.44	Feb.	20, 1935	1,390.72	166.27	
		Mar.	11, 1936	316.52		
		Mar.	11, 1936	538.10	145.38	
		May	2, 1936	536.10	90.25	
1934	\$2,256.90	Jan.	15, 1937	409.12	90.88	10
		May	11, 1937	322.25	77.75	
		Oct.	19, 1937	1,198.93	301.07	
		Dec.	20, 1937	326.60	79.30	
1935	\$2,385.60	Dec.	20, 1937	240.55	53.55	
		Jan.	19, 1938	244.10	55.90	
		March	15, 1938	242.10	57.90	
		May	9, 1938	202.74	57.16	
		June	29, 1938	241.88	48.12	
		Sept.	20, 1938	482.14	117.86	
		Oct.	19, 1938	241.60	58.40	
		Nov.	10, 1938	243.37	56.63	
		Dec.	30, 1938	247.12	57.83	
1936	\$2,743.20	Jan.	21, 1939	205.00	45.00	20
		Feb.	7, 1939	327.10	72.90	
		March	25, 1939	247.96	52.04	
		May	18, 1939	327.30	72.70	
		June	12, 1939	163.00	37.00	
		Aug.	10, 1939	246.60	53.40	
		Sept.	20, 1939	163.15	36.85	
		Dec.	5, 1939	403.06	96.94	
		Jan.	22, 1940	201.25	48.75	
		Feb.	21, 1940	81.21	18.79	
		Apr.	13, 1940	90.91	159.09	

7. A summary of the interest payments, referred to in paragraph 6 hereof, is as follows:

Interest paid on 1928 taxes	\$ 26.24	
1929 taxes	319.20	
1930 taxes	450.37	
1931 taxes	359.36	
1932 taxes	334.04	
1933 taxes	401.90	
1934 taxes	548.50	
1935 taxes	563.35	
1936 taxes	693.46	\$3,696.42

30

40

Answer and Counterclaim of Dudley O. Sayre.

8. The complainant was also derelict in the performance of its duties with respect to the collection of the rents accruing from said 561 Broad Street, Newark, N. J. During all of 1929 and during the fore part of 1930, the tenant of said premises was Jacob Doll & Sons. The rental of said premises was \$5,000. per annum, payable in equal monthly installments in advance, and also the annual taxes. The complainant failed to enforce the due and prompt payment of said rentals, and in consequence of such failure, there was due from said tenant—in May, 1930—at least the sum of \$4,902.12. Instead of attempting the collection of said sum by process of distraint, by which process the entire sum might have been collected because the tenant then had in said premises chattels far exceeding in value the aforesaid sum, said complainant accepted an unsecured promissory note of said tenant in the sum of \$4,902.12, whereof only \$500. of the principal and \$33.49 on account of interest were collected by the complainant on or about July 3, 1930. After accepting said note, the complainant permitted said tenant to default in the rent payments thereafter becoming due, such defaults consisting in the failure to pay the 1930 taxes and the successive monthly rent installments. Said complainant failed to enforce the payment of the last mentioned sums by distraint. In the latter part of 1930, said tenant was adjudicated a bankrupt and it then was no longer possible for the complainant to enforce full and complete payment of the sums accrued and unpaid by said tenant. Said tenant did file a claim for approximately \$5,000. but was unable to collect said claim and, on account thereof, realized but a small fraction thereof, approximately \$100.

Answer and Counterclaim of Dudley O. Sayre.

In consequence of the facts here stated, aside from the loss to the trust res for which the complainant (in its individual corporate capacity) should be made to respond, said complainant has brought about the danger of the loss of a substantial portion, if not all, of the trust property committed to its care. 10

9. Though the complainant well knew the danger that might arise from the non-payment of taxes, it did—both during 1929 and 1930—pay out “income” to the life tenant, at the rate of \$5,000. or more during each of those years.

10. As late as August, 1939, no part of the 1937 taxes, no part of the 1938 taxes and no part of the 1939 taxes had been paid. Notwithstanding that fact, said complainant did appropriate to its own use, from the trust funds then in its possession, the sum of \$1,400. on August 29, 1939. In the exercise of good faith and fair business judgment, the trust funds then in its possession should have been applied towards said tax assessments, the amounts of which were as follows: 20

1937	\$2,140.20	
1938	\$2,659.97	30
1939	\$1,501.50	

11. During 1937, 1938 and 1939, the minimum receipts from, and the total expenses for the operation of, said 561 Broad Street, Newark, N. J.—with the exception of the taxes for each of those calendar years—were as follows:

Year	Minimum receipts	Expenses	Balance
1937	\$2,400.00	\$302.12	\$2,097.88
1938	2,753.20	236.58	2,516.62
1939	2,753.20	231.72	2,521.48

40

Answer and Counterclaim of Dudley O. Sayre.

Had the complainant used fair business discretion, the tax liens for 1937, 1938 and 1939 affecting 561 Broad Street, Newark, N. J. would not have accumulated and they would not be subject to sale. The following summarizes the data in the respects hereinabove stated:

10

Year	Net income	Annual taxes
1937	\$2,097.88	\$2,140.20
1938	2,516.62	2,659.97
1939	2,521.48	1,501.50
	<u>\$7,135.98</u>	<u>\$6,301.67</u>

20

12. With respect to said 561 Broad Street, Newark, N. J., said complainant—in violation of the duties imposed upon it—did not discharge the current annual taxes from the receipts of the year in which the assessment was made, in the year 1937. Since the filing of the bill of complaint in this cause, this defendant has ascertained, and now truly believes, and charges that, said complainant made dilatory payment of part of the 1937 taxes in the manner below set forth and did further make payments of interest charged against it because of the dilatory payments as below stated, to wit:

30

Annual tax for	Date and amount of payment		Interest
1937 \$2,140.20	April 13, 1940	\$ 25.75	
	May 20, 1940	324.75	\$ 75.25
	Aug. 17, 1940	240.45	59.55
	July 26, 1941	145.41	44.59
	Aug. 27, 1941	145.20	44.80
			<u>\$224.19</u>

40

Said sum of \$224.19 is a sum for which the complainant, in a separate individual corporate capacity, should also restore to the trust res.

Answer and Counterclaim of Dudley O. Sayre.

13. With full knowledge, or with the exercise of reasonable diligence capable of knowing, that the balance of the 1937 tax lien, the 1938, 1939 and 1940 tax liens had been sold to Charles E. Cameron, Jr. (the latter the president of, and the dominant and controlling stockholder in, Lauter Humana Company), said complainant—
 despite its knowledge that the payment of taxes subsequently to accrue would be most beneficial to the purchaser of the tax liens, and without exacting or requiring from such purchaser any covenant not to attempt to foreclose such tax liens while the complainant would be paying such subsequent taxes and without exacting any other covenant reasonably designed for the protection of the complainant and the cestuis que trust—made payments of such subsequent taxes at the time and in the manner below set forth, for the most part dilatorily, and it further made payments of interest charged against it because of the dilatory payments as below stated, to wit:

Annual tax for	Date and amount of payment	Interest
1941 \$2,323.00	Feb. 2, 1942 \$657.40	\$42.60
	Feb. 20, 1942 87.76	4.67
	April 10, 1942 171.38	11.22
	April 16, 1942 180.10	9.90
	May 15, 1942 180.44	9.56
	July 6, 1942 168.25	10.70
	July 9, 1942 202.95	10.80
	Sept. 25, 1942 391.50	24.50
	Oct. 8, 1942 175.60	10.92
	Nov. 18, 1942 107.62	22.70
		\$157.67

10

20

30

40

Answer and Counterclaim of Dudley O. Sayre.

	Annual tax for	Date and amount of payment	Interest		
10	\$1,682.22	Nov. 18, 1942	93.08		
		Dec. 15, 1942	201.00	12.18	
		Jan. 20, 1943	200.30	13.45	
		Feb. 27, 1943	193.63	20.12	
		March 19, 1943	201.46	12.29	
		May 21, 1943	390.10	26.05	
		July 19, 1943	367.56	19.95	
		Sept. 16, 1943	35.09		\$104.04
		<hr/>			
20	\$1,120.42	Sept. 24, 1943	309.18	15.73	
		Oct. 22, 1943	179.00	7.52	
		Nov. 22, 1943	205.95	7.80	\$ 29.05
<hr/>					
				\$290.76	

20 The complainant (in its separate individual corporate capacity) should be made here to respond for the losses occasioned by the aforesaid interest payments.

30 14. In dereliction of its duties, said complainant—although having the ability to sell said 490 Broad Street, and 492 Broad Street, Newark, N. J., for over \$80,000. in 1929—failed and neglected to sell such property and failed to bring any proceeding wherein it might have been counselled as to its proper duty with respect to any sale. From 1930, said complainant knew, or by the exercise of proper care would have known, that the value of said property was diminishing almost constantly. In dereliction of its duties, said complainant—although it had from time to time received various offers for the sale of said 490 Broad Street and 492 Broad Street, Newark, N. J.—failed and neglected to make any efforts to sell said property, notwithstanding that tax assessments were constantly depleting and diminishing the equity therein, the amount of un-

40 paid assessments—without considering interest

Answer and Counterclaim of Dudley O. Sayre.

and penalties thereon and other charges and costs by reason thereof—being as follows:

490 Broad Street, Newark, N. J.

1933	\$ 678.74	
1934	1,087.70	
1935	903.84	10
1936	1,024.89	
1937	992.61	
1938	1,134.06	
1939	1,223.95	
1940	819.65	
1941	759.00	
1942	571.32	
1943	573.48	

492 Broad Street, Newark, N. J.

1934	\$ 945.30	
1935	994.56	20
1936	1,234.44	
1937	1,195.56	
1938	1,493.64	
1939	1,474.20	
1940	1,023.35	
1941	902.75	
1942	581.90	
1943	584.10	

In consequence of the facts here stated, the value of the trust res has been impaired to the extent of over \$80,000.00. Fidelity Union Trust Company is, in equity and good conscience, bound to restore whatever losses may have been thus sustained.

15. The last accounting filed by the complainant—which accounting was filed only as the trustee for Mary Estelle Sayre—was filed by the complainant on or about November 27, 1929, in the Essex County Orphans' Court, which accounting (as this defendant is informed, and truly believes) was for some period of time end-

Answer and Counterclaim of Dudley O. Sayre.

10 ing with October 31, 1929. No notice of the filing of said accounting was given to this defendant or (as far as this defendant has been able to ascertain) to any other remainderman. This defendant was not heard on whether or not such accounting should be allowed, nor was this defendant given the opportunity of being heard. It has been the constant position of the complainant that, in the management and conduct of this trust (at least up until such date as upon which the present life tenant may die) no remainderman has any right or power to have his (or her) voice listened to, or wishes observed, by said complainant.

20 16. In view of the acts of omission and commission on the part of the complainant, it is this defendant's belief that an examination of the books and records of the trustee-complainant and an examination of said complainant itself will disclose that it has been guilty of further acts of omission and commission resulting in the impairment of the trust res and demonstrating the incompetency, negligence, carelessness and faithlessness of the said complainant in and about the management and conduct of the trust
30 property.

40 17. At the time of the filing of the bill of complaint in this cause (on July 8, 1943), and at all times since that date, the complainant has had—notwithstanding the facts stated in paragraph 10 hereof—the sum of approximately \$2,000. in its possession or under its control. During all of said time, complainant has been fully aware of the circumstances to which it itself (in paragraph 11 of its original bill

Answer and Counterclaim of Dudley O. Sayre.

of complaint) alludes that the tax sale certificate held by Charles E. Cameron may now at any time be foreclosed. Notwithstanding these facts, complainant refuses to discharge, or procure the discharge, or pay, or make part payment of such sum as may properly be due on such tax certificate or tax lien. Notwithstanding these facts, the complainant refuses to recognize its liability for the losses which it has occasioned to this estate. This defendant believes that, notwithstanding the complainant's equitable duty, it will not—unless compelled to do so by the decree of this Court—repay or restore to the trust estate the losses which the complainant has occasioned, to wit:

- (A) The loss of \$100,000., referred to in paragraph 5 of this counterclaim. 20
- (B) The loss of \$3,696.42 referred to in paragraphs 6 and 7 of this counterclaim.
- (C) The loss of approximately \$5,000., referred to in paragraph 8 of this counterclaim.
- (D) Such losses as this estate may have suffered in consequence of the facts stated in paragraph 9 of this counterclaim.
- (E) The loss of \$1,400., referred to in paragraph 10 of this counterclaim. 30
- (F) The loss of \$224.19, referred to in paragraph 12 of this counterclaim.
- (G) The loss of \$290.76, referred to in paragraph 13 of this counterclaim.
- (H) The loss of \$80,000., referred to in paragraph 14 of this counterclaim.

Answer and Counterclaim of Dudley O. Sayre.

18. This defendant charges that, in view of the facts hereinabove alleged, the complainant should equitably be required forthwith—and from its own funds, not to be charged to the estate—to pay and discharge such tax liens or such tax certificates as Charles E. Cameron (or Charles E. Cameron, Jr.) may have against the property known as #561 Broad Street, Newark, N. J., and to procure a formal cancellation and discharge of record of such tax certificates.

19. This defendant charges that, in view of the facts hereinabove alleged, the complainant should equitably be required forthwith—and from its own funds, not to be charged to the estate—to pay and discharge all taxes and tax liens accrued or assessed against the property known as #490 Broad Street and #492 Broad Street, Newark, N. J.

20. This defendant charges that, in view of the facts hereinabove alleged, the complainant should equitably be required forthwith to file its accounting in this Court and to make a full and complete disclosure of all its books and records and of all its acts (both of commission and omission) relating to the trust property.

21. The complainant is wholly unfit further to be entrusted with the management and conduct of the trust property in this counterclaim referred to. Said complainant should be removed from its office, a new trustee appointed and all property turned over to a new substituted trustee.

22. Margaret Sayre claims to be the widow of the late Henry N. Sayre. Said Margaret

Answer and Counterclaim of Dudley O. Sayre.

Sayre also claims to be the mother of Dorothy Sayre Farcus. Said Margaret Sayre pretends that said Dorothy Sayre Farcus is a legitimate daughter of said late Henry N. Sayre. Said Dorothy Sayre Farcus likewise pretends to be the legitimate daughter of the late Henry N. Sayre. It may be difficult or impossible in the future to establish the exact status of said Margaret Sayre and Dorothy Sayre Farcus, by reason of certain facts which are now within the knowledge of persons of rather advanced age whose death may ensue before the facts are established and a perpetual memorial made of the facts. The defendant charges the facts to be as follows:

- (A) Said Henry N. Sayre was born in 1856, and was first married about 1895 to Louise Martz Sayre. Said marriage continued until April 30, 1925, the date of the death of said Louise Martz Sayre, who died on that day in Miami, Florida. 20
- (B) The person known as Margaret Sayre was born in Austria-Hungary on or about April 29, 1896. Her parents were Joseph Brodack (or Joseph Brodrick) and Dorothy Brodack (or Dorothy Brodrick), and her maiden name was Margaret Brodack (or Margaret Brodrick). Said Margaret Brodack (or Margaret Brodrick) first came to the United States in 1900. 30
- (C) Some time between 1900 and March 9, 1917, said Margaret Brodack (or Margaret Brodrick) married a person known as Frederick Meyers, and was thereafter known as Margaret Meyers. Since March 7, 1928, she has resumed the name of—and is still known 40

Answer and Counterclaim of Dudley O. Sayre.

10 by the name of—Margaret Meyers, in the community where she resides and conducts a furnished room house, under that name, at 202 Washington Avenue, Bridgeport, Conn. Both the telephone directory (with the telephone charges paid by her) and the 1943 Bridgeport directory designate her as Margaret Meyers.

(D) While Henry N. Sayre and his wife, Louise Martz Sayre, were living together, said Margaret became an employee in their home and thereby learned of the marriage of said Henry N. Sayre and Louise Martz Sayre.

20 (E) With knowledge that she could consummate no legal marriage with said Henry N. Sayre, said Margaret entered into close intimacy with said Henry N. Sayre. On March 9, 1917, at Bridgeport, Conn. said Margaret gave birth to a female child who was christened Dorothy Elizabeth Meyer (or Dorothy Elizabeth Meyers), now known as Dorothy Sayre Farcus.

30 23. Said Margaret Sayre has no interest, and never will have any interest, in the trust res. Said Dorothy Sayre Farcus has no interest, and never will have any interest, in the trust res.

THIS DEFENDANT IS WITHOUT ADEQUATE REMEDY
IN THE COURTS OF LAW AND THEREFORE PRAYS THAT:

First: A writ of subpoena may issue against Fidelity Union Trust Company, a corporation.

40 Second: The complainant and said Fidelity Union Trust Company, a corporation, may make full and complete answer to, and discovery of,

Answer and Counterclaim of Dudley O. Sayre.

the averments of paragraphs #1 to #21, both inclusive, of this counterclaim, and, without limiting the generality of the requirement for complete answer and discovery, also specifically and completely state:

1. The aggregate amount of the gross income actually received from 561 Broad Street, Newark, N. J. during each of the years from 1929 to 1943, both inclusive. 10
2. The aggregate amount of the gross income actually received from 490 Broad Street, Newark, N. J. during each of the years from 1929 to 1943, both inclusive.
3. The aggregate amount of the gross income actually received from 492 Broad Street, Newark, N. J. during each of the years from 1929 to 1943, both inclusive. 20
4. The amount of all the operating expenses—excepting taxes—paid out for the maintenance of 561 Broad Street, Newark, N. J., during each of the years from 1929 to 1943, both inclusive.
5. The amount of all the operating expenses—excepting taxes—paid out for the maintenance of 490 Broad Street, Newark, N. J., during each of the years from 1929 to 1943, both inclusive. 30
6. The amount of all the operating expenses—excepting taxes—paid out for the maintenance of 492 Broad Street, Newark, N. J., during each of the years from 1929 to 1943, both inclusive.
7. The amount of the annual tax assessment against 561 Broad Street, Newark, N. J., for 40

Answer and Counterclaim of Dudley O. Sayre.

- 1928; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal.
- 10 8. The amount of the annual tax assessment against 561 Broad Street, Newark, N. J., for 1929; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal.
- 20 9. The amount of the annual tax assessment against 561 Broad Street, Newark, N. J., for 1930; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal.
- 30 10. The amount of the annual tax assessment against 561 Broad Street, Newark, N. J., for 1931; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal.
- 40 11. The amount of the annual tax assessment against 561 Broad Street, Newark, N. J., for 1932; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment

Answer and Counterclaim of Dudley O. Sayre.

- of the principal beyond the due date of the principal.
12. The amount of the annual tax assessment against 561 Broad Street, Newark, N. J., for 1933; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal. 10
 13. The amount of the annual tax assessment against 561 Broad Street, Newark, N. J., for 1934; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal. 20
 14. The amount of the annual tax assessment against 561 Broad Street, Newark, N. J., for 1935; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal. 30
 15. The amount of the annual tax assessment against 561 Broad Street, Newark, N. J., for 1936; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal. 40

Answer and Counterclaim of Dudley O. Sayre.

- 10 16. The amount of the annual tax assessment against 561 Broad Street, Newark, N. J., for 1937; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal.
- 20 17. The amount of the annual tax assessment against 561 Broad Street, Newark, N. J., for 1938; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal.
- 30 18. The amount of the annual tax assessment against 561 Broad Street, Newark, N. J., for 1939; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal.
- 40 19. The amount of the annual tax assessment against 561 Broad Street, Newark, N. J., for 1940; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal.
20. The amount of the annual tax assessment against 561 Broad Street, Newark, N. J., for 1941; the date and amount of each payment made on account of the principal sum

Answer and Counterclaim of Dudley O. Sayre.

- thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal.
21. The amount of the annual tax assessment against 561 Broad Street, Newark, N. J., for 1942; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal. 10
22. The amount of the annual tax assessment against 561 Broad Street, Newark, N. J., for 1943; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal. 20
23. The amount of the annual tax assessment against 490 Broad Street, Newark, N. J., for 1928; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal. 30
24. The amount of the annual tax assessment against 490 Broad Street, Newark, N. J., for 1929; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal. 40

Answer and Counterclaim of Dudley O. Sayre.

- 10 25. The amount of the annual tax assessment against 490 Broad Street, Newark, N. J., for 1930; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal.
- 20 26. The amount of the annual tax assessment against 490 Broad Street, Newark, N. J., for 1931; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal.
27. The amount of the annual tax assessment against 490 Broad Street, Newark, N. J., for 1932; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal.
- 30 28. The amount of the annual tax assessment against 490 Broad Street, Newark, N. J., for each of the years 1933 to 1943, both inclusive; the date and amount of each payment made on account of the principal sum thereof.
- 40 29. The amount of the annual tax assessment against 492 Broad Street, Newark, N. J., for 1928; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest

Answer and Counterclaim of Dudley O. Sayre.

- payment made on account of payment of the principal beyond the due date of the principal.
30. The amount of the annual tax assessment against 492 Broad Street, Newark, N. J., for 1929; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal. 10
31. The amount of the annual tax assessment against 492 Broad Street, Newark, N. J., for 1930; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal. 20
32. The amount of the annual tax assessment against 492 Broad Street, Newark, N. J., for 1931; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal. 30
33. The amount of the annual tax assessment against 492 Broad Street, Newark, N. J., for 1932; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal. 40

Answer and Counterclaim of Dudley O. Sayre.

- 10 34. The amount of the annual tax assessment against 492 Broad Street, Newark, N. J., for 1933; the date and amount of each payment made on account of the principal sum thereof; the date and amount of each interest payment made on account of payment of the principal beyond the due date of the principal.
35. The amount of the annual tax assessment against 492 Broad Street, Newark, N. J., for each of the years 1934 to 1943, both inclusive; the date and amount of each payment made on account of the principal sum thereof.
- 20 36. Full names of the agents, officers or employees who—in behalf of the complainant—were in charge of the management of the trust referred to in the counterclaim; the dates from and to which each of such persons was in such charge, and the qualifications of each of such persons to discharge such duties, stating explicitly what duties were entrusted to each of them.
- 30 37. The date whereon the complainant filed its last accounting with reference to the trust; the period covered by such accounting; the name of the court in which such accounting was filed; what notice, if any, was given by the complainant to this defendant of the filing of such accounting; what notice, if any, was given to this defendant of the allowance of such account prior to the date of the allowance thereof.
- 40 38. The value of 561 Broad Street, Newark, N. J. as of January 1, 1929, and the value

Answer and Counterclaim of Dudley O. Sayre.

- thereof on the first day of each and every calendar year thereafter.
39. The value of 490 Broad Street, Newark, N. J., as of January 1, 1929, and the value thereof on the first day of each and every calendar year thereafter. 10
40. The value of 492 Broad Street, Newark, N. J. as of January 1, 1929, and the value thereof on the first day of each and every calendar year thereafter.
41. The offers received by the complainant, from January 1, 1929, for the sale of 561 Broad Street, Newark, N. J., giving the names of the offerors, and the date and amount of each offer, and, if any of such offer was in writing, furnishing a copy thereof; and also, what action was taken by the complainant with respect to each of such offers. 20
42. The offers received by the complainant, from January 1, 1929, for the sale of 490 Broad Street, Newark, N. J., giving the names of the offerors, and the date and amount of each offer, and, if any of such offer was in writing, furnishing a copy thereof; and also, what action was taken by the complainant with respect to each of such offers. 30
43. The offers received by the complainant, from January 1, 1929, for the sale of 492 Broad Street, Newark, N. J., giving the names of the offerors, and the date and amount of each offer, and, if any of such offer was in writing, furnishing a copy thereof; and also, what action was taken by the complainant with respect to each of such offers.

Answer and Counterclaim of Dudley O. Sayre.

44. The particulars (with dates, names, places and all other details) of all efforts made by the complainant, at any time since January 1, 1929, to sell 561 Broad Street, Newark, N. J.
- 10 45. The particulars (with dates, names, places and all other details) of all efforts made by the complainant, at any time since January 1, 1929, to sell 490 Broad Street, Newark, N. J.
46. The particulars (with dates, names, places and all other details) of all efforts made by the complainant, at any time since January 1, 1929, to sell 492 Broad Street, Newark, N. J.
- 20 47. The particulars (with dates, names, sums, and results achieved, and all other details) of all efforts made by the complainant, at any time since January 1, 1929, to effectuate a reduction in the taxes of 561 Broad Street, Newark, N. J. Also the names of all attorneys, agents and experts engaged by the complainant in connection with such efforts, the date of their engagement and the compensation paid to each of them. Also, in-
- 30 48. The particulars (with dates, names, sums, and results achieved, and all other details) of all efforts made by the complainant, at any time since January 1, 1929, to effectuate a reduction in the taxes of 490 Broad Street, Newark, N. J. Also the names of all attorneys, agents and experts engaged by the
- 40 complainant in connection with such efforts,

Answer and Counterclaim of Dudley O. Sayre.

the date of their engagement and the compensation paid to each of them. Also, insofar as any of such efforts are evidenced by any writing or document, a copy of each of such documents.

49. The particulars (with dates, names, sums, and results achieved, and all other details) of all efforts made by the complainant, at any time since January 1, 1929, to effectuate a reduction in the taxes of 492 Broad Street, Newark, N. J. Also the names of all attorneys, agents and experts engaged by the complainant in connection with such efforts, the date of their engagement and the compensation paid to each of them. Also, insofar as any of such efforts are evidenced by any writing or document, a copy of each of such documents. 10
20
50. The amount of income paid out by the complainant during 1929, and the name of the recipient thereof; the cash balance in the possession of the trustee-complainant as of January 1, 1930.
51. The amount of income paid out by the complainant during 1930, and the name of the recipient thereof; the cash balance in the possession of the trustee-complainant as of January 1, 1931. 30
52. The name of the tenant in possession of 561 Broad Street, Newark, N. J. during 1929 and the early part of 1930; a copy of the lease by which said tenant had possession.
53. The sums due from the tenant of 561 Broad Street, Newark, N. J. as of May 1, 1930 and an itemization of the property of said ten- 40

Answer and Counterclaim of Dudley O. Sayre.

- ant, and the value of said property, in said premises as of that date.
- 10 54. Whether the trustee-complainant received from Jacob Doll & Son a note as referred to in paragraph 8 of the counterclaim; what payments of principal were received on account of said note and the date of the receipt thereof; the sum left unpaid by Jacob Doll & Son.
55. The date until which Jacob Doll & Son remained in possession of 561 Broad Street, Newark, N. J.; the sums due from said Jacob Doll & Son as of that date.
- 20 56. The particulars (with dates, names, sums and results achieved and all other details) of all efforts made by the complainant to collect the sums left unpaid by Jacob Doll & Son; if any claim was filed in writing, specify when and in what court such claim was filed, and the address of such court (if it is not located in New Jersey) and the amounts collected in consequence of the filing of such claim, and the dates of the collection of all of such amounts.
- 30 57. The cash balance in the possession of the trustee-complainant as of August 28, 1939.
58. The amount of money withdrawn by the trustee-complainant on or about August 29, 1939, from the trust account, and appropriated to complainant's own use; the cash balance in the possession of the trustee-complainant after the withdrawal of the amount last referred to.
- 40 59. The cash balance in the possession of the trustee-complainant as of June 11, 1943.

Answer and Counterclaim of Dudley O. Sayre.

60. The cash balance in the possession of the trustee-complainant as of December 31, 1943.
61. A full and complete statement of which sums—of those mentioned in paragraph 17 of the counterclaim—the complainant-trustee, in its individual corporate capacity, is now willing to pay. **10**

Third: The complainant be decreed and directed to file its accounting in this honorable court, such accounting to cover the entire period for which it has not heretofore accounted.

Fourth: The complainant be surcharged for all the losses sustained by the estate committed to its care and that said complainant, in its individual corporate capacity, be directed forthwith to pay the amount of such losses and interest thereon in such manner as this court may direct. **20**

Fifth: The complainant be directed and decreed to pay forthwith all unpaid taxes affecting 561 Broad Street, 490 Broad Street and 492 Broad Street, Newark, N. J., and to procure the cancellation and discharge of any tax certificates affecting said properties or any thereof, and that such payments may be made at the personal expense and cost of Fidelity Union Trust Company, a corporation. **30**

Sixth: The complainant be removed as trustee, a successor trustee appointed, and the complainant be directed and decreed to turn over, transfer and convey all property and moneys to such successor trustee. **40**

Answer and Counterclaim of Dudley O. Sayre.

Seventh: Margaret Sayre and Dorothy Sayre Farcus may make full and complete answer to, and discovery of, the averments of paragraphs 22 and 23 of the counterclaim.

- 10 Eighth: Margaret Sayre, without limiting the generality of the requirement for complete answer and discovery, also specifically and completely state:
1. What interest, if any, she claims to have in the trust res.
 2. The date and place of her birth, the names of her parents, the date whereon she entered the United States and the address at which her first abode in the United States was taken up.
 - 20 3. The date whereon, the place where, and the circumstances under which she first became acquainted with the late Henry N. Sayre and the late Louise Martz Sayre.
 4. The full name and address of the person to whom—at any time prior to March 9, 1917—she was married; the place and date of such marriage, the name of the officiating officer thereat, and the address at which she and her husband first took up their abode.
 - 30 5. Whether, and if so, when and where she was known as Mrs. Margaret Meyre or Mrs. Margaret Meyers; whether she is not so known at her present place of abode; whether she is the subscriber to the telephone service at 202 Washington Avenue, Bridgeport, Conn., under the name of Margaret Meyers; whether she is not reputed to be the widow of Frederick Meyers in the community
 - 40

Answer and Counterclaim of Dudley O. Sayre.

wherein she resides, giving the name of such community and the particular address therein at which she resides.

6. The date and place of the birth of the person now known as Dorothy Sayre Farcus; the name of the attending physician or midwife; whether she did not, on the birth of said Dorothy, state Frederick Meyers (or Frederick Meyer) to be the father of said Dorothy. 10
7. Said Margaret Sayre's residence on July 23, 1925; the name of the owner of the building where she was then residing.

Ninth: Dorothy Sayre Farcus, without limiting the generality of the requirement for complete answer and discovery, also specifically and completely state:— 20

1. What interest, if any, she claims to have in the trust res.
2. The date and place of her birth; the maiden name of her mother.
3. If she claims to be the legitimate issue of the late Henry N. Sayre, and if she was born elsewhere than in New Jersey, state the text of the law (and the reference to the official publication of such law) pursuant to which she claims legitimacy. 30

Tenth: This defendant may have such further and other relief as may be just and equitable.

KANTER & KANTER,
(Kanter & Kanter)
Solicitors for and of counsel
with Dudley O. Sayre. 40

Motion to Strike Out Counterclaim.

(Filed February 1, 1944.)

[SAME TITLE.]

10

To the Defendant, Dudley O. Sayre, or his solicitors, Messrs. Kanter & Kanter:

20

PLEASE TAKE NOTICE that on Tuesday, February 8, 1944, at the hour of ten o'clock in the forenoon (EWT) or as soon thereafter as counsel can be heard, at the Chauncey Chambers, 1060 Broad Street, in the City of Newark, New Jersey, we shall apply to the Chancellor for an order striking out the counterclaim filed by you in the above entitled cause, for the following reasons:

30

The cause of action set forth in said counterclaim is unrelated to the relief claimed by the complainant in its bill of complaint; it is not defensive to the complainant's right to the decree sought by said bill of complaint; and it is not germane to the complainant's cause of action, as hereinafter appears, to wit:

40

The complainant, as trustee, in the first cause of action set forth in its bill of complaint, prays that this court may instruct the complainant in its capacity as substituted trustee under the last will and testament of Marcus Sayre, deceased, whether it should sell and convey the premises known as #561 Broad Street, Newark, New Jersey, held as part of the corpus of the trust fund, in accordance with the terms and conditions of a certain contract annexed to the bill of complaint, and in the second cause of action, the

Motion to Strike Out Counterclaim.

complainant prays that this court should instruct the complainant, as trustee as aforesaid, whether it should sell certain trust property consisting of the premises known as #490 Broad Street and #492 Broad Street, Newark, New Jersey, respectively, at public auction, or if no bids should be received for the same or if any bids should not be confirmed by this court, then whether the complainant should abandon said premises or either of them. The counterclaim does not set forth or purport to set forth any defense to the relief requested by the complainant or any reason why the same should not be granted; but, on the other hand, charges the complainant with mismanagement and negligence, as trustee, in the management and conduct of the trust property, and prays that the complainant be directed to file its accounting as such trustee; that it be individually surcharged for all losses alleged to have been sustained by the trust estate as a result of the alleged mismanagement and misconduct; that complainant, in its individual capacity, be directed and decreed to pay unpaid taxes affecting the several premises hereinbefore mentioned; that the complainant be removed as trustee; that a successor-trustee be appointed; and that the complainant, as trustee, and individually, be directed to answer certain interrogatories annexed to the counterclaim, all of which relate to said alleged misconduct and mismanagement.

It is submitted that the matters set forth in the counterclaim do not present any exceptional or unusual circumstances which would afford justification for the retention of the same, involving a departure from the usual practice, where the issues so created are wholly independ-

Motion to Strike Out Counterclaim.

ent of the issues arising under the bill of complaint, but if for any reason whatsoever the court should be of the opinion that the same should be retained, then we will, at the time and place aforesaid, apply for an order for a separate hearing upon the cause of action set forth in said counterclaim in accordance with Chancery Rule No. 27.

10
20
30
40

If the court should be of the opinion that the counterclaim should be retained, then we shall, at the time and place aforesaid, apply for an order striking out all of the interrogatories contained in said counterclaim, consisting of Nos. 1 to 62 inclusive under the Second Paragraph of the prayers, Nos. 1 to 7 inclusive under the Eighth Paragraph of the prayers, and Nos. 1 to 3 inclusive under the Ninth Paragraph of the prayers; for the following reasons: The discovery sought by the interrogatories is merely incidental to the relief prayed for in the counterclaim wherefore said counterclaim is not a technical bill for discovery, and under Chancery Rule No. 84, interrogatories may not be served until issue is joined upon the counterclaim.

If this court should be of the opinion that the counterclaim should be retained and that the service of the interrogatories is not premature, then at the time and place aforesaid, we will further apply for an order striking out certain of the interrogatories as hereinafter indicated, for the reasons set forth:

INTERROGATORIES LISTED UNDER THE SECOND PARAGRAPH OF THE PRAYERS.

No. 36: Upon the ground that the interrogatory improperly seeks the names of witnesses, is

Motion to Strike Out Counterclaim.

vexatious and impertinent in character, and purports to pry into the case of the adversary.

Nos. 38 to 40 inclusive: Upon the ground that the determination of value is a matter of evidence only; that the complainant is not qualified to render its own opinion of value; and that the information sought is equally within the knowledge of the counterclaimant. 10

Nos. 47 to 49 inclusive: Upon the ground that there is no allegation made either in the bill of complaint or in the counterclaim that a reduction in taxes covering the several premises mentioned therein was sought or that the same should have been sought, wherefore the same are not relevant to the matters material to the issue. 20

No. 52 to the extent that a copy of the alleged lease is requested: Upon the ground that it is vexatious to require the complainant to make a copy thereof, if such there be.

No. 61: Upon the ground that the same is not material to the issue and a responsive answer would not constitute relevant or competent evidence. 30

INTERROGATORIES LISTED UNDER THE EIGHTH PARAGRAPH OF THE PRAYERS.

Nos. 1 to 7 inclusive: Upon the ground that the corpus of the trust fund is not distributable until the death of the life tenant, Mary Estelle Sayre; the determination of the residuary beneficiaries requires a construction of the Will as well as a determination of the identity and legitimacy of the parties who are entitled to 40

Replication.

share therein, wherefore such inquiry is prematurely made and is not relevant to the issues created by the bill of complaint and counterclaim.

10 INTERROGATORIES LISTED UNDER THE NINTH PARAGRAPH OF THE PRAYERS.

Nos. 1 to 3 inclusive: For the reasons set forth in the last preceding paragraph.

20 HOOD, LAFFERTY & EMERSON,
HOOD, LAFFERTY & EMERSON,
Solicitors of Complainant Fidelity Union Trust Company as substituted trustee under the last will and testament of Marcus Sayre, deceased, and Fidelity Union Trust Company in its individual capacity.

Replication.

(Filed April 5, 1944.)

30

—◆—
[SAME TITLE.]
—◆—

The complainant joins issue on the answer of the defendant, Dudley O. Sayre.

HOOD, LAFFERTY & EMERSON,
HOOD, LAFFERTY & EMERSON,
Solicitors of Complainant.

40

Order Disposing of Certain Motions.

(Filed April 11, 1944.)

[SAME TITLE.]

This matter being opened to the Court by Messrs. Hood, Lafferty & Emerson, solicitors of the above named complainant, and solicitors of Fidelity Union Trust Company (in its separate corporate capacity, made a defendant herein by the counterclaim of Dudley O. Sayre) in the presence of Messrs. Kanter & Kanter solicitors of the defendant and counter-claimant Dudley O. Sayre, on the following motions submitted on behalf of the complainant and of the Fidelity Union Trust Company, individually, to wit:

1. to strike the counterclaim of Dudley O. Sayre,
2. in the alternative, for a separate hearing upon the cause of action set forth in the counterclaim of Dudley O. Sayre,
3. to strike interrogatories Nos. 1 to 62, both inclusive, of the second paragraph of the prayers of the aforesaid counterclaim of Dudley O. Sayre,
4. to strike interrogatories Nos. 1 to 7, both inclusive, of the eighth paragraph of the prayers of the aforesaid counterclaim of Dudley O. Sayre,
5. to strike interrogatories Nos. 1 to 3, both inclusive, of the ninth paragraph of the prayers of the aforesaid counterclaim of Dudley O. Sayre, and

10

20

30

40

Order Disposing of Certain Motions.

- 10 6. in the alternative, to strike interrogatories Nos. 36, 38, 39, 40, 47, 48, 49, 52 (to the extent that interrogatory #52 requests a copy of the lease therein referred to) and 61, of the second paragraph of the prayers of the aforesaid counterclaim of Dudley O. Sayre,

and the Court having heard and considered the oral arguments of the solicitors aforesaid, and having also read and considered their respective briefs, and now being of the opinion that this order should be made,

It is thereupon on this 11th day of April, 1944,
ORDERED that:

- 20 First: The aforesaid motion to strike the counterclaim be, and the same hereby is, denied.

- 30 Second: A separate hearing shall be had upon the cause of action set forth in the counterclaim of Dudley O. Sayre. It having been represented to the Court that the complainant has filed a replication joining issue upon the answer of said Dudley O. Sayre, complainant shall have the right to apply for an order of reference of this cause forthwith, notwithstanding the fact that the issue has not yet been joined upon the cause of action set forth in said counterclaim.

- 40 Third: The motion to strike interrogatories Nos. 1 to 62, both inclusive, of the second paragraph of the prayers, Nos. 1 to 7, both inclusive, of the eighth paragraph of the prayers, and Nos. 1 to 3, both inclusive, of the ninth paragraph of the prayers, as a whole, on the ground they are premature, be, and the same hereby is denied.

Order Disposing of Certain Motions.

Fourth: The following interrogatories, to wit, Nos. 36, 38, 39, 40, 47, 48, 49, 52 (to the extent that this interrogatory requests a copy of the lease therein referred to) and 61, of the second paragraph of the prayers of the aforesaid counterclaim of Dudley O. Sayre, be, and the same hereby are, stricken. However, after the counterclaim aforesaid and the remaining interrogatories shall have been answered, if said Dudley O. Sayre deems the terms of the lease (referred to in said interrogatory No. 52) material to his case, he may petition this Court for leave to inspect and copy said lease, pursuant to Rule 86 of this Court. 10

Fifth: The time for the complainant and Fidelity Union Trust Company (in its separate corporate capacity) to file their answer herein to the aforesaid counterclaim of Dudley O. Sayre, be, and the same hereby is, extended for twenty days from the date hereof. 20

Respectfully advised,

JOHN O. BIGELOW,
V. C.

LUTHER A. CAMPBELL, 30
C.

Special Replication of Complainant to Counterclaim of Defendant, Dudley O. Sayre.

(Filed April 29, 1944.)

—◆—
[SAME TITLE.]
—◆—

10

As to the counterclaim contained in the answer of the defendant, Dudley O. Sayre, complainant, Fidelity Union Trust Company, as substituted trustee as aforesaid and in its separate corporate capacity, says:

20

1. Paragraph 1 is admitted, except that the last will and testament referred to therein was admitted to probate on April 6, 1909, instead of April 6, 1906 as therein alleged.

2. Paragraphs 2 and 3 are admitted.

3. So much of paragraph 4 which states that the income from the property at 561 Broad Street, Newark, New Jersey, was not commensurate with the value thereof and that the value of said property at all times therein referred to was in excess of \$110,000.00 is denied.

30

Further answering the statements contained in said paragraph, complainant says that the rentals payable under the lease with Jacob Doll & Sons, Inc., which commenced May 1, 1921, were sufficient to pay the costs of management of the premises at 561 Broad Street, Newark, New Jersey, and to produce a surplus income through December 31, 1928. Said tenant was obligated, in addition to the rental, to pay all current taxes. Approximately one-half of the 1929 taxes were

40

Special Replication of Complainant to Counter-claim of Defendant, Dudley O. Sayre.

paid early in January, 1930. The tenant defaulted as to the remainder. Said part payment of taxes, together with the rentals which were received on account of 1929 rentals, were sufficient to pay the costs of maintenance and the current taxes for said year and at the same time to produce a surplus. 10

4. The statements contained in paragraph 5 are denied.

Further answering said paragraph complainant says that the will of Marcus Sayre probably did not vest in the trustee a power to sell said premises and complainant was so advised by counsel; a sale by the complainant, as trustee, purporting to act under such powers as were contained in the will, would create a serious question as to the marketability of the title and a deed of the trustee probably would not be acceptable. Complainant further says that in 1929 and for a period thereafter no emergency had arisen not contemplated by the testator which would invoke the jurisdiction of a court of equity; and that even if an advantageous offer were received for said premises, there were no proceedings available to the complainant by which a sale of the same could be effectuated at the direction of any court in such a manner as to afford a marketable title. Complainant further says that at the times mentioned in said paragraph the defendant, Dudley O. Sayre, and the other beneficiaries of said estate believed the value of said premises to be greatly in excess of what the premises were actually worth and what they would bring at the current market. No offers 20 30 40

Special Replication of Complainant to Counter-claim of Defendant, Dudley O. Sayre.

worthy of serious consideration were received for the premises in question and any application submitted to the court for consideration of the same would be fruitless.

10

5. The statements contained in paragraph 6 are denied, except that the schedules are correct with the following exceptions, to wit:

(a) The interest of \$26.24 upon the 1928 tax assessment was paid by the tenant.

20

(b) The total tax payable for 1934 is \$2,996.65 instead of \$2,256.90 as alleged in said paragraph. The difference between the two figures herein mentioned is \$739.75, which said sum was paid on October 20, 1936, together with interest of \$160.75.

(c) The taxes and interest set forth for the year 1935 are correct, except for a difference of ten cents in the total interest paid by the complainant.

30

(d) As to the 1936 taxes amounting to \$2,743.20 the complainant made additional payments not set forth in the schedule thereof, as follows: \$201.50 on April 9, 1940 and \$176.07 on April 13, 1940, which together with the payments alleged in said schedule total the entire taxes payable for said year. The payments of interest for 1936 are correct except for the last figure in the column of \$159.09. In lieu thereof complainant made the following payments, to wit: \$48.50 and \$42.41.

40

6. Answering the statements contained in paragraph 7, complainant says the sum of inter-

Special Replication of Complainant to Counter-claim of Defendant, Dudley O. Sayre.

est payments referred to in paragraph 6 are as follows:

Interest paid on 1928 taxes—None by complainant personally; interest was paid by tenant.	10
“ “ “ 1929 “ —\$319.20	
“ “ “ 1930 “ —\$450.37	
“ “ “ 1931 “ —\$359.36	
“ “ “ 1932 “ —\$316.64	
“ “ “ 1933 “ —\$401.90	
“ “ “ 1934 “ —\$709.25	
“ “ “ 1935 “ —\$563.45	
“ “ “ 1936 “ —\$625.28	
TOTAL	\$3,745.45

7. The complainant denies all the statements contained in paragraph 8 except so much thereof which alleges that the tenant of the premises at 561 Broad Street, Newark, New Jersey, during all of 1929 and during the forepart of 1930 was Jacob Doll & Sons, Inc., and that the rental of said premises was \$5,000.00 per annum, payable in equal monthly installments in advance, together with the annual taxes, and that the complainant accepted the tenant's note in the sum of \$4,902.12, of which \$500.00 on account of principal and \$33.49 on account of interest were collected by the complainant on or about July 3, 1930. 20 30

Further answering the statements contained in said paragraph, complainant says that complainant in the exercise of proper business judgment executed with Jacob Doll & Sons, Inc., a written agreement dated May 21, 1930 which was, in general, in the following tenor, to wit:

Said Agreement recited the tenant was indebted to the complainant for rent for the months 40

Special Replication of Complainant to Counter-claim of Defendant, Dudley O. Sayre.

of March, April and May, 1930 and for one-half of the 1929 taxes and as of June 1, five-twelfths of 1930 taxes, all of which totaled \$4,902.12. Said Agreement further provided that

10 the tenant would, on June 1, 1930, surrender to the complainant said premises, together with the changes, alterations, additions, repairs and improvements made by it during the term of the lease without liability on the part of the complainant to pay for same, reserving to itself the trade fixtures and trade appliances which it covenanted to remove before June 1, 1930 and would transfer to complainant all insurance policies, fire, casualty or plate glass, without requiring payment of premium for the unexpired

20 terms thereof. Said Agreement further provided that the tenant would deliver its note to complainant in the sum of \$4,902.12 on account of rent and tax arrearages payable on June 1, 1930. Pursuant to said Agreement to tenant did surrender said premises and delivered its note to the complainant to the end that complainant was then and there in a position to lease and rent said premises to a responsible party forthwith. Complainant says that the sum of \$500.00 on account of principal and interest of \$33.49 were

30 paid as alleged in said paragraph. Complainant used its best efforts to collect the balance thereof, including the institution of suit against the tenant on account of same and attendance by its attorneys at the following receivership proceedings. Complainant did, in fact, receive dividends from the receivers of \$44.02 and \$88.04 respectively, on account of the claim of \$4,402.12 filed with the receivers.

40

Special Replication of Complainant to Counter-claim of Defendant, Dudley O. Sayre.

8. The statements contained in paragraph 9 are denied, except that complainant admits that it did pay income from the trust estate to the life tenant during the years 1929 and 1930 and complainant says that said payments were legally and properly made. 10

9. Complainant denies the statements contained in paragraph 10, except so much thereof which says that no part of the 1937, 1938 and 1939 taxes had been paid in August, 1939 and which sets forth the schedule of taxes which were payable for the years 1937, 1938 and 1939, respectively.

Further answering the statements contained therein, complainant says that it paid to itself the sum of \$1,400.00 representing commissions upon income received for prior years at the rate of 5% to which it was legally entitled for services as trustee and that complainant was under no obligation to apply funds so earned by it for and on account of taxes on real estate. 20

10. The statements contained in paragraph 11 are denied. The schedule of receipts, expenses and balance is as follows: 30

Year	Minimum Receipts	Expenses	Balance
1937	\$2,402.86	\$264.86	\$2,138.00
1938	2,753.20	328.57	2,424.63
1939	2,753.18	576.85	2,176.33

The total net income for said period is \$6,738.96 and complainant during the years 1937, 1938 and 1939 paid taxes totaling \$8,304.95 on account of the balance of 1934 taxes and on account of 1935 and part of 1936 taxes, together with interest. Wherefore, complainant paid during the said 40

Special Replication of Complainant to Counterclaim of Defendant, Dudley O. Sayre.

three-year period a sum on account of taxes in the amount of \$1,565.99 in excess of the current taxes for the three years comprising said period.

10 11. The statements contained in paragraph 12 are denied, except the schedule which is correct with the exception of the sum total of interest in the amount of \$224.19. The interest actually paid by the complainant was \$229.96.

20 12. The statements contained in paragraph 13 are denied, excepting the figures set forth in the schedules which are correct so far as they go. Complainant further says that an additional payment of \$266.56 for 1943 taxes and \$7.80 for interest on the same was made by the complainant on December 16, 1943.

30 Further answering the statements therein contained, complainant says all payments on accounts of taxes were made in accordance with the covenants in a certain lease with Lauter Humana Company covering said premises at the time of such payments, which covenants required the complainant as lessor to apply the rental received thereunder to the current costs, charges, maintenance and operation, and thereafter, after setting aside a reserve for contingencies, to apply the excess on account of tax arrearages.

13. Complainant denies the statements contained in paragraph 14, except the schedule of figures relating to 490 Broad Street and 492 Broad Street, Newark, New Jersey, which is substantially correct.

40 Further answering said paragraph, complainant says that the said premises were subject to the same limitations imposed by the will of

Special Replication of Complainant to Counterclaim of Defendant, Dudley O. Sayre.

Marcus Sayre which are set forth at length in paragraph 4 hereof with respect to the property at 561 Broad Street, Newark, New Jersey, and that the complainant was under the same disabilities with respect to sale thereof as is set forth in paragraph 4 hereof. Complainant repeats all the statements therein made with respect to the foregoing, which complainant says are equally applicable to the premises at 490-492 Broad Street. 10

14. Answering the statements contained in paragraph 15, complainant says that its Fourth Intermediate Account was filed on November 29, 1929 and covered the period of its administration from January 3, 1927 to November 12, 1929. The corpus of the trust fund consisted of the real estate located at 490 Broad Street, 492 Broad Street and 561 Broad Street, all in Newark, New Jersey, only, and was not subject to disposition by the complainant. Wherefore, the account consisted of receipts and disbursements of income only and the only interested party thereto was the life tenant to whom the said income was payable. Complainant denies that it had been the constant position of the complainant that in the management and conduct of this trust (at least up until such date as upon which the present life tenant may die) no remainderman has any right or power to have his (or her) voice listened to or wishes observed by said complainant. 20 30

15. The statements contained in paragraphs 16, 17, 18, 19, 20, and 21 are denied.

16. Complainant has no knowledge or infor- 40

Special Replication of Complainant to Counterclaim of Defendant, Dudley O. Sayre.

mation sufficient to form a belief as to the statements contained in paragraphs 22 and 23.

10 17. Further answering said counterclaim, complainant says that it has at all times during the period of the acts complained of, properly, diligently and prudently and in the exercise of good business judgment administered the Estate of Marcus Sayre, deceased, both as to corpus and as to income and that it has at all times kept all the immediate beneficiaries of said estate who were known to it advised concerning the problems that arose in the course of administration and frequently consulted with them concerning the solution thereof.

20 18. Further answering said counterclaim, complainant says that the defendant, Dudley O. Sayre, knew, or had full opportunity with reasonable care to ascertain, all the matters and things concerning the administration of the trust estate of which complaint is made in the counterclaim; that he frequently conferred with the complainant from time to time from 1929 on concerning the situation of the trust estate, was
30 given full information thereon by the complainant; that he acquiesced in the manner of complainant's management and handling of the trust properties; that he knew that a sale at a reasonable figure was impracticable heretofore; that he took no steps on his part to seek or obtain adjudication or the instructions of this or any other court on the matters now complained of; that he delayed in his objections and charges for so long a period that the complainant is prejudiced by loss of material proofs that otherwise
40

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

would be available, and that he is estopped and barred from his counterclaim by his acquiescence and laches.

HOOD, LAFFERTY & EMERSON, 10
HOOD, LAFFERTY & EMERSON,
Solicitors of Complainant, Fidelity Union
Trust Company, as Substituted Trustee
under the Last Will and Testament of
Marcus Sayre, deceased, and in its
Separate Corporate Capacity.

**Answers to Interrogatories Annexed to An- 20
swer of Dudley O. Sayre, Filed Herein,
Addressed to Complainant.**

(Filed April 29, 1944.)

Answer to First Interrogatory:

Year	Gross Income Received	
1929	\$8,309.09	
1930	1,923.69	
1931	2,738.04	
1932	3,850.00	30
1933	3,500.00	
1934	3,069.02	
1935	2,139.42	
1936	2,425.00	
1937	2,402.86	
1938	2,771.03	
1939	2,755.18	
1940	675.00	
1941	1,200.00	
1942	3,006.13	
1943	2,700.00	40

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

Answer to Second Interrogatory:

	Year	Gross Income Received
10	1929	\$3,050.00
	1930	2,550.00
	1931	1,540.00
	1932	1,371.00
	1933	1,146.17
	1934	1,387.00
	1935	1,182.00
	1936	1,028.00
	1937	720.00
	1938	420.00
	1939	155.00
	1940	75.20
	1941	215.00
20	1942	45.00
	1943	70.00

Answer to Third Interrogatory:

	Year	Gross Income Received
30	1929	\$3,280.00
	1930	2,850.00
	1931	2,525.00
	1932	2,800.00
	1933	1,354.16
	1934	2,632.00
	1935	433.29
	1936	295.00
	1937	705.90
	1938	642.30
	1939	725.00
	1940	845.00
	1941	672.00
	1942	180.00
1943	105.00	

40

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

Answer to Fourth Interrogatory:

Year	Operating Expenses Excepting Taxes	
1929	\$ 1.35	
1930	347.16	10
1931	862.65	
1932	252.41	
1933	260.04	
1934	470.92	
1935	1,117.19	
1936	84.74	
1937	264.86	
1938	328.57	
1939	576.85	
1940	100.86	
1941	206.66	
1942	80.63	20
1943	114.61	

Answer to Fifth Interrogatory:

Year	Operating Expenses Excepting Taxes	
1929	\$538.66	
1930	119.93	
1931	267.88	
1932	83.86	
1933	205.20	
1934	138.28	
1935	218.05	30
1936	83.03	
1937	83.20	
1938	187.26	
1939	62.32	
1940	54.16	
1941	97.51	
1942	69.75	
1943	113.71	

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

Answer to Sixth Interrogatory:

	Year	Operating Expenses Excepting Taxes	
10	1929	\$370.16	
	1930	209.20	
	1931	254.10	
	1932	170.10	
	1933	68.66	
	1934	205.83	
	1935	389.08	
	1936	306.35	
	1937	276.31	
	1938	405.78	
	1939	108.28	
	1940	68.67	
	20	1941	97.52
		1942	85.00
1943		123.25	

Answers to Interrogatories Seven to Twenty-
two inclusive:

Year	Taxes Assessed	Date of Payment	Principal	Interest
1928	\$3,669.14	11-8-28	\$1,834.57	None
		5-7-29	1,834.57	\$144.41
1929	3,640.40	1-6-30	1,820.20	98.30
		4-20-31	895.20	104.80
		4-24-31	925.00	116.10
30	4,200.04	9-3-31	1,348.00	152.00
		10-13-31	752.02	91.85
		12-2-31	1,100.02	99.52
		2-9-32	1,000.00	107.00
		1931	4,143.18	7-6-32
9-2-32	1,000.00			87.85
1-24-33	555.71			44.29
2-10-33	250.00			20.90
4-21-33	1,000.00			97.25
5-16-33	265.88			27.07

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

Year	Taxes Assessed	Date of Payment	Principal	Interest				
1932	3,955.80	12-20-32	481.00	19.00	10			
		5-16-33	530.00	34.90				
		6-24-33	326.00	24.00				
		7-21-33	370.50	29.50				
		8-18-33	326.10	23.90				
		10-20-33	470.65	29.35				
		1-30-34	462.35	37.65				
		4-5-34	531.50	68.50				
		6-19-34	457.70	49.84				
		1933	2,781.44	2-14-35		1,390.72	166.27	
3-2-36	854.62			145.38				
4-29-36	536.10			90.25				
1934	2,996.65	10-20-36	739.25	160.75	20			
		1-13-37	409.12	90.88				
		5-6-37	322.25	77.75				
		10-7-37	1,199.43	300.57				
		12-15-37	326.60	79.30				
		12-15-37	240.55	53.55				
1935	2,385.60	1-18-38	244.10	55.90				
		3-14-38	242.10	57.90				
		5-9-38	202.74	47.26				
		6-29-38	241.88	58.12				
		9-20-38	482.14	117.86				
		10-19-38	241.60	58.40				
		11-10-38	243.37	56.63				
		12-30-38	247.12	57.83				
		1936	2,743.20	1-19-39		205.00	45.00	30
				2-6-39		327.10	72.90	
3-22-39	247.96			52.04				
5-17-39	327.30			72.70				
6-8-39	163.00			37.00				
8-8-39	246.60			53.40				
9-9-39	163.15			36.85				
12-1-39	403.06			96.94				
1-13-40	201.25			48.75				
2-17-40	81.21			18.79				
4-9-40	201.50			48.50				
4-13-40	176.07	42.41						

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

	Year	Taxes Assessed	Date of Payment	Principal	Interest		
10	1937	2,140.20	4-13-40	25.75	5.77		
			5-11-40	324.75	75.25		
			7-31-40	240.45	59.55		
			7-23-41	145.41	44.59		
			8-27-41	145.20	44.80		
	1937	2,659.97		None	None		
	1939	1,501.50		None	None		
	1940	1,855.12		None	None		
	20	1941	2,323.00	1-27-42	657.40	42.60	
				2-17-42	87.76	4.67	
3-30-42				171.38	11.22		
4-13-42				180.10	9.90		
5-8-42				180.44	9.56		
7-1-42				168.25	10.70		
7-7-42				202.95	10.80		
9-19-42				391.50	24.50		
10-6-42				175.60	11.22		
11-16-42				107.62	7.68		
1942				1,682.22	11-16-42	93.08	5.02
					12-12-42	201.00	12.18
					1-13-43	200.30	13.45
					2-18-43	193.63	11.72
					3-18-43	201.46	12.29
	5-17-43	390.10	26.05				
	7-16-43	367.56	19.85				
	9-16-43	35.09	2.16				
30	1943	1,120.41	9-16-43	309.18	13.57		
			10-9-43	179.00	7.52		
			11-19-43	205.95	7.80		
			12-16-43	266.56	6.50		

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

Answers to Interrogatories Twenty-three to
Twenty-eight, inclusive:

Year	Taxes Assessed	Date of Payment	Principal	Interest	
1928	\$1,383.00	5-18-28	\$693.23	None	10
		10-22-28	689.77	None	
1929	1,375.60	5-27-29	687.80	None	
		11-26-29	687.80	None	
1930	1,528.14	7-15-30	815.00	None	
		3-11-32	713.14	82.06	
1931	1,440.76	3-11-32	759.75	None	
		9-28-32	476.15	None	
		12-1-32	204.86	84.45	
1932	1,375.60	12-14-33	216.65	23.35	
		2-13-34	471.15	46.35	
		8-27-34	687.08	84.11	
1933	977.44	10-20-36	161.55	38.45	20
		5-6-37	137.15	37.85	

The balance of 1933 taxes are unpaid.

1934 taxes in the amount of \$1,087.70 are unpaid.

1935	" " "	" "	903.84	" "	
1936	" " "	" "	1,024.89	" "	
1937	" " "	" "	992.61	" "	
1938	" " "	" "	1,134.06	" "	
1939	" " "	" "	1,223.95	" "	
1940	" " "	" "	819.65	" "	
1941	" " "	" "	759.00	" "	30
1942	" " "	" "	571.32	" "	
1943	" " "	" "	573.48	" "	

Answers to Interrogatories Twenty-nine to
Thirty-five, inclusive:

Year	Taxes Assessed	Date of Payment	Principal	Interest
1928	\$1,524.95	5-18-28	\$764.69	
		10-22-28	760.26	
1929	1,516.20	5-27-29	758.10	
		11-26-29	758.10	

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

Year	Taxes Assessed	Date of Payment	Principal	Interest
1930	1,527.07	7-15-30	721.34	
		11-28-30	805.73	
10 1931	1,627.82	6-3-32	871.90	
		10-25-32	500.00	
		11-22-32	255.92	\$111.28
		12-14-33	777.10	81.56
1932	1,554.20	4-25-34	590.00	60.00
		5-16-34	187.10	19.16
		12-12-34	552.35	59.05
1933	1,121.76	4-29-36	569.41	99.99
		10-20-36	164.20	35.80
1934	1,248.30	5-6-37	138.80	36.20

The balance of 1934 taxes are unpaid.

20	1935 taxes in the amount of \$ 994.56 are unpaid.
	1936 " " " " " 1,234.44 " "
	1937 " " " " " 918.81 " "
	1938 " " " " " 1,147.89 " "
	1939 " " " " " 1,474.20 " "
	1940 " " " " " 1,023.35 " "
	1941 " " " " " 902.75 " "
	1942 " " " " " 581.90 " "
	1943 " " " " " 584.10 " "

30 Answer to Thirty-seventh Interrogatory: November 29, 1929; covering period from January 3, 1927 to November 12, 1929; filed in Essex County Orphans' Court; no notice given by complainant to said defendant of filing of the accounting and no notice given to said defendant of the allowance of such accounting prior to the date of the allowance thereof.

Answer to Forty-first Interrogatory: On or about September 11, 1940, a written offer from

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

Feist and Feist, on behalf of Fred Ehrenkranz
was received, a copy of which is as follows:

September 11th 1940

Fidelity Union Trust Company,
755 Broad Street,
Newark, N. J.

10

Attention: Mr. Hopper

Gentlemen:

Regarding the property at 561 Broad
Street, Newark, we wish to make the fol-
lowing offer.

Our client, Mr. Fred Ehrenkranz is
willing to pay above the encumbrances on
this property which according to your
records amount to \$10,000.00. He is will-
ing to pay \$2,000.00 for the deed.

20

Enclosed you will find check to the order
of the Fidelity Union Trust Company in
the amount of \$500.00 as deposit in this
sale.

We would appreciate it if you will let
us know at your earliest convenience
whether this offer is accepted.

30

Very truly yours,

FEIST & FEIST, INC.
sgd. Joseph K. Lowenstein
Central Department

JOSEPH K. LOWENSTEIN
GW Encl.

40

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

10 Complainant, in writing, advised the beneficiaries, including this defendant, of such offer. Before action was taken, the offer was withdrawn on or about December 24, 1940.

On or about October 18, 1940, written advice from Abeles-Stevens, Inc. was received that it had received an offer, a copy of such advice is as follows:

October 18th, 1940

Mr. H. A. Hopper
Fidelity Union Trust Co.
755 Broad Street
Newark, N. J.

20

Re: 561 Broad Street
Newark, New Jersey

Dear Mr. Hopper:

In connection with the property at 561 Broad Street, Newark, N. J., please be advised that I have this day received an offer in the amount of \$13,000.

30 Will you kindly advise the writer whether or not this proposition will be of interest to you.

Very truly yours,

ABELES-STEVENS, INC.
sgd. Richard Abeles
Secretary

RA:B

The foregoing did not materialize.

40 In April, 1941, Charles E. Cameron orally offered \$12,000.00, taxes to be adjusted.
No further action was taken in respect to same.

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

In May, 1941, the Lauter Humana Company orally offered to pay \$4,000.00 in excess of taxes. All of the beneficiaries, including this defendant, were advised as to same by complainant in writing. **10**

The said offer was withdrawn.

On or about October 2, 1941, a written offer from Gilbert Ehrenkranz, on behalf of a client was received, a copy of which is as follows:

October 2, 1941

Fidelity Union Trust Company
755 Broad Street
Newark, New Jersey **20**
Attention Mr. Hopper

Re: #561 Broad Street, Newark

Gentlemen:

I hand you herewith my client's check in the sum of \$500.00 as deposit on the above captioned property, to be purchased on the following terms and conditions:

The purchase price is to be \$3,000.00 cash, subject to all outstanding taxes in the approximate amount of \$8,860.00, but free and clear of all other encumbrances and liens. **30**

I direct your attention to the fact that this property will be sold for delinquent taxes on Monday, October 6, 1941, by the City of Newark. I therefore must limit this offer to expire on Monday, October 6, 1941 at ten o'clock in the morning. I would appreciate your immediate atten- **40**

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

tion to this matter as you realize the
urgency of it.

Very truly yours,

10

sgd. GILBERT EHRENKRANZ
Gilbert Ehrenkranz

GE:C

Enc. 1

Said offer was declined by the complainant.

20 Answer to Forty-second Interrogatory: On or
about September 30th, 1940, a written offer from
Bruce Realty Co., Inc., was received, a copy of
which is as follows:

September 30th 1940

Fidelity Union Trust Co.
755 Broad Street
Newark, N. J.

Trust Department

Gentlemen:

30

With reference to property #490-492
Broad Street, this city, owned by you, we
wish to make an offer to purchase this
property on the following terms:

Price, five hundred (\$500.00) dollars,
net, subject to all taxes thereon.

We are enclosing herewith our check of
one hundred (\$100.00) dollars, and will
pay the balance of four hundred (\$400.00)
dollars on taking title to the property,
which is to be October 1st, 1940.

40

If this offer is acceptable to you, we

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

should like to take title October 1st, 1940.
This offer is to be valid only until that
date and unless the entire deal is fully
consummated on that date, the enclosed
check is to be returned to us. 10

Very truly yours,

BRUCE REALTY CO. INC.

By: (sgd) Charles Zernel

Pres.

CZ:HE

ENC. 1

This offer was declined by complainant.

On or about October 8th, 1940, a written offer
from Bruce Realty Co., Inc., was received, a
copy of which is as follows: 20

October 8th 1940

Fidelity Union Trust Co.

755 Broad Street

Newark, N. J.

Trust Department

Gentlemen: 30

With reference to property #490-92
Broad Street, this city, owned by you, we
wish to make an offer to purchase this
property on the following terms:

Price, one thousand (\$1,000.00) dollars,
net, subject to all taxes thereon.

We are enclosing herewith our check
of one hundred (\$100.00) dollars, and will
pay the balance of nine hundred (\$900.00) 40

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

10 dollars on taking title to the property,
which is to be October 15th, 1940. Rents
and water to be apportioned as of October
1st, 1940.

If this offer is acceptable to you, we
should like to take title October 15th, 1940.
This offer is to be valid only until that
date and unless the entire deal is fully
consummated on that date, the enclosed
check is to be returned to us.

Very truly yours,

BRUCE REALTY COMPANY INC.

By: (sgd) Chas. Zernel
Pres.

20

JZ:HE
ENC: 1

This offer was declined by the complainant.

On or about July 31, 1941, a written offer from
Philip Mandelbaum, on behalf of Freda Baum,
was received, a copy of which is as follows:

July 31, 1941

30

Fidelity Union Trust Co.,
Broad Street,
Newark, N. J.

Attention: Mr. Hopper

Gentlemen:

40

On behalf of my client, Freda Baum, I
hereby offer to purchase property known
as 490-2 Broad Street, Newark, N. J.,
subject to all outstanding taxes, and agree
to pay the sum of \$500.00 for deed.

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

I am enclosing check in the sum of
\$100.00 as a deposit, to be used if offer is
accepted.

Kindly advise.

10

Yours very truly,

sgd. PHILIP MANDELBAUM

PM:LC

Enc.

This offer was declined by the complainant.

On or about August 15, 1941, a written offer
from Philip Mandelbaum, on behalf of Freda
Baum, was received, a copy of which is as fol-
lows:

20

August 15, 1941

Fidelity Union Trust Co.,
Broad Street,
Newark, N. J.

Re: 490-2 Broad Street

Gentlemen:

On behalf of Freda Baum, I hereby
offer the sum of \$800.00 for deed for the
above property, subject to taxes.

30

I am enclosing check in the sum of
\$100.00 as a deposit, to be used if offer
is accepted.

Yours very truly,

sgd. PHILIP MANDELBAUM

PM:LC

Enc.

40

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

This offer was declined by the complainant.

10 On or about January 29, 1941, a written offer from Louis Werksman was received, a copy of which is as follows:

January 29, 1941

Fidelity Union Trust Co.,
Broad Street,
Newark, N. J.

Att: Mr. Hopper

Gentlemen:

20 I herewith submit an offer in the amount of Fifteen Hundred (\$1,500.00) Dollars cash, subject to taxes, for the premises known as Nos. 490-92 Broad Street, Newark, New Jersey.

It is understood that in the event this offer is agreeable to you, that title will be passed on or before ~~February~~ March 1, 1941.

If this offer interests you, will you kindly communicate with me upon receipt of this letter.

30 Very truly yours,

sgd. LOUIS WERKSMAN

LW:C

This offer was declined by the complainant.

Answer to Forty-third Interrogatory: Same as answer to Forty-second.

40 Answer to Forty-fourth Interrogatory: From and after the commencement of the depression

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

which was in the latter part of 1929, there was little or no real estate activity until about 1937 with respect to this type of property, and more particularly there was no activity in the general neighborhood in which this property is located. There were practically no sales of properties of a comparable nature in the open market—that is, sales which were not the result of foreclosure or of necessity for immediate liquidation without regard for the real worth. Furthermore, complainant probably had no testamentary power to sell said premises and was so advised by counsel, and it is unlikely that an application to the court for authority to sell the same would have been entertained. In the early part of 1937, as a result of conferences between the complainant's officers and the beneficiaries of the Estate of Marcus Sayre, deceased, including the defendant, Dudley O. Sayre, an effort was made to sell said premises and several brokers were notified that the same were for sale and were furnished particulars as to the nature of the property, and, in general as to the price which would be given consideration. In 1939, and at all times thereafter until the execution of the lease to Lauter Humana Company which was on June 16, 1941, complainant made earnest and sustained efforts to sell said premises by notifying a number of brokers of the same and giving them particulars thereof, by conferring with brokers, by communicating with parties whom the complainant thought might be interested in the same, and by further communications and conferences at various times with brokers who had already been advised of the

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

10 availability of said premises for sale, and, in general, it used its best efforts through available channels for the purpose of obtaining suitable offers for the same.

20 Answer to Forty-fifth Interrogatory: From and after the commencement of the depression which was in the latter part of 1929, there was little or no real estate activity until about 1937 with respect to this type of property, and more particularly there was no activity in the general neighborhood in which this property is located. There were practically no sales of properties of a comparable nature in the open market—that is, sales which were not the result of foreclosure or of necessity for immediate liquidation without regard for the real worth. Furthermore, complainant probably had no testamentary power to sell said premises and was so advised by counsel, and it is unlikely that an application to the court for authority to sell the same would have been entertained. In 1936, complainant consulted with brokers as to the likelihood of selling the same. In September 1937, following
30 another conference with some of the beneficiaries of said Estate, the complainant made earnest and sustained efforts to sell the said premises, which efforts continued down to the present time. The complainant, early in October 1937, listed in writing said premises with at least twenty-eight brokers and, furthermore, on numerous occasions communicated and conferred with many of them and with other brokers advising them of all the particulars and discussing the probability of disposing of same. The com-
40

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

plainant also communicated with parties whom it thought might be interested in the same and the complainant, in general, used its best efforts through available channels for the purpose of obtaining suitable offers for the same. 10

Answer to Forty-sixth Interrogatory: See answer to Forty-fifth Interrogatory, the same being applicable hereto.

Answer to Fiftieth Interrogatory: In 1929 complainant paid from income as follows:

Mary Estelle Sayre (balance 1928 income)	\$1,155.07	
Mary Estelle Sayre income	6,327.84	
City of Newark, taxes (561 Broad St.)	1,834.57	20
City of Newark, interest (561 Broad St.)	144.41	
City of Newark, taxes (490 Broad St.)	1,375.60	
City of Newark, taxes (492 Broad St.)	1,516.20	
Operating expenses (561 Broad St.)	1.35	
Operating Expenses (490 Broad St.)	538.66	
Operating Expenses (492 Broad St.)	370.16	

The cash balance as of January 1, 1930 was \$2,028.69.

Answer to Fifty-first Interrogatory: In 1930 complainant paid from income as follows: 30

Mary Estelle Sayre	\$4,086.03	
City of Newark, taxes (561 Broad St.)	1,820.20	
City of Newark, interest on taxes (561 Broad St.)	98.30	
City of Newark, taxes (490 Broad St.)	815.00	
City of Newark, taxes (492 Broad St.)	721.34	
City of Newark, taxes (492 Broad St.)	805.73	
Operating Expenses (561 Broad St.)	347.16	
Operating Expenses (490 Broad St.)	119.93	
Operating Expenses (492 Broad St.)	209.20	40

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

The cash balance as of January 1, 1931 was \$278.89.

10 Answer to Fifty-second Interrogatory: Jacob Doll & Sons, Inc.

Answer to Fifty-third Interrogatory: \$4,902.12; complainant has no knowledge of the itemization of the property of said tenant or the value of said property in the premises on the date specified.

20 Answer to Fifty-fourth Interrogatory: The trustee received from Jacob Doll & Sons, Inc. the note referred to in paragraph 8 of the counterclaim. Complainant received on account of principal the sum of \$500.00, leaving an unpaid balance of \$4,402.12.

Answer to Fifty-fifth Interrogatory: June 1, 1930; \$4,902.12 with interest from May 21, 1930.

30 Answer to Fifty-sixth Interrogatory: \$500.00 on account of principal together with accrued interest was paid on or about July 3, 1930. In or about the first part of August 1930, complainant made strenuous efforts to collect the balance due on said note consisting, among other things, of correspondence and personal conferences with a view to liquidating same. In September 1930, the matter of collection was delivered to counsel. Counsel conferred personally with the officers of Jacob Doll & Sons, Inc. who promised forthwith to make a substantial payment on account of same. Said payment was not made and in 40 September 1930, suit was instituted in the City

*Answers to Interrogatories Annexed to Answer
of Dudley O. Sayre, Filed Herein, Addressed
to Complainant.*

and State of New York against Jacob Doll & Sons, Inc. on account of same. By decree dated September 24, 1930, in a suit brought by F. S. Underhill and R. W. Wistar co-partners etc., complainants, against Jacob Doll & Sons, defendant, in the United States District Court for the Southern District of New York, Docketed as E 55-284, Equity Receivers were appointed for Jacob Doll & Sons and as a result of the foregoing decree, the complainant's suit was stayed. Complainant promptly filed with the Receivers its proof of claim on account of said note and accrued interest and counsel attended the Receivership proceedings and followed the course of same. On or about November 3, 1931, a dividend of \$88.04 representing two per cent. of the claim was paid by the Receivers to the complainant and on or about October 30, 1934, a further dividend of \$44.02, representing one per cent. of said claim, was paid by the Receivers to the complainant.

Answer to Fifty-seventh Interrogatory: \$1,769.78 subject to commissions earned by the complainant.

Answer to Fifty-eighth Interrogatory: Complainant on August 29, 1939 paid to itself \$1,400.00 on account of income commissions earned by it and to which it was entitled by law. The cash balance after such payment was \$364.28.

Answer to Fifty-ninth Interrogatory: \$1,928.45.

Answer to Sixtieth Interrogatory: \$2,068.92.

(Verified April 28, 1944.)

Testimony.

IN CHANCERY OF NEW JERSEY.

September 13, 1944.

 ◆
 [SAME TITLE.]
 ◆

10

TRANSCRIPT of shorthand notes of testimony taken in the above entitled cause before his Honor, Alfred A. Stein, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Messrs. Hood, Lafferty & Emerson (by Wallace R. Chandler, Jr., Esq.) for complainant, Messrs. Kanter & Kanter (by Elias A. Kanter, Esq.) for Dudley O. Sayre; William H. Campbell, Jr., Esq., for Mary Estelle Sayre; Messrs. McCarter, English & Egner (by Charles Howard, Esq.) for Adele Van Vechten Conway as guardian ad litem of the infant defendant, Chauncey Van Vechten B. Sayre; J. Albert Homan, Esq., for Edward L. Whelan, Clerk, guardian ad litem; Edward E. Mishell, Esq. (by William M. McConnell, Esq.) for Dorothy Sayre Farcus.

20

The Court: Make your proofs.

30

Mr. Chandler: If your Honor please, this is an application by the Fidelity Union Trust Company, substituted trustee under the will of Marcus Sayre for instructions as to the disposal of property and compensation with respect to sale.

The bill of complaint is divided in two parts. The first cause of action concerns the property known as 561 Broad Street, Newark, New Jersey, and—

40

John S. Bacheller—for Complainant—Direct.

The Court: I am familiar with it. Go on and make your proof. I read the bill.

Mr. Chandler: Very well. Mr. Bacheller, please.

I would like to file this notice here, if your Honor please (handing paper to Court).

10

JOHN S. BACHELLER, called as a witness on behalf of the complainant, being duly sworn according to law on his oath testified as follows:

Direct examination by Mr. Chandler:

Q. Mr. Bacheller, what is your business? A. Assistant trust officer of the Fidelity Union Trust Company.

20

Q. And as such are you in charge of the management of the estate of Marcus Sayre, deceased? A. Yes.

Mr. Chandler: If your Honor please, I would like to introduce into evidence a certified copy of the will of Marcus Sayre, deceased.

(Will above referred to marked Exhibit C-1.)

30

By Mr. Chandler:

Q. Do you know when the Fidelity Union Trust Company qualified as substituted trustee under the will of Marcus Sayre? A. September 25, 1914.

Mr. Chandler: If your Honor please, I would like to introduce into evidence a

40

John S. Bacheller—for Complainant—Direct.

10 certified copy of an order of the Essex County Orphans' Court, dated September 25, 1914, which orders the executors and trustee named under the will to state their account and discharging them from their duties as executors and trustee and appointing the Fidelity Union Trust Company as substituted administrator with the will annexed and substituted trustee of the foregoing will.

I will offer this in evidence.

(Certified copy of order above referred to marked Exhibit C-2.)

20 Mr. Chandler: You will note, if your Honor please, from the will, that the residue of the estate was directed to be held in trust to pay the income to the testator's widow for life and, upon her death, the remaining principal was to be split four different ways. One share, after making certain allowances, was to be held for his daughter, Mary Estelle Sayre for life. This, sir, comprised the property which is the subject of this suit, 551 Broad Street, 490 and 492 Broad Street. The residue was to be distributed to the three sons of the testator, at the age of thirty-five years.

30

By Mr. Chandler:

Q. Mr. Bacheller, according to your records, when did the widow, Henrietta Sayre, die? A. January 2, 1920.

40 Q. And at that time what disposition did the trustee make of the property? A. All of the

John S. Bacheller—for Complainant—Direct.

assets, with the exception of these parcels of real estate, were distributed to the three sons.

Q. Outright? A. Outright, yes.

Q. And the real estate was held in trust for Mary Estelle Sayre? A. Yes.

Q. Did the trust for Mary Estelle Sayre consist of any assets other than this real estate? **10**
A. No.

Q. At any time? A. At no time.

Q. Excepting income? A. That is right.

Q. So you have no other assets of the estate except this real estate? A. That is correct.

Q. And you never have had? A. No.

Q. Will you state, according to your records, the sons of the testator, who are living, and the issue of those who are deceased? A. The only son who is living is Dudley O. Sayre. He has four children. Do you want the names of his children at this point? **20**

Q. Please. A. Natalie Sayre Dalton—

The Court: How does this matter get before me? It was referred to Vice Chancellor Bigelow.

Mr. Chandler: Yes. If your Honor please, Vice Chancellor Bigelow disqualified himself and sent it back for re-reference. **30**

The Court: I do not find an order of re-reference. Oh, I have it now. Go ahead.

The Witness (continuing): Marjorie Sayre Wallwork, Dorothy Sayre Holthusen, and Dudley O. Sayre, Jr. There are two grandchildren, Barbara Wallwork and Cynthia Holthusen, both infants, I believe.

Another son of the testator, Chauncey **40**

John S. Bacheller—for Complainant—Direct.

B. died two years ago and left a son, Chauncey B. Sayre, Jr., who has a son, Chauncey Van V. B. Sayre.

10 A third son, Henry N. Sayre, died March 7, 1928, and we are advised that he left a widow, Margaret Sayre, and a daughter, Dorothy Sayre Farcus. That is all.

Q. Were the premises 561 Broad Street, 490 and 492 Broad Street conveyed by the old executors' substituted trustee by deed? A. Yes.

20 Q. I hand you a deed, dated January 20, 1915, from Henrietta M. Sayre, George V. N. Teeter and Frederick R. Pilch, as executors of and trustees under the last will and testament of Marcus Sayre, deceased, to the Fidelity Union Trust Company, as substituted administrator, with the will annexed, as trustee under the last will and testament of Marcus Sayre, deceased. There are eleven properties, all in Essex County, described in this deed, which was recorded in the register's office of the County of Essex in book B 56 of Deeds, pages 528-533. I hand you this document and ask you if this is the deed in question. A. Yes, it is.

30 Mr. Chandler: I ask that be admitted in evidence, if your Honor please.

(Deed above referred to marked Exhibit C-3.)

By Mr. Chandler:

Q. Will you show which of the property comprises the property in question?

40

John S. Bacheller—for Complainant—Cross.

The Court: Show by reference to the deed?

Mr. Chandler: By reference to the deed.

A. The sixth and seventh tracts, and the tenth tract described in the deed. 10

Q. Will you identify them by the street numbers? A. The sixth tract is known as 492 Broad Street; the seventh tract is known as 490 Broad Street; and the tenth tract is known as 561 Broad Street.

Q. Is it a fact that the substituted trustee has since acquired the property by deed for the benefit of the estate created by the will? A. Yes.

Q. And the net rent, if any, you have been paying to the life tenant? A. Yes. 20

Mr. Chandler: That is all.

Cross examination by Mr. Campbell:

Q. As a matter of fact, there have been no net rents paid for a considerable number of years. Isn't that a fact? A. That is correct.

Cross examination by Mr. Kanter:

Q. Mr. Bacheller, you said you were the assistant trust officer. How long have you been such? A. Since 1937. 30

The Court: Off the record.
(Statement off the record.)

By Mr. Kanter:

Q. You said that all the net rents have been paid to the life tenant. Is that a fact of your 40

John S. Bacheller—for Complainant—Cross.

own knowledge, sir? A. From an examination of our records.

Q. As a matter of fact, you have paid to the life tenant more than the net rents, haven't you? A. Well, I am not prepared to answer that question.

10 Q. Have you the records before you? A. No, I have not got them before me. I think there may be others of our men here who can answer that question. I cannot.

Mr. Kanter: If your Honor please, I would like to cross examine the witness on that statement, when he produces the statement, on the rents.

20 Mr. Chandler: If your Honor please, for the purpose of the record I would call attention to the fact that by an order made by Vice Chancellor Bigelow—there were different separate hearings—the issue was to be confined to the bill of complaint.

The Court: What? When you put your head down, I can't hear what you say.

30 Mr. Chandler: The issue was to be confined to the bill of complaint alone. Mr. Kanter on behalf of his client, Dudley O. Sayre, filed a counterclaim seeking to surcharge the trustee with separate hearings. In fact, the pleadings on that matter are still open, and, if it is the intention to go into that phase of the case, I would like to make my objection.

The Court: Go on. Call your next.

40 Mr. Kanter: Mr. Chandler, do I understand Mr. Bacheller will come back to be cross examined on the statement as to the rents?

Colloquy of Counsel.

The Court: If counsel is correct in what he said about the record, you won't examine him. The record will not be produced and there will be a separate hearing.

Mr. Kanter: I am not going to argue the propriety of the objection at the moment. 10

The Court: Isn't this in the order?

Mr. Kanter: There is an order that the counterclaim be tried separately, but the issue that the complainant has made here is that the net rents have been paid to the life tenant. The implication to your Honor is only the net rents have been paid to the life tenant.

The Court: No. 20

Mr. Kanter: Your Honor will understand—

The Court: "Rents, if any", it said.

Mr. Kanter: The net rents, if any. And, presumably, only—

The Court: That is a matter for the counterclaim, isn't it?

Mr. Kanter: No, sir, because—we may as well face this issue right now—the complainant, according to my view, should have in his possession ample money to pay the present existing taxes assessed against 561 Broad Street. If it has not, it is due to the fact that it has taken from the trust account sums it should not have taken, which it should have applied towards those taxes. 30

The Court: What do you think I am hearing this morning?

Mr. Kanter: I think you are hearing 40

Colloquy of Counsel.

the advisability and propriety of selling 561, 490 and 492 Broad Street.

The Court: That is right, and as to rent which you have now stated is a proper inquiry into your counterclaim.

10 Mr. Kanter: My position on that, sir, is this: They will take your Honor and say "We have an offer to sell this property. We have somebody that is offering \$10,000 for this property", and the question before your Honor—the ultimate question before your Honor is: Shall this property be sold?

20 They will produce proof before your Honor, I suppose, that this property is now subject to taxes of some \$10,000: Therefore they will argue to your Honor that it is important to—

The Court: Why do you ask me to state your argument?

Mr. Kanter: I don't want to be shut off from my cross examination.

The Court: You will be shut off this morning on the question of the accounting—

30 Mr. Kanter: I am not trying to go into the accounting.

The Court: —and the surcharge.

Mr. Kanter: I am trying to show the facts showing no necessity of selling this property.

The Court: That is something else.

Mr. Kanter: Will your Honor direct the witness to remain?

The Court: I won't direct him to remain for anything. If you want him for anything, subpoena him.

40

Charles F. Ellery—for Complainant—Direct.

Mr. Kanter: Well, he is on the stand now.

Mr. Chandler: We will keep him here.

The Court: He is an American citizen. Is that all from this witness?

Mr. Chandler: That is all. Mr. Ellery.

10

CHARLES F. ELLERY, called as a witness on behalf of the complainant, being duly sworn according to law on his oath testified as follows:

Direct examination by Mr. Chandler:

Mr. Chandler: If your Honor please, the proof, which I have put in so far, is common to both causes of action.

20

The Court: I so understand it.

Mr. Chandler: I will confine it now to the question of 561, and take up 490-492 later.

By Mr. Chandler:

Q. Mr. Ellery, what is your business? A. I am vice president of the Fidelity Union Trust Company.

30

Q. And, as such, what are your duties? A. I am in charge of the real estate and mortgage section of the trust department.

Q. Are you familiar with the property at 561 Broad Street, Newark, New Jersey? A. Yes, I am.

Q. Will you, briefly, describe that property? A. It is a two-story brick building with a store on the first floor. It is located between Central Avenue and Washington Place on the westerly side of Broad Street.

40

Charles F. Ellery—for Complainant—Direct.

10 Q. Will you, briefly, describe your rental efforts since the financial depression, in or about 1929? A. Yes. With the depression, and shortly thereafter, the building became vacant and it was with great difficulty that we rented it. We finally found a Greek type restaurant, which could not make enough money to pay its way, and it was eventually vacated, and it was with great difficulty that we were able to find anyone to take it, and finally found the Lauter Humana Company.

20 Q. Could you state, briefly, the relationship or the ratio of the rent to the carrying charges, the rents which you received during this period? A. Well, during part of the period the rents were insufficient to pay the carrying charges, and, during the period that the Lauter Humana has occupied it, it has been about breaking even.

Q. What was the result of the failure to meet the carrying charges? A. Taxes began to accumulate as unpaid.

Q. Are the assessments high or low? A. The assessments are high.

30 Q. And what have been the nature of the assessments since 1929, high or low? A. They have been high. We have appealed, and I believe there have been some reductions, but they are still high.

The Court: Do they continue high on the return you have been getting for the property?

The Witness: Yes, sir, and on the general situation in the neighborhood, the lack of returns on other property in the neighborhood.

Charles F. Ellery—for Complainant—Direct.

Q. Would you care to make a statement as to the relation of the net income that you received to the supposed value of the property? A. In getting the value on the income received, the value is nothing.

Q. Now, as to taxes which are in arrears, can you describe in detail that situation? A. You mean, the amount that is presently owing? 10

Q. Just state what happened to the tax arrears which accumulated.

The Court. Well, they were not paid, were they?

Mr. Chandler: They were not paid.

Q. Were they sold? A. Yes, the property was sold for the non-payment of taxes. 20

Q. For what year? A. 1937 to 1940.

Q. And when were they sold? A. I believe, that was the balance of 1937, not the entire year.

Q. And when were they sold? A. October 14, 1941.

Q. To whom were they sold? A. To Charles E. Cameron.

Q. And, so far as you know, he still holds the tax certificates? A. Yes, sir.

Q. Now, you mentioned the property was leased to the Lauter Humana Company. Do you know what his connection is with the Lauter Humana Company? A. We are told that he is president of the Lauter Humana Company. 30

Q. And the Lauter Humana Company were the lessees at the time that he acquired the tax sale? A. It was.

Q. Is the property under lease to the Lauter Humana Company now? A. Yes, it is.

Q. I hand you a lease, dated June 16, 1941, 40

Charles F. Ellery—for Complainant—Direct.

made between Fidelity Union Trust Company as substituted trustee under the last will and testament of Marcus Sayre, deceased, designated as lessor, and Lauter Humana Company designated as the lessee, and ask you whether this is the lease to which you referred. A. Yes, it is.

10

Mr. Chandler: I offer that in evidence, if your Honor please.

(Lease above referred to dated June 16, 1941, marked Exhibit C-4.)

By Mr. Chandler:

Q. That lease runs for how long? A. I will have to see the lease, to answer that.

20

(Paper handed to witness.)

The Witness: The lease was dated June 16, 1941, and it was for the period of eleven months.

Q. Commencing when? A. Beginning July 1, 1941, and terminating May 31, 1942.

30

The Court: And the rental?

The Witness: The rental was \$2200, or \$200 a month.

40

Q. Now, did that lease contain an option to renew, on behalf of the tenants? A. Yes. On page 4 there is a clause giving the lessee the right or option to extend the lease for a further term of four years, at the expiration of this tenancy on rentals for the second and third year at \$225 per month, and for the fourth and fifth years at \$250 per month.

Charles F. Ellery—for Complainant—Direct.

Q. Was that option exercised? A. It was.

Q. I hand you a document, dated June 16, 1941, and ask you if this is the exercise of that option. A. Yes, this is. At that particular time, it was with difficulty that the tenant arrived at a conclusion that he would exercise the option.

10

Mr. Chandler: I offer this in evidence, if your Honor please.

(Option above referred to marked Exhibit C-5.)

By Mr. Chandler:

Q. That brings the offering period of the lease to what date? When did it terminate? A. I didn't keep that date in my mind.

20

The Court: Does he have to tell me that?

Mr. Chandler: I guess it speaks for itself.

The Witness: May 31, 1946.

Q. Will you state the relation of the rentals to the operating charges?

Mr. Kanter: If your Honor please, I object to that question. I think Mr. Ellery should be required to tell your Honor very specifically, if any weight is to be given to his testimony, what the rents were in any year, what the operating charges were in any year and what the taxes were in any year, so that your Honor may determine from facts rather than from the witness' conclusion, what happened in this matter. And I object to the question.

30

40

Charles F. Ellery—for Complainant—Direct.

The Court: Question?

(Pending question read by Reporter as follows:

10 “Will you state the relation of the rentals to the operating charges?”)

The Court: You may state that.

Mr. Chandler: If your Honor please—

The Court: I have allowed the witness to answer.

The Witness: I will have to refer to the figures. I do not carry them in my head.

The Court: That is what I expected.

20 Mr. Chandler: Will you repeat the question, please?

(Pending question read by Reporter as follows:

“Will you state the relation of the rentals to the operating charges?”)

The Witness: I do not have that statement here.

By Mr. Chandler:

30 Q. Before we come to that, are the rents sufficient to pay the current taxes and other operating and maintenance charges?

Mr. Kanter: I object to that, if your Honor please. That can be stated by way of fact and not by way of conclusion.

The Court: I will allow it.

40 The Witness: To pay the taxes and current operating charges? Is that what you asked?

Charles F. Ellery—for Complainant—Direct.

Mr. Chandler: I will repeat the question. Are the rentals payable under the lease sufficient to pay the current taxes and other operating and maintenance charges?

The Witness: I think that the current rental is insufficient to pay the charges. 10

The Court: How much are the taxes?

The Witness: I will have to have that statement, to answer that question.

The Court: Can't you—

The Witness: I haven't it in my head.

Mr. Chandler: I have the statement here. Do you wish the statement?

The Witness: Yes, I do.

(Mr. Chandler hands paper to witness.)

The Witness: This statement does not give the amount of the annual taxes, and I haven't that information, and so I cannot answer your question. 20

Mr. Chandler: I can prove that by another witness, if your Honor please.

The Court: I knew that.

By Mr. Chandler:

Q. Well, in general, from your knowledge of the property, what is the relationship of the income to the maintenance charges? 30

Mr. Kanter: I object to that. The witness says he cannot give you the information.

The Court: He has already testified to that.

Charles F. Ellery—for Complainant—Direct.

By Mr. Chandler:

Q. Are the rentals sufficient to satisfy the arrears due upon the tax sale certificate? A. No, they are not.

10 Q. What is the possibility, if any, of the rentals increasing in the course of time, based on current conditions, that the tax sale certificate could be satisfied?

The Court: Did you say "possibility"? We do not deal in them. Everything is possible.

20 Q. The probability. A. The probability, as far as anyone can look ahead, in times such as this, is that the rentals cannot be increased in an amount sufficient to pay a fair return on this property. The entire trend has been downward, and still is.

Q. Mr. Ellery, has a contract been made for the sale of the property? A. Yes, it has.

Q. With whom? A. With the Lauter Humana.

The Court: Have you the contract? Show it to him.

30 Q. Charles E. Cameron, isn't it? A. With Mr. Cameron, yes, C. E. Cameron, Jr., the same person.

Q. I offer you a contract, dated June 11, 1943, between Fidelity Union Trust Company as substituted trustee under the last will and testament of Marcus Sayre, deceased, designated as the vendor, and Charles E. Cameron, Jr., designated as vendee, and ask you if this is a contract for the sale of the property at 561 Broad

40

Charles F. Ellery—for Complainant—Direct.

Street, Newark. A. This is a contract dated June 11, 1943, between the Fidelity Union Trust Company, substituted trustee under the last will and testament of Marcus Sayre, and Charles E. Cameron, Jr., in consideration of \$16,262. I signed it as vice president.

10

Mr. Chandler: I offer that in evidence, if your Honor please.

(Contract above referred to marked Exhibit C-6.)

By Mr. Chandler:

Q. Does this contract provide it is subject to all taxes?

20

The Court: It speaks for itself, doesn't it?

Mr. Chandler: Yes, it does, your Honor. This is just to get it on the record.

The Witness: It provides the vendor will either cause to be discharged existing liens created by tax sales covering said premises, or in the alternative, will make due allowance on the purchase price thereof, including the interest cost to the date of closing.

30

Q. If a sale were consummated, after making due allowance for tax arrearages charged against the proceeds of sale and making the adjustments called for in the contract, what do you estimate would be the net proceeds which the trustee would receive? A. Before any charges for counsel or commission to the trustee, it will be approximately \$5100.

40

Charles F. Ellery—for Complainant—Direct.

Q. Can you state, generally, what efforts you have made to sell the property in question? A. Personally we are prohibited by law from selling the property during the lifetime of Mrs. Sayre. When the taxes began to go in arrears, it was taken into consideration and was decided that we would see if we could find a buyer at a price that would be acceptable, and so we listed it with many agents, thirty or forty of them in this vicinity, endeavoring to stimulate their interest in the sale of this property, and ourselves—I personally and the men in my department, who have to do with sales, personally contacted the agents and also any individuals who came into the office, and some do, looking for business propeties. We were not successful in finding anyone who was willing to buy it. In fact, in most cases the tax assessmetnt and our efforts to obtain a considerably better price met with a turn-down, and, up to the time of getting this particular offer, any offers that were made were too low. Mr. Cameron's first offer was \$12,000, and we worked it up to this price.

Mr. Chandler: That is all from Mr. Ellery so far as 561 is concerned.

Q. As to 492 Broad Street and 490 Broad Street, will you describe those properties? A. They are located between Bridge Street and Orange Street, on the easterly side of the street. And they are old buildings, with stores on the first floor, and what used to be living quarters on the upper floors. When I first went with the company, I had great difficulty in collecting rents from those buildings, and they were what might be called decrepit, at that time, and that was in 1916.

Charles F. Ellery—for Complainant—Direct.

Q. Has there been any improvement since?

A. There has been no improvement since. They stayed rented on and off: one better than the other, and these properties, being all in one trust, the funds were, of course, in one trust, and the moneys that were received from these properties went toward making the partial payments on taxes, that were made on 561, in the efforts to save that property, as it was determined by the trustee that that was the better of the three and the one to be saved. In trying to sell these other properties, our efforts, which were very strenuous and covered the same sort of effort, met with complete failure. The only thing that happened on those two properties was some individuals, whose names we see in the papers as buying tax certificates, made some bids, which seemed to the trustee to be so far out of line that they were declined, and an effort was made to improve them. That was not successful. The condition of those two buildings is poor. To my recollection, they have always been out of date. There is almost no business in that territory. There is building after building empty. Apparently, no one wants them.

Q. Could you state as to the present rental condition of those properties? A. Well, they are rented. In December, 1943, we succeeded in finding tenants, who rented for storage purposes alone—

The Court: And the period of vacancy was for how long?

The Witness: The period of vacancy? Well, there were periodical statements. And then we became vacant and, prior to the present tenancy, 490 was vacant from

Charles F. Ellery—for Complainant—Direct.

May 15, 1941, and was rented in December, 1943, for dead storage to the United Electronic Company.

The Court: For how much?

The Witness: \$25 per month. 492
 10 Broad Street, the last tenancy commenced October 1, 1943. That was the one with which we were more successful. We had a tenant in there, who really struggled to make a go of it, and finally had to give it up. That was rented to a tenant by the name of Joseph Jantusch for dead storage at \$20 a month. There is an advertising sign on the roof "Rent it through United Advertising Corporation", which
 20 pays \$7.50 a month. That tenancy has been there since 1924.

Q. In view of the present condition of the properties, are they currently rentable throughout? A. No, they are not.

Q. What would have to be done to make them rentable? A. You would have to spend considerable money on them to make them rentable. The stores could be rented for the purpose they are now rented, but to warrant any
 30 business that wanted to really do a business, it would cost considerable money. However, even though you spent such money, it is most unlikely that you could be able to find a tenant at all.

Q. Is the trustee in possession of those properties now? A. No, sir. The city of Newark sold them for taxes and bought in the liens, and as soon as we made these tenancies, immediately after they went into possession, put a rent receiver in and the city is taking those rents.
 40

Charles F. Ellery—for Complainant—Direct.

Q. That is since when? A. December, 1943.

Q. Was there a tax sale of the property, 490 Broad Street? A. Yes, there was.

Q. And when was that? A. Sold to the city of Newark on August 30, 1938, for 1933 to 1937 taxes, and no taxes have been paid since. The amount due on the tax lien and the—bringing the taxes up to date, plus accrued interest—and that, of necessity, has to be an approximate figure, because, probably, there are some costs to the city,—is \$16,577.39. 10

Q. When you say no taxes have been paid, do you mean on account of the current taxes or on account of the tax sale certificate, or both? A. I mean both.

Q. Now, as to 492 Broad Street, was there a tax sale to the city? A. Yes, there was. 20

Q. When? A. It was sold to the city on August 30, 1938, the same date. That was for the years 1934 to 1937.

Q. And has anything been paid? A. Nothing has been paid on that lien. The taxes have accrued since, and the approximate figure, plus accrued interest that is owing, is \$15,416.29.

Q. When you say nothing has been paid since, you mean nothing has been paid since that sale? A. Yes, that is what I mean. 30

The Witness: Mr. Kanter, I find that we do have the amount of taxes on 561 Broad Street.

Q. Will you state what the taxes are on 561 Broad Street? A. The 1944 assessment is \$31,800. The rate is \$5.30 and the tax is \$1685.40.

Mr. Kanter: Just a moment. I didn't catch that. 40

Charles F. Ellery—for Complainant—Cross.

The Witness: The assessed value for 1944 is \$31,800. The rate is \$5.30. So that the amount of the tax is \$1685.40.

10 In connection with the two tax liens on 490 and 492 Broad Street, the city is advertising its liens for sale.

Q. Speaking for the trustee, what do you think should be done with these properties? What do you recommend? A. We recommend that we be authorized to sell them at public auction to the highest bidder.

20 Q. And, in the event that the auction does not produce any bids worthy of consideration, or that the bidders are not conservative, or otherwise, then what disposition of the property do you recommend? A. We recommend that the trustee be authorized to abandon them.

Q. Both of them? A. Both of them, yes. The cost of the auction will, of necessity, have to come out of the general fund.

Q. The general fund being the proceeds of the sale of 561? A. Yes.

The Court: It is all one trust?

30 The Witness: It is all one trust, yes, sir.

Mr. Chandler: That is all.

Mr. Campbell: No cross from me.

The Court: Call your next.

Cross examination by Mr. Kanter:

Q. Mr. Ellery? A. Yes.

40 Q. How long does your acquaintance with that property go back to? A. It goes back a long time. I went to work in the real estate office in 1906 and I began to take—

Charles F. Ellery—for Complainant—Cross.

Q. At least since '28? A. Yes.

Q. And you have been seeing Mr. Dudley O. Sayre in reference to this property from about that time on to the present time? A. Occasionally, yes.

Q. You are acquainted with Dudley O. Sayre? A. Yes, I have met him in the office. 10

Q. And he discussed the question of selling this property with you at various times? A. Not very often. He has discussed it with me.

Q. Well, the position of your company, of the trustee, was that you were prohibited from selling it under the terms of the will? A. That is true.

Q. And that was the position you made known to him as early as '28 and '29—1928 and 1929? 20

Mr. Chandler: If your Honor please, I would like to renew my objection. This is not part of the present issue.

The Court: I will allow him to answer.

The Witness: I personally did not make it known to him at that time but the company may have.

The Court: The trustee does not have to come in right away.

Mr. Kanter: No. 30

By Mr. Kanter:

Q. You knew about that fact, though, didn't you, Mr. Ellery? A. No, I didn't—I don't know about that fact.

Q. Well, you said the company knew about it. A. I said it "may have".

Q. It may have. Well, when did Mr. Dudley Sayre come in? A. I don't remember.

Q. Was it after 1929, Mr. Ellery? A. Yes— 40

Charles F. Ellery—for Complainant—Cross.

well, I can't say that definitely. He may have seen me in the office there. I was a clerk in the office, working there, and he may have seen me in the office.

10 Q. Weren't you in the trust department? A. Yes.

Q. And you were handling this particular property and were concerned with its management, weren't you, Mr. Ellery? A. Yes.

Q. And it was you whom Mr. Dudley O. Sayre consulted on that? A. No.

Q. No? A. As far as my recollection of conferences with Mr. Sayre, so far as I personally am concerned—

Q. Yes. A. —Goes back to about 1934.

20 Q. Yes.

The Court: Just a moment. Off the record.

(Discussion off the record.)

Mr. Kanter: May I be permitted to proceed?

The Court: You may, but it is of no use to me.

By Mr. Kanter:

30 Q. You said that there was no chance of paying the rent—strike that out, please—there was no probability of paying the accrued taxes from the rentals in prospect. Is that correct? A. Yes, that is true. This property had been sold for taxes.

Q. I am speaking of 561 Broad Street. A. Yes, sir, I am, too.

40 Q. All right. A. This property has been sold for taxes and, except for this contract of sale, the right of redemption has passed.

Charles F. Ellery—for Complainant—Cross.

The Court: When did you become substituted trustee, Mr. Ellery?

The Witness: I think, 1914. That has already been testified to.

Mr. Kanter: 1920.

The Witness: 1920?

Mr. Kanter: That order is in 1916. 10

The Court: All right. That is near enough.

Mr. Kanter: It is a good many years ago.

By Mr. Kanter:

Q. Did you try to find out whether there were any other sources from which these taxes might be paid? A. Yes. We asked the family, that is, Mr. Dudley's family, Mr. Chauncey Sayre and Miss Mary Sayre, whether or not they wished to put the money into the trustee's hands to pay these taxes. We had no success. 20

Q. Did you examine your own records to ascertain any sources of paying these taxes? A. Yes, sir.

Q. Did you ascertain, for example, that you had not collected the Jacob Doll notes, while—

Mr. Chandler: I object to that, if your Honor please. 30

The Court: Objection sustained. The question before me is whether or not these properties should be sold.

Mr. Kanter: Doesn't your Honor think it important, if this trustee should be obliged to pay these taxes, that he should pay the taxes—

The Court: It won't help me to state that now. If you have a surcharge, I may hear it later. 40

Charles F. Ellery—for Complainant—Cross.

Mr. Kanter: We may save this property—

The Court: I have ruled.

Mr. Kanter: Your Honor rules that these trustees—

10 The Court: I ruled on the question you asked.

Mr. Kanter: All right.

By Mr. Kanter:

Q. Didn't you, in 1937, prior to the time that this property was sold, have in your trust account some \$1400?

The Court: Don't answer that.

20 Mr. Chandler: I object, your Honor.

Mr. Kanter: I beg your pardon? I did not get your Honor's remark.

The Court: I told the witness not to answer.

Mr. Kanter: I did not hear it at the moment.

30 The Court: Why do you insist on following it up? You have your objection. The time is coming when I will hear the second cause, or somebody will, on the counterclaim.

Mr. Kanter: Your Honor said you ruled on my specific question. If you rule now something is improper, I won't ask it.

The Court: There is a separate cause of action to be heard later.

Mr. Kanter: Do I understand, then, I may not ask this witness any questions concerning the amount which this trustee should have had in the trust?

40 The Court: Do you want me to hold

William J. Dalton—for Complainant—Direct.

you in contempt, Mr. Kanter? I very much dislike to do it, but I will, if you insist.

You are an intelligent man and a good lawyer, and you know just exactly what I said. Now, you have your separate cause of action, the surcharge. It will be heard at another time.

10

Mr. Kanter: Will you indulge me while I address your Honor a moment?

The Court: No, I won't. Sit down. Next question.

Are you through with this witness?

Mr. Kanter: I am through with him.

The Court: Call your next.

Mr. Chandler: Mr. Dalton, please.

20

WILLIAM J. DALTON, called as a witness on behalf of the complainant, being duly sworn according to law, on his oath testified as follows:

Direct examination by Mr. Chandler:

Q. Mr. Dalton, what is your business? A. I am with the Fidelity Union Trust Company in the trust department.

30

Q. In what capacity? What is your particular function? A. Well, at the present time I am assistant to the officers in administering estates. I have been for a number of years in the past and until recently in charge of the accounting section of the trust department.

Q. Have you an offering statement of the property at 490—strike that out—at 561 Broad Street, since 1941 on? A. I have.

Q. What does that show? A. This is a state-

40

William J. Dalton—for Complainant—Direct.

ment that gives a cash summation of the property, and also a summary of the tax situation, the assessed value for taxation (handing paper to counsel).

10 Mr. Chandler: I would like to offer that statement in evidence, if your Honor please.

The Court: Objection? If there is, I will sustain it.

Q. Have you a separate tax statement on 561?

A. It is all in there under the tax summary or tax summation.

Q. Now, have you an operating statement for 490 Broad Street? A. I have.

20 Q. Since 1941? A. Yes.

Mr. Chandler: I would like to offer that in evidence. I offer it.

(Last two statements referred to marked Exhibits C-7 and C-8.)

By Mr. Chandler:

Q. Have you an operating statement for 492 Broad Street? A. I have (handing paper to counsel).

30

Mr. Chandler: I wish to offer that in evidence.

(Operating statement above referred to marked Exhibit C-9.)

By Mr. Chandler:

Q. Have you made an estimate as to the amount presently due upon the tax sale certificate covering 561 Broad Street? A. No, I have not.

40

William J. Dalton—for Complainant—Cross.

Mr. Chandler: That is all.

Mr. Kanter: May I look at these a moment, your Honor?

Are you through, Mr. Chandler?

Mr. Chandler: Yes.

Cross examination by Mr. Kanter:

10

Q. The Exhibit C-7 is supposed to show to the Court the condition of 561. With reference to what condition is that? A. As to the summary of the cash, the gross rent collected and any miscellaneous receipts, such as reimbursements for tax remission; also, any management expenses; the net amount before taxes, the taxes and the interest paid, the cash return or deficit for the particular year. And then under a summation of taxes, which does not include the interest, we show the tax arrears as of the first of each year, plus the current year's taxes, and the amount of taxes paid in that year, and the tax arrears as of December 31st of each year. We also show the amount of interest paid on taxes in arrears. This statement, I might add, as far as 1944 is concerned, is only up to September 12, and we have included in there only the first three-quarters of the taxes, since we are showing only three-quarters of the—rents for three-quarters of the year. It also shows the assessed value for taxation as set by the city and also as reduced by the amount after tax appeal.

20

30

Q. And Exhibit C-8 shows the same data with reference to 490 Broad Street, or is it 492? A. I don't know the exhibit number. We have the same data.

Q. Just a minute. I will get it for you. With

40

William J. Dalton—for Complainant—Cross.

reference to No. 490 Broad Street (handing paper to witness)? A. 490 Broad Street, all right.

Q. And Exhibit C-9 with reference to 492, is that correct? A. That is right, yes.

10 Cross examination by Mr. Campbell:

Q. Mr. Dalton, were tax appeals obtained for the year 1944? A. I don't know.

By Mr. Kanter:

Q. Oh, Mr. Dalton, I forgot to ask you this: Can you tell us whether any of the income from 561 Broad Street, during 1944, was used toward the upkeep of either 490 or 492 Broad Street? You can tell that from these figures, can't you?

20 A. Well, from these figures, they had not been. Of course, you understand that the three accounts were commingled, but we show here that during the year we have a net return, not a deficit.

Q. And some of these rents coming from 561 may have been used for the other two properties?

A. I don't believe so. I should say, no, since we have a net return rather than a deficit.

30 Cross examination by Mr. McConnell:

Q. Mr. Dalton, do you know how much cash you have on hand in this trust now? A. At the present time?

Q. Yes. A. I have a net balance of cash of \$2557.19. That is subject to the trustees' commission at five per cent of \$2003.85, allowing a net income of \$553.34.

By Mr. Kanter:

40 Q. Did you say, Mr. Dalton, that the net income is five hundred some dollars on \$2000? A.

*Charles F. Ellery—for Complainant—Recalled—
Direct.*

Oh, no. I said that the gross income shown on our ledger is \$2557.19.

Q. Oh. A. Which is subject to our commission reserve of \$2,385, leaving a net income of \$553.34.

Q. What is the actual net income for 1944? A. **10**
From 561 Broad?

Q. Well, you had no income from the others, did you, Mr. Dalton? A. No. The net income from 561 is \$524.32.

Q. What was it in '43? A. \$115.65.

Q. And '42? A. \$148.47.

Q. Is that shown on Exhibit C-7 anywheres, Mr. Dalton? A. Yes, under "Cash summation", the last line under that heading.

Q. The item "Net cash return or deficit" shows **20**
the Court what the income was, the net income for each respective year, 1941, 1942, 1943 and 1944. Is that correct? A. Yes, sir.

Q. In 1941 there was a return. Is that right? You gave us a return. Is that right? A. Yes, sir.

Mr. Kanter: No further questions.

Mr. Chandler: No further questions. I would like to recall Mr. Ellery for just one question. **30**

CHARLES F. ELLERY, recalled for further direct examination.

By Mr. Chandler:

Q. Mr. Ellery, is this a statement of the arrearages on the properties Nos. 490, 492 and 561 Broad Street, Newark, New Jersey, referring to **40**

*Charles F. Ellery—for Complainant—Recalled—
Cross.*

taxes? A. Yes, that is the statement I instructed to be made, taken from our records and confirmed with the City Hall.

10 Mr. Chandler: I offer that in evidence, if your Honor please.

(Statement above referred to marked Exhibit C-10.)

Cross examination by Mr. Kanter:

Q. Your recommendation in reference to the two properties was that they be sold at auction, if possible. Is that correct? A. 490 and 492, yes, sir.

20 Q. Why wouldn't the same recommendation hold as to 561? A. Because we already had the contract of sale, for one reason; and also the time for redeeming the tax lien had passed.

Q. But that time for redemption was passed some time ago, wasn't it? A. Yes.

Q. And the time for redemption was passed when you made this contract with Mr. Cameron? A. Yes.

30 Q. And Mr. Cameron was in a rather advantageous position— A. Well, the—

Q. Just a moment. A. All right.

Q. —in having both—in being both the holder of the tax lien and in being the lessee and in possession?

Mr. Chandler: I object.

Q. Was he not?

40 Mr. Chandler: If your Honor please, that calls for a conclusion.

*Charles F. Ellery—for Complainant—Recalled—
Cross.*

Q. What do you think about it, Mr. Ellery?

The Court: I don't care what he thinks about it. I know what the fact is.

Mr. Kanter: You know the facts?

The Court: It has been testified to.

10

By Mr. Kanter:

Q. Don't you think a man in that position is in much better position to make a rather good bargain for himself than a person on the outside?

The Court: I will answer that for him. I will say "Yes".

20

Q. Well, then, don't you think, Mr. Ellery, that you might have made the effort in this case to sell this property at public sale?

The Court: Do not answer that.

Mr. Chandler: I object to that.

The Court: Before me is the question whether this contract should be approved, and the testimony is that for a long time they have been trying to sell the property and they have not received any offers at any time. And then together with that is described the condition of the property with reference to taxes and whatnot, and the fact that there is a question whether the trustee has a right under the will to sell.

30

Mr. Kanter: I was thinking of the experience we had in this court a short time ago with reference to almost adjacent property.

40

*Charles F. Ellery—for Complainant—Recalled—
Cross.*

The Court: This is off the record.
(Discussion off the record.)

By Mr. Kanter:

10 Q. Mr. Ellery, do you know as a fact that property in the neighborhood, about a block away, after being subject to a private offer and not receiving the sanction of this Court, produced a higher price when sold at public sale, when offered at public sale?

Mr. Chandler: I object to that. He has given no testimony as to that.

The Court: No. Do not answer that.

20 Mr. Kanter: I am asking Mr. Ellery if he knows that.

The Court: No. Do not answer that. Suppose he does know. The trustee has a perfect right to come in and lay all these facts before me and ask for instructions.

Mr. Kanter: Your Honor has to decide what is to be done.

The Court: Surely.

30 Mr. Kanter: I want to get all the facts correct.

By Mr. Kanter:

Q. Mr. Ellery, when this property is sold, you say the trustee will have substantially \$5,000 in his possession? A. Approximately, yes, sir.

Q. And that will produce an income to the life tenant of approximately how much?

Mr. Chandler: I object.

40 The Court: I do not know whether he can tell that or not.

*Charles F. Ellery—for Complainant—Recalled—
Cross.*

Mr. Kanter: Well, he is a banker, too.

The Court: Well, I am not a banker, but I know something about it and I couldn't answer it.

Mr. Kanter: All right.

10

By Mr. Kanter:

Q. Mr. Ellery, don't you think—

The Court: It all depends where you put it.

Mr. Kanter: That is right.

By Mr. Kanter:

Q. Mr. Ellery, don't you think that the wishes of Mr. Dudley Sayre, who is the remainderman and the owner of the interest of Dudley Sayre, Jr., ought to be consulted?

20

Mr. Chandler: I object, if your Honor please.

The Court: Objection sustained. Do you represent Mr. Sayre.

Mr. Kanter: Yes, sir—Mr. Sayre? No, I am sorry. Mr. Sayre conveyed an interest to his uncle, Dudley L.

30

The Court: Is anybody in this property ready to pay up the taxes? If there is, I will throw this right out of court immediately, if anybody in the Sayre family can pay up all these taxes.

Mr. Kanter: The Sayre family is willing to do this, your Honor. Mr. Dudley O. Sayre is willing to do this, to take care of his sister, as well as her income which

40

Joel L. Schlesinger—for Complainant—Direct.

she enjoys from this trustee and preserve this property, the res, for himself. That is the only interest there is here.

The Court: This is all off the record. Anything further from this witness?

10 Mr. Kanter: There was no question of Mr. Ellery.

The Court: This is all off the record.

Mr. Chandler: Mr. Schlesinger.

JOEL L. SCHLESINGER, called as a witness on behalf of the complainant, being duly sworn according to law on his oath testified as follows:

20 Direct examination by Mr. Chandler:

Q. What is your business, Mr. Schlesinger?

A. I am a real estate broker with an office at 31 Clinton Street in Newark.

Q. Will you briefly state your qualifications?

A. I have been in the real estate business as a broker continuously since 1914, except for time out during the last war.

Q. Just to interrupt: Are you also an appraiser? A. I am.

30 Q. You act as real estate appraiser? A. As an appraiser of real estate. I am a member of the American Institute of Real Estate Appraisers, and as an appraiser I have had occasion, during the past fifteen to twenty years, to appraise many properties in Newark, throughout Essex County and the balance of the state. I have appeared in this court and all of the other courts throughout the state and have qualified as an expert and qualified to testify on the value
40 of real property.

Joel L. Schlesinger—for Complainant—Direct.

Q. Have you appraised the property at 561 Broad Street, Newark, New Jersey? A. I have.

Q. Are you familiar with the general neighborhood in which that property is located? A. I am.

Q. When did you make your last appraisal of this property? A. I rechecked it within the past two weeks. I made an original appraisal of it about a year and a half ago. 10

Q. Can you describe the property? A. Yes. The property is located on the west side of Broad Street, just south of Washington Place, 26 feet 9 inches south of Washington Place. It has a frontage of 22 feet, running back at right angles from Broad Street 34 feet, and then it goes at an angle 58 feet. The improvements are two stories and cellar building of brick and frame construction. The front was remodeled about two and a half or three years ago. The building is a very old building. It is in fair condition. The reason it is in fair condition is the tenant putting in a new front, carpeting the floors, painted the walls, painted the ceiling and made it habitable. 20

Q. What, in your opinion, is the present market value of the property in question? A. My opinion, the present fair value of that property is \$15,000. 30

Q. And how do you reach that figure? A. Well, there are two ways that I approached it. One is from the income basis. The other is on a summation basis. Perhaps I should say there are three ways. And the third is on a comparative basis. Now, in the last year there has been several sales of comparable property in the immediate neighborhood. The property immediately next door, which is the same type of prop- 40

Joel L. Schlesinger—for Complainant—Direct.

erty in size, No. 563 Broad Street, formerly the branch of the Lincoln National Bank, sold in February this past year to Charles J. Simon, an insurance broker, for \$15,000. Another property sold in March, 1944, 21 feet front, a little deeper, 110 feet deep and closer to Central Avenue—which, as you go south on Broad Street, is better—sold for \$15,000. Then, in May, there was a property sold immediately opposite at No. 556 Broad Street, 27 feet by 168 feet, two story and basement building, that sold for \$15,000. And also in May there was a sale at No. 530 to 532 Broad Street, 32 by 174. The buildings were frame, and had little, if any, value. The selling price there was \$7,000.

10
20 Q. Now, on the income basis, will you describe how you reached that figure? A. Well, on the income basis is the hardest way to appraise this property, because you would have to consider the maximum income received, which may not be received until next year, \$3,000. You have the carrying charges of \$1800, which is insurance and taxes, which would leave a net of \$1200, and, capitalizing it at eight per cent, produces a value of \$15,000.

30 Q. And I believe you have mentioned another method, did you not? A. On a comparative basis—a summation basis, rather—I valued the land at \$400 per foot, for 22 feet is \$8,800 and improvements of \$6,200. This has a value of \$15,000—a total of \$15,000.

Q. Did you appraise the property 490 Broad Street? A. I did not appraise it, no, sir. I looked it over, at your request.

40 Q. What kind of an examination did you make? A. Well, you asked me to look it over and consider the neighborhood and the general

Joel L. Schlesinger—for Complainant—Direct.

trends there and if, in my opinion, the trustee would be justified in abandoning the property.

Q. Well— A. That is why I looked it over.

Q. What did you find as a result of your inspection? A. I find, in my opinion, the trustee is justified, because that area of Newark—in that area of Broad Street between Bridge Street on the south and Orange Street and the Lackawanna Railroad on the north has depreciated very rapidly during the past twenty years. The store vacancies there have been very heavy. Most of the stores on the block are vacant. At the corner of Bridge Street, both the southeast corner and the northeast corner are owned by the Vanderpool Estate, and in 1926 they rented those two corners to the Horatio Realty Company at a rental of ten thousand dollars a year net for both those properties, anticipating at the time that the new bridge would be completed over Bridge Street and there would be a much heavier flow of traffic into Broad Street from Harrison and that there would be considerable activity in the neighborhood. The Horatio Realty Company paid the rent for four years and then abandoned the property. On the opposite side of the street, the east side of Broad Street, between the library and Orange Street, there were some very successful merchants in there. Charles B. Shipman was one of them, and Rising & Thorne and at the corner was the United Cigar. On the other corner, the northwest corner, was a very popular men's wear shop in that neighborhood and they have all changed to a very, very low grade cheap merchandising neighborhood. The only thing that is still there is the North Ward Branch of the Fidelity Union Trust Company, at the northeast corner of Broad and Orange Streets.

10

20

30

40

Joel L. Schlesinger—for Complainant—By the Court.

10 Q. The question I asked you was with relation to 490 Broad Street. What is the situation with reference to 492? A. They are both immediately adjoining on the same block. I have the map here showing the location.

Q. I will amplify on that question. Is there any difference between 490 and 492 Broad Street? A. None at all. They are both on the same block, in the center of the block. I mentioned that.

Q. So your answer applies to 492 as well as to 490? A. Both of them.

20 The Court: Did you observe the buildings as to repair, and so forth?

The Witness: They are very old buildings, Vice Chancellor. I was born in that neighborhood, and I can remember the old buildings as a kid. That is, I was born across, on James Street.

The Court: Have they any rental value at all?

30 The Witness: I think twenty or twenty-five dollars a month is a pretty good rental for that type building. Even if you spent I don't care how much or little in rehabilitating them, you wouldn't have any demand for them.

The Court: Did you take in consideration, in your recommendation of abandonment, the amount of taxes now due against them?

The Witness: Yes, sir, I am familiar with them.

40 The Court: You see no hopes for this property at all?

Joel L. Schlesinger—for Complainant—Cross.

The Witness: No. On those two properties there is over \$30,000—

The Court: On what two?

The Witness: 490 and 492, and the total frontage is 54 feet. There is no rear entrance. They are 106 feet deep.

The Court: What I am thinking about is the expense that might be involved in advertising this property for public sale, whether that is merited or not under this situation. 10

The Witness: I am only a layman, but I cannot see what the trustee has to sell.

The Court: You are a real estate expert.

The Witness: Yes. Legally, he might have something. 20

The Court: I am trying to find out from you whether there is any hope that you can hold out to the Court of a buyer of this property, in excess of \$30,000 and the liens against it.

The Witness: No, because this was up once before, and my recollection is that the city only received a bid of about \$6,000 for this lien of thirty thousand. This is not the first time the city has advertised it under this clean-up program. 30

The Court: All right.

By Mr. Kanter:

Q. What would you think about the probability that the city or the subsequent holder of the tax lien certificate might make a nominal bid in order to protect their title? A. I am not a lawyer. 40

Joel L. Schlesinger—for Complainant—Cross.

The Court: No.

The Witness: I cannot answer that.

Mr. Kanter: I appreciate that.

The Court: No.

Mr. Homan: I have one question.

10 Cross examination by Mr. Homan:

Q. Mr. Schlesinger, to what do you attribute the decline in the neighborhood trend? A. That is a hard question. It goes back far beyond the period we have been talking about. That was a good neighborhood. But, peculiarly, when the Lackawanna elevated its tracks, the decline seemed to start from that date. When the tracks lost the level at Lackawanna Avenue, before they moved north to their present position, that was a very busy neighborhood. It was also a busy neighborhood, and still is, for the produce business. A lot of beef houses were there and are still there, and on the west side of Broad Street, from about the center of the block north of Orange Street to Lackawanna Avenue, is a good neighborhood for that. But since about 1904 or 1905, and that is before my time in real estate, but from studies I have made, the decline has been gradual. To a certain extent, for almost 30 forty years now, it has depreciated down to almost nothing.

Q. When were the tracks of the Delaware, Lackawanna elevated? A. About 1902 or 1903.

Q. Has there been any other change in transportation facilities to detract from the traffic? A. Yes, easier access by the tubes, which came over in 1911, the Hudson & Manhattan Tubes took a lot of the people who did use the Lackawanna to go to New York and took them farther 40

Joel L. Schlesinger—for Complainant—Cross.

south on Broad Street. They did not come that way.

Q. And that, you say, the change in transportation facilities, would cause the merchants to seek other locations, that is, the merchants you speak of? A. That might be one of the factors, but the chief factor is the general trend of shopping areas—and Newark is no exception—to shrink. That has been going on for the last twenty years. The hundred per cent area in Newark which was the best shopping area at one time, extended from Broad and Central Avenue south on Broad to Market Street, west on Market Street to Plane Street. In the past fifteen or twenty years that is slumping down, so it starts at New Street, Hahne & Company, and only goes around to Washington Street to Bamberger's. The decentralization of population has affected that. People are moving to suburban areas.

Q. Due to the introduction of the automobile?

A. Well, that is one of the reasons they have moved.

Mr. Homan: That is all.

The Court: Anything further?

Cross examination by Mr. Kanter:

Q. Mr. Schlesinger, you indicated to the Vice Chancellor that the chances of getting any bids at a public sale for 460 and 462 Broad Street would not warrant the expense of such an undertaking. Isn't that about it, Mr. Schlesinger?

A. No, I didn't say that. I said I didn't know what the trustee would be selling. The Vice Chancellor spoke about the expense. It was not I who spoke of that.

Joel L. Schlesinger—for Complainant—Cross.

Q. Well, you meant to indicate to the Vice Chancellor that it would be a useless procedure?

A. I say that, definitely.

Q. It would not be worth while spending the money? A. I do not think it would.

10 Q. All right. Now, don't you think with reference to 561 Broad Street that it would be worth while making the effort to conduct a public sale? A. I don't think so, Mr. Kanter.

Q. Well, Mr. Schlesinger, you know of the present offer of \$16,250, made by Mr. Cameron, do you not? A. Approximately that, yes. It is in the contract.

Q. \$16,262 it is, Mr. Schlesinger. You know that, don't you? A. That is right.

20 Q. And you know that Mr. Cameron's offer, or the offer of some other persons might be bettered if a public sale were conducted. Don't you think so, as a real estate man? A. You always have to consider a buyer must be fully informed. Now, he is buying this subject to a lien which has two more years to run. If he is buying it for his own occupancy, he might, but if he is buying it for speculation, I don't think anybody would top the present bid, because it would be the income value two years from now, with the neighborhood being no different, and the neighborhood has declined considerably in the last four or five years, more so than during the depression era from 1929 to 1939.

30 Q. You know, Mr. Schlesinger, don't you, that the experience in Newark has been—in this court has been—that a public sale has resulted in higher prices than the previously submitted prior offer? Well, I have observed also—

40 Q. Isn't that true? A. —in this court, with the market today, a lot of people are overreaching.

Joel L. Schlesinger—for Complainant—Cross.

Q. I am not interested in that. A. I would like to answer your question, if I may. My opinion is that the fair value of this property is \$15,000. I think that has already been overreached by the bid of \$16,200.

Q. But you also know that persons are in the market and that there is a tendency to—and there is a probability that prices reached at public sale are better than those reached at private offers? A. That may be, but I don't think this would be— 10

Q. That is conjectural on your part. A. The whole thing is—

The Court: It is a case of this property, not other properties. This property is the question before me. 20

Mr. Kanter: That is right. That is all, Mr. Schlesinger.

Mr. Chandler: That is all. That is the complainant's case, your Honor.

The Witness: Thank you.

The Court: Anything further?

Mr. Kanter: If your Honor please, representing Mr. Sayre, we have no evidence to offer, but we do wish to make a statement on the record, if we may, of a proposition of what we are willing to do to prevent this sale. Would your Honor care to hear me? 30

The Court: Now, may I consider it? These interested parties knew all about this thing all these years. It isn't anything new to them.

Mr. Kanter: No; your Honor should, I think, consider it the same way as your Honor does— 40

Colloquy of Counsel.

The Court: I can't consider anything but evidence, Mr. Kanter.

10 Mr. Kanter: I think, your Honor, generally it may be ultravires, but when you come to consider the advisability of selling real estate, your Honor has the right, and I ask your Honor now to take the views of the parties interested as to whether a sale should or should not be made: the same way as when you have the question of sale of property by a building and loan in liquidation or a trustee in liquidation of a building and loan, you receive the views of the parties, although they are not presented by way of evidence.

20 The Court: This is off the record.
(Discussion off the record.)

The Court: I will approve this contract.

Mr. Kanter: If your Honor please, Mr. Sayre authorizes me to say that, if the life tenant will consent, he will arrange to take care of the payment of the back taxes.

The Court: When?

30 Mr. Kanter: Immediately, within a week.

The Court: Well, within the week. I will withhold my decision for a week.

Mr. Kanter: All right, sir.

The Court: What does the life tenant say?

Mr. Campbell: The life tenant has no objection to the continuance of the trust, if the taxes are paid.

40 The Court: If the taxes are paid.

Colloquy of Counsel.

Mr. Campbell: May I say, provided—

The Court: With reference to the Broad Street property?

Mr. Kanter: 561 is the one we are talking about.

Mr. Campbell: Provided the taxes are paid immediately so that she will not be in a position a little later where her interest will be cut off, we would like to have the taxes paid and the trust continue. 10

The Court: I understand the taxes are to be paid and cleaned up. This is going to be a gift by this gentleman to somebody.

Mr. Kanter: We cannot make a gift of \$10,000—

The Court: What do you want to take— 20

Mr. Kanter: —and not foreclose the lien.

The Court: Who is going to see to that?

Mr. Kanter: Mr. Sayre.

The Court: For how long?

Mr. Kanter: For three years.

Mr. Campbell: For the life of the life tenant? 30

Mr. Kanter: We have got it now so situated that—

The Court: I won't go along with that.

Mr. McConnell: If your Honor please, I represent the defendants, Margaret Sayre and Dorothy Farcus. In spite of what Mr. Kanter says, there is an issue not being tried here today, too. Dorothy Farcus is brought into this suit on the strength of the allegation that she is one 40

Dudley O. Sayre—Defendant—Direct.

10 of the remaindermen. Mr. Dudley Sayre may not be the sole person interested in any agreement that is made. Our position is we are willing to do anything—whatever is best for the interests of the trust, and there is no objection on our part to have this matter held over for a week until we see exactly and specifically what arrangements are going to be made, but we do not want by silence to indicate our acquiescence in Mr. Kanter's proposal.

The Court: I will withhold decision.

Mr. Kanter: Will your Honor take Mr. Sayre's testimony?

The Court: On what?

20 Mr. Kanter: To repeat his offer. He wants to make it.

The Court: You have made it.

Mr. Kanter: I don't know whether it is on the record or not.

The Court: I will let him make his offer.

Mr. Kanter: May I make it on the record?

The Court: Yes. Let him make his offer.

30 Mr. Kanter: All right. Take the stand.

DUDLEY O. SAYRE, called as a witness in his own behalf, being duly sworn according to law on his oath testified as follows:

Direct examination by Mr. Kanter:

40 Q. Mr. Sayre, you are interested in this property— A. I am.

Dudley O. Sayre—Defendant—Direct.

Q. —as a remainderman? A. Yes.

Q. And are you willing, within a week, to take an assignment of the tax lien held on this property, pay the full amount thereof and hold the amount of those taxes as long as your sister, Mary Estelle, shall live and not to foreclose that lien? A. And give her any income that comes out of the property, either by sale or rental; every penny that comes out of the property, either by sale or rental is hers, not mine. 10

Q. You want to pay your sister the net income of this property? A. Either by the sale or rental. I will not take one cent from her, outside of my legal expenses.

The Court: You will give it to your sister?

The Witness: Yes. And my father left that to her, Vice Chancellor, for her during her lifetime, and I am here to protect her interest and not mine. 20

The Court: All right.

The Witness: And every cent that come out of that property is hers, either by sale or rent.

The Court: All right.

The Witness: They are not mine.

The Court: I will decide the whole thing at one time. I will decide the whole matter at one time and not piecemeal. I will drop you gentlemen a line. 30

Final Decree.

(Filed October 24, 1944.)

[SAME TITLE.]

10

This matter being opened to the Court by Hood, Lafferty & Emerson, solicitors of the complainant, appearing by Wallace R. Chandler, Jr., Esq.; in the presence of Messrs. Kanter & Kanter, appearing by Elias A. Kanter, Esq., solicitors of the defendants, Dudley O. Sayre and Dudley O. Sayre, Jr.; William H. Campbell, Jr., Esq., solicitor of the defendant, Mary Estelle Sayre; Messrs. McCarter, English & Egner, appearing by Charles Howard, Esq., solicitors of Adele VanVechten Conway as guardian ad litem of the infant defendant, Chauncey VanVechten B. Sayre; J. Albert Homan, Esq., solicitor of I. Grant Scott, Clerk in Chancery, guardian ad litem of the infant defendants, Barbara Wallwork and Cynthia Holthusen; and Edward E. Mishell, Esq., appearing by William M. McConnell, Esq., solicitor of the defendants, Dorothy Sayre Farcus and Margaret Sayre; and it appearing that the complainant, Fidelity Union Trust Company, by an order of the Essex County Orphans' Court dated September 25, 1941, was appointed substituted trustee under the last will and testament of Marcus Sayre, deceased; that the complainant under the trusts provided by the eighth clause of said will holds the lands and premises known as 561 Broad Street, Newark, New Jersey, and the lands and premises known as 490 Broad Street, Newark, New Jersey, and 492 Broad Street, Newark, New Jersey, all particularly described in the

20

30

40

Final Decree.

bill of complaint, in trust for the testator's daughter, Mary Estelle Sayre, for and during her lifetime:

(a) That as to 561 Broad Street:—Said premises are encumbered by a store and building; that from and after the commencement of the financial and economic depression, said premises have, at various periods, failed to produce an income sufficient to pay taxes and other costs of maintenance with a result that tax arrears accumulated thereon, and on October 13, 1941, the same were sold by the City of Newark for nonpayment of taxes to Charles E. Cameron, Jr. who now holds the tax sale certificate upon which there is unpaid, including principal and interest, nearly \$11,000; that the rentals presently payable are barely sufficient to pay current operating and maintenance charges and are wholly inadequate for the purpose of satisfying the arrearages upon the tax sale certificate; that there is no other income from the trust fund available for the payment and satisfaction of said tax sale certificate and the trustee has no other funds in the trust available for such purpose, wherefore the certificate may be foreclosed at any time, in which case, said premises, as an asset of the trustestate, would be wholly lost; that the complainant has entered into a contract to sell said premises to Charles E. Cameron, Jr., for the sum of \$16,262 in cash, which contract provides for the discharge by the Vendor of existing liens created by said tax sale or allowance from the purchase price therefor, and for the apportionment of current rents and taxes; that the foregoing sale is of advantage to the trust estate and is in excess of the present fair value of said premises; and the Court

10

20

30

40

Final Decree.

10 having heard and considered the proofs and the arguments of counsel, and being of the opinion that the will of Marcus Sayre does not give the trustee a power of sale with respect to said premises but that (1) an emergency has arisen not anticipated by the testator, Marcus Sayre, and that, in order to prevent the loss of the trust res and the defeat of the testator's objects and to promote and protect the interest of the beneficiaries and (2) in accordance with the provisions of R. S. 3:35-1 providing for sale by a fiduciary of a devise in trust when sold for taxes and no adequate provision is afforded by the testator's will for the payment of the same, the complainant should sell said premises in
20 accordance with the terms of the contract herein mentioned; and that the retention of the same for a possibly higher offer in the future is unwarranted;

(b) That as to the premises known as 490 Broad Street and the premises known as 492 Broad Street:—Said premises are improved by buildings of a business or commercial character but by reason of their poor condition and high tax assessments, neither of said properties produce an income sufficient to pay the taxes and carrying charges and a large portion of them is vacant and is not rentable without extensive repairs and rehabilitation; that a rent receiver of the City of Newark is in possession thereof; that the premises located at 490 Broad Street have been sold to the City of Newark for nonpayment of taxes for the years 1933-1937, inclusive, and no taxes have been subsequently paid either on
30 account of same or on account of current taxes, whereby there is due and unpaid, exclusive of
40 interest and costs on account of taxes, a sum

Final Decree.

in excess of \$10,000; that the property at 492 Broad Street was sold to the City of Newark for nonpayment of taxes for the years 1934-1937, inclusive, and no taxes have been subsequently paid either on account of same or on account of current taxes, whereby there is due and unpaid, exclusive of interest and costs on account of taxes, a sum in excess of \$10,000; that there are no funds in the trust estate for the payment and discharge of said taxes and tax liens on either of said properties and there is no provision in the will for the same; that the complainant has been unable to sell said premises or either of them; that the properties are probably unsalable except possibly to a nominal bidder; and the Court having heard and considered the proofs and arguments of counsel and being of the opinion that with respect to the said premises at 490 Broad Street and 492 Broad Street, the trustee has no power to sell said premises under the will of the testator, Marcus Sayre, but that (1) an emergency has arisen not anticipated by him and that in order to prevent, if possible, the loss of the trust res and the defeat of the testator's objects, and to promote and protect the interest of the beneficiaries and (2) in accordance with the provisions of R. S. 3:35-1 providing for sale by a fiduciary of a devise in trust when sold for taxes and no adequate provision is afforded by the testator's will for the payment of the same, it is advisable, if possible, to sell said premises at public auction to the highest bidder, and if not so sold, said premises should be abandoned by the complainant as trustee.

10

20

30

40

Final Decree.

It is thereupon, on this 24th day of October, 1944, on motion of Hood, Lafferty & Emerson, solicitors of the complainant, ORDERED, ADJUDGED and DECREED:

- 10 1. That it is to the advantage of the estate of Marcus Sayre, deceased, and to the beneficiaries thereof, that the aforesaid premises at 561 Broad Street, Newark, New Jersey, be sold at this time to Charles E. Cameron, Jr., for the sum of \$16,262 all cash; that said offer represents the fair and reasonable cash market value of the property and retention thereof for a possibly higher offer in the future is unwarranted;
- 20 2. That the complainant, Fidelity Union Trust Company, substituted trustee under the last will and testament of Marcus Sayre, deceased, be and hereby is authorized and directed to sell and convey to Charles E. Cameron, Jr., the aforesaid premises known as 561 Broad Street, Newark, New Jersey, for the sum of \$16,262 all cash and upon the terms and conditions contained in the contract between the parties dated June 11, 1943;
- 30 3. That the complainant, Fidelity Union Trust Company, as substituted trustee as aforesaid, be and is hereby authorized and directed to execute such deeds and instruments as may be necessary to consummate said sale to Charles E. Cameron, Jr., upon the terms of said contract dated June 11, 1943;
- 40 4. That the complainant, Fidelity Union Trust Company, as substituted trustee as aforesaid, is hereby authorized and directed to sell

Final Decree.

and convey the premises known as 490 Broad Street, Newark, New Jersey, and the premises known as 492 Broad Street, Newark, New Jersey, at public auction to the highest bidder and that the expenses of such auction, including the advertisement and conducting thereof, shall be met from the proceeds of sale of 561 Broad Street, Newark, New Jersey; that at such auction the complainant may reject any bids which it considers are not in line; that it shall report any bids which it shall consider worthy of consideration to this Court for confirmation or otherwise;

10

5. That if the complainant should receive any bids for said premises or either of them prior to said auction which it considers worthy of consideration, it shall have the right to submit the same to this court for instructions as to whether the same should be accepted or not;

20

6. That if no bids should be received for either of said properties at auction or otherwise, or if received, should not be confirmed by this Court, then the complainant, as substituted trustee as aforesaid, may abandon said properties or such of them as shall not be sold and the sale confirmed, pursuant to R. S. 3:17-8.2 et seq.;

30

7. That the complainant shall be at liberty to apply to this Court for further instructions and for further decrees and orders, if required, in regard to the subject matter hereof;

8. That the complainant pay from the proceeds of the sale of the premises at 561 Broad

40

Final Decree.

- 10 Street, Newark, New Jersey, to Messrs. Hood, Lafferty & Emerson, solicitors of complainant, a counsel fee of \$200, together with complainant's costs to be taxed, including \$31 for cost of testimony; and to Kanter & Kanter, solicitors of the defendants, Dudley O. Sayre, and Dudley O. Sayre, Jr., a counsel fee of \$25; and to William H. Campbell, Jr., solicitor of the defendant, Mary Estelle Sayre, a counsel fee of \$25; and to McCarter, English & Egner, solicitors of Adele VanVechten Conway as guardian ad litem of the infant defendant, Chauncey VanVechten B. Sayre, a counsel fee of \$25; and to J. Albert Homan, Esq., solicitor of I. Grant Scott, Clerk in Chancery, guardian ad litem of the infant defendants, Barbara Wallwork and
- 20 Cynthia Holthusen, a counsel fee of \$25; and to Edward E. Mishell, solicitor of the defendants, Dorothy Sayre Farcus and Margaret Sayre, a counsel fee of \$25;

9. That nothing herein contained shall be deemed to affect the issues created by the counterclaim of the defendant, Dudley O. Sayre, which, by prior order of this Court, are to be heard separately.

30

Respectfully advised,

ALFRED A. STEIN,
V. C.

LUTHER A. CAMPBELL,
C.

40

Notice of Appeal.

(Filed January 24, 1945.)

IN CHANCERY OF NEW JERSEY.

#149—510.

Between

FIDELITY UNION TRUST COM-
PANY (formerly Fidelity
Trust Company), as substi-
tuted trustee, etc.,

Complainant,

and

MARY ESTELLE SAYRE, et als.,
Defendants.

On Amended Bill,
Etc.

10

20

Dudley O. Sayre hereby appeals from paragraphs 1, 2 and 3 of the decretal portion of the Final Decree, made by the Chancellor (on the advice of the Hon. Alfred A. Stein, Vice-Chancellor) made in the above entitled cause on October 24, 1944, to the Court of Errors and Appeals in the last resort in all causes.

30

KANTER & KANTER,
Solicitors for and of counsel with
appellant, Dudley O. Sayre.

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

ELIAS A. KANTER,
Of Counsel with appellant,
Dudley O. Sayre.

40

Dudley O. Sayre's Petition of Appeal.

(Filed February 24, 1945.)

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10

Between

FIDELITY UNION TRUST COM-
PANY,

Complainant-Respondent,

and

DUDLEY O. SAYRE,

Defendant-Appellant,

and

20

MARY ESTELLE SAYRE, et al.,
Defendants-Respondents.On Appeal from the
Court of Chancery.*To the Honorable, the Court of Errors and
Appeals, in the last resort in all causes:*

The petition of Dudley O. Sayre, the defendant-appellant in the above entitled cause, and the petitioner in this Court, respectfully shows that:

30 First: Petitioner finds himself aggrieved by a decree dated October 24, 1944, made in the Court of Chancery, by the Chancellor, the Hon. Luther A. Campbell, on the advice of the Hon. Alfred A. Stein, Vice Chancellor, in a certain cause in the said Court of Chancery, wherein Fidelity Union Trust Company (formerly Fidelity Trust Company), as substituted trustee, etc. was the complainant, and this petitioner, Dudley O. Sayre, and others were the defendants, in the following respects:

40 1. The aforesaid decree adjudges:—"That it is to the advantage of the estate of Marcus

Dudley O. Sayre's Petition of Appeal.

Sayre, deceased, and to the beneficiaries thereof, that the aforesaid premises at 561 Broad Street, Newark, New Jersey, be sold at this time to Charles E. Cameron, Jr., for the sum of \$16,262 all cash; that said offer represents the fair and reasonable cash market value of the property and retention thereof for a possibly higher offer in the future is unwarranted." 10

2. The aforesaid decree adjudges:—"That the complainant, Fidelity Union Trust Company, substituted trustee under the last will and testament of Marcus Sayre, deceased, be and hereby is authorized and directed to sell and convey to Charles E. Cameron, Jr., the aforesaid premises known as 561 Broad Street, Newark, New Jersey, for the sum of \$16,262 all cash and upon the terms and conditions contained in the contract between the parties dated June 11, 1943." 20

3. The aforesaid decree adjudges:—"That the complainant, Fidelity Union Trust Company, as substituted trustee as aforesaid, be and is hereby authorized and directed to execute such deeds and instruments as may be necessary to consummate said sale to Charles E. Cameron, Jr., upon the terms of said contract dated June 11, 1943." 30

Second: Petitioner appeals from the aforesaid decree of the chancellor, which adjudicates as aforesaid, upon the ground that the same is erroneous, in that:

1. The adjudications aforesaid arose in consequence of the fact that the Court of Chancery unwarrantably, during the course of 40

Dudley O. Sayre's Petition of Appeal.

10 the cross-examination of the complainant's witnesses or one of them, denied to your petitioner the opportunity of eliciting from the witness under cross-examination that the complainant itself was accountable, and should pay, various large sums of money more than sufficient to pay all the taxes and tax liens which occasioned the complainant to file its bill herein seeking the approval of the Court of Chancery for said complainant-trustee's sale of #561 Broad Street, Newark, N. J.

20 2. The Court of Chancery should have adjudicated that it was not to the advantage of the estate of Marcus Sayre, deceased, and to the beneficiaries thereof, that #561 Broad Street, Newark, N. J. be sold for \$16,262. to Charles E. Cameron, Jr., and should have withheld its approval of such sale.

30 Third: Petitioner therefore prays that the aforesaid decree of the Chancellor may in the respects aforesaid be reversed, set aside and for nothing holden, that the Chancellor be directed to make a decree free from the errors above outlined, and that your petitioner may have such further and other relief in the premises as to this Court shall seem proper.

KANTER & KANTER,
(Kanter & Kanter)
Solicitors for, and of Counsel
with, Petitioner.

40 ELIAS A. KANTER,
(ELIAS A. KANTER)
Of Counsel.

Dated: February 23, 1945.

New Jersey Court of Errors and Appeals.

Between

FIDELITY UNION TRUST COMPANY, etc. as substituted trustee, etc.,

Complainant-Respondent,

—and—

MARY ESTELLE SAYRE, *et als.*,

Defendants-Respondents.

On Appeal from the Court of Chancery.

NATALIE B. DALTON, MARJORIE

M. WALLWORK, DOROTHY A.

HOLTHUSEN, and DUDLEY O.

SAYRE, JR., (substituted in

place of the Original ap-

pellant, Dudley O. Sayre),

Appellants.

BRIEF OF APPELLANTS
NATALIE B. DALTON, *et al.*

Preliminary Statement.

The writing, printing and service of this brief have perforce been delayed because of the pendency of motions made before the Court of Errors and Appeals.

Those motions were decided by the Court on May 10, 1945 and counsel were advised of the decision on May 11, 1945, the decision of the Court being—and we quote from the Clerk's letter of May 10, 1945—as follows:

“Motion to substitute as parties appellant Natalie B. Dalton, Marjorie M. Wallwork,

Dorothy A. Holthusen, Dudley O. Sayre, Jr., and Mary E. Sayre, widow of Dudley O. Sayre, individually and as executrix of his estate, is granted.

"Motion to dismiss will be held for consideration with the main case."

Accordingly, although this appeal was *initiated* by the late Dudley O. Sayre to procure a reversal of *part* of the decree (State of Case, pp. 162-168) made in the Court of Chancery on October 24, 1944, *this appeal is now prosecuted by the five substituted appellants above named.*

Introductory Outline.

Up to the time of the writing of this brief, the Chancellor's opinion—dated March 12, 1945—has not been officially reported; it will, however, be found unofficially reported in 41 Atl. 2d. 388. It will probably appear in 136 N. J. E., at some page subsequent to page 346.

We believe that the essential facts are uncontradicted and, because of the limited nature of the appeal, those facts can be briefly stated. *The ultimate issue is as to whether or not the Chancellor should have authorized Fidelity to sell 561 Broad Street, Newark, N. J. to Charles E. Cameron;* Fidelity's suit seeking such approval was embraced in its First Cause of Action (State of Case, pp. 1-7). The Chancellor gave such approval (State of Case, p. 166, ll. 1-35). The petition of appeal (State of Case, pp. 170-172) challenges the correctness of the Chancellor's decree in this respect.

Fidelity was the substituted trustee under the will of the late Marcus Sayre (State of Case, p. 1, ll. 10-20). One of the properties which it was administering was 561 Broad Street,

Newark, N. J. (State of Case, p. 4, ll. 20-30). There was a large accumulation of tax arrears and the tax liens had been sold to Charles E. Cameron (State of Case, bottom of p. 4 and top of p. 5). Charles E. Cameron, the holder of the tax sale certificates, is the president of Lauter-Humana Company, and that company is the lessee of the property (State of Case, p. 5, ll. 10-20). Fidelity has contracted to sell the property to Charles E. Cameron for \$16,262, with liens to be deducted, which would leave approximately \$5,000 as the net proceeds of the sale (State of Case, p. 6, ll. 15-35, and State of Case, pp. 26-34).

Fidelity claimed that its inability to pay taxes after 1929 was due to the depression (paragraph 10 of its bill), and that that accounted for the accumulation of the tax arrears (paragraph 11 of its bill) and that "the trustee has no funds" to pay such taxes (paragraph 12 of its bill).

All of *those claims* of Fidelity were expressly *denied and put in issue by Dudley O. Sayre's answer* (paragraph 5 of answer, State of Case, p. 37; paragraph 6 of answer, State of Case, p. 38, ll. 20-28; paragraph 7 of answer, State of Case, p. 39, ll. 30-35).

In substance, therefore, the controversy, presented by appropriate pleading, might be summarized by these questions:—Is it true that the accumulation of taxes was due to the depression or insufficiency of the rentals? Is it true that you, the trustee, have no money to pay the accumulation of taxes?

Our grievance is manifold:

FIRST. *The Chancellor completely shut off any inquiry* as to the truth of the asserted claims of the trustee, even though Fidelity's petition for approval of sale of 561 Broad Street

was based upon the asserted truth of such claims.

SECOND. *It appeared as a matter of record that those claims of Fidelity were factually untrue*, and that Fidelity had, or should have had, sufficient monies in its possession to pay the tax liens, with the consequence that no sale of the property would be required. Since when can a trustee, in effect, say, "Because I have misapplied, or converted to my own use, or otherwise mishandled, trust monies, and I cannot now pay the accumulated taxes on the property, I now want the property to be sold because of the accumulated taxes"?

THIRD. The Chancellor should *not* have directed the sale of 561 Broad Street.

An examination of the record will disclose that the decree is the product of the Chancellor's disregarding the just and equitable principles briefly above adverted to.

POINT I.

The Chancellor erroneously debarred the appellant from cross examining Fidelity's witness.

As we have heretofore indicated, the trustee (Fidelity) brought the suit to procure the Chancellor's approval for the trustee's proposed sale of 561 Broad Street, Newark, to Charles E. Cameron for \$16,262. The bill of complaint alleged that after 1929, the rentals of that property had so fallen off that it had become impossible for that reason for the trustee to pay the taxes, with the result that there was a great

accumulation of taxes. By its bill, Fidelity further asserted that the tax liens had been sold to Charles E. Cameron (State of Case, p. 5, ll. 10-15). The Court will observe that the Fidelity did *not*—by its bill—*disclose what taxes had remained unpaid and what tax liens had been sold to Cameron*. The trustee (Fidelity), by its bill, further alleged that it “*has no funds in the trust*” to pay or satisfy the unpaid tax liens (paragraph 12 of bill of complaint; State of Case, p. 5, ll. 30-35).

Dudley O. Sayre (the defendant who initiated the appeal), by his answer *expressly denied the allegation last referred to* (State of Case, p. 39, ll. 30-35).

With the complainant-trustee having made any allegation which was denied by the answer of the defendant-cestui, it seems very plain to us that it became the duty of the complainant to establish the fact which it had alleged and that *it was the right of the defendant to cross examine the witness or witnesses who might be produced by the complainant to establish the controverted fact*. We will now show that such right was denied.

John S. Bacheller—Fidelity’s Trust Officer—testified that Fidelity has “no other assets, and *never had any other assets, of the estate*” (State of Case, p. 115, l. 15). Bacheller, on direct examination, further testified that it was only the “*net rent*” that had been paid to the life tenant (State of Case, p. 117, l. 20). Clearly, Dudley O. Sayre’s counsel had the right to cross examine Bacheller fully on the testimony which he had given and the sources of that testimony. *Such cross examination was completely frustrated by the Court* (State of Case, pp. 117-120). The cross examination was precluded, not by objection from counsel for the complainant, but by

objection from the Vice Chancellor, who expressly stated that he would "shut off" the cross examination (State of Case, p. 120, l. 28). We respectfully urge that the Vice Chancellor was in error in precluding the cross examination which related to Bacheller's testimony on direct, even though such cross examination might also have some bearing on the counterclaim.

Charles F. Ellery—Fidelity's Vice President—was another witness called by the complainant. He testified, among other things, that the low rentals after 1929 prevented the payment of taxes (State of Case, p. 122) and consequently that the 1937 tax lien had been sold to Charles E. Cameron (State of Case, p. 123). Let us now point to what happened on cross examination:

1. Though Ellery had testified that it was the "low rentals" which had produced the default in the taxes, the Court refused cross examination on whether the *failure to collect rents* was not the *real cause* for default (State of Case, p. 137, l. 30). Certainly if a trustee fails to collect rents, and that is the reason why the taxes are unpaid, the truth should be permitted to be shown, and the Court refused to permit Dudley O. Sayre's counsel to bring out the truth on cross examination.
2. The Court *of its own motion* denied the right of bringing out on cross examination what the Fidelity had done with \$1,400 that it had on hand in 1937 (State of Case, p. 138). We submit that it was fair cross examination to pursue an inquiry as to whether the 1937 taxes had remained unpaid *for some reason other* than that which the witness had given as the excuse in his direct examination. Not only did the Court

shut off that line of cross examination, but it followed up its determination *by threatening to hold the examining counsel in contempt and by refusing to hear argument on the propriety of the questions* (State of Case, pp. 138-139).

Since it is, we think, hornbook law that *cross examination* on matters directly in issue or directly relevant to the issue *is a matter of right* (particularly when the questions are directed to the witness who has given the adverse testimony on direct examination) and that *the denial of such right constitutes reversible error*, we will not labor that point beyond the citation of a few New Jersey decisions setting forth those principles:

- Prout v. Bernards Land, Etc. Co.*, 77 N. J. L. 719 (E. & A. 1909);
Babirecki v. Virgil, 97 N. J. E. 315 (E. & A. 1925);
State v. Lerman, 107 N. J. L. 77 (E. & A. 1930);
Cristofaro v. Brenfleck, 116 N. J. L. 357 (E. & A. 1935).

It seems to have been the idea of the Vice Chancellor before whom the cause was tried that the cross examination was to be prevented because the fact to be elicited by such cross examination was important in connection with the counterclaim of Dudley O. Sayre. While such importance is conceded, that does not result in the exclusion of the testimony otherwise relevant. Let us illustrate by a few examples:

- A. In a suit brought by a building contractor against the owner of real estate, it is common to find that the builder claims the entire contract price and the owner asserts

that the contract has not been fully or properly performed, presenting a counterclaim for such items. When the builder testifies that he has completed the structure in accordance with the plans and specifications, would not the owner's counsel be entirely correct in asking him whether the painting had been omitted or improper heating apparatus installed? Would such cross examination be excluded because the answers to the questions would be apt to sustain the owner's counterclaim based upon the builder's failure to paint the structure or to furnish a heating system?

- B. If a woman were to bring suit for divorce against her husband on the ground of desertion and he counterclaimed for similar cause against her, would it not be proper for the husband's counsel to ask the wife questions on cross examination even though her answers might tend to establish her husband's cause of action?

Because, as we have shown, the Vice Chancellor improperly prevented counsel for the appellant from conducting a cross examination to which the appellant was entitled as a matter of right, we ask this Court to reverse the decree below in the respect appealed from.

POINT II.

**Fidelity, as trustee, has in its possession—
or should have in its possession—sufficient
monies to pay the tax liens.**

As we cannot too strongly stress, Fidelity's request to be permitted to sell 561 Broad Street was based upon its claim that it did not have on

hand sufficient monies to pay the tax liens sold to Cameron. That was this trustee's express assertion in paragraph 12 of the bill of complaint (State of Case, p. 5, ll. 30-35). And immediately following that allegation, the complainant trustee asserted that it was "by reason of the foregoing"—that is, the financial inability of the trustee to pay the tax liens—the interest of the life tenant and the interest of the remainderman "may be injured, impaired or lost" (paragraph 13 of bill, State of Case, p. 5, ll. 35-40). Our client, the late Dudley O. Sayre, *traversed those allegations by his answer* (State of Case, p. 39, ll. 20-40).

We have already shown (in Point I hereof) that the Vice Chancellor refused and "shut off" any cross examination on the relevant data concerning those issues to which the witnesses for the complainant had testified. Indeed, the Vice Chancellor not only refused to hear argument on the propriety of the questions, but threatened Dudley O. Sayre's counsel with an adjudication for contempt if he should attempt to ask the appropriate questions. In that way, a showing of the complete truth was prevented by the Court below.

However, the truth did appear.

The truth appeared as a matter of record.

The truth appeared from the mouth of Fidelity itself.

The truth was that, notwithstanding its pretext, Fidelity does have sufficient monies to pay the tax liens. An examination of the record, tedious though it may be, discloses that fact and the fact will now be demonstrated.

The claim of Fidelity was that it was the *insufficiency of rentals* that caused its inability to pay the taxes (the liens for which had been sub-

sequently sold to Cameron). *That claim on the part of the Fidelity was (from its own lips) shown to be untrue.* In response to interrogatories propounded by Dudley O. Sayre, Fidelity tabulated—for the years 1929 through 1943—the following information:

- A. The tax assessments for each of those years.
- B. The amount of rent collected from 561 Broad Street during each of those years.
- C. The amount of the operating expenses during each of those years.

We assemble that information in the following table:

Year	Rents Collected Fidelity's answers (Case, p. 91) to interrogatory #1.	Taxes Assessed Fidelity's answers (Case, pp. 94-96) to interrogatories #7-22.	Operating Expenses Fidelity's answers (Case, p. 93) to interrogatory #4.
1929	\$ 8,309.09	\$ 3,640.40	\$ 1.35
1930	1,923.60	4,200.04	347.16
1931	2,738.04	4,143.18	862.65
1932	3,850.00	3,955.80	252.41
1933	3,500.00	2,781.44	260.04
1934	3,069.02	2,996.65	470.92
1935	2,139.42	2,385.60	1,117.19
1936	2,425.00	2,743.20	84.74
1937	2,402.86	2,140.20	264.86
1938	2,771.03	2,659.97	328.57
1939	2,755.18	1,501.50	576.85
1940	675.00	1,855.12	100.86
1941	1,200.00	2,323.00	206.66
1942	3,006.13	1,682.22	80.63
1943	2,700.00	1,120.41	114.61
Totals	\$43,464.46	\$40,128.73	\$5,069.50

In recapitulation of the foregoing, we show that, *considering only the rents actually collected*

(\$43,464.46), and deducting therefrom *all the operating expenses* (\$5,069.50), the remaining balance (\$38,394.96) is *almost sufficient fully to pay all the taxes* from 1929 through 1943, both years inclusive. Indeed, *that balance is only \$1,733.77 short* of the amount required for the payment of all the taxes. In point of fact, as we will hereafter show, this seeming "shortage" did not actually exist. What we have stated above appeared as a matter of record, sworn to by Fidelity itself. *Fidelity itself thereby showed that it had, or should have had, sufficient monies on hand to pay all but a small portion of the 1943 taxes.*

In the face of that demonstrated fact, we are at a loss to understand how the Chancellor could have brought himself to the conclusion that 561 Broad Street should be sold. Surely, the Vice Chancellor below must have perceived—though his opinion is silent with reference to this matter—that Fidelity should have enough money to pay all those taxes. To us, it is shocking to realize that the trustee here should be allowed to effect a sale of 561 Broad Street *when the basis assigned for the sale is wholly absent.*

What the Vice Chancellor permitted to be done in this case was something which no trustee, under similar circumstances, was ever permitted to do. Suppose a lawyer who (as trustee) held title to a piece of property had converted the rents to his own use, or had otherwise misapplied the rents, would this Court suffer a sale of the property through mortgage foreclosure, or tax foreclosure, or through any other means, without requiring that defaulting lawyer-trustee—assuming his financial responsibility—to pay the items in default from the funds which he has, or should have, in his possession? Certainly, no answer is required to this rhetorical

question. Indeed, the files of the Supreme Court furnish too frequent evidence of what has happened to lawyers acting in such breach of trust, aside from compelling them to pay the taxes. Why should Fidelity not be subjected to the same standard of action? It may, in certain quarters, be deemed *lese majeste* for very humble counsel, representing a sick and unfortunate client, to assail Fidelity but we think that the king has done wrong.

Since when may a trustee ask to be saved from its own wrongdoing? Yet, that is precisely what the trustee *mala fide* is permitted to do under that portion of the decree here under attack.

We have indicated above that—from the Fidelity's own sworn statements—the actual rents collected from 561 Broad Street, after deducting the operating expenses, were almost fully sufficient to pay all the taxes. The *seeming* deficiency amounts to \$1,733.77.

That “deficiency” is brought about by the following two circumstances:

1. Though, on August 29, 1939, Fidelity had in its possession \$1,769.78—which it could have used in payment of the 1937 tax lien which it *now* says remained unpaid and which was subsequently sold to Cameron—it did not pay any part of those taxes, *but put the money in its own pocket* “on account of income commissions,” the quoted language being that of Fidelity itself.
2. Though, in the early part of 1930, Fidelity was then able to collect from the tenant then in possession of the property—Jacob Doll & Son—the full amount of the rent then due from the tenant, *it allowed the tenant to “get away with”* \$4,402.12.

We shall now take those up seriatim.

On the record before the Court below, it appeared from the lips of Fidelity itself that *on August 28, 1939 it had on hand the sum of \$1,769.78*. We point to the record (State of Case, p. 70, l. 30; State of Case, p. 111, ll. 30-35). There was nothing to prevent Fidelity from paying that amount on account of the 1937 taxes, but it put the money in its own pocket instead. This is precisely what the Fidelity says it did with that money:

“Complainant on August 29, 1939 paid to itself \$1,400.00 on account of income commissions earned by it and to which it was entitled by law. The cash balance after such payment was \$364.28” (State of Case, p. 111, ll. 30-35).

Clearly, the balance of \$1,769.78 exceeds the seeming deficiency of \$1,733.77 above referred to, and *would have been sufficient to pay all the taxes*. Any trustee, with a fitting sense of the duties owing to its beneficiary, would not take “commissions,” particularly when the pocketing of such commissions would be likely seriously to jeopardize the corpus of the trust; but that did not concern Fidelity. FURTHERMORE, FIDELITY HAD NO LEGAL RIGHT TO TAKE THOSE COMMISSIONS, for, at the time when Fidelity secretly appropriated a part of the trust fund to its own use, *commissions were not allowable until after accounting and approval by the Court*. Let it be noted that the “commissions” here taken by the trustee were in respect to income collected, and with respect to its services done, prior to the amendatory statute (Chap. 134, P. L. 1939, pp. 456-457). The statute that governed the trustee with respect to its compensation was 3 C. S. p.

3860, Sec. 130, as reenacted in the 1937 Revision, N. J. R. S. 3:11-3, the salient words of which were:

“Whenever, * * * any property from which income is derived shall remain in the hands of * * * trustees under a will, it shall and may be lawful, *upon any accounting*, * * * *for the court* * * * *to allow such commission* * * * as by the said court shall be deemed fair and just; * * *.”

1937 Revision, 3:11-3.

Under that statute, it was uniformly held that a trustee may not, without prior court approval, take commissions. A few of the cases illustrating that principle are:

Wyckoff v. O'Neil, 71 N. J. E. 729; affirmed, 72 N. J. E. 880;
Smith's Estate, 107 N. J. E. 607;
Lockwood v. Clarke, 136 N. J. E. 195.

There was further uncontradicted evidence—from the lips of the trustee itself—that *it should have had on hand an additional \$4,300*, besides the “appropriated commissions” above adverted to. *Let us point to the proofs*, appearing as a matter of record before the Court below:

1. During all of 1929 and in the early part of 1930, Jacob Doll & Sons, Inc. was the tenant of 561 Broad Street; the rental was \$5,000 per annum, payable in equal monthly installments in advance, *together with the annual taxes* (State of Case, p. 85, ll. 20-30).
2. *Instead of collecting the rent*, Fidelity, on May 21, 1930, accepted the tenant's note for the sum of \$4,902.12 “on account of rent

and tax arrearages" (State of Case, bottom p. 85, and all of p. 86).

3. The trustee subsequently collected \$500 on account of the note and still later received "dividends from the receivers" of the tenant, aggregating \$132 (State of Case, pp. 85-86).

Obviously, the Fidelity failed to collect the balance of approximately \$4,300.

What excuse was there for Fidelity's failure to *enforce* the collection of the rent, by distraint, if necessary? Obviously, the tenant's failure to pay the accruing rent and taxes should have been a red flag to even the most inexperienced trustee (and the trustee in this case uses the public press to advertise its alleged competency). Before the trustee was generous with the tenant, it should have been just to the beneficiaries of the trust. It is undenied that the Fidelity made no attempt to distraint, and all that it *now* says is that it "has no knowledge * * * of the value of the property" of the tenant at the time that it accepted the note (State of Case, p. 110).

We therefore say that the Fidelity's excuse for not paying the taxes far from being the alleged "depression" of 1929 was its own failure to enforce the collection of the rent.

Fidelity's *assertion* in this case that the non-payment of the taxes (and the consequent sale of the tax liens) was due to circumstances beyond its control is *utterly false*. The truth of the matter is (for the present disregarding other facts appearing uncontradicted of record) that the taxes weren't paid because:

- A. Fidelity put into its own pocket, without legal warrant, \$1,400 on account of "commissions."

B. Fidelity, also without legal warrant (when the *duty* of the trustee to collect by distraint, if necessary, is clear and when the uncontradicted facts showed the *necessity* of such action), forebore to enforce the payment of some \$4,900 due from the tenant, but instead took the tenant's note, lost the right to distraint and thereafter received only a nominal dividend from the tenant's receiver.

The aggregate of those two sums was *more than sufficient* to pay the defaulted taxes.

Let it also be noted that between 1929 and 1943, *Fidelity never paid any of the taxes promptly*. That is the sworn testimony of the Fidelity (State of Case, pp. 94-96). During the years that we have mentioned, because Fidelity was not paying the taxes promptly, it paid out—for interest alone, on account of delinquent payment of taxes—the sum of \$4,158.07. That is the aggregate of the figures—given in the last column—shown on pages 94-96 of the State of Case. That, of course, is always the sorry experience of every dishonest trustee who is unmindful of the principles of trusteeship by misappropriation of the principal.

For the reasons here indicated, we respectfully urge that the Vice Chancellor should not have permitted the proposed sale in the face of the fact—uncontradicted on the record—that Fidelity was *equitably chargeable* with having enough monies on hand to pay the taxes, the non-payment of which occasioned Fidelity's bill. Of course, if interest accrued on those taxes which had remained unpaid, Fidelity should pay the interest also for it cannot profit from its own misconduct.

CONCLUSION.

We respectfully urge that that portion of the Decree from which we have appealed—to wit, the decretal portions thereof marked #1, #2 and #3, which authorize and direct the sale of 561 Broad Street, Newark, N. J.—be reversed.

Respectfully submitted,

ELIAS A. KANTER,
*Of Counsel with Natalie B. Dalton,
et als., Appellants.*

CONCLUSION

The results of the present study are in agreement with those of other workers who have shown that the rate of the reaction is first order with respect to the concentration of the reactants and that the reaction is catalyzed by the presence of water.

The rate of the reaction is independent of the concentration of the catalyst and is also independent of the concentration of the solvent. This is in agreement with the theory of the reaction proposed by the author.

The activation energy of the reaction has been determined and is found to be 12.5 kcal/mole. This is in agreement with the values reported by other workers for the reaction of the same type.

The present study has shown that the reaction is a simple bimolecular reaction and that the rate of the reaction is first order with respect to the concentration of the reactants and that the reaction is catalyzed by the presence of water.

The results of the present study are in agreement with those of other workers who have shown that the rate of the reaction is first order with respect to the concentration of the reactants and that the reaction is catalyzed by the presence of water.

The present study has shown that the reaction is a simple bimolecular reaction and that the rate of the reaction is first order with respect to the concentration of the reactants and that the reaction is catalyzed by the presence of water.

New Jersey Court of Errors and Appeals

Between

FIDELITY UNION TRUST COMPANY,
(formerly Fidelity Trust Com-
pany) as substituted trustee,
etc.,

Complainant-Respondent,

and

MARY ESTELLE SAYRE, *et als.*,
Defendants-Respondents,

NATALIE B. DALTON, MARJORIE M.
WALLWORK, DOROTHY A. HOL-
THUSEN, and DUDLEY O. SAYRE,
JR. (substituted in place of
the Original appellant, Dudley
O. Sayre),

Appellants.

On Appeal from
the Court of
Chancery.

BRIEF OF COMPLAINANT- RESPONDENT.

Preliminary Statement.

The appellants failed to include in their State of Case, the opinion of Vice-Chancellor Stein in the Court of Chancery below. As it contains findings of pertinent facts established at the hearing and the statutes and rules of law applicable thereto, we set it forth verbatim to wit:

STEIN, V. C.

Fidelity Union Trust Company, substituted trustee under the last will and testa-

ment of Marcus Sayre, deceased, prays for construction of the will and for instruction.

The 'Eighth' clause of the will directs that upon the death or re-marriage of testator's wife, his executors and trustees are to hold the store and premises known as No. 490 Broad Street, the store and premises known as No. 492 Broad Street, and also the premises known as No. 561 Broad Street, all in Newark, in trust for his daughter, Mary Estelle Sayre, for her sole and separate use and to permit her to take and receive the rents, issues and profits, after the payment of management charges etc., for and during the term of her natural life. Upon her death, her share should be distributed to her lawful issue and in default of issue, it should fall into the residue of the estate and be distributed in the same manner.

The 'Ninth' clause distributes the residue on the death of testator's wife to his three sons, Henry N., Chauncey B., and Dudley O. Sayre; and the 'Tenth' clause provides that in case any of the sons of the testator should die before any of the payments provided for therein should be payable, leaving issue, then the same should be made to the children of such son and to the child of a deceased child.

The widow has since died. Mary Estelle Sayre is living and unmarried. Chauncey B. Sayre died leaving issue. Henry N. Sayre has since died; and Dudley O. Sayre is alive.

The parties interested herein are the present life tenant, Mary Estelle Sayre, Dudley O. Sayre and his issue, and the issue or representatives of the other sons. All are joined as defendants.

The complainant was appointed administrator c.t.a. and substituted trustee on September 25, 1914 and has been administering the estate of Marcus Sayre since its appointment, including the properties specified in the 'Eighth' clause of the will. While the 'Sixth' clause of the will vests a power of sale in the executors and trustees, the language of the 'Eighth' clause appears to

render this power inapplicable to the properties in Newark held in trust for Mary Estelle Sayre.

By reason of the financial and economic depression commencing in 1929, and continuing thereafter, the property at No. 561 Broad Street has failed to produce an income either proportionate to its value or sufficient to pay the taxes and other expenses of maintenance. While the trustee has at all times made efforts to keep the property rented at a rent which would pay the carrying charges and produce a surplus net income, it has been unable to do so and by reason of the foregoing, tax arrearages accumulated and in October, 1941, the premises were sold by the City of Newark for non-payment of taxes to Charles E. Cameron, who is the president of Lauter Humana Co., the present tenant, under lease expiring May 30, 1946. The rentals payable under this lease are barely sufficient to pay the current taxes and other operating charges and are wholly inadequate for the purpose of satisfying the arrears represented by the tax sale certificate, which now is subject to foreclosure. There is no other income from the trust fund established for Mary Estelle Sayre nor is there adequate provision afforded by the will or by the testator's estate for the payment of taxes; whereby the interests of the life tenant, as well as the estates in remainder may be injured, impaired or completely destroyed, thus giving rise to an emergency not contemplated by the testator.

The bill alleges that the trustee entered into a contract to sell the property to Charles E. Cameron, Jr. for the sum of \$16,262 in cash, the sale to be conditioned upon the authorization of this court. The contract requires the trustee to either discharge all existing tax arrearages, including those represented by tax sale, or in the alternative to make allowance for the same from the purchase price. If the sale is consummated, the complainant would receive net proceeds of approximately \$5,000. It further appears that complainant has en-

deavored to find purchasers for the property, but has received no other offers worthy of serious consideration and believes that this sale is for the best interests of the estate.

No. 490 Broad Street and No. 492 Broad Street have buildings of a business or commercial character, but neither of them are presently producing income. Because of the economic depression, both the extent of occupancy as to area and rental value have progressively diminished and both properties are now vacant. They are in poor condition and are not suitable for renting without extensive repairs and rehabilitation and the trustee is without funds to make them tenantable.

The No. 490 Broad Street property was sold to the City of Newark for non-payment of taxes for the years 1933-1937, inclusive. Nothing has been paid on account of same nor have subsequent taxes been paid. There is due the total sum of approximately \$10,700 on account of unpaid taxes, exclusive of interest and costs.

The No. 492 Broad Street property was sold to the City of Newark for non-payment of taxes for 1934-1937, inclusive. Nothing has been paid on account of same nor on account of subsequent taxes, and there is due the total sum of approximately \$10,600, exclusive of interest and costs.

It appears that rental conditions are not favorable in this part of the City of Newark, and even if funds were available from the trust or otherwise, the expense of rehabilitating the properties to make them income producing would be so great that the value of the same, as improved, would not be equal to the tax charges. The trustee has endeavored to sell the properties but has received no offer worthy of serious consideration and it is not likely that any will be received. By reason of the foregoing the interests of the life tenant as well as the estates in remainder will probably be lost. The continued retention of these properties requires funds for insurance and other protection, for

which no income is available. This situation has likewise given rise to an emergency not contemplated by the testator.

As to No. 561 Broad Street, the complainant prays that the will of Marcus Sayre be construed to the end that it may be advised whether it has a power of sale and if it has, then that it may be advised whether it should sell this property in accordance with the terms and conditions of the contract herein referred to.

Complainant further prays that if the will be construed to the end that the complainant has no power of sale, then it be advised whether the property may be sold and conveyed in accordance with the contract under the inherent jurisdiction of the Court of Chancery where an emergency has arisen, or, pursuant to the provisions of *N.J.S.A. 3:35-1* authorizing the sale by a fiduciary of a devise in trust encumbered by the lien of a tax or assessment or a tax sale where no adequate provision is afforded by the testator's estate for the payment of the same.

As to No. 490 and No. 492 Broad Street, complainant prays that it be advised whether it has a power of sale with respect thereto and if it has not, whether it may sell the property at public auction pursuant to the inherent powers of the Court of Chancery where an emergency has arisen or pursuant to the provisions of *N.J.S.A. 3:35-1*.

The bill further prays that if it should be authorized by this Court to sell No. 490 and No. 492 Broad Street at public auction but should be unsuccessful, then that this Court, pursuant to *N. J. S. A. 3:17-8.2 et seq.*, may authorize and direct the complainant to abandon the same.

Some of the beneficiaries filed answers to the bill of complaint. None of them other than Dudley O. Sayre, controverted the allegations of the bill of complaint or denied or disputed the relief prayed for by the complainant. The answer of Dudley O. Sayre denied many of the material allegations in

the bill of complaint, and counterclaimed against the Fidelity Union Trust Company, as trustee, and in its individual capacity, charging the complainant with breach of trust in the administration of the trust estate in various particulars. Complainant moved to strike out the counterclaim as not being germane to the relief prayed for by it, and on the hearing of this motion, an order was advised by Vice Chancellor Bigelow on April 11, 1944, which, among other things, directed that a separate hearing should be had upon the cause of action set forth in the counterclaim and provided that complainant have the right to apply for an order of reference of the cause forthwith, notwithstanding the fact that issue had not been joined upon the cause of action alleged in the counterclaim, thus limiting this hearing now before me to the allegations and prayers contained in the bill of complaint.

At the final hearing, complainant produced the following witnesses: John S. Bacheller, assistant trust officer of the Fidelity Union Trust Company; Charles F. Ellery, vice president; William J. Dalton of the Trust Company, an assistant in the administration of estates; and Joel L. Schlesinger, a real estate broker and appraiser. The factual allegations of the bill of complaint were substantiated by the proofs adduced at the hearing, and, in fact, no evidence was introduced to the contrary. It further appeared that the market value of No. 561 Broad Street was less than the consideration in the sale contract to Mr. Cameron. It also appeared with respect to No. 490 Broad Street, the amount due on tax liens and subsequent taxes to date, plus accrued interest was approximately \$16,577.39 and with respect to the No. 492 Broad Street property, the figure was approximately \$15,416.29. At the time of the hearing, part of No. 490 Broad Street was rented for \$25 a month, and the sign privileges on No. 492 Broad Street rented for \$7.50 a month. Both properties had been in possession of a rent

receiver for the City of Newark since December, 1943. The tax arrearages covering both properties were greatly in excess of their current market values.

Mr. Elias Kanter, on behalf of the defendant, Dudley O. Sayre, on cross examination attempted to elicit information relating to the management of the administration of the trust estate by the trustee. Questions to this end were objected to on behalf of the complainant upon the ground that they related to issues not raised by the bill of complaint. These objections were sustained by the Court.

Dudley O. Sayre, on the stand, stated that he was willing within a week to take an assignment of the tax lien held on the property at No. 561 Broad Street, Newark, pay the full amount, and hold the lien without foreclosure during the lifetime of his sister and to give her the income which the property would produce either by sale or rental. This offer did not appear in any of the pleadings filed on behalf of Dudley O. Sayre nor was any application made to amend the same to conform to his statement.

The hearing in this matter was held September 13, 1944. Thereafter no representation was made to the Court that Dudley O. Sayre had complied with this offer or made any effort to do so, and after more than a month had elapsed, complainant's counsel was advised by the Court to submit a decree providing for the sale of the premises No. 561 Broad Street, Newark, New Jersey, to Charles E. Cameron, Jr., for the sum of \$16,262.00 in cash, which offer represents the fair and reasonable cash market value of the property, the Court having concluded that retention of the premises for a higher offer in future was not warranted; the terms and conditions of the sale to be those contained in the contract between the parties dated June 11, 1943, and directed that the substituted trustee execute deeds and instruments in consummation of the sale, and directed the trustee to sell the premises known as No. 490 and No. 492 Broad

Street, Newark, New Jersey, at public auction to the highest bidder, the expense thereof to be met from the proceeds of sale of No. 561 Broad Street, and that at such auction the complainant be authorized to reject any bids and report any bids which it shall consider worthy of consideration to the Court for confirmation, and if no bids should be received for either of said properties at auction or otherwise or if received and not confirmed by the Court, the complainant may abandon the properties or such of them as shall not be sold and the sale confirmed pursuant to N. J. S. A. 3:17-8.2 *et seq.*

On notice to parties in interest and annexed to such notice complainant served the form of decree which was submitted on October 24, 1944, at which time all parties in interest were represented by counsel. No objection being made to the form or substance of the decree, the same was entered.

ADDENDUM.

On November 13, 1944, Dudley O. Sayre served on complainant a notice of application returnable November 24, 1944, for re-argument. Parties by their counsel appeared as well as James LeRoy Lafferty, counsel for Charles E. Cameron. Dudley O. Sayre through his counsel offered to acquire the tax sale certificate from Mr. Cameron by assignment, stating that he would not foreclose the same during the life of the present life tenant and that he would undertake to pay her so long as she lives \$150.00 per year. After hearing the argument of counsel, the Court advised that it would consider a petition for re-hearing if Mr. Sayre would deposit with the clerk of the court \$5,000.00, which sum was so fixed at the suggestion of his counsel, providing the same would be deposited before December 10, 1944. The deposit was not made but instead on January 24, 1945, Dudley O. Sayre filed notice of appeal and a petition of appeal on February 24, 1945 to the Court of Errors and Appeals, and hence this memorandum is now prepared and filed.

The foregoing opinion has not yet to our knowledge been officially reported, but, except for the addendum, it was published in 41 Atl. (2nd) at page 388.

We are advised that the motion to substitute Natalie B. Dalton, Marjorie M. Wallwork, Dorothy A. Holthusen, Dudley O. Sayre, Jr., and Mary E. Sayre, widow of Dudley O. Sayre, individually and as executrix of his estate, as party appellants in the place of Dudley O. Sayre, since deceased, was granted and that the motion of complainant-respondent to dismiss the appeal will be held for consideration with the main case.

The respondent's motion to dismiss was based on the following grounds:

1. The petition of appeal from the decree of the Court of Chancery filed by the late Dudley O. Sayre in his lifetime, was not filed within the time limited by Rule No. 24 of this Court;

2. The parties who applied for substitution in his place and stead were concluded by their failure to appeal from the foregoing decree in their own right.

We assume, inasmuch as the motion for substitution is dependent upon the final determination of the respondent's motion to dismiss the appeal, that the substitution is provisional, subject to the disposal of the respondent's motion.

Our arguments in support of the respondent's motion and in opposition to the appellants' motion have been set forth in our notice of motion now before this Court for consideration and we will not reiterate them except to invite the Court's attention to the pertinent provisions of the will of Marcus Sayre, particularly the "Eighth" clause (Case, p. 19), the "Ninth" clause (Case,

p. 21), the "Tenth" clause (Case, p. 22), and the "Eleventh" clause (Case, p. 23). The testator, upon the death of his widow, which in fact has occurred (Case, p. 114), directed the trustees to hold, among other assets, the premises known as No. 561 Broad Street, Newark, New Jersey, with the disposition of which this appeal is concerned, in trust, for his daughter, Mary Estelle Sayre, for life. She, in fact, is a party to this proceeding. On her death, her share is to go to her lawful issue and if she die without leaving issue, then the will provides that this share shall fall into the residue of the estate and be distributed as is directed with respect to the residue in his will. The testator set aside the three remaining parts of the estate for the benefit of his three sons, respectively, including Dudley O. Sayre, with the proviso that upon the death or remarriage of his widow, and when either of his sons, Chauncey and Dudley, should have attained the age of 35 years, then there shall be paid to them the balance of their shares. It appears that the balance of their shares has been paid to them, presumably according to the directions of the will (Case, p. 115).

This, then, suggests the question as to whether Dudley O. Sayre's interest, as remainderman, in the share set aside for Mary Estelle Sayre vests in him absolutely upon her death without issue, and passes to his estate, or is subject to be divested in the event that he should sooner die leaving children. Inasmuch as he has already received the balance of his share, a conceivable interpretation is that his ultimate share is not subject to be divested. On the other hand, the provision for substitution in the "Tenth" clause, distinctly provides that if any son die before the time when under the provisions of this will any payment directed to be made is payable, leaving lawful issue, then such payments shall be made to the child or children of such son.

The course of devolution of this interest cannot be determined until the death of the present life tenant. The immediate significance of this unresolved question is in the establishment of the identity of the parties who may legally prosecute this appeal in the place of Dudley O. Sayre. As we said in our motion, if the children of Dudley O. Sayre succeeded to his interest by way of substitution, then they are proper parties to this suit in their own right; and they were accordingly made such. They, however, did not take any steps whatsoever to appeal from the decree of the Court of Chancery and by their failure to so act, it is submitted that they are concluded from proceeding at this time. As to the executrix of the estate, so far as we know, there has been no application by her for substitution except a suggestion in the memorandum of the solicitors of the appellants opposing respondent's motion to dismiss the appeal, that this Court permit the widow to be added as an appellant. In any case, as we pointed out in our former memorandum, since Dudley O. Sayre did not comply with the law and the rules of this Court in connection with the appellate proceedings, she should have no greater right or standing.

**Statement Concerning the Cause Presently
at Issue.**

The prayers of the bill of complaint as to 561 Broad Street, Newark, New Jersey, may be summarized as follows (Case, p. 13) :

1. That the Court of Chancery advise the complainant-respondent whether the substituted trustee has a testamentary power of sale;
2. If it has such power, then that the Court may advise whether the substituted trustee

shall make sale thereof in accordance with the terms of the contract annexed hereto;

3. That if the Court finds that the substituted trustee does not have such a power under the terms of the will, then whether the lands may be sold under the inherent jurisdiction of the Court where an emergency has arisen not anticipated by the testator, or subject to an order of the Court made pursuant to the provisions of R. S. 3:35-1.

An answer was filed by Dudley O. Sayre (Case, p. 36) in which he denied some of the allegations of the bill of complaint. In the same pleading, he counterclaimed against the complainant-respondent in its individual capacity, in which he charges the complainant with the commission and omission of various acts in the administration of the trust estate to the alleged detriment of the trust and the beneficiaries. His charges may be briefly summarized as follows:

1. Failure to sell the property at an earlier period, commencing from 1929;
2. Failure to make prompt payment of taxes from 1928;
3. Failure to collect 1929 and part of 1930 rent arrearages from a defaulting tenant;
4. Payments of income to the life tenant in 1929 and 1930 when taxes were alleged to be in arrears;
5. Taking the statutory commissions on income in 1939 amounting to \$1,400;
6. Payment of taxes while tax liens were outstanding.

Dudley O. Sayre prayed that the complainant-respondent answer some 61 interrogatories an-

nexed to the counterclaim; that it be surcharged for the alleged losses sustained by the estate; that it be directed to pay unpaid taxes affecting the property in question; and that it be removed as trustee.

We invite the Court's attention to the interrogatories (Case, p. 59, *et seq.*). A reading and examination of the same will disclose that none of them have any bearing with respect to the relief prayed for by the complainant, that is—that the complainant-respondent be advised as to its powers and duties concerning the present sale of the property in question. It is submitted that their only purpose is to obtain material, if possible for the defendant to establish a cause of action against the Fidelity Union Trust Company personally.

In consequence of the motion to strike out the counterclaim, Vice-Chancellor Bigelow advised an order, which, among other things, directed that a *separate hearing* should be had upon the cause of action set forth in his counterclaim. The order further provided that the complainant-respondent should have the right to apply for an order of reference of the cause forthwith, notwithstanding the fact that issue had not been joined on the cause of action set forth in the counterclaim (Case, p. 80).

The complainant-respondent filed a special replication to the counterclaim (Case, p. 82) in which it denied all the charges of wrongdoing alleged by Dudley O. Sayre. It further gave complete explanations of the features of estate management which, if established would in fact and in law exonerate the trustee. This matter has not yet been heard.

We allude to the foregoing pleadings in this phase of the case not with a view to influencing the court in advance of hearing on the merits, but

merely to demonstrate that we cannot pass unchallenged the derogatory remarks of the appellants in their brief, relative to the conduct of the complainant-respondent when there is nothing before the court to establish the basis of such characterizations and innuendoes. In other words, the administration of the trust and the conduct of the trustee were not before the Court below and are not before this Court. The issues in the case were confined, it is respectfully submitted, to the following:

1. Do the facts show that the Court of Chancery had jurisdiction to authorize the proposed sale?

2. If such jurisdiction attached, was the sale proper under the circumstances?

The Court of Chancery found, as a fact, in its opinion (pp. 2-3 of this brief) and by way of recital in the final decree (Case, p. 165) that there was no power of sale under the will. The Court of Chancery further found that there was an emergency not anticipated by the testator that would impair the accomplishment of the testator's trust purposes, warranting the court in authorizing the trustee to deviate from the terms of the trust and to sell the property in question. This is in accord with the principles of law set forth in:

Pennington v. Metropolitan Museum of Art, 65 N. J. Eq. 11;

Price v. Long, 87 N. J. Eq. 578;

Hedges v. Hopper, 118 N. J. Eq. 359;

Trust Co. of New Jersey v. Glunz, 119 N. J. Eq. 73; Mod. 121 N. J. Eq. 593;

New Jersey National Bank & Trust Co. v. Lincoln Mortgage & Title Guaranty Co., 105 N. J. Eq. 557.

The Court further found that the facts brought the case within the purview of R. S. 3:35-1, which reads as follows:

“Whenever real estate is devised, conveyed to or held by (a) an executor or trustee in trust for any person for life or until the happening of some event specified in the instrument creating or continuing the trust, or (b) a trustee in trust with power to sell at a specified time or upon the happening of some event, or (c) a person for life or until the happening of some event named in the instrument creating such an estate, and such real estate (a) is, at the time of taking effect of the devise or conveyance, charged with the payment of a legacy, encumbered with a mortgage or subject to the lien of any judgment, tax or assessment, or (b) at any time thereafter, becomes chargeable with or subject to any judgment, tax or assessment, or (c) has been sold or shall be liable to be sold for taxes or assessments, and no adequate provision is afforded by the estate of the testator for the discharge, satisfaction or payment of such legacy, mortgage, judgment, tax or assessment, or none except out of income from the real estate affected, and, because of such a situation, the interests of the life tenant, *cestui que* trust or owners of the particular estate or of the estates in remainder or reversion may be injured, impaired or lost, the chancellor may, upon petition therefor by the fiduciary, *cestui que* trust, or owner and upon notice to all interested persons, order the fiduciary to sell and convey or mortgage such real estate, or some part thereof, as the chancellor may deem most beneficial to all parties in interest; or the chancellor may, when such real estate has been devised or conveyed to a person for life or until the happening of some event named in the will, appoint a trustee to sell and convey or mortgage such real estate, and the trustee for all said owners so appointed shall before making

sale, give security for the faithful performance of his duties as trustee, in such form and for such an amount as the chancellor shall order.”

Accordingly, the decree authorizing and directing the sale was in accordance with the foregoing findings.

The proofs amply support the jurisdictional requirements of both the rule of law established in this State and the statute above quoted, and were not challenged or questioned by the appellants at the hearing or in their brief.

POINT I.

The Chancellor did not erroneously debar the original appellant from cross examining Fidelity's witness.

Appellants in Point I of their brief (pp. 4-8) contend that counsel for Dudley O. Sayre was improperly denied the right of cross examination of complainant's witnesses, Bacheller and Ellery. Respondent submits that the record does not bear out appellants' contention.

The record shows that the witness, Bacheller, answered all questions put to him by Sayre's counsel on cross examination (Case, pp. 117 to 121). Appellants' point, as to this witness, is not well taken.

It may be noted at this point that Sayre's answer to the bill of complaint raised no question that the trustee "should have had" monies in hand for payment of the taxes (Answer, Case, pp. 36-40); and that the prior order of the Chancery court (not appealed from) directed that a separate hearing be had on the counterclaim (Case, p. 80, ll. 22-32; paragraph second of order).

The effect of that order was to limit the scope of the final hearing on the complainant's bill to the issues raised by the bill and answers thereto. That counsel and court both understood this limitation is apparent from the colloquy that followed Bacheller's cross examination (Case, pp. 117-121). Counsel for Dudley O. Sayre conceded, and very properly, that he could not go into the question of the accounting, as is shown by the following excerpt from that colloquy (Case, p. 120, ll. 24-35):

"Mr. Kanter: I don't want to be shut off from my cross examination.

"The Court: You will be shut off this morning on the question of the accounting—

"Mr. Kanter: I am not trying to go into the accounting.

"The Court: —and the surcharge.

"Mr. Kanter: I am trying to show the facts showing no necessity of selling this property.

"The Court: That is something else."

The court below was therefore entirely correct in ruling that the issues involved in the counterclaim could not be gone into on the hearing on complainant's bill. In view of counsel's statement to that court that he was "not trying to go into the accounting", but was merely "trying to show the facts showing no necessity of selling this property", there is an inconsistency in the appellants' argument that he should have been permitted to try out, by indirection in the suit then on trial, matters which concerned the trial of the counterclaim.

Appellants contend that Sayre's counsel was improperly denied the right to cross examine the witness, Charles F. Ellery (Brief, pp. 6-8). Here, too, the point is not well taken.

Ellery was asked, on cross (Case, p. 137, ll. 27-28):

“Q. Did you ascertain, for example, that you had not collected the Jacob Doll notes, while——”

Objection thereto was sustained.

Counsel for Sayre next asked the witness the following question (Case, p. 138, ll. 14-18):

“Q. Didn't you, in 1937, prior to the time that this property was sold, have in your trust account some \$1,400?”

The witness was directed not to answer, and objection was taken.

Both questions asked were irrelevant and immaterial. The Doll settlement was made in 1930. The other question went back as far as 1937. Both matters pertained to the counterclaim and accounting. The two questions asked on cross examination of this witness related to matters too remote to have any materiality or relevancy to the points whether the trustee had funds in the trust in 1944, and whether at the time of hearing a necessity had arisen to sell the property. The two questions likewise were irrelevant to the other issues raised by the pleadings, i.e., whether or not the will gave a power of sale during the life of the life tenant; whether or not an unanticipated emergency had arisen which would wholly defeat the testator's objects unless a departure from the terms of the trust be authorized and a sale be permitted; whether or not by the large tax arrears and the tax sale the interests of the *cestuis* for life and in remainder might be injured, impaired or lost; whether or not a sale was the most beneficial course to all parties in interest; and whether or not the acceptance of Cameron's offer was to the best advantage of those parties.

Complainant had introduced no testimony concerning matters to which the Doll notes were per-

tenant, nor concerning matters respecting the funds in the trust in 1937. The two questions asked were not proper cross examination, and were obviously based on the charges made against the trustee in its individual capacity in the counterclaim of Dudley O. Sayre (Case, pp. 48-49). If any evidence concerning those matters might properly be admitted at all, such evidence should have been part of the defendant Sayre's proofs on his own defense.

We may note here that the \$1,400 referred to in counsel's question represented trustee's commissions earned on income (Case, p. 111, ll. 30-35). The law does not require a trustee to give up such a reserve for income commissions, nor to repay income commissions received, for the purpose of paying off taxes on trust property or other like administration expenses of the trust. We do not understand that appellants contend that the law requires that sacrifice of a trustee.

The Vice Chancellor's rulings were correct. And if appellants deem them somewhat brusque, there may have been provocation.

Hackensack Trust Co. v. Kelly, 120 N. J. Eq. 596 (affirming 118 N. J. Eq. 587) was a case in which a trustee filed a bill for instructions concerning payment of taxes on properties held in trust. Certain interested parties later filed a petition alleging breaches of trust, seeking an accounting and other relief. This court said (p. 599):

“Certainly a petition seeking the removal of a trustee, joinder of new parties and for an accounting, is in no way cognate or germane to a suit brought by a trustee for instructions from the court.”

There is further good reason why, on an application of the kind here made for instructions con-

cerning the sale of property, a beneficiary may not seek to inject a trial of charges of mismanagement against the trustee. When a trustee comes into court because of the danger that the trust property may be lost, the danger may be greatly increased by the delay incident to trial of a side issue of alleged mismanagement.

POINT II.

Point II of appellants' brief is not well founded in fact or in law.

Point II of appellants' brief is that—"Fidelity, as trustee, has in its possession—or should have in its possession—sufficient monies to pay the tax liens" (Brief, p. 8, *et seq.*).

The appellants' point involves alternative propositions: First, that the trustee had funds. Second, that it "should have had" funds. The trustee denies that either proposition is well founded in fact or in law. The second alternative, moreover, is irrelevant to this suit and to this appeal.

As to the first alternative: The tax lien amounted to nearly \$11,000 (Case, p. 163, ll. 3 to 20). At the time of the hearing (September 13, 1944) there was a net balance of cash in the trust fund of \$2,557.19, which was subject to a reserve for trustee's commissions at 5% amounting to \$2,003.85, leaving a net income on hand of \$553.34 (Case, p. 142, l. 30 to p. 143, l. 10, witness William J. Dalton). Those facts are not in dispute. They dispose of appellants' contention that the trustee had monies to pay the tax liens. \$553.34 will not pay off \$11,000.

As to appellants' next contention that the Fidelity as trustee *should have* in its possession suffi-

cient monies to pay the tax lien: That, again, is a matter involved solely in the counterclaim, which still remains to be heard. It does not fall within the scope of the issues raised by the pleadings of the case heard by the Vice-Chancellor. The contention was irrelevant there, and is irrelevant here. The appellants' brief cites or refers to numerous portions of Sayre's interrogatories on his counterclaim and of the trustee's answers thereto, to support their claim of error in the rulings of the court below. However, those answers to interrogatories were no part of the pleadings or proofs in the case which the Vice-Chancellor was engaged in trying. If he failed to consider, or to rule on, alleged evidence which was not before him at all, that would not be reversible error.

To support the appellants' claim that the trustee "should have" had monies in hand, their brief contends (1) that the trustee, in 1939, paid over to itself the sum of \$1,400, a reserve for income commissions; and (2) that in 1930 the trustee might have collected some \$4,402.12 from Jacob Doll & Sons, Inc., a former tenant, which was lost because of its failure to distrain for rent.

The trustee's replication in answer to the counterclaim fully denies any accountability with respect to those transactions, and its answers to the interrogatories explain the transactions. While we feel that the appellants' contentions are not relevant on this appeal, their character makes it appropriate to touch briefly on those transactions here.

FIRST: The \$1,400 in question represented a reserve for income commissions earned. By the statute relating to fiduciaries' commissions passed in 1939 (P. L. 1939, pp. 546-547; R. S. 3:11-2, as amended) trustees were authorized to take their

“income commissions *as of the time* or when the income *was* or is *received* by them without allowance thereof by the court” (Italics ours). The effect of the act was to permit a fiduciary, without court allowance, to withdraw a reserve for income commissions theretofore earned, i.e., he might take them *as of* the time when the income was received. That answers appellants’ argument that the trustee was not entitled to withdraw commissions. A further answer is that a trustee is not obliged to pass over its own commissions in order to pay taxes on the trust property.

SECOND: The trustees’ version of the Jacob Doll transactions appears in its replication to the counterclaim (Case, p. 85, l. 18 to the end of p. 86). Jacob Doll & Sons was tenant of 561 Broad Street in 1930. It defaulted in rent, including the taxes which its lease obligated it to pay as part of the rent. The trustee made a settlement with Doll, the tenant agreeing to surrender the premises on June 1, 1930 and to give notes for \$4,902.12 for the rent arrears. By the tenant’s surrender, the property was rid of an unsatisfactory tenant and freed for a new tenancy. The settlement was a matter of business judgment, and appeared wise to the trustee. There was no reason to assume that distraint would have gained anything of greater advantage to the trust; and it would not have freed the property. Although Doll later became bankrupt, and only about \$632 was collected on the notes, that created no presumption of negligence on the part of the trustee.

In any event, both those matters are ones for hearing on the counterclaim.

Appellants have prepared, and have listed on page 10 of their brief, schedules purporting to show for each year from 1929 to 1943 the amount of the rents collected, the amount of the taxes

assessed, and the amount of the operating expenses for the premises No. 561 Broad Street. Their source was from the complainant's answer to the interrogatories attached to Sayre's counterclaim, which were not part of the record of the case before the Vice Chancellor. Appellants seek to show, by their argument, that the rents received from the premises came within \$1,733.77 of enough money to pay the taxes; such contention being based on their own set-up of the figures and their own interpretation thereof. Appellee here categorically denies the correctness of appellants' claims. It has been already noted that, in point of fact, the taxes were nearly \$11,000, and that there was but \$553.34 on hand to meet them. Several omissions and inaccuracies in the appellants' schedules or columns, and in their set-up of the figures, are immediately apparent. Appellants start by listing the gross rents of \$8,309.09 for the year 1929, and infer that the full amount was available for payment of taxes for that year and those following. There was no income deficit in 1929, and under the will, the life tenant became entitled to the bulk of those rents. Appellants overlook the payments made to the life tenant, an omission that throws their mathematics out of line by some \$5,000 or so. Income payable to the life tenant in one year of course may not be considered as available for use against deficits which occur only in later years. The income deficit did not begin until 1930. It increased thereafter with the passing years. Next, appellants fail to take into account the fact that the trustee's income commissions at 5% are deductible from the rents. That gives a further deduction of \$2,000 or more from the rents. It thus appears that the appellants have overestimated by some \$7,000 or so the amount of rents available for payment of taxes. Finally,

the appellants, in their column of taxes assessed, list only the tax principal, omitting the interest that had accrued. Their brief claims that interest amounted to \$4,158.07 (p. 16). Here is an underestimate by appellants of taxes payable of probably several thousand dollars. The foregoing illustrate some of the omissions and inaccuracies in the appellants' figures. They put the appellants' calculation out by some \$10,000 to \$11,000. Doubtless there are other inaccuracies, but this appeal is hardly the time or the place to thresh out those matters.

Appellants' whole argument on this matter is based on misapprehension of the facts. The actual proofs were that tax arrears were nearly \$11,000 (Case, p. 163, ll. 18-20); and that there was only \$553.34⁴ income on hand (Case, p. 142, l. 30 to p. 143, l. 9).

POINT III.

The sale is advantageous to the trust.

Joel L. Schlesinger, realtor, testified that 561 Broad Street, was, in his opinion, worth \$15,000 (Case, p. 149, ll. 27-30) and supported his conclusions by comparable sales and income returns (Case, p. 149-150). The contract price was more than that—\$16,262 (Case, p. 28, ll. 12-15). His figure was not challenged and there is no evidence that the sale price was not fair and the best obtainable. Appellants apparently abandon the ground stated in their petition of appeal, that the court should have adjudged that "it was not to the advantage of the estate of Marcus Sayre, deceased, and to the beneficiaries" that the property be sold to Cameron at the price named (Case, p. 172, ll. 17-24). They did not argue it.

The trustee seeks only that the best interests of the estate be served. Receiving the Cameron offer, it deemed it to be the best obtainable, and one which would be advantageous to the trust. It entered into a contract, calling for Chancery approval of the sale, and agreeing on its part to proceed forthwith to submit the proposal to that court (Case, p. 31, ll. 24-30). It did so, and the beneficiaries had the opportunity to present their views. Apparently the beneficiaries were unwilling or unable to redeem from the tax lien. Dudley O. Sayre, since deceased, was the sole party among all the beneficiaries who disputed the relief prayed for by the trustee (Opinion, Vice-Chancellor Stein, this brief, p. 5). At one time he felt that he could gather in the tax lien (Case, pp. 160-161); but nothing came of it.

The sale will salvage something for the trust, which otherwise may be lost.

Dudley O. Sayre did not, at any time, offer proofs or advance arguments that the sale was not made at the best price that could be obtained or that a deferment of the sale would afford an opportunity to dispose of the property to better advantage in the future. The trustee has not deemed that it would be justified in speculating on the possibility of a better price hereafter as against the risk of total loss. The court below, for its part, deemed such speculation to be unwarranted.

Conclusion.

This appellee, the trustee, therefore submits that there was no prejudicial error in the decree and that it should be affirmed in all respects.

HOOD, LAFFERTY & EMERSON,
Solicitors for Complainant-Respondent.
WALLACE R. CHANDLER, JR.,
Of Counsel.

The trustee sought that the best interests of the estate be served. It is his duty to offer it deemed to be the best obtainable, and one which would be advantageous to the trust. It entered into a contract with the beneficiary for the purchase of the property, and offering on its part to proceed forthwith to execute the proposal to that effect (Case, p. 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

which otherwise may be lost. Dudley O. Saxe did not, at any time, offer proofs or advance arguments that the sale was not made at the best price that could be obtained or that a detrimental sale would be made if an opportunity to dispose of the property to better advantage in the future. The trustee has not shown that it would be better to speculate in another purchase of the property at a higher price than the price at which it was sold. The court below, for the part deemed such speculation to be unwarranted, is in error. (Cases, p. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

Conclusion. This appellee, the trustee, therefore submits that there was no prejudicial error in the decree and that it should be affirmed in all respects.

WALTER R. GARDNER, JR.,
 Attorney for Complainant Respondent.
 Of Counsel.

New Jersey Court of Errors and Appeals.

Between

FIDELITY UNION TRUST COMPANY, etc. as substituted trustee, etc.,
Complainant-Respondent,

—and—

MARY ESTELLE SAYRE, *et als.*,
Defendants-Respondents.

On Appeal from the Court of Chancery.

NATALIE B. DALTON, MARJORIE M. WALLWORK, DOROTHY A. HOLTHUSEN, and DUDLEY O. SAYRE, JR. (substituted in place of the Original appellant, Dudley O. Sayre),
Appellants.

REPLY BRIEF OF APPELLANTS

NATALIE B. DALTON, *et al.* (including Mary E. Sayre, individually and executrix, etc.).

Prefatory Statement.

The brief presented in behalf of Fidelity Union Trust Company, substituted trustee, etc. of Marcus Sayre, deceased, contains some decidedly mistaken—and indeed, glaringly erroneous—statements. We think they should not go unnoticed and therefore respectfully request the consideration of this reply brief. We shall attempt to point out, in as brief compass as possible, Fidelity's principal lapses and deviations either from accuracy or from reason.

Re Fidelity's Argument to Dismiss the Appeal.

This Court, on May 10, 1945, decided:—

“Motion to substitute as parties appellant Natalie B. Dalton, Marjorie M. Wallwork, Dorothy A. Holthusen, Dudley O. Sayre, Jr., and Mary E. Sayre, widow of Dudley O. Sayre, individually and as executrix of his estate, is granted.

“Motion to dismiss will be held for consideration with the main case.”

Accordingly, this appeal is now being prosecuted—which Fidelity's brief completely overlooks—not merely by the four children of the late Dudley O. Sayre (our deceased client), they being four of the grandchildren of the late Marcus Sayre (under whose will Fidelity is operating), *but the appeal is also being prosecuted by Mary E. Sayre, widow of Dudley O. Sayre, individually and as executrix of his estate.*

What we have just stated is completely ignored by Fidelity in making its argument for the dismissal of the appeal, but, as will hereafter appear, it should not be ignored.

What we have thus stated is likewise of importance in order to prevent some confusion. In connection with its argument for the dismissal of the appeal (near the top of page 10 of its brief), Fidelity refers to a Mary Estelle Sayre who was the *daughter of the late Marcus Sayre*; she is an unmarried lady. She is not to be confused with Mary E. Sayre—our client—who is the widow of the late Dudley O. Sayre, our deceased client.

Taking up a consideration of Fidelity's argument (pp. 9-11 of its brief) for the dismissal of the appeal, it is observed that that is based on two grounds, to wit:—

1. The petition of appeal was not filed "within the time limited by Rule 24," that is, the petition was not filed within *twenty* days after the filing of the notice of appeal.
2. The parties who asked to be substituted in the place of Dudley O. Sayre (who died during the prosecution of the appeal, and *after* the petition of appeal had been filed) are "concluded by their failure to appeal from the foregoing decree in their own right."

The petition of appeal was filed within *thirty* days after the filing of the notice of appeal, rather than within the twenty days prescribed by Rule 24 of this Court. That dereliction on our part was heretofore urged by Fidelity as ground for dismissal. While we admit the venal sin, we hope that this more compassionate Court may forgive our trespass because of exculpatory circumstances. By the *uncontradicted* affidavit (heretofore filed with this Court in previously resisting Fidelity's motion to dismiss), these facts were shown:—

- A. Dudley O. Sayre's notice of appeal was filed on January 24, 1945.
- B. Dudley O. Sayre's petition of appeal was filed on February 24, 1945.
- C. Dudley O. Sayre died on March 11, 1945.
- D. For *several months* prior to his death, Dudley O. Sayre "was extremely ill, confined to his bed and practically constantly under the administration of oxygen. During the last three weeks of his lifetime, he

was *in extremis*, comatose or semi-comatose during most of the time, and so ill that it was impossible for" his counsel to confer with him or to obtain funds wherewith to make the deposit for security of costs.

It is respectfully suggested that those practical difficulties show sufficient cause for failure to comply with the strict letter of Rule 24 of this Court.

Of course, "the letter killeth, but the spirit giveth life." That teaching is undoubtedly the foundation for Rule 45 of this Court, which we abbreviate:—

"The rules * * * may be relaxed or dispensed with by the court in any cases where it shall be manifest to the court that a strict adherence to them will work surprise or injustice."

On the basis therefore of II Corinthians 3:6, and its reiteration in Rule 45 of this Court, we respectfully urge that Fidelity's contention should not be adopted by this Court. Fidelity has in no way been injured by the ten day delay in the filing of the petition of appeal for this appeal is presented at the first term following the entry of the Chancery decree. The appeal could not have been argued any sooner.

Taking up Fidelity's second and last ground for dismissal, we think it will be found that Fidelity is "blowing both hot and cold". As soon as possible after the death of Dudley O. Sayre, we moved in this Court that the *four grandchildren* of the testator, Marcus Sayre—those *four grandchildren* being Natalie B. Dalton, Marjorie M. Wallwork, Dorothy A. Holthusen and Dudley O. Sayre, Jr.—to be substituted as

parties appellant in the place of the original, but then deceased, appellant. We did this upon the view that the remainder estate theretofore vested in the late Dudley O. Sayre had become vested—under the terms of the will of Marcus Sayre—in those four grandchildren since the life tenant (Mary E. Sayre, the daughter of Marcus Sayre) was still alive. That testator, paraphrasing the language of his will, directed “If Dudley O. Sayre should die before the termination of the life estate, I want the portion which would have gone to him to be paid to his children”. We viewed that as the common case of a substituted beneficiary, illustrated by such cases as:—

- Clark v. Morehous*, 74 N. J. E. 658;
Redmond v. Gummere, 94 N. J. E. 216;
Rippel v. King, 126 N. J. E. 297; affirmed,
 128 N. J. E. 179;
Schumacher v. Howard Savings Institution, 128 N. J. E. 56; affirmed, 131
 N. J. E. 581.

In opposition to our aforesaid motion, *Fidelity insisted*—and we here refer to page 34 of *Fidelity's* booklet on its motion to dismiss the appeal—that, upon its “construction” of the will of Marcus Sayre, “the only party who should be substituted in his (Dudley O. Sayre’s) place would be his executrix and residuary devisee, Mary E. Sayre”. Desiring to avoid fruitless discussion over a minor procedural question, we then moved that Mary E. Sayre, executrix and individually, be added, *and this Court thereupon permitted her inclusion as a party appellant*. We refer to this Court’s decision, given at the very outset of this brief. *Fidelity*, however, ignores all this and *erroneously insists* that the appeal should be dismissed because Mary E.

Sayre, individually and as executrix under the will of Dudley O. Sayre, was not made a party appellant. Fidelity's incorrect statement of fact may well be taken as the touchstone of the soundness of its position.

It is true that the other four appellants now before this Court—the four grandchildren of the late Marcus Sayre—did not appeal from the final decree. There was good legal reason for that: *Their father was alive and it was only he who had the legal interest as the vested remainderman; they had no legal interest in the subject matter of the suit.* All that those four grandchildren then had was the *possibility* of becoming the substitutionary devisees to take (after the death of the life tenant, Mary E. Sayre) *if* their father was not then alive. Clearly, my son—because he will become my heir (if I die intestate) and will become my devisee (if I make an appropriate will)—is *now* possessed of a “legal interest or estate” in realty which I may have acquired through the will of some decedent. Clearly, my son is neither a necessary or proper party in any litigation concerning that real estate; he cannot be heard to defend his “possible” interest, or to resist a decree that might be made against me, or to appeal from such adverse decree. My son would not become vested of some title because the complainant should choose to make him a “party” to the litigation; and, being made a party, my son could safely ignore, and properly should ignore, the suit. Of course, if there were an adverse decree against me and I should die after having initiated an appeal, my son would then—and only then—become vested with a “legal interest” which he might assert by being substituted as the appellant in my place.

So, in the case at bar, Marcus Sayre's four grandchildren (the four children of Dudley O. Sayre) had no *legal interest* while this suit was pending in the Court of Chancery. The question was not even discussed in that Court. The matter was in no way adjudicated. Even Fidelity admits:—

“The course of devolution of this interest cannot be determined until the death of the present life tenant.”

Fidelity's brief, top of page 11.

We stress that Fidelity thus admits that the question of the devolution of this interest—using Fidelity's own language—can *not* be determined “*until the death of the present life tenant.*” That time has not yet arrived. Despite this, Fidelity now urges that this Court forget its functions as a court of review and—in the course of an incidental motion to dismiss an appeal—*now determine what is incapable of present determination.* Will this Court act as a *nisi prius* court? Will this Court act in the absence of notice to all parties entitled to be heard on that question? Will this Court, without a resolution of the facts and without hearing from the parties entitled to be heard, dismiss an appeal depending on unsettled and presently undeterminable factual and legal basis?

Accordingly, we respectfully suggest that Fidelity's motion to dismiss the appeal should be denied.

Did Not the Vice Chancellor Unjustly Foreclose Cross-Examination?

We have contended in our main brief (page 7 thereof, particularly)—and we notice that Fidelity's brief does not in any way contradict—

that the *denial of cross-examination constitutes reversible error.*

Since the denial of cross-examination constitutes reversible error, Fidelity essays to minimize the grievance, substantially on the basis that the cross-examination was "irrelevant." Let us consider that briefly.

The reason, and the *only reason*, given in the bill of complaint for Fidelity now seeking permission to sell 561 Broad Street was:—The low rentals from 1929 on had prevented Fidelity from paying the taxes.

To substantiate that allegation, Fidelity called two witnesses, Bacheller and Ellery. Their testimony was elicited by the complainant with the view of establishing the allegations of the bill. Questions tending to negative what those witnesses had testified to were clearly proper; such questions were legally relevant. "*Irrelevancy*" was not the ground urged for the exclusion of the answers, either by counsel or by the Vice Chancellor. Fidelity's present contention of irrelevancy is a forced argument. As this Court will observe, the Vice Chancellor *sua sponte* even ruled out—under threat of holding the cross-examiner in contempt—any argument on the propriety of the questions addressed to Ellery, after having earlier excluded cross-examination of Bacheller on the alleged "records" to which Bacheller was permitted to testify on direct examination.

We respectfully submit that, under the circumstances presented by this record, there was nothing that the cross-examiner could do but to submit to the erroneous rulings of the Vice Chancellor, relying upon this Court ("the last resort in all cases") to correct the injustice. A trial judge enjoys—and is entitled to enjoy—a commanding position over the litigants and counsel before him; we would be the last to gainsay that.

However, much as we respect that principle, not merely by adulation but in practice also, we most respectfully deprecate and disapprove what the Vice Chancellor did in this case. In our humble judgment, such conduct does not comport with the dignity of any court, much less that of the Court of Chancery. No judge should out of hand rule out testimony, merely because he has the *power* to do so. Fidelity's brief, faintly essaying justification for the "brusque" rulings of the Vice Chancellor, intimates that "there may have been provocation." The record before this Court speaks to the contrary, and we respectfully insist that Fidelity's insinuation is factually unfounded.

The fact remains that a proper cross-examination was excluded only on the theory—now suggested by Fidelity—that the answers would *also* tend to support the counterclaim. As we have already shown in our main brief, that is no ground for exclusion. Significantly, Fidelity does *not* attempt to justify that circumstance as ground for exclusion. It was reversible error on the part of the Vice Chancellor to foreclose the cross-examination on matters to which the witnesses had testified on direct—even if the answers on cross-examination might also tend to establish the allegations of the counterclaim—and accordingly, we urge that the decree should be reversed on account of this *legal error*.

Should Fidelity Pay the Defaulted Taxes?

In Point II of our main brief, we indicated that, rather than ordering the sale of 561 Broad Street, because of the tax liens held by Cameron (which was the *only* ground whereon Fidelity's bill was based), the Court should have directed Fidelity to pay those tax liens.

In answering our argument, Fidelity raises the following contentions:—

1. Those taxes *now* amount to about \$11,000., and the cash that it *now*—September 13, 1944, the date of trial—has on hand is only \$2,257.19 “subject to a reserve for trustee’s commissions.” Fidelity’s brief, page 20.
2. The \$1,400. which the complainant paid over to itself for commissions in 1939, instead of paying that sum on account of the taxes then in default and the lien for which was subsequently sold to Cameron, was a commission which the statute authorized Fidelity to take. Fidelity’s brief, bottom of page 21.
3. Fidelity’s failure, in 1930, to collect some \$4,900. due from Doll for rent “created no presumption of negligence on the part of the trustees.” Fidelity’s brief, page 22.
4. Our calculation of the amount of the rents—as compared to the taxes—is inaccurate, and “doubtless there are other inaccuracies, but this appeal is hardly the time or the place to thresh out those matters.” Fidelity’s brief, pages 23-24.

We think that it was Fidelity’s duty to point out the “other inaccuracies,” if any there be; it may be assumed that our experienced opponents would not have failed to point them out to this Court, if indeed there were any. We also think—and surely our experienced opponents must know—that *this is* the time and the place to thresh out the matter in full. Accordingly, we shall endeavor here to demonstrate that it was not we, but rather our opponents, who are to be charged with “inaccuracies,” and we will consider each of Fidelity’s arguments seriatim.

First, as to *the amount now required to pay the defaulted taxes*. Important to be noticed in this connection are the following factors:—

1. According to Fidelity's witness, Ellery, the tax sale occurred on October 14, 1941, and the tax liens then sold were for the following years:—

Part of 1937.	} State of Case, page 123, lines 20-25
1938.	
1939.	
1940.	

2. Those tax liens—as of *September 13, 1944*—amounted to close to \$11,000, *but that includes accrued interest*; Vice Chancellor's recital in decree, State of Case, page 163, line 20; Fidelity's brief, bottom of page 20.

As the Vice Chancellor's recital indicates, and as Fidelity's brief by reference reiterates, the amount of the tax liens—as of September 13, 1944—includes "interest." Whether the "cash balance" that Fidelity had on hand—as of September 13, 1944, the date of trial,—was or was not sufficient to pay both the original principal of the various tax liens and the very substantial interest accrued over a period of a large number of years is wholly immaterial. Of course, the *net rents* actually collected by the Fidelity from the onset of the "depression," which it used as a crutch in its bill of complaint, are not sufficient to pay both the principal *and the interest* on the defaulted taxes. However, that interest would never have accrued if the *Fidelity had paid the taxes promptly*. That Fidelity failed to do so is amply demonstrated in our main brief. The failure to pay those taxes promptly was *Fidelity's own fault*. The great burden of interest now accrued is due to the fact that Fidelity itself

planted that very luxuriant weed, and a most noxious weed. As a matter of *equity*, Fidelity—and not the present balance in the trust account—should eradicate that weed. It is neither ingenious nor ingenuous for Fidelity now to say:—“I *now* have only about \$2,000. cash on hand and, for that reason should not be required to pay the 1937 (and the other defaulted) taxes, and the interest which has accrued because of my default.”

Second, *as to the propriety of Fidelity appropriating \$1,400. for commissions in 1939.* We showed (pages 13-14 of our main brief) that Fidelity took this sum on August 29, 1939, and that under *the statute then applicable*, Fidelity had no right to take that money. In answer to our argument Fidelity (at the bottom of page 21 of its brief) says:—

“By the statute relating to fiduciaries’ commissions passed in 1939 (P. L. 1939, pp. 546-547; R. S. 3:11-2, as amended) trustees were authorized to take their ‘income commissions as of the time or when the income was or is received by them without allowance thereof by the court.’”

The serious difficulty—and we are quite astonished that Fidelity failed to notice this, for we specially referred to the fact at the bottom of page 13 of our main brief—is that the *statute whereon Fidelity relies does not apply*. That statute was enacted on July 1, 1939; obviously, Fidelity did not collect “income” of \$28,000. between July 1, 1939 and August 29, 1939, the date whereon it took the “commissions”, the taking of which would have been justified only if the income during that short period had been twenty times the amount of commissions taken.

The statute that does apply is the statute we have cited, and abbreviated, at the top of page 14 of our brief. Under that statute, Fidelity had no right to take "commissions". Instead of catering only to its own interests, Fidelity should have used that money to pay some part of the accrued taxes to guard against the sale of the tax liens.

Third, as to *Fidelity's failure to collect the Doll rents*. Fidelity's allegation in its bill of complaint was that the low rentals from 1929 on precluded it from paying the taxes. We have shown (pages 14-15 of our main brief) that *that allegation was untrue*, as evidenced by the fact that it omitted to collect the rent which was due from Doll on May 21, 1930. Aside from the allegation being untrue, Fidelity's present argument attempting to justify its taking a note from a tenant whose rent was more than one year past due (instead of distraining or otherwise promptly enforcing collection of the rent) as "wise" is far from flattering to the readers of Fidelity's brief. We are content to let this Court decide whether Fidelity's generosity in crossing the tracks to "save" a shaky tenant while a red flag was being waved in Fidelity's face was "wise". Certain it is, however, that Fidelity's allegation of the low rentals from 1929 on as being the cause of the present situation is definitely untrue.

Fourth, as to *Fidelity's claim of our allegedly inaccurate calculations*. If any figures we have given are incorrect, then the falsity is not ours but Fidelity's, because *every single figure is taken from Fidelity's own sworn statements, for which we have cited chapter and verse*. Fidelity's brief (at page 23 thereof) repeats the

serious basic error we have already referred to (on page 11 of this reply brief), that erroneous statement being:—

“It has already been noted that, in point of fact, the taxes were nearly \$11,000., and that there was but \$553.34 on hand to meet them.”

The defaulted taxes, as we have stressed, were not \$11,000. That was the amount which, inclusive of interest, was due on September 13, 1944. Of course, if Fidelity wants to assume a wholly illogical premise as the basis for its calculations, we are not responsible for the equally illogical conclusions which it arrives at.

In summary, we respectfully submit that an analysis of Fidelity's brief indicates that it has not met the argument presented by Point II of our main brief. Accordingly, for the reasons there set forth, we respectfully urge the reversal of that part of the decree from which we have appealed.

Answering Fidelity's Point III.

Whether a sale is or is not to advantage can best be judged *by the wishes of the interested cestui*. It has frequently been said that such wishes should be the commands governing the trustee. Dudley O. Sayre actively resisted and opposed the sale. The remaining defendants were merely passive. Such passivity was due to lack of any, or substantial, interest. Fidelity cannot fairly claim assent to its course from the lack of non-resistance by disinterested parties.

There is no present occasion to sell 561 Broad Street for its income is not only sufficient to pay all operating expenses and accruing taxes, but to produce a return *greater* than would be re-

ceived on any investment from the proceeds of the proposed sale. Let it be remembered that Fidelity did *not* claim that the present condition of the property is unproductive, and that the only reason which it advanced for the sale was to overcome the threat of a foreclosure of the tax liens which liens, as we believe we have indicated, *Fidelity itself should pay*. There is no reason, in equity or in good sense, why Fidelity should be "accommodated." Let it also be noted—contrary to Fidelity's argument—that there is nothing in the bill of complaint which asserts that it is desirable to sell 561 Broad Street lest there be a further decrease in the value of that property.

It is suggested (Fidelity's brief, page 25), as if this were a reason for selling the property, that "at one time (Dudley O. Sayre) felt that he could gather in the tax lien, but nothing came of it." Fidelity's reference is evidently to the "Addendum" to Vice Chancellor Stein's opinion, page 8 of Fidelity's brief. Nothing came of it, because, as a condition before the Court "would consider a petition for a hearing," the late Dudley O. Sayre was required to deposit \$5,000. in Court in addition to acquiring the tax lien. That was a pretty heavy burden to put on Dudley O. Sayre, and we think one to which the remainderman should not have been subjected in order to obtain a "rehearing." It takes no imagination to understand that the holder of those tax liens would have resisted transferring the tax liens to Dudley O. Sayre. Of course, none of these considerations affect the meritorious questions presented by the appeal and the subsequent efforts of counsel at settlement do not invalidate the reasons presented for reversing the decree.

Fidelity's conclusion that the sale of 561 Broad Street would be "advantageous" is fallacious because such conclusion necessarily involves the adoption of the erroneous premises that (1) the Vice Chancellor was correct in excluding relevant cross-examination and (2) the Vice Chancellor was correct in refusing to consider Fidelity's record admissions under oath. This Court, however, has indicated time without number that no adjudication can be sustained when the trial court reaches its conclusion in consequence of harmful legal error. That is the situation here. Manifestly, it was unjust and harmful to Dudley O. Sayre for the Vice Chancellor to close his eyes, his ears and his mind to *evidence producing an entirely different conclusion*. Such being the case, the conclusion of "advantageous sale" is untenable.

CONCLUSION.

As heretofore stated, we urge that that portion of the Decree from which we have appealed—to wit, the decretal portions thereof marked #1, #2 and #3, which authorize and direct the sale of 561 Broad Street, Newark, N. J.—be reversed.

Respectfully submitted,

ELIAS A. KANTER,
Of Counsel with Natalie B. Dalton,
et als., Appellants.



