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Petition of Appeal.

[Filed April 27, 1934.]

New Jersey Court of Errors and Appeals

Between

KINGDON GOULD and SCHUYLER NEIL-
SON RICE, as Executors, etc., of
GEORGE J. GOULD, Deceased,
Complainants-Respondents,

and

COMMERCIAL TRUST COMPANY OF
NEW JERSEY, *et al.*,
Defendants-Respondents.

CHARLES A. ROBERTS,
Petitioner-Appellant.

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On Appeal from
the Court of
Chancery.

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*To the Honorable the Court of Errors and
Appeals in the Last Resort in All Causes:*

The petition of Charles A. Roberts, the appel-
lant in the above-entitled cause, respectfully
shows that:

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Petitioner finds himself aggrieved by a decree
made in the Court of Chancery by his Honor
Luther A. Campbell, Chancellor of the State of
New Jersey, bearing date May 3, 1933, in the
above-entitled cause in said Court of Chancery,
wherein said Charles A. Roberts was a petitioner,
and by a decree or order made by said Chancellor
bearing date April 18, 1934, in the cause afore-

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Petition on Appeal.

said, upon petition of the appellant as aforesaid, in this respect, to wit, that the said decrees and order allowed to petitioner, as counsel for defendant Marjorie Gould Drexel, a fee of only \$2,500 and denied the application of petitioner for an increase in and reconsideration of said counsel fee.

And petitioner appeals from so much of said decrees and order as allowed him only said counsel fee of \$2,500 and as denied to him an increase in and reconsideration of said counsel fee, upon the ground that the same are erroneous in that:

(a) When the attorneys for the Executors under the will of George J. Gould had decided to abandon their appeal from the decision of the Bureau of Internal Revenue as to Federal estate taxes, the petitioner, as counsel for a beneficiary under the will, was entitled to take action to prevent such abandonment, and to advise regarding the procedure and evidence to be used in contesting such decision, and was entitled to be compensated by an allowance from the Estate for his services so rendered for the benefit of the Estate and not for the sole benefit of his own client.

(b) For services so rendered by petitioner, involving highly technical questions of taxation and resulting in a saving of \$434,000 in taxes and interest (which would otherwise surely have been lost by the Estate), petitioner was entitled to be compensated in the full amount of \$20,000 prayed for.

(c) The Chancellor's action in allowing \$2,500 for the appellant's services in effect-

Petition on Appeal.

ing a saving of some \$78,000 in connection with the so-called Little Kanawha Syndicate but allowing nothing for his services in connection with such saving of \$434,000 in taxes, was erroneous.

Petitioner therefore prays that so much of said decrees and order as allowed petitioner only the sum of \$2,500 as a counsel fee and denied the application of the petitioner for an increase in and reconsideration of said counsel fee, be reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper. 10

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel with Appellant. 20

Service of a copy of the within Petition of Appeal acknowledged this 30th day of April, 1934.

McCARTER & ENGLISH,
Solicitors for Kingdon Gould and Schuyler Neilson Rice as Executors, Complainants-Respondents. 30

J. FISHER ANDERSON,
Solicitor for Commercial Trust Company of New Jersey, *et al.*, Defendants-Respondents.

LINDABURY, DEPUE & FAULKS,
Solicitors for Kingdon Gould, individually, *et al.*, Defendants-Respondents. 40

Notice of Appeal.

MERRITT LANE,
Solicitor for Guinivere Dunsford,
et al., and for Hon. Thomas
Barber, Guardian *ad litem* for
George Sinclair Gould, *et al.*,
Defendants-Respondents.

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W. DURWARD McCLOSKEY,
Guardian *ad litem* for Patrick
Gould, *et al.*, Defendants-Re-
spondents.

W. DURWARD McCLOSKEY,
Solr. for Wilfred H. Jayne, Jr.,
Guardian *ad litem* for Anthony
J. Drexel, 3rd, *et al.*, Defend-
ant-Respondents.

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Notice of Appeal.

[Filed April 27, 1934.]

IN CHANCERY OF NEW JERSEY.

Between
KINGDON GOULD and SCHUYLER NEIL-
SON RICE, as Executors, etc., of
30 GEORGE J. GOULD, Deceased,
Complainants,

and

COMMERCIAL TRUST COMPANY OF
NEW JERSEY, *et al.*,
Defendants.

62/608.

On Bill, etc.

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CHARLES A. ROBERTS hereby appeals from so
much of the decree entered in the above entitled

Notice of Appeal.

cause on May 3rd, 1933, by the Chancellor on the advice of Vice Chancellor John H. Backes as allowed him as counsel for the defendant Marjorie Gould Drexel a fee of only the sum of \$2,500; and from the decree or order made in the above-entitled cause on the 18th day of April, 1934, by the Chancellor on the advice of Vice Chancellor John H. Backes, denying the application of the said Charles A. Roberts for an increase in and reconsideration of said counsel fee, to the Court of Errors and Appeals in the Last Resort in all Causes.

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Dated, April 24, 1934.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel with
Charles A. Roberts, Appellant.

20

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

THOMAS G. HAIGHT,
Of counsel with Appellant, Charles
A. Roberts.

Service of a copy of within Notice of Appeal acknowledged this 24th day of April, 1934.

McCARTER & ENGLISH,
Solicitors for Kingdon Gould and
Schuyler Neilson Rice, as Execu-
tors, etc.

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J. FISHER ANDERSON,
Solicitor for Commercial Trust
Company of New Jersey.

LINDABURY, DEPUE & FAULKS,
Solicitors for Kingdon Gould, in-
divid., *et al.*

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*Decree Assuming General Jurisdiction Over
Estate of George J. Gould and Authorizing
Compromise with Estate of Jay Gould.*

MERRITT LANE,

Solicitor for Guinivere Dunsford,
et al., and for Hon. Thomas Bar-
ber, Guardian *ad litem* for George
Sinclair Gould, *et al.*

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W. DURWARD McCLOSKEY,
Guardian *ad litem* for Patrick
Gould, *et al.*

W. DURWARD McCLOSKEY,
Solr. for Wilfred H. Jayne, Jr.,
Guardian *ad litem* for Anthony
J. Drexel, 3rd, *et al.*

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**Decree Assuming General Jurisdiction over
Estate of George J. Gould and Authorizing
Compromise with Estate of Jay Gould.**

[Filed March 19, 1927.]

IN CHANCERY OF NEW JERSEY.

DOCKET 62, P. 608.

Between

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SCHUYLER NEILSON RICE and
KINGDON GOULD, as Executors
etc. of George J. Gould, de-
ceased,

Complainants,

and

COMMERCIAL TRUST COMPANY OF
NEW JERSEY, *et als.*,
Defendants.

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On Bill, &c.
Final Decree.

This cause coming on to be heard on the 3rd
day of March, 1927, in the presence of McCarter

*Decree Assuming General Jurisdiction Over
Estate of George J. Gould and Authorizing
Compromise with Estate of Jay Gould.*

& English, Esquires, of counsel with complainants; and Harrison & Roche, Esquires, (and Walter B. Walker, Esquire, of the New York Bar) of Counsel with defendants, United States Trust Co. of New York, Frank Jay Gould and Helen Gould de Montenach; and Fisk & Fisk, Esquires, of counsel with defendants, Commercial Trust Company of New Jersey and Schuyler Neilson Rice, as, Trustees, etc., and defendant, Edith Gould Wainwright; and Lum, Tamblyn & Colyer, Esquires, of counsel with defendant, Guinevere Dunsford, individually and as one of the testamentary guardians of George Sinclair Gould, Jane Sinclair Gould and Guinevere Gould, infants under the age of fourteen years; and Gerald McLaughlin, Esquire, of counsel with defendant, Schuyler Neilson Rice, as one of the testamentary guardians of George Sinclair Gould, Jane Sinclair Gould and Guinevere Gould, infants under the age of fourteen years; and Lindabury, Depue & Faulks, Esquires, of counsel with defendants, Marjorie Gould Drexel, Vivien Decies, George J. Gould, Jr., Jay Gould, and Kingdon Gould, individually, and as General Guardian of Gloria Gould Bishop; and Merritt Lane, Esquire, of counsel with Thomas Barber, as guardian *ad litem* for defendants, George Sinclair Gould, Jane Sinclair Gould and Guinevere Gould; and John P. Manning, Esquire, of counsel with defendant, Gloria Gould Bishop; and Wilfred H. Jayne, Jr., Esquire, as guardian for defendants, Edith K. Drexel, Anthony J. Drexel, 3rd, Marjorie Gould Drexel, Eleanor Gould, Anne Douglas Gould, Jay Gould, Jr., Eileen Vivien de la Poer Beresford, Catherine Maya Beresford, Arthur George Marcus Douglas, Horseley de la Poer Beresford,

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*Decree Assuming General Jurisdiction Over
Estate of George J. Gould and Authorizing
Compromise with Estate of Jay Gould.*

10 Sylvia Annunciata Gould, Edith Kingdon Gould,
Kingdon Henry Gould, George J. Gould, 3rd,
Maughan Carter Gould, Stuyvesant Wainwright,
Carolina DePeyster Wainwright, Carroll Living-
ston Wainwright, Jr., and Gioia Bishop; and Pit-
ney, Hardin & Skinner, Esquires, of counsel with
defendants Anna Duchesse de Talleyrand, Marie
Louis Jean Jay Georges Paul Ernest Boniface de
Castellane, Georges Gustave Marie Antonine Bon-
iface Charles de Castellane, Jason Honore Louis
Sever de Castellane, Bankers Trust Company,
Farmers' Loan & Trust Company, Equitable
Trust Company, and the pleadings and proofs
20 having been read and the arguments of the respec-
tive counsel having been heard and considered,
and it satisfactorily appearing that in or about
the year 1916, George J. Gould (now deceased),
a resident of Lakewood, in the County of Ocean,
State of New Jersey, together with Edwin Gould,
Howard Gould and Helen G. Shepard, co-executors
and co-trustees with him, of and under the last
Will and Testament and Codicils thereto of Jay
Gould, deceased, commenced an administration ac-
30 tion in the Supreme Court of the State of New
York, in and for the County of New York, for the
construction of the Will of said Jay Gould, de-
ceased, to account for their administration and
management as such executors and trustees of
and under said will from the date of the testa-
tor's death on December 2, 1892, of the funds re-
ceived by them as such executors and trustees and
for instructions and other relief, and it further
appearing that before the completion of the trial
of said action, said George J. Gould died on May
40 16, 1923, and that on the 4th day of June, 1923, the
last Will and Testament of George J. Gould, de-

*Decree Assuming General Jurisdiction Over
Estate of George J. Gould and Authorizing
Compromise with Estate of Jay Gould.*

ceased, was duly admitted to probate before the Surrogate of the County of Ocean, State of New Jersey, and that on said day letters testamentary were duly issued to Schuyler Neilson Rice and Kingdon Gould, executors named in said will, who 10
duly qualified and are now acting as such, and it further appearing that on the 13th day of December, 1923, an order was duly made by the Supreme Court of the State of New York in the above described action, substituting said Schuyler Neilson Rice and Kingdon Gould as such executors aforesaid, in the place and stead of their decedent, said George J. Gould, as a party plaintiff and as a party defendant, individually, in the aforesaid 20
action in the Supreme Court of the State of New York, and it further appearing that all the issues in said action in the Supreme Court of the State of New York have been tried before Honorable James A. O'Gorman, as referee, duly appointed to hear and determine the issues of fact and law according to the practice of said Supreme Court of the State of New York, and it further appearing that said Honorable James A. O'Gorman, as such referee, duly rendered and filed his opinion in the aforesaid action under date of November 30
10, 1925, in which he held that the four executors of the trustees under the will and codicils of Jay Gould, deceased, one of whom was George J. Gould, had committed breaches of their trust, were guilty of misfeasance and were liable for the losses resulting therefrom, and it further appearing that unless said action in the Supreme Court of the State of New York be compromised and settled a judgment surcharging their accounts will be entered for so large an amount that in all prob- 40
ability the entire estate of George J. Gould will

*Decree Assuming General Jurisdiction Over
Estate of George J. Gould and Authorizing
Compromise with Estate of Jay Gould.*

10 be used up in the payment of his liability thereon,
and it further appearing that under date of De-
cember 4, 1926, all parties to said action in the
State of New York, either individually, or by their
attorneys of record therein, or by their guardians
ad litem in the case of infants under the age of
twenty-one years, signed and entered into a cer-
tain Stipulation for Compromise, a copy of which
Stipulation for Compromise is annexed to the bill
of complaint herein and marked Exhibit "B," and
it further appearing that the entering into and
signing of such Stipulation on the part of the
executors of the Estate of George J. Gould, de-
ceased, and his issue, was limited by the following
20 clause contained in said Stipulation for Com-
promise, to wit:

30 "VIII. The signing of this stipulation for
compromise by the executors of the Estate of
George J. Gould, deceased, now in process of
administration in the State of New Jersey
and by the attorneys for the adult children of
George J. Gould, deceased, and their assignees
and the infant children of George J. Gould,
deceased, by their guardians ad litem is con-
ditional upon the approval, by the Courts of
that State of an agreement entered into be-
tween them and others not parties to this ac-
tion, which agreement among other things pro-
vides for the creation of trust funds each in
the sum of One hundred thousand (\$100,000)
Dollars for the benefit of each of the three
children of George J. Gould by his second
wife and the payment of Two hundred seven-
teen thousand, eight hundred fifty-seven and
40 one-seventh (\$217,857 1/7) Dollars to each of

*Decree Assuming General Jurisdiction Over
Estate of George J. Gould and Authorizing
Compromise with Estate of Jay Gould.*

the seven children of George J. Gould by his first wife; and upon the signing hereof by or on behalf of the parties hereto as hereinbefore provided, the executors of the Will of George J. Gould will forthwith take steps to submit the aforesaid agreement and this Stipulation for Compromise to the proper Courts of the State of New Jersey for approval and for instructions with respect thereto; and it is understood and agreed that all acts done or to be done and payments to be made hereunder by parties to the action who are interested in the Estate of George J. Gould, deceased, are subject to the approval of and to be performed under the authority and direction of the Courts of the State of New Jersey.”

And it further appearing that the agreement referred to in said clause in the Stipulation for Compromise above set forth was duly signed and entered into under date of December 16, 1926, by and between the widow, children and executors of the Will of George J. Gould, deceased, a copy of which said agreement is annexed to the bill of complaint herein and marked Exhibit “C”, and it further appearing that the settlement of the matters in controversy between the parties to the action in the Supreme Court of the State of New York above described as provided in said Stipulation for Compromise, Exhibit “B” to the bill of complaint herein, will result beneficially to all parties beneficially interested in the Estate of George J. Gould, deceased, and that the agreement hereinabove referred to of December 16, 1926, Exhibit “C” to the bill of complaint herein,

*Decree Assuming General Jurisdiction Over
Estate of George J. Gould and Authorizing
Compromise with Estate of Jay Gould.*

10 is necessary to the accomplishment of the com-
promise of the action in the Supreme Court of
the State of New York above described, and it
further appearing that the last mentioned agree-
ment and the carrying out of the aforesaid Stipu-
lation for Compromise in the New York action, if
both be carried out and enforced according to
their terms, will result beneficially to all parties
interested in the Estate of George J. Gould, de-
ceased, and it further appearing that the settle-
ment of the matters in controversy between the
parties, as provided in said Stipulation for Com-
promise dated December 4, 1926, and the agree-
ment dated December 16, 1926, will result benefi-
20 cially to the infant defendants in this suit who
are also parties to said agreement and affected
thereby and interested in the Estate of George J.
Gould, deceased, and that the interest of the sev-
eral infant parties hereto will be promoted by the
proposed settlement of the action pending in the
Supreme Court of the State of New York and by
the distribution of the Estate of said George J.
Gould, deceased, pursuant to the terms of his will
and the agreement of December 16, 1926, and that
30 the carrying out of said Stipulation for Com-
promise of the action in the Supreme Court of
New York will permit the immediate distribution
of the Estate of George J. Gould, deceased, now
withheld from distribution by the decrees of this
court and of the Orphans' Court of the County of
Ocean, according to the terms of the agreement of
December 16, 1926, and the last Will and Testa-
ment of said George J. Gould, deceased, read to-
gether, and it further appearing that the com-
40 plainants are entitled to the relief by them prayed
for in the bill:

*Decree Assuming General Jurisdiction Over
Estate of George J. Gould and Authorizing
Compromise with Estate of Jay Gould.*

It is, on this 19th day of March, A. D., Nineteen
Hundred and Twenty-seven, by His Honor, Edwin
Robert Walker, Chancellor of the State of New
Jersey, ORDERED, ADJUDGED and DECREED, that the
signing and execution by the complainants herein
of the Stipulation for Compromise above referred
to, be and the same hereby is approved and said
complainants are hereby authorized and directed
specifically to perform and carry out all things in
and by the terms of said Stipulation to be per-
formed by them, and further that the making of
the agreement of December 16, 1926, be and the
same hereby is approved, and the parties thereto
are hereby ordered and directed to specifically
perform the same, and that the said agreement
of December 16, 1926, and the aforesaid Stipula-
tion for Compromise of the action in the Supreme
Court of the State of New York, dated December
4, 1926, be and they hereby are approved, and that
they be in all things specifically performed, and
that Schuyler Neilson Rice and Kingdon Gould,
as executors of the last Will and Testament of
George J. Gould, deceased, the complainants
herein, be and they hereby are authorized, empow-
ered and directed to do and perform all acts and
things required of them to be done and performed
in and by the aforesaid Stipulation for Comprom-
ise of the action in the Supreme Court of the
State of New York, dated December 4, 1926, and
in and by any order and judgment of the Supreme
Court of the State of New York to be entered upon
said Stipulation for Compromise, and in the afore-
said agreement of December 16, 1926, and that
said executors of the last Will and Testament of
George J. Gould, deceased, be and they hereby are
authorized, empowered and directed to appear

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*Decree Assuming General Jurisdiction Over
Estate of George J. Gould and Authorizing
Compromise with Estate of Jay Gould.*

generally as parties plaintiff and defendant in the action in the Supreme Court of the State of New York above referred to and more definitely described as Gould vs. Gould, New York County Clerk's Index Number 19346, Year 1916, and do and perform all acts and things, give all consents and pay all sums required of them in and by said Stipulation for Compromise dated December 4, 1926, above described, to be given and paid.

And it is further ORDERED, ADJUDGED and DECREED, that said Schuyler Neilson Rice and Kingdon Gould, as executors of the last Will and Testament of George J. Gould, deceased, be and they hereby are authorized, empowered and directed, in addition to the payment of the specified amounts in said Stipulation for Compromise of December 4, 1926, to consent to and authorize and this Court hereby directs the making of all payments required of them to be made from the fund now in the hands of the Equitable Trust Company of New York, 37 Wall Street, Borough of Manhattan, City, County and State of New York, representing the income of George J. Gould and the income thereon to carry out the provisions of Paragraph IV of said Stipulation for Compromise dated December 4, 1926, in such amount or amounts as shall be hereafter determined in accordance with the provisions of said Paragraph IV shall be contributed from the income account of the trust for George J. Gould and remaindermen for the payment of all sums provided for in said Paragraph IV of the aforesaid Stipulation for Compromise, and that when the amount of such payment or payments so to be made by them, pursuant to the terms of Paragraph IV of said Stipulation for Compro-

*Decree Assuming General Jurisdiction Over
Estate of George J. Gould and Authorizing
Compromise with Estate of Jay Gould.*

mise of December 4, 1926, shall have been determined as in said Paragraph IV provided, the amount or amounts thereof shall be added at the foot of this decree.

And it is further ORDERED, ADJUDGED and DECREED, that this Court assume general jurisdiction of the administration by the complainants of their trusts as executors of the Estate of George J. Gould, deceased, and take over the administration of said estate. 10

And it is further ORDERED, ADJUDGED and DECREED, that, upon making all the payments and doing all acts required of them to be made and done under and pursuant to the aforesaid Stipulation for Compromise dated December 4, 1926, of the action in the Supreme Court of the State of New York, and under and pursuant to any Order or Judgment of the Supreme Court of the State of New York entered upon or with respect to said Stipulation for Compromise, the said executors of the last Will and Testament of George J. Gould, deceased, namely, Schuyler Neilson Rice and Kingdon Gould, be and they hereby are authorized, empowered and directed to pay the debts of said decedent, and to proceed with the complete administration of the Estate of said George J. Gould, deceased, pursuant to the provisions of the will and the provisions of said agreement of December 16, 1926. 20 30

Respectfully advised,

JOHN H. BACKES,
Vice Chancellor.

E. R. WALKER,
C.

Petition of Executors on Final Accounting.

[Filed April 13, 1933.]

IN CHANCERY OF NEW JERSEY.

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Between

KINGDON GOULD and SCHUYLER NEILSON RICE, as Executors, etc., of
GEORGE J. GOULD, Deceased,
Complainants,

and

COMMERCIAL TRUST COMPANY OF
NEW JERSEY, *et als.*,
Defendants.

62/608
On Bill, Etc.

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

The petition of KINGDON GOULD, of the Township of Lakewood, in the County of Ocean and State of New Jersey, and SCHUYLER NEILSON RICE, of the Borough of Highland Park, in the County of Middlesex and State of New Jersey, respectfully shows as follows:

30 1. Your petitioners are complainants in the above entitled cause and are the Executors of the Last Will and Testament of George J. Gould, deceased, late of Lakewood, aforesaid.

2. Your petitioners present herewith their final account of their administration of the estate of said George J. Gould, deceased.

3. The names and addresses of all persons interested in said accounting are as follows:

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Petition of Executors on Final Accounting.

<i>Name</i>	<i>Address</i>	
Kingdon Gould.....	Private Way, Lakewood, New Jersey.	
Annunziata Gould (wife of Kingdon Gould).....	Private Way, Lakewood, New Jersey.	
Marjorie Gould Drexel.....	Biarritz, France.	
Anthony J. Drexel, Jr. (husband of Marjorie Gould Drexel)	Biarritz, France.	
Jay Gould	Private Way, Lakewood, New Jersey.	
Anne Graham Gould (wife of Jay Gould).....	Private Way, Lakewood, New Jersey.	10
Equitable Trust Company of New York, as Administrator of Vivien Decies, deceased.....	11 Broad St., New York.	
John Graham de la Poer, Lord Decies (widower of Vivien Decies).....	11 Broad St., New York.	
George J. Gould, Jr.....	39 Broadway, New York.	
Jacqueline Gould (wife of George J. Gould, Jr.)	39 Broadway, New York.	
Edith Gould MacNeal.....	c/o Guaranty Trust Co., Paris, France.	
Sir Hector MacNeal (husband of Edith Gould MacNeal)	c/o Guaranty Trust Co., Paris, France.	
Gloria Gould Barker.....	39 Broadway, New York.	
Wallace MacFarlane Barker (husband of Gloria Gould Barker).....	39 Broadway, New York.	20
George Sinclair Gould.....	c/o Chase National Bank, Madison Ave. & 45th St., New York.	
Jane Sinclair Gould.....	c/o Chase National Bank, Madison Ave. & 45th St., New York.	
Guinevere Gould.....	c/o Chase National Bank, Madison Ave. & 45th St., New York.	
Guinevere S. Dunsford.....	c/o Chase National Bank, Madison Ave. & 45th St., New York.	
Commercial Trust Company of New Jersey and Schuyler Neilson Rice, as Trustees under the Will of George J. Gould, deceased.....	15 Exchange Place, Jersey City, N. J.	
Silvia Annunziata Gould.....	Private Way, Lakewood, New Jersey.	30
Edith Kingdon Gould.....	Private Way, Lakewood, New Jersey.	
Kingdon Henry Gould.....	Private Way, Lakewood, New Jersey.	
Eleanor Gould.....	Private Way, Lakewood, New Jersey.	
Anne Douglas Gould.....	Private Way, Lakewood, New Jersey.	
Jay Gould, Jr.....	Private Way, Lakewood, New Jersey.	
Edith K. Cram (formerly Drexel).....	Bluffton, South Carolina.	
Anthony J. Drexel, Third.....	Biarritz, France.	
Marjorie Gould Drexel.....	Biarritz, France.	
Eileen O'Brien (formerly Beresford).....	51 South St., Mayfair, London, Eng.	
Catherine Moya Beresford.....	Orchard Court, Portman Sq., London, England.	
Arthur George Beresford.....	Orchard Court, Portman Sq., London, England.	
George J. Gould, Third.....	39 Broadway, New York.	
Maughan Carter Gould.....	39 Broadway, New York.	
Howard J. Gould.....	39 Broadway, New York.	40

Petition of Executors on Final Accounting.

<i>Name</i>	<i>Address</i>
Patrick Gould.....	39 Broadway, New York.
Stuyvesant Wainwright.....	c/o Lady Hector MacNeal, Guaranty Trust Co., Paris, France.
Caroline DePeyster Wainwright.....	c/o Lady Hector MacNeal, Guaranty Trust Co., Paris, France.
Carroll Livingston Wainwright, Jr.....	c/o Lady Hector MacNeal, Guaranty Trust Co., Paris, France.
10 Gioia Bishop	c/o Kingdon Gould, 39 Broadway, New York.
Maureen O'Brien.....	51 South St., Mayfair, London, Eng.
John Sergeant Cram.....	Bluffton, South Carolina.

All of the foregoing are of full age, except those whose names are hereinafter stated. The names and addresses of the guardians of such minors, if any, or if there be no guardians, the names and addresses of the parents, or other persons in *loco parentis* to the said minors, are hereinafter given:

<i>Name</i>	<i>Name of Guardian or Person In Loco Parentis</i>	<i>Address of Guardian or Person In Loco Parentis</i>
George Sinclair Gould } Jane Sinclair Gould } Guinevere Gould }	Guinevere S. Dunford and Schuyler Neilson Rice	{ c/o Commercial Trust Co. of New Jersey, Jersey City, New Jersey.
Sylvia Annunziata Gould	Wilfred H. Jayne, Jr., <i>Guardian ad litem</i>	Lakewood, N. J.
Edith Kingdon Gould	Wilfred H. Jayne, Jr., <i>Guardian ad litem</i>	Lakewood, N. J.
Kingdon Henry Gould	Wilfred H. Jayne, Jr., <i>Guardian ad litem</i>	Lakewood, N. J.
Eleanor Gould	Wilfred H. Jayne, Jr., <i>Guardian ad litem</i>	Lakewood, N. J.
30 Anne Douglas Gould	Wilfred H. Jayne, Jr., <i>Guardian ad litem</i>	Lakewood, N. J.
Jay Gould, Jr.	Wilfred H. Jayne, Jr., <i>Guardian ad litem</i>	Lakewood, N. J.
Edith K. Cram	Wilfred H. Jayne, Jr., <i>Guardian ad litem</i>	Lakewood, N. J.
Anthony J. Drexel, Third	Wilfred H. Jayne, Jr., <i>Guardian ad litem</i>	Lakewood, N. J.
Marjorie Gould Drexel	Wilfred H. Jayne, Jr., <i>Guardian ad litem</i>	Lakewood, N. J.
Eileen O'Brien	Wilfred H. Jayne, Jr., <i>Guardian ad litem</i>	Lakewood, N. J.
Catherine Moya Beresford	Wilfred H. Jayne, Jr., <i>Guardian ad litem</i>	Lakewood, N. J.
40 Arthur George Beresford	Wilfred H. Jayne, Jr., <i>Guardian ad litem</i>	Lakewood, N. J.

Petition of Executors on Final Accounting.

<i>Name</i>	<i>Name of Guardian or Person In Loco Parentis</i>	<i>Address of Guardian or Person In Loco Parentis</i>	
George J. Gould, Third	Wilfred H. Jayne, Jr., <i>Guardian ad litem</i>	Lakewood, N. J.	
Maughan Carter Gould	Wilfred H. Jayne, Jr., <i>Guardian ad litem</i>	Lakewood, N. J.	
Howard J. Gould	Wilfred H. Jayne, Jr., <i>Guardian ad litem</i>	Lakewood, N. J.	
Stuyvesant Wainwright	Wilfred H. Jayne, Jr., <i>Guardian ad litem</i>	Lakewood, N. J.	10
Caroline DePeyster Wainwright	Wilfred H. Jayne, Jr., <i>Guardian ad litem</i>	Lakewood, N. J.	
Carroll Livingston Wainwright Jr.	Wilfred H. Jayne, Jr., <i>Guardian ad litem</i>	Lakewood, N. J.	
Gioia Bishop	Wilfred H. Jayne, Jr., <i>Guardian ad litem</i>	Lakewood, N. J.	
Patrick Gould	c/o W. Durward McCloskey, <i>Guardian ad litem</i>	Lakewood, N. J.	
Maureen O'Brien	c/o W. Durward McCloskey, <i>Guardian ad litem</i>	Lakewood, N. J.	
John Sergeant Cram	c/o W. Durward McCloskey, <i>Guardian ad litem</i>	Lakewood, N. J.	20

4. The following is a summary of the aforesaid account:

September 7, 1927 to November 2, 1927.

INTERMEDIATE SUMMARY

See Foot Note below and Note on next page

THESE ACCOUNTANTS CHARGE THEMSELVES WITH:

30

By Balance of Corpus and Income at September 7, 1927, as shown in the Supplement to the Fourth Account, page 10, and Exhibit I(a) of this Account..... \$2,882,106.96

Exhibit II(a) Changes in Corpus (An Information Exhibit)

Exhibit III(a) By Receipts of Income..... 34,224.36

Total Charges..... \$2,916,331.32

40

Petition of Executors on Final Accounting.

THESE ACCOUNTANTS PRAY ALLOWANCE AS FOLLOWS:

	Exhibit IV(a) Charges Against Corpus.....	\$ 207,753.74	
	Exhibit V(a) Charges Against Income.....	658,265.20	
	Total Credits.....		866,018.94
10	Balance of Corpus and Income in Hands of Executors at November 2, 1927, as per inventory, Exhibit VI(a).....		\$2,050,312.38

Foot Note: See Page 18 for Summary from Nov. 2, 1927 to End of Final Account.

NOTE:

20 The above Intermediate Summary while forming an integral part of this, the Final Account of the Executors, is set up as an INTERMEDIATE SUMMARY to provide a reconciliation of the Executors' Accounts with the Report of Arthur Young & Co. dated June 7, 1929 entitled "Recension of Allocation of Corpus and Income in Accordance with Advices of Messrs. McCarter and English as at November 2, 1927."

The following Allocation of Corpus and Income is the figure arrived at by Arthur Young & Co. after agreement between all Counsel on the various questions and amounts at issue and such Allocation is arrived at after all adjustments have been made in the respective accounts as between Corpus and Income and is the amount adjudicated by Vice-Chancellor Backes in his Decree dated February 25, 1930, and in which Decree he allocated to

30	CORPUS	\$1,249,561.40	
	INCOME	800,750.98	
	Total		\$2,050,312.38

See Exhibit XII of this Account for details of above Allocation.

40 Wherefore your petitioners pray that their said account may be audited and allowed, and that an order be made for the allowance of commissions and counsel fees, and that your petitioners be instructed as to making distribution of the balance then remaining in their hands,

Final Account of Executors.

particularly as to the amount of the refunding bond which they should take; and that your petitioner may have such other and further relief as may be proper.

KINGDON GOULD,
SCHUYLER NEILSON RICE,
Petitioners.

McCARTER & ENGLISH,
Solicitors for Petitioners,
Lefcourt Building,
Newark, N. J.

10

[Verified by Kingdon Gould and Schuyler Neilson Rice, April 12, 1933.]

(Exhibits here omitted.)

20

Final Account of Executors.

[Filed April 13, 1933.]

IN CHANCERY OF NEW JERSEY.

Between

KINGDON GOULD and SCHUYLER NEILSON RICE, as Executors, etc., of
GEORGE J. GOULD, Deceased,
Complainants,

and

COMMERCIAL TRUST COMPANY OF
NEW JERSEY, *et als.*,
Defendants.

62/608

On Bill, Etc.

On Final Accounting
of Complainants.

30

The Final Account of KINGDON GOULD and SCHUYLER NEILSON RICE, as Executors of the Last Will and Testament of GEORGE J. GOULD, shows as follows:

40

Final Account of Executors.

NOVEMBER 2, 1927 TO MARCH 31, 1933.

SUMMARY.

THESE ACCOUNTANTS CHARGE THEMSELVES WITH:

10	By Balance of Corpus and Income at November 2, 1927, as shown in Exhibit VI(a) on page 17, Intermediate Section of this account	\$2,050,312.38
	Exhibit I. By Receipt of Income.....	112,876.61
	Exhibit II. Changes in Corpus (An Information Exhibit)	
	Exhibit III. By Receipts of Corpus.....	392,519.30
	Exhibit IV. By Gains	299.60
	Exhibit V. By Receipts of Corpus not on Inventory	4,360.34
	Total Charges	\$2,560,368.23

20 THESE ACCOUNTANTS PRAY ALLOWANCES AS FOLLOWS:

30	Exhibit VI. Administration Expense Chargeable against Corpus....	\$ 4,977.17
	Exhibit VII. Charges against Income.....	42,468.27
	Exhibit VIII. Charges against Corpus.....	102,780.81
	Exhibit IX. Losses	56,599.21
	Exhibit X. Payments to Trustees.....	2,028,912.74
	Exhibit XI. Adjustments as of November 2, 1927 (An Information Exhibit)	
	Exhibit XII. Due from Sundry Individuals (An Information Exhibit)	
	Total Credits	2,235,738.20

Leaving a balance of Corpus and Income in hands of Executors at March 31, 1933, as per Inventory Exhibit XIII.....	\$ 324,630.03
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(Exhibits here omitted.)

[Verified by Kingdon Gould and Schuyler Neilson Rice, April 12, 1933.]

Affidavit of Charles A. Roberts.

[Filed April 25, 1933.]

IN CHANCERY OF NEW JERSEY.

Between

KINGDON GOULD and SCHUYLER NEIL-
SON RICE, as Executors, etc., of
GEORGE J. GOULD, Deceased,

Complainants,

*and*COMMERCIAL TRUST COMPANY OF
NEW JERSEY, *et als.*,
Defendants.

62/608.

On Application
for Allowance.

10

20

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:CHARLES A. ROBERTS, being duly sworn, deposes
and says:I am a member of the New York Bar, admitted
also to practice before the United States Supreme
Court, Treasury Department and Board of Tax
Appeals. This affidavit is made in support of my
application for an allowance in the final account-
ing of the George J. Gould estate.

30

I represent Marjorie G. Drexel generally in her
legal affairs and am of counsel for her with
Messrs. Lindabury, Depue & Faulks in this case.In the proceedings to determine the Federal
estate tax on the estate of her father, George J.
Gould, I was compelled to take active steps to
simplify the procedure and prevent abandonment
of substantial rights. The direct result of my

40

Affidavit of Charles A. Roberts.

activities was a saving to the estate of \$328,000 (\$305,000 tax and over \$23,000 of the interest received on tax refund).

10 On April 24, 1931, the Court of Errors and Appeals affirmed decisions of the Chancery and Supreme Courts, disallowing a deduction of
20 \$1,825,000 in computing transfer taxes upon George Gould's estate. *In re Gould*, 108 N. J. L. 197, affirming 8 N. J. Misc. 798 and 105 N. J. Eq. 598. The Bureau of Internal Revenue had previously disallowed the same deduction for Federal estate tax and an appeal to the Board of Tax Appeals, taken in 1928, was still pending. In June, 1931, I was told by counsel to the Executors that they had about concluded to abandon the
30 appeal to the Board as to the \$1,825,000 deduction (all other items being susceptible of speedy adjustment), because in their opinion the Board would follow the decisions of the New Jersey Courts and affirm the adverse decision of the Bureau. They therefore felt that further prosecution of the appeal would only waste the money and delay the settlement of the estate. Counsel to other parties consulted were in accord with their view. Such abandonment would have involved the estate in a 20% tax (\$365,000) on the \$1,825,000, the loss to our client alone being \$36,500.

40 Because I had had extended experience in Federal tax practice, and had made an intensive study of the Board of Tax Appeals Reports in preparing and publishing a Manual thereto, and I had also participated actively in negotiating the settlement of the Jay Gould estate (including the \$1,825,000 payments), I dissented vigorously from the proposal to abandon this deduction. The New Jersey Courts had obviously been influenced by

Affidavit of Charles A. Roberts.

the formal contract under which the \$1,825,000 was paid (105 Eq. at p. 600), and particularly by misleading recitals therein which had been drafted by other parties but accepted on the part of Mrs. Drexel as an immaterial preamble to the operative provisions of the contract. With all deference to the New Jersey Comptroller and Courts, I questioned the correctness of their ruling as applied to the actual facts, and felt confident that a contrary ruling could be obtained at Washington, on a full showing of the facts, including evidence outside the contract if necessary. 10

Mr. McCarter agreed with me in questioning the correctness of the New Jersey rulings, but felt that the Board would follow them. On June 18, 1931, he wrote me, saying: 20

“I do think we should have had, however, a contrary decision that the \$1,825,000 paid to or in trust for the ten children was a deduction as a payment in settlement of a claim against the estate, rather than a mere shifting of legacies and therefore taxable, as the Courts have held.

“Of course, so far as the New Jersey tax is concerned, we have heard from the Court of last resort. We have raised exactly the same questions on our appeal to the United States Board of Tax Appeals, where we have not yet been heard. Of course the decision of the New Jersey Court is not *res adjudicata* with respect to the Federal estate tax. It is, however, a precedent so directly in point that we have all felt that the Federal tribunals would follow it * * *.” 30

After examining the State of the Case in the Supreme Court and certain of the briefs I con- 40

Affidavit of Charles A. Roberts.

cluded that the New Jersey Courts had been misled by the recitals above mentioned and had consequently applied a rule applicable to testamentary compromises (*cf. In re O'Neill*, 111 N. J. Eq. at 280), without applying the companion rule that sums paid out by executors in a bona fide compromise of claims against an estate are deductible.

See:

People v. Tatge (1915), 267 Ill. 634, 108 N. E. 748;

Appeal of Osmond R. Fraenkel, Executor (1926), 3 Board of Tax Appeals 1207;

Matter of Healy (Surrogate's Court, N. Y. Co.), New York Law Journal, January 15, 1908, p. 1561;

Matter of Thomas (Surr. Ct., N. Y. Co., 1902), 39 Misc. 223, 79 N. Y. Supp. 571;

Matter of Enos (Surr. Ct., Montgomery Co., 1908), 61 Misc. 594, 115 N. Y. Supp. 863, where, in computing transfer tax, a sole legatee and devisee was allowed to deduct for board and services furnished to the testatrix.

On July 6, 1931, I accordingly wrote Mr. McCarter:

"I assume that you are right in waiving all questions except the deduction of \$1,825,000. As to the disallowance of that deduction, however, I feel that with all respect to the Courts their decision was clearly wrong. Your briefs on this point seem to me to be perfectly clear and unanswerable.

"I do not believe that the Board of Tax Appeals would fall into the same error as the New Jersey Courts. I should expect that on

Affidavit of Charles A. Roberts.

the same arguments which you presented to the Courts you would obtain a favorable decision from the Board. I should therefore favor a vigorous prosecution of the case before the Board.

“Although, as indicated above, I think the presentation which you made of both the facts and the law was admirable and should have won a favorable decision, I venture to suggest in view of the outcome that certain additional facts should be proved before the Board. There seemed to lurk in the opinions of the Courts a feeling that the deduction was purely an arbitrary adjustment among the members of the family. It should be made clear to the Board that the \$1,525,000 paid to the seven children was necessary to adjust their shares in the settlement fund equitably in comparison with the shares which other branches of the Jay Gould family were to receive. The history of the negotiations leading to the settlement should remove any notion that the \$1,525,000 was an arbitrary hold-up or was anything but part and parcel of the general fund distributed to claimants against George Gould’s estate. Similar considerations also apply to the \$300,000 placed in trust for the Sinclair children.”

Mr. McCarter replied on July 7, saying:

“I wish I could agree with you that we have any chance of success before the United States Board of Tax Appeals. Since you request it I enclose our office copy of the petition before the United States Board of Tax Appeals and of the Government’s answer,

Affidavit of Charles A. Roberts.

the case being Docket 38444. * * * That case, if pressed, will not be reached until sometime after the summer vacation."

10 Shortly thereafter I learned from Mr. Ashmead of Lindabury, Depue & Faulks that he had a letter from Mr. McCarter to the effect that in a conference between the Executors and Messrs. McCarter and Gillespie it had been practically decided to abandon the Federal tax appeal as hopeless (so far as the \$1,825,000 deduction was concerned), and in fact worse than hopeless because it would involve fruitless expense. Mr. Ashmead added that Mr. McCarter had quoted my letter of July 6 (above mentioned) and had asked his views, and that he (Mr. Ashmead) was
20 inclined to agree with Mr. McCarter.

I thereupon made a careful study of the decisions and re-examined my files in the Jay Gould suit, after which I went to Newark on July 14, 1931 and conferred first with Messrs. Ashmead and Tams and afterward with Messrs. McCarter and Ashmead. Mr. McCarter agreed with me as to the law and the facts, but said that further prosecution of the Federal appeal seemed to him quite hopeless in view of the adverse decisions
30 of all the New Jersey Courts and the Bureau of Internal Revenue.

I persisted in contending that, notwithstanding the adverse decisions, the \$1,825,000 must almost surely be held deductible by the Board or by the superior officers of the Bureau, on a full showing of the facts.

Moreover, I called attention to the fact (which had not been previously observed in this case) that cases pending before the Board of Tax Appeals could be reopened and reconsidered in the
40

Affidavit of Charles A. Roberts.

Bureau, that a Special Advisory Committee existed in the Bureau for that express purpose, and that such reconsideration in the Bureau would be speedy, inexpensive and free from technicalities. I urged that the matter of such reconsideration be taken up with the attorney in the Appeals Division of the office of General Counsel to the Bureau, having charge of the case, and I ventured the prediction that two or three informal conferences across the table, either in the General Counsel's office or before the Special Advisory Committee, should suffice to procure a reversal of the Bureau's decision.

10

This informal procedure, with which I was familiar, was well described in an address by Hon. Ogden L. Mills, then Undersecretary of the Treasury (Report of New York State Bar Association, 1929, p. 503):

20

"We created what is known as a Special Advisory Committee consisting of fourteen members and a number of conferees both in Washington and throughout the country. They were to take up cases in which sixty-day letters had been sent out and cases pending before the Board of Tax Appeals which involved questions of fact, and they were to take them up with the view to having it out with the taxpayer across the table and reaching a final settlement—that is what they were created for and that is what they have sought to accomplish.

30

"What have they accomplished? In the period of a year they considered 5,748 appealed cases and 2,777 sixty-day cases, and they have settled 3,288 appealed cases and 2,088 sixty-day-letter cases, and they have

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Affidavit of Charles A. Roberts.

reached agreements on taxes involving \$37,000,000—a very good start.

10 “So, then, we created a second body, in the General Counsel’s office, to perform a similar function in relation to questions involving mixed questions of law and fact. * * * In other words, we are applying, in the field of tax administration, the ordinary business methods of adjusting disputes, because we found that, both for the taxpayer and for the Government, litigation is unsatisfactory and expensive.”

20 As a result of my representations, counsel to the Executors agreed to confer with them and advise me of their decision. About a week later Mr. McCarter wrote me (on July 22, 1931) as follows:

“In view of the fact that you, on behalf of Mrs. Drexel, think that the Federal tax appeal should not be abandoned, I beg to advise you that the executors have decided not to abandon it.”

30 I called attention to the fact that he made no mention of the Special Advisory Committee, to which he replied (on July 24, 1931):

“I think we shall make application to the Special Advisory Committee.”

40 To justify me in expressing the views above outlined, it was necessary for me to make a close examination of the law, and also make a thorough search of the voluminous records of the Jay Gould accounting action in my files and to segregate from such records the papers which evidenced the course of the negotiations for the settlement. It

Affidavit of Charles A. Roberts.

seemed to me that the New Jersey Courts had regarded the \$1,825,000 payments as an *arbitrary* hold-up, *collateral* to the settlement of the Jay Gould action, *whereas the \$1,825,000 was an integral part of the settlement fund and was offered by the Dunsford interests to meet our objection that the settlement fund was, under previous proposals, inequitably apportioned*, Frank Gould's share (and Anna Gould's also) being given twice as much as was provided for the George Gould share (nearly \$6,000,000 for Frank's share, the same for Anna's share, and only \$3,000,000 for the George Gould share). I emphasized to counsel for the Executors the importance of this aspect of the case, and furnished them a three-page statistical analysis showing the logical relation of the \$1,825,000 to the other payments in the settlement.

As late as September, 1931, I was informed and believe that the Executors still regarded the Federal tax proceeding as hopeless, but shortly thereafter Mr. Gillespie of their counsel telephoned me that it had been unnecessary even to appear before the Special Advisory Committee, and that the entire matter had been settled in two or three informal conferences with the attorney in charge for the Bureau, that it had been necessary to waive the deduction of \$300,000 (included in \$1,825,000), which was put in trust for the three children of George Gould by his second wife, but that the General Counsel for the Bureau would stipulate for the allowance of the remaining \$1,525,000 by the Board of Tax Appeals. (Parenthetically, the \$300,000 should also have been allowed, with a saving of 20% or \$60,000 in taxes.)

Thereafter, on January 27, 1932, an order was entered redetermining the Federal estate tax on

Affidavit of Charles A. Roberts.

George Gould's estate at \$679,230.63, as against the \$1,002,630.63 at which it had been fixed by the Bureau's previous decision. \$305,000 of the saving (20% of \$1,525,000) was directly due to my insistence on the further prosecution of the appeal, and my suggestions as to reopening the case in the Bureau and thereby avoiding the formalities, the expense and the delays incident to procedure before the Board. The redetermination resulted in a refund with interest (p. 26 of the Final Account), and over \$23,000 of the interest was attributable to the \$305,000 tax saving, so that the total gain to the estate from the allowance of the \$1,825,000 deduction was over \$328,000.

The unanimous action of the Courts and State Comptroller and of the Bureau officials who had theretofore acted, and the general consensus of opinion among counsel in this case, certainly would absolve any general practitioner from criticism for concluding that the Federal tax appeal was hopeless. I submit, however, that these circumstances only emphasize the importance in this case of the specialized training and experience in tax matters, combined with an intimate familiarity with the Jay Gould Estate litigation, which I brought to bear upon the matter.

My experience at the Bar, dating from 1906, included sixteen years with the law firm of Cravath, Henderson & de Gersdorff and its predecessors. During six years of that period I was a partner in that firm, and for the last four years was the partner in charge of tax cases. Both with that firm and in my individual practice I have handled many tax controversies, involving hundreds of thousands and even many millions, of dollars, including both income and inheritance

Affidavit of Charles A. Roberts.

taxes and other forms of taxation, and in the course of this practice I have become completely familiar with the procedure of the Federal tax tribunals.

Incidentally I had spent six months as a special Assistant United States Attorney.

Having withdrawn from the Cravath firm in 1928, I devoted the major part of my time for more than two years to the preparation of a Manual to the United States Board of Tax Appeals Reports, described in a book review reprinted from the Harvard Law Review and appended hereto as Exhibit A. In the course of that work I examined thousands of decisions of the Board and of the Federal Courts and obtained a thorough knowledge of their attitude toward income and estate tax questions generally. 10 20

Without this specialized knowledge and experience (much of it obtained through the expenditure of time without direct return) and without my knowledge of the circumstances surrounding the Jay Gould Estate settlement, I would not have been justified in asserting so positively the propriety of the deduction claimed, and could not have advised as to the informal procedure for obtaining a speedy and favorable decision. It is my opinion, based on long experience and observation, that the services which I thus rendered in the preservation of the estate, were worth between \$20,000 and \$30,000. I believe that most tax practitioners with similar experience and equipment would charge the higher of those figures in an ordinary case of this type. 30

The interests of my client made it necessary for me to take the initiative and participate actively in these proceedings (a participation which benefited the entire estate), yet I could not ask 40

Affidavit of Charles A. Roberts.

10 for a retainer in view of the many adverse decisions and in view of her moderate proportionate interest (one-tenth) in the savings to be effected. My compensation for such services was therefore necessarily contingent on the outcome, and the proper allowance should be measured by the standards usual for contingent fees rather than those applicable under definite retainers. I respectfully submit that the circumstances required my intervention and justify an allowance proportionate to the difficulties encountered and the results obtained.

CHARLES A. ROBERTS.

20 Sworn and subscribed before me, a Notary Public of the State of New York in and for the County of New York, at the City of New York in said County and State, this 24th day of April, 1933.

V. MAY RUSSELL

Notary Public of the State of New York in and for the County of New York in said State.

30 [NOTARIAL SEAL]

Exhibit A to Affidavit of Charles A. Roberts.

BOOK REVIEW OF ROBERTS' B. T. A. MANUAL *from* HARVARD LAW REVIEW

MANUAL TO UNITED STATES BOARD OF TAX APPEALS
REPORTS. By Charles A. Roberts. Two vol-
umes. New York: Harper & Bros. 1929, 10
1930. Pp. xviii, 1097; 1223. \$35.00.

The reports of the Federal Board of Tax Ap-
peals are now moving toward their twenty-first
volume, with the impressive total of something
like 27,000 pages.¹ Although the tribunal's first
reported opinion was handed down no longer ago
than August 27, 1924, and appears in a bound vol-
ume published during 1926, it is already difficult
to obtain complete sets of the Board's reports. 20
Now nearly all hands agree that our law publish-
ers, official and private, are called upon to print
great masses of opinions which only clutter library
shelves. So one is tempted to say good riddance
to bad rubbish when told that a recent report is
not to be had; unavailability gives some evidence
that lack of utility has led to the lack of demand.
But Mr. Roberts, in a distinctly interesting pref-
ace, contends vigorously that many of the B. T. A.
cases have definite and peculiar value. They sup-
ply not alone a record of how particular tax con-
troversies were discussed and at least initially
determined, but also an intimate contemporaneous
view of problems of finance and industry, together
with striking indications of the commercial and
legal devices employed to meet those problems.² 30

Doubtless in large part because of this belief,
Mr. Roberts set himself to prepare a guide to the
B. T. A. reports. As published, this guide or man-

¹ This estimate excludes many additional pages of tabulations.

² Pp. vi-vii.

Exhibit A to Affidavit of Charles A. Roberts.

ual covers the first seventeen volumes, omitting those cases apparently of interest only to the immediate participants. While performing the familiar functions of a citator, it also does much more. Mr. Roberts has taken the pains to insert through his first sixty-eight pages detailed analyses of the fundamental conceptions underlying the Board's earliest decisions, and to show at some length the later development of these conceptions. Such discussions help to introduce lawyers to the lines of thought followed by accountants, and *vice versa*. They carry forward in effect to many later decisions of the Board, and are paralleled by a number of briefer and more scattered criticisms or suggestions on later pages of the manual.³ For each case covered there is a reprint of the official headnote, so that some description of the controversy⁴ is added to the tracing of its technical history by way of administrative acquiescence or non-acquiescence, judicial affirmance or reversal, and subsequent citation in other cases. Moreover, there are lists of the authorities relied on by the Board in the immediate decisions, and cross references to connected or allied cases. The second volume closes with elaborate citator tables covering separately the various United States courts, an alphabetical table of cases, and a topical index to leading cases which forms a useful compact

³ See examples on pp. 934, 935, 1135-1140, 1143, 1187, 1248, and 1309-10.

⁴ Headnotes, of course, are none too reliable; and some of these headnotes are useless or worse. For instance, the headnote to Appeal of Woodruff, 4 B. T. A. 842 (1926), (Roberts, p. 599), runs: "1. *Held*, that the transaction involved herein [naming the parties] constituted a joint venture. 2. The amount of gain realized by [the participants], determined." Even with Mr. Roberts' reference back to Appeal of Bradley, 1 B. T. A. 111 (1924), (Roberts, p. 81), an uninformed reader is not sufficiently warned of what was going on behind the scenes. No doubt it is too much to expect the author to check all the headnotes, but perhaps in a later printing of the manual some dropped stitches of this kind can be picked up.

Exhibit A to Affidavit of Charles A. Roberts.

digest. By this description it is apparent that a lawyer or accountant desiring to work from a tax problem to the decisions, or from one decision to others, will find here the means for running backward and forward along the Board's reports and laterally into the decisions of federal courts. To the publisher's glory, this can be done throughout on large pages and in type of liberal size; there is none of the cramped fine print usually associated with citator tabulations. 10

All in all, the manual must have demanded heavy expense and a vast amount of labor. So much of the work was routine that the whole might easily have slipped into a commonplace rut. This peril has been avoided to a marked degree. Perusal of the introduction should convince any reader that Mr. Roberts entertains, and has been following out, a philosophic purpose. Many evidences of special care and attention will be observed. Even in the citator lists one finds corrective comment,⁵ brief characterizations of decisions,⁶ and the like. The profession is fortunate that a man of Mr. Roberts' mental capacity has patiently carried through this difficult task, and it is to be hoped that the reception accorded his manual will be sufficiently warm to encourage him to keep the book up to date.⁷ 20 30

J. M. MAGUIRE.

Harvard Law School.

⁵ P. 3404, mis-citation detected.

⁶ *E.g.*, pp. 3401-82, *passim*.

⁷ In this respect it is of interest to notice that the pagination of Volume II is broken and thus indicates an intention to insert additional material in the future.

Affidavit of J. Edward Ashmead.

[Filed April 25, 1933.]

IN CHANCERY OF NEW JERSEY.

62/608.

10

Between

KINGDON GOULD and SCHUYLER NEIL-
SON RICE, as Executors, etc., of
GEORGE J. GOULD, Deceased,
Complainants,

and

COMMERCIAL TRUST COMPANY OF
NEW JERSEY, *et als.*,
Defendants.

20

On Bill, etc.
Affidavit in
Support of
Application for
Allowance of
Counsel Fees.

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

J. EDWARD ASHMEAD, of full age, being duly
sworn according to law on his oath, says:

1. I am a member of the law firm of Lindabury,
Depue & Faulks and have had personal supervi-
sion of all of the work done by my firm in connec-
tion with the estate of George J. Gould, deceased,
during the period covered by the final account of
Kingdon Gould and Schuyler Neilson Rice, as
Executors of the said estate, namely from Novem-
ber 2, 1927, to the present time. This affidavit is
made in support of my firm's application to the
Court of Chancery upon the settlement of the said
Executors' final account for the allowance of a
counsel fee for the services rendered during the

Affidavit of J. Edward Ashmead.

said period on behalf of the various parties interested in said estate and account, whom my firm represents, namely, Kingdon Gould, individually, Jay Gould, George J. Gould, Jr., Marjorie Gould Drexel, Anthony J. Drexel, Jr., Edith Drexel Cram, Annunziata Gould, Anne Graham Gould, Gloria Gould Barker, Wallace MacFarlane Barker and Edith Gould MacNeal. This affidavit does not include any services rendered in connection with any of the proceedings in which special allowances have been made to my firm. 10

2. During the said period the services rendered have been chiefly in connection with the following matters, namely:

(a) The proceedings instituted in this Court upon petition of the Executors in February, 1929, for instructions as to payments, if any, that should be made by them upon the call made under an agreement known as the "Little Kanawha Syndicate Agreement" by the managers of the said Syndicate for a percentage of the subscription made to said Syndicate by the said George J. Gould during his lifetime. 20

(b) The proceedings in this Court and in the Court of Errors and Appeals for the determination of the amount of transfer inheritance tax payable by the Executors to the State of New Jersey. 30

(c) The proceedings in the Treasury Department and in the United States Board of Tax Appeals for the determination of the amount of federal estate tax payable by the Executors to the United States of America.

3. In the suit for instructions as to the amount, if any, which the Executors should pay in response 40

Affidavit of J. Edward Ashmead.

10 to the call of the Syndicate manager of the Little Kanawha Syndicate, I made a thorough examination of the records of the decedent's participation in the said Syndicate and an investigation of the history of said Syndicate, the calls which had been previously made, the extent to which the numerous other members of the Syndicate had responded to the various calls and the financial responsibility of the members who had not paid the calls made upon them. In all of this investigation Charles A. Roberts, Esq., of the New York Bar who represented the members of the Drexel family, procured and furnished to me a large part of the information. I then made a thorough examination of the law upon the various questions involved and rendered a lengthy opinion upon them to my correspondents who personally represented the clients for whom I was to appear. I prepared and filed answers for Kingdon Gould, Jay Gould, Marjorie Gould Drexel, Vivien Decies (now deceased), George J. Gould, Jr., Edith Gould Wainwright (now Edith Gould MacNeal) and Gloria Gould Barker. During the period between the filing of the said petition and March 25, 1930, the date on which the matter came on for hearing before the Court of Chancery at Newark, negotiations were had almost continuously in an effort to induce the surviving Syndicate managers to collect as much as possible from the various other members of the Syndicate who were able to pay and also with the representatives of such other members of the Syndicate. I participated in the work and my associate counsel, the said Charles A. Roberts, Esq., did a great amount of work which in my opinion substantially contributed to the favorable result that was finally accomplished in which other members of the Syndicate did agree to contribute

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Affidavit of J. Edward Ashmead.

and thereby reduce the amount payable by the Executors of the estate of George J. Gould, deceased.

4. In the proceedings for the determination of the New Jersey transfer inheritance tax, my firm did not appear. I did, however, receive reports from Messrs. McCarter & English who represented the Executors and I conferred with them and with my associate counsel from time to time concerning the advisability of the steps which were to be taken and I carefully considered and advised both the Executors and my associate counsel of my opinion as to the legal questions involved. 10

5. In connection with the proceedings for the determination of the federal estate tax I also had numerous communications and conferences with Messrs. McCarter & English and with my associate counsel concerning the questions and procedure there involved and particularly with reference to the advisability of pressing the appeal before the Board of Tax Appeals which involved questions similar to those which had been litigated and finally determined in the New Jersey Courts. In this matter the said Charles A. Roberts, Esq., again rendered valuable assistance. He has for many years specialized in federal tax matters and has had great experience in handling matters before the various branches of the Treasury Department and the United States Board of Tax Appeals. I spent considerable time in connection with this matter because the Executors were in grave doubt whether in view of the result of the New Jersey litigation which involved similar questions they should subject the estate to the expense of further litigation in connection with the federal estate tax proceedings. As a result of the consideration then 20 30 40

Affidavit of J. Edward Ashmead.

10 given by the Executors which included the advice and suggestions made and given by the said Charles A. Roberts it was decided to continue the efforts to sustain the Executors' contention and this was done by them with a most satisfactory outcome by which the estate saved a large amount in taxes. A detailed statement of the services rendered by the said Charles A. Roberts in this connection is also included in his affidavit which is presented herewith.

20 6. Prior to the filing of the Executors' final account they obtained an amendment to their original bill of complaint in the above entitled suit and a supplement thereto for the purpose of bringing in as additional parties Annunziata Gould, Anne Graham Gould, Wallace MacFarlane Barker, Anthony J. Drexel, Jr., and John Sergeant Cram, son of the said Edith Drexel Cram. My firm was retained to enter appearances on behalf of and to represent the said additional parties with the exception of John Sergeant Cram, who is a minor, and for whom W. Durward McCloskey was appointed as guardian *ad litem* with our approval.

30 7. Since the filing of the said final account I have made a careful examination of the account and have conferred with my various associate counsel who are the personal representatives of the various clients for whom I appear and with Messrs. McCarter & English concerning several matters in connection with the account and the allowances to be applied for. I also intend to appear on behalf of the various parties whom my firm represents at the return day of the order to show cause. One of my partners and I have spent
40 several days' time in connection with this matter

Affidavit of George W. C. McCarter.

of the settlement of the final account in addition
to the great amount of time spent and work done
on the larger matters above referred to.

J. EDWARD ASHMEAD.

Subscribed and sworn to }
before me, this 25th day } 10
of April, 1933. }

DOROTHY B. GOODEN,
Notary Public of New Jersey.

[NOTARIAL SEAL]

Affidavit of George W. C. McCarter.

[Filed April 25, 1933.]

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IN CHANCERY OF NEW JERSEY.

Between

KINGDON GOULD and SCHUYLER
NEILSON RICE, as Executors,
etc., of George J. Gould, de-
ceased,

Complainants,

and

COMMERCIAL TRUST COMPANY OF
NEW JERSEY, *et als.*,
Defendants.

62/608.

On Bill, Etc.

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

GEORGE W. C. McCARTER, being duly sworn upon
his oath according to law, deposes and says:— 40

Affidavit of George W. C. McCarter.

1: I am a member of the firm of McCarter & English, solicitors for the complainants in the above entitled cause. My firm have been proctors for the executors of George J. Gould, deceased, since the probate of his will June 4, 1923, and have been acting as sole New Jersey counsel to the said
10 executors since the probate of the decedent's will.

2: The executors have heretofore filed four accounts, the first three of which have been allowed by the Ocean County Orphans Court, and the last of which was allowed by decree of this Court in this cause. We have received allowances totalling two hundred and forty-five thousand dollars (\$245,000.00). The last allowance covered services down to October 6, 1927. Since that date my
20 firm has performed very many services for the executors. These services principally had to do with tax matters. There was of course a Federal Estate Tax, a New Jersey Transfer Inheritance Tax, and there were transfer tax proceedings also in the following States:—Arkansas, Illinois, Michigan, New York, North Carolina and Pennsylvania. I had very little to do with the New York proceedings. I carried on a correspondence with the authorities in the various States, which resulted in satisfactory adjustments, and concluded
30 in some instances in refunds in the other non-domiciliary States. However, I took part and had practically sole charge of the New Jersey proceedings. The matter of the New Jersey tax was referred by the Comptroller's office to Theodore Rurode as Special Examiner. There were numerous hearings before him and there were hearings and conferences in the office of William D. Kelly, State Supervisor. After the State rendered its final bill we took an appeal to the Prerogative
40 Court, which resulted in a modification of the

Affidavit of George W. C. McCarter.

assessment, but the result was not satisfactory, and I advised a further Court review. Certiorari was applied for and the matter was argued in the Supreme Court, which affirmed the Prerogative Court. A further appeal was taken to the Court of Errors and Appeals, where the matter was argued, which in turn affirmed the Supreme Court. The questions were very complicated. The record itself was very complicated. I had to spend a great deal of time in preparing the record, part of the time being spent in conferring in the office of the State Supervisor in Trenton. I prepared briefs in each of the three Courts, and each brief was substantially re-written in an effort to improve on the former briefs. After the final affirmance I carefully went over the revised assessment, computed the amount of tax which should be reimbursed to the executors by the trustees of the Preferential Trust and the Liberty Bond Trust, and made demands for such reimbursement. I also conferred with counsel for interested parties on the compromise tax proposed by the State on the contingent remainders and obtained their approval to the acceptance of such compromise. When the reimbursements by the Liberty Bond Trust and Preferential Trust were not made as contended, a bill was filed by the trustees in which those questions were litigated successfully to the executors. For services in that actual litigation we were allowed the sum of fifteen hundred dollars (\$1500.00) to be paid by the trustees of the Liberty Bond and Preferential Trust, which sum has been paid.

3: I also, assisted by Mr. George J. Gillespie, of the New York Bar, prosecuted the Federal Estate Tax proceedings. We had various conferences with Internal Revenue people, including

Affidavit of George W. C. McCarter.

10 a special trip to Washington on February 7, 1928, and after the final action by the Bureau of Internal Revenue I drafted and filed a petition of appeal to the United States Board of Tax Appeals. This appeal was pending undetermined at the time of the final action by the New Jersey Court of Errors and Appeals in the New Jersey tax. The questions raised in both appeals were the same. After the final action by the Court of Last Resort in New Jersey I conferred with the executors and counsel for interested parties as to whether or not further to prosecute the Federal Tax appeal. We were instructed to do so. I wrote Washington, suggesting a conference with a view to settlement, and on or about October 1, 1931, Mr. Gillespie and I went to Washington and had a very full conference with counsel for the Bureau of Internal Revenue. We took with us the briefs in the New Jersey proceedings and the record there, and offered to settle the proceeding by conceding the taxability of the gift of \$1,000,000.00 par value of First Liberty Loan Bonds by the testator to his wife in consideration of the allowance of \$1,825,000.00, paid to or in trust for the testator's ten children, as a valid deduction from the gross estate. Settlement was finally made by an allowance of \$1,525,000, which resulted in a very substantial refund.

4: There was also the matter of the settlement of the estate's liability by reason of George J. Gould's membership in a Syndicate known as the Little Kanawha Syndicate. I took part in conferences with counsel of various parties, prepared a petition in this Court in this cause, which resulted in an order being made herein March 25th, 1930, which resulted in a payment of \$92,000.00 by the executors, in exchange for a release and re-

Affidavit of George W. C. McCarter.

ceipt in full. This was a desirable settlement and was approved by all parties in interest, and it enabled the estate to obtain an additional deduction in its New Jersey and Federal Estate tax returns.

5: Hereunto annexed, marked Schedule A and made part hereof, is an itemized statement taken from the entries in my firm's books of services and disbursements covering the period in question. The disbursements which we have actually paid total three hundred forty-one dollars and forty-four cents (\$341.44). To this should be added the sum of seven hundred eighty-three dollars and fifty cents (\$783.50), the printers' bill for printing the executors' final account and petition thereunto annexed. 10

G. W. C. McCARTER. 20

Sworn to and subscribed before me, }
this 25th day of April, 1933. }

LEAH M. BAILEY,
Notary Public of N. J.

[NOTARIAL SEAL]

Schedule "A." 30

To further services to date:

(Oct. 7, 1927) Protracted conference with State Auditor and Certified Public Accountant and also with counsel for some residuary legatees; (Nov. 2) Various conferences with you and with Theodore Rurode, Esq., Special Examiner for the State, examination of law, preparation of supplementary affidavits, conferences with Messrs. Hubert & 40

Affidavit of George W. C. McCarter.

Langford, studying files, preparing affidavit for execution by Messrs. Rice and Langford, studying accounts, prepared by Mr. Hubert, attending on hearing before Mr. Rurode, at his office and today, supplying him with all papers desired, including affidavits aforesaid; (Jan. 6, 1928) Further services in the New Jersey Transfer Inheritance Tax proceedings; (Jan. 13) Further services and protracted conference in New York with you, associate counsel and counsel for Edith K. Gould, Estate; (Jan. 17) Conferring with Mr. Gillespie and revising letter of protest on Federal Inheritance Tax; Going over re-drafted letter of protest and Federal Estate Tax, attaching exhibits and arranging letter for execution, studying file, examining law and determining that nothing further should be done with respect to Pennsylvania tax, writing letter starting proceedings for final ascertainment of tax in Illinois, Michigan & No. Carolina; (Feb. 7) Services in connection with the Federal Estate tax, conference Jan. 30 with Mr. Gillespie with respect to need for further proof in addition to letter of protest, further conference Feb. 3 with Messrs. Taylor, Knowles and Hack with respect to situation on art treasures; today going specially to Washington, appearing before Bureau of Internal Revenue in support of protest and arguing for them; (Feb. 15) Further services with respect to Federal Estate Tax, making report to you of results in Washington, gathering necessary data for interview with Field Agent arranged for in Washington and today conferring with him; (Mar. 10) Services in connection with request by the trustees under the third clause of the Will for information with respect to interest paid on legacy in connection with income tax, examination of law, correspondence with you, study-

Affidavit of George W. C. McCarter.

ing schedules prepared by you, and today writing
 you opinion and drafting form of letter to be sent
 by you to trustees; (Mar. 12) Studying 60 day let-
 ter from Commissioner of Internal Revenue, mak-
 ing copy of same for associate counsel and writing
 you with respect thereto; (Mar. 13) Going spe- 10
 cially to New York and attending conference of
 Executors and associate counsel on policy to be
 pursued under Little Kanawha Syndicate situa-
 tion with respect to disposal of securities believed
 to be worthless and procedure with respect to
 Federal Estate tax; (Mar. 30) One-half day going
 over figures in tax returns and preparing revised
 statement for use in revision proceedings in all
 state returns; (Apr. 2) Further services in con-
 nection with Estate Tax Matters, going over state- 20
 ment, revising same and writing letters to Mr.
 Rice and Mr. Gillespie with respect thereto; (Apr.
 12) Previously arranging for and today going
 specially to New York and conferring with execu-
 tors and associate counsel on inheritance tax re-
 turns; (Apr. 13) Studying file, drafting letter to
 Commissioner of Internal Revenue requesting cor-
 rection of error in his determination of Federal
 Estate Tax Return through elimination by his
 oversight of deduction of \$217,448.95; (May 8)
 Further services in connection with Federal Estate 30
 Tax, reading letter from Commissioner of Inter-
 nal Revenue dated April 25th, with respect to
 deductions for debts of decedent, carefully com-
 paring same with previous reports, making copies
 thereof and May 3rd sending same with comments
 to Messrs. Rice and Gillespie, examining law with
 respect to practice and procedure before U. S.
 Board of Tax Appeals, studying file, drafting
 petition to U. S. Board of Tax Appeals, and today
 going specially to New York and conferring with 40

Affidavit of George W. C. McCarter.

10 you and Mr. Gillespie and attending to execution
 of petition of appeal and sending same to U. S.
 Board of Tax Appeals; (May 17) Services in con-
 nection with Illinois, Michigan, North Carolina
 inheritance taxes, studying file and form of affi-
 davits in each case, correspondence with proper
 officials of each State, examination of law, prepar-
 ing supplemental affidavits in each case and today
 forwarding them to you for execution; (May 31)
 Studying file, correspondence with proper state
 officials and preparing appropriate papers for
 appropriate tax and refund for states of Illinois
 and No. Carolina and today forwarding papers;
 (June 11) Further services in suit in Chancery
 brought by you, writing long letter to each of
 20 Messrs. Gillespie, Content, Roberts, Wallace and
 Lane, explaining suit situation and urging the
 counsel to speed the cause; (June 12) Services
 with respect to Michigan Inheritance Tax, prepar-
 ing supplemental affidavit and arranging for exe-
 cution by Executors, drawing petition for redeter-
 mination of tax and forwarding papers to proper
 authorities; (June 29) Services with respect to
 North Carolina inheritance tax, studying file, read-
 ing letter from Commissioner of Revenue and
 writing letter seeking information from Mr. Gil-
 30 lespie; Further services in the matter of the Little
 Kanawha Syndicate, studying file, conference by
 telephone yesterday with Mr. Gillespie, examina-
 tion of law, correspondence with Mr. Rice and
 today writing Mr. Gillespie and Mr. Rice on pro-
 cedure to be followed by them; (Sept. 21-25) Ex-
 amining law on Illinois tax matters; (Oct. 18)
 Services in protracted conference with you and
 associate counsel at your office in Little Kanawha
 Syndicate Matter; (Nov. 7) This morning making
 40 application to V. C. Backes and securing order

Affidavit of George W. C. McCarter.

appointing guardian *ad litem* of the infants in the
 suit brought by the Executors; (Nov. 20) Services
 today conferring with State Supervisor of Trans-
 fer Inheritance Tax Bureau with respect to N. Y.
 Inheritance Taxes; (Feb. 20, 1929) Further ser-
 vices in various estate inheritance tax matters,
 obtaining certain refunds and paying same over 10
 to you, examination of law with respect to determi-
 nation of net tax due by State of Illinois and
 opinion to you thereon, conferences and corre-
 spondence with a view to expediting and fixing of
 New Jersey tax, conferences with Mr. Rice, pre-
 paring and filing third and fourth supplemental
 affidavits with New Jersey authorities; (Mar. 15)
 Further services in the New Jersey Inheritance
 Tax Matter, arranging for and today going spe- 20
 cially to Trenton to confer with State Supervisor
 of Inheritance Tax Bureau; (May 14) Further
 services in the New Jersey Transfer Inheritance
 Tax, studying tax bill and Department's letter of
 April 24, suggesting compromise payment, making
 copies of same for executors and associate coun-
 sel; (May 1) Studying analysis of estate and
 assessment submitted by Department; further cor-
 respondence with Department, including today
 long letter of inquiry to Department and long let-
 ter to counsel for Commercial Trust Co. of New 30
 Jersey, made after studying file with respect to
 refund due from Trustees of preferential trust to
 executors; (June 21) Further services in the mat-
 ter of the N. J. Transfer Inheritance Tax, corre-
 spondence with the office of the State Supervisor
 of Transfer Inheritance Tax, protracted confer-
 ence in New York with Mr. Rice and Mr. Gillespie,
 examination of law, drafting petition of appeal to
 Ordinary and today going specially to Court and
 getting order to show cause; (July 16) Going to 40

Affidavit of George W. C. McCarter.

Trenton, conferring with State Supervisor of Transfer Inheritance Tax Bureau, Attorney General and obtaining an order of reference of tax appeal to Vice Ordinary Backes; (Sept. 24) Services going to Trenton and conferring with officials of Transfer Inheritance Tax Bureau with
 10 respect to preparation of record on tax appeal; (Nov. 21) Preparing for argument, today going specially to Trenton before Vice Ordinary and arguing inheritance tax appeal; (Dec. 2) Further services in the New Jersey Transfer Inheritance Tax Matter, studying brief filed by the State, examination of law, preparation of brief and today serving same; (Dec. 14) Studying answering brief of State and writing letter to Vice Chancellor in lieu of reply brief; (Feb. 6, 1930) Reading opinion
 20 of V. C. Backes, making copies of same, going specially to New York and protracted conference with Mr. DeLaney with respect to appeal; (Apr. 4) Services studying opinion of Vice Ordinary, drafting writ of certiorari, making appointment with Supreme Court Justice, and today going specially to Trenton, obtaining allowance of writ of certiorari and filing same with Clerk of Pre-rogative Court; (Sept. 18) Preparing brief on New Jersey Transfer Inheritance Tax Appeal in
 30 Supreme Court; (Oct. 1) Reading brief for Comptroller in New Jersey Transfer Tax matter, and September 29th, Sept. 30th and today, working on and preparing reply brief; (Oct. 6) Reading defendant's brief and preparing reply brief; (Oct. 7) Yesterday and today going to Trenton and waiting for and arguing inheritance tax certiorari before Supreme Court; (Feb. 5, 1931) Services in Inheritance Tax Appeal in the Court of Errors, preparing record for printing, writing brief, reading brief for respondent, going specially to court
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Affidavit of George W. C. McCarter.

for three days, waiting for and arguing appeal;
 (June 3) Services going specially to New York
 and conferring with you and Mr. Gillespie relative
 to future action with respect to the New Jersey
 Inheritance and Federal Estate Taxes; (July 22)
 Services conferring with Mr. Ashmead and Mr.
 Roberts, writing letters to counsel for interested
 parties, and today going specially to New York
 and conferring with you and associate counsel
 relative to the further prosecution of the appeal
 in the Federal Estate Tax Matter; (Oct. 1) Pre-
 paring for and going especially to Washington
 and attending on conference with counsel for
 Bureau relative to settlement of Federal Tax
 Appeal; (Jan. 26, 1933) To opinion today to you
 as to how to charge the Federal and New Jersey
 Transfer Inheritance taxes; (Mar. 6) Services
 going specially to New York and conferring with
 you relative to procedure on accounting; (Mar. 7)
 Services preparing affidavit in executors' account-
 ing suit, drawing amendment and addition by way
 of supplement, and today going specially to Court
 and obtaining leave to file same, and filing same;
 (Mar. 8) Services serving amendment and addi-
 tion by way of supplement; (Mar. 20) Examining
 order of Surrogate of New York, fixing New York
 transfer inheritance tax, examination of law and
 today writing opinion with respect to reimburse-
 ment of same by trustees of preferential trust and
 letters to Messrs. Lane and Anderson thereon.

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Affidavit of George W. C. McCarter.

DISBURSEMENTS.

	Paid F. L. Salmon, stenographer, for 4 copies of decree.....	\$ 4.00
	Paid F. L. Salmon for bill.....	8.40
	Paid U. S. Board of Tax Appeals.....	10.00
10	Paid Lakewood Citizen for publishing notice	18.36
	Paid Ernest G. Davids <i>re</i> : tax matters....	6.00
	Paid Ruth E. Schultz for copy of ap- praiser's report	6.00
	Paid Ocean County Sheriff for fees.....	1.62
	Paid Dorothy Rice, Secretary to V. C. Backes for copy of opinions.....	11.50
	Paid Secretary of State for filing notice of appeal in Inheritance Tax Matter....	.34
20	Paid Secretary of State for filing peti- tion, order to show cause, order dis- pensing with bond, order of reference, designation, transcript and decree.....	12.18
	Paid Secretary of State for dismissal.....	2.36
	Paid Secretary of State for fees on pro- ceedings in Geo. J. Gould Estate.....	11.50
	Paid Secretary of State for filing notice of argument	.70
	Paid A. W. Cross for printing state of case	15.00
30	Paid Secretary of State for filing return	.56
	Paid Ocean County Sheriff for subpoena to answer in Dunsford Matter.....	1.62
	Paid Times and Journal Publishing Co. for advertising	14.28
	Miscellaneous expenses	217.02
		\$341.44

Affidavit of George J. Gillespie.

[Filed May 3, 1933.]

IN CHANCERY OF NEW JERSEY.

Between

KINGDON GOULD and SCHUYLER
NEILSON RICE as Executors,
etc., of GEORGE J. GOULD, de-
ceased,

Complainants,

and

COMMERCIAL TRUST COMPANY OF
NEW JERSEY, *et als.*,
Defendants.

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62/608.

On Bill, etc.

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STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

GEORGE J. GILLESPIE, being duly sworn, upon his
oath according to law deposes and says:—

1. I am a member of the firm of Gillespie &
O'Connor, attorneys-at-law, with offices at No. 20
Vesey Street, in the Borough of Manhattan, New
York City. My firm has been with the firm of
McCarter & English, general counsel for Schuy-
ler Neilson Rice and Kingdon Gould, Executors
of the Estate of George J. Gould, deceased, since
the probate of his will on June 4, 1923, and have
acted as such with reference to estate matters
outside the State of New Jersey and especially in
the State of New York.

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Affidavit of George J. Gillespie.

2. The accounting in this action is the fifth accounting of the executors. Three were made in the Ocean County Orphans Court and the last in this Court. In each of the previous accountings allowances were made to my firm and these allowances have covered services heretofore rendered
10 down to October 6, 1927. Since that date, a period of five and one-half years no compensation or allowance of any kind has been made to deponent or his firm for services rendered. During said period deponent has been in frequent conferences with the executors with reference to estate matters.

With regard to matters in New Jersey deponent has been in conferences with the firm of McCarter & English with reference to the various actions
20 that had to be brought in order to wind up and settle mooted questions particularly the New Jersey Inheritance Tax Proceedings and the Little Kanawha transactions.

Deponent in addition thereto has had principal charge of the following matters:

Foreclosure of the Mortgage of Albert Bryant and Mattie Bryant in North Carolina, purchasing the property at foreclosure sale in the name of one of deponent's employees and subsequently disposing of the same for the benefit of the estate.
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During the first six months of 1929 deponent examined all papers and instruments in the estate's possession concerning the property at High Point, North Carolina, and delivered same to Frank B. Hower in June, 1929, said Hower being the purchaser of the estate property at High Point.

Deponent further had conferences with the executors and Mr. McCarter regarding the sale of
40 the miscellaneous assets of the estate. Deponent

Affidavit of George J. Gillespie.

arranged for the sale of all of these preparing the advertisements, attending the sale and delivering the securities and turning over the proceeds of sale to the executors.

Deponent had entire charge of the New York State Inheritance Tax proceedings. These proceedings began in February, 1932 and continued to February, 1933. The conduct of these proceedings involved exhaustive inquiry into all of the proceedings in the so-called Jay Gould litigation and the appraisals of the entire estate, the examination of the Edith K. Gould (Mrs. George J. Gould) tax proceedings, the examination of the New Jersey Estate Tax proceedings of the Estate of George J. Gould and the Federal Tax proceedings of the Estate of George J. Gould. It also involved consideration of the election by the beneficiaries interested in the Jay Gould Estate Trust for George J. Gould to take over their interest under the Will of Jay Gould rather than under the appointment made by the Will of George J. Gould. The sum of \$30,000 had been deposited in 1923 to cover the New York State Inheritance Tax. The order of the Surrogate of New York County, signed on February 3, 1933 fixed the tax at \$387.97, so that the refund to the estate is \$29,612.03.

The Estate of George J. Gould was involved in a very complicated syndicate arrangement known as the Little Kanawha Syndicate. Mr. George J. Gould was one of the managers of this syndicate and individually had underwritten the syndicate in the sum of \$2,300,000. The syndicate had substantially closed out its operations except for a underwriting liability in the sum of \$170,000 which grew out of the sale of some real estate in Virginia. Litigation there had resulted in establish-

Affidavit of George J. Gillespie.

ing the liability of the syndicate. Call was made by the substitute syndicate managers upon the members of the syndicate. These calls involved a possible liability on the part of the Estate of George J. Gould of an amount up to approximately \$170,000. Deponent had sole charge of all the negotiations looking to a settlement and adjustment of this claim. He had conferences in New York, Baltimore and St. Louis with counsel for the syndicate managers, representatives of the Baltimore and Ohio Railroad, the Pennsylvania Railroad, the Pittsburgh and Lake Erie Railroad and with the attorneys of various members of the syndicate, and as a result thereof he made a contingent agreement with the syndicate managers, to be subject to the approval of the Court of Chancery in New Jersey. The plan thus agreed upon was made the subject of an action brought in February, 1929, by the executors of the Estate of George J. Gould against the Commercial Trust Company as Trustee, and an order approving the prayer of the executors was made in March, 1930. This action and the payment of \$92,000 provided for therein settled the claim and released the executors from any further liability.

Deponent had many conferences during the entire year 1928 with regard to this matter with the executors and with counsel for various parties interested.

Deponent had appeared solely for the executors of the Estate of George J. Gould in the accounting action brought in the Supreme Court of the State of New York by Helen Gould Shepard and the Chase National Bank as Substituted Trustee under the Will of Jay Gould, deceased, for the Trust set up for the benefit of George J. Gould. The accounting itself was quite voluminous and

Affidavit of George J. Gillespie.

complicated. Deponent had many conferences with Messrs. Milbank, Tweed, Hope & Webb, attorneys for the Chase National Bank, and with the trust officers of the bank itself.

There was involved in this accounting the election of the beneficiaries to take under the Will of Jay Gould rather than under the Power of Appointment set forth under the Will of George J. Gould. Action was brought to settle the account at the instance of De Forest Brothers as a desirable procedure. We filed an answer for the estate and subsequently united in formal judgment. Final judgment has been entered in this matter and the estate distributed. 10

Deponent with Mr. McCarter had charge of the Federal Estate Tax proceedings. These proceedings involved many conferences with the Internal Revenue representatives and three trips to Washington by deponent, two of a preliminary character during the years 1927 and 1928 and one on October 1, 1931, when we argued to a conclusion the matters under consideration. 20

The tax proceedings in New Jersey had held against the contention of the executors in all respects so that the estate was held taxable on the \$1,000,000 gift made by Mr. Gould shortly before his death to his widow and on the adjustment of \$300,000 under the preferential trust of the three children of the widow and on the \$1,525,000 paid in settlement of the claim of the seven children of George J. Gould by his first wife against the estate. There were many conferences with regard to these questions which were again brought up in the Federal Inheritance Tax proceedings, and at the conference on October 1, 1931, just before the cause was to come on for trial before the Board of Tax Appeals the Federal Tax authorities con- 30 40

Affidavit of George J. Gillespie.

ceded our contention as to the claim of the seven children in the sum of \$1,525,000 and held the same to be non-taxable, and we in behalf of the estate waived our claim as to the other two items. This adjustment of the situation was of great monetary value to the estate, as it changed a debit of \$252,630.63 and interest to a refund or credit of approximately \$70,769.37. In these proceedings Mr. McCarter and I acted together and went to Washington together except on one occasion when I went along.

Prior to 1927 Henry W. McMaster and F. H. Skelding, as Receivers of the Wabash Pittsburgh Terminal Railway Company had began an action against Kingdon Gould and Schuyler Neilson Rice as Executors of the Estate of George J. Gould, deceased, which action had been carried to the Supreme Court of the United States and decided in favor of the executors. At the 1927 October Term of the Supreme Court of the United States petition was made for a re-hearing. In January, 1928, the United States Supreme Court ordered both parties to Show Cause why the Writs of Certiorari should not be dismissed for want of jurisdiction. On March 5, 1928, the Court dismissed the Writs for want of jurisdiction. On March 8, 1928, petitioner petitioned for a re-hearing. On April 18, 1928, this was denied and the final mandate of the United States Supreme Court issued. Later an order was made making the United States Supreme Court the order of the New York Supreme Court in this action, and terminating the litigation finally in favor of the executors.

Deponent was associated with Mr. Wallace in this matter. He argued the question. While these proceedings in great measure were repetitions of

Affidavit of George J. Gillespie.

questions already argued and resulted in confirmation of decisions theretofore made, a great deal of time and study had to be given to the contentions of Louis Marshall, attorney for the petitioners.

Deponent submits this affidavit in support of his request for an allowance for services to the firm of Gillespie & O'Connor in the sum of Fifty Thousand (\$50,000) dollars. 10

Deponent annexes hereto a schedule and made a part hereof as a statement of disbursements not heretofore paid for covering the period in question. These disbursements amount to the sum of \$199.20.

GEORGE J. GILLESPIE.

Sworn and subscribed to before me
in the City, County and State of
New York, before me a Notary
Public of the State of New York,
duly authorized by law to administer oaths in said City of New York, this 25th day of April, 1933.
Witness my hand and seal the day
and year aforesaid, at said City of
New York. 20

ERNEST A. ZEMA 30

ERNEST A. ZEMA

Notary Public, Kings County
Kings Co. Clk's No. 29, Reg. No. 4027
N. Y. Co. Clk's No. 92, Reg. No. 4Z52
Commission expires March 30, 1934

(L. S.)

Affidavit of George J. Gillespie.

DIARY EXTRACTS—REGARDING SERVICES.

1928

10	Jan.	10	Conference with Kingdon Gould re Little Kanawha Syndicate					
	"	11	"	"	"	"	"	"
	"	13	"	"	"	"	"	"
20		17	Conference with Mr. McCarter regarding revision letter of Protest Federal Inheritance Tax.					
	Jan.	30	Conference with Mr. McCarter re further proof for letter of Protest.					
	Mar.	3	Conference executors regarding Little Kanawha Syndicate Federal Tax, New York Inheritance Tax, High Point Mortgage.					
30	Mar.	5	Conference Kingdon Gould regarding Little Kanawha Syndicate.					
	Mar.	6	Kingdon Gould re Bryant Mortgage.					
	Mar.	13	Conference with Mr. McCarter and Mr. Rice. Letter to McPheeters regarding Little Kanawha Syndicate. Letter to Mr. Rice and Commercial Trust Company regarding taxes on widow's interest.					
40	Mar.	16	Conference with Mr. Wallace regarding McMasters.					
	"	19	"	"	"	"	"	"
	"	21	"	"	"	"	"	"
	"	22	"	"	"	"	"	"
	Apr.	2	Conference with Kingdon Gould regarding N. Y. Inheritance tax question of election to take under will of Jay Gould or under Power by Will of George J. Gould.					
	Apr.	9	Conference at office of estate with Executors.					
	Apr.	12	Conference at office of estate.					
	Apr.	30	Conference with Kingdon Gould.					
	May	2	Conference with Mr. Gould regarding Louisiana property.					
	May	3	Conference with Equitable Trust Company regarding George J. Gould estate trust.					
	May	8	Conference with Kingdon Gould regarding Estate matters.					
	May	9	"	"	"	"	"	"
	May	17	"	"	"	"	"	"
	May	23	"	"	"	"	"	"
	May	25	"	"	"	"	"	"
	May	29	Conference Mr. Content re N. J. allocations.					
	May	8	Conference with Mr. McCarter, Rice and Gould regarding Federal Tax Appeal, the sale of securities and the N. Y. State Inheritance Tax Proceedings.					
	June	28th	Conference with Mr. McCarter regarding Little Kanawha Syndicate.					

Affidavit of George J. Gillespie.

July	2nd	Conference with attorneys for Jay Gould and admission re Appearance in New Jersey suit.	
July	6th	Conference with Kingdon Gould regarding allocations suit in New Jersey.	
July	9th	Conference with Mr. McCarter regarding Little Kanawha Matter.	
July	20	Conference with Mr. Content, Mr. Leve, and Messrs. Humes and Smith regarding Little Kanawha matter.	
July	23	Conference with Mr. Ashmead regarding New Jersey Accounting Action.	10
July	24	Conference with Mr. McCarter regarding Little Kanawha Matter.	
Sept.	4th	Conference with Kingdon Gould.	
Nov.	27th	Long conference with Mr. Gould regarding Little Kanawha matter.	
Dec.	11th	At office of Estate, conference with Mr. Kingdon Gould regarding various estate matters.	
Dec.	17th	Attended at office of estate regarding various matters.	
Dec.	28th	Conference with Mr. Smith—explained status to date of Little Kanawha matter.	
1929			20
Jan.	16	Conference at office of estate.	
Jan.	25	Conference with Mr. McCarter regarding Tax Matters.	
Feb.	11	Conference with Kingdon Gould at office of Estate regarding Little Kanawha matter.	
Mar.	5	Attended at Newark in Conference with Mr. McCarter regarding Federal Estate Tax questions.	
Mar.	18	Conference with Mr. McCarter.	
Mar.	19	Conference with Mr. Gould regarding Gould vs. Commercial Trust Company.	
Apr.	19	Agreement regarding Little Kanawha Syndicate completed.	
May	9th	At Newark all day with Mr. McCarter regarding New Jersey Tax.	
May	20th	Conference with Mr. McCarter regarding Little Kanawha action and Federal Tax.	30
May	28th	Conference with Executors and Mr. McCarter regarding New Jersey Tax, Federal Tax matter.	
June	21	Conference with Mr. McCarter and Mr. Rice re examination of law and draft of petition of appeal.	
Nov.	21	Gould Inheritance Tax—attended hearing at Trenton.	
1930			
Feb.	6	Conference with Mr. McCarter with respect to Appeal.	
May	29	Conference Equitable Trust Company regarding George J. Gould Trust Accounting.	40

Affidavit of George J. Gillespie.

	June 18	Conference Mr. Cram representing Equitable Trust Company regarding accounting action.
	June 28	Conference with Kingdon Gould regarding Equitable Trust Company Accounting action.
	Sept. 22	Mr. Roberts regarding Federal Inheritance Tax.
	Sept. 23	Conference with Kingdon Gould regarding Estate matters.
10	Oct. 7th	" " " " " " "
	Oct. 9th	" " " " " " "
	Oct. 22nd	" " " " " " "
	Dec. 19th	" " " " " " "
	1931	
	Jan. 15	Before Judge Glennon in Equitable Trust Company Accounting action.
	Feb. 20	Conference at office of Estate regarding New Jersey Inheritance Tax and complainants in Edwin Gould Accounting action.
	Mar. 12	Conference with Mr. Roberts explained situation with regard to Federal Inheritance Tax matter.
20	June 3rd	Conference with Mr. Gould, M. Rice and Mr. McCarter regarding New Jersey Inheritance Tax matters—question of refunds and arranging with Lady Dunsford and Trustees for payment of her share. Considered the matter of continuing appeal in Federal Inheritance Tax matter and to proceed with the New York State Tax matter.
	June 10th	Conference Mr. Graber, Chase National Bank regarding New York State Tax.
	July 21st	Conference with Mr. Wallace regarding Little Kanawha Syndicate. Conference with Kingdon Gould and Mr. Rice.
30	July 22nd	Conference with Mr. Rice, Mr. Kingdon Gould and Mr. McCarter regarding estate matters.
	July 31	Conference estate with Mr. Gould regarding Huntsman and Roberts. Conference with Mr. Wallace.
	Aug. 24	Mr. Roberts re Federal Inheritance Tax.
	Aug. 25	Stewart & Shearer re U. S. Trust Company accounting.
	Aug. 27	Conference with Mr. Sykes, attorney for U. S. Trust Company.
	Sept. 10	Conference with Mr. Rice and McCarter regarding Federal estate Tax matter.
	Sept. 21	Conference at office of estate regarding various tax matters.
40	Sept. 22	Further conference.

Affidavit of George J. Gillespie.

Sept. 23 Further conference.
 Oct. 1st Hearing at Washington re Federal Inheritance Tax.
 Oct. 3rd Explained to Mr. Roberts the situation with regard to the Federal
 and 5th Tax Hearing.

1932

Feb. 1 Engaged in preparation of New York Transfer Tax matter.
 " 3 Engaged in preparation of New York Transfer Tax matter. 10
 " 4 Engaged in preparation of New York Transfer Tax matter.
 " 8 Engaged in preparation of New York Transfer Tax matter.
 " 9 Engaged in preparation of New York Transfer Tax matter.
 " 10 Engaged in preparation of New York Transfer Tax matter.
 " 11 Engaged in preparation of New York Transfer Tax matter; called
 at the Surrogate's office and learned of the appointment of
 appraiser on application of the Chase National Bank; called at
 State Tax Commission's office and saw representatives there and
 examined all papers on file.
 " 13 Engaged in preparation of New York Transfer Tax matter.
 " 15 Engaged in preparation of New York Transfer Tax matter. 20
 " 16 Engaged in preparation of New York Transfer Tax matter.
 " 17 Engaged in preparation of New York Transfer Tax matter.
 " 18 Engaged in preparation of New York Transfer Tax matter; con-
 ferred with Mr. McCarter regarding the New Jersey Inheritance
 Tax and the Federal Estate Tax matters.
 " 19 Engaged in preparation of New York Transfer Tax matter.
 " 23 Engaged in preparation of New York Transfer Tax matter.
 " 24 Filed original petition for appointment of appraiser in the Office
 of the Surrogate of New York County.
 " 26 Memorandum in New York Law Journal of appointment of ap-
 praiser in Transfer Tax matter.
 Mar. 2 Attorney for Chase National Bank representing the Estate of Jay 30
 Gould called regarding New York Transfer Tax matter.
 " 11 Conference with attorney for Chase National Bank regarding ques-
 tion of election under will of Jay Gould or appointment exercised
 by George J. Gould.
 " 14 Conference with Mr. Rice regarding New York State Inheritance
 Tax.
 " 21 Conference with Mr. Rice regarding Transfer Tax.
 " 28 Conference with Mr. Roberts regarding New York State Inheritance
 Tax.
 " 29 Conference with Mr. Content and Mr. Hubert. 40

Affidavit of George J. Gillespie.

	Apr.	4	Conference with Mr. Cram, attorney for Chase National Bank and with Mr. Gould and Mr. Content.	July
	"	5	Conference with Mr. David T. Taylor regarding the New York Transfer Tax. Also conference with Mr. Rice.	"
	"	11	Conference with Mr. Content.	"
	"	14	Engaged in preparation of New York Transfer Tax matter.	Aug.
10	Apr.	15	Advised Mr. Content of status of proceeding.	Sept.
	"	18	Conferred with Mr. Rice.	"
	"	19	Conference with Estate's office.	"
	"	20	Conference with Mr. Content.	"
	"	21	Conference with Mr. Gould.	"
	May	3	Conference with Messrs. Gould and Rice.	"
	"	6	Engaged in New York Transfer Tax matter and saw representative of New York Tax office.	"
	"	9	Conference with Mr. Cram.	"
	"	10	Conference with Mr. Content.	"
	"	12	Conference with Mr. Kingdon Gould re New York State Tax.	"
20	"	18	Conference with Mr. Gould.	"
	"	23	Conference with Mr. Rice; engaged on tax matter.	
	"	24	Conference with Estate's office and also with Mr. Cram.	Oct.
	"	25	Conference with Mr. Kingdon Gould with regard to Federal Tax and New York State Tax.	"
	"	31	Conference with Estate's office and with Mr. Cram; received and examined petition and notice of motion by Chase National Bank for determination of New York Tax on the George J. Gould remainder in the Jay Gould Estate; acknowledge service of motion papers; conference with Mr. Rice; examined papers.	Nov.
	June	9	Conference with Mr. McCarter regarding Federal Tax and New Jersey Taxes.	"
30	"	18	Engaged in Transfer Tax matter.	"
	"	19	Engaged in Transfer Tax matter.	"
	"	20	Conferred with Estate's office, Mr. Rice and Mr. Cram.	Dec.
	"	21	Engaged in Transfer Tax matter.	"
	"	24	Conference with Mr. Graber, Chase National Bank, regarding New York State Inheritance Tax and with Mr. Graber and Mr. Cram regarding form of receipts and releases.	"
	"	29	Engaged in New York Transfer Tax matter.	"
	July	6	Prepared affidavit for Mr. Rice, Jr., appraising stocks and sent same to Mr. Rice for verification.	"
40	"	7	Conference with Mr. Rice.	"

Affidavit of George J. Gillespie.

July	8	Engaged in Transfer Tax matter and had conference with Mr. Rice.	
"	11	Conference with Mr. Gould.	
"	25	Conference with Mr. Rice.	
"	26	Received appraisals from Mr. Rice.	
"	27	Engaged in New York Transfer Tax matter.	
Aug.	12	Conference with Estate's office.	
Sept.	6	Conference with Estate's office.	
"	7	Engaged in Transfer Tax matter.	10
"	8	Conference with Estate's office.	
"	12	Conference with Mr. Millard.	
"	14	Conference with Mr. Millard.	
"	15	Conference with Mr. Millard and with Estate's office.	
"	16	Engaged on Tax matter.	
"	17	Engaged on Tax matter.	
"	19	Engaged on Tax matter.	
"	20	Engaged on Tax matter.	
"	21	Engaged on Tax matter.	
"	22	Engaged on Tax matter; filed original and two copies of affidavits and schedules with New York State Tax Commission.	20
Oct.	21	Conference with the attorney and examiner at the New York State Tax office.	
"	24	Conference with Mr. Rice.	
Nov.	2	Conference with Mr. Hubert.	
"	3	Conference with Estate's office.	
"	14	Engaged in preparation of supplemental affidavit.	
"	15	Sent supplemental affidavit to office of Estate for execution.	
"	16	Conference with Estate's office and with Mr. Rice; conference with State Tax representative; filed with State Tax Commission original supplemental affidavit and two copies and letter of transmission.	30
"	25	Conference with Mr. Rice.	
Dec.	3	Conference with State Tax Commission representative.	
"	5	Conference with Mr. Rice.	
"	7	Conference with State Tax Commission representative and also with Mr. Rice.	
"	12	Conference with State Tax Commission representative.	
"	13	Conference with Mr. Rice and with State Tax Commission representative.	
"	14	Received notice of hearing before State Tax Commission for December 16th; received notices in the behalf of the Sinclair chil-	40

Affidavit of George J. Gillespie.

- dren and mailed same to their attorney; received copy of the proposed report of the appraiser and examined same.
- Dec. 15 Conference with executors and Estate's office and also with State Tax Commission representative; prepared additional supplemental affidavit and sent same to Mr. Rice for verification.
- 10 " 16 Received supplemental affidavit of executors and filed original and two copies with State Tax Commission upon attendance and on return of notice of hearing; conference with Messrs. Rice and Hubert.
- " 20 Conference with Mr. Rice.
- " 22 Conference with Mr. Rice.
- " 27 Conference with Mr. Rice and with State Tax Commission representative.
- " 28 Conference with Mr. Rice and also with Mr. Buckley, attorney for State Tax Commission.
- 1933
- 20 Jan. 6 Conference with Mr. Rice regarding Transfer Tax matter; appraiser's report was filed today.
- " 11 Examined original report at the Surrogates' office and prepared order fixing tax.
- " 12 Submitted to the Surrogates' Court proposed order and copy of same. Conference with estate's office relative to the amount of tax and refund.
- " 18 Obtained a copy of order fixing tax the original having been entered as of January 12, 1933. Conference with estate's office.
- " 19 Engaged in consideration of refund from the State of New York for overpayment. Conference with office of estate regarding same.
- 30 " 20 Conference with estate's office and with Mr. Rice and with office of Mr. Hack.
- " 23 Conference with estate's office and with Mr. Hubert. Conference with Mr. Hack.
- " 24 Conference with Mr. Hack. Wrote executors regarding tax.
- " 28 Conference with New York State Tax Commission.
- " 30 Conference with Mr. Hubert. Sent copy of appraiser's report to Mr. Letterhouse and also to the executors. Prepared letter to State Tax Commission asking for refund.
- 40 " 31 Examined law relative to the refund. Conference with Mr. Buckley of the New York State Tax Commission who stated he had received a letter from Albany asking for amendment of order. Conference with Messrs. Rice and Letterhouse. Prepared order to amend order now entered assessing tax.

Affidavit of George J. Gillespie.

Feb.	1	Conference with Mr. Buckley of State Tax Commission and otherwise engaged on matter.	
"	2	Conference with Mr. Buckley of State Tax Commission and re-drafted order of amendment and obtained consent of the State Tax Commission's attorney to such order. Conference with Mr. Hubert.	
"	3	Conference with Mr. Rice, submitted to Surrogates' office order for amendment of tax order heretofore entered leaving additional copy.	10
"	4	Obtained a copy of order amending transfer tax order, order of amendment having been signed February 3rd. Sent copy of order with temporary receipt to State Tax Commission at Albany and asked for refund of overpayment.	
"	6	Conference with Mr. Rice.	
"	14	Received letter from State Tax Commission at Albany that refund for overpayment was barred by the Constitution of New York; examined law and Constitution and replied to the State Tax Commissioner and again demanded payment of refund.	20
"	17	Sent Mr. Rice copy of order amending order assessing New York Transfer tax.	
"	18	Sent executors copies of order amending order assessing transfer tax.	
"	21	Prepared memorandum on the matter of the refund of overpayment.	
Mar.	3	Examined further into the law covering the refund.	
"	6	Conference with Mr. Rice relative to refund.	

DISBURSEMENTS.

1927				30
June	30	Expenses to Washington, Federal Tax.....	\$ 34.00	
Dec.	21	Geo. A. Wardell, Stenographer, Minutes—New Jersey Inheritance Tax proceeding.....	22.20	
1928				
Oct.	19	Expenses to St. Louis, Mo., and return, re Little Kanawha	95.00	
1931				
Sept.	30th			
Oct.	1st	Expenses to Washington re Federal Tax.....	45.00	
1932				
Feb.	24th	Filing schedules and photostatic copy of New York State Treasurer's Temporary Receipt, New York Inheritance Tax	3.00	40
			\$199.20	

Decree on Executors' Final Accounting.

[Filed May 3, 1933.]

IN CHANCERY OF NEW JERSEY.

10	Between KINGDON GOULD and SCHUYLER NEIL- SON RICE, as Executors, etc., of GEORGE J. GOULD, Deceased, Complainants,	62/608. On Bill, etc.
	<i>and</i> COMMERCIAL TRUST COMPANY OF NEW JERSEY, <i>et als.</i> , Defendants.	

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The complainants having heretofore, on the 13th day of April, 1933, filed herein their final account, and the Court on that day having made an order referring it to Nicholas La Vecchia, Esquire, one of the Masters of this Court, to audit the said account, and directing all interested parties to show cause before the Chancellor at the Chancery Chambers in the City of Newark, on the 25th day of April, 1933, why the said account should not be in all respects allowed and proper allowances of commission and counsel fee be made, and it appearing to the Court that the said order to show cause has been duly served, and upon reading and filing the report of the said Master, from which it appears that he has audited, as in and by the said order to show cause directed, the said final account, and has found the same in all respects correct, and no exceptions to the said account having been filed, and this matter coming on to be heard in the pres-

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40

Decree on Executors' Final Accounting.

ence of George W. C. McCarter and George J. Gillespie (of the New York Bar), of counsel with the complainants, and J. Fisher Anderson, of counsel with the defendants Commercial Trust Company of New Jersey and Schuyler Neilson Rice, as trustees under the will of George J. Gould, deceased, of Merritt Lane, of counsel with Guinivere Dunsford individually and as one of the testamentary guardians of George Sinclair Gould, Jane Sinclair Gould and Guinivere Gould and of counsel with Thomas Barber, guardian *ad litem* for George Sinclair Gould, Jane Sinclair Gould and Guinivere Gould, and of James E. M. Tams, of counsel with the defendants Kingdon Gould, individually, Jay Gould, and others, and of W. Durward McCloskey, guardian *ad litem* for the defendants Patrick Gould, Maureen O'Brien and John Sergeant Cram, and counsel for Wilfred H. Jayne, Jr., guardian *ad litem* for the remaining infant defendants; it is, on this 3rd day of May, 1933, on motion of counsel of the complainants, ORDERED, ADJUDGED and DECREED as follows:

1. The report of the said Master be in all respects confirmed, and the said final account of the complainants as executors of the last will and testament of George J. Gould, deceased, be in all things allowed, and there is a balance in the hands of the complainants as of the 31st day of March, 1933, amounting to three hundred twenty-four thousand six hundred thirty dollars and three cents (\$324,630.03), to be disposed of according to law.

2. From the aforesaid balance in the hands of the complainants they be allowed as and for com-

Decree on Executors' Final Accounting.

missions on corpus the sum of \$20,000.00 each, being forty thousand dollars in all, and for commissions on income the sum of \$7,355.04, being 5% on the total income of \$147,100.97, equally to be divided between them.

- 10 3. There be allowed to the solicitors, counsel and guardians *ad litem* for fees and disbursements as follows:

To Messrs. McCarter & English, solicitors for the complainants, the sum of twenty-five thousand dollars for their services, and \$1,124.94 for their disbursements.

To Messrs. Gillespie & O'Connor, of counsel with the complainants, the sum of twenty-five thousand dollars.

- 20 To J. Fisher Anderson, Esquire, of counsel with the defendants Commercial Trust Company of New Jersey and Schuyler Neilson Rice, as trustees under the will of George J. Gould, deceased, the sum of one thousand dollars.

- 30 To Merritt Lane, Esquire, counsel for Guinivere Dunsford, individually, and as one of the testamentary guardians of George Sinclair Gould, Jane Sinclair Gould and Guinivere Gould, and as counsel for Thomas Barber, guardian *ad litem* of George Sinclair Gould, Jane Sinclair Gould and Guinivere Gould, the sum of two thousand dollars for his services, and \$695.18 for his disbursements.

To Messrs. Lindabury, Depue & Faulks, counsel for the defendants Kingdon Gould, individually, Jay Gould and others, the sum of twenty-five hundred dollars.

- 40 To Charles A. Roberts, Esquire, of counsel with the defendant Marjorie Gould Drexel, the sum of Twenty-five hundred dollars.

Decree on Executors' Final Accounting.

To W. Durward McCloskey, Esquire, guardian *ad litem* for the defendants Patrick Gould, Maureen O'Brien and John Sergeant Cram, and of counsel with Wilfred H. Jayne, Jr., guardian *ad litem* for the other infant defendants, the sum of one thousand dollars.

The complainants out of the aforesaid balance in their hands do forthwith pay the said several sums so allowed to solicitors, counsel and guardians *ad litem*, and charge the same to corpus. 10

4. There be allowed to Nicholas La Vecchia, Esquire, for his fees as Master the sum of one thousand dollars, and the same be charged, one-half to corpus and one-half to income.

5. Nothing in this decree shall be deemed to adjudge that the allocations made by the complainants in any of their accounts as between corpus and income is or is not a valid allocation of corpus and income as between life beneficiaries and remaindermen in the several trusts constituting the residuary estate of George J. Gould, deceased. 20

6. The complainants are instructed to deliver to Commercial Trust Company of New Jersey and Schuyler Neilson Rice, as Trustees of the several trusts constituting the residuary estate of George J. Gould, deceased, all of the balance so remaining in their hands after paying the allowances aforesaid, upon receipt of a proper refunding bond or refunding bonds by the said trustees to the complainants. The penalty of the said refunding bond or refunding bonds shall not amount in all to more than double the total of principal turned over by the executors to the said trustees. 30

Respectfully advised,

JOHN H. BACKES,
V. C.

LUTHER A. CAMPBELL,
C. 40

**Notice of Application for Rehearing
as to Allowance.**

[Filed September 12, 1933.]

IN CHANCERY OF NEW JERSEY.

10

Between

KINGDON GOULD and SCHUYLER NEIL-
SON RICE, as Executors, etc., of
GEORGE J. GOULD, Deceased,
Complainants,

and

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COMMERCIAL TRUST COMPANY OF
NEW JERSEY, *et al.*,
Defendants.

62/608.

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PLEASE TAKE NOTICE that on the 12th day of
September, 1933, at 10 o'clock in the forenoon
(Daylight Saving Time), or as soon thereafter as
counsel can be heard, at the Chancery Chambers
in the City of Newark, New Jersey, we shall apply
to the Honorable John H. Backes, Vice-Chancel-
lor, for a reconsideration and increase of the
allowance made to Charles A. Roberts by an order
entered in the above-entitled matter on May 3,
1933; and

PLEASE TAKE FURTHER NOTICE that on the said
application we shall rely, in addition to affidavits
heretofore filed by the said Charles A. Roberts
and by J. Edward Ashmead at the hearing on

40

*Notice of Application for Rehearing as to
Allowance.*

April 25, 1933, upon an affidavit of which the enclosed is a true copy.

Dated, July 18, 1933.

WALL, HAIGHT, CAREY & HARTPENCE, 10
Solicitors for Charles A. Roberts,
15 Exchange Place,
Jersey City, N. J.

To

McCARTER & ENGLISH, Esqs.,
Solicitors for Kingdon Gould and Schuyler
Neilson Rice as Executors,
1172 Raymond Boulevard,
Newark, N. J. 20

J. FISHER ANDERSON, Esq.,
Solicitor for Commercial Trust Company
of New Jersey, *et al.*,
15 Exchange Place,
Jersey City, N. J.

LINDABURY, DEPUE & FAULKS, Esqs.,
Solicitors for Kingdon Gould, indi-
vidually, *et al.*,
763 Broad Street, 30
Newark, N. J.

HON. MERRITT LANE,
Solicitor for Guinivere Dunsford, *et al.*
and for Hon. Thomas Barber,
Guardian *ad litem* for George
Sinclair Gould, *et al.*,
1172 Raymond Boulevard,
Newark, N. J.

Supplemental Affidavit of Charles A. Roberts.

W. DURWARD McCLOSKEY, Esq.,
Guardian *ad litem* for Patrick Gould,
et al.,
Lakewood, N. J.

10 Hon. WILFRED H. JAYNE, JR.,
Guardian *ad litem* for Anthony J.
Drexel, 3d, *et al.*,
Lakewood, N. J.

Supplemental Affidavit of Charles A. Roberts.

[Filed September 12, 1933.]

IN CHANCERY OF NEW JERSEY.

20

Between

KINGDON GOULD and SCHUYLER NEIL-
SON RICE, as Executors, etc., of
GEORGE J. GOULD, Deceased,
Complainants,

and

COMMERCIAL TRUST COMPANY OF
NEW JERSEY, *et als.*,
Defendants.

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62/608.

On Application
for Rehearing as
to Allowance.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

CHARLES A. ROBERTS, being duly sworn, de-
poses and says:

40 On the final accounting of the Executors herein,
I applied for an allowance of \$20,000 for legal

Supplemental Affidavit of Charles A. Roberts.

services rendered to the Estate. There was no opposition to the allowance asked, and I did not calculate in detail the savings effected for the Estate by my services. It now appears that in my previous affidavit I inadvertently underestimated the tax savings by about \$100,000, and that the precise character of my services and the circumstances under which they were rendered were not made clear. 10

The Court having allowed me only \$2,500 (less than 1% of the tax savings), I respectfully request a rehearing for reasons summarized as follows:

- (1) The savings to the Estate as a direct result of my initiative and advice and my insistence in the *Federal estate tax contest* were over \$434,000, and not \$328,000 as estimated in my previous affidavit, the interest payable on deficiency assessments having been inadvertently overlooked in that affidavit. [See under (1) below.] 20
- (2) The Court must have inferred from remarks at the hearing and affidavits thereafter submitted, that the favorable decision in the Federal tax case was reached through a *trade or bargain* with the Bureau of Internal Revenue, the Executors conceding to the Bureau that the \$1,000,000 Liberty Bond gift had been made in contemplation of death. 30

No such trade was possible except on the merits of the \$1,525,000 deduction. No one seriously doubted that the Liberty Bond gift had been in contemplation of death, and the concession of that fact 40

Supplemental Affidavit of Charles A. Roberts.

by the Executors could not have been a substantial consideration to the Bureau for allowing the \$1,525,000 deduction.

10 (3) Incidentally if there had been such a trade, it would have been the result of my insistence on continuing the Federal tax case, and my advice to seek a reconsideration in the Bureau and to prove certain facts not shown in the New Jersey tax case.

20 (4) The \$2,500 allowance was no more than is frequently awarded to counsel for merely representing and *protecting the interests of a beneficiary* in the administration of the Estate. It fails to recognize the fact that the Executors and their counsel had concluded to abandon the \$434,000 tax claim. Under such circumstances *counsel for a beneficiary is entitled to take the initiative* and assume the primary responsibility for averting the threatened loss to the Estate as a whole, and is indeed bound to take such action.

30 My services were therefore not those of a volunteer, nor was my advice that of a mere bystander. Being entitled in the circumstances to act for the *protection of the entire Estate*, and having thus acted and benefited the Estate by \$434,000, I respectfully submit that I am entitled as a matter of right to such compensation from the Estate as an attorney would ordinarily receive for similar services to his client, and that the allowance of only \$2,500 fails to provide such compensation.

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- (5) Apparently the Court did not take into consideration the *contingent character* of my claim for compensation.

The same tax questions, or similar questions, had been determined against the Estate four times by tribunals of New Jersey and three times by officers or tribunals of the Federal Government, and all counsel consulted except myself were of opinion that the Federal tax case should be discontinued as a waste of time and money. In the face of such opinions I could have made no claim for compensation, either from the Estate or from my client, if my intervention had not been justified by the eventual saving of the \$434,000.

\$2,500, allowed after a successful outcome, is hardly equivalent to \$1,000 in the case of an assured fee. As an allowance for saving \$434,000, it does not compensate for the element of contingency.

- (6) The \$2,500 allowance is disproportionately small in view of the fact that the \$434,000 saved equals *one-third of the entire residuary estate* of George Gould (which amounts to about \$1,250,000), and largely exceeds the total corpus and income (\$324,630) reported as in the hands of the Executors on their final accounting.
- (7) The allowance made was inadequate also in view of the *technical and difficult questions involved*, as evidenced by the seven adverse decisions which had already been made against the Estate.

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10 The Court may not have been apprised of the three-fold character of these legal questions, and of the guidance which I furnished,—namely, in matters of *substantive law*, of *procedural practice* and of *evidence*. As will be shown below, the services rendered were of a highly specialized nature and required experience and familiarity with tax law and practice, as well as a correct analysis of intricate facts.

20 (8) Irrespective of the tax case, the \$2,500 allowed would have been only adequate compensation for the savings effected through the settlement which I initiated and negotiated in the matter of the *Little Kanawha Syndicate* claim, a matter which required my attention from time to time for over a year before it was settled.

30 At the hearing on April 25, 1933, the cash savings through that settlement were estimated by Mr. McCarter at some \$78,000. In addition the settlement averted litigation with numerous parties and in several jurisdictions, which would undoubtedly have delayed the settlement of the Estate for some years to come.

40 While others participated also in this matter, I think it fair to say that I devised a practicable basis of settlement and negotiated the assent of the principal parties thereto, thus procuring a reduction of \$23,000 in the assessment already made by the Syndicate, and eliminating large additional claims which would undoubtedly have been asserted in litigation.

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1. The savings effected in Federal estate tax and interest were over \$434,000.

In the absence of opposition to the \$20,000 allowance requested, the savings effected were not closely calculated in my affidavit submitted in support of such allowance. The savings were there stated at approximately \$328,000, but that figure omits the interest (at least \$98,376.86 from May 16, 1924 to May 16, 1931) which would have been payable by the Estate if the deficiency attributable to the \$1,525,000 item had been affirmed.

Revenue Act of 1921, §406.

Revenue Act of 1924, §§308(e), 316.

Revenue Act of 1926, §318(a).

On reexamination it develops that the interest payable thus saved (with some minor adjustments) brings the total estate tax savings to over \$434,000.

The savings effected by the George Gould Estate through my action in the matter of Federal estate tax were as follows:

Direct saving in tax (20% of \$1,525,000)	\$305,000.00	
Interest <i>received</i> on refund of overpayment (p. 26 of Final Account)	31,336.29	30
Interest for upwards of seven years which would have been payable by the Estate on the "deficiency" or unpaid balance of tax, if the case had been abandoned, over	98,376.86	
Total savings (tax and interest), over	\$434,713.15	40

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The foregoing is exclusive of tax savings due to a \$92,000 deduction allowed for moneys paid by the Executors in settling the claim of the Little Kanawha Syndicate, and is of course exclusive of the savings (at least \$23,000) directly effected in that settlement.

10

2. These tax savings were not obtained by mere bargaining, as intimated on the hearing.

20

The suggestion was made at the hearing and in affidavits thereafter submitted, that in the final adjustment of the Federal estate tax the executors obtained the allowance of the \$1,525,000 deduction in a trade, by conceding "in consideration" therefor that the gift of \$1,000,000 Liberty Bonds to Mrs. Guinivere Sinclair Gould was in contemplation of death. There never was any substantial ground for denying the taxability of the Liberty Bond gift, however, nor did anyone think the point worth contesting further after the decision in the Court of Errors and Appeals (108 N. J. L. 197).

In his letter of June 18, 1931 to me, Mr. McCarter, of counsel to the executors, said:

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"I do not complain of the decision that the million dollars in Liberty Bonds to the testator's widow was a gift in contemplation of death."

And in the same letter he expressed the feeling that the Federal tribunals would follow the New Jersey decisions "*on the only really meritorious question, namely—the taxability of the sums totaling \$1,825,000 paid to or in trust for the ten children.*" (Italics mine.)

40

It is unreasonable to suppose that the Bureau regarded a concession of the Liberty Bond gift

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item as a substantial *quid pro quo* for allowing the \$1,525,000 deduction. The opinions of the New Jersey courts had left little to be said as to the character of the gift.

In re Gould, 105 N. J. Eq., at 602; affirmed 8 N. J. Misc., at 798-9; affirmed 108 N. J. L. 197. 10

The only semblance of bargaining in the final decision, and the only substantial concession made by the executors, was in their waiver of \$300,000 out of the \$1,825,00 deduction. It is apparent that the Bureau was reasonably satisfied on the merits as to the deductibility of the \$1,525,000.

3. Regardless of whether the favorable Federal decision was obtained by bargaining, the attempt to save the \$434,000 would not have been made but for my insistence. 20

This appears from the correspondence quoted in my original affidavit, and is so clearly the fact that no one has questioned it. The situation when I intervened is best described in Mr. McCarter's letter of July 7, 1931 to Mr. Ashmead, in which he said:

"Of course, so far as the New Jersey tax is concerned, we have to take our medicine. I still think that the court was wrong in not allowing the \$1,825,000 as a deduction. I feel it was paid in settlement of a claim, and should not have been treated differently from the other payments made in settlement of *Gould vs. Gould*, in the New York Supreme Court. 30

"Exactly those three same questions are now pending before the United States Board 40

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of Tax Appeals. The New Jersey decision will not be *res adjudicata* on the Federal estate tax. I feel, however, that it will be a precedent which will be insurmountable. The two executors Mr. Gillespie and I had a conference shortly after the affirmance by the Court of Errors and Appeals, and concluded that to prosecute a Federal estate tax appeal, in view of the New Jersey decision, would be useless, and that the incurring of the expense thereof would be unjustifiable.

"I may say that Merritt Lane, solicitor for Lady Dunsford and counsel for the guardian *ad litem* of her three children, has expressed his concurrence in this opinion. * * *"

These views of the executors and their counsel, which were shared by all counsel consulted except myself, were confirmed also by telephone conversations and by a letter dated June 13, 1931 from Mr. Gillespie to me.

After reexamining my records and the relevant law I went to Newark on July 14, 1931, and had a conference with Messrs. Ashmead and McCarter, in which Mr. McCarter finally assured us that the executors and their counsel would reconsider the matter. That on such reconsideration their decision not to abandon the case was due to my views, appears from Mr. McCarter's letter to me of July 22, 1931, which was as follows:

"In view of the fact that you, on behalf of Mrs. Drexel, think that the Federal tax appeal should not be abandoned, I beg to advise you that the executors have decided not to abandon it."

That they would not of their own accord have continued the contest for the \$1,825,000 deduc-

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tion, is confirmed by information which I received two months later to the effect that they still regarded the case as hopeless.

Whatever may have been the method by which the favorable result was obtained, it surely would not have been obtained, and the \$434,000 would not have been saved, but for my action in the matter. 10

4. Mrs. Drexel, as life beneficiary of one-tenth of George Gould's residuary estate, was entitled as a matter of right to have her counsel intervene actively and prevent abandonment of the Federal tax case. Her counsel's services having been rightfully rendered for the protection of the entire estate, a reasonable fee therefor should be paid by the estate. 20

My services were not those of an interloper or volunteer, meddling unnecessarily with the executors' conduct of the estate's affairs. The Chancery Court by its decree of March 29, 1927, had assumed general jurisdiction of the administration by Kingdon Gould and Rice "of their trusts as executors of the estate of George J. Gould," and the case therefore comes within the general rule that in equity *a beneficiary has a right to intervene*, even to the extent of suing, *to prevent waste* of the estate by inaction of the trustees. 30

Van Dyke v. Van Dyke (1879), 31 N. J. Eq. 176, creditor suing to set aside foreclosure sale, on refusal of administrator to act;

Doll v. Cash (1901), 61 N. J. Eq. 108, injunction to restrain sale by administrator at an unnecessary sacrifice; 40

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- 10 *Weeks v. Sibley* (D. C., N. D. Tex. 1920),
269 Fed. 155, beneficiary granted in-
junction restraining trustee from mak-
ing return and paying illegal tax;
Gueli v. Lennihan (Sup. Ct. Genl. Term
1890), 8 N. Y. Supp. 453, legatee suing
to revive action collusively discontin-
ued by executor;
Ettlinger v. Persian Rug Co. (1894), 142
N. Y. 189, 36 N. E. 1055, bondholder
may bring foreclosure suit in absence
of trustee;
Dodge v. Woolsey (1855), 59 U. S. 331,
stockholder enjoining payment of tax
by corporation; followed in
20 *Pollock v. Farmers' Loan & T. Co.*
(1895), 157 U. S. 429, 553.
3 *Pomeroy's Equity Jurisprudence* (4th
ed.), pages 2715-2716, 2733.

It would be inequitable to require Mrs. Drexel's
counsel to look to her alone for payment for such
services, nine-tenths of the benefit having enured
to others.

In

- 30 *Smith v. McDonald* (Prerogative Court
1905), 69 N. J. Eq. 765, 770 (affirmed
in 71 N. J. Eq. 261, 269),

the Vice-Ordinary said:

- 40 "The practice in this court of allowing
costs and reasonable fees to be paid out of
the estate for services rendered for the bene-
fit of those who take the fund, and who
should, in equity, contribute toward the pay-
ment of the same, seems to be established.

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Munn's Executor v. Munn, 20 N. J. Eq. (5 C. E. Gr.) 472. In my opinion, the counsel who in this case represent the cousins and descendants of deceased cousins should be allowed their costs and reasonable counsel fees to be paid from the fund, upon the ground that the burden and expense of this litigation should not be borne by the few who have defended the fund against distribution among those who, it is held, are not entitled to participate. These services and expenses have held the fund together for a limited distribution, and those benefited thereby should contribute.” 10

And in

In re Emery (Chancery, 1931), 109 N. J. Eq. 144, 20

the Vice-Chancellor said:

“The fund being in the control of the court the court has power to compensate counsel aiding in the administration of the trust.”

As to one who there “defended the trust in behalf of the missing cestui que trust”, it was said in the *Emery* case: 30

“His counsel are entitled to compensation according to the common practice for their aid in protecting the fund. Allowance of counsel fee to him is also justified under section 91 of the Chancery act * * *.”

See also discussion of counsel fees in

Soper v. Bilder (1917), 87 N. J. Eq. 564, 569, where the Vice-Chancellor said: 40

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10 “In computing what is reasonable compensation many elements must be taken into account. There is no yardstick by which the value of legal services can be measured; no rate per diem or percentages can be employed with justice to both parties. The legal ability of the attorney, the amount of work which he does, the skill with which he does it, and, of much importance, the amount involved, and the success of his efforts. There may also be considered the contingency that in case he is unsuccessful he will receive nothing, and the fact, if it be a fact, that the fund was created through the efforts of the attorney.”

- 20 5. The \$2,500 allowance should be reconsidered and increased in view of the contingent character of my claim for compensation.

The circumstances would not have permitted a charge against my client or a claim for an allowance if my opinion as to the law and the facts had proved erroneous. In such cases the compensation should be a higher percentage of the recovery than would otherwise be permissible.

- 30 Cf. *Hassell v. Van Houten* (1884), 39 N. J. Eq. 105;
 Adams v. Schmitt (1904), 68 N. J. Eq. 168;
 Soper v. Bilder (1917), 87 N. J. Eq. 564, quoted above.

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6. The \$2,500 allowance is disproportionately small, because the \$434,000 saved equals one-third of the entire residuary estate of George Gould (which amounts to about \$1,250,000), and largely exceeds the total corpus and income (\$324,630) reported as in the hands of the Executors on their final accounting. 10

But for my intervention in the Federal estate tax controversy there would have been nothing for the Executors to turn over to the Trustees on the final accounting; on the contrary, it would have been necessary for the Executors to withhold or recall from the Trustees over \$110,000 of the sums turned over to the Trustees before the final accounting. \$2,500 is too small a compensation for such a service. 20

7. The allowance made was inadequate also in view of the highly technical and difficult questions involved, as evidenced by the seven adverse decisions which had already been made against the Estate. The Court may not have been apprised of the three-fold character of these legal questions, and of the guidance which I furnished,—namely, in matters of substantive law, of procedural practice and of evidence. 30

The merits of the Federal tax case are not directly at issue here, but it is necessary to review briefly certain aspects of that case, to show the bearing of my services on the results attained, and to show that my advice and insistence were not based on mere reckless conjecture in the face of the New Jersey decisions. 40

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10 The New Jersey decisions did not in fact warrant abandonment of the Federal tax case, although general practitioners might reasonably have thought (and did think) the Federal case hopeless. In the New Jersey tax case the *deductibility* of the \$1,825,000 was complicated with the question as to *who should have the benefit* of the deduction. The arrangement for shifting the burden of the \$1,825,000 payments from the residuary estate to the preferential trust could not be disregarded for the purposes of New Jersey inheritance tax.

The Federal tax case presented no such complications. It involved but a single, simple question:

20 Was the \$1,825,000 a reasonable expenditure in a bona fide compromise of claims *against* the estate, or was it an adjustment of conflicting claims *to* the estate,—an arbitrary adjustment among beneficiaries?

30 On this question the New Jersey Courts had before them, in the transfer inheritance tax case, only the Stipulation for Compromise, the contract for the \$1,825,000 payments, the complaint and decree in the proceeding to approve such stipulation and contract, and papers relating to the Fourth Account. This is shown by the State of the Case in Supreme Court, pp. 320-466. Naturally the Vice-Ordinary found that

“The only evidence of the arrangement is to be found in the contract.” (105 N. J. Eq. at 600.)

40 And in considering this evidence the Vice-Ordinary was influenced by recitals which were drafted by counsel for the Dunsford interests and

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which were misleading but were not objected to by myself as Mrs. Drexel's counsel on the settlement because they were immaterial.

With some plausibility the Attorney-General argued, at p. 8 of his brief in the Supreme Court, that the contract "merely allocates the total liability of \$5,442,392.55 * * * among the widow and children rather than solely against the children as residuary beneficiaries." At page 13 of his brief the Attorney-General offered the subtle but fanciful conjecture, as to the origin of the \$1,825,000 figure, that

"Since she [Lady Dunsford] took $\frac{1}{3}$ of the estate of George J. Gould it was only logical that her portion of the total liability should be in that fraction, and the Compromise Agreement fixed the round figure of \$1,825,000 as her portion which is substantially $\frac{1}{3}$ of the total liability of \$5,442,392.55."

And from this the Attorney-General drew the conclusion that

"the sum of \$1,825,000 represents merely an allocation of the original liability of \$5,442,392.55 and not an additional liability in that amount."

Even the excellent brief for the Executors in the Court of Errors and Appeals admitted a question as to the logical origin of the \$1,825,000 contribution to the settlement, for at page 26 the brief observed that:

"Those payments might be considered as a sort of 'hold up' but the recipients thereof had the whip hand and could insist upon the payments being made."

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10 It happens that these conjectures and this suggestion that the \$1,825,000 adjustment was arbitrary, had no foundation in fact. The distribution of the settlement fund as originally proposed in the Jay Gould Estate accounting suit was grossly unfair to the seven older children of George Gould, the amount of that fund allocated to the Frank Gould share (and similarly the amount allocated to the Anna Gould share) being more than double the amount allocated to the George Gould share, in spite of derelictions on the part of Frank and laches on the part of Anna. The \$1,825,000 was added to that fund to minimize this unfairness.

20 After years of litigation, expense and risks of forfeiture, the seven older children of George had been found entitled to participate in heavy surcharges which would probably have yielded to each child a net profit of at least half a million dollars. The settlement as proposed was rejected by myself as counsel for two of George Gould's children because it would instead have given them each a net loss of \$300,000 on the entire litigation. In the interests of family peace they were willing to forego the profit, but on my advice they required that their participations in the settlement fund be increased by some \$200,000 or \$300,000 for each, to eliminate the loss.

30 The Dunsford Trust, having most to lose in the situation, volunteered a contribution to satisfy this requirement, and the figure of \$1,525,000 for the seven children with \$300,000 additional for the Sinclair children was finally agreed upon. Even this arrangement was not accepted until Article VIII was added to the Stipulation for Compromise, making the \$1,825,000 adjustment an integral part of the settlement. A copy of

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Article VIII is hereto annexed, marked Exhibit 1.

To characterize such an adjustment as an allocation of the \$5,442,392.55 item, or as a collateral arrangement or a "hold up" or arbitrary demand on the part of the seven older children of George Gould, involves an unjust reflection on them and a fantastic distortion of the actual facts.

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Nowhere in the New Jersey tax proceedings did it appear that the \$1,825,000 was a logical and integral part of the general settlement fund, necessary to give the children of George an equitable proportion of the fund. I therefore urged upon counsel for the Executors that the extrinsic facts showing the origin and purpose of the \$1,825,000 payments should be submitted to the Bureau and not merely the formal documents consummating the settlement.

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To aid them in presenting this extrinsic evidence I prepared and furnished to Mr. McCarter at a conference held July 14, 1931, a memorandum entitled "Analysis of Compromise Settlement" (Exhibit 2 hereto). The Distribution of the Settlement Fund, as set forth in that memorandum, shows how essential the \$1,525,000 was in reducing to a reasonable degree the disparity in treatment of the distribution to the shares of George, Frank and Anna, while the concluding paragraphs show that the amount was fixed not arbitrarily but to avoid substantial loss to the seven children of George on the settlement. At the same conference I advised Mr. McCarter that I had abundant documentary evidence to support this memorandum.

30

Even if the New Jersey decisions on the \$1,825,000 deduction were to be considered as wholly correct *on the record before the New Jersey Courts*, it was still true that *on a full showing of*

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the facts the deduction would be allowable for Federal estate tax.

See, in addition to cases cited in my previous affidavit:

- 10 *In re Pierce's Estate* (Surr. Ct. N. Y. Co., 1931), 255 N. Y. Supp. 414, 142 N. Y. Misc. 673,—allowing deduction of an amount paid in compromise of a claim against the estate;
- Matter of William H. Hamilton* (Surr. Ct. Kings Co., 1917), 164 N. Y. Supp. 938, 100 N. Y. Misc. 61, end of opinion;
- Cf. Bente v. Bugbee* (Err. & App. 1927), 103 N. J. L. 608;
- 20 *In re Soden* (Prerogative Ct., 1929), 105 N. J. Eq. 595.

There were thus ample grounds for urging that the New Jersey decisions did not warrant abandonment of the Federal tax case, but the unanimous opposition of my fellow-counsel to that view bears eloquent testimony to the technical and difficult questions involved, and emphasizes the need for specialized experience and equipment in such matters.

- 30 The service which I rendered was thus three-fold, (a) urging the meritorious character of the claim for the \$1,825,000 as a matter of substantive law, and therefore insisting on continuance of the Federal tax case, (b) suggesting and advising the attempt to obtain informal reconsideration in the Bureau (a most important step in tax procedure), and (c) urging the presentation of extrinsic evidence as to the nature of the \$1,825,000 payments, and furnishing an outline analysis as to their origin. I submit that the advice as to
- 40

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procedure and evidence was equally important with the advice as to substantive law, in saving the \$434,000.

In preparation for such cases as this I had spent the better part of two years in research work on Federal taxation, without direct return, after ten years of specialization in tax practice. The services rendered here were of a highly specialized and occasional character, which cannot be adequately compensated in the long run by payments at the rate reflected in a \$2,500 allowance. The \$20,000 requested is less than 5% on the amount saved and is, I respectfully submit, fully justified by the circumstances of this case. 10

8. The services of Messrs. Ashmead and myself in negotiating the Little Kanawha Syndicate settlement were alone worth the entire amount of the allowances heretofore granted to us (\$2,500 to each) by the Court. 20

As to this I beg leave to refer to Mr. Ashmead's affidavit verified April 25, 1933 in this proceeding and particularly to the extract therefrom hereto annexed, marked Exhibit 3.

But for the action taken by Mr. Ashmead and myself in arranging this settlement, extensive litigation would probably have ensued and the Estate could not have been closed. Both for the saving in cash and for the incidental expediting of the final accounting herein, I respectfully submit that these services were worth to the Estate far more than the entire amounts allowed to both Mr. Ashmead and myself. 30

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I therefore respectfully request a reconsideration of my allowance in this case.

CHARLES A. ROBERTS.

10 Sworn and subscribed before me, a Notary Public of the State of New York in and for the County of New York, at the City of New York in said County and State, this 17 day of July, 1933.

V. MAY RUSSELL,

Notary Public of the State of New York in and for the County of New York in said State.

20 Notary Public of Richmond County
Certificate filed in N. Y. Co. No. 552
N. Y. Co. Reg. No. 4R313
Term expires March 30, 1934.

(NOTARIAL SEAL)

Exhibit 1.

Article VIII from the Stipulation for Compromise of the Jay Gould Estate Accounting Action.

30 "VIII. The signing of this stipulation for compromise by the executors of the Estate of George J. Gould, deceased, now in process of administration in the State of New Jersey and by the attorneys for the adult children of George J. Gould, deceased, and their assignees and the infant children of George J. Gould, deceased, by their guardians *ad litem* is conditional upon the approval, by the Courts of that State of an agreement entered into between them and others not parties to this

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action, which agreement among other things provides for the creation of trust funds each in the sum of One hundred thousand (\$100,000) Dollars for the benefit of each of the three children of George J. Gould by his second wife and the payment of Two hundred seventeen thousand, eight hundred fifty-seven and one-seventh (\$217,857 1/7) Dollars to each of the seven children of George J. Gould by his first wife; and upon the signing hereof by or on behalf of the parties hereto as hereinbefore provided, the executors of the Will of George J. Gould will forthwith take steps to submit the aforesaid agreement and this Stipulation for Compromise to the proper Courts of the State of New Jersey for approval and for instructions with respect thereto; and it is understood and agreed that all acts done or to be done and payments to be made hereunder by parties to the action who are interested in the Estate of George J. Gould, deceased, are subject to the approval of and to be performed under the authority and direction of the Courts of the State of New Jersey."

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*Supplemental Affidavit of Charles A. Roberts.***Exhibit 2.***As handed by Mr. Roberts to
Mr. McCarter July 14, 1931.***GOULD ESTATE TAX.**

10

ANALYSIS OF COMPROMISE SETTLEMENT.

C. A. R.

July 13, 1931.

To Principal of the Trusts:

From four trustees.....	\$12,000,000	
From G. J. G. estate.....	360,000	\$12,360,000

To Seven Children of G. J. G. from three trustees.....	50,000
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To Equitable Trust in trust for three Sinclairs, from three trustees	300,000
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To Income of the Trusts:

From four trustees.....	\$ 5,500,000	
From G. J. G. estate.....	470,000	5,970,000

Interest to April 30, 1927.....	547,833.34
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Allowances to counsel.....	957,015.98
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\$20,184,849.32

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(Foregoing figures are taken from Referee's
report)

Add payments from Dunsford Trust.....	1,825,000.
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Makes a total of.....	\$22,009,849.32
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Less interest item above.....	547,833.34
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Total exclusive of interest.....	\$21,462,015.98
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DISTRIBUTION OF SETTLEMENT FUND.

To Seven Children of George J. Gould:

Addition to Principal of Trust.....	\$ 2,000,000	
G. J. G. contribution to income.....	60,000	
Payment by three trustees.....	50,000	
Payment from Dunsford Trust.....	1,525,000	10
	\$ 3,635,000	
Adjustments <i>re</i> Helen and Howard's shares.....	900,000	
Total to Seven Children.....	\$ 4,535,000	

Also remote contingent interests to Seven Children in \$600,000 Sinclair trusts.

Also about \$235,000 counsel fees.

To other Parties:

To Frank, including \$900,000 <i>re</i> Helen and Howard trusts, but excluding \$1,060,000 counsel fees allowed to Frank.....	\$ 5,885,000	20
To Anna, including such \$900,000, but excluding \$700,000 counsel fees allowed to Anna and her children	5,885,000	
To Edwin, Helen and Howard.....	2,300,000	
Plus \$4,000,000 — \$2,700,000.....	1,300,000	
To Sinclairs	600,000	
To counsel	957,015.98	
	\$21,462,015.98	30

Cost to Seven Children:

7/10 of \$5,442,392.55 equals.....	\$ 3,809,674.79	
As against recoveries in New York of.....	4,535,000	
Making net gain for the Seven.....	\$ 725,325.21	

The net gain for each of the Seven was therefore about \$100,000 before allowing for counsel fees (over and above the \$235,000 allowances), increased administration expense in New Jersey due to pendency of the New York action, loss of interest, risk to one-half of their share in New York, etc. All in all I estimate that each of the Seven lost about \$100,000 as the net result of all the litigation.

*Supplemental Affidavit of Charles A. Roberts.***Exhibit 3.****SERVICES IN LITTLE KANAWHA
SYNDICATE SETTLEMENT.**

10 **Extract from Mr. Ashmead's Affidavit Dated
 April 25, 1933, in Support of Allowances.**

 "3. In the suit for instructions as to the amount,
if any, which the Executors should pay in response
to the call of the Syndicate manager of the Little
Kanawha Syndicate, I made a thorough examina-
tion of the records of the decedent's participation
in the said Syndicate and an investigation of the
history of said Syndicate, the calls which had been
previously made, the extent to which the numer-
20 ous other members of the Syndicate had responded
to the various calls and the financial responsibility
of the members who had not paid the calls made
upon them. In all of this investigation Charles
A. Roberts, Esq., of the New York Bar, who rep-
resented the members of the Drexel family, pro-
cured and furnished to me a large part of the
information. I then made a thorough examina-
tion of the law upon the various questions in-
volved and rendered a lengthy opinion upon them
30 to my correspondents who personally represented
the clients for whom I was to appear. I prepared
and filed answers for Kingdon Gould, Jay Gould,
Marjorie Gould Drexel, Vivien Decies (now de-
ceased), George J. Gould, Jr., Edith Gould Wain-
wright (now Edith Gould MacNeal) and Gloria
Gould Barker. During the period between the
filing of the said petition and March 25, 1930, the
date on which the matter came on for hearing
before the Court of Chancery at Newark, nego-
40 tiations were had almost continuously in an effort

Supplemental Affidavit of Charles A. Roberts.

to induce the surviving Syndicate managers to collect as much as possible from the various other members of the Syndicate who were able to pay and also with the representatives of such other members of the Syndicate. I participated in the work and my associate counsel, the said Charles A. Roberts, Esq., did a great amount of work which in my opinion substantially contributed to the favorable result that was finally accomplished in which other members of the Syndicate did agree to contribute and thereby reduce the amount payable by the Executors of the estate of George J. Gould, deceased."

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Memorandum from Vice-Chancellor Backes.

(Filed September 21, 1933.)

"I will grant a rehearing. The applicant will take the testimony of the lawyers involved on the point involved 'that the applicant was the stimulant to the lawyers resulting in saving the estate from the payment of the Federal tax' and the cause will then be brought on for hearing on the depositions.

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"Let it be taken before Mr. Price, my reporter. He is not a master, but let one of the lawyers administer the oath and take the testimony as though in my presence."

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Depositions.

(Filed November 3, 1933.)

IN CHANCERY OF NEW JERSEY.

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Between

KINGDON GOULD and SCHUYLER
NEILSON RICE, as Executors,
etc. of GEORGE J. GOULD, De-
ceased,

Complainants,

and

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COMMERCIAL TRUST COMPANY OF
NEW JERSEY, et al.,
Defendants.

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Depositions taken on the application of Charles A. Roberts, Esq., for a consideration and increase of the counsel fee allowed to him by an order entered in the above entitled cause on May 3rd, 1933; pursuant to the directions of his Honor, John H. Backes, Vice Chancellor, in a memorandum sent to counsel for the complainant in the above entitled matter, before W. Robert Price, on Friday, November 3rd, 1933, at 2 o'clock in the afternoon, at Chancery Chambers, Newark, New Jersey, in the presence of Thomas G. Haight, Esq., for the applicant.

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Deposition of Merritt Lane.

MERRITT LANE, is sworn.

Direct examination by Mr. Haight:

Q. Judge Lane, you represented some of the parties in the Gould accounting— A. I did.

Q. (Continuing) here in New Jersey? A. I did.

Q. And you recall the decision that was handed down by the Court of Errors and Appeals of New Jersey in reference to the allowance of deduction for inheritance tax purposes of \$1,825,000.00? A. I do.

Q. That seems to have been in the spring of 1931? A. I don't remember the date, but I remember the occasion very well.

Q. Did you, subsequent to the reading of the opinion of the Court in that case, have a conference with Mr. McCarter, who was representing the executors of the George Gould estate? A. I did.

Q. Did the conference relate to the advisability of making any further efforts to have the allowance of the \$1,825,000 as a deduction for Federal estate taxes? A. It did.

Q. Will you please tell us your conversation and the conclusion, if any, or opinion, if any, that you expressed at that conference, and if anybody was in the conference besides Mr. McCarter, please state who it was? A. I can't remember the details of the conference. I cannot remember whether it was one conference or whether there were more. I cannot remember whether Mr. McCarter and myself, or Mr. McCarter and Mr. Ashmead and myself, were together at any one time. My recollection is that we were, but I may be mistaken with respect to that. I know that there were conferences between all of us, and I know that I came to the conclusion, and had come to the conclusion

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Deposition of Merritt Lane.

10 before going to the conference or before talking about it with either of them, that it would be unwise and a useless waste of money to attempt to litigate the matter of the Federal tax. I based my conclusion upon the fact that I conceived that the opinion of Vice Chancellor Backes, concurred in as it had been by the Court of Errors and Appeals, would be, while not controlling upon the Federal authority, yet, so persuasive upon the Federal authority, whom I assumed would, as most taxing boards do, lean toward the taxing authority, that the result would only be increase in the expense of counsel and whatnot.

Q. Did you so express yourself to Mr. McCarter? A. I did.

20 Q. I have before me a letter written by Mr. McCarter to Mr. Ashmead under date of July 7th, 1931, and I will ask if you received a letter from Mr. McCarter similar to that one or the same as that one? A. I have no doubt but that I received a copy of this letter. I cannot state definitely. I have not examined my files. But it sounds familiar, and I can say without equivocation that I either received a copy of this letter or I received the information which is contained in the letter from Mr. McCarter directly. We are
30 in the same building and had personal conferences from time to time, and I may have gotten the information from Mr. McCarter personally.

Q. I take it that you had expressed to Mr. McCarter the opinion which you mentioned a while ago before this letter was written, because in this letter he refers to your concurrence in the opinion that no further proceedings should be taken in the matter of the Federal estate taxes? A. Undoubtedly I had talked to Mr. McCarter before Mr. Ashmead talked to Mr. McCarter, and
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Deposition of J. Edward Ashmead.

my recollection is that I talked to Mr. Ashmead after that, and again to Mr. McCarter. Mr. McCarter, I notice in this letter, says he thought that the Court was wrong in not allowing the \$1,825,000 as a deduction, that he felt it had been paid in the settlement of the claim. My view was a little bit different from that. I thought that, as a matter of technical law, the Vice Chancellor was right and our Court of Appeals was right. 10

Q. I take it from what you have said that, so far as you were concerned, no further efforts would have been made to have the allowance made in the Federal estate tax proceeding? A. That is correct.

(Witness excused.)

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J. EDWARD ASHMEAD, is SWORN.

Direct examination by Mr. Haight:

Q. Mr. Ashmead, you represented a number of the beneficiaries of the George Gould Estate in the accounting proceedings in the Court of Chancery of New Jersey, didn't you? A. I did.

Q. And you recall the decision that was rendered by the Court of Errors and Appeals of New Jersey in respect to the allowance of a deduction for inheritance tax purposes of the \$1,825,000? A. I do. 30

Q. And subsequent to the coming down of that decision, I presume that you read the opinion? A. I did.

Q. (Continuing) and studied it? A. I did.

Q. And did you then have a talk with Mr. McCarter or Judge Lane, or both of them, in 40

Deposition of J. Edward Ashmead.

reference to the advisability of making any further effort to have the allowance made for Federal estate tax purposes? A. That matter first came to my attention upon receipt of a letter that I got from Mr. McCarter dated July 7th, 1931, in which he set forth what had been the result of the prior conference he had had with Mr. Lane.

Q. And the letter that you refer to is the one, a photostatic copy of which I now show you? A. Here is the original. Upon receipt of that letter I again examined the cases that had been decided by the Court, and the references at the top of the letter are in my handwriting, which refer to these decisions. On the bottom of the letter I endorsed in my own handwriting, "Do not think you would succeed." And that appears on the photostat in my own handwriting. The next thing that happened among the Gould heirs that I represented was, Mrs. Drexel, who was represented by Mr. Roberts—and I may have had a conversation—I don't doubt that I did—with Mr. Roberts subsequently to that, and advised him of my view of the matter. In looking over our files I find that on July 13th, 1931 there is a memorandum of a telephone call by Mr. Roberts asking for an appointment with me the next morning. There is the original and here is a copy if you want to put it in the record. As a result of that call I arranged a conference with Mr. Roberts the next day, which was on July 13th. Mr. Roberts came to our office at 11:30.

Mr. Roberts: The 14th.

Mr. Ashmead: It was the next day after that telephone conversation. He came to the office, arrived at 11:30, and I was with him until 4:10 p. m. I find in the file a memorandum in my own handwriting as to

Deposition of J. Edward Ashmead.

what was done, which reads as follows:
 "Mr. Charles E. Roberts came over at
 11:30. Conferred until lunch. He thinks he
 can succeed in tax appeal. Suggested that he
 take it on contingent basis. After lunch
 went to see George W. McCarter. He agree-
 able to prosecute appeal. Will take up
 with Executors Roberts participation in
 prosecution of appeal. Will let me know.
 Said not necessary to communicate with
 others. If executors decided to go ahead
 this would be unnecessary. Time 11:30—
 4:10 p. m.," signed by myself.

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Q. The appeal which you refer to there is the
 appeal that was then pending from the Federal
 estate tax, before the Board of Tax Appeals at
 Washington? A That is correct.

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Q. And related to the allowance as a deduction
 for Federal estate taxes of this \$1,825,000? A.
 That is correct.

Q. Now then, you did have a conference with
 Mr. McCarter that afternoon, did you? A. Yes.

Q. And what position was taken there? A. As
 stated in that memorandum.

Q. And Mr. McCarter,—did he express the same
 opinion then as he expressed in the letter of July
 7th, that he did not feel that they could succeed in
 the Federal estate tax matter? A. Yes. He stated
 that, as he had always felt, he thought that the
 decision of the State Court was not correct; that,
 notwithstanding that, in view of the decision, he
 had a feeling that the prospects would not be very
 great in succeeding before the tax board, but, how-
 ever, if anybody objected, he would take it up
 with the executors, and he thought they would
 prosecute the appeal.

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Deposition of J. Edward Ashmead.

10 Q. Did Mr. Roberts take any position regarding the probability of success in the appeal? A. Oh, he was very optimistic about success. Mr. Roberts had, sometime previous, gotten out a book on tax appeals, and had made a very thorough study of the organization of that department in Washington, was familiar with the procedure; and suggested that, the way it operated there, that the State Court's decision would not have a binding effect, and that they would consider it from a broad point of view, and that he thought that he could be successful, and suggested that he might participate in the prosecution of that appeal.

Q. What opinion did you express? The same one you expressed in the letter? A. I did.

20 Q. And you had called in Mr. Tams, your tax expert, and discussed it with him in the conference with Mr. Roberts? A. I had before I wrote that other letter, yes.

Q. And Mr. Tams was of the same idea? A. He was.

Q. And I take it, so far as you are concerned, there would not have been any prosecution of the Federal Estate Tax matter had it not been for Mr. Roberts? A. I would not have advised it under the circumstances.

30 Mr. Haight: I will read into the record an extract from the letter of July 7th, 1931, to which Mr. Ashmead has referred. After stating that the Court of Errors and Appeals had affirmed Vice Chancellor Backes, and some other matters that are not pertinent here, the letter reads: "Of course, so far as the New Jersey tax is concerned, we have to take our medicine. I still think that the Court was wrong in not allowing
40 the \$1,825,000. as a deduction. I feel it was

Deposition of J. Edward Ashmead.

paid in settlement of a claim, and should not have been treated differently from the other payments made in settlement of Gould *vs.* Gould, in the New York Supreme Court. Exactly those three same questions are now pending before the United States Board of Tax Appeals. The New Jersey decision will not be *res adjudicata* on the Federal estate tax. I feel, however, that it will be a precedent which will be insurmountable. The two executors Mr. Gillespie and I had a conference shortly after the affirmance by the Court of Errors and Appeals, and concluded that to prosecute a Federal estate tax appeal, in view of the New Jersey decision, would be useless, and that the incurring of the expense thereof would be unjustifiable. I may say that Merritt Lane, solicitor for Lady Dunsford and counsel for the guardian ad litem of her three children, has expressed his concurrence in this opinion. On the other hand, Mr. Charles A. Roberts, of Alley, Geer & Roberts, 111 Broadway, New York City, who represents Mrs. Drexel, has written me a letter, saying, among other things: "I do not believe that the Board of Tax Appeals would fall into the same error as the New Jersey Courts. I should expect that on the same arguments which you presented to the Courts you would obtain a favorable decision from the Board. I should therefore favor a vigorous prosecution of the case before the Board." I should like to have your views on this, on behalf of such of the children of our decedent as you represent.

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Deposition of J. Edward Ashmead.

Q. Did you have any conference with Judge Lane about this at all after the decision of the New Jersey Court of Appeals? A. I participated in no general conference between him and Mr. McCarter, but I had seen Mr. Lane, meeting him, and had discussed the matter with him generally, at
10 which time he expressed the same view as stated in that letter.

Q. You mean by "that letter," the letter written by Mr. McCarter on July 7th, 1931? A. Yes.

Q. At the conference in Mr. McCarter's office between you, Mr. McCarter and Mr. Roberts, did Mr. Roberts make any suggestion as to the procedure in Washington? A. Yes.

Q. (Continuing) for instance, as to whether an effort should be made to settle the matter before
20 the Special Advisory Committee of the Bureau before proceeding before the Board of Tax Appeals? A. Yes. He stated that the method to follow would be to take it before the Special Advisory Board.

Q. And that that should be done by application to the General Counsel's office? A. That detail I don't recall.

Q. You don't remember? A. I don't remember
30 about that but I know that the procedure was discussed.

(Witness excused.)

Deposition of George W. C. McCarter.

GEORGE W. C. McCARTER, is sworn.

Direct examination by Mr. Haight:

Q. Mr. McCarter, you represented the executors of the estate of George J. Gould in the accounting proceeding in the Court of Chancery?

A. In association with Mr. George J. Gillespie, of the New York Bar, I did.

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Q. Did you have a conference with Mr. Gillespie after the New Jersey Court of Errors and Appeals affirmed the decree of Vice Chancellor Backes in reference to the disallowance of the \$1,825,000 as a deduction for inheritance tax purposes, the conference relating to the further prosecution of the appeal which was then pending in the Board of Tax Appeals at Washington in respect to the said item for inheritance tax purposes? A. With Mr. Gillespie and with the two executors I did have a conference.

20

Q. And was any conclusion reached in that conference as to the advisability of proceeding further with the proceedings in respect to the Federal inheritance tax? A. Well, it was certainly definitely concluded that we would not reach any decision without circularizing, so to speak, counsel for the various heirs; that is, for the ten children and the widow. And while I have no independent recollection of it now, my recollection as refreshed by this letter of July 7th, a copy of which I have read before testifying, is that we had concluded that, if all of the heirs said, "Do not go ahead," that we would not. But I don't have any independent recollection to that last effect.

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Q. In the letter of July 7th, to Mr. Ashmead you said that the executors, Mr. Gillespie and you had had a conference, "and concluded that to pros-

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Deposition of George W. C. McCarter.

ecute a Federal estate tax appeal, in view of the New Jersey decision, would be useless, and that the incurring of the expense thereof would be unjustifiable." A. I say, except as refreshed by that, I don't remember it.

Q. That undoubtedly is a correct statement?

10 A. That must be a correct statement. I do remember very distinctly that we talked about money; money in the sense of the cost of the proceedings. And I do remember that I had in mind that I did not want to be criticized for running up a bill.

Q. I have here a letter which purports to have been written by you to Mr. Roberts under date of June 18th, and which refers to the fact that
20 Mr. Gillespie had sent you copies of his letter of July 13th to Mr. Roberts, and Mr. Roberts' of June 16th to him, and in which you said that you are sending under separate cover a copy of the state of the case and briefs on both sides in the New Jersey Supreme Court to Mr. Roberts. A. I have that letter before me—rather, a copy of it.

Q. Have you the copies of the letters written by Mr. Roberts to Mr. Gillespie and by Mr. Gillespie to Mr. Roberts? A. I have. They are dated
30 June 13th, 1931, from Mr. Gillespie to Mr. Roberts; and June 16th, from Mr. Roberts to Mr. Gillespie. That is all I have.

Q. Will you read those into the record? A. The first is June 13th, "Charles A. Roberts, Esq., 111 Broadway, New York City."

Q. That is written by Mr. Gillespie? A. Yes. (Reading) "Dear Mr. Roberts: I have yours of June 12th. The New Jersey Court of Errors and Appeals decided adversely in all respects to the
40 contention of the executors. The decision settled

Deposition of George W. C. McCarter.

the matter financially—" I think it is meant to be "finally," but "financially" is what it is,—
 "so far as New Jersey is concerned. Last week a communication was received from the comptroller of the State of New Jersey setting out the computations of the State made in conformity with the decision. Mr. McCarter has sent me only one copy but I am having a copy made and it will follow this letter. 10

"Following the receipt of this communication the executors of the estate, Mr. McCarter and myself, had a conference last Wednesday. We then decided to abandon, in view of the New Jersey decision, the Federal Appeal."

The rest of the letter is on another subject. That is signed "George J. Gillespie." 20

Then there is a letter on the letterhead of Alley, Geer & Roberts, 111 Broadway, June 16th, 1931, addressed to George J. Gillespie, Esq., 20 Vesey Street, New York City. "Dear Mr. Gillespie: Thank you for your letter of June 13. The decision of the Court of Errors and Appeals is so far at variance with my presuppositions of the law that I should appreciate an opportunity to examine the record on appeal to that Court. 20

"My presuppositions reflect chiefly a number of Federal decisions and I should be particularly regretful if the Executors found it necessary to concede a similar point in the Federal tax case. If there is a printed record in the Federal tax case and you can spare me a copy of that I should appreciate an opportunity to examine that also. Very sincerely yours, Charles A. Roberts." 30

Q. I take it, then, that the sending of the state of the case and the briefs to Mr. Roberts, as you stated you were doing in this letter of June 18th, was in response to his letter request to Mr. Gil- 40

Deposition of George W. C. McCarter.

lespie? A. Yes,—which was forwarded to me by the letter of Mr. Gillespie to me dated June 17th, in which he enclosed copies of the two letters which I have just read from, in which Mr. Gillespie states it might be inadvisable to withdraw the appeal until we have had an opportunity to confer with him—meaning Mr. Roberts.

10 Q. And Mr. Gillespie wrote you that? A. Wrote that to me.

Q. Under date of June 17th? A. Under date of June 17th. Then I wrote Mr. Roberts my letter of June 18th.

Q. June 18th. I will read that. This is the letter you have here that I identify now? A. Yes. That is the original letter you are showing me.

20 Q. I will read into the record this part of it which is apparently the only part that is applicable to this situation, except the part to which I have previously called your attention. (Reading) “Of course, so far as the New Jersey tax is concerned, we have heard from the Court of last resort. We have raised exactly the same questions on our appeal to the United States Board of Tax Appeals, where we have not yet been heard. Of course the decision of the New Jersey Court is not *res adjudicata* with respect to the Federal estate tax. It is, however, a precedent so directly in point that we have all felt that the Federal tribunals would follow it on the only really meritorious question, namely—the taxability of the sums totalling \$1,825,000 paid to or in trust for the ten children. Mr. Lane, representing Lady Dunsford, has expressed himself in conformity with that view. I have not had any definite expression, however, to that effect from counsel for all seven of the children. If you have any ideas on the subject I should be glad to hear them.

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Deposition of George W. C. McCarter.

In any event, please return the office copy of the State of the case and briefs. I enclose a copy of my brief in the Court of Errors and Appeals, which you may keep."

Q. Who were the seven children referred to?
A. Mr. Ashmead's clients.

Q. Mr. Ashmead's clients. Now, then, after receipt of that letter, did you get a reply from Mr. Roberts? A. Yes, I did, written under date of July 6th. 10

Q. And you have the original? A. I have the original before me.

Q. I will then have it read into the record.

"July 6, 1931.

"GOULD ESTATE TAX MATTERS

20

"George W. C. McCarter, Esq.,
13 Commerce Street,
Newark, New Jersey.

Dear Mr. McCarter:

"I have read with care the papers mentioned in your letter of June 18, for all of which I am obliged. I should appreciate a copy of the petition and answer before the Board of Tax Appeals, and in that connection should like to keep a little longer the State of the Case and briefs in the New Jersey Supreme Court. 30

"I assume that you are right in waiving all questions except the deduction of \$1,825,000. As to the disallowance of that deduction, however, I feel that with all respect to the Courts their decision was clearly wrong. Your briefs on this point seem to me to be perfectly clear and unanswerable. 40

Deposition of George W. C. McCarter.

“I do not believe that the Board of Tax Appeals would fall into the same error as the New Jersey Courts. I should expect that on the same arguments which you presented to the Courts you would obtain a favorable decision from the Board. I should therefore favor a vigorous prosecution of the case before the Board.

10 “Although, as indicated above, I think the presentation which you made of both the facts and the law was admirable and should have won a favorable decision, I venture to suggest in view of the outcome that certain additional facts should be proved before the Board. There seemed to lurk in the opinions of the Courts a feeling that the deduction was purely an arbitrary adjustment among the members of the family. It should be
20 made clear to the Board that the \$1,525,000 paid to the seven children was necessary to adjust their shares in the settlement fund equitably in comparison with the shares which other branches of the Jay Gould family were to receive. The history of the negotiations leading to the settlement should remove any notion that the \$1,525,000 was an arbitrary hold-up or was anything but part and parcel of the general fund distributed to claimants against George Gould’s estate. Similar
30 considerations also apply to the \$300,000 placed in trust for the Sinclair children. If you ever happen to be in New York and have any spare time to discuss these matters I should be glad to see you.

“May I ask what the latest official computations are, as to the New Jersey taxes chargeable to the various interests in the estate.

“May I also ask when the case before the Board of Tax Appeals is likely to come to trial, whether
40 any depositions have been taken or stipulations

Deposition of George W. C. McCarter.

of fact prepared, and whether you have presented the case before the Special Advisory Committee of the Bureau of Internal Revenue.

“Thanking you again for your courtesies, I am

Very sincerely yours,

CHARLES A. ROBERTS.

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Copy to Mr. George J. Gillespie.”

Q. And I take it that, after you wrote that letter of June 18th and received Mr. Roberts' letter, you then wrote Mr. Ashmead this letter of July 7th? A. Yes, on the same day on which I wrote Mr. Roberts a letter.

Q. Yes, but the letter of July 7th which Mr. Ashmead has referred to— A. Was written, I think, after receipt of Mr. Roberts' letter of July 6th.

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Q. Now, then, I show you this letter bearing date July 7th, 1931, which purports to be written by you to Mr. Roberts, and ask if that is the letter you wrote to Mr. Roberts? A. That is the letter I wrote to Mr. Roberts, yes.

Q. We will read into the record the first two paragraphs of this letter, which are the only ones that pertain to this matter. (Reading.) “Dear Mr. Roberts: I have your letter of yesterday. I wish I could agree with you that we have any chance of success before the United States Board of Tax Appeals. Since you request it, I enclose our office copy of the petition before the United States Board of Tax Appeals and of the Government's answer, the case being Docket 38444. Please return these when they have served your purpose.

30

“It soon became obvious that the New Jersey tax would be passed on by the Court of Last

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Deposition of George W. C. McCarter.

10 Resort before the Federal tax was reached by the Board of Tax Appeals. As the cause was at issue, therefore, we have done nothing by way of taking depositions or otherwise in the Board of Tax Appeals. That case, if pressed, will not be reached until some time after the summer vacation. I may say that the reason my name does not appear on the petition to the Board of Tax Appeals is that at that time I was not admitted to practice before it, although I since have been."

A. Let me interject something here which will answer the question you asked before about circularization. I sent a copy of my letter of July 7th to Mr. Ashmead, and to Mr. Wilfred H. Jayne, Jr., who was guardian *ad litem* for the infant remaindermen.

20 Q. Did you send that to Judge Lane? A. Mr. Lane I had a talk with, orally, is my recollection. I find no letter in here, and I think that must be the fact.

Q. You had a talk with Judge Lane? A. Yes.

Q. And he expressed himself as he testified here? A. Expressed himself as he testified here.

Q. And what did you hear from Wilfred Jayne? A. I don't remember having heard anything from him. Silence is my recollection.

30 Q. You then did have a conference with Mr. Roberts and Mr. Ashmead on July 14th? A. July 14th is right.

Q. And at that conference Mr. Ashmead expressed himself, I take it, as he testified today, that the appeal in Washington would be a useless proceeding? A. I don't remember definitely. I will give you my best recollection, that Mr. Ashmead called me up and said that Mr. Roberts was in his office and could they come over—although perhaps that was during the day before. At any

Deposition of George W. C. McCarter.

rate, Mr. Ashmead and Mr. Roberts came to my office, and Mr. Ashmead opened the subject by saying, to some general effect, that he did not have a great deal of confidence in the success of a Federal contest, but that Mr. Roberts did; and that Mr. Roberts then spoke on the subject to a certain extent. I forget what he said, but he said he thought we ought to succeed in the Federal Tribunal, and either Mr. Ashmead or Mr. Roberts said that Mr. Roberts would be glad to take the case on a contingency basis if the executors saw fit to employ him. And I said that, of course, that was something for the executors to say and not for me, and that I would report that to the executors, and that we certainly would have a conference on the subject, in view of Mr. Roberts' position as counsel for one of the beneficiaries, Mrs. Drexel, who was against acquiescence in the Federal Tax. He said something in that meeting—I think he asked me in that meeting whether we had taken the matter up with the Special Advisory Committee. And, to be quite frank, that was the first time I had ever heard of the Special Advisory Committee.

Q. You mean of the Bureau of Internal Revenue? A. Yes. So I said that we had not, and he suggested that would be a good thing to do. That either took place in that meeting or later, but I think then. At any rate, Mr. Roberts at one time or another made that suggestion to me.

Q. Did he suggest that the best way was to take it up with the General Counsel's office? A. No, he did not. He said take it up with the Special Advisory Committee.

Q. I mean, to take it up with the Advisory Committee, to get the procedure before the Advisory Committee, to get the General Counsel's office to

Deposition of George W. C. McCarter.

agree to it? A. No. I don't remember anything to that effect. He just asked me whether we had taken it up with the Special Advisory Committee, and told me of its existence and what we were supposed to do.

10 Q. Did he at that time discuss with you the reason why he thought you would be successful in the Federal proceedings? A. I think, to a certain extent. I think he said something on the subject. I don't recall specifically, but he did more, as I recall, than just state his conclusion. But if he says he did not, I won't say he is wrong, and if he says he did, I won't say he is wrong. I don't remember.

20 Q. I show you a copy of an analysis of compromise settlement attached to the supplemental affidavit of Charles A. Roberts, in this matter, and ask you if Mr. Roberts presented that to you at this conference? A. I thought he sent that out later, but if he says he handed that to me——

Q. You did get it? A. I got it sometime or another.

30 Q. Prior to the proceedings in Washington? A. Yes. Prior to Mr. Gillespie's and my going to Washington. I am assuming—I haven't compared the copy—it was a statement to that effect, unquestionably. My recollection is refreshed a little bit. On July 15th, I wrote a letter to the executors in which I said, and which refreshes my recollection, as follows: "Mr. Roberts is very strongly in favor of prosecuting this appeal, at least to the extent of appearing before the Special Advisory Committee of the Bureau of Internal Revenue, which he says can be done informally in the course of the next two months, and might result in a victory." To that extent I do remember the details of what Mr. Roberts said at the

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Deposition of George W. C. McCarter.

conference of July 14th. Then the executors and Mr. Gillespie and I had a conference.

Q. And on July 22nd, 1931 you wrote Mr. Roberts a letter? A. I wrote Mr. Roberts a letter.

Q. Which I show you. A. Which you show me, yes.

Q. This letter I will read into the record. It is addressed to Mr. Roberts: "In view of the fact that you, on behalf of Mrs. Drexel, think that the Federal tax appeal should not be abandoned, I beg to advise you, that the executors have decided not to abandon it." Then you received a letter from Mr. Roberts— A. Dated July 23rd, of which you show me a copy. 10

Q. Of which I show you a copy. In which he says, "I have your letter of July 22nd, and I am glad to learn of the decision of the executors not to abandon the appeal as to the Federal Estate Tax. You make no mention of the Special Advisory Committee, however, and at your convenience I should be glad to learn more of your plan of procedure." That is right, isn't it? A. That is right, oh, yes. 20

Q. And on July 24th you wrote him this letter? A. That is right.

Q. (Continuing) which I now read, "Answering your letter of yesterday, I think we shall make application to the Special Advisory Committee." A. Right. 30

Q. Mr. McCarter, you subsequently did appear in Washington before the Federal taxing authority, and I understand that you stated in Court it was before the representative of the General Counsel? A. Yes. I wrote the Special Advisory Committee requesting an interview, and it was declined. Then Mr. Gilliespie and I decided that we could probably contact the General Counsel. 40

Deposition of George W. C. McCarter.

And I got in touch with him, and got a letter from their office—I telephoned and they said they would be glad to see us, and confirmed it by letter. And eventually, whether the date was made at that time or later, Mr. Gillespie and I went down to Washington. I wrote the chairman of the Special
10 Advisory Committee on September 11th, asking a conference, and he turned that down under date of September 15th. Mr. Gillespie and I went down October 1st, 1931, and met a man named Horner in the office of the General Counsel, and we spent most of the morning with him. We brought with us, and left with him, the record in the New Jersey Court of Errors and Appeals, and our briefs. And Mr. Gillespie and I took part in an extended
20 discussion with that gentleman just on the papers that we had laid before the State Courts unsuccessfully. Of course, they were the pleadings in the appeal to the Board of Tax Appeals, and there was a record in the office of the Commissioner of Internal Revenue. We had all of that. But what I mean is that we did not get any more ammunition from Mr. Roberts. We had this very long and very satisfactory talk which led me to conclude that, so far as Mr. Horner himself was concerned, he was in favor of the settlement which
30 we proposed, which was to concede the taxability of the gift of \$1,000,000 of first Liberty bonds as a gift in anticipation of death, and to have conceded to us the deductibility of the \$1,825,000 sum that has been mentioned. Mr. Horner said, as I recall, that he felt that there might be a distinction between so much of that last figure as went to the seven children, and the \$300,000 that went in trust for the three children by the second marriage, being Lady Dunsford's children. And it
40 was with that modification of our proposition

Deposition of George W. C. McCarter.

that the settlement was finally accepted by higher authority.

Q. There was never any real question about that \$1,000,000 having been given in anticipation of death? A. I never felt there was, but I read just before I went down to Washington several then recent decisions in the Federal Court adverse to gifts before death being held to be taxable. In other words, the Government had rather recently then received some bad knocks on that question in other cases. I always felt that we would never win that point even in the State Court.

10

Q. And you did lose it in the State Court? A. And we did lose it in the State Court. I thought we ought to have won that point even so, because I felt the gift was one in defraud of creditors of George Gould and not in anticipation of death. But it was a fact case. It had reams of testimony on it. And I despaired even more fundamentally of winning that in Washington than winning the \$1,825,000.

20

Q. What was Mr. Roberts' position on that, if he ever expressed any? A. I don't remember his ever expressing an opinion on one side or the other, because when we went into that, on the facts, that was a case very hard to win. The gift was given when George Gould was in his final sickness, and when he was so sick that at one time the executors tried to recover the gift as having been done when he did not know what he was doing.

30

Mr. Haight: I read into the record the letter from the chairman of the Special Advisory Committee of the Bureau of Internal Revenue, to which Mr. McCarter has referred, and which he has produced from his files, dated September 15th, 1931,

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Deposition of George W. C. McCarter.

10 which reads as follows: "Receipt is acknowledged of your letter dated September 11, 1931, in which you request that the above mentioned case be considered by the Special Advisory Committee with the view to settlement thereof without a hearing before the United States Board of Tax Appeals. It is noted from your letter that the case has been placed on the date calendar of the Board of October 26th, 1931, which has been confirmed. And in view of that fact, you are advised that it is impracticable for the committee to take the case under consideration. The practice is not to interfere with the Board of Tax Appeals calendar when once a case has been set for hearing. And for that reason the committee is not in a position to grant your request."

20

Q. Isn't it a fact that the case had been placed on the date calendar of the Board of Tax Appeals between the time you had the conference with Mr. Roberts on July 14th, and September 11th? A. Yes.

30 Q. You received notice that it had been set down for hearing? A. By letter from Washington dated September 10th, 1931.

Q. So far as the executors were concerned, I take it, from what has appeared in the correspondence and what you have testified to, that the efforts to have this \$1,825,000 allowed by the Federal authority for Federal tax purposes would have been abandoned if it had not been for Mr. Roberts? A. I think that is the fair conclusion; that if all the beneficial interests had concurred with Mr. Lane in abandoning appeal, that is what

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Deposition of George W. C. McCarter.

the executors would have done. Mr. Roberts, representing Mrs. Drexel, expressed his disapproval with that view, and we did not go on—rather, Mr. Ashmead did not go on and circularize his other clients.

Q. And, so far as you knew, there was nobody else that expressed a contrary view to that expressed by Judge Lane and Mr. Ashmead, with the exception of Mr. Roberts? A. That is right. 10

Q. And I take it that the executors determined not to avail themselves of Mr. Roberts' offer to take this appeal up? A. Yes.

Q. (Continuing) either on a contingent basis or otherwise? A. That is correct.

(Witness excused.)

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EXHIBITS TO DEPOSITIONS.

Letter from Charles A. Roberts to
George J. Gillespie.

June 12, 1931.

10

George J. Gould Estate

George J. Gillespie, Esq.,
20 Vesey Street,
New York City.

Dear Mr. Gillespie:

20

I understood that the appeal in the New Jersey Court of Errors and Appeals would probably be decided sometime in May but have heard nothing further. Can you advise me whether it has been decided. If not can you spare me a copy of the record on appeal.

I should also appreciate advice as to how soon you think you can proceed with the matter of the New York transfer tax and of the final closing of the Estate in New Jersey.

Very sincerely yours,

30

CHARLES A. ROBERTS.

CAR:R

40

*Exhibits to Depositions.***Extract from Letter of George J. Gillespie to
Charles A. Roberts, Dated June 13, 1931.**

(Depositions, pp. 112-113.)

"Dear Mr. Roberts:

10

"I have yours of June 12th. The New Jersey Court of Errors and Appeals decided adversely in all respects to the contention of the executors. The decision settled the matter financially [finally] so far as New Jersey is concerned. Last week a communication was received from the comptroller of the State of New Jersey setting out the computations of the State made in conformity with the decision. Mr. McCarter has sent me only one copy, but I am having a copy made and it will follow this letter.

20

"Following the receipt of this communication the executors of the estate, Mr. McCarter and myself, had a conference last Wednesday. We then decided to abandon, in view of the New Jersey decision, the Federal Appeal.

* * *

GEORGE J. GILLESPIE."

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*Exhibits to Depositions.***Letter from Charles A. Roberts to
George J. Gillespie.**

ALLEY, GEER & ROBERTS

ATTORNEYS AT LAW

111 BROADWAY

NEW YORK

June 16, 1931.

George J. Gould Estate

George J. Gillespie, Esq.,
20 Vesey Street,
New York City.

Dear Mr. Gillespie:

Thank you for your letter of June 13. The decision of the Court of Errors and Appeals is so far at variance with my presuppositions of the law that I should appreciate an opportunity to examine the record on appeal to that Court.

My presuppositions reflect chiefly a number of Federal decisions and I should be particularly regretful if the Executors found it necessary to concede a similar point in the Federal tax case. If there is a printed record in the Federal tax case and you can spare me a copy of that I should appreciate an opportunity to examine that also.

Very sincerely yours,

CHARLES A. ROBERTS.

CAR:R

*Exhibits to Depositions.***Letter from George W. C. McCarter to
Charles A. Roberts.**

McCARTER & ENGLISH

COUNSELLORS AT LAW

LEFCOURT BUILDING—13 COMMERCE STREET

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NEWARK, N. J.

Robert H. McCarter	George W. C. McCarter
Conover English	Arthur F. Egner
Augustus C. Studer, Jr.	Gerald M. McLaughlin

T. Bryant Smith
Herbert R. Baer

TELEPHONE MULBERRY 4-2095

June 18, 1931.

re: Gould Estate Tax Matters.

20

Charles A. Roberts, Esq.,
111 Broadway,
New York City.

Dear Mr. Roberts:

Mr. Gillespie has sent me copies of his letter of June 13th to you and yours of the 16th to him. I am sending you under separate cover our office copy of the State of the Case and briefs on both sides in the New Jersey Supreme Court. Please return it when it has served your purpose. I also enclose copies of the opinions of the Supreme Court and of the Court of Errors and Appeals, which you may keep. The opinion of the Vice Ordinary you will find at page 24 of the State of the Case in the Supreme Court.

30

We did not pursue beyond the Vice Ordinary the question of the valuation of the shares of Consolidated Coal Company. I do not complain

40

Exhibits to Depositions.

10 of the decision that the million dollars in Liberty Bonds to the testator's widow was a gift in contemplation of death. I do think we should have had, however, a contrary decision that the \$1,825,000. paid to or in trust for the ten children was a deduction as a payment in settlement of a claim against the estate, rather than a mere shifting of legacies and therefore taxable, as the Courts have held.

20 Of course, so far as the New Jersey tax is concerned, we have heard from the Court of last resort. We have raised exactly the same questions on our appeal to the United States Board of Tax Appeals, where we have not yet been heard. Of course the decision of the New Jersey Court in not *res adjudicata* with respect to the Federal estate tax. It is, however, a precedent so directly in point that we have all felt that the Federal tribunals would follow it on the only really meritorious question, namely—the taxability of the sums totalling \$1,825,000. paid to or in trust for the ten children. Mr. Lane, representing Lady Dunsford, has expressed himself in conformity with that view. I have not had any definite expression, however, to that effect from counsel for all seven of the children. If you have any
30 ideas on the subject I should be glad to hear them. In any event, please return the office copy of the State of the case and briefs. I enclose a copy of my brief in the Court of Errors and Appeals, which you may keep.

Yours very truly,

G. W. C. McCARTER.

D/C
Enc.

*Exhibits to Depositions.***Letter from Charles A. Roberts to
George J. Gillespie.**

CHARLES A. ROBERTS
ATTORNEY AT LAW AND TAX COUNSEL
111 BROADWAY
NEW YORK

10

July 6, 1931.

Gould Estate Tax Matters

George W. C. McCarter, Esq.,
13 Commerce Street,
Newark, New Jersey.

Dear Mr. McCarter:

20

I have read with care the papers mentioned in your letter of June 18, for all of which I am obliged. I should appreciate a copy of the petition and answer before the Board of Tax Appeals, and in that connection should like to keep a little longer the State of the Case and briefs in the New Jersey Supreme Court.

I assume that you are right in waiving all questions except the deduction of \$1,825,000. As to the disallowance of that deduction, however, I feel that with all respect to the Courts their decision was clearly wrong. Your briefs on this point seem to me to be perfectly clear and unanswerable.

30

I do not believe that the Board of Tax Appeals would fall into the same error as the New Jersey Courts. I should expect that on the same arguments which you presented to the Courts you would obtain a favorable decision from the Board. I should therefore favor a vigorous prosecution of the case before the Board.

40

Exhibits to Depositions.

Although, as indicated above, I think the presentation which you made of both the facts and the law was admirable and should have won a favorable decision, I venture to suggest in view of the outcome that certain additional facts should be proved before the Board. There seemed to lurk in the opinions of the Courts a feeling that the deduction was purely an arbitrary adjustment among the members of the family. It should be made clear to the Board that the \$1,525,000 paid to the seven children was necessary to adjust their shares in the settlement fund equitably in comparison with the shares which other branches of the Jay Gould family were to receive. The history of the negotiations leading to the settlement should remove any notion that the \$1,525,000 was an arbitrary hold-up or was anything but part and parcel of the general fund distributed to claimants against George Gould's estate. Similar considerations also apply to the \$300,000 placed in trust for the Sinclair children. If you ever happen to be in New York and have any spare time to discuss these matters I should be glad to see you.

May I ask what the latest official computations are, as to the New Jersey taxes chargeable to the various interests in the estate.

May I also ask when the case before the Board of Tax Appeals is likely to come to trial, whether any depositions have been taken or stipulations of fact prepared, and whether you have presented the case before the Special Advisory Committee of the Bureau of Internal Revenue.

Thanking you again for your courtesies, I am

Very sincerely yours,

CHARLES A. ROBERTS.

CAR:R

Copy to Mr. George J. Gillespie.

*Exhibits to Depositions.***Letter from George W. C. McCarter to
J. Edward Ashmead.**

McCARTER & ENGLISH

COUNSELLORS AT LAW

LEFCOURT BUILDING—13 COMMERCE STREET

10

NEWARK, N. J.

Robert H. McCarter	George W. C. McCarter
Conover English	Arthur F. Egner
Augustus C. Studer, Jr.	Gerald M. McLaughlin

T. Bryant Smith
Herbert R. Baer

TELEPHONE MULBERRY 4-2095

July 7, 1931.

Gould Estate Tax Matters.

20

J. Edward Ashmead, Esq.,
Prudential Building,
Newark, N. J.

Dear Mr. Ashmead:

As you probably know, the New Jersey Court of Errors and Appeals has affirmed the Supreme Court, which in turn affirmed Vice Ordinary Backes on our appeal from the New Jersey inheritance tax assessment in the estate of George J. Gould, deceased. The only three questions which were presented on this appeal were:

30

1: The valuation of the stock in the Consolidated Gas Company;

2: The taxability of the gift of \$1,000,000.00 par value Liberty bonds by the decedent to his second wife, two months before his death, as a gift in contemplation of death; and

40

Exhibits to Depositions.

3: The failure of the Comptroller to allow as a deduction the payments totalling \$1,825,000. to the seven children by the first marriage and to trustees for the three children by the second marriage.

10 As a matter of fact, only the last two of these questions were argued in the Supreme Court and the Court of Errors and Appeals. We acquiesced in the Vice Ordinary's affirmance of the Comptroller on the valuation of the Consolidated Coal Company's stock.

20 Of course, so far as the New Jersey tax is concerned, we have to take our medicine. I still think that the Court was wrong in not allowing the \$1,825,000. as a deduction. I feel it was paid in settlement of a claim, and should not have been treated differently from the other payments made in settlement of *Gould vs. Gould*, in the New York Supreme Court.

30 Exactly those three same questions are now pending before the United States Board of Tax Appeals. The New Jersey decision will not be *res adjudicata* on the Federal estate tax. I feel, however, that it will be a precedent which will be insurmountable. The two executors Mr. Gillespie and I had a conference shortly after the affirmance by the Court of Errors and Appeals, and concluded that to prosecute a Federal estate tax appeal, in view of the New Jersey decision, would be useless, and that the incurring of the expense thereof would be unjustifiable.

40 I may say that Merritt Lane, solicitor for Lady Dunsford and counsel for the guardian *ad litem* of her three children, has expressed his concurrence in this opinion. On the other hand, Mr. Charles A. Roberts, of Alley, Geer & Roberts, 111 Broadway, New York City, who represents Mrs.

Exhibits to Depositions.

Drexel, has written me a letter, saying, among other things:

“I do not believe that the Board of Tax Appeals would fall into the same error as the New Jersey Courts. I should expect that on the same arguments which you presented to the Courts you would obtain a favorable decision from the Board. I should therefore favor a vigorous prosecution of the case before the Board.”

10

I should like to have your views on this, on behalf of such of the children of our decedent as you represent.

Yours very truly,

20

G. W. C. McCARTER.

D/C

(Pencil notation by Mr. Ashmead: Do not believe you would succeed.)

30

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*Exhibits to Depositions.***Letter from George W. C. McCarter to
Charles A. Roberts.**

McCARTER & ENGLISH

COUNSELLORS AT LAW

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LEFCOURT BUILDING—13 COMMERCE STREET

NEWARK, N. J.

Robert H. McCarter	George W. C. McCarter
Conover English	Arthur F. Egner
Augustus C. Studer, Jr.	Gerald M. McLaughlin

T. Bryant Smith
Herbert R. Baer

TELEPHONE MULBERRY 4-2095

July 7, 1931.

20

Gould Estate Tax Matters.

Charles A. Roberts, Esq.,
 Alley, Geer & Roberts, Esqs.,
 111 Broadway, N. Y. City.

Dear Mr. Roberts:

30

I have your letter of yesterday. I wish I could agree with you that we have any chance of success before the United States Board of Tax Appeals. Since you request it I enclose our office copy of the petition before the United States Board of Tax Appeals and of the Government's answer, the case being Docket 38444. Please return these when they have served your purpose.

40

It soon became obvious that the New Jersey tax would be passed on by the Court of Last Resort before the Federal tax was reached by the Board of Tax Appeals. As the cause was at issue, therefore, we have done nothing by way of taking depositions or otherwise in the Board of Tax Appeals. That case, if pressed, will not be reached until

Exhibits to Depositions.

some time after the summer vacation. I may say that the reason my name does not appear on the petition to the Board of Tax Appeals is that at that time I was not admitted to practice before it, although I since have been.

The latest official computation as to the New Jersey taxes chargeable to the various interests are as follows:

Direct taxes assessed, as per corrected statement.....	\$132,103.48
Presently payable, contingent tax.....	187.57
Compromise	8,837.63
	\$141,128.68
Amount to be refunded.....	91,771.32
Payment on account May 16, 1924.....	\$232,900.00
(John Spensley \$ 400.00)	(Jay Gould..... \$ 1,204.68)
(George P. Langford..... 400.00)	(Vivien Decies..... 1,253.76)
(William Bishop 400.00)	(George J. Gould, Jr.... 1,285.16)
(Gottfried Fluckiger..... 400.00)	(Edith G. Wainwright.. 1,336.37)
(David Sommer..... 400.00)	(Gloria Gould..... 1,363.43)
(Guinivere S. Gould..... 117,199.25)	(George S. Gould..... 1,405.77)
(Kingdon Gould..... 1,190.98)	(Jane S. Gould..... 1,396.71)
(Marjorie G. Drexel..... 1,230.32)	(Guinivere Gould..... 1,237.05)

The following taxes became due and payable upon the death of Vivien G. Decies, intestate:

(Eilien V. de la Poer Beresford.....	\$62.52)	
(Catherine M. Beresford.....	62.52)	CONTINGENT ASSESSMENT.
(Arthur H. M. de la Poer Beresford	62.53)	

Yours very truly,

G. W. C. McCARTER.

D/C

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*Exhibits to Depositions.***Letter from George W. C. McCarter to
Charles A. Roberts.****McCARTER & ENGLISH**

COUNSELLORS AT LAW

10 Lefcourt Building—13 Commerce Street
Newark, N. J.Robert H. McCarter George W. C. McCarter
Conover English Arthur F. Egner
Augustus C. Studer, Jr. Gerald M. McLaughlinT. Bryant Smith
Herbert R. Baer

TELEPHONE MULBERRY 4-2095

July 22, 1931.

20 *re:* Gould Estate Tax Matters.Charles A. Roberts, Esq.,
111 Broadway,
New York City.

Dear Mr. Roberts:

In view of the fact that you, on behalf of Mrs.
Drexel, think that the Federal tax appeal should
not be abandoned, I beg to advise you that the
executors have decided not to abandon it.

30 Yours very sincerely,

G. W. C. McCARTER.

D/C

*Exhibits to Depositions.***Letter from George W. C. McCarter to
Charles A. Roberts.****McCARTER & ENGLISH**

COUNSELLORS AT LAW

LEFCOURT BUILDING—13 COMMERCE STREET

NEWARK, N. J.

Robert H. McCarter	George W. C. McCarter
Conover English	Arthur F. Egner
Augustus C. Studer, Jr.	Gerald M. McLaughlin

T. Bryant Smith
Herbert R. Baer

TELEPHONE MULBERRY 4-2095

10

July 24, 1931.

re: Gould Estate Tax Matters.

Charles A. Roberts, Esq.,
 111 Broadway,
 New York City.

20

Dear Mr. Roberts:

Answering your letter of yesterday, I think we shall make application to the Special Advisory Committee.

I enclose two copies of our brief in the Court of Errors and Appeals, as requested by you.

Please do not forget that I want the record and
 briefs in the Supreme Court back. 30

Yours very truly,

G. W. C. McCARTER.

D/C
 Enc.

40

**Second Supplemental Affidavit of
Charles A. Roberts.**
In re Little Kanawha Syndicate Settlement.

[Filed December 2, 1933.]

IN CHANCERY OF NEW JERSEY.

10

Between

KINGDON GOULD and SCHUYLER NEIL-
SON RICE, as Executors, etc., of
GEORGE J. GOULD, Deceased,
Complainants,

and

20

COMMERCIAL TRUST COMPANY OF
NEW JERSEY, *et al.*,
Defendants.

62/608.

On Application
for Rehearing as
to Allowance.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

CHARLES A. ROBERTS, being duly sworn, deposes
and says:

30 For many years past I have represented
Marjorie G. Drexel generally in her legal affairs
and have collaborated with her New Jersey coun-
sel, Messrs. Lindabury, Depue & Faulks, on all
her interests in New Jersey litigation.

40 On February 15, 1929, Mr. J. Edward Ashmead
of Lindabury, Depue & Faulks, sent me a copy of
a petition filed by the executors under the will
of George J. Gould, asking instructions as to pay-
ment of a call made upon them by the so-called
surviving Syndicate Managers of the "Little
Kanawha Syndicate." This call was for \$92,000,
representing 4% upon George Gould's participa-

*Second Supplemental Affidavit of Charles A.
Roberts.*

tion of \$2,300,000 in the Syndicate. (It developed subsequently that another call for 1% additional [\$23,000] had previously been made and remained unpaid, although not referred to in the petition.) Mr. Ashmead asked for instructions as to my client's wishes regarding this petition.

10

It appeared that the original managers of the Syndicate had been the late William E. Guy, George J. Gould and one Ramsey, who had died insolvent, and that the Syndicate had debts and other commitments aggregating about \$170,000, including some \$130,000 and interest which were owing to the estate of said William E. Guy.

I thereupon placed myself in touch with Albridge C. Smith, the New York attorney for the surviving Syndicate Managers, obtained copies of the Syndicate Agreement and examined all the available reports of judicial proceedings relating to the Syndicate, including the three principal cases in the West Virginia Supreme Court and eleven reported decisions in the New York courts. I also examined the case on appeal in *Jones v. Gould*, 123 A. D. 236. This examination of the reported decisions verified in general the claims and allegations of the surviving Syndicate Managers.

20

From this examination and from an elaborate opinion prepared by Mr. Ashmead as to the New Jersey law bearing on their claims, I concluded that there was no meritorious defense, that the interposition of technical defenses would only cause needless litigation and expense and that the chief object to be sought was a speedy termination of the litigation among the Syndicate members and the prevention of further accruals for legal and other expense of the Syndicate, at least so far as such litigation and expense might involve the George Gould estate.

30

40

Second Supplemental Affidavit of Charles A. Roberts.

10 I obtained from Mr. Smith a list of all the Syndicate participants, annotated to show the possibilities of collection from each of the participants according to the best information of the Syndicate Managers. From this list and from my
20 conversations with Mr. Smith and with his associate counsel in St. Louis, Mr. Thomas B. McPheeters, I was satisfied that many of the Syndicate participants were insolvent or could not be located or for other reasons were beyond the effective reach of process, and that the burden of the Syndicate liabilities must be chiefly assumed by a few of the larger participants who still remained solvent. I concluded that if a few of these
30 larger participants could be induced to meet a 4% assessment it would be unnecessary to collect more than 4% from the George Gould estate, the additional amounts having been assessed because of the danger of default on the part of other Syndicate participants.

In April, 1929, I therefore instituted negotiations with the New York counsel for Edwin Gould, the Equitable Trust Company and others with a view to arranging for a simultaneous payment of a 4% assessment by these larger participants and a release by the Syndicate Managers of any further liability. Counsel for Edwin Gould promptly accepted the proposed arrangement, but the then counsel for Equitable Trust Company interposed all manner of technical objections and demanded a complete accounting by the Syndicate Managers. It was not until late in 1929 that we succeeded in satisfying counsel for the Equitable Trust Company and the matter was then further
40 delayed by attempts to obtain one or two other assents to the compromise arrangement.

*Second Supplemental Affidavit of Charles A.
Roberts.*

It proved impossible to obtain assents by others than those above named and in conference with Mr. Smith I thereupon formulated an agreement by which the Syndicate Managers undertook, in consideration of the payments by Edwin Gould, Equitable Trust Company and George Gould's estate, to prosecute proceedings for collection from certain other participants, without expense to the three participants above named, and to account for any excess collections which might thus be made. 10

I am informed by Mr. Albridge C. Smith that he has succeeded in collecting for the Syndicate the full 4% assessment (\$9,600) upon the \$240,000 participation of the George M. Hard estate in the Syndicate, and that he understands that proceedings are still in progress in other states to collect substantial assessments, so that there is a very good prospect that the Syndicate Managers will ultimately be able to declare a dividend, out of the surplus funds so collected, such dividend being provided for in the compromise arrangements under which the George Gould estate paid the 4% assessment. As nearly as I can estimate it, the George Gould estate should be entitled to more than one-third of any such dividends out of surplus collections, and will probably receive at least \$5,000 additional from this source. 20 30

This Little Kanawha Syndicate matter required my attention, in conferences and otherwise, on thirty-six occasions in February, March, April and May 1929, on twelve occasions later in 1929, and on twenty occasions in the first three months of 1930, so that it was continually on my office docket and required recurrent attention for somewhat over a year before the settlement could be finally consummated. 40

Second Supplemental Affidavit of Charles A. Roberts.

10 So far as I am aware the investigation of the facts and the work of examining the law applicable thereto was chiefly done by Mr. Ashmead and myself, and both the initiative and the bulk of the work in negotiating the settlement were assumed by me. But for our activities I believe that the estate would have become involved in much heavier assessments and probably in prolonged accounting suits between the Syndicate Managers and the various Syndicate members. The savings effected included the \$23,000 assessment which had been made and was waived by the Managers, some \$10,000 of interest on assessments and a potential liability of say \$25,000 to \$40,000 for subsequent expenses of the Syndicate, in addition to which 20 there is a substantial prospect of obtaining a refund from excessive collections on the 4% assessment basis.

Further details regarding this matter will be found at pages 3 and 16 of my supplemental affidavit verified July 17, 1933, and in the extract from Mr. Ashmead's affidavit appended as Exhibit 3 to such supplemental affidavit.

CHARLES A. ROBERTS.

30 Sworn and subscribed before me, a Notary Public of the State of New York in and for the County of New York, at the City of New York in said County and State, this 25 day of November, 1933.

V. MAY RUSSELL,
Notary Public of the State of New York in and for the County of New York in said State.

40 Notary Public of Richmond County
Certificate filed in N. Y. Co. 552
N. Y. Co. Reg. No. 4R313
Term expires March 30, 1934.

(NOTARIAL SEAL)

Supplemental Affidavit of George J. Gillespie.

In re Little Kanawha Syndicate Settlement.

[Filed December 23, 1933.]

IN CHANCERY OF NEW JERSEY.

Between

KINGDON GOULD and SCHUYLER NEIL-
SON RICE, as Executors, etc., of
GEORGE J. GOULD, Deceased,
Complainants,

and

COMMERCIAL TRUST COMPANY OF
NEW JERSEY, *et al.*,
Defendants.

62/608.

On Application
for Rehearing as
to Allowance.

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20

STATE OF NEW YORK, }
CITY OF NEW YORK, } ss.:
COUNTY OF NEW YORK, }

GEORGE J. GILLESPIE, being duly sworn, upon his
oath, according to law, deposes and says:

I am a member of the firm of Gillespie & O'Con-
nor, associated with the firm of McCarter & Eng-
lish, as counsel for said complainants since the
probate of the decedent's will in 1923, and have,
in many matters affecting this estate outside of
the State of New Jersey, acted as active repre-
sentative of the estate. I had charge especially
of what is known as the "Little Kanawha Syndi-
cate." I had, in behalf of the complainants, ex-
amined carefully into the entire matter for some
time prior to 1929. In 1928, the obligations, if
any, of the complainants to the syndicate and to

30

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Supplemental Affidavit of George J. Gillespie.

10 a settlement thereof were the subject of many conferences between deponent and the representative of the Syndicate Managers. These conferences took place in New York, Baltimore and St. Louis. The conferences involved various questions, to wit: previous assessment calls, payments by participants in the syndicate, the deaths of subscribers, the availability of their estates to answer a further call, the interpretation of the bond obligation, the death of the Syndicate Managers, the appointment of substituted trustees by Mr. Guy, the sole survivor, etc.

20 There was also involved the very definite question of closing up of the estate matters and fixing the obligation of the members of the syndicate in view of the fact that Mr. Guy, the surviving Syndicate Manager, was willing to take on and assume definite financial responsibilities, which he subsequently assumed. As the result of these conferences, the Syndicate Manager and myself, in behalf of the complainants, agreed in or about October, 1928, on a definite adjustment fixing the liability of the complainants at \$92,000.00, arranging for a call of 4%, which it was agreed would liquidate the obligation. In fixing this amount, the financial responsibilities of the said Syndicate members was taken into consideration. I, however, definitely stated that the settlement was conditional upon the approval by the Court of Chancery of the State of New Jersey, and that the complainants would institute an action for the purpose of bringing this compromise adjustment before the Court for its approval.

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40 Subsequently petition was made by the complainants herein for instructions and directions in this matter. In due course, although after many postponements, the matter was brought be-

Supplemental Affidavit of George J. Gillespie.

fore Vice-Chancellor Backes and approval given to the complainants' petition, and the matter settled in accordance therewith.

Deponent has read a copy of Mr. Roberts' affidavit of November 25th, 1933, designated as "Second Supplemental Affidavit of Charles A. Roberts" in this matter. Mr. Roberts predicates his claim for an additional allowance seemingly for services rendered after February 15th, 1929, at which time Mr. J. Edward Ashmead, of Lindabury, Depue & Faulks, sent him a copy of the petition filed by the complainants herein. Deponent knows of no service rendered by Mr. Roberts in behalf of the estate. From correspondence deponent had with Mr. Ashmead, it is evident that Mr. Roberts and Mr. Ashmead were in conference with regard to this matter, as Mr. Roberts represented Marjorie G. Drexel, one of the children of George J. Gould, deceased, in collaboration with Messrs. Lindabury, Depue & Faulks, acting through Mr. Ashmead. The said firm in this matter also represented all or most of the other children of George J. Gould.

Deponent, during the period following the filing of the petition, had occasional telephone conferences with the attorneys of the different children of George J. Gould, to wit, Mr. Harold Content, Mr. Arthur Leve and Mr. Roberts. Deponent is unable to say to what extent Mr. Roberts labored in his investigations and work with Mr. Smith and Mr. Ashmead. Deponent believes that whatever services were rendered by Mr. Roberts were rendered in behalf of his client, Marjorie G. Drexel, in connection with her New Jersey counsel, Mr. Ashmead, for the purpose of determining whether or not they would approve the settlement sought for

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Supplemental Affidavit of George J. Gillespie.

by the petition. Their determination was to con-
cur in the settlement set forth in the petition.

GEORGE J. GILLESPIE.

10 Sworn to before me this 18th }
day of December, 1933. }

IRENE B. COX

IRENE B. COX

Commissioner of Deeds for the City of New York

Residing in Borough of Manhattan

N. Y. County Clerk's No. 130

N. Y. County Register's No. 46-C-4

20 My term expires Oct. 18, 1934

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Reply Affidavit of Charles A. Roberts.
In re Little Kanawha Syndicate Settlement.

[Filed December 23, 1933.]

IN CHANCERY OF NEW JERSEY.

Between

KINGDON GOULD and SCHUYLER NEIL-
 SON RICE, as Executors, etc., of
 GEORGE J. GOULD, Deceased,
 Complainants,

and

COMMERCIAL TRUST COMPANY OF
 NEW JERSEY, *et al.*,
 Defendants.

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62/608.

On Application
 for Rehearing as
 to Allowance.

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STATE OF NEW YORK, }
 COUNTY OF NEW YORK, } ss.:

CHARLES A. ROBERTS, being duly sworn, de-
 poses and says:

I have read the affidavit of George J. Gillespie
 verified December 18, 1933. I know nothing about
 his investigations of the Little Kanawha Syndi-
 cate, except that he did not ascertain the existence
 of the \$23,000 assessments made by the Syndi-
 cate Managers against the George Gould Estate
 in 1923, which represented 1% upon George
 Gould's \$2,300,000 participation in the Syndicate
 and was in addition to the 4% assessment
 (\$92,000) made against the Estate in December,
 1928. Twenty-five other members of the syndi-
 cate had paid both the 1% and 4% assessments,

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Reply Affidavit of Charles A. Roberts.

and the amount demanded from the Gould Estate proved to be \$115,000 (not \$92,000).

10 In the petition for instructions in this matter, the Executors made no mention of the \$23,000 assessment and made no recommendations as to the course to be pursued. Mr. Gillespie's affidavit is also silent as to the \$23,000. Whatever may have been Mr. Gillespie's investigations, Mr. Ashmead and I were unable to obtain from him or from the petition a clear view of the situation or sufficient data on which to form a conclusion as to the proper course to be followed by Mrs. Drexel and by the other children whom Mr. Ashmead represented.

20 Moreover, the original petition suggested no means of protecting the Estate against additional assessments and expense. The final settlement, which disposed of the \$23,000 assessment and guarded against any further liabilities to the Syndicate, while providing for possible recoveries by the Estate out of future collections from other subscribers, was initiated and negotiated by Mr. Ashmead and myself, on the basis of our own investigations and without material assistance from counsel for the Executors.

30 Mr. Gillespie concludes that the determination reached by Mr. Ashmead and myself "was to concur in the settlement set forth in the petition." The Executors' original petition proposed no settlement and made no recommendation, — it merely submitted the question whether the Executors should pay \$92,000. The subsequent petition, which proposed the settlement protecting the Estate, was *originated* by Mr. Ashmead and myself and not merely *concurred in* by us. It was the Executors and the other parties who concurred in
40 the settlement which we devised and negotiated,

Reply Affidavit of Charles A. Roberts.

and without which the Estate would have been subjected to further litigation, expense and risks of assessment.

CHARLES A. ROBERTS.

Sworn and subscribed before me, a Notary Public of the State of New York in and for the County of New York, at the City of New York in said County and State, this 21 day of December, 1933. 10

V. MAY RUSSELL,
Notary Public of the State of New York in and for the County of New York in said State. 20
Notary Public of Richmond County,
Certificate filed in N. Y. Co. No. 552,
N. Y. Co. Reg. No. 4R313,
Term expires March 30, 1934.

[NOTARIAL SEAL]

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Affidavit of Albridge C. Smith.
In re Little Kanawha Syndicate Settlement.

[Filed December 23, 1933.]

IN CHANCERY OF NEW JERSEY.

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Between

KINGDON GOULD and SCHUYLER NEL-
 SON RICE, as Executors, etc., of
 GEORGE J. GOULD, Deceased,
 Complainants,

and

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COMMERCIAL TRUST COMPANY OF
 NEW JERSEY, *et al.*,
 Defendants.

62/608.

ALBRIDGE C. SMITH, being duly sworn, deposes
 and says:

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I am an attorney and counsellor-at-law of the
 State of New York and a member of the firm of
 Humes, Buck, Smith and Stowell, 50 Broadway,
 New York City. I am also a counsellor-at-law of
 the State of New Jersey.

In May, 1928, I was retained by the Managers
 of a syndicate, known as the Little Kanawha Syn-
 dicate, to enforce assessments against certain sub-
 scribers to said Syndicate resident in the State
 of New York. Among the subscribers residing in
 New York were the Estate of George J. Gould,
 Equitable Trust Company, Chatham & Phenix
 National Bank and Edwin Gould.

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Affidavit of Albridge C. Smith.

Prior to that time the St. Louis counsel of the Syndicate Managers had been in contact with Mr. George J. Gillespie, representing the Gould interests, but no decision of any definite character had been reached between the Syndicate Managers and Mr. Gillespie.

I addressed a letter, under date of June 26, 1928, to Schuyler Nelson Rice and Commercial Trust Company of New Jersey, as Trustee under the Will of George J. Gould, deceased on the subject, asserting the claim of the Managers against the Estate. I also communicated with Mr. Gillespie by telephone and later had a conference with him, the object of such conference being to secure some definite action by the Executors, particularly with reference to Court authority for payment of the amount alleged to be due from the Estate.

It is my recollection that a petition was filed, in the proper Court in New Jersey, for such authority, notice thereof being given to the beneficiaries.

It was at this juncture that Charles A. Roberts, Esquire, who appeared as the attorney and representative of one of the beneficiaries, came into the matter. He desired and received full and complete information respecting the claim made by the Syndicate Managers. I had a number of conferences with Mr. Roberts and finally was advised by him that he felt that the claim as made by the Managers against the Estate of George J. Gould might be reduced if concerted action were taken against other available and solvent subscribers. In other words, Mr. Roberts, while recognizing a liability, was of the opinion that the Syndicate Managers were attempting to enforce too great an indebtedness against the Gould Estate and were omitting to enforce similar liabilities against other subscribers.

Affidavit of Albridge C. Smith.

In the meantime, I had gotten into contact with some other principal subscribers in New York and Mr. Roberts agreed to cooperate with me in securing payments from these other subscribers, thus reducing the obligation of the Gould Estate.

10 Mr. Roberts was present at a number of conferences with attorneys and representatives of other subscribers and also, quite independently of me, had personal conferences with these representatives.

20 As a result of our combined efforts, in which Mr. Roberts was most cooperative and helpful, we finally secured pro rata payments from Equitable Trust Company, Edwin Gould, Frank J. Gould and also ultimately from Chatham & Phenix National Bank. This matter (with the exception of litigation against Chatham & Phenix National Bank) was concluded in April, 1930. During most of the two years that intervened between the inception of the matter in 1928 and the final settlement in 1930, I was in touch with Mr. Roberts and received his cooperation and support in my efforts to compel other subscribers to meet their obligations.

30 I can conscientiously say that Mr. Roberts' assistance and cooperation in this matter was not only consistent but highly intelligent, his object in giving me his full cooperation being understood from the very beginning to be in the interest of the Estate of George J. Gould. I can also conscientiously state that had Mr. Roberts not taken the attitude he did and had he not cooperated with me in securing the result obtained, the liability of the Estate of George J. Gould would have been very much greater than the amount at which said liability was ultimately liquidated. I have not available at the moment the figures upon

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Affidavit of Albridge C. Smith.

which this saving may be computed but the amount of such saving was unquestionably substantial.

I had very few, if any, contacts with Mr. Gillespie after my original talk with him during which he agreed to recommend to the Executors that they apply to the Court for leave to pay the assessment levied by the Syndicate Managers.

One of the terms of settlement with the subscribers was an agreement to account to these subscribers for any surplus funds collected by the Syndicate Managers over and above the amount necessary to liquidate the Syndicate's obligations. I understand that there is still outstanding litigation, so that an accounting in this respect is not possible. I cannot, therefore, compute the amount, if any, to which the Estate of George J. Gould will be entitled as a refund.

I am making this affidavit at the request of Mr. Roberts, who, I understand, is applying for an allowance for legal services to the Estate of George J. Gould, including the services in connection with the Little Kanawha Syndicate assessment. It is a fact that Mr. Roberts did render these services and that they resulted in a substantial saving to the Estate of George J. Gould.

ALBRIDGE C. SMITH.

Sworn to and subscribed before
me this 20th day of December, 1933 }

WM. J. FLANAGAN.

WM. J. FLANAGAN,
Notary Public, Westchester County,
Cert. Filed N. Y. Co. No. 840, Reg. No. 4F504,
Commission expires March 30, 1934.

[NOTARIAL SEAL]

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Opinion of Vice-Chancellor John H. Backes.

[Filed April 10, 1934.]

IN CHANCERY OF NEW JERSEY.

62-608.

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Between

KINGDON GOULD and SCHUYLER NEIL-
SON RICE, as Executors, etc., of
GEORGE J. GOULD, Deceased,
Complainants,

and

COMMERCIAL TRUST COMPANY OF
NEW JERSEY, *et al.*,
Defendants.

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Memorandum.

On motion for re-hearing.

WALL, HAIGHT, CAREY & HARTPENCE (MR.
HAIGHT) for the motion.

MCCARTER & ENGLISH (MR. GEORGE MCCARTER)
for the respondents.

30 BACKES, Vice Chancellor.

Upon the final account, the court made allow-
ances to the respective counsel, among others, Mr.
Charles A. Roberts of the New York Bar of \$2,500.
He asked for \$25,000, and now asks a re-hearing
and that his allowance be increased.

All the facts on this motion were before the
court on the final hearing and were given consid-
eration. The affidavits now presented simply
stress those facts.

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Opinion of Vice-Chancellor John H. Backes.

On an appeal from an assessment of the Federal Death Tax against the estate, counsel for the executors were successful in satisfying the federal taxing authorities that \$1,525,000 of the item of \$1,825,000 dealt with by us in *In re Gould*, 105 N. J. E. 628, 108 N. J. L. 197, and 8 N. J. Misc. 798, was not taxable, apparently contrary to our holding that the item was taxable under our Transfer Inheritance Tax Act. Just why \$300,000 of the item was held not to be taxable, is not apparent. The result was a saving to the residuary estate of over \$400,000. The litigation was conducted by counsel for the executors and the labor involved in the effort was taken into consideration in fixing their compensation of \$50,000. 10

Mr. Roberts, in association with the firm of Lindabury, Depue & Faulks, representing one of the ten residuary legatees, took no active part in the litigation before the Federal Board, but he claims that after our Court of Appeals affirmed the taxes in this state, counsel for the executors lost hope of success of the tax appeal and would have abandoned it had he not encouraged them and insisted upon going forward; that he supplied them with the ammunition and furnished the brains, that he made the balls and they threw them in the successful prosecution of the appeal. Counsel for the executors are not in agreement with him. He, no doubt, is a practitioner of profound learning and wide experience in the technique of taxation, and if he was the means of spurring them on, guiding them in their course, and giving to them his services and the benefit of his learning, he must look to them for compensation. If they retained him, he can recover from them. The court cannot make an allowance to him for 20 30 40

Order Denying Application.

services he rendered to them. It cannot pay twice.

Mr. Roberts rendered services in conjunction with his New Jersey associates, Little Kanawha Syndicate, for which he admits the allowance made to him was adequate.

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The motion for an increase is denied.

Order Denying Application.

[Filed April 18, 1934.]

IN CHANCERY OF NEW JERSEY.

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Between

KINGDON GOULD and SCHUYLER
NEILSON RICE, as Executors,
etc., of GEORGE J. GOULD, de-
ceased,

Complainants,

and

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COMMERCIAL TRUST COMPANY OF
NEW JERSEY, *et al.*,
Defendants.

62/608.

On Bill, etc.

Application having been made by Charles A. Roberts, Esquire, of the New York Bar, for an increase in and reconsideration of the counsel fee allowed upon the final accounting of the complainants, as executors, to him as counsel for the defendant Marjorie Gould Drexel, and the Court

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Order Denying Application.

having considered and read the affidavits on both sides and the testimony taken, and having heard the argument of counsel, and being of opinion that the application should be denied; it is, on this 18th day of April, 1934, on motion of counsel for the complainants, ORDERED

That the application of the said Charles A. Roberts be and it hereby is denied. 10

Respectfully advised,

JOHN H. BACKES, LUTHER A. CAMPBELL,
V. C. C.

Approved as to form

THOMAS G. HAIGHT,
Solicitor for Charles A. Roberts.

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New Jersey Court of Errors and Appeals

Between

KINGDON GOULD and SCHUYLER NEEL-
SON RICE, as Executors, etc., of
GEORGE J. GOULD, Deceased.

Complainants-Respondents,

and

COMMERCIAL TRUST COMPANY OF
NEW JERSEY, *et al.*,
Defendants-Respondents.

CHARLES A. ROBERTS,
Petitioner-Appellant.

On Appeal from
the Court of
Chancery.

BRIEF FOR PETITIONER-APPELLANT.

This case arises in connection with the final accounting of the Executors under the will of George Gould. The appellant, Charles A. Roberts, is a New York attorney *specializing in Federal tax matters*. In association with Messrs. Lindabury, Depue & Faulks he represents Marjorie Gould Drexel, one of George Gould's ten children, who are life beneficiaries of residuary trusts under his will. Upon the final accounting he asked for an allowance of \$20,000 for services rendered by him which had resulted in savings of nearly \$500,000 to the estate.

On the advice of Vice Chancellor Backes, the Chancellor allowed Mr. Roberts \$2,500 for aiding in the settlement of the claim of the Little Kanawha Syndicate against the estate—a settle-

ment which saved the estate amounts variously estimated at from \$23,000 to \$78,000—but he disallowed any compensation to Mr. Roberts for services rendered by him in the matter of Federal estate taxation, although those services involved highly technical questions and resulted in a saving of \$434,000 in taxes and interest, which would otherwise surely have been lost to the estate. From this denial of compensation for tax services Mr. Roberts appeals.

Statement of Facts.

In the computation of both the Federal estate tax and the New Jersey transfer inheritance tax upon the estate of George Gould, the Executors had claimed a deduction of \$1,825,000 as representing *payments made in compromise of surcharge claims* against the estate. The New Jersey authorities disallowed this deduction on the ground that the *payments were merely transactions between beneficiaries* of the estate, and their action was confirmed by this Court in *In re Gould* (1931), 108 N. J. L. 197, affirming 8 N. J. Misc. 798 and 105 N. J. Eq. 598. Cf. *In re O'Neill* (1932), 111 N. J. Eq. 378, at 380. (Case, p. 24.)

The Bureau of Internal Revenue had also disallowed the deduction and an appeal by the Executors from the Bureau's decision was pending in the United States Board of Tax Appeals. In view of the New Jersey decision the Executors and their counsel (George J. Gillespie of the New York Bar and George W. C. McCarter) thereupon determined to abandon the Federal appeal (Case, p. 127, l. 24; p. 134, l. 31). All counsel interested in the estate and consulted by the Executors, except Mr. Roberts, were in accord with their view that further prosecution of the Federal appeal would

be futile and would merely involve the estate in unjustifiable expense (Case, p. 125).

Mr. Roberts, however, after careful re-examination of the law and the facts including the records and briefs in the New Jersey tax case, protested, both by letters and in conference with Mr. McCarter, against the proposed abandonment and also against the previous intention of the Executors to stake their chances of success in the Federal tax case entirely upon the formal proceedings before the Board of Tax Appeals (Case, pp. 129, 131). Mr. Roberts recommended and urged that the Federal case be vigorously pressed and that negotiations be reopened in the Bureau of Internal Revenue before submitting the case to trial in the Board of Tax Appeals (Case, pp. 28-29). In view of the reluctance of the Executors to act, Mr. Roberts offered to conduct the Federal proceedings on a contingent fee basis (Case, p. 107, l. 8; p. 119, l. 13), but this offer was not availed of (Case, p. 125).

Solely because of this protest and recommendation of Mr. Roberts, the Executors' counsel took the matter up again with the Bureau (Case, p. 138), and in a single conference in the office of its General Counsel they secured an allowance of \$1,525,000 out of the \$1,825,000 deduction claimed, with the resultant saving to the Estate of \$434,000 in taxes and interest (Case, p. 122). These tax savings were not obtained by mere bargaining (Case, p. 82).

Upon the final accounting of the Executors Mr. Roberts applied for an allowance of \$20,000 for his services in connection with this tax adjustment and in connection with the Little Kanawha Syndicate settlement (Case, p. 76), but was allowed only \$2,500 on the advice of Vice-Chan-

cellor Backes (Case, p. 72, l. 38). He thereupon petitioned for a rehearing as to his allowance and the Vice-Chancellor granted such rehearing and directed that depositions be taken (Case, pp. 74, 101). Pursuant to such direction the depositions of Hon. Merritt Lane, J. Edward Ashmead and George W. C. McCarter, all of counsel in this cause, were thereupon taken (Case, pp. 102-139), and further affidavits submitted, upon all of which the Vice-Chancellor rendered his opinion set forth at pages 156-158 of the State of Case, and entered the order from which this appeal is taken (pp. 158-159), denying compensation for the tax services.

In this opinion the Vice-Chancellor attributed the \$2,500 allowance to Mr. Roberts' services in the Little Kanawha Syndicate matter, but disclaimed any power to grant him an allowance in the tax matter. The opinion holds that the Executors' counsel are entitled to all the compensation allowable for the saving in taxes above mentioned, and that the Court cannot duplicate such payment by making an allowance to counsel for a beneficiary.

While avoiding this duplication of allowance as an unjust burden upon the estate, the Vice-Chancellor granted to Mr. McCarter's firm an allowance of \$25,000 and granted a like allowance of \$25,000 to Mr. Gillespie's firm (Messrs. Gillespie & O'Connor of New York), in addition to large allowances previously granted them (Case, p. 72; p. 44, l. 17).

The Question Involved.

The fundamental question presented is whether counsel for a beneficiary should be compensated out of the savings effected for the estate as a

whole, where Executors and their attorneys have "decided to abandon" a valuable asset, and the asset is saved solely through the activities and advice of such counsel for the beneficiary.

Conversely stated, the question is whether a beneficiary interested as a life tenant in only one-tenth of the \$434,000 saved, should be charged with the entire expense of saving it, while the holders of the other nine-tenths interests enjoy the full benefit of the savings without sharing such expense.

Variances Between the Opinion and the Record.

The allowance asked by Mr. Roberts was \$20,000, and the reference in the opinion to \$25,000 is doubtless due to the view expressed in Mr. Roberts' supporting affidavit that the services were worth from \$20,000 to \$30,000 (Case, p. 33; p. 76, last line).

The more important facts in this controversy are not in dispute, and the intimation in the opinion that counsel are not in agreement must be intended to refer chiefly to Mr. McCarter's testimony (Case, p. 122, l. 25) that he did not get any "ammunition" from Mr. Roberts, *i. e.*, any extrinsic evidence not presented to the New Jersey courts in the transfer inheritance tax case (Cf. Case, pp. 90-93; 96-99).

There is no disagreement as to the vital points, *first*, that the Federal tax claim would have been abandoned except for Mr. Roberts' action, and *second*, that the Executors' counsel were not even aware, until advised by Mr. Roberts, that such claims could and should be taken up for settlement by informal negotiation in the Bureau

of Internal Revenue, without the risks and expense of a technical trial before the Board of Tax Appeals. As to these points the facts are undisputed and the evidence is conclusive.

POINT I.

The executors and their counsel had decided to abandon the Federal estate tax appeal, and would have done so but for the protests of Mr. Roberts.

On April 24, 1931, the Court of Errors and Appeals rendered its decision confirming the disallowance of the \$1,825,000 deduction for transfer inheritance tax purposes.

In re Gould, 108 N. J. L. 197, affirming 8 N. J. Misc. 798 and 105 N. J. Eq. 598.

On June 3, 1931, the Executors and their counsel, Mr. George J. Gillespie of the New York Bar and Mr. George W. C. McCarter, held a conference and considered "the matter of continuing appeal in Federal Inheritance Tax matter" (Case, pp. 64, 53, l. 2).

In response to a letter from Mr. Roberts as to the status of the New Jersey tax case, Mr. Gillespie wrote him on June 13, 1931, advising him of the adverse decision and saying, with reference to the conference above mentioned:

"We then decided to abandon, in view of the New Jersey decision, the Federal Appeal" (Case, pp. 127, 126).

That this determination to abandon the Federal tax case was no mere off-hand impulse, is indi-

cated by the fact that seven weeks had elapsed since the decision of this Court.

Mr. Roberts' answer, expressing doubts and asking further information, was referred by Mr. Gillespie to Mr. McCarter with a suggestion that it might be inadvisable to withdraw the appeal until they had an opportunity to confer with Mr. Roberts (Case, p. 114, l. 5). Mr. McCarter thereupon wrote Mr. Roberts on June 18, 1931, in part as follows (Case, p. 130):

"Of course, so far as the New Jersey tax is concerned, we have heard from the Court of last resort. We have raised exactly the same questions on our appeal to the United States Board of Tax Appeals, where we have not yet been heard. Of course the decision of the New Jersey Court is not *res adjudicata* with respect to the Federal estate tax. It is, however, a precedent so directly in point that we have all felt that the Federal tribunals would follow it on the only really meritorious question, namely—the taxability of the sums totalling \$1,825,000 paid to or in trust for the ten children. Mr. Lane, representing Lady Dunsford, has expressed himself in conformity with that view. I have not had any definite expression, however, to that effect from counsel for all seven of the children. If you have any ideas on the subject I should be glad to hear them."

On July 7, 1931, Mr. McCarter wrote Mr. Ashmead in part as follows (Case, pp. 133-135):

"Exactly those three same questions are now pending before the United States Board of Tax Appeals. The New Jersey decision will not be *res adjudicata* on the Federal estate tax. I feel, however, that it will be a precedent which will be insurmountable. The two executors Mr. Gillespie and I had a conference shortly after the affirmance by the Court of Errors and Appeals, and concluded

that to prosecute a Federal estate tax appeal, in view of the New Jersey decision, would be useless, and that the incurring of the expense thereof would be unjustifiable.

"I may say that Merritt Lane, solicitor for Lady Dunsford and counsel for the guardian *ad litem* of her three children, has expressed his concurrence in this opinion."

Mr. McCarter added that Mr. Roberts was urging vigorous prosecution of the Federal tax case, and asked for the views of Mr. Ashmead as counsel to several of the children of George Gould. Mr. Ashmead's reply, as noted by him in pencil on the original of this letter, was:

"Do not believe you would succeed" (Case, p. 135).

That Mr. Ashmead's partner, Mr. Tams, was of the same opinion, appears from Mr. Ashmead's deposition (Case, p. 108, l. 23).

On the same day (July 7), Mr. McCarter wrote Mr. Roberts in part:

"I wish I could agree with you that we have any chance of success before the United States Board of Tax Appeals" (Case, p. 136).

Around July 7, 1931 or prior thereto Hon. Merritt Lane had conferences with Messrs. McCarter and Ashmead, as to which Judge Lane says in his deposition (Case, p. 103, l. 38, to p. 105):

"* * * I know that there were conferences between all of us, and I know that I came to the conclusion, and had come to the conclusion before going to the conference or before talking about it with either of them, that it would be unwise and a useless waste of money to attempt to litigate the matter of the Federal tax. I based my conclusion upon the fact that I conceived that the opinion of Vice

Chancellor Backes, concurred in as it had been by the Court of Errors and Appeals, would be, while not controlling upon the Federal authority, yet, so persuasive upon the Federal authority, who I assumed would, as most taxing boards do, lean toward the taxing authority, that the result would only be increase in the expense of counsel and whatnot.

"Q. Did you so express yourself to Mr. McCarter? A. I did. * * *

"A. Undoubtedly I had talked to Mr. McCarter before Mr. Ashmead talked to Mr. McCarter, and my recollection is that I talked to Mr. Ashmead after that, and again to Mr. McCarter. Mr. McCarter, I notice in this letter, says he thought that the Court was wrong in not allowing the \$1,825,000 as a deduction, that he felt it had been paid in the settlement of the claim. My view was a little bit different from that. I thought that, as a matter of technical law, the Vice Chancellor was right and our Court of Appeals was right.

"Q. I take it from what you have said that, so far as you were concerned, no further efforts would have been made to have the allowance made in the Federal estate tax proceeding? A. That is correct."

Similarly Mr. Ashmead testifies as follows (Case, p. 108, l. 25):

"Q. And I take it, so far as you are concerned, there would not have been any prosecution of the Federal Estate Tax matter had it not been for Mr. Roberts? A. I would not have advised it under the circumstances."

In Mr. McCarter's testimony the attitude of the Executors was summarized as follows (Case, pp. 124-125):

"Q. So far as the executors were concerned, I take it, from what has appeared in the correspondence and what you have testified to, that the efforts to have this \$1,825,000

allowed by the Federal authority for Federal tax purposes would have been abandoned if it had not been for Mr. Roberts? A. I think that is the fair conclusion; that if all the beneficial interests had concurred with Mr. Lane in abandoning appeal, that is what the executors would have done. Mr. Roberts, representing Mrs. Drexel, expressed his disapproval with that view, and we did not go on—rather, Mr. Ashmead did not go on and circularize his other clients.

“Q. And, so far as you knew, there was nobody else that expressed a contrary view to that expressed by Judge Lane and Mr. Ashmead, with the exception of Mr. Roberts? A. That is right.”

With which should be read Mr. McCarter's comments on his letter to Mr. Ashmead (Case, pp. 111-112):

“Q. In the letter of July 7th, to Mr. Ashmead you said that the executors, Mr. Gillespie and you had had a conference, ‘and concluded that to prosecute a Federal estate tax appeal, in view of the New Jersey decision, would be useless, and that the incurring of the expense thereof would be unjustifiable.’ A. I say, except as refreshed by that, I don't remember it.

“Q. That undoubtedly is a correct statement? A. That must be a correct statement. I do remember very distinctly that we talked about money; money in the sense of the cost of the proceedings. And I do remember that I had in mind that I did not want to be criticized for running up a bill.”

It thus appears not only that the Executors and their counsel had concluded to abandon the Federal tax appeal, but that this conclusion was in accord with the views of all counsel consulted except Mr. Roberts.

Parenthetically it should be observed that there is no occasion for criticism of the Executors or

their counsel for their decision in June, 1931, to abandon the Federal tax case. The long series of decisions rendered by the New Jersey State Comptroller and Courts and by the Federal field agent, Internal Revenue Agent in charge at Newark and Miscellaneous Tax Unit at Washington, unanimously disallowing the \$1,825,000 deduction, coupled with the general consensus of opinion among counsel for interested parties, furnished ample ground for general practitioners to conclude that the Federal case was hopeless. These very circumstances, however, emphasize the importance of the specialized training and experience in tax matters, combined with intimate familiarity with the Jay Gould Estate litigation, which Mr. Roberts brought to bear upon the matter. (Case, pp. 32-37, 41, 95.)

POINT II.

On the initiative and insistence of Mr. Roberts, and through renewed negotiations in the Bureau of Internal Revenue as advised by him, the saving of \$434,000 in taxes and interest was simply and speedily effected.

The New Jersey tax case involved a question of law as to whether the tax resulting from disallowance of the \$1,825,000 item should be charged against the preferential trust for George Gould's widow, or against the residuary trusts for his ten children. (105 N. J. Eq. 598.)

By contrast, the Federal tax, being upon the estate as an entirety, involved only a question of fact, whether the \$1,825,000 was in fact paid to compromise claims of the ten children for *sur-charges against* the estate, or merely to readjust rights among *beneficiaries* of the estate. The New

Jersey authorities took the latter view, on a very limited record, the Vice-Ordinary correctly observing as to that record:

“The only evidence of the arrangement is to be found in the contract.” (105 N. J. Eq. at 600.)

Mr. Roberts was convinced that the documentary record in the New Jersey tax case was too narrow in scope and did not fully present the issues. (Cf. Case, pp. 92-94.) Having in view the actual facts, Mr. Roberts therefore replied as follows, when advised of the adverse ruling of this Court and the decision to abandon the Federal tax appeal (Case, p. 128):

“June 16, 1931.

“*George J. Gould Estate*

“George J. Gillespie, Esq.,
20 Vesey Street,
New York City.

“Dear Mr. Gillespie:

“Thank you for your letter of June 13. The decision of the Court of Errors and Appeals is so far at variance with my presuppositions of the law that I should appreciate an opportunity to examine the record on appeal to that Court.

“My presuppositions reflect chiefly a number of Federal decisions and I should be particularly regretful if the Executors found it necessary to concede a similar point in the Federal tax case. If there is a printed record in the Federal tax case and you can spare me a copy of that I should appreciate an opportunity to examine that also.”

And in the letter of July 6 to Mr. McCarter, Mr. Roberts said (Case, p. 132, italics ours):

“* * * I venture to suggest in view of the outcome that certain additional facts should be proved before the Board. There seemed to lurk in the opinions of the Courts a feeling that the deduction was purely an arbitrary adjustment among the members of the family. It should be made clear to the Board that the \$1,525,000 paid to the seven children was necessary to adjust their shares in the settlement fund equitably in comparison with the shares which other branches of the Jay Gould family were to receive. The *history of the negotiations* leading to the settlement should remove any notion that the \$1,525,000 was an arbitrary hold-up or was anything but *part and parcel of the general fund distributed to claimants against George Gould's estate*. Similar considerations also apply to the \$300,000 placed in trust for the Sinclair children.”

With reference further to this question of fact, on July 14 Mr. Roberts handed Mr. McCarter a memorandum (Case, pp. 98-99, and p. 93, ll. 11-36), analyzing the compromise settlement in the Jay Gould accounting action and demonstrating that the entire amount received by the seven children of George Gould, *including the \$1,525,000*, was not only less than *their share in the surcharge claims* against the George Gould Estate but also less than *their equitable share in the settlement fund* raised to compromise those claims. Regardless of what arguments were ultimately used in Washington, the position taken by Mr. Roberts was not arbitrary or speculative; it rested on his personal knowledge of the settlement negotiations of 1927 as well as his special familiarity with Federal tax decisions.

Entertaining these views, Mr. Roberts protested against the abandonment of the Federal tax case. After devoting considerable time to *re-examining the voluminous records of the Jay Gould Estate*

litigation in his own office, collecting the relevant documents therefrom, and considering the records in the New Jersey tax case, lent him by Mr. McCarter, Mr. Roberts went to Newark on July 14, 1931 and conferred first with his associates, Messrs. Ashmead and Tams, and later in the day with Messrs. Ashmead and McCarter.

In these conferences, as in the correspondence, Mr. Roberts vigorously urged that the Executors should press the Federal tax case instead of abandoning it. Mr. McCarter, while agreeing with Mr. Roberts on the merits of the case, was disposed to regard its further prosecution as entailing merely useless expense, and further delay in winding up the Estate, but agreed to reconsider the matter with the Executors and Mr. Gillespie. So confident was Mr. Roberts of success in the Federal tax case that he offered to conduct it on a contingent fee basis (Case, p. 107, l. 8; p. 119, l. 12; cf. p. 108, ll. 1-16).

About a week later, July 22, 1931, Mr. McCarter wrote Mr. Roberts as follows (Case, p. 138):

“In view of the fact that you, on behalf of Mrs. Drexel, think that the Federal tax appeal should not be abandoned, I beg to advise you that the executors have decided not to abandon it.”

The record is thus plain, not only that the Executors and their counsel had decided to abandon the tax case before Mr. Roberts was aware of the situation (Case, p. 127, ll. 24-26), but also that the reversal of their decision was, as stated in this letter of July 22, caused by Mr. Roberts' arguments and insistence that it should not be abandoned.

Mr. Roberts did more, however, than marshal the facts and urge the view that the case should

not be abandoned. He found that the Executors were wholly overlooking the possibilities of obtaining reconsideration of the case in the Bureau of Internal Revenue, and would have staked their chances of success (even if the case were not abandoned) entirely on a trial of the case before the United States Board of Tax Appeals, where the procedure and rules of evidence are highly technical. Mr. McCarter has frankly recognized that his first information as to the possibility of proceeding further in the Bureau was given him by Mr. Roberts in the conference of July 14 (Case, p. 119, ll. 22-27). In his deposition Mr. McCarter did not recall clearly the details of the conversation as to this, but they are set forth in Mr. Roberts' affidavit as follows (Case, pp. 28-29):

"Moreover, I called attention to the fact (which had not been previously observed in this case) that cases pending before the Board of Tax Appeals could be reopened and reconsidered in the Bureau, that a Special Advisory Committee existed in the Bureau for that express purpose, and that such reconsideration in the Bureau would be speedy, inexpensive and free from technicalities. I urged that the matter of such reconsideration be taken up with the attorney in the Appeals Division of the office of General Counsel to the Bureau, having charge of the case, and I ventured the prediction that two or three informal conferences across the table, either in the General Counsel's office or before the Special Advisory Committee, should suffice to procure a reversal of the Bureau's decision."

On receiving Mr. McCarter's letter of July 22, 1931, Mr. Roberts called attention to the fact that it made no mention of the Special Advisory Committee, to which Mr. McCarter replied, on July 24, 1931 (Case, p. 139):

"I think we shall make application to the Special Advisory Committee."

Thereafter the Executors' counsel delayed action until September 11, 1931, and in the *interim* the case had on *September 10* been placed on the day calendar of the Board of Tax Appeals, for which reason the Special Advisory Committee declined to take jurisdiction (Case, pp. 123-124).

The benefit of Mr. Roberts' advice to proceed by negotiation in the Bureau was not lost, however. Although no longer able to deal with the Special Advisory Committee, the Executors' counsel arranged for a conference on October 1, 1931, with the attorney in charge of the case in the office of General Counsel to the Bureau. Except for Mr. McCarter's testimony that he did not use the "ammunition" or evidence outside the record in the New Jersey tax case, which Mr. Roberts had urged him to use and had in part supplied (Case, pp. 93-99), the arguments used by Executors' counsel do not appear in this record. We are left to infer that the Executors' counsel on this occasion made substantially the same sort of presentation of the case as they had unsuccessfully done before seven other officials and tribunals. However, in this conference the attorney for the Bureau conceded the contention that out of the \$1,825,000, \$1,525,000 paid to the seven children of George Gould by his first marriage was deductible; and this concession resulted shortly thereafter in the settlement with the Bureau (Case, p. 59, l. 35, to p. 60, l. 14). As we have observed above, this settlement was not obtained by mere bargaining. See Case, p. 82.

Thus in a single, informal conference in the Bureau the bulk of the Federal tax item was saved, very much as Mr. Roberts had predicted in the conference of July 14 (see p. 15, *supra*).

POINT III.

Compensation should not be denied to Mr. Roberts on the ground of supposed duplication of services or of compensation as between him and the Executors' counsel.

In the face of the record reviewed above, the Vice-Chancellor's opinion gives the Executors' counsel all the credit for the results obtained, assumes that those results were obtained by them through "litigation", states that their "labor involved in the effort" was taken into consideration in fixing their compensation, that Mr. Roberts "took no active part in the litigation before the Federal Board," and concludes:

"The court cannot make an allowance to him for services he rendered to them. It cannot pay twice." (Case, p. 157.)

How far the Vice-Chancellor's summary of the proceedings which saved the tax, varies from the record is obvious. Aside from the inadvertent understatement of the tax savings as \$328,000 in Mr. Roberts' first affidavit, all the essential facts, *as well as Mr. Roberts' application for compensation*, were before the Vice-Chancellor *when he fixed the compensation of the Executors' counsel*, and this is recognized in his opinion.

The limited scope of the *effective* services of the Executors' counsel in the tax matter is apparent from the description of those services in Mr. McCarter's affidavit, which described them as follows (Case, pp. 45-46, italics ours):

"3: I also, assisted by Mr. George J. Gillespie, of the New York Bar, prosecuted the Federal Estate Tax proceedings. We had various conferences with Internal Revenue

people, including a special trip to Washington on February 7, 1928, and after the final action by the Bureau of Internal Revenue I drafted and filed a petition of appeal to the United States Board of Tax Appeals. This appeal was pending undetermined at the time of the final action by the New Jersey Court of Errors and Appeals in the New Jersey tax. The questions raised in both appeals were the same. *After the final action by the Court of Last Resort in New Jersey I conferred with the executors and counsel for interested parties as to whether or not further to prosecute the Federal Tax appeal. We were instructed to do so. I wrote Washington, suggesting a conference with a view to settlement, and on or about October 1, 1931, Mr. Gillespie and I went to Washington and had a very full conference with counsel for the Bureau of Internal Revenue. We took with us the briefs in the New Jersey proceedings and the record there, and offered to settle the proceeding by conceding the taxability of the gift of \$1,000,000.00 par value of First Liberty Loan Bonds by the testator to his wife in consideration of the allowance of \$1,825,000.00, paid to or in trust for the testator's ten children, as a valid deduction from the gross estate. Settlement was finally made by an allowance of \$1,525,000, which resulted in a very substantial refund."*

It will be observed that all the services thus described in Mr. McCarter's affidavit, with reference to the Federal estate tax, accomplished nothing except the single conference which was held on the advice and urging of Mr. Roberts and in the manner which he urgently suggested and which resulted in a settlement without litigation as he had confidently predicted.

Compensation to Executors' counsel is not here in question, although it should be noted that on the final accounting Mr. McCarter's firm was allowed \$25,000, and a like allowance of \$25,000

was made to Mr. Gillespie's firm, in addition to large allowances previously granted them (Case, p. 72; p. 44, l. 17). There was no exigency requiring that Mr. Roberts be denied compensation for his tax services for fear of duplication or undue deprivation in allowances to the Executors' counsel.

POINT IV.

Mrs. Drexel, as life beneficiary of one-tenth of George Gould's residuary estate, was entitled as a matter of right to have her counsel intervene actively and prevent abandonment of the Federal tax case. Her counsel's services having been rightfully rendered for the protection of the entire estate, a reasonable fee therefor should be paid by the estate.

The Vice-Chancellor's ruling in the present instance that counsel to the beneficiary must look to the Executors' counsel for compensation and can recover from them if they retained him, but that the Court cannot make an allowance to him, is difficult to reconcile with his own action, taken in a prior accounting proceeding of this same estate, when he volunteered to Mr. Roberts an allowance for services rendered by him on behalf of Mrs. Drexel and another beneficiary, which resulted in savings to the estate in matters wholly distinct from those now in controversy.

The official reports show that Mr. Roberts has been recognized by the Chancery Court as of counsel for Mrs. Drexel in other Gould Estate matters (*e. g.*, *Rice v. Gould*, 112 N. J. Eq. at 379), but the present opinion seems to proceed on the assumption that Mr. Roberts' services

were merely those of an interloper or volunteer, meddling unnecessarily with the Executors' conduct of the estate's affairs.

The Chancery Court by its decree of March 19, 1927, had assumed general jurisdiction of the administration by Kingdon Gould and Rice "of their trusts as executors of the estate of George J. Gould" (Case, p. 15, l. 10), and the case therefore comes within the general rule that in equity *a beneficiary has a right to intervene*, even to the extent of suing, *to prevent waste* of the estate by inaction of the trustees.

Van Dyke v. Van Dyke (1879), 31 N. J. Eq. 176, creditor suing to set aside foreclosure sale, on refusal of administrator to act.

Doll v. Cash (1901), 61 N. J. Eq. 108, injunction to restrain sale by administrator at an unnecessary sacrifice.

Weeks v. Sibley (D. C., N. D. Tex. 1920), 269 Fed. 155, beneficiary granted injunction restraining trustee from making return and paying illegal tax.

Gueli v. Lennihan (Sup. Ct. Genl. Term 1890), 8 N. Y. Supp. 453, legatee suing to revive action collusively discontinued by executor.

Ettlinger v. Persian Rug Co. (1894), 142 N. Y. 189, 36 N. E. 1055, bondholder may bring foreclosure suit in absence of trustee.

Dodge v. Woolsey (1855), 59 U. S. 331, stockholder enjoining payment of tax by corporation; followed in

Pollock v. Farmers' Loan & T. Co. (1895), 157 U. S. 429, 553.

3 *Pomeroy's Equity Jurisprudence* (4th ed.), pages 2715-2716, 2733.

It would be inequitable to require Mrs. Drexel's counsel to look to her alone for payment for such services, nine-tenths of the benefit having enured to others.

In

Smith v. McDonald (Prerogative Court 1905), 69 N. J. Eq. 765, 770 (affirmed in 71 N. J. Eq. 261, 269),

the Vice-Ordinary said:

“The practice in this court of allowing costs and reasonable fees to be paid out of the estate for services rendered for the benefit of those who take the fund, and who should, in equity, contribute toward the payment of the same, seems to be established. *Munn's Executor v. Munn*, 20 N. J. Eq. (5 C. E. Gr.) 472. In my opinion, the counsel who in this case represent the cousins and descendants of deceased cousins should be allowed their costs and reasonable counsel fees to be paid from the fund, upon the ground that the burden and expense of this litigation should not be borne by the few who have defended the fund against distribution among those who, it is held, are not entitled to participate. These services and expenses have held the fund together for a limited distribution, and those benefited thereby should contribute.”

And in

In re Emery (Chancery, 1931), 109 N. J. Eq. 144,

Vice-Chancellor Backes said:

“The fund being in the control of the court the court has power to compensate counsel aiding in the administration of the trust.”

As to one who there "defended the trust in behalf of the missing *cestui que* trust," it was said in the *Emery* case:

"His counsel are entitled to compensation according to the common practice for their aid in protecting the fund. Allowance of counsel fee to him is also justified under section 91 of the Chancery act * * *."

See also discussion of counsel fees in

Soper v. Bilder (1917), 87 N. J. Eq. 564.

POINT V.

The allowance requested is fully justified by the technical services required, the contingent character of the right to compensation, and the important results to the estate.

The same tax questions, or similar questions, had been determined against the estate four times by tribunals of New Jersey and three times by officers or tribunals of the Federal Government, and all counsel consulted except Mr. Roberts were of opinion that the Federal tax case should be discontinued as a waste of time and money. To meet such a situation successfully called for services and equipment of a highly specialized nature, including experience and familiarity with Federal tax law, decisions and practice.

In preparation for such cases as this Mr. Roberts had spent the better part of two years in research work on Federal taxation, without direct return, after ten years of specialization in tax practice. The services rendered here were of a technical and occasional character, which cannot be adequately compensated in the long run by payments at a low rate in case of success,—let alone

by denial of all compensation as in the Court below.

The contingent character of any compensation for these services should also be taken into consideration. The unanimity of official and unofficial opinion against Mr. Roberts' views would not have permitted a charge against Mr. Roberts' client or a claim for an allowance if his views had proved erroneous. In the face of such adverse rulings and opinions Mr. Roberts could have made no claim if his intervention had not been justified by the eventual saving of the \$434,000. In such cases the compensation should be a higher percentage of the recovery than would otherwise be permissible.

Cf. *Hassell v. Van Houten* (1884), 39 N. J. Eq. 105;

Adams v. Schmitt (1905), 68 N. J. Eq. 168;

Soper v. Bilder (1917), 87 N. J. Eq. 564, 569, where the Vice-Chancellor said:

"In computing what is reasonable compensation many elements must be taken into account. There is no yardstick by which the value of legal services can be measured; no rate per diem or percentages can be employed with justice to both parties. The legal ability of the attorney, the amount of work which he does, the skill with which he does it, and, of much importance, the amount involved, and the success of his efforts. There may also be considered the contingency that in case he is unsuccessful he will receive nothing, and the fact, if it be a fact, that the fund was created through the efforts of the attorney."

But for Mr. Roberts' intervention in the Federal estate tax controversy there would have been nothing for the Executors to turn over to the Trus-

tees on the final accounting; on the contrary, it would have been necessary for the Executors to withhold or recall from the Trustees over \$110,000 of the sums turned over to the Trustees before the final accounting. The \$434,000 saved largely exceeds the total corpus and income (\$324,630) reported as in the hands of the Executors on their final accounting, and equals *one-third of the entire residuary estate* of George Gould (which amounts to about \$1,250,000). The vital importance to the estate of the savings effected by Mr. Roberts, should therefore be borne in mind in determining his compensation.

POINT VI.

The \$2,500 allowance made to Mr. Roberts for services in the Little Kanawha Syndicate settlement, is not in controversy here; but that it was fully earned is incidentally shown in the present record.

As to this item we refer particularly to the affidavits in the Case at pp. 140-155, and p. 39, l. 39, to p. 41, l. 3.

CONCLUSION.

The decree and order appealed from should be reversed, in so far as it denied compensation to Mr. Roberts for the tax saving of \$434,000 effected by him for the estate.

We submit that this conclusion is justified by the considerations reviewed above, but we invite the Court's attention also to the affidavits of Mr.

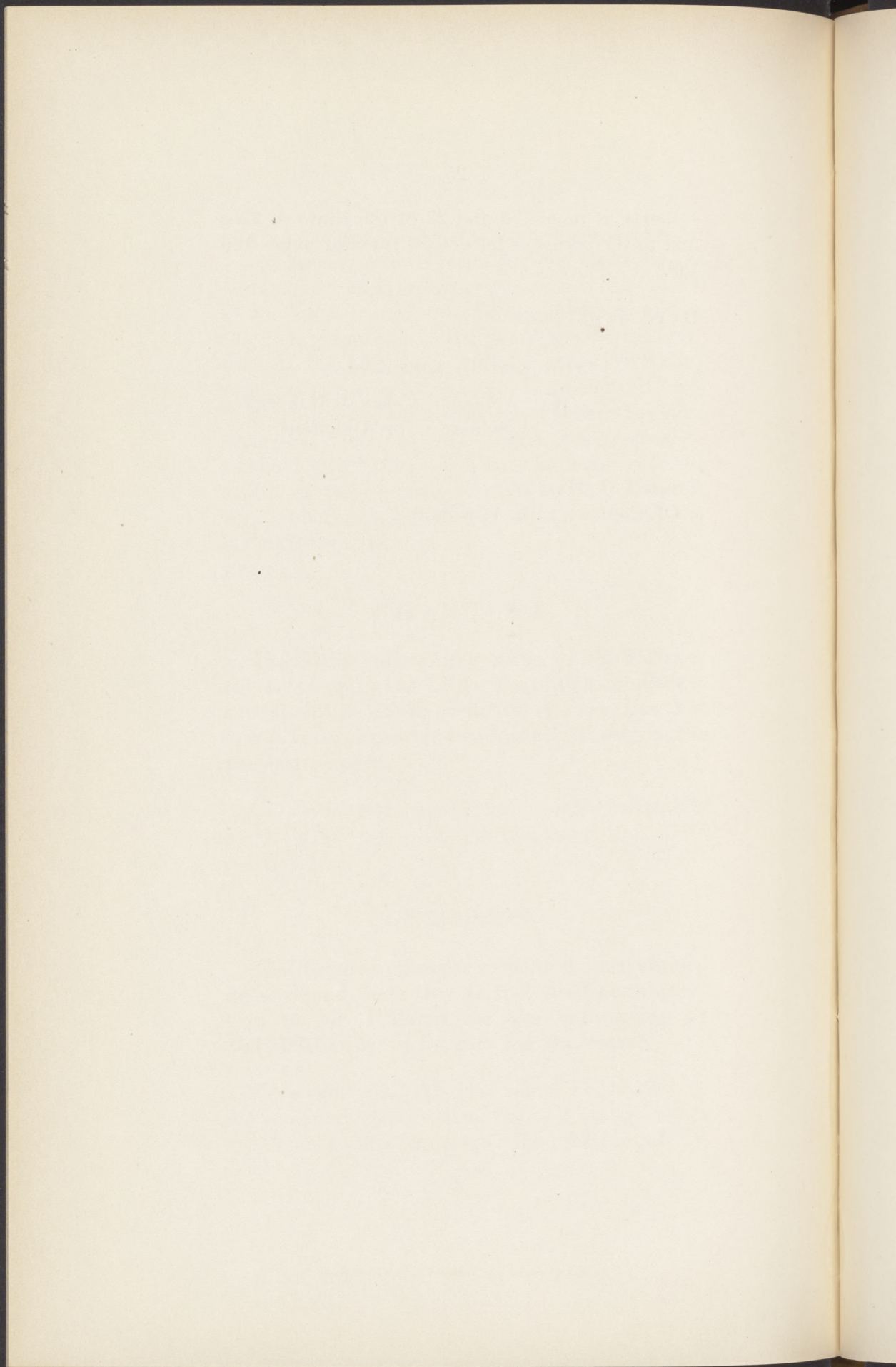
Roberts at pages 76 and 23 of the State of Case
and to the series of letters set forth at pages 126-
139.

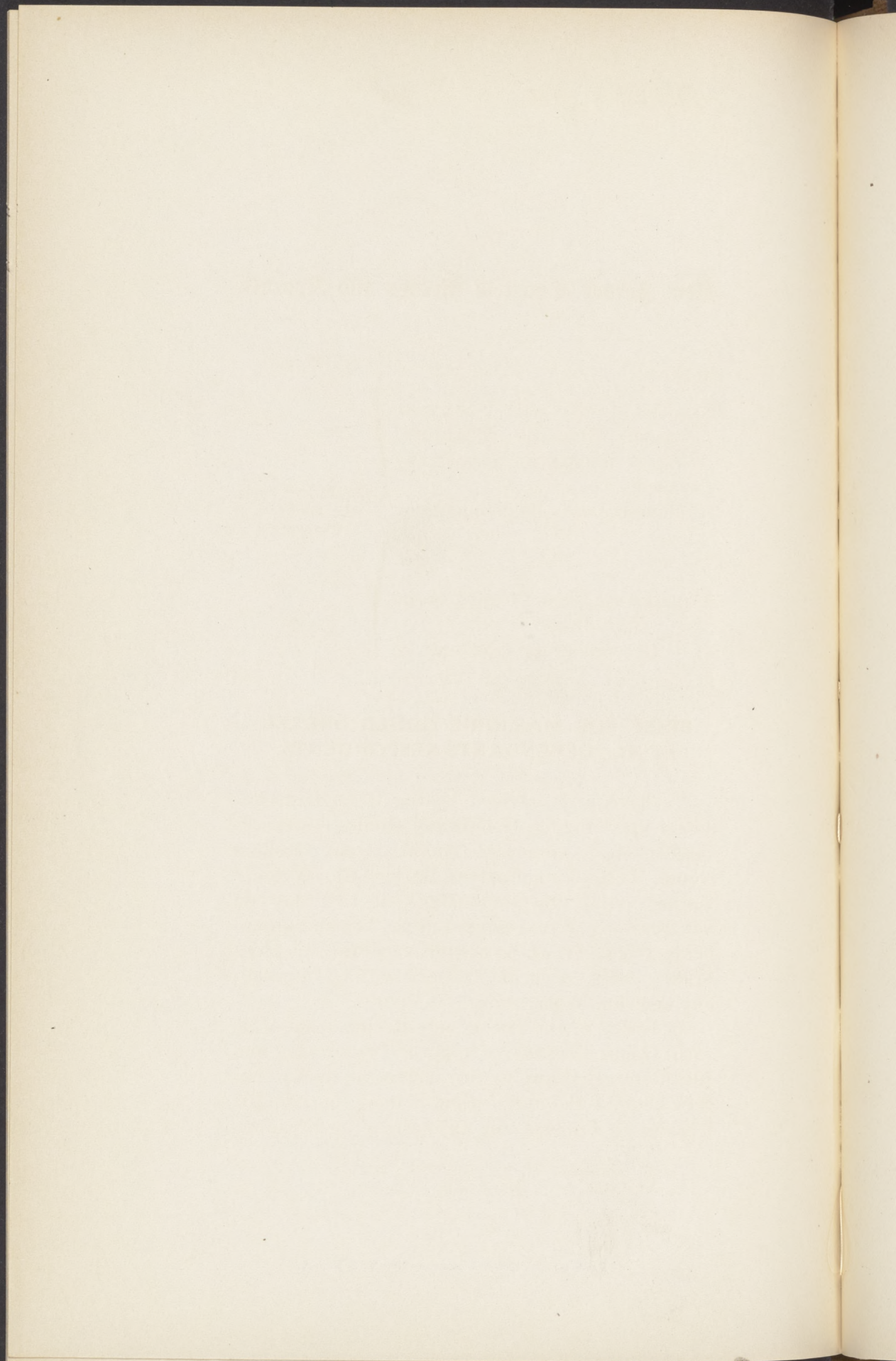
Dated May 5, 1934.

Respectfully submitted,

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for Appellant.

THOMAS G. HAIGHT,
Of Counsel with Appellant.





137 MAY. T. 1934

New Jersey Court of Errors and Appeals

Between

KINGDON GOULD and SCHUYLER
NEILSON RICE, as Executors,
etc., of GEORGE J. GOULD, De-
ceased,

Complainants-Respondents,

and

COMMERCIAL TRUST COMPANY OF
NEW JERSEY, *et al.*,
Defendants-Respondents.

On Appeal from
the Court of
Chancery.

BRIEF FOR MARJORIE GOULD DREXEL, *ET AL.*, DEFENDANTS-RESPONDENTS.

We have been advised by the Defendants-Respondents Kingdon Gould, Jay Gould, George J. Gould, Jr., Annunziata Gould, Anne Graham Gould, Wallace MacFarland Barker, Gloria Gould Barker and Edith Gould MacNeal, that they do not desire to be represented at the hearing on appeal; they feel that the matter is one for this Honorable Court to decide and are willing to accept any decision it may make.

On behalf of the Defendants-Respondents Marjorie Gould Drexel, Anthony J. Drexel, Jr., and Edith Drexel Cram, we are instructed to say that they endorse the application of their counsel, Mr. Charles A. Roberts, for an increase in his allow-

THE HISTORY OF THE

REIGN OF

CHARLES THE FIRST

BY

JOHN BURNET

OF THE UNIVERSITY OF OXFORD

IN TWO VOLUMES

THE SECOND VOLUME

CONTAINING

THE HISTORY OF THE

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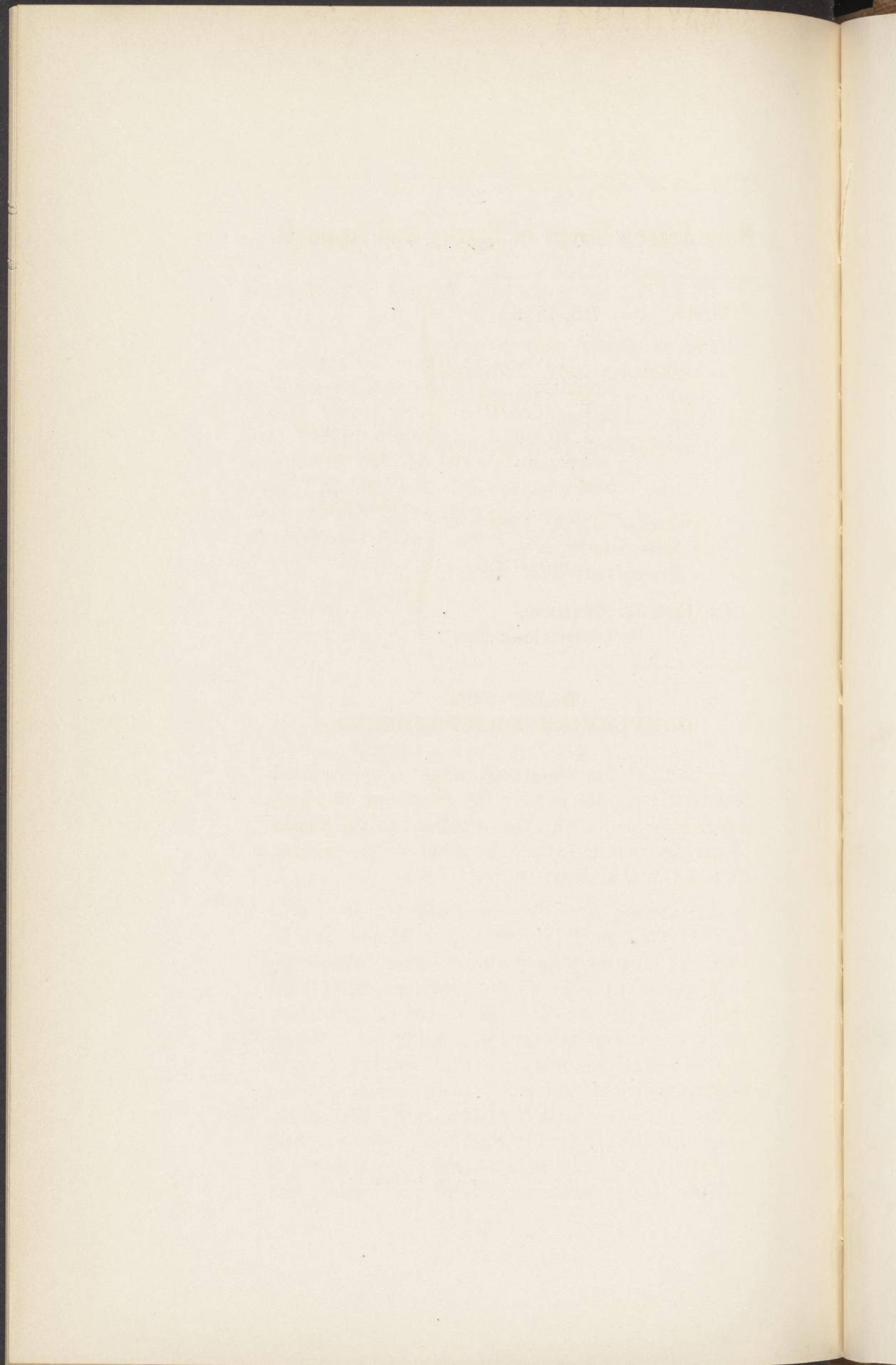
CHARLES THE FIRST

ance to \$20,000.00, the amount applied for in the court below.

Dated, May 7th, 1934.

LINDABURY, DEPUE & FAULKS,
Solicitors for Defendants-Respondents
Kingdon Gould, Jay Gould, George
J. Gould, Jr., Marjorie Gould Drexel,
Anthony J. Drexel, Jr., Annunziata
Gould, Anne Graham Gould, Wallace
MacFarland Barker, Gloria Gould
Barker, Edith Gould MacNeal and
Edith Drexel Cram.

J. EDWARD ASHMEAD,
Of Counsel.



Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

KINGDON GOULD and SCHUY-
LER NEILSON RICE, as Execu-
tors, etc., of GEORGE J.
GOULD, deceased,
Complainants-Respondents,

and

COMMERCIAL TRUST COMPANY
OF NEW JERSEY, *et al.,*
Defendants-Respondents.

CHARLES A. ROBERTS,
Petitioner-Appellant.

*On Appeal
from the
Court of
Chancery.*

BRIEF FOR COMPLAINANTS-RESPONDENTS.

As counsel for the complainants-respondents I feel that I should protect the trust out of which payment is sought by the appellant to the extent of laying certain facts briefly before this Court, as I did in the Court below.

Jurisdiction over the accounts of the executors of George J. Gould was assumed by the Court of Chancery by its decree made March 19, 1927 (Case 6). Thereafter the executors filed their final account and the Court of Chancery made its decree (Case 70) passing the account and allowing commissions and making certain allowances to solicitors, counsel and guardians *ad litem* for fees and disbursements. The allowance made to my firm in that decree was \$25,000., and it covered services rendered from October 6, 1927 to May 3, 1933, the date of the decree. See

affidavit of services (Case 43). A like sum of \$25,000. was allowed to Messrs. Gillespie & O'Connor, of the New York Bar, associate counsel for the executors. See affidavit of services (Case 55). The following allowances were also made: To J. Fisher Anderson, of counsel with the trustees of the residuary estate, \$1,000.; to Merritt Lane, counsel for the widow of the decedent and her three children, being three of the ten life tenants of the residuary estate, \$2,000.; to Messrs. Lindabury, Depue & Faulks, counsel for the decedent's seven children by his first marriage, life tenants of the residuary trust, \$2,500.; to Charles A. Roberts, the appellant, counsel in association with Lindabury, Depue & Faulks, for Marjorie Gould Drexel, one of the seven children, \$2,500.; to W. Durward McCloskey, guardian *ad litem* and counsel for the guardian *ad litem* of infant remaindermen, \$1,000.

A very substantial part of the services rendered by my firm and by Mr. Gillespie's was in connection with the transfer inheritance taxes. In New Jersey those taxes were litigated up to this Court, and resulted adversely to the executors. The two principal questions were the taxability of a gift in contemplation of death of \$1,000,000. in Liberty Bonds, given by the decedent to his wife a few months before his death; and the deductibility of sums totalling \$1,825,000. paid as incident to the settlement of litigation in the Supreme Court of New York over the estate of Jay Gould, father of our decedent, and paid to or in trust for the ten children of our decedent. Exactly the same questions were raised in connection with the Federal estate tax, and had been decided adversely to the claim of the executors by the Bureau of Internal Revenue, and the executors had taken an appeal

to the United States Board of Tax Appeals. This appeal was pending unheard, awaiting argument, when this Court handed down its final unfavorable decision.

After the decision of this Court the executors and their counsel had a conference to decide what to do with respect to the Federal tax appeal. The New Jersey decision, while not *res adjudicata* as to the Federal tax, was unquestionably a highly persuasive authority, and counsel for the executors did not want to be criticized for running up a bill (Case 112) by further prosecution of the Federal tax appeal, if on reflection that was not deemed advisable. Accordingly counsel for the parties beneficially interested were circularized and asked to express their opinion. Nothing was heard from the infant remaindermen. Mr. Lane, speaking for the widow and her three children, orally expressed himself that the further prosecution of the Federal appeal would, in the face of the New Jersey decisions, be useless. Mr. Ashmead, of Messrs. Lindabury, Depue & Faulks, counsel for the seven other life tenants, was of the same view, but the appellant, Charles A. Roberts, associate counsel for one of Mr. Ashmead's clients, Mrs. Drexel, took the contrary view. Mr. Roberts is a specialist in Federal tax matters.

Before Mr. Ashmead made any inquiry of any of his clients other than Mrs. Drexel, he and Mr. Roberts had a conference with me, at which conference Mr. Roberts repeated what he had previously expressed in writing, that he was in favor of the Federal tax appeal being prosecuted and thought it would be successful. He advised making application to the Special Advisory Committee, of which body, frankly, I had never there-

tofore heard. He sought employment by the executors to prosecute the appeal, and said he would do it on a contingent basis. I told him that the question of employment was a matter for the executors to decide. Associate counsel and I then had a conference with the executors, and it was decided to go ahead with the Federal tax appeal in view of Mr. Roberts' position. Mr. Roberts was not, however, employed by the executors. Mr. Roberts having on behalf of his client expressed himself against abandoning the Federal tax appeal, and that being sufficient to persuade the executors not to abandon it, Mr. Ashmead did not circularize his other clients (Case 107, 125).

Thereafter, following out Mr. Roberts' suggestion, I requested a conference with the Special Advisory Committee, but the case by that time having been put on the day calendar of the Board of Tax Appeals, the Special Advisory Committee refused to have anything to do with it. Mr. Gillespie and I, however, succeeded in getting into contact with the office of the general counsel of the Bureau of Internal Revenue (Case 121, 122), and an appointment was made to discuss settlement. Mr. Gillespie and I went to Washington and had a long conference with a Mr. Horner in the Department. We took with us the briefs and record in the New Jersey Court, and left them with Mr. Horner at the close of our conference. No additional matter or ammunition furnished by Mr. Roberts was laid before the general counsel. The object of the conference was to effect a settlement. We offered to concede the taxability of the gift in contemplation of death if the Government would allow as a deduction the payments totalling \$1,825,000. The evidence on the taxability of the

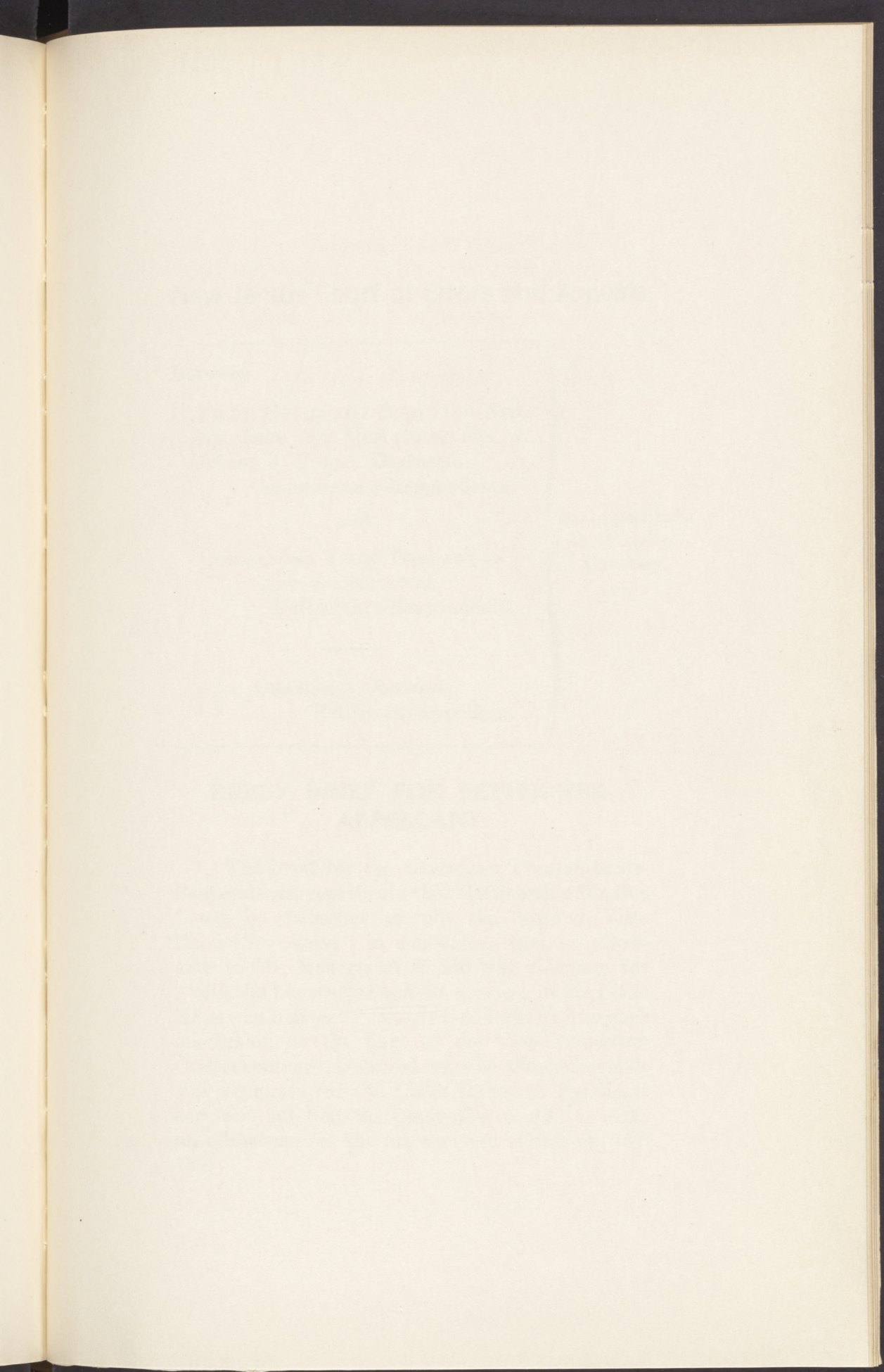
gift in contemplation of death was very voluminous, and I felt that our case on that was not as strong on that as on the other point. There had, however, then recently been some Federal Court decisions adverse to gifts before death being held to be taxable. In other words, the Government had then recently received some bad knocks on that question in other cases (Case 123). The Government's counsel considered our offer of settlement and subsequently came back with a counter-offer of allowing the deduction in the sum of \$1,525,000. instead of \$1,825,000., as desired by the executors. This modified settlement was concluded, and resulted in a tax saving to the estate of approximately \$400,000.

The facts may be summarized as follows: If some one of the parties beneficially interested had not objected to the abandonment of the Federal tax appeal, it would have been abandoned. Mr. Roberts, on behalf of Mrs. Drexel, objected to its abandonment. It is impossible to say whether any of Mrs. Drexel's brothers and sisters, had they also been asked would have objected. Mr. Roberts' objection, therefore, did, as an objection, result in a very substantial saving to the estate. Mr. Roberts suggested his employment by the executors, which suggestion was by them declined. Mr. Roberts did not take any part in the argument of the Federal tax matter or in the negotiations which resulted in its settlement, nor did he furnish any ammunition or material which was used, nor, except as above stated, do anything toward securing the tax reduction. In Mr. Roberts' original affidavit, which was filed in support of his claim for a counsel fee (Case 23) he relied on both the tax matter and his services in the Little Kanawha matter.

On these facts the learned Vice-Chancellor concluded in effect that Mr. Roberts' allowance of \$2,500. was adequate. The question for this Court is whether or not the learned Vice-Chancellor erred.

Respectfully submitted,

G. W. C. McCARTER,
Of Counsel with Complainants.



New Jersey Court of Errors and Appeals

Between

KINGDON GOULD and SCHUYLER NEIL-
SON RICE, as Executors, etc., of
GEORGE J. GOULD, Deceased,
Complainants-Respondents,

and

COMMERCIAL TRUST COMPANY OF
NEW JERSEY, *et al.*,
Defendants-Respondents.

CHARLES A. ROBERTS,
Petitioner-Appellant.

On Appeal from
the Court of
Chancery.

REPLY BRIEF FOR PETITIONER- APPELLANT.

1. The brief for the Executors, Complainants-Respondents, represents that the question for this Court is "whether or not the learned Vice-Chancellor erred" in concluding that an allowance to Mr. Roberts of \$2,500 was adequate for "both the tax matter and his services in the Little Kanawha matter". The record indicates no such conclusion on the part of the Vice-Chancellor. On the contrary, he found that the allowance made was adequate for the Little Kanawha Syndicate services, but that the Chancellor could not make an allowance for the tax services (Case, pp. 157-158).

2. The Executors' brief pictures the tax settlement as reached by bargaining with Mr. Horner in the Treasury Department, and suggests that in allowing the \$1,525,000 deduction the Department regarded as a fair *quid pro quo* the concession by the Executors that the Liberty Bond gift was taxable as having been made in contemplation of death, the Department being actuated thereto by some "bad knocks" which it had recently received in Federal Court decisions regarding such gifts. We know of no such decisions which could even remotely suggest a doubt as to the taxability of Mr. Gould's Liberty Bond gift made at a time when his "condition was precarious and he realized that his days were few" (*In re Gould*, 105 N. J. Eq. 598, 602). The tax savings were not obtained by mere bargaining (see Case, p. 82); but even if they had been, that would not militate against the correctness of Mr. Roberts' judgment that the Federal tax case should not be abandoned.

3. At page 3 of the Executors' brief the erroneous impression is given that the Executors were circularizing the beneficiaries to get their opinions before deciding as to the advisability of further prosecution of the Federal tax appeal, and that the conference between Messrs. McCarter, Ashmead and Roberts was held "before Mr. Ashmead made any inquiry of any of his clients *other than Mrs. Drexel*".

The fact is that on June 3, 1931, the Executors and their counsel held the conference in which they concluded that to prosecute the Federal tax appeal would be useless and the expense thereof unjustifiable (Case p. 134, line 31; p. 64, lines 20-25; p. 53, lines 2-5); that as late as June 12 (seven weeks after this Court's decision in the tax case) Mr. Roberts *had heard nothing* of these developments (Case p. 126); and that Mr. Gilles-

pie's letter of June 13, advising Mr. Roberts of the Court's decision, was written in response to an inquiry from Mr. Roberts as to the tax situation, and merely stated that at the conference above mentioned the Executors and their counsel "*decided to abandon*, in view of the New Jersey decision, the Federal Appeal" (Case p. 127, *italics ours*).

Not until after Mr. Roberts' letter of June 16 to Mr. Gillespie questioning the advisability of dropping the Federal tax case (Case p. 128) *do we find any suggestion that the Executors would like the views of Mrs. Drexel's counsel before reaching a decision* (Case p. 130, line 29; p. 114, line 7). If the Executors' counsel had any mental reservations as to what Mr. McCarter called their conclusion, and Mr. Gillespie called their decision, to abandon the Federal case, such mental reservations were never communicated to Mr. Roberts and could not affect his right and duty to intervene actively and prevent such abandonment. Any such reservations were certainly inconsistent with the determination expressed in Mr. Gillespie's letter of June 13 (Case p. 127).

4. The Executors' brief represents that Mr. Roberts "sought employment" to prosecute the Federal tax appeal and that his offer to act on a contingent basis was declined by the Executors. Finding that the Executors' counsel were loath to continue the case or to incur the incidental expense and were unfamiliar with the procedure for reconsideration in the Bureau, Mr. Roberts could hardly have done otherwise than make such an offer.

That offer was made, however, *at the conclusion* of the services for which compensation is here sought, and the making of the offer is relevant only as evidence of Mr. Roberts' good faith and definite conviction that the Federal tax

case could be won. These services consisted in bringing to the case not only the experience and learning of an expert in Federal income taxation, but also a careful and exhaustive examination of the record and briefs in the New Jersey tax case (some hundreds of pages) and the assembling and reviewing of material from the voluminous files of the Jay Gould Estate accounting suit in New York. Mr. Roberts' right to compensation is based not on a contract with the Executors, but on the propriety of his action in intervening actively when he found that an important asset of the estate was about to be abandoned. As was said in

Smith v. Johnson (1922), 200 App. Div. 811, 194 N. Y. Supp. 67, at 73:

"The right of a third party, having a personal interest in the estate or trust, to act as quasi trustee in behalf of the estate arises only from the necessity of the situation, and that necessity may be created by the absence of any trustee who can act impartially for the estate, as well as by the refusal of the trustee to act for the estate." (Italics ours.)

And the Court there held that it would be inequitable to require the beneficiary to bear the expense of her contest, made not only in her own interest but in the interest of the entire estate, in which her counsel were successful in obtaining the fund from which an allowance was asked.

The same doctrine was declared by Chancellor Walker in

Unger v. Newlin Haines Co. (1923), 95 N. J. Eq. 16,

where he declared the general principle that there can be no allowance out of the estate in a chancery receivership, except for counsel representing

the receiver, but qualified this by observing (p. 19):

“An exception exists where the attorney for a creditor successfully resists a claim which the trustee refuses to contest. *In re Little River Lumber Co.*, 101 Fed. Rep. 558. This is merely mentioned to show the character of exceptions to the rule.”

In re Little River Lumber Co. (D. C., W. D. Ark. 1900), 101 Fed. 558,

was a bankruptcy proceeding, in which the Referee said (p. 559):

“It is the province of the trustee to represent all the creditors and bring all suits in the administration of the estate. Yet where the trustee declines to act, as is plainly shown by the evidence in this case (although secured against costs and expense of the suit in event of failure), and where the trustee leaves it to a creditor of the estate to resist the allowance of a claim, it is the opinion of the referee that that creditor had the right to make the contest; and, having made it successfully, is entitled to have the fee of his attorney paid out of the general fund.”

In affirming the action of the Referee the Court said:

“This allowance is made and goes as a part of the expenses of the administration of the estate, and is allowed under the general equity powers of the bankrupt court. It seems to me that, on well-recognized equitable principles, an attorney who, under the circumstances of this case, intervened and successfully resisted an unjust claim, ought to be paid by the estate which was benefited by his services. The injustice of requiring the intervening creditor to pay the attorney is manifest. His distributive share of the funds preserved to the estate would not pay one-

third of the attorney's fee if he were required to pay for the services. It is inequitable and unjust to permit the other creditors to avail themselves of his services, accompanied by the necessary risk, involving costs, etc., and then share in the estate without contributing to the payment of the attorney who did the work."

Similarly in the recent case of

U. S. v. Equitable Trust Co. (1931), 283
U. S. 738,

the Court allowed attorneys representing an Indian beneficiary \$50,000 for assisting in the recovery of some \$550,000 bonds which should have been held by the Secretary of the Interior for the Indian's benefit, but which the Secretary had been induced to deliver to third persons. The Court said (p. 744, italics ours):

"It is a general rule in courts of equity that a trust fund which has been recovered or preserved through their intervention may be charged with the costs and expenses, including reasonable attorney's fees, incurred in that behalf; and this rule is deemed specially applicable where the fund belongs to an infant or incompetent who is represented in the litigation by a next friend. '*Such a rule of practice,*' it has been said, '*is absolutely essential* to the safety and security of a large number of persons who are entitled to the protection of the law—indeed, stand most in need of it—but who are incompetent to know when they are wronged, or to ask for protection or redress.'"

This quotation by the United States Supreme Court is from

Voorhees v. Polhemus (1883), 36 N. J.
Eq. 456, 458 (per Van Fleet, V. C.).

It is submitted that, as a matter of equity recognized in both the Federal and New Jersey decisions, the Court of Chancery not only had the power (denied by the opinion below) to make an allowance to Mr. Roberts for his tax services, but could not justly refuse an allowance and require him to look to a single beneficiary for compensation while nine-tenths of the \$434,000 savings enured to the benefit of other parties.

Dated May 16, 1934.

Respectfully submitted,

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for Appellant.

THOMAS G. HAIGHT,
Of Counsel with Appellant.

