New Jersey Court of Errors and Appeals

Between WILLIAM F. MULLIN, *Complainant-Appellant,* *and* ANNIE E. MULLIN, *et als.*, *Defendants-Respondents.*	*On Bill, etc.* *On Appeal from Chancery.*

Brief on Behalf of Complainant-Appellant.

This is an appeal from the Court of Chancery, and it involves a situation which for sheer hardship surpasses anything which we think this court has met with in many years.

Peter M. Mullin was an undertaker in the City of Newark, where he had carried on a business on Lafayette Street. He had a wife and eight children. On the 4th of November, 1891, he was killed in a railway accident. He left a last will and testament, which is set out in the bill of complaint (Book, page 1). Under this will all of his property was divided, share and share alike, among his children. He then directed that the business be continued for the benefit of his wife and children, under the direction of his wife and his brother, Joseph J. Mullin. He appointed his wife and his brother guardians of the children and executors, with power to sell, if necessary for the best interests of the wife and children. The assets of the estate at that time consisted of $5,000; insurance in the Mutual Benefit, $5,000; in the Benevolent Legion, claim against the railroad, from which the estate received $7,500,

and some money in the bank, which was entirely exhausted in paying debts. There was also the Layfayette Street property, worth perhaps $4,000 or $5,000, and the undertaking business.

At this time the complainant, William F. Mullin, was 18 years of age, and he had been for two or three years previous assisting his father in the business (Book page 58, line 20). The undertaking business at that time consisted of some few caskets, a horse, wagon, etc., of the value of $500. (Book page 59, line 18; page 140, line 20). There was, of course, no good will to the business. This question was considered on the hearing, and disposed of by the Master on page 211, lines 20, etc., and the question was entirely placed beyond dispute by a sale of the business made pending this litigation, which was widely advertised, and which, by means of these greedy defendants' own bid, brought exactly the sum of $500, and the Master in his report finds as a fact that that was the value of the business on August 1st, 1900, (page 414, line 10).

Joseph J. Mullin, the brother of the testator and uncle of the complainant and defendants, did not qualify as an executor. Annie E. Mullin, the widow, was at the time in a helpless condition. She gave birth to a child, Peter M. Mullin, one of these defendants, a few months after the death of her husband, and besides being hopelessly unacquainted with the business, she suffered from rheumatism and physical disabilities which prevented her being active in business transactions (Book page 59, line 30). The mother accordingly requested the complainant to continue the conduction of the business, and he assisted her in every way, and the business prospered; and then, in September, 1895, an agreement was entered into between Annie E. Mullin,

sole acting executrix, Joseph L. Mullin, a brother of the complainant, one of the defendants, and the complainant, William F. Mullin. This agreement is set out at length in Book page 25, and, in a word, it provided that the two boys should manage the business from October 1st, 1895 for one year, unless otherwise terminated, and out of the net proceeds the family were to be maintained and educated, as was then being done, and that the profits after that should be divided so that William, the complainant, should receive 3/6, Joseph 2/6 and Annie as executrix the remaining 1/6, and then, in addition, the boys were to draw $15 per week salary, which should not be charged against the profits of the business.

Acting under this, the business was managed for some months, until Joseph, becoming dissatisfied and desiring to better himself, broke his agreement, demanded an accounting of his share of the estate and went to Morristown, where he started in business (Book page 61, lines 10, etc.) An appraisement was then made of the estate, and it was agreed that it would be sufficient to pay to each of the children, when they became of age, the sum of $3,750, and on the 19th of May, 1896, Joseph signed his release (Book page 27, lines 20, etc.,) and received that sum "in full discharge and satisfaction of all my right, share and both interest of every name and nature in the estate of said Peter M. Mullin, deceased," and in that consideration he released both Annie E. Mullin, executrix, and also the estate of Peter M. Mullin.

We find, then, this condition—the helpless widow, with a very large family of young boys and girls, each of whom was entitled to a sum, the income of which would not keep them for half a year, a business which, if wound up, would be worth $500 or

less, two sons able to run the business, one of them of that shifting, easygoing moral disposition which would enable him to cast the burden on others, and which will today permit him to seek to take advantage of such a situation as this case now presents. Well may we say "How sharper than a serpent's tooth," etc.

In this condition of affairs Mrs. Mullin begged Will to continue to manage the business. She induced Father Cody, the family priest, to join her in the attempt to secure this great sacrifice and service. Will realized that he had his own way to make in the world and that he could start in business for himself with everything to gain and nothing to share, and yet his loyal conscientiousness led him to give way and make the sacrifice which this case develops. He entered into an agreement with his mother that he should continue to run the business alone, educate and maintain and provide for the family out of the proceeds, and what should remain, if anything, should be his. Bear in mind, that before this, under the written agreement, the estate had received only 1/6, and at that time, the family being younger, the expense of its maintenance was much less. This expense increased each year, so that the agreement under which Mr. Will Mullin continued was much more disadvantageous than that which the shifty Joe had run away from as unsatisfactory.

This arrangement above mentioned was continued and the family were educated, clothed and fed, and Will Mullin acted in all respects as a father to the brood until August, 1900, when the mother died.

Releases similar to that above mentioned were signed by William F. Mullin on May 19th, 1896, (pages 29-30), by Grace T. Mullin in April, 1899 (Book page 31), and on the death of the mother the same arrangement was continued. On December 21st, 1903, James S. Mullin, became of age and signed his release (Book page 32), and in December, 1906, Isabel R. Mullin signed her release (Book page 34). Annie E. Mullin received from time to time on account of her share in her father's estate, sums aggregating $2075. (Book page 8, line 17).

We ask the court to keep in mind that on the death of this mother on July 18th, 1900, there were still five infants: James, who was born April, 1882, Isabel, born March, 1885, Annie E., born July, 1886, Marie, born March, 1889, and Peter M., born April, 1892. Mr. Will Mullin at this time had the agreement above mentioned, which was sworn to (Book page 64, line 30).

The only question, as we understand it, that has arisen as to this agreement, that is, a question of fact, is as to whether, in addition to the profits entirely belonging to William F. Mullin, the business was also to be his on the children becoming of age. There is no word to contradict the evidence of Mr. Mullin. It is certainly and surely born out by the conduct of the parties to the releases and by every fact in the case, but the first conclusion of Vice-Chancellor Stevens (Book page 134) held that on the death of the widow, when Will became administrator c.t.a. the agreement ended and he was under obligation to account.

The issue was limited to his conduction of the business as administrator. It was held that when he became such the business belonged to the estate and he could not treat it as his own, and having

no authority to carry it on, he should have disposed of it for the benefit of the estate, but having carried it on he was entitled to such compensation as is awarded to an unauthorized administrator.

The rule laid down in *Gilligan* v. *Daly,* 79 N. J. Eq., 36, also 80 Atl. Rep., 995, held that an account should be had so that the beneficiaries might determine how they would exercise the option determined by that case, that is, either charge the executor with the value of the estate and interest or with the amount of the net profits from the business.

An order of reference was then made to Halsey M. Barrett as Special Master to state the account. This order of reference appears in Book page 136. The Master was ordered in taking the account to estimate the profits so that as far as ascertainable, they should include only those resulting from the employment of the testator's estate as capital in the business, due allowance to be made for other elements creating the profits, such as the business skill and credit of the executor in carrying it on, and he should allow such compensation for the administrator's services, as part of the expenses of the business, as might be reasonable and proper, and deduct the same from the gross income of said business in ascertaining the net profits with which he is chargeable.

Hearings were had from January, 1913, to June 2nd; a huge mass of testimony was put in, and the report was made on April 30th, 1914 (Book pages 412-428).

It was admitted, as well as proved beyond dispute, that Mr. Mullin, during all the years in question, considered that he was running the business entirely as his own. He made no efforts to keep

track of anything by voucher, kept no trustee or executor accounts, and so found it as difficult to protect himself as any other man would, under like circumstances.

By an order of court, at the expense of the estate, an auditor named Constam was authorized to go over the books, accounts, etc. He was given the fullest access to everything, and he spent some weeks at the place.

Constam seemed to consider that he was a representative of the defendants, and he figured accordingly. His report is set out (Book page 308). This mass of figures need not be considered by this court. The total sales or gross business amounted to $277,000, plus, according to Constam's estimate. While this was unquestionably high, nevertheless the expenses to which he had been put and also the great difficulty in getting an accurate figure led Mr. Mullin to advise Mr. Du Bois, an accountant whom he then called in, to accept these figures as to sales or gross business, for the purpose of his work. In reaching this conclusion, Mr. Mullin was also at this time of the opinion that he would receive just allowance for his disbursements, full credit for his expenses in the maintenance and education of the children, and a proper allowance for his skill and ability, for he knew, of course, that he had received nothing to work with save a few caskets and some second-hand stock worth $500 at the outside.

Constam proceeded, under the instruction of some of these defendants, to figure highly excessive profits, and several hundred pages of testimony were taken in the effort by Mr. Will Mullin to protect himself.

It was this issue as to the profits with which Mr. Mullin should be charged under the iniquitous theory on which the case was then being conducted which took several days at the trial. That, however, is a point now entirely outside of the case, and is not a thing to which this court need give any concern, in the main. The task of reaching an exact figure for such an item as the profits made on caskets during the 11 years covered by the accounting was utterly hopeless, and by instruction of our client, we conceded thousands of dollars profit beyond that which he felt had ever been made, and this enabled us on the argument to come together on an item of profits of $106,000, plus, for the 11 years in question (See report of Special Master, Book page 414, lines 15, etc.). The items included in this stipulation as to profits are set out on page 416, lines 1, etc. This concession left for consideration three matters only on this phase of the case:

1. The legitimate and necessary expenses of conducting the business.
2. The compensation to be allowed complainant for services in conducting the business.
3. What sums should be allowed the administrator for the expenses incurred by him or contributed by him towards support of his minor brothers and sisters.

The Master found that certain items of expense should be allowed, and they are set out at the bottom of page 420 and top of page 421. They amount to a little less than $3,000, making for the 11 years in question a deduction of approximately $33,000. From this finding the complainant excepts (Book page 429, line 30; page 430, line 20; page 431, line 1, covering the first, second and third exceptions). Mr. Mullin claims allowance for upkeep, consump-

tion of supplies, printing, etc., $250, which was allowed; wagon and horse, $600, which was allowed; light and heat, $120, which was allowed; advertising, $90, which was allowed; expenses of transportation, personal meals, etc., $365; telephone and telegrams, etc., $200; incidental expenses, $43, all of which were allowed. Mr. Mullin claimed also wages of two men at $17 a week and expenses, $1 a week, totaling $1,872 per year. He was allowed only $25 a week or $1,320. Mr. Mullin testified (Book page 214, lines 22, etc.,) that he had a man for years at $17 a week and that he employed one or two men many times, some times three men, if he had two or three calls, and that he figured that, at a very conservative estimate, that would equal the wages of another man; and he said that he knew of several concerns that did not do the business that he did that had more help than he did, and he thought that a very conservative estimate for help.

Mr. Mullin was not cross-examined on this important point, and the defendant put on the stand his client, Joseph L. Mullin, who had left his brother Will and his mother at the time of his breaking his agreement, and who had failed in the undertaking business in Morristown (Book page 313, lines 10, etc.,) and on South Orange Avenue (Book page 316, line 1), and who had then been employed by his brother for some years as manager of his stable (Book page 316, lines 18, etc.,) at a salary which increased to the sum of $2,500 a year. He ventured to guess, however, (Book page 312, line 29) that from the figure given by Mr. Will Mullin "you could cut off at least $9 of that—$8 of it. He employed one man, and the other man would be an extra man that he would pay $1 or $1.50 when he would use him."

We call the court's attention to the fact that the evidence shows that Mr. Joseph L. Mullin was the manager of the stable up at High Street and came only occasionally, when called by his brother Will, down to the establishment on Lafeyette Street (Book page 317, line 1). This is nothing but a rank guess, and purports to be nothing else.

All the books and bills were always open to him, at all times (Book page 318, line 30). Of course, it is wholly inconceivable, as a matter of fact, that, had he ever deemed he had any interest in this business or was in the slightest concerned in the profits, he would not have had every figure. In fact, he would of course have demanded yearly statements, as would the others.

Mr. Joseph J. Mullin was asked, on behalf of the defendant (Book page 321, line 29):

Q Do you know whether Mr. Mullin paid wages to two men at $17 a week each?

A No, sir; I do not know.

James Mullin, another of the defendants (Book page 364, line 5) was asked:

Q Now, as to the wages of two men at $17 a week?

A He never had two men when I was there.

He then proceeded to say, just as the complainant had sworn, that there was one man there always, and then extra help called in. He was asked (Book page 365, line 5):

Q Would it average $17. a week?

A No, sir.

He then said it would cost about $1 for the extra man, each job. This is all the evidence offered by the defendants under this head. Now, of course there can be no question but that the complainant is the only person who knew what he paid, and he gives positive and direct sworn testimony, and

this should not certainly be overborne by the ridiculous guesses and estimates of his brothers, who had been rivals in business and who were now striving to take from him that little which they thought he might have left, after acting as parent to their young brothers and sisters through so many, many years. This exception should, we think, certainly be sustained.

The next claim related to the item of $500, covering programs, donations, tickets, etc. The Master said he could see no basis for allowing this. His remarks under this head are set out in the book, page 421, lines 13, etc. He says that it is probable that Mr. Mullin from time to time did expend money in that way and for this purpose, and he says if there were any records showing just what sums were so spend and from which it would appear that such expenses were reasonable and of advantage to the business, some portion thereof would be allowed. This is covered by the first exception (Book page 429, line 30).

We refer here again to the peculiar nature of this case. The report of the Master, at the top of page 417, mentions that nothing in the nature of an account which would show charges and discharges, has been made, and he sets out the testimony which shows why it could not be made, and an instant's consideration shows us that it could not have been otherwise. There are probably few men in business who do not have to contribute various sums at frequent intervals, which are in the nature of advertising, and which sums would never be expended were it not for the benefit looked for directly and solely in connection with business, and there is certainly not one man in a thousand who, if called upon to account at the end of eleven years for what he had considered all the time his own business,

could give an accurate statement of his disbursements or expenses. All the way through this case the Master recognized this rule, and permitted estimates of everything from profits on caskets to incidentals, and why he should have singled out this item for disallowance we are unable to understand.

The testimony of Mr. Mullin himself under this head will be found in Book page 215, lines 26, etc. Mr. Mullin said that he considered this expenditure of $500 advisable in the continuation of the business, and he mentioned that he had expended $32 in the seven preceding days on programs alone, without tickets. "Not because I am crazy anxious to do it, but because I think it is good business; I felt I had to do it, from the people that solicited the advertising, and $500 is pretty conservative." Just why the Master should have deducted this item of advertising, for apparently the $500 was made up, in the larger part, by advertising in programs of church affairs, etc., and yet should have allowed the advertising in the three newspapers, we are unable to understand. He was not even cross-examined on this expenditure, and the defendant Joseph, when called, absolutely corroborates both the necessity and the reasonableness of the item (Book page 313, line 3):

> Q Programs, donations, tickets, etc., $500. a year?
>
> A That is something that runs up into money; I don't question that.

Will the court please bear in mind that this is the defendant who was adding profits on caskets and placing upon the complainant every possible burden? He was the man who gave Constam most of his figures, and his concession in this instance is absolutely conclusive in favor of this exception. Joseph J. Mullin, the uncle, did not have certain other expenses, which will be later referred to, but

he did not even question this item of tickets and programs, etc., and James, the other brother, when asked about this (Book page 363, line 1), testifies as follows:

> Q Referring to the matter of programs, tickets, donations, etc., $500 a year, do you know whether Mr. Mullin would spend that much in his business?
>
> A I figure he spent about—I couldn't exactly figure, but I don't think he spent $500; he spent a lot of money, but not $500.
>
> Q How much do you suppose he did spend?
>
> A About $300.
>
> *Master.* Was that expenditure necessary, or was it simply in his judgment necessary?
>
> A It was his judgment; he couldn't prove it necessary; it was simply a question of taking a chance; advertising is all very well and good, but you don't know.

This is all the testimony under this head. One defendant says positively that he thinks the complainant expended at least that amount, and another of the defendants says that he knows he spent a lot of money under this head, and guesses it was about $300 a year, and yet the Master makes not one cent of allowance under this head. We respectfully ask a full allowance of $500 for each of the eleven years. How does the Master in this case presume, that a capital of $500 produces $106,000 gross profits in eleven years?

Mr. Mullin had 1,774 funerals during the time in question, and they showed a gross profit per funeral of $53.29 (Book page 390, line 17). One of the witnesses called in this case was a little undertaker named Mooney (Book page 266, line 20), who said he was an old-fashioned undertaker, not a funeral director. He did not have some of the expenses that Mr. Mullin did, and his profits for each funeral were $25. (Book page 268, line 13). There are

two ways of doing business and different items of expense incurred by different individuals, but certainly as this expense of $500 a year was incurred by Mr. Mullin in good faith and with the perfect understanding that he was expending his own money and running his own business, it should be allowed without question.

The next item is that of drinks, cigars, dinners, fees, etc., $30 a week, amounting to $1,560 a year. This is covered in the Master's report Book page 421, line 28, and it did seem to the Master a large expense, no doubt, and because it was a mere guess he refused to allow it. He did not suggest any way in which Mr. Mullin, while running his own business, could have kept this item in any different shape. The evidence shows and the report finds that Mr. Mullin was a total abstainer. From the time of the death of his father, when the heavy responsibility settled on his 18-year-old shoulders, he never touched a drink himself. If he had followed the more convivial example of his brother Joe, he might have himself failed in business and have saved himself the present trouble and expense.

The reason for not allowing this item mentioned by the Master, to wit, that it was not covered by vouchers or some such definite proof, can be given no weight whatsoever. Let us then turn to the proof under this item. The complainant was asked (Book page 213, line 22):

> Q I call your attention to the fact that there are expenditures running to considerable sums, I think it is $30 a week, for cigars, drinks and other items of that kind; first, in your best judgment, were these expenditures advisable in managing and handling this business?
>
> A I would like to answer, if I may be permitted, this way: I think that $30 a week, as

far as I can figure it, is very conservative, I have acquaintances in the business who are considered very successful men in this line, who have told me they spend a great deal more than that, twice as much, every week, and they think it is good business to do it, and they are men who do not drink to excess, and are always able at attend to their business and are successful.

Q Did you, in your best judgment, spend at least $30 a week on drinks, cigars, dinners, etc.?

A Refreshments of various kinds around different places; I think it figured up at least that.

Q And in your best judgment, was it advisable to spend that amount?

A Oh, I surely always thought so.

He was then taken up on this item on cross examination (Book page 241, line 25). He said he kept no record of this item and that he spent money for drinks, cigars, dinners, fees, etc., on his own account, aside from this $30 a week, and that he did not saddle all the expense of such items on the business; that he considered his figure very conservative, and there the matter was left. Taking up, then, the testimony of Joseph L. Mullin, one of the defendants (Book page 311, line 15), he was asked:

Q What have you to say as to the necessity of expenses as shown on the report of DuBois, accountant, on page 11, for drinks, cigars, dinners, fees, etc., $30 a week?

A I wouldn't question that; I don't know. It is customary with a great many undertakers to entertain people; it would cost $30 a week if he did a big enough business; I don't know that it is necessary; it is done on occasions; there are times when it is not done.

And Joseph J., the uncle (Book page 320, line 22) said that he did not have such expense in con-

nection with his funerals. This might, of course, well be true, and doubtless dozens of other undertakers could give the same testimony. This can be no possible ground for a refusal to allow this item of expense to Mr. William F. Mullin, who did have it. His judgment was sufficiently good so that he was able to so run this busines as to educate, maintain and provide for all of the family and make a profit beside, and the refusal to allow him this claim simply because it was not proved by voucher or was not such an expense as all undertakers had, seems hardly fair.

The defendant, James Mullin, gave testimony under this head (Book page 362, line 20). He was asked as to the reasonableness of that charge in the business, and he was told by the Master to consider it from the observation of his own business, and he replied:

> A Cut that in half, about $15.00 a week, I would say.
>
> Q Do you find it necessary to make large expenditures?
>
> A Not as large as that, no sir. I find it necessary to spend a few dollars once in awhile, but not all the time, not regularly.

This witness did about half the business done by the complainant. It is true that he swore (Book page 365) that he had 130 funerals the year before, but the permit records showed that he was perjuring himself to the extent of about 50%. His evidence, however, is sufficient to show that he considered such expense legitimate, and the only difference is that he guesses it should be $15 a week, while Mr. Mullin, who actually expended the money, said it should be $30. But what possible grounds could be found for making no allowance we are unable to understand.

Summing up these three items, then, we find that, as to the first exception, overwhelming evidence shows that Mr. Mullin actually expended $500 a year, which for the eleven years amounted to $5,500; that the item of $1,560 is fully sustained by the weight of evidence and should be allowed, amounting to $17,160, and that the item of wages is supported by the burden of proof and should be allowed, amounting to $1,872, whereas the Master allowed under this item only $1,320, a difference of $552, which for eleven years amounts to $6,072, making a total of $28,732.

The next exception considers the second point, that is, what compensation should be allowed Mr. Mullin for his services in conducting the business. Mr. Mullin has a fine voice. His father sang in the St. James Church in Newark, and had a reputation in the city for singing (Book page 154, line 30), and Will, a year after his father's death, took his place in the choir and still remains there as a baritone (Book page 100, line 30). He was always considered to have a good singing voice (Book page 208, line 40), and while managing the business for his mother he had the fullest opportunity to make money out of his voice. He had many offers (Book page 209, lines 1-10). He was offered $5,000 a year to do the comedy work with two opera companies, and he has been offered the baritone soloist position in the Jewish Synagogue in Newark, in the Presbyterian Church, in a church in Morristown, the Cathedral at Newark, and another church. The offers for the church positions ran from $1,500 to $800 a year, but during all the years since his father's death—twenty-one years—he has sung continuously in St. James Church, without salary (Book page 212, lines 1-30). In this he always had the business in mind, and it was his best judgment that the sacrifice which he made was of distinct

and direct advantage and benefit to the business. He always gave his services to the church and in addition to that he did concert work and church work all around the city without any charge, for the same reason (Book page 212, lines 40, etc.) He repeats his offers for singing on cross examination (Book page 222, lines 15, etc.), and he was asked:

> Q Why did you not accept that $5,000 a year offer?
>
> A Simply sentiment, I suppose. I listened to the pleading of my mother and the advice of Father Cody as much as anybody, to remain and stay with the children. (Book page 223, line 21).

Up until recently he devoted all the time required for Sunday services, requiem masses, concerts and all other affairs connected with the musical program required by the church. When, by reason of stress of business he found it impossible to do the requiem work he made arrangements for a substitute and he paid the substitute and charged it to Father Cody, but he never at any time received one penny for his own services (Book page 224, line 35, etc.) During this time he did concert work around the city and never accepted a single penny for it (Book page 225, line 12).

We repeat that from the death of his father in 1891 to the death of his mother in 1900 he expended practically all of his time on this business (Book page 63, line 15). His mother was helpless (Book page 59, line 30; page 60). While he owned a livery business he did not manage it, but paid to his unsuccessful and unreliable brother Joe as high as $2,500 a year as manager, and yet the Master in this case allowed him only about $800 a year more than that for all his services, skill and ability. If Joe Mullin is worth $2,500 for any job in the

world, then any individual who knows them both would unhesitatingly testify that Will is worth $10,000. In other words, to rate them as four to one would be giving Joe the benefit of a large measure of doubt.

After Joe left his employ as manager of the stable, Mr. Will Mullin employed another manager so that he could give practically his undivided attention to the undertaking business, so that it would not be inconvenienced or hampered in any way; otherwise he could have saved considerable expense in this respect (Book page 220, lines 20, etc.)

He increased the business after the death of his father (Book page 69, line 15). The number of funerals increased (Book page 278, line 35), and this was true, although the number of undertakers had increased in the neighborhood, which made the going harder (Book page 279, line 10); yet he managed to hold the trade of his father and add more to it, by means of a great deal of work (Book page 279, line 11), but although the business averaged about the same from the death of his mother in 1900 up to 1905 he had to hustle a good deal harder to get it and hold it (Book page 276, line 22). After 1905 the number of funerals decreased. This is adverted to by the Master in his report, but to give this as a reason for decrease in the allowance to be made to Mr. Mullin is frightfully unfair. It loses entire track of such things as the rivalry for business, the keener competition engendered by the entry of his own brother, James, who of course would draw from the trade of Will even much more than a stranger. In 1913 James had been in business for himself five years, and he had increased from sixty funerals a year up to one hundred and thirty (Book page 365, lines 20, etc.)

There was no word of evidence introduced, or any suggestion or intimation made throughout the entire case, that Mr. Mullin's skill or ability had diminished in the slightest during the entire period of his loyal and faithful service.

He built a morgue in connection with the business, and this building cost him about $750. This he did himself, and had himself appointed morgue keeper for three or four terms. The payment for the morgue funerals gave little or no profit to him, but once in a while a regular funeral would be obtained through that means (Book pages 156-160). In other words, there seems nothing that could be turned to advantage which was not done by the complainant.

He did not want to remain and give all the best years of his life to the care, service and protection of the family without any assistance from his brothers. The situation in this respect will be made clear by testimony which is no wise in dispute:

> A After Joe had made his, I will say demands, of course requests, but he wanted his settlement, and as a result of it Mr. Lum suggested that the appraisement be made, etc., which was done; I told my mother at that time that I did not think, if Joe could quit and break his agreement, discontinue to have any connection with the business, that I should stay there and work for nothing and have no object to gain by staying there, and nothing to look forward to, and all that; as a result of that statement to her we had this conference, Uncle Mike, Mr. Fred Lum, my mother and myself. (Book page 64, lines 15, etc.)

On cross examination (Book page 67, line 32):

> Q Then I understand you to say you told your mother that you didn't want to stay there

any further because you didn't have any future ahead of you, and you wanted some arrangement made?

A Yes.

And again, on cross examination (Book page 76, line 19):

Q Well, now, after he had left why was it that your mother, you were then getting three-sixths of the profits, why was it that your mother gave you six-sixths of the profits?

A Because I told her that I didn't think if I was to stay there and be utilized to maintain the business, conduct it, manage it and hold it together and look after it, that Joe could quit and go in business and help himself, with no regard or consideration for the children, and I was expected to stay there and give my life to them, that I should work for nothing, and I told her there would have to be some arrangement made which would be interesting to me.

And again, (Book page 80, line 20):

A I told her (mother) if Joe could walk out and leave the children on her hands I had the right to do the same thing.

Q Didn't she then tell you that you might go if you wanted to, that she would get someone else to run the business?

A She pleaded and begged with me, and sent for Father Cody to come and talk to me and ask me to stay.

Please bear in mind that there is no word offered to contradict this or even question it. And again, (Book page 88, line 15):

Q You said if Joe had a right to, you would?

A If Joe had a right to there wasn't any reason why I should not do it too.

Q And your mother begged and pleaded with you to stay?

A Yes.

Q It wasn't a fact that she said she could get it run by anybody else as well as you?

A She told me she could not.

Q And on that arrangement you stayed and took all the profits, after supporting the children?

A Yes, sir.

Q After she died you still continued under the same arrangement?

A Yes.

He had assisted in conducting the business before his father's death, and ever since he was fifteen years of age (Book page 65, line 35). He was working at the business at the time of his father's death (Book page 150, line 2). And then, after his father's death, as has been shown, he continued to act as manager. And then came the partnership agreement before mentioned. He was asked, on cross examination:

Q What was the occasion of entering into that, Mr. Mullin?

A Why, Joe and I were getting along then and I thought that we ought to have some interest in the estate, that we ought to get some interest in the business rather, and have something more than fifteen dollars a week, when I realized we were saving quite an amount of money for the children that we were not deriving much benefit from; I discussed the matter with Joe and my mother, and we entered into that agreement. (Book page 74, line 27).

He drew no salary after Joe left (Book page 77, line 10).

He took a business worth at the outside, with everything included, $500, and he so ran it that the whole family were well clothed, finely educated and maintained and provided for throughout, and he made in addition to all this considerable profit—and he did it with a business which, in 1900, continued to be worth, with everything, only $500 (Master's re-

port, Book page 414, line 10); and during the pendency of this suit the business was sold, after due notice and advertisement (Book page 161, line 15), and although it was bid up beyond its value by these defendants, some of whom purchased it themselves, it sold, lock, stock and barrel, with good will, and realized but $500. (Book page 277, line 30). In this connection we submit the evidence of Mr. Mullin as to his worth (Book page 218, line 25). He had expected to do better with the business than he had done when he made the agreement with his mother; he was positive that he could have gotten $5,000 a year, and probably a good deal more, in any other profession. But his mother pleaded with him to stay and support the children, and he stayed and refused an offer of $5,000 a year. He figured that he would be pretty cheap at $6,000 a year; that he would not be a high-priced man at $6,000 a year (Book page 218, line 25; page 219, line 10).

There is no word of evidence produced to contradict this. No one has even offered to place an estimate on the value of his services below this sum, and how the Master could have arrived at the figure he did, of $3,316 a year or about $276 a month, we are unable to understand (Book page 424, line 5). The Master refers to a remark which he understood to be made by counsel on the argument, but certainly his understanding was entirely in error. We never conceded, nor had any thought of conceding, that Mr. Mullin should receive $2,500 a year, or anything like that sum. To allow him, with all his ability, the same figure he was paying a manager for his own stable, as to which he had to bear all the risk, responsibility, etc., would be preposterous on the face of it.

Every cent of the net profits, whatever they were, were absolutely and entirely due to the skill, ability, energy, personality and individuality of William F. Mullin, and he was entitled to every cent of them, if they amounted to $10,000 a year.

The estate of the testator engaged in the business was admittedly only $500, which at 6% would have produced $30 a year, enough to have kept this family for part of a week, and everything that was added to that was the result of Mr. Will Mullin's efforts and nothing else, and any other conclusion is not only unjust and inequitable, but absurd, illogical, unjustifiable and unsupportable.

We can well assume that the Master's finding in this respect must have been based upon a misunderstanding as to what he doubtless considered he had heard complainant's counsel concede, for it can find no other shred of basis. This is made the subject of the fifth exception (Book page 432), and also the fourth exception (Book p. 431).

Mr. Mooney testified (Book page 266) that he did not incur some of the expenses which Mr. Will Mullin did. He conducted his business personally, entirely for his own benefit, in the most economical way possible, and he said that he did about the same class of work as Mr. Muulin (Book page 266, line 38). He said that from an average of eighty funerals a year, after paying his expenses, he cleared maybe a couple of thousand a year (Book page 267, line 10); in other words, not enough to even support this family.

Making, then, due allowance for the various elements creating the profits of the business, as the Order of Reference directed, such as business skill and credit of the complainant in carry-

ing on the business, we say that he should be allowed as salary everything above and beyond expenses, whether it were $500 a year or $10,000 a year.

After the sale of this business to certain of these defendants, they were able to run it about three months, and then were obliged to go out of business, richer in experience, but otherwise poorer. This is a fact, we think, which will not be disputed on argument, but it certainly has an important bearing on the phase now under consideration, and is one which, if not conceded, can be proved without difficulty, if an opportunity can be afforded.

In this case Vice-Chancellor Stevens seems to have considered that he was bound to the unjust and inequitable results of the case by the decision of Vice-Chancellor Emery in *Gilligan* v. *Daly*, 79 N. J. Eq., 41. That was a case involving an undertaking business carried on without authorization. It was run without profit and so did not lead to the unjust results which have been developed in this case.

But as we analyze the Gilligan case it seems to us authority for our contention rather than otherwise. Let us analyze the basis on which the Gilligan case rests. In this case there are cited a number of cases, and an examination of each of these lays down the rule that the allowance to be made on unauthorized conduction of a business must depend upon the individual circumstances of the particular case. This being the rule, it would be hard to conceive of a more appropriate case for an adequate and full allowance to the administrator for his services, bearing in mind the fact that the defendants in this case have, as a result of his efforts, received a

very large sum of money that they never could have had under any other circumstances.

The case of *Wedderburn* v. *Wedderburn,* reported in 52 English Reports (Full Reprint, at page 1039), also 22 Beav., 84, 100, is a case where a partner died, having appointed his co-partners as executors. They continued the business, having made out an account from which it appeared that the assets were $496,000, the liabilities $410,000 and the surplus $85,900, of which the deceased partner's share was $55,000. The surviving partners carried this to the credit of the deceased partner's account and paid the amount with interest, to the *cestui que* trust as they respectively became of age. When coming of age the children apparently claimed to be entitled to participate in the profits of the subsequent trading which in the thirty years involved in the action had amounted to $308,000, on the ground that their capital had been employed therein. The Court found that at the testator's death the actual surplus was merely nominal—that the surplus of $85,900 stated in the account was a mere book valuation, and that the subsequent profits were attributable to good will and the personal exertions and capital of the surviving partners. It held that the plaintiffs were not entitled to participate in the profits, so far as those profits were attributable to the good will and connection in trade of the surviving partners, and that their share in that portion of the profits in which they would be entitled to participate could not be estimated higher than the interest already paid to them.

In the present case the values of all of the assets of the business managed by William F. Mullin has been determined at a judicial sale as $500 and this sum has no place in this account-

ing, because it of necessity falls into the corpus of the estate, from which of course the children will receive their share. The testimony is that the business at the time of the mother's death as well as at the time of the father's death, owed about the same amount that was due to it. The situation, therefore, shows that William F. Mullin conducted the business for a period of over twelve years in all without authority, but with a net result that during that period nearly $24,000, if not more, was paid to his infant brothers and sisters, without effort upon their part and with due certainty that but for his effort they would have realized nothing.

The rules laid down in the Gilligan case are made expressly to apply here. These rules require that this Court keep in mind the assumption of risk by this complainant. The administrator made himself personally liable for every penny of these thousands of dollars worth of materials ordered, and is entitled to compensation accordingly. Secondly, this court in enforcing the liability of trustees does not act as a court of penal jurisdiction or for the purpose of punishment, but only for the purpose of compelling restitution or granting compensation for losses actually sustained. It is not the intent of a court of justice that these defendants, standing by and accepting the benefit and fruit of the complainant's unauthorized acts admittedly entirely for their own benefit, shall be unjustly enriched at the expense of their helper.

It is respectfully submitted that in justice, fairness and equity such allowance should be made to this administrator for his services as will balance the amount of net profits otherwise found to be due, these defendants being permitted to retain the benefits received by being supported through their period of infancy and helplessness.

In Willett v. *Blanford,* Vice-Chancellor Wigram, 1842, 1. Hare, 253, says:

> "Held that where a surviving partner had carried on the partnership business without withdrawing from the concern the capital or share of a deceased partner, there is no absolute rule that in taking the subsequent accounts of the partnership dealings as between the surviving and the estate of the deceased partner, the division of the profit shall be determined by the aliquot shares of the several partners in the business in their joint lifetime —or by the amount of the agreed capital which they were respectively to supply—or by the actual amount of the capital belonging to the surviving and the estate of the deceased partner respectively; but the principle of division may be affected by circumstances of the source of the profit, the nature of the business and the other circumstances of the case.

The opinion, quoting from Lord Eldon, says:

> "My opinion goes upon the particular circumstances of this case; and I do not lay down any principle which will decide any other cases. * * *
>
> I must therefore believe that the circumstances of the trade and the property of the partnership require very great consideration before I can finally dispose of this case. * * *
>
> I have considered the subject and read the cases to which I was referred, and I remain of the opinion I expressed at the close of the argument, that there is no rule of this court applicable alike to all cases; and that there is no rule which is so established or general in its application that it is to be taken to be the general rule until circumstances are shown which displace it. The facts in each case must be fully brought unto the view of the court before it can be in a position to state what justice to the party seeking its protec-

tion may require, with due regard to the interests of all other parties. * * *

I am not informed at present of the value of the stock in trade or of the amount of capital or of the current profits of either partnership at the time of the testator's death, nor do I know to what extent the good will of either trade may then have constituted its value, nor to what extent the successful prosecution of each business may have been dependent upon the personal skill and attention of either partner or upon the new capital brought into the concern since the testator's death. * * *

I think it is impossible to consider the subject abstractly from authority without feeling satisfied that justice would be endangered by an attempt to subject all cases of this description to any uniform rule. * * *

Again, the whole or the substantial part of a trade may consist in good will, leading to renewals of contracts with old connections. In such a case it is the identical source of profit which operates both before and after dissolution; and this appears to me to be the ground work of Lord Eldon's reasoning in *Cook* v. *Collingridge*. Circumstances may be suggested of a very different kind. Take the case of a business in which profit is made by the personal activity and attention with which the use of the money capital is directed; and the case may require a different determination. * * *

I consider myself, therefore, bound by authority and reason to hold that the nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the partnership and the deceased partner at the time of his death, and the conduct of the parties after his death, may materially affect the rights of the parties; and that I must have more information than

I now possess before I can safely decide this case."

The order of the court for taking testimony then follows, and it is of interest.

The Wedderburn case is also of much interest. In his decision Sir John Romilly, Master of the Rolls, uses language which is particularly applicable to the present case. He holds that it is not imperative that one of two things must happen, either that misery must be brought upon the *cestui que* trust or that punishment must be inflicted upon the helpers. Such cases as this and the one at hand should be controlled, in every instance, by the peculiar facts, and to regard such a decision as that in *Gilligan* v. *Daly,* as was done in this case, is to make of it a straitjacket to crib and confine justice and equity, an end which we think was never contemplated by that decision.

Many authorities are cited in the Wedderburn case. We refer particularly to *Vyce* v. *Foster,* C. A. 1873, L. R., 8 Ch., 309, 42 L. J. Ch., 245; same case on appeal, 44 L. J. Ch., 37, 7 H. L., 318.

We contend there is ample law to support the conclusion that Mr. Mullin is entitled to all the profits in excess of sums which he paid for the education, maintenance, etc, of the family.

This brings us to the third consideration—as to the amount which should be allowed Mr. Mullin for the care, education and provision of the children. Nowhere are we more strongly met by the frightful injustice of the present claim, and nowhere are we more strongly impressed by the grave difficulty of producing the necessary proof. We ask the several members of this court who may have children, to attempt to figure back all the expenses of every kind, nature or condition incident to these children in the past eleven years —every dollar expended for food, for clothing,

for schooling, for music, books, vacations, and for the hundred and one other details falling under these heads.

Mr. Will Mullin, with the assistance of Mr. DuBois, figured out the respective ages of the children. At the time of the death of the father the oldest child was seventeen years of age, and the youngest was *en ventra sa mere.* The maintenance of the family, including everything, was figured out in Exhibit P 1 (Book page 398), and taking a low average allowance of $1.00 a day for each child, has brought an average yearly expense of $1,929.28. These figures ranged back to the death of the testator, but are accurate for our purpose of average, for while some of the children became of age, the expense of the others materially increased. At the death of the testator all of the children of school age went to parochial school, and certainly this court needs no evidence to convince it that the cost of living has increased in every respect tremendously since 1891, so that the figure of $1.00 a day for each child while a minor, starting from 1900 and coming to the end of the account, is certainly most reasonable, and if every item could be checked up and an exact verification found, it would undoubtedly far exceed this figure.

What finally decided the Master was the fact that some time during the progress of the case, upon an application for an allowance pending the litigation, the Vice-Chancellor ordered payment of $5.00 a week, and the Master in some marvellous and inexplicable way, considered that the "judgment of the Vice-Chancellor when that question was before him should control my own conclusions" (Book page 427, line 20).

The fact is, however, that the matter was never given any consideration by the court at all; the sum was merely allowed out of the estate, the administrator having in his hands corpus which admittedly belonged to the infants, amounting to over $3,000, and this order was simply consented to by the complainant, the order expressly reciting: "It is the intention of this order to deal with the aforesaid allowances and payments only in a premlinary manner; the question of the fund or funds to which they are properly chargeable being expressly reserved until final hearing" (Book pages 129-130). As a matter of fact, this order was not even made by Vice-Chancellor Stevens; it being by consent, was apparently presented by Mr. Tansey to Vice-Chancellor Howell. The order was filled November 28, 1911 (Book page 129, line 5). The order of reference was not made until March 14, 1912 (Book page 55), and the first hearing in the matter did not occur until June 7, 1912 (Book page 56, line 20).

All we can do under this head is to set out briefly to the court what these children received.

Shortly after the father's death the expense of taking care of the whole family, including medicine, doctors' charges, running the house, and everything, amounted to nearly $4,000 a year (Book page 77, line 22). Joe at this time was about 17 or 18 years of age and Grace but a year or two younger, yet neither of them, when called as witnesses, deny this figure, and at this time none of them had been sent to boarding school. There were eight children at the time of the father's death (Book page 148, line 4). One was born after this, and one died shortly therafter.

Immediately after the mother's death, in the summer of 1900, Grace, who then married, moved to Fifth street, and it was then decided to send three of the children to St. Vincent's Academy, a boarding school, and a little later one of them was sent to St. Benedict's College. That took care of four, and the balance were boarded at the time by the sister Grace. Will paid the board of the boy who went to St. Benedict's College, while the boy was with either his brother or sister, and he lived for a little while with Will. During the vacation seasons or holidays, when they had no school at St. Vincent's Academy, the children visited their sister, and Will paid the board, so that, as he said, there was no day in the year when he did not pay board for them, no matter where they were, and in addition they got piano lessons, musical education, doctors and medicine and clothes, spending money, vacation money, education and board (Book page 217, lines 1-30).

He sets forth on page 217 and 218 the method used in arriving at the figures, and while he was not a mathematician, he asserted positively that he never supported the family for any average of $1,900 a year; that is was greatly in excess of that; that one year, when his mother was living, he tried to figure out how much it cost him for the family, and it was something like $3,800 (Book page 218, lines 1-10). He averaged $5 for their board, and was very sure that all the other things could not be figured at $2 in addition (Book page 218, line 12). He repeats (Book page 244, line 1) that he considers $1 a day for each child as very conservative, and no one who has had any experience with children and who will consider what these children received, can for one instance question it. It did happen

that occasionally, when the children were simply home from school for a few days, board was paid at the rate of $3 a week, but this was not the regular rate, and the balance would be very much more than taken care of by the excess incidentals (Book page 244, line 20). He paid a good deal more than $5 a week at the boarding school (Book page 244, line 35). After the children left school he paid $5 a week for their board, except for Peter, and for one period his board was $15 a month (Book page 245, lines 30, etc.). After Peter started to St. Benedict's College he boarded with a sister, and she increased the price of the board to $5 a week (Book page 246, line 8).

A few certain bills which happened to be found showed that Peter's clothing was purchased at J. Marshall & Ball; there was a dentist's bill of $16.50 (Book page 247, line 10), bills from St. Benedict's College (Book page 247, line 20), bills for music for two of the girls at St. Vincent's, more bills from St. Benedict's Academy amounting to $203 and $195, and then there was offered a package of bills which were received and marked in a lump C 2 (Book page 247, line 30). There were dressmakers' bills (Book page 251, line 2), milliners' bills (Book page 251, line 10), and the Master observed that "We know he paid large bills for a long period, and they must have included, since the family were clothed and fed and educated, many items for that class of disbursements. How can he prove that a particular bill was paid when there is no claim based on that particular disbursement? How is it going to help me?" (Book page 251, line 25). We find further (Book page 254, lines 15-25) the witness stating that he produced everything he had, that Mr. Tansey had every bit of record that he had since the time his mother died, in the bunch of

receipts and books, and that he never intentionally destroyed anything. Many of the receipts and books had been burned up by the fire in the trimming room (Book page 256, line 5). Part of them being destroyed, the others were then burned (Book page 257). There is no charge or question that Mr. Mullin ever purposely destroyed anything, for of course under his theory of the case, as to which there is no question, in fact, all of the bills concerned no one in the world but himself.

Mr. Mullin repeats that he considers his estimate of $1,900 a year a very conservative estimate (Book page 255, line 40). Even Peter, when young, went to St. Vincent's Academy, after the mother's death (Book page 83, line 22). After he got through at St. Vincent's he went to St. Benedict's College, and was there about a year and a half, and then left because he would not stay longer (Book page 84, lines 18, etc.). This is not questioned or denied. Besides Peter's board he gave him more than $15 a month (Book page 85, line 5).

He paid the board of his sister Anna for a year after she was 21, furnished her clothes and everything, because he was not informed when she became of age, and he learned it only by chance (Book page 85, line 20).

On behalf of the defendant, Grace Coburn (formerly Mullin) swore that she got $15 a month for each child that boarded with her (Book page 324, line 20). She had the children with her after the mother's death, four all the time and sometimes five (Book page 325, line 2). She admitted that money was given to the children for vacation, as much as $50 in a check (Book page

325, line 38). She admitted frankly that she did not know how much a year the clothing of the children cost (Book page 326, line 10).

Now notice the utter absurdity of this effort of these ingrates to increase the amount they claim they should now receive by keeping to the lowest possible sum the deductions claimed for their support. This sister says that the summer dresses would only cost from $3 to $4, and the winter dresses would come generally in suits, $12 or $14 (Book page 326, line 20). She never counted how much was spent in a year. She estimated that it wouldn't cost over $100 a year to dress them, that is, three of them (Book page 326, line 35), and then admitted that that didn't include shoes or underwear or hats (Book page 327, line 18). She would add $50 for the three girls for these items. For Peter she figured two suits at $9, $15 for shoes, $5 for hats, and $6 or $7 for underwear (Book page 327, lines 25, etc.). She made his total expense for clothes $60 a year (Book page 328, line 20). This, be it noted, was more than the figure she made for each of the girls, which on the face of it shows the utter and absurd ridiculousness of her effort.

She was asked to estimate the cost of dressing the children in 1902, on cross examination, and she said she didn't know that year, "but it was always about the same" (Book page 330, line 10). Could we have more utter nonsense in the way of testimony than the statement that the expense of clothing a child of ten or eleven is about the same as that of clothing a girl of eighteen or nineteen?

Marie Mullin, another of the defendants, then testifies as to the cost of her clothing; she said

it would be different in different years (Book page 333, line 1). At about 1907 she began to buy more clothes and paid more for them than when she was younger. She said that her winter suits averaged probably $25 (Book page 333, line 20); that she would get a school dress which cost from $10 to $15; that she would get a spring dress of some kind which would cost about $15, and summer dresses which would average about $9 or $10 (Book page 333, lines 25, etc.). Compart this with the absurd statements of Grace (Book page 326, line 20). Where the dresses were made there would be the dressmaker's bill to add. She didn't know about the price of her hats, because the bills were sent straight to her brother's office (Book page 334, line 10). She had two hats a year, she supposed, of the price of $10 per hat (Book page 334, line 25); she got a winter hat and a spring hat for the summer, and a very cheap school hat, and then probably an everyday hat for the summer, making four hats (Book page 334, line 28). She figured her hat expense $15.50 per year. She thought her shoes were about $16 a year (Book page 335, line 20). For gloves and other extras she added $23 a year (Book page 336, line 1). Will gave her $5 a month cash when she was going to high school for lunch, carfare and spending money, not paid by check (Book page 336, line 25). Three or four times a year she would get money for theatre tickets or some little odd thing of that kind (Book page 336, line 25), $10 perhaps a year, for vacation money, $25 a year, and then occasionally, toward the end of the summer $25 or $30 more for all of them (Book page 337, line 22).

On cross examination she admitted that she went to St. Vincent's Academy in 1906, took mu-

sic lessons, which were $15 a quarter, had the use of the piano, sheet music, etc. (Book page 338, lines 20, etc.). Cross examined on the dressmakers' expense, she said that if she saw some of the bills she might tell (Book page 339, line 22). Could anything better illustrate the utter worthlessness of such testimony?

Then comes Anna, who was fourteen years old when her mother died (Book page 340, line 30). She didn't seem to know much about her expenditures for clothing; she thought that her clothes maybe cost her about $100 a year (Book page 342, line 1). She went to St. Vincent's Academy from the time she was fourteen until she graduated. She was very ill for a time (Book page 342, line 30). She got spending money while she was at school (Book page 342, line 10). The sisters loaned them money, and it was charged on the bill. The year she graduated she was allowed $5 a month for spending money (Book page 343, line 22). She received vacation money; she didn't know the price of her music lessons, but her elocution was extra, and she thought there was an extra charge for the use of the piano and the library and the books (Book page 344, line 30). She did remember breaking a study hall window, for which her brother was charged $5 (Book page 345, line 15).

Then follows Isabella's testimony (Book page 345). She goes into details of her clothing, and she admitted that she had an operation immediately after her mother's death for her ear (Book page 349). She did not know the expense of this operation, but she knew her brother paid $15 a week, and that she had to go to a doctor for a good while after and her brother paid that (Book page 349, line 20).

Among the exhibits which throw light on this subject is P 1 (Book page 398), where the complainant's method of figuring his expense is set forth; also Exhibit C 2, which shows dentist's bills, college bills, including tuition, lunch, physical culture, stationery, music, books, etc. Continuing on page 402, we find an interesting list covering various items for Anna in 1906, running from board and music to the use of the piano and library, dress goods, violin bow and string, medicine, breaking kindergarten table and study hall window, and for Marie, more music, tickets for commencement, etc. On page 403 is another bill of the same order; some doctors' bills for the year 1906 on page 404, some dressmaking bills on pages 405 and 406. And so it goes.

These are only of interest and of value in indicating to the court the nature of the education, support, etc., which was afforded to these children by their brother, and certainly they are sufficient to show that what they received could never have been provided at any such rate as $1 a day. And yet the Master has arbitrarily reduced the amount to be allowed to $5 a week, and he loses entire track of the fact, both proved and admitted, that Anna, by keeping her coming of age a secret, secured her board and maintenance until she was twenty-two. A very brief examination or consideration will, we think, show that the complainant is entitled to the allowance of $1,929.28. This is covered in the sixth exception.

The Master found that Wiliam F. Mullin supported the family on a basis equivalent to the support of one child for 448 months, which is equivalent to 1,792 weeks, and the admissions of all of the defendants were that board was paid for all of them at all times during this period.

They say that it was at all times at the rate of $3.75 a week. This sum, even if it is accepted as the amount actually paid, would make a sum of $6,711 paid for the board of these children. The Master found that Mr. Mullin was entitled to $9,706.58 as an allowance for all the money expended by him for all purposes in the support, maintenance and education of these children. Deducting the amount of $6,711 from this allowance would reduce the proposition to this—that Mr. Mullin spent only $2,995.58 for the clothing, education, doctors' bills, vacation money and sending money admittedly advanced during a period of 1,792 weeks. We submit that a hasty glance at the exhibits incorporated under the head of C 2 will show the manifest absurdity and the ridiculous inadequacy of the amount which the Master allowed to Mr. Mullin for his expenditures for the support, maintenance and education of these children.

It should be here observed that Vice-Chancellor Stevens did not attempt to pass upon these exceptions, except to say that the case was one which, on its basic principles, should be taken to the Court of Errors and Appeals, and that for him to submit another set of figures would really add little. We regret that his remarks to this effect, which were made orally on an appearance before him, are not in the record, but his assumption that this was a case to be passed upon by this court is made manifestly clear by his remarks at page 442. He was there referring to the release, but his assumption as to the exceptions was made in exactly the same way.

This brief review of the exceptions enables us to come to a consideration of the case as a whole. We will treat it under the following heads:

I. Should the complainant, under the proof in this case, be compelled to account at all?

II. Should he be compelled, under any circumstances, to account beyond $500 and interest?

III. The effect of the releases.

IV. The expenses of complainant of counsel fees and disbursements should be allowed out of the fund of income, if any, otherwise out of the corpus.

I.

The Complainant Should Not Be Compelled to Account.

The bill sets forth that after the death of his father, the complainant, at the request of his mother, the sole acting executrix, managed the business, that is, from November, 1891, until September, 1895, when a partnership agreement was entered into, as has been heretofore stated, and which agreement is set out on page 25; that a little while thereafter, in May, 1896, Joseph L. Mullin withdrew from the partnership, refused to be further bound by his agreement, and demanded his share in the estate, and that therafter the complainant, at the request of his mother, continued the business with a definite agreement that he should support his mother as long as she lived, and the infant children at home, and that the balance of the profits remaining thereafter should belong to the complainant in payment of his services; that in July, 1900, the mother died (Book page 5), and at the time letters of administration were granted to the complainant, there be-

ing then still five infants (Book page 7, lines 20-30), and that since the mother's death the complainant continued the business in all respects as he had done before, and supported and maintained the infants until they arrived of age, and as they became of age each was paid a certain agreed sum of money and signed a general release. The bill then alleges that the complainant expended at least $500 a year on each of the children for maintenance, education and support (Book page 9, line 32); that the money so paid was really the earnings of the complainant, the result of his personal efforts, and that the assets of the undertaking business carried on by him were of absolutely no value and would have produced nothing on sale, and that the business existed and realized results only by reason of the personal efforts of the complainant and of the reputation and good will established and maintained by him and at the solicitation of his mother devoted to the maintenance and support of the children (Book page 10, lines 1-12).

The substance of the agreement is also sworn to in the affidavit annexed to the bill (Book page 19, line 30). We have before referred to the terms of the agreement (Book page 61, lines 10, etc., page 62). On page 64, line 30, the complainant says: "The agreement was that I was to support these children out of this business, educate, clothe and feed them until they became of age, whatever profits arising from the business were to be mine and the business mine after the children had arrived at their majority."

The business at the time was considered of no value at all (Book page 68, line 13). This of course meant in a relative sense; it was worth $500 with the good will and everything, and later

it brought that sum (although the purchasers are now sorry they made the bargain). This figure, under the circumstances, meant that the business was of no value, for $500 would not have provided for these eight children and the widow for more than a couple of months. By keeping in mind the situation as it then existed the whole think becomes very clear. The question of Mr. Mullin's owning the business after the last child became of age and after the mother's death, was of minor importance.

There is no evidence offered to contradict this sworn testimony as to the agreement, and of course none could be offered. The agreement was not only fully proved, on behalf of Mr. Mullin, but the whole case shows that it was actually executed. He says he agreed to do a certain thing and he did it, and no one ever seems to have questioned his right until every shred of benefit that could come to even the last one of the ungrateful brood had been received. James, who came of age April, 1903, took his $3,750 and signed his general release in December of that year (see pages 32 and 33). He never made any claim to any interest in the business in addition, and he then worked in the business as an employe of his brother Will (Book page 81, line 15). He worked in the undertaking business for his brother at two different times (Book page 82, line 9), and was paid while he was working there (Book page 82, line 20). After he became of age and had received his settlement and signed his release he was again employed by his brother Will and was paid then $17 a week (Book page 83, line 12). This situation is not conceivable if he had any interest in the business. He would have demanded an accounting or would have insisted that it be sold, for this was about 1907 or

1908, and immediately before he went in business for himself in the same line.

There was never an accounting asked for by James or Isabella or Grace or any of them, until Anna became of age a year or so before the suit was started (Book page 89, line 20).

Joseph, after his breach of the partnership agreement, often saw his mother; he knew there was a good business being done; his mother never discussed matters with him after he left, and although he used to talk over business matters with William F. once in a while in the stable, while he was working in the livery business, it was "simply in a casual way, never referring to anything particularly" (Book page 102, lines 1-40).

Imagine the situation that he speaks of (Book page 103, line 12) if he even dreamed of his having any interest in the business. Keeping in mind the testimony on page 102, and looking at the answer on page 104, line 30, we get a good line on the caliber of witness we are dealing with in this man. When he made his demand at the time of his leaving, in 1896, he demanded his share in the business (Book page 106, line 1). In signing the release he understood that he released all his interest in the estate except that in the real estate, No. 91 Lafayette street (Book page 106, line 21). The complainant says that from the time he made the arrangement with his mother, whatever there was went to him; that he continued since her death the same way as before and that his brothers and sisters as they became of age signed releases for three thousand and odd dollars each, and never demanded any accounting or wanted to go over the books or asked about any of those things until the last

girl, Marie, made demands (Book page 205, line 25; page 206, line 1).

In these preliminary conclusions filed by Vice-Chancellor Stevens at the time he ordered the accounting (Book page 131), the Vice-Chancellor considers that what he regarded as a discrepancy between the complainant's bill and affidavit and his testimony, enabled him to find that the agreement was not proved. He lays much stress on the statement in the bill (Book page 132, line 30), and he loses entire track of the all-important fact mentioned in the bill (Book page 10, line 1) that the assets of the undertaking business were considered of no value, and in the light of the whole case this is now established as a fact. We must keep in mind that at the time the Vice-Chancellor made this observation he certainly never assumed that the value of the business was never more than $500, and that we could be meeting the situation in which we now find ourselves (Book page 134, line 3).

We think, then, that in the light of all the proof, with the evidence now clear that the contract has been most fully carried out on the part of Mr. William F. Mullin, that the parties themselves, as soon as they became of age, before the litigation, construed the contract; that the business belonged to Mr. Mullin and that he should not have been held to account in this case.

The defendants attempted to make a point of the fact that the complainant only recently made claims to entire ownership of the business.

As we have already said, the business was considered of such insignificant value, in consideration of the whole transaction involved in this case, that it received little attention, and in the second place, each of the children in turn con-

tinued to release and no question was ever raised as to Will's ownership. No one ever asked him, nor claims to have asked him for whom he was running the business, under what terms, what salary he was receiving, or anything of the kind. And James, when he worked there, was paid as a regular helper. A man never says of his property, "This is mine," unless someone has raised the question. Until then it is neither necessary nor natural for him to do more than enjoy quiet possession of his own. The undisputed facts show that from 1896, nineteen years ago, complainant has asserted ownership of the business in every possible manner. During all that time he has exercised complete dominion over it, has received and disbursed as his own the profits therefrom, has incurred and discharged as his own the liabilities thereof, and as his own has enlarged and enhanced the business. After 1896 Joseph J. Mullin, the uncle, made no attempt to supervise or direct the business, although the will provides that he should do so, and although up to that time he had done so. For years all members of the family, adults and minors, stood quietly by and permitted complainant to treat the business as his own, to work persistently and capably at it, to save it from ruin and put it upon a sound, practical basis by dint of his ability and his financial credit in the city. He distributed to the members of the family thousands of dollars which would never have gone to them save for the fidelity in discharging his undertaking with the executors; and now in a court of equity they seek to recover a large sum in addition.

The defendants' counsel errs when he states that the facts rest entirely upon complainant's own word. At the time of the partnership, in 1896, the estate received but one-sixth, and after that

time, up until the death of the mother, it received nothing. The releases of the children as they became of age, the conduct of the complainant in supporting and educating the children through all those years, the fact that for fourteen years no member of the family, adult or minor, ever questioned complainant's title or demanded any of the profits of the business, the fact that at the time the agreement was made the business of itself was not of sufficient value to be worth an instant's consideration, and all the written and circumstantial evidence corroborate the complainant. The facts as to the agreement do not rest upon his word alone. Every word of the evidence is consistent with complainant's testimony, and no fact, either proved or offered, negatives it directly or indirectly.

The defendants maintain that even if the agreement was made, it is wholly invalid, but we insist that the executrix had power to make the disposition which she did of the business and to transfer a good title to the complainant. We refer particularly to the fourth clause of the testator's will, which gave the executrix "power to sell, if necessary for the best interests of my wife and children." This power of sale, being mentioned in connection with the then interests of the wife as well as of the children, must apply to the business, for the business is the only property of testator in which the wife is mentioned as having an interest. All else was left to the children only, but the business was directed to be "continued for the benefit of my wife and children."

There can be no question but that the disposition which the executrix made of the business was necessary for the best interest of herself

and the family. It is not difficult to imagine the state of the mother's mind when, realizing the entire dependence of herself and minor children upon the business, she found it about to be abandoned by everyone who had ever been connected with it, or who was in any way able to make it support the family. The necessity was dire. The business was worth but $500; she knew no outsider would run it for the benefit of the family, and she did what was not only necessary, but was natural as well.

Regardless of the power of sale contained in the will, the executrix, by virtue of the common law, had absolute power over the decedent's personal property, including the business, and might sell and dispose of it in the same manner and with like effect as the decedent himself might do, if living. In addition to this, a purchaser from an executor, gets a title and possesion which is good in law, even though the sale be indiscreetly made or the necessity for the exercise of the power had not arisen or the sale was made for an inadequate consideration or in violation of the executor's duty.

See

Lindley v. *O'Reilly,* 50 N. J. L., 636.
Scudder v. *Stout,* 10 N. J. Eq., 377.
Hayes v. *Hayes,* 45 N. J. Eq., 461.
Prawl v. *Tilt,* 1 Stew. Eq., 479, 484.
Williams on Exrs. and Admrs., Part III. of Book I., Chapter 1, Vol. II, p. 120, *Amer. & Eng. Encyc. of Law,* Vol. II, p. 1005 second Ed.).
Twentieth Century Digest, Exr. & Admrs., par. 595.

The liability of the executrix for her unauthorized acts is a question quite distinct from the rights of third parties acquired by such acts.

But we ask again, could the executrix by any other means have accomplished such results from the worthless business, for under the circumstances, $500 was literally nothing. If the executrix were still alive, we would very gladly undertake to defend her in any action brought against her by these children because of her unauthorized act in making sale of this property.

II.

But if this view should not prevail and it should be held that, although there is no evidence whatsoever to contradict him, nevertheless the business was not his, then he should be held to account only for the value of the capital, $500, and interest from the time the youngest child became of age. At the time of the filing of its first memorandum, the court says (Book page 134, line 2): "Is it likely that the family would have understandingly relinquished all interest in its (the business) good will?" This verifies our view that at that time the court could not and did not consider that there is nothing to this business first, last and all the time, excepting William F. Mullin with his skill and ability.

The court sustained the agreement as to the time the mother was alive, but held that the complainant must account from that time, 1900, when he became administrator.

We maintain that the will in question (Book page 2, lines 1, etc.), gave the mother the right to sell the business if in her judgment it became necessary for the best interests of herself and children. We observe from the date of this will

that it was drawn on the same day the testator met his death, probably while he was in extremis, yet he seemed to recognize that it might be necessary to make a sale, and he accordingly gave that authority. Beyond question the mother as executrix had the fullest right and authority to make any fair agreement with reference to the conduction of the business which should provide for the education, maintenance and support of the family.

Let us again look back at the situation as it then existed. There was a mother with eight minor children, an estate which would give them each, at that time, about $3,000, and a business which, with all its stock, good will and fixtures, was worth at the outside $500. In this posture can it be doubted that she might have made arrangements with a stranger with terms to this effect: That he manage the business, educate, clothe, maintain and provide for the executrix herself so long as she should live and for each and every one of the children until he or she should become severally of age, and that during that time he as manager should receive and have as his compensation all sums in excess of those requirements, he to pay in addition all the running expenses of the business, run the risk of loss and be responsible for all credits. Could any court, let alone a court of equity, question the soundness or the advisability or the legality of such an agreement? What possible difference could it make that the widow herself died before the youngest child became of age?

The question of the widow's death can make no shred of difference to this agreement, and Will's becoming administrator in no wise changes the situation. The widow had the right to make

such an agreement as she did make. She made it. The complainant, upon his part, has executed it and there can be in law or equity no possible reason why he should account after 1900 rather than before 1900. The agreement was made for the benefit of the infants, and it inured most highly to their benefit. If this court will take one-eighth of $500 and then refer for an instant to two of the exhibits on pages 402 and 403, and then further consider a small part of what these children have received, further argument on this phase of the case would certainly seem unnecessary.

The complainant in carrying out his agreement (assuming, though not admitting, that the corpus did not belong to him when the youngest child became twenty-one), of course had to keep intact this corpus. He could not then, under the terms of his agreement, have disposed of it until the youngest child became of age, that is, during the pendency of this suit, and the utmost to which he could or should be held to account would be $500 and interest from that time.

The widow had a right to employ an agent or a manager for this business; not only the right, but the duty in this case, and we can find no case that would limit her authority to making a contract to run only for a year or five years or the period of her life. There was greater necessity for this contract, and greater benefit to the minors, at the time of the widow's death, even than before, for the children were then just of an age where they needed good education, more expensive clothes and a thousand other things which could only have been provided in the single way in which they were provided—that is, by the skill, ability and loyalty of the older brother, Will.

The widow undoubtedly relied upon the appreciation of the children, as they became of age, and the evidence shows that in this she was not mistaken as to the first five or six, who freely, and probably gladly, gave their releases as early as they could do so; but both she and the complainant evidently failed to figure that human greed could go to the extent to which it did go in the case of these younger children. It is not unknown for a dog to bite the hand that feeds it, but it is a rare sight among human beings.

The rule, then, to be applied in this case, in the event that this court should find that the evidence of a sale was not made out, is not that of an executor or administrator running a business without authority, but that of an agent or manager running a business under a contract, and under this view there should be no accounting for profits in this case.

III.

The Releases.

This is a phase of this case which, we may as well state now, we are hopelessly unable to comprehend. The complainant's cross bill did not seek to set aside the releases, and there was no claim or contention made whatsoever that they did not bind the releasors during all years they were in force. No evidence was offered of fraud or duress, and yet, on the conclusion of this remarkable case the complainant was held to account for some $25,000, and all the releases on which he relied in continuing his efforts were held to be of no possible value or account. The opinion of the court with reference to these re-

leases appears on pages 435 to 442. The final decree (Book page 444, line 30) recites that the releases heretofore given by William F., Grace, Joseph L., James S. and Isabella did not extend to or affect any right of the said releasors in the proceeds derived from the conduct of the undertaking business of the estate of the said Peter M. Mullin, deceased.

We have before referred to the testimony of Joseph L. Mullin that in 1896, when he broke his partnership agreement and abandoned his mother and six younger brothers and sisters, he demanded his share in the business, and then signed a release which he understood released all his interest in the estate excepting in 91 Lafayette street (Book page 106, lines 1-20). There is other reference to the releases on page 87, but we nowhere find in this case anything which, it seems to us, can in the slightest justify the setting aside of these releases.

The court, indeed, seemed to regard these releases as nothing more than mere assignments. It is settled in this state that evidence permitting the consideration to be controverted in actions on sealed instruments does not apply to releases.

Braden v. *Ward,* 42 N. J. L., 518.
Waln v. Waln, 58 N. J. L., 640.

Now, it is true that a release may transfer from the releasor to the releasee something either personal or real, but on the other hand, it may discharge the releasee from his obligations to the releasor and from the actions and demands of the releasor. This distinction is brought out clearly in the case of *Binsee* v. *Ohl.* 51 N. J. L., 22 Vr., 47 (Sup. Ct.), at page 50.

Obviously, under all the facts of the present case, these releases were intended to be of the latter sort. They discharged the executor as well as the estate (see Book, page 27). Joseph acknowledges the receipt of $3,750 "in full discharge and satisfaction of all my right, share and interest of every name and nature in the estate of said Peter M. Mullin, deceased, and in consideration thereof, I have released and discharged and do by these presents release and forever discharge the said Annie E. Mullin, sole acting executrix as aforesaid, and also the estate of the said Peter M. Mullin, deceased, of and from any and all further or other accounting or reckoning in respect to my interest in said estate, and of and from any and all distributive shares, debts, dues, claims and demands which I ever had, now have or hereafter can, shall or may have against said estate by reason of anything existing at the date hereof; excepting only my share or interest in the house and premises situate and known as number ninety-one (91) Lafayette street in said city." And then followed a further covenant in which he agreed, when requested, to make and execute any further or other instrument or instruments of writing such as might be necessary "to fully effectuate and carry into effect the true intent and meaning of these presents." This document was signed in May, 1896, and acknowledged before a Master in Chancery, and Joseph, with his hands full of the family spoils, betook himself to a far country, where he wasted his substance in riotous living.

Can it be conceived that Mr. Fred Lum, careful counsel as he was, as has been mentioned in the opinion of the Vice-Chancellor, could have had inserted in this release a reservation of this man's interest in the premises No. 91 Lafayette

street and have omitted any reference to his right to share further in the business? The release does not in terms transfer to Mrs. Mullin any interest or property in the business, the situation in that respect being just as in the Binsee case, *supra* (see page 51, 1st paragraph).

But the Vice-Chancellor seems to have held a view that, even though the releasor had parted with his interest in the business, yet he might share in the profits after that time, and he refers to the use of the words "by reason of anything existing at the date hereof." But if the releasor parted with his interest in the business as of that date, he of course and of necessity parted with his right to any profits from that business in the future. Under the view of the Vice-Chancellor, we would find an analogy in the situation of a man who, having sold to another a drove of cows, sought an accounting five years later for all the increase of the herd, claiming that he sold only as of the date of sale.

The evidence of Joseph Mullin before referred to, is that he understood he was demanding his share in the business and releasing everything except the real estate, and to permit him now to come in, nineteen years after, and take several thousand dollars, or one single dollar, accumulated since by the effort of Mr. Will Mullin, would be a wrong and an outrage and a gross injustice.

The widow made an agreement which looked to the running of this business for the benefit of the family, and under which she believed she had disposed of the business. The children being minors, this could not be ratified. They took the benefit, recognized the inherent justice of the situation, and each, as he or she became of age,

relased first the executor and the estate and later the administrator and the estate.

Our court has held valid an agreement by a child with its father by which, in consideration of a sum of money presently paid by the father, the child agrees to make no claim to a share in its father's estate in case he die intestate, and it may be enforced in equity at the instance of the other children, should he attempt to make or assert a claim in violation of the agrement.

Havens v. *Thompson,* 11 C. E. Gr., 383.
Greene v. *Hatheway,* 36 N. J. Eq., 9 Stew., 471, at 472.

All the cases, text books and encyclopedias agree that the scope and extent of a release depends, as a rule, upon the intent of the parties as expressed in the terms of the particular instrument, and that a general release ordinarily includes all claims and demands then due and within the contemplation of the parties (34 Cyc., 1092).

We fail to see how an instrument could be drawn or prepared so as to more fully discharge the legal representatives and the estate of all claims whatsoever on the part of the releasor against either the representative or the estate.

In the answer, the defendants Joseph and Grace say that their releases applied only to the value of bonds and mortgages, etc., left by the father at his death, and did not extend to the real estate or his undertaking business, "their rights in said business being held subject to a future accounting thereof."

It is needless to say that there is no word of evidence offered in proof of any such ridiculous claim. The whole case in its entirety contradicts and negatives any such suggestion. Can this court conceive Joseph standing by for nineteen years and never even asking for a statement as to either gross or net earnings of the business, in the event that he considered he had any shred of interest in it?

James makes some allegation about having relied upon information furnished by William without an accounting, and that this information was misleading and false and intended to be, and further, that he believed the release had no reference to the undertaking business. We ask the court again to bear in mind that this was the man who, after signing this release, worked for his brother and received $17 a week, and never even glanced at the books and never suggested or requested anything with reference to an accounting.

By his very act in signing this release he lulled his brother into security, for if at any time during the whole continuance of this agreement, up until the youngest child became of age, the demand had been made, this complainant could have brought matters to an issue, but we find nothing of the kind. On the contrary, each child as he reaches maturity, signs the fullest kind of a general release, and without qualification or limitation. And Isabella, in her answer, makes other statements, none of which are verified or attempted to be verified, and raises issues which we have never had a chance to try or consider.

In his testimony the complainant swears that there was never any question by James about

signing his release or demanding an accounting of the business. He said, "He signed it and Mr. Lum explained it to him."

Mrs. Coburn in her testimony was asked (Book page 109, line 20):

Q Did anyone ever tell you that you settled? A Yes, I settled. * * *

Q You understood what you were signing when you signed this paper, didn't you?

The Court. I shall assume that.

With respect to the releases given by James and Isabella, little need be said. These releases were in the same form as the others, with the exception of the omission of the sentence referring to the real estate. The legal effect, however, is of course the same. They were executed after the death of the mother, and ran to William F. Mullin, the complainant, and also the estate of Peter M. Mullin.

The effect of all of these releases is to release the legal representative from all claims of the legatee against the legal representative so far as all of the personal estate of the decedent is concerned. The estate of the decedent was entirely in existence at the time these releases were executed, and to hold that, having released all interest in the estate these defendants could still, at this late date, receive a share of earnings from the estate, would be to do wilful and positive violence to the clear intent and understanding of the parties as it existed at the time.

Furthermore, the plight of the pleadings in this case, on the part of these releasors, is such that they could not possibly secure any advantage against the complainant in the way that has been

attempted. It may be said that the pleadings may be amended, since the court now has admittedly practically unlimited powers of amendment, but what amendment can be made? The court cannot amend the pleadings to conform to the proof, because there is no proof whatsoever that could possibly justify the setting aside of these releases. We have set out substantially all of the evidence under this head, and we respectfully submit that it could not, by any stretch of the imagination, be considered sufficient to set aside these releases, in any manner whatsoever. This whole idea of going back on their releases was a most palpable and painted after-thought. When the older children perceived that their younger brothers had outrivaled Moses in striking gushing streams, their greed knew no bounds, and they were immediately filled with an overwhelming desire to share in the spoils. That they should have actually succeeded in this design, and with the assistance of a court of equity, seems much the more remarkable.

Finally we will observe that nothing has been alleged in the pleadings or shown by evidence produced that could in any way affect the validity of the releases. Nothing whatever exists or has been alleged which would suggest any possibility of avoiding the natural effect of these instruments. It is remarkable too that these parties who now seek to avoid the natural effect of the release practically admit that they knew of the undertaking business at the time of the execution of the papers. With the knowledge of the fact that their father died possessed of this business certainly no fraud could have been worked upon them either by their mother or by their brother, relative to this matter, when they executed the releases.

In fact, the attitude of these releasors since the execution of their respective releases, has not only been such as to amount to an acquiescence and ratification upon their part of anything and everything that may have been done with respect to this business, but it clearly estops them from coming into a court of equity at this late day to dispute the effect of their own acts. There can be no question but that had any one of them at the time of the execution of his release, or shortly thereafter, raised a question as to the propriety of the management of the business by William F. Mullin, he could and undoubtedly would have disposed of the business as an asset of the estate and continued in business, perhaps even in another location, in his own individual right. Having admitted, as these releasors do, knowledge of the conditions then surrounding the business and its management, it does not lie in their mouths to come into this court and say that, after having remained silent all of these years, in some cases as much as eighteen or nineteen years, they are now entitled to dispute the effect of their own acts and share in a reward for their failure to act with that vigilance which a court of equity always demands. We repeat that it is perfectly apparent that these releasors never for one moment contemplated repudiating their releases until even after the inception of this litigation.

And we repeat that a full consideration of the contents of these releases in connection with the will of the testator and in connection with the actual condition as it existed at the time, will show very clearly what their purport and effect were intended to be. It is indeed most unfortunate that the two persons who would have known the most about the settlement, Fred H. Lum and Michael Mullin, have passed away. Mr. William F. Mullin,

the only other individual with actual knowledge of the situation, has testified; he is not contradicted and he is borne out to the fullest extent by what actually happened, and in fact the situation as it actually existed is incomprehensible under any other condition than that to which he has testified. This agreement, let us repeat, he has been executing continuously for nineteen years.

The court seemed of the opinion that, if these releases were not set aside, then the three who had not signed releases might take all of whatever sum there should be. But this, we respectfully insist, is an erroneous view.

To find an analogy, let us consider a condition of a testator who left a farm worth $500 and personal property, consisting of plows, farming utensils, stock in trade and good will worth in all $500. Let us now assume that his widow finds herself with eight minor children, and makes arrangements whereby two of them should carry on the business for the benefit of herself and family, and after the family had been educated and provided for and maintained, that the two boys who did the managing should have five-sixths of the profit, in addition to $15 a week which they were to receive, and the estate should receive one-sixth. Let us pass, then, to the next step, where the second son felt unwilling to continue to work under such an arrangement and went out into the world to seek his fortune, having first demanded and received his share in the estate "and business," to use his own words, and having signed a full general release releasing everything from the date thereof. Let us assume that an arrangement was then made whereby the other son should continue alone to manage and operate the business, with all the risks attendant thereto, and under the same terms as formerly existed, except

that the estate did not receive its one-sixth, it having been agreed that under this arrangement the son who was continuing the business should receive releases from each in turn and should himself own a little stock, $500, when the necessity of using it for the support of the family had ceased and the youngest child had become twenty-one years of age. This is, of course, an exact analogy to the present situation. Each child was entitled to one-eighth of the estate, real or personal, and to one-eighth only, and after four of the children had received their shares and signed releases, the remaining four did not thereby become each seized and possessed of or entitled to one-fourth each. If the release of Joseph can by any trick of legerdemain be held not to have released his interest in the business, then we must concede that he still has it, but if it was effective to release his interest, we cannot comprehend on what theory or by what line of reasoning it can be held that those who were not released became seized of or entitled to his share. We respectfully insist that these releases must be sustained and supported both on the facts and under the law.

We except from all and every part of the final decree. One of the terms of that decree was the allowance to the solicitor for the defendants of the sum of $3,000 and the costs of the suit, to be paid out of the fund, and no allowance to the solicitors of the complainant.

Now we contend, in the first instance, that there can be under our view of the case, no income fund, and whatever payments are to be allowed must come out of the corpus now in the hands of the administrator c. t. a., but we respectfully urge that the solicitors for the complainant should be entitled to a proper allowance to be made also from the corpus. There is in this case no charge of bad faith, no al-

legation of fraud admittedly through the whole case, as stated by the Master and as overwhelmingly proved. The complainant, William F. Mullin, considered that the business was his. He could not, by any stretch of the imagination, have conceived that, after using a $500 estate for nearly twenty years and after having made for his brothers and sisters many thousands of dollars which had been used for their education, maintenance and support, and after having received releases from Joe, Grace, Isabella and James and having himself released the estate, he could be held to account, as has been done in this case. We urge that, from a practical standpoint, no layman could have conceived the situation, and from a legal standpoint Mr. Mullin would unquestionably have been advised that, under all the circumstances, his part of the contract having been fully executed, even if it was held that the executrix had no right of sale, yet he would be obliged to account merely for three-eighths of $500. Under these circumstances, to place upon him the burden of the expense of this accounting, seems to us manifestly unjust.

If he had accounted in the Orphans' Court in the regular form, he would, as a matter of course, have been allowed reasonable counsel fees. This case was brought to Chancery because of the difficulty of accounting in the Orphans' Court. Mr. Will Mullin denied his legal obligation to account, but when ordered to account he did so to the fullest possible extent. He assisted Constam, the defendant's accountant; he supplied every check book, paper and document of every kind that could be of the slightest assistance, and we respectfully urge that he should be allowed reasonable counsel fees, to be paid out of the corpus now in his hands.

We again urge most earnestly and sincerely upon this court that it consider this account not only from the narrow technical standpoint of law, but in the broad light of justice and equity and mercy.

In conclusion, then, we contend:

That the proof shows that the mother as executrix made a sale of the business to this complainant, and that not only should he not be compelled to account, but that the $500 brought under the sale ordered by the court below, must be held to belong to him.

Or, if the executrix shall be held without power to make sale, or the sale shall be held not proved, that in such event he must account for the corpus with interest from the time the youngest child became of age, which was pending this litigation.

That Mr. Mullin has performed his contract in full.

That the children have received the benefit provided in their behalf.

That Mr. Mullin's becoming administrator, c. t. a. can in no wise affect the construction of the contract. The contract certainly disposed of the business to Mr. William F. Mullin until the youngest child should become of age, for anything else than this would not have permitted him to have done what he actually did do, and which must have been intended by all concerned; so that we see he could never have received the business as administrator c. t. a. until the termination of the contract. The situation in that respect must be considered as though a stranger had been appointed administrator, or one of the other children. No change whatsoever resulted in the course of the transaction after the mother's death; those of age made no claim to the business, and the children were supported as before.

That all the exceptions should be allowed.

That the releases should be sustained, and the decree herein entered reversed, with costs to this complainant.

Respectfully submitted,

LUM, TAMBLYN & COLYER.

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Of Counsel.

New Jersey Court of Errors and Appeals

Between WILLIAM F. MULLIN, *Complainant-Appellant,* AND ANNIE E. MULLIN ET ALS., *Defendants-Respondents.*	*On Bill for Accounting, &c.* *On Appeal from Chancery.*

MICHAEL J. TANSEY,
Of Counsel with Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS.

Peter M. Mullin was killed in an accident on November fourth, eighteen hundred and ninety-one. At the time of his death and for upwards of twenty years previously he was engaged in the undertaking business at two hundred twenty-eight (228), formerly ninety-one (91) Lafayette street, and owned the building in which the business was conducted. He left a widow and a family of eight (8) children, of whom the complainant was the eldest and was then about eighteen (18) years old. After the death of the father another child, a boy, was born and is one of the present defendants in this suit. The complainant had worked for his father in the undertaking business since he was fourteen (14) years old. At the time of the father's death, as the

complainant testifies, there was a stock on hand consisting of some caskets and furnishings worth perhaps one hundred and seventy-five dollars ($175.00) ; a horse and carriage worth five hundred dollars ($500.00), and other personal property pertaining to the undertaking business worth about two hundred dollars ($200.00). There was in addition sixteen or seventeen hundred dollars in bank and some book accounts, the amount of which the complainant did not state. The widow at the time of Mr. Mullin's death was about forty (40) years of age, but was not in good health, and after the boy was born she was confined to her bed most of the time and had to be helped in and out when necessary. She knew many things in connection with the business, but did not do anything except answer telephone calls when she was able. There was ~~some~~ evidence that she signed checks as executrix. up to her death p. 221 l. 4

The children in the order of their seniority were the complainant, William F. Mullin; Grace T. Mullin, now Coburn; Joseph Louis, now deceased; Isabella Mullin, now Mulvihill; Anna, Marie and Peter. The widow was Annie E. Mullin.

In his last will the testator provided as follows:

> "Second—I hereby give and bequeath to my children, share and share alike, my property of every kind and description.
>
> Third—I hereby direct that my business be continued for the benefit of my wife and children and under the direction of my wife and brother, Joseph J. Mullin.
>
> Fourth—I hereby appoint and constitute my wife, Annie E. Mullin, and my brother, Joseph

J. Mullin, guardians of my children and executors of this, my last will and testament, with power to sell, if necessary, for the best interests of my wife and children."

Joseph J. Mullin did not qualify as executor, and Annie E. Mullin qualified and took upon herself the administration of the estate. Nevertheless Joseph J. Mullin continually watched affairs and consulted with and advised her in the management of the business in accordance with the terms of the will.

After the death of Peter M. Mullin, Joseph L. Mullin, his son, who had been working in New York, returned at the request of the executrix and William F. Mullin and engaged with them in running the business. James S. Mullin, another of the sons, worked in the business and they all lived at two hundred twenty-eight (228), formerly ninety-one (91) Lafayette street, the homestead property.

In eighteen hundred ninety-five, when William F. Mullin had reached the age of twenty-one (21) years, a partnership agreement was entered into in writing, dated September twenty-fourth, eighteen hundred ninety-five, between Annie E. Mullin, sole acting executrix; William F. Mullin and Joseph L. Mullin, wherein it was set forth that:

"Whereas, the said Peter M. Mullin, deceased, in and by his last will and testament, duly admitted to probate in the Surrogate's office of said County of Essex, did provide in and by his last will and testament that the undertaking business carried on by him in his lifetime, at number ninety-one (91) Lafayette street, in said city of Newark, should be con-

ducted for the benefit of his family, and the said William F. Mullin and Joseph L. Mullin, since the decease of said Peter M. Mullin, have carried on the same successfully and have increased said business and the profits arising from same, and have managed the same to the entire satisfaction of the said Annie E. Mullin and have supported out of said business the family of the said Peter M. Mullin; and, whereas, the said Annie E. Mullin desires to retain the services of the said William F. Mullin and Joseph L. Mullin in the conduct and management of said business; now, therefore, in consideration of the premises the said parties have agreed to and with each other as follows: The said business shall be continued by the said William F. Mullin and Joseph L. Mullin in the name of the Estate of Peter M. Mullin."

Further provisions are inserted providing that William and Joseph devote their undivided time and attention to the business; that the business be continued for one (1) year from the first day of October, eighteen hundred ninety-five; that Annie E. Mullin might terminate the agreement at any time by one (1) month's notice in writing to said William and Joseph. And then it provides, as follows:

"It is understood and agreed that from the net proceeds of said business the family of said Peter shall be maintained and educated as at present. The profits of said business which shall remain after payment of the expense of the maintenance and education of said family shall be divided between said parties as follows: Said William shall be entitled to three

equal sixth parts; said Joseph shall be entitled to two equal sixth parts and said Annie, as executrix, shall be entitled to the remaining one-sixth part."

Joseph and William in addition were to draw fifteen dollars ($15.00) per week each. The agreement was signed by Annie E. Mullin, executrix, and by William F. Mullin and Joseph L. Mullin and witnessed by Joseph J. Mullin.

The business was run under this agreement as testified to by Joseph L. Mullin for upwards of a year, or until April first, eighteen hundred ninety-seven, when it was terminated so far as Joseph was concerned, and he withdrew from the business and went to Morristown.

In May, eighteen hundred ninety-six, an estimate of the value of the estate was made at a conference between William F. Mullin, Annie E. Mullin, the executrix; Michael Mullin and Mr. Lum, as counsel for the estate, and a schedule was made from figures furnished by William F. Mullin, which showed the value of the estate, without any reference to the business, to be such a sum as would give to each of the surviving children the sum of thirty-seven hundred fifty dollars ($3750.00), which, computed on the basis of nine (9) children surviving Peter M. Mullin, would net an estate of the value of thirty-three thousand seven hundred fifty dollars ($33,750), or computed on the basis of eight (8) children surviving (Louis having died), would net an estate valued at thirty thousand dollars ($30,000.00).

The complainant now swears that the Lafayette street property was included in the estimate, but it is significant that the release which he and his brother Joseph and his sister Grace executed expressly reserved their interest in the real estate, ninety-one (91) Lafayette street; and it is further set forth in the Bill of Complaint at page 22, line 21, that:

> "Subsequent to the appointment of your orator as administrator as aforesaid, he discovered that the assets of the estate of his father would not be sufficient to pay to each child upon attaining its majority the sum of thirty-seven hundred fifty dollars ($3750), without including therein the value of the premises known as two hundred twenty-eight (228) Lafayette street."

And it, therefore, appears under these circumstances that the value of the real estate was not considered in estimating the value of each child's share which was set in eighteen hundred ninety-six at thirty-seven hundred fifty dollars ($3750.00).

The items as he gives them now, however, are:

$10,000.00	railroad settlement.
5,000.00	Benevolent Legion insurance.
5,000.00	Mutual Life insurance.
1,600.00	cash in bank.
5,000.00	real estate (Lafayette street).
$26,600.00	total.

The difference between this and the amount of the inventory, thirty odd thousand dollars, as he

said, about seventy-five hundred dollars ($7500.00) is what they saved in the business between the time of his father's death and the time of the estimate, presumably cash on hand or invested.

His testimony is absolute to the fact that the undertaking business was not considered at all in making estimates and inventory, so it would naturally follow that any release given by the legatees could not affect their interest in the business, which had not been considered in making up the amount due them. (See p. 68, lines 10-42.) There is further absolute testimony by them that they had not intended to release or give up their interest in the business.

After Joseph L. Mullin withdrew from the business and went to Morristown, William F. Mullin still continued in charge and ran the business for his mother, as he claims under a new agreement in his words, as follows:

> "It was after my brother went to Morristown, and my mother agreed with me if I stayed and supported the children, whatever was left I took it."

And further:

> "I made this agreement with my mother and expected to live up to it until the youngest child should reach twenty-one (21). As I stated, I had a verbal agreement with my mother as the result of a conference held by Mr. Lum, my uncle, Michael Mullin, myself and her. I told my mother at that time if Joe could quit and have no connection with the business, I should

not stay and have nothing to look forward to. As a result of that talk we had with my uncle, Michael Mullin, and Mr. Lum, I was to educate and support the children until they arrived at twenty-one (21), and whatever there was in the business was to be mine after the children arrived at their majority" (p. 61, line 35; 64, line 30).

No other agreement was ever made, it is claimed by the complainant, for the operation of the business. He continued under this arrangement to run the business up to the time of his mother's death in July, nineteen hundred. In the meantime James S. Mullin, his brother, worked in the business also for him, but he does not remember what he paid him. After the death of his mother his uncle, Joseph J. Mullin, renounced his right as executor and he was appointed administrator with the will annexed, and has run the business from that time and still is conducting it under the name of the Estate of Peter M. Mullin. The administrator, complainant, claims complete title to the business of Peter M. Mullin by virtue of the last mentioned agreement with his mother as executrix, alleging that he has supported, educated and maintained the infant children of Peter M. Mullin, deceased, in accordance with his agreement, and is, therefore, entitled to all the profits of the business which remain. The agreement is attacked by the remaining children of Peter M. Mullin both as to the fact of making and the legality, if made.

It is conceded in the replication of complainant to the defendants' cross-bill that the gross receipts of the business were upwards of twenty-five thousand dollars ($25,000.00) per year, and he testified

on the hearing that the expense of family would run about four thousand dollars ($4,000.00) per year. There is reason, therefore, to assume that the net profits would average ten (10) to twelve thousand dollars ($12,000.00) per year, at least.

Complainant sets forth in his Bill of Complaint (p. 21-22) that since the death of his mother he spent as much as five hundred dollars ($500.00) per year on each of the infant children in their maintenance, education and support. Assuming, for the sake of argument, that there were five (5) infant children receiving this support, which was not the fact, because James largely supported himself before his mother's death and entirely after her death. This would make twenty-five hundred dollars ($2500.00) a year up to the time that James released in nineteen hundred and three; two thousand dollars ($2,000.00) a year from nineteen hundred and three until Isabella released in nineteen hundred and six, and fifteen hundred dollars ($1500.00) a year from nineteen hundred and six until Anna Mullin became of age in nineteen hundred and seven, and one thousand dollars ($1,000) a year from nineteen hundred and seven until Marie Mullin became of age in nineteen hundred and ten, and five hundred dollars ($500.00) a year from that time until the present, representing payments to Peter M. Mullin, who is still an infant. Making the highest deduction twenty-five hundred dollars ($2500.00) a year, would leave seventy-five hundred dollars ($7500.00), as estimated, net income in complainant's pocket, with the amount gradually increasing until at the present time it would be between ten (10) and twelve thousand dollars ($12,000.00) a year for his services in managing the estate.

It is a fact that all the children except three (3) were infants at the time their mother died in nineteen hundred. It is also a fact conceded that none of the children knew of the verbal agreement which the complainant claims he made with his mother after the agreement for partnership was terminated when Joseph went to Morristown, nor did Joseph J. Mullin, under whose direction, in conjunction with Annie E. Mullin, the business was to be conducted according to the terms of the will, know about the arrangement and nothing was ever said to anyone about it by William F. Mullin, nor did he make a claim of entire ownership of the business until Marie Mullin and Anna Mullin sought a settlement about two (2) years ago (1910). No one testifies to the fact of the agreement but William F. Mullin. All the persons concerned in alleged negotiations with him are dead. The facts rest entirely upon his own word, and it is, to say the least, exceedingly dangerous to establish a right as important as the one claimed by the complainant upon his unsupported word as to transactions with persons deceased. As to the probabilities of the fact, it is hard to see why Annie E. Mullin, as executrix, after Joseph L. Mullin had retired from the partnership, should agree to give William F. Mullin, in addition to his three sixths of the profits, not only the two-sixths formerly received by his brother Joseph, but also the one-sixth set off as some return to the estate. William F. Mullin does not say that he was dissatisfied with the agreement as it stood by which he was to receive three-sixths of the profits. He said his brother Joseph left and then he told his mother he should have return for his work in case he stayed, and thereupon she begged and entreated him to remain and arranged to give him all the profit after supporting and

educating the infant children and herself (p. 88, 78). He did say, however, that after this agreement was made he did not receive fifteen dollars ($15.00) per week salary. This, however, would be unimportant, as it would be included as an addition to the profit, as well as the $15 per week formerly paid Joseph L. Mullin. The agreement for partnership previously entered into had been made only after consultation by the executrix with Joseph J. Mullin and a careful discussion of the shares into which the profits should be divided (p. 95-94). It is very strange that this agreement should be made and not committed to writing and without notifying any person, particularly Joseph J. Mullin, of its existence, although he was in constant communication with the executrix, discussing with her matters of importance to the estate. The burden of proof is upon the complainant, and under the circumstances his unsupported word should not be deemed sufficient to prove that such an agreement was made.

But if the agreement were made it was wholly invalid: First, because it purported to be only for the benefit of the widow and the infant children until they should reach their majority; whereas, the directions of the will were that the business should be conducted for the benefit of all the children and the widow. The executrix could not make an agreement for the benefit of other persons than those mentioned in the will, and particularly could not exclude therefrom certain of the children who, while of age, had not yet released. Grace Mullin did not release until eighteen hundred ninety-nine, three (3) years after this alleged agreement was made. Besides, as the business was not contemplated in settling the value of the child's interest,

their release could not be held to affect their interest in the business. Therefore, they could not be excluded from the benefits arising from the continuation of the business as provided by the will.

Moreover, since the will directs that the business should be conducted under the direction of the wife of the testator and his brother, Joseph J. Mullin, said Joseph J. Mullin would have the right of direction notwithstanding he had not qualified at that time as executor. I suppose a testator can give directions in his will that a certain thing should be done under the supervision of some individual and such direction be effectual notwithstanding that individual is not appointed executor and does not qualify as such.

The executrix had no right to make such a contract to bind the estate; and having made it it became her personal contract and did not affect the estate in any way.

> "The general rule is well settled that executors or trustees by their executory contracts, although made in the interest and for the benefit of the estate they represent, cannot bind the estate, but such contracts are, if made upon a new * * * and independent consideration moving between the promisee and the representative as promisor, the personal contracts of the executor or administrator and do not bind the estate. Hence, an executor or administrator cannot make any agreement enlarging the liability of the estate in his hands nor create against it a debt, charge or lien enforceable at the suit of the person with whom he contracts, since the immediate liability in

curred is a personal one on his part. If the contract was one which he had no right to make all the more is it he who must respond for it and not the estate."

18 Cyc., 247-248.

O'Brien v. *Jackson,* 167 N. Y., 31.
60 N. E. Rep., 238.

"While as between the executor and the person with whom he contracts the latter may rely on the contract, the beneficiaries are not concluded by the executor's act, but the propriety of the charge and the liability of the estate therefor must be determined in the accounting of the executor" (*ib*).

"But what is a proper charge on the estate and how that charge shall be apportioned and satisfied are to be determined in proceedings between the trustee and his *cestui que trustent.* Unless he is without trust funds sufficient for the purpose he must act for himself in making expenditures, leaving the propriety of the expenditures to be determined in such proceedings. He can create a lien in favor of a third party only where the expenditures would otherwise necessarily involve an advance of his own funds" (*ib*).

Ferrin v. *Myrick,* 41 N. Y., 315.

Austin v. *Monroe,* 47 N. Y., 360.

Van Slooten v. *Dodge,* 145 N. Y., 327.

39 N. E. Rep., 950.

Parker v. *Day,* 155 N. Y., 383.

49 N. E., 1046.

Willis v. *Sharp,* 113 N. Y., 586.

21 N. E., 705.

"It is the settled doctrine of courts of common law that a debt contracted by an executor after the death of his testator, although contracted by him as executor, binds him individually and does not bind the estate which he represents, and notwithstanding it may have been contracted for the benefit of the estate. It has been held in numerous cases that an executor carrying on a trade under the authority of the will, binds himself individually by his contracts in the trade. He is not bound to carry on the trade and incur this hazard, although authorized or directed to do so; but if he does carry it on, the contracts of the business are his individual contracts."

Ex. Parte Garland, 10 Ves., 119.
Fairlie v. *Percy,* L. R. 3 (Prob. Div.), 217.
Labouchere v. *Tupper,* 11 Moore P. C., 198.
Downs v. *Collins,* 6 Hare, 418.

"The rule is well settled that contracts of executors for services to be rendered are their personal contracts and do not bind the estate."

Parker v. *Day* (N. Y. Ct. of Ap.) 49 N. E., 1046; also

Austin v. *Monroe,* 47 N. Y., 360-366.
Ferrin v. *Myrick,* 41 N. Y., 315.
Reynolds v. *Reynolds,* 3 Wend., 244.
Demott v. *Field,* 7 Cov., 58.
Meyer v. *Cole,* 349.

"The principle is that an executor may disburse and use the funds of the estate for purposes authorized by law, but may not bind the estate by an executory contract and thus create a liability not founded upon a contract or obligation of the testator."

Austin v. *Monroe,* 47 N. Y. App. (2 Sickels), 360-367.

"The general rule is that administrators, executors and trustees are not only bound to assume the responsibility and exercise the duties of their office, but must also perform within reasonable limits the actual manual labor requisite to the due execution of the trust."

In re *Harbeck,* 81 Hun. (N. Y.), 26

30 N. Y. Supp., 521.

"Though an executor or administrator may employ an agent, if the particular circumstances of the estate require it, yet the compensation of the agent must be measured by the nature, extent and value of the services."

O'Gara v. *Cierkin,* 58 N. Y. App. (13 Sic.), 663.

This was an appeal from an order of the general term reversing a Surrogate's decree on a final accounting of respondent as administrator of the estate of William Domery. (Reported in New York Supreme Court Reports, 2 Thompson & Cook, 675.) In her account she credited herself with various sums paid to two brothers and a sister for services

to the estate. The Surrogate allowed a small portion of these sums so credited and rejected the residue. The Court held as above that the amounts allowed were sufficient to pay a full compensation for the services proved to have been rendered. The general term opinion in 2 Thompson & Cook was as follows:

> "Plaintiff, the administratrix of an estate, successfully through great skill and labor both before and after her appointment, secured certain moneys belonging to the estate, and under advice of counsel and in good faith paid certain charges, which were reasonable, for the services of others in securing such moneys. Held: That she should be allowed for the charges paid and for her disbursements on behalf of the estate, including those made before her appointment."

As stated above, the Surrogate had disallowed certain portions of the charges. On appeal to the Supreme Court, his order was reversed and the charges allowed in full. On appeal to the Court of Appeals the Supreme Court was reversed and the Surrogate's ruling affirmed.

> "The representative is not entitled to a salary for his own services to be deducted out of the gross receipts, since he is not entitled to deal with the trust property to his own advantage."

Matter of *Peck*, 79 N. Y. App. Div., 296.

80 N. Y. Supp., 76.

Affirmed, 177 N. Y., 538.

69 N. E. Rep., 1129.

"The administrator himself will be personally liable for the value of services rendered at his instance for the benefit of the estate, where there is no agreement on the part of the creditor to look to or confine his claim for compensation to the estate itself or the defendant in his individual capacity."

Foland v. *Dayton,* N. Y. (40 Hun.), 563.

"The personal representative and not the estate is as a rule directly liable to one whom he employs incidentally in the discharge of his trust, as for selling, custody, charge, or such work upon the assets or clerical or other services in managing the property and the like."

18 Cyc., 247 at 248.

"But upon contracts made by personal representatives, though for services and expenses necessary in the due execution of his trust, he is individually liable, for he is without authority to bind the estate by his promise. * * * The principle is that an executor may disburse and use the funds of the estate for purposes authorized by law, but may not bind the estate by an executory contract and thus create a liability not founded upon a contract or obligation of the deceased."

Thomas v. *Moore* (Ohio Sup. Ct.), 39 N. E., 803.

Citing *Austin* v. *Munro,* 47 N. Y., 360-366.

Woerner, Adm'r., Sec. 356.

Williams's Ex'rs, 1776.

"Although a judgment (for services) is conclusive against the defendant (executor individually) it has not that effect against the estate or those beneficially interested in it. Anyone interested in the estate may appear in the Court having in charge the settlement of the administration account and oppose the allowance of any credit claimed for counsel fees paid, on the ground that the services were unnecessary or became necessary from the wrongful act or neglect of the representative or that the amount paid was unreasonable. The rule is that the administrator can be allowed credit only for counsel fees which he has actually paid and no more than is reasonable compensation for the services rendered to the estate, no matter what the administrator may have actually paid or contracted to pay; and the burden is on him to prove the necessity and value of the services."

Thomas v. *Moore,* 39 N. E., 803-804.

Woerner Adm'r. Sec. 515.

"So that a judgment against the representative for such services will be nothing against the estate he represents nor the persons interested in it. (*ib.*)

"The general rule is that an executor can make no contract which shall bind the estate of his testator by a new promise. If he borrow money for the purposes of the estate and devote it to the payment of the debts due, if he contract for services valuable and important to it which are rendered, he only is liable therefor,

and it will be for the probate court to determine whether he shall be allowed in his accounts compensation for the liability which he has incurred."

Kelly v. *Kelly,* U. S. Cir. Ct. (S. D. Ohio), 84 Fed., 420-425.

Citing *Kingman* v. *Soule,* 132 Mass., 285.

Thomas v. *Moore,* 39 N. E., 803.

"Executors and administrators even when contracting for matters necessary to the execution of their trusts do not bind the estate they represent, but are individually liable on such contracts; suits against them must be personal and the judgment is de bonis prop. and not de bonis test."

Citing *Vanderveen* v. *Ware,* 69 Ala., 607.

"The representative has no power to charge the assets in his hands by contracts originating with himself, nor can any other person reach the assets for claims originating since the death of the decedent by suit against the representative as such; for such contracts and claims the remedy is against the executor or administrator in his individual capacity."

Judge Daniel in *Executor* v. *Fitzhugh,* 11 Grat., 300.

Citing, with approval, *Lovell* v. *Field,* 5 Vt., 218.

"The administrator cannot bind the estate for goods furnished for the benefit of the estate.

The promise is his own and he is personally liable. He may make it on the credit of the estate in his hands, but whether he has a right to pay out the same depends on its receiving the sanction of the Probate Court."

Citing *Banking Company* v. *Moorehead*, 116 N. C., 410.

21 S. E., 190.

"Where an executor executes a note in his representative capacity for money borrowed and used for the purpose of paying the debts of the testator, the estate is not liable, but the executor is personally liable therefor, and this is so notwithstanding the fact that the lender knows for what purpose the money was borrowed and how it was used. In such case the executor takes the risk of being reimbursed the amount of the note out of the assets of the estate upon the final accounting."

Kelley v. *Kelley*, 84 Fed., 420.

These citations are made, it is true, from decisions of courts of other States, but it is believed that they state the general law on the subject, and, besides, they cite and are cited in the New Jersey cases following:

"The leading question presented by the appeal is, as to the rights of creditors of a business carried on under a will. It is manifest that, in this case, the testator designed that his brewery business should be continued after his decease, by his executors, on behalf of his

estate, under the management of his son John. John was to receive a specified compensation for his services, but the profits were to go to the executors, who were also empowered under certain circumstances to put an end to the trade. In such cases the general rule is, that the executors are personally liable for the debts contracted. (Citing *Owen* v. *Delamere,* L. R. (15 Eq.), 134; *Wightman* v. *Townroe,* 1 Man. & Sel., 412; *Labouchere* v. *Tupper,* 11 Moore P. C., 198.) But for what they do in obedience to their trust, they are entitled in equity to be indemnified out of the property lawfully embarked in the business, and from this title to indemnity springs an equitable right of the creditors to resort to the same fund for payment, when their remedy against the executors is unavailing." (Citing Ex Parte *Garland,* 10 Ves., 110.)

Laible v. *Ferry,* 32 N. J. Eq., 791 at 795.

"The important and difficult question in most controversies of this nature relates to the amount of the testator's estate which ought to be considered as embarked in the business." (*ib.,* p. 796).

Wild v. *Davenport,* 48 N. J. L., 129 at 136-137.

"The proceeds of the business constitute a fund in the hands of the executors, as trustees, for the payment of creditors as *cestuis que* trust; and, therefore, a court of equity would pursue those funds and reclaim them from any one whose title did not depend upon an innocent purchase for value."

Laible v. *Ferry,* 32 N. J. Eq., 791 at 801.

It is, therefore, contended that any executory contract which the executrix made for the continuance of the business of the estate was not binding upon the estate, but only bound the executrix personally, subject only to such allowance therefor upon the settlement of her accounts as would be deemed reasonable by the Probate Court, and in order to get such allowance it would plainly be necessary to account. That the executrix is dead would not prevent an accounting being made, because the present complainant was in sole charge of the business from the beginning of the agreement and before, down to the present time. He kept all the books and was familiar with the matters entered thereon, and the burden is on him to show by his accounting that the compensation which he claimed from the executrix was fair.

When an executor has employed assistance to perform the duties in a business which properly should be performed by himself, he should be made to pay personally therefor or have the amount thereof considered and deducted in settling his commissions.

> "The 7th ground of objection is that the Court has allowed for the salary of Anthony Dey, Jr., Agent of the Executors in the business of the estate. It is enough to say on this head that it appears that the fact that the salary was paid out of the estate to this agent was taken into account in fixing the amount of the commissions of the executors. The settlement of the estate began in 1859. The account was filed in 1880, so it appears that 21 years or thereabouts elapsed from the beginning of

the settlement of the estate until its termination. For the compensation of the agent $4,200.00 in all was allowed; in addition whereto commissions to the amount of only $2,288.06 were allowed to the executors. * * * Executors were entitled to commissions on about $160,000; the commissions on which, at 5%, would be about $8,000. The salary of the agent and commissions allowed are less than $6,500.00 altogether."

Deyr Codman 39 Eq. 258-264

It is the duty of an executor running a business to account for the profits and not dispose of them otherwise than in the regular channels of distribution. No case in New Jersey appears, nor elsewhere so far as I have been able to discover, where an executor was permitted to dispose of the profits of a business in exchange for services rendered in the business. The only case that I have found where the question was in any way litigated was that of *Danielwitz* v. *Sheppard,* 62 Calf. 339, in which case an agreement was made by the administratrix and the heir to give a broker all that he received over a certain sum for property of the decedent sold by him. He obtained an advance of $7,500.00 and brought suit for this amount against Ann Sheppard, who had made an agreement with him in writing as administratrix and Jennie Sheppard as heir of the estate, styling them both heirs. The Court in deciding the case against the claim said:

"Even if agreement be treated as the individual contract of Ann and Jennie Sheppard, it is invalid. Neither of them had any power so to dispose of the proceeds of sale of the real

property of the deceased. The property could only be sold in the manner pointed out by the Statute, and all the money derived from its sale became assets of the estate, and subject to disposition contemplated by the terms of the agreement sought to be enforced in this action of a portion of those proceeds, is unauthorized by the provision of the Statute and contrary to the policy of the law."

The Statute referred to does not prohibit the method of compensation by a share of the profits, but merely directs that the proceeds be accounted for.

There are two (2) cases in New Jersey, however, which bear directly on the duties of an Executor or Administrator in conducting business: One is in re *Merchant's,* 39 N. J. Eq. 506, affirmed on Appeal 41, N. J. Eq. 341, and the other is the case of *Gilligan* v. *Daly,* decided by Vice-Chancellor Emery in 1911, and reported in Atl. Rep. 994.

In Merchant's case it was held that administrators should account for the net profits made from the sale of milk in running a milk business for the time during which the business was carried on with the property of the estate, after taking out Letters of Administration.

In the case of *Gilligan* v. *Daly,* an executor conducted an undertaking business for the benefit of the estate but without any authority therefor in the will. All the children were infants during the time that such business was being run. The executor himself advanced money necessary to pay current bills and himself supervised the business. The

Court refused to make him an allowance for compensation for services in carrying on the business because he had not been able to show that the estate had benefited by his services; restricting his allowance merely to his commissions upon the valuation of the estate as originally inventoried. The law is set out very fully as to the compensation of executors and trustees running business under authority of the will and also running the business without such authority, and it was held in this case that inasmuch as the children concerned were all infants that the business had been run without authority. In the case it is said regarding the continuance, at page 996:

> "In carrying on the business the executor clearly acted without authority, not only because of the general rule relating to the administration of estates, but also because all the legatees were infants incapable of consenting to the continuance, and one of them is still an infant. One risk which an executor takes in such continuance of business is that the estate suffer no loss therefrom, and this indemnity against loss extends to loss by reason of running the business as well from * * * payments for services of the executor in carrying it on, or additional expenses in settling his accounts, as from any other cause. Where an executor continues the business of testator under authority of the will, or merely for the purpose of winding up the business, his compensation for this service is included in his commissions as executor, and the basis for fixing commissions is not the gross receipts or expenses of the business but the net income and the amount by which this increases the corpus of the fund,

and cannot include a charge for services in continuing the business."

And he will not be entitled to commissions unless from the net profits of the business there has been an increase in the corpus of the fund. In any case, there must be an accounting to ascertain what the net profits have been and whether a gain or loss has been sustained by the estate. The rule as to the conducting of an unauthorized business is stated to be that the beneficiaries have the option to charge the executor either with the value of the estate and interest or with the amount of the net profits realized from the business, and the beneficiaries have the right to an account of the profits for the purpose of determining this option. It is therein further held that compensation for an executor's services running an unauthorized business may be made as part of the expenses of carrying on the business, provided he can show that there has been no loss but rather a benefit to the estate from such business, the compensation allowed to be deducted from the profits for which he is to account. The case further explaining that while it seems that an executor running a business without authority might thereby be allowed more than an executor who is running it with authority, yet he incurs greater liability by reason of the fact that when he runs an unauthorized business he must absolutely guarantee the estate from liability, and in addition in order to earn compensation, must show that there was a benefit to the estate by reason of the running of the business.

From these provisions it is plain that in conducting the business the executor had no right, first, to make an agreement for compensation which

will be binding upon the estate, and, second, that she had no right to make any agreement disbursing the profits in any way except under order of the Court, and, third, that she had no right to make an agreement for compensation for attending to her duties as supervisor of the business, in advance of the allowance thereof by the Court. But whatever may be said about the conditions under which the business was operated before the death of the executrix of Peter M. Mullin's will, the Complainant in taking upon himself the burden of continuing the business as administrator with the will annexed, was bound by all the rules stated in the preceding cases and could in nowise claim any benefit from the contract made, as alleged, with the executrix in her lifetime. Therefore, before being entitled to any compnsation for running the business, he must account in order to show whether the estate has received any benefit from the continuance of the business, and if it has received such benefit, what, under the circumstances, should be his compensation.

Any agreement made with the former executrix, of course, could not bind any of the infants because of their non-age, nor any of the adult parties in interest on account of the fact that they were not aware of it. Further, it must not be lost sight of that Joseph J. Mullin renounced his right as Executor when William F. Mullin was appointed as administrator with the will annexed, upon an express understanding with him that he would run the business for the benefit of the estate and keep and maintain a home for the children (p. 96 and 97), and no arrangement whatever was made whereby the administrator should be exempt from accounting for his transactions as in ordinary cases.

It must be remembered, moreover, that the Executor in this case did not support and maintain the family from the business. He admits that as early as Eighteen hundred ninety six and really back as far as the time his father died in Eighteen hundred ninety-one each one of the family was entitled to a share in the estate, amounting to $3,750.00. This sum, if invested at 5%, would bring an income of $187.50 a year. It is undenied that the Complainant either used this money in the business or collected the interest thereon when invested and applied the proceeds to general purposes. Spending as he says he did, $500.00 a year for each of the children, he must have included therein the income from their shares in the estate of Peter M. Mullin, and therefore should be charged with the amount of the income as against any expenditure which he claims to have made.

Moreover, the business has been conducted in property belonging to the estate, which was worth at least $50.00 per month, and no rental has been paid therefor, nor has rent been paid for the house of the estate occupied by the Complainant. These items also should be charged against him upon any estimate of the amounts spent by him in maintaining the children as he claims.

If it be understood that the administrator was running the business under the authority of the will, he would be entitled to no compensation therefor, beyond the statutory commissions computed on the net increase of the estate therefrom. (See *Gilligan* v. *Daly*, 80 Atl. Rep. 994.)

Releases were given to Annie E. Mullin, executrix, by William F. Mullin, Joseph L. Mullin and Grace

Coburn, and to William F. Mullin, administrator, by James S. Mullin and Isabella Mulvihill. On an accounting of the busines, it is insisted that these releases were not intended to cut off any rights the releasors had therein, and that although the releases appear to be absolute on their face, they should not be taken as cutting off the releasors from their interest in the business of the estate of Peter M. Mullin, now accounted for by the administrator with the will annexed.

The consideration of each release was stated to be Thirty-seven Hundred and Fifty Dollars ($3750.00), and this amount was arrived at by taking all the personal property available at the time of Peter Mullin's death, together with such earnings from the business as accrued up to the year 1896, when the settlement was first reached, and excluding the value of the Lafayette Street homestead, which together produced about Thirty Thousand Dollars ($30,000.00), and this divided up in eight parts, made a share of Thirty-seven Hundred and Fifty Dollars each.

The only testimony on the subject of what went to make up the estimate was given by William F. Mullin, the administrator, who testified that he himself made the estimate and knew exactly what it contained.

See testimony of William F. Mullin, before Vice-Chancellor Stevens, June 7, 1912, at pages 18-19.

Q. Was that the time when they made this inventory of the value of the business, etc.?

A. Yes, sir.

Q. And at that time it was figured thirty odd thousand dollars?

A. Something like that, yes.

Q. That was outside the value of the business?

A. Didn't consider the value of the business at that time at all.

Q. But you said, I think, that it considered the value of the real estate?

A. Yes.

Q. (By the Court). Did you put it in the inventory; you say you took an inventory, did you assign any value to the business in that inventory?

A. No.

Q. (By the Court). The inventory is not in existence?

A. No.

Q. That was a verbal arrangement between you?

The Court: Well, the inventory itself must have been in writing.

Mr. Lum: No inventory was ever filed.

The Court: No, but there were figures.

A. I substituted figures, yes.

The Court: And those figures of course were on paper.

Mr. Lum: Undoubtedly, but we haven't the paper now.

The Court: As I understand the witness they did not figure in the sum total the value of this business.

Mr. Lum: No, did not.

A. No.

Q. As a result of that you figured that each child was entitled to thirty-seven hundred and fifty dollars?

A. In that appraisement, at that time the money of my father's death until that time was in that adjustment.

A. (By the Court): Saved out of the business?

It further appeared that in three of the releases their interest in the homestead had been excepted, while the remainder of the releases did not make such exception, and Willam F. Mullin stated in regard to that, under cross-examination, pages 24 to 26, on June 7, 1912:

Q. Now, if it were true that you included the value of the real estate in that estimate, why did you in signing the release of your interest exclude the real estate?

A. I didn't remember that that was there until we noticed it in a later release, and I don't remember just now whether Mr. Fred Lum was alive at that time or not, but it wasn't put in the other releases for the reason that it had to be part of that estimate.

Q. Why did you set forth in your bill of complaint that it was later discovered that the estate would not be sufficient to make three thousand seven hundred and fifty dollars, without including the real estate?

A. The fact that that condition existed possibly is the reason.

Q. You said you later discovered it, it was later discovered?

A. Yes.

Q. It was not discovered until after you had

released, reserving the real estate, and your brother Joseph had released reserving his interest in the real estate, and your sister Grace had released reserving her interest in the real estate, it was not discovered until after your mother died, was it?

A. I don't believe it was; I never claimed my interest in the estate because I never expected to get it, and understood I had released my right to that portion of the estate.

Q. The matter was fresh in your mind at that time, and if the real estate were included in your release or in your estimate, why should you not have released the real estate, too?

A. I certainly should have and intended that I should, expected that I did.

Q. And yet Mr. Lum drew the releases, didn't he?

A. Yes.

Q. He was present when the estimate was made?

A. Oh, yes.

Q. You may be wrong about saying that the value of the real estate was included in that, may you not?

A. I am positively not, because there was nobody else but myself submitted the list of the holdings of the estate; from time to time we had invested those moneys, some of them on the advice of my uncle Mike, we bought water bonds on his advice with some of the proceeds from my father's death, and those and other things which I mentioned were enumerated in the list supplied by me; I was taking care of those things; my mother didn't know what they were, she hadn't them in charge, she knew because I reported to

her, but I was acting for her and I took charge of those things, and I submitted the list, and I remember distinctly that part of the appraisement was the valuation of the Lafayette Street house.

Q. Can you tell me in what year it was that you and Mr. Lum and your uncle, Michael Mullin, and your mother met and figured up the value of the estate?

A. At the time that we appraised it, shortly before the first releases were signed there, in May of 1896, if I am correct, or 1906, 1896.

Whatever might be said about the inclusion of the homestead in the estimate upon which the shares and releases were based, there can be no question that the business and its income were not so included, and that there was no intention to include the question of the business in any such release.

The wording of the releases is all alike, as follows:

> "Do hereby acknowledge the receipt from Annie E. Mullin, sole acting executrix of the last will and testament of Peter M. Mullin, late of the said City, deceased (William F. Mullin, administrator, with the will annexed of Peter M. Mullin, &c.) of the sum of Three Thousand Seven Hundred and Fifty Dollars ($3,750) in full discharge and satisfaction of all my right, share and interest of every name and nature in the estate of said Peter M. Mullin, deceased; and in consideration thereof, I have released and discharged, and do by these presents release and forever discharge, the said

Annie E. Mullin, sole acting executrix as aforesaid, and also the estate of said Peter M. Mullin, deceased, of and from any and all further or other accounting or reckoning in respect to my interest in said estate, and of and from any and all distributive share, debts, dues, claims and demands, which I ever had, now have, or hereafter can, shall or may have against said estate *by reason of anything existing at the date hereof* (excepting only my share or interest in the house and premises situate and known as No. 91 Lafayette Street, in said City."

The clause in brackets is only in the first three releases. The release of James and Isabella Mullin have no such reservation.

"A release, though general in its terms, will be limited to those things contemplated by the parties at the time it was made, and will not be construed to include particular things then unknown and uncontemplated. The circumstances surrounding the parties at the time the release was made, should be kept in view as well as the purpose for which it was executed."

20 Am. & Eng. Enc. of Law, First Edition, p. 745.

"A release operates upon matters and things mentioned in it which existed at the time of its execution and delivery, and will not be construed out of its general terms to defeat a cause of action arising afterward." *ib.*

The case of *Church of Holy Com'n* vs. *Paterson, &c., R. R. Co.*, 68 N. J. Law, 399, and the same case

in 66 N. J. Law, page 218, lays down the doctrine that a receipt purporting to be "in full settlement and discharge of all damages done by the Railroad Co. against our church," is not a bar to an action for damages to be sustained thereafter. And the Court in arriving at this conclusion considers the language of the receipt itself and also the negotiations that preceded the giving of it.

See case, 66 N. J. Law, at p. 233. To the same effect is the same case, 68 N. J. Law, p. 399 at 403 and 4 (both in the Court of Errors and Appeals).

The cases in New Jersey on the construction of releases are extremely limited. The only one besides that I have been able to find bearing on this question is *Cooper* vs. *Cooper*, 1 Stockton, p. 566.

In that case a bill was filed against a guardian by his ward, for an accounting. The guardian answered by setting up a partition agreement and the exchange of mutual releases. The Court held that the release to the defendant as guardian did not cover the claim in question in the following language, at page 569:

> "The release does not embrace technically, nor in its spirit, the claim in question. There is nothing in the pleadings or proofs to show that it was the intention of the parties to the release that it should embrace any other claims in any other right, than the legal technical construction that the instrument warrants. There is no allegation in the answer that it was the understanding or intention of the parties or of the defendant himself that the release should embrace this claim. The release is set

up as a *legal* defense, and the defendant claims no benefit from it, except what upon the face of it the strict rule of law will give him."

I think, however, it is plainly apparent from these cases that the intention of the parties who make a release is to be ascertained in determining what the release is intended to include.

Cases from other states and from the United States Courts hold that the intention of the parties will govern in all cases, and that a release will not operate on demands subsequently accruing, or which were not contemplated by the parties in making the release.

"A demand which exists at the time a release is given is barred; if it did not, but originated then or subsequently, it is not."

Drake vs. *Stocks*, 45 Conn. 96 at 99.

"It was the claims for these injuries and these only that this release discharged the company from. The injury now complained of was then unknown to both parties, and their settlement was without reference to it. A disregard of the rule would work manifest injustice and impose upon the defendant in error a release he did not intend to make."

Union & Pacific Railway vs. *Artist*, 60 Federal Rep. 365 at 367. (U. S. District Court of Appeals.)

The case of *Van Slyke* vs. *Van Slyke* (Court of Err. & App.) 80 Law, 382, was a suit against an

executrix of the maker of a note to recover the amount due thereon from funds in her hands remaining after the settlement of the estate. A general release was pleaded, which contained a clause relieving the executors "from rendering any accounting for any moneys or property heretofore received by them as such executors, now in hand, or to be received under the agreement of Nov. 27, 1905, hereinbefore referred to especially relinquishing my life interest therein as by the terms of the will, &c."

The Court said at p. 386:

> "The only possible ground on which a direction of a verdict for the defendant could be rested, in view of the evidence, is that the release operated as a bar to any claim on the note. We think this was erroneous. The release does not mention the note, either expressly or by implication, and consequently the only theory on which it can be deemed to affect it is that the general words of release are broad enough to cover it, and are not limited or qualified by other language of the instrument, so as to be deprived of their full, natural force."

The case goes on further to say:

> "In construing a release as in the case of any other writing, all parts of it are to be taken together."
>
> Citing 34 Cyc. 1076.

And then goes on to approve the rule, stated by Chief Justice Shaw in *Rich* vs. *Lord*, 18 Pick. 325:

"It is a general rule in construing releases * * * that general words, although the most broad and comprehensive, are to be limited to particular demands where it manifestly appears by the consideration, by the recital, by the nature and circumstances of the several demands to one or more of which it is proposed to apply the release that it was so intended to be limited by the parties. And for the purpose of ascertaining that intent every part of the instrument is to be considered; as where general words of release are immediately connected with the proviso restraining their operation."

The Court then proceeded to examine the agreement referred to in the release, and then continued as follows:

"In the light of the compromise agreement, and especially of the clause just quoted, and of the preamble to the release, the conclusion is inevitable that the release must be regarded as restricted to claims of Evert Van Slyke intended to be disposed of by the agreement, of which claims the note sued on was not one."

This case is authority for the proposition that a release, though general in its terms, may be restricted in its effect if that appears to have been the intention of the parties; and while the intention of the parties in this instance is gathered from the written documents (the release and agreement), yet there seems to be no good reason where the intent of the parties, as in the release to the Mullin executors, to exempt certain property from the effect of the release is plain that this intent

should not prevail, even though it is gathered from undoubted testimony outside the paper writing.

This case cites with approval the doctrine stated in *Lyman* vs. *Clark,* 9 Mass. 235, in which a general release given to an executor in consideration of payment of certain particular moneys, part of the estate, was held not a bar to a suit for a legacy to which the party in interest was entitled, notwithstanding such payment.

In the case of *Lyman* vs. *Clark,* 9 Mass. 234, an action was against the executor for a legacy of Fifty Pounds, left in a will, and he set up a general release, which recited that each one of the releasors

> "have this day received of Eleazor Clark, Executor of the last will and testament of Caleb Clark, deceased, $25.00, each of us as our proportion to the estate that was left the said Hannah Clark, Jr., deceased, by the said Caleb Clark, Esquire, deceased, in his last will and testament, and we do, each one for ourselves, our executors, administrators and assigns, hereby acquit and discharge the said Eleazor Clark, from all demands, we have or may have on him by virtue of said Caleb's last will. In testimony whereof, &c."

The Court said:

> "The words used in this release ought not to be extended beyond the consideration. Otherwise we should make a release for the parties which they never intended or contemplated. * * * The plain meaning of this is, that $25.00 had been paid to each one of the releas-

> ors. * * * This was obviously the cause and occasion of making the release, and it cannot be understood as intimated to have any other operation *than to discharge the executor from that particular demand.* * * * The claimants are entitled to recover the legacy bequeathed to the wife."

In the case of *Butcher* vs. *Butcher,* 1 Bosanquet & Puller (N. R.), 113, cited in *Lyman* vs. *Clark,* a general release, given to the obligor in a bond of indemnity, after the bond had been given to secure a debt of Two Thousand Pounds, which release cited various other loans to the obligor and continued:

> "And of and from all and every other sum or sums of money, claims and demands thereby secured, or intended so to be, and all other sum or sums of money, claims and demands, whatsoever * * * and also all bills, etc., debts, counts and reckonings, etc., against the said defendant, which the said E. B. then had, or might any time thereafter have, on account of the said several sums of money having been so advanced and lent, and the said bonds and receipts having been respectively given, or on account of any other sum or sums of money lent or advanced by her to said defendant, or for or on account of any other matter, cause or thing, whatsoever, from the beginning of the world to the day of the date of these presents."

was held by the Court not to extend to the indemnity bond in question previously given, notwithstanding the generality of the releasing clause.

It is true that the instruments in those cases contained particular references as well as a gen-

eral clause, and that they were construed as restricted to the particular reference set out in the release; it is likewise true that in the Mullin releases in question, there are no particular references, but merely the statement of having received a certain sum of money, as the share in the estate of Peter Mullin in full discharge and satisfaction of all the releasor's right, share and interest of every name and nature in the estate of said Peter M. Mullin, deceased, and then follows the general release clause to the executrix (and administrator) and to the estate, of every claim and demand, distributive share, etc., which the releasors "ever had, now have, or hereafter can, shall or may have against said estate, by reason of *anything existing at the date hereof.*"

But all the cases hold, and particularly the case of *Lyman* vs. *Clark,* that no construction should be placed upon an instrument which would make a release for the parties different from what they had contemplated or intended, and if we are guided by the evidence that appears in the case, it must be plain that it was not the intention of any one of the releasors to in any way affect the business carried on by the estate, and even though it may be necessary to resort to parol evidence to make clear the intention of the parties in that regard.

But it seems to be perfectly clear that the releases were restricted to any right or interest which existed at the date of the releases. At the time of the first releases the executrix was still living, and the business was run for the benefit of the widow and the children, first under a special agreement, by which, after providing such support, the profits were divided up, three-sixths to William F. Mullin,

two-sixths to Joseph L. Mullin, and one-sixth to the estate of Peter M. Mullin; there was none who could say in advance of an accounting and settlement, whether the business would be an asset or a liability of the estate. How, therefore, in advance of a settlement and accounting of the business, can a general release be held to apply to such business, any proceeds from which were not in existence, upon which the release could act at the time of its execution? The heirs derived an interest in the business only in case there were a tangible result from the operation thereof, and until that result appeared a release, general in its terms, and without mentioning the business, cannot be held to apply to it, as a release will be limited to those matters and things in existence at the time of releasing and not those subsequently brought into being.

If, however, it be said that this is a general release, and must be held to include the entire interest of the releasor in the estate of Peter Mullin with the share in the business because the intention to restrict the release cannot be shown by parol, then it is a case where both parties to the release were mistaken, and a general release given, when only one restrictive in character was intended, and therefore the instrument, upon the presentation of the evidence in Court, could be reformed to carry out the intentions of the parties, and in such an issue, evidence of the preliminary negotiations of the parties would be competent.

See *Kirchner* v. *New Home Mch. Co.*, N. Y. Ct. of App., October 4, 1892, 32 N. E. Rep. 1104, in which case a release, general in its terms, was held to cut off a claim of the parties not mentioned therein,

although their intention was that such claim should not be included. The Court said:

> "It does not follow that this release is conclusive or unavoidable. * * * If the plaintiff can show that by mutual mistake of the parties, or by what is its equivalent, a mistake on his part and fraud on the part of his adversary, the present cause of action is embraced in the release contrary to the intention of the parties or contrary to his intention, in case fraud is proven, he is entitled to an instruction to the jury to the effect that the release does not bar his right to recover. * * * Generally speaking, whatever proofs would be regarded as sufficient to enable the plaintiff to maintain an action for the reformation of the release, so as to except from its provisions the demand in suit, would be available to him in this action by way of avoidance of its terms, and upon such an issue evidence of preliminary negotiations of the parties is important."
>
> See also *Weils* v. *Yates*, 44 N. Y. (App.) 525.
>
> *Maher* v. *Hibernia Ins. Co.*, 67 N. Y. (App.) 22, Sickles, 283 at 291, 292.

The proof is clear and convincing that the value of the interest in the business was not considered in estimating the amount of the share of each child in the estate, and that, therefore, a release would be without consideration if it cut off the interest of the child in the business, and further that the parties in giving and receiving a general release under the circumstances, were under a mistake as to the effect thereof, and the instrument should be reformed to comply with the intentions of the parties.

See *Green* v. *Stone* (Er. & App.) 9 Dick, 54 Eq. 387.

The Court remarked in deciding the case in Conclusions, filed Oct. 4, 1912: "Mr. Mullin says that in the four years between his father's death and the partial distribution of the assets he figured out that the family accumulated $7500, after paying all household expenses. The shows a very prosperous state of things. It demonstrates that in 1896 the business was valuable. It has been growing ever since. In this situation is it likely that the *family would have understandingly relinquished all interest in its good will?*"

If, however, it be the fact that this general release must operate as a complete bar against the releasors, to share in the business accounting, yet the administrator must account for the full amount of the business proceeds, and the remaining children, who have not released their share, will participate in the full accounting to the exclusion of the others, who have released.

The case particularly in point, supporting this contention, is *Crum* v. *O'Rear*, decided in the Supreme Ct. of Illinois, March 31, 1890, 24 N. E. Rep. 956, in which case it is held that where a man made a contract with his wife (as permitted by the Ill. law) for a sufficient consideration by which he released and relinquished all the interests which he would be entitled to claim in the real and personal estate of his wife, in case he should survive her, and his wife having predeceased him, a controversy arose between the complainant, the surviving husband, who, but for said contract, would have been one of the heirs of the intestate, and her

next of kin, who, if there had been no surviving husband, would have been her sole heirs. The Court said at page 961:

> "The point made seems to be that whether the contract is to be regarded as having been made with the intestate herself for her own benefit, or with and for the benefit of her heirs, it must be deemed to inure as completely to the benefit of the complainant as of the other heirs at law. It is claimed that, if the contract vested property rights in the intestate herself, those rights passed by descent to the complainant in the portion in which he was entitled by law to inherit her estate, and that, if it is to be enforced as a contract running to her heirs generally, he, as one of the heirs, is entitled to its benefits. To this view we are unable to yield our assent. Such interpretation of the contract would render it simply nugatory. A relinquishment of an heir to his ancestor of the former's expected inheritance is, in its nature, a relinquishment in favor of the other heirs, whether they are mentioned in the instrument by which the relinquishment is made or not; and after the death of the ancestor, such relinquishment will be enforced in their favor. Thus, in *Bishop* v. *Davenport,* 58 Ill. 105, two of several children and heirs expectant executed to their father instruments acknowledging the receipt from him of certain sums of money in full of their shares of his estate, and two others executed receipts for similar sums of money, in which they expressly released all claim to any share of his estate. In none of these instruments was any reference made to the other heirs, nor did they

purport to be made for the benefit of the other heirs. It was held that said moneys were not received by way of advancement, but that said instruments would be enforced as releases by heirs of their expectancies; and on bill by the other heirs for partition, it was held that they were entitled to the entire estate, to the exclusion of those who had executed the releases. So in *Kershaw* v. *Kershaw,* 102 Ill., 307, a father conveyed to one of his sons a tract of land, and inserted in the deed a clause reciting that said conveyance was made to his son, and accepted by him, as his full and entire share of his father's estate; and, although the other heirs were not mentioned in the deed, it was held, in proceedings for partition of the estate, after the death of their father, to operate in favor of the other heirs, so as to vest in them the entire estate, to the exclusion of the one who, by accepting the deed, released his expectancy in the said estate.

The true view would seem to be that a release by an heir of his expectancy operates not as a transfer or conveyance to either the ancestor or the other heirs of the estate, which would descend to him upon the death of the ancestor, but rather as an extinguishment of his right to take any estate by descent. It obliterates the right to inherit to an extent substantially equivalent to its obliteration by the death of an heir expectant without issue before the death of the ancestor. The other heirs are thereby placed in the same condition in which they would have been if such right had never existed; and they therefore inherit the entire estate, not upon the theory of an

> assignment to them of the estate in expectancy of the heir executing the release, but upon the theory of an extinguishment or obliteration of that estate."

The question of the releases, therefore, as affecting the obligation of the administrator to account in full would seem to be of no particular consequence.

A further case on question of releases is *Tatman* v. *Phila. & C. R. R. Co.*, Del. Chancery, 1913, 85 At. Rep., 716, wherein it was held:

> "Where the release given states the particular injuries compensated for, and there were other injuries unknown to both parties to the release, there is such a mistake of fact as will invalidate the release and equity will give relief against the use of the release to bar the claim for damages for the injury unknown at the time of the release. This principle would apply even if there were in addition general language following the description of specific injuries, for the general language would be held to refer to the specific injuries."

It is respectfully submitted that the releases given in this case were not effectual to bar the right of the releasors to share in the accounting of the business proceeds.

But whatever may be the effect of the agreement alleged to have been made for compensation during the lifetime of the executrix, it is plain that it did not extend beyond her life, but that, on the contrary, the complainant when he qualified as administrator with the will annexed took upon himself the entire burden as a trustee, and as such is liable to account for the business done during the time from the date of such administering, and that is all that these defendants are claiming, because they are not seeking any account for the period during their mother's life, or any return of excessive compensation paid to complainant by his mother as testified to by him during that period.

It is contended that he should not be required to account, because:

1. The alleged agreement for compensation constituted a sale of the business to him; or,

2. If it did not constitute a sale, yet he is entitled to all the profits either because of the agreement, or because all the profits are due to his skill and efforts in carrying on the business.

Stevens, V. C., thus disposes of the first contention at p. 134 of the case, line 8-18:

> "As complainant states the agreement in his bill, he was only to have the profits remaining after the support of his mother and the infant children. Counsel argues that the agreement made with the widow was really a sale. The argument is untenable, first, because no disposition was made of the corpus; second, because the agreement as William states it, was such as the executrix could not lawfully have

made; for net earnings and corpus were to go, under the will, to *all* the children—not merely to those who were under twenty-one."

I think this so clearly and correctly lays down the law of the case on this point that it needs no further argument; and, indeed, the complainant in effect concedes the correctness of this legal finding by arguing that although the act of the executrix may have been illegal if actually done as alleged, yet William nevertheless got a good title to the business as an innocent purchaser.

As to the second point: William F. Mullin continued the business after his appointment as administrator with the will annexed right up to the time of the sale thereof under order of the Court in January, 1913, under the name "Estate of Peter M. Mullin." The business had been in operation in the same place since 1870, by his father, Peter M. Mullin, up to the time of his death in November, 1891, and by the executrix up to the time of her death in August, 1900, or about thirty years before William qualified. The business had been successful during Peter Mullin's time, and, it is claimed, still more successful during the time of the executrix up to 1900 when she died. It is idle to assume that a business carried on with success at a certain place during thirty years had no good will; and that its value as an asset of the estate is measured by the few caskets carried in stock, the candlesticks, embalming board, rug and other funeral paraphernalia, together with the horse and wagon used for the purpose of the business. An undertaking business above all others is dependent upon good will, because families having cast upon them the solemn duty of laying away their dead almost invariably

turn to the undertaker whom they know and respect, and more especially if he has previously performed like services in their family or close acquaintanceship. A reference to the printed case will show that Peter M. Mullin was a man to command such respect and regard as would induce persons to retain him for burials and that his connection, political, religious and social, gave him an advantage in business of this character far beyond the average; and his success shows that he made good use of his opportunities (pp. 154-163).

His accidental death, moreover, and the fact that he left a large family of dependent children were likely to and did turn persons to deal with his estate more constantly than ever, which is shown by an increase in business after his death.

William F. Mullin was a boy of seventeen or eighteen years. Up to that time he had not had entire charge of arrangements for funerals except in rare instances when his father was away (p. 65). We can readily understand that while a boy of seventeen might be very capable, the general public would not feel so sure of him until he had acquired more mature years; and in this case it appears that his uncle, Joseph J. Mullin, took his father's place singing in St. James's choir in order to keep up that end of the business, and constantly advised with his mother and kept his cautionary eyes on affairs (pp. 92-100).

The Vice-Chancellor at p. 133, line 35, decides that there was a valuable good will to be considered in the following words:

"Mr. Mullin says that in the four years between his father's death and the partial dis-

tribution of the assets, he figured out that the family accumulated $7500, after paying all household expenses. This shows a very prosperous state of things. It demonstrates that in 1896 the business was valuable. It has been growing ever since. In this situation, is it likely that the family would have understandingly relinquished all interest in its good will?"

In *Williitt* v. *Blanford,* 1 Hare, 253; 66 Eng. Rep. Reprint, p. 1027, good will is defined to be "Connections leading 'to renewals of contracts with old customers.'" And it further said in that case, where the whole or the substantial part of the trade consists in this good will, it is the identical source of profit which operates both before and after dissolution, and in such a case "It would be difficult to suggest a principle upon which the estate of the deceased partner should be refused the same proportion of the profits which he enjoyed in his lifetime."

It is further said in the case:

"If, on the other hand, the skill of an individual without capital had been exercised as a partner in a concern until it had created a connection and good will, and upon his death his surviving partner, instead of giving to the estate of the deceased the benefit of the good will by a sale of the concern, should think proper to carry on the business for his own benefit until the connection and good will were lost, it would not be difficult to justify a decree which in such a case should declare the estate of the deceased entitled to share any profits made after his death."

I do not believe, however, that this case or the other cases cited in it constitute authority for the statement in *Gilligan* v. *Daly* that the profits with which the administrator is chargeable should include only such as result from the employment of testator's estate as capital, and due allowance should be made for other elements creating the profits, such as the business skill and credit of the executor or administrator in carrying it on, because these were cases of partnerships where the surviving partner carried on the business, and had a right by contract to take to himself any profit naturally accruing on his share. But where an executor or administrator merely continues a business without having put any of his own capital therein, he will, if that is most for the benefit of the estate, be held to be continuing the business upon its former footing; that is entirely for the benefit of the parties interested in the estate, who must receive all the profits accruing therefrom, subject only to the allowance of such commissions as he is entitled to; and he cannot be allowed to pay himself in advance of the allowance thereof by the Court.

The case of *Beard* v. *Beard,* N. Y. Court App., 140 N. Y., 260-264; 31 N. E. Rep., 488, cited by V. C. Emery in *Gilligan* v. *Daly,* is very like the one at bar. The executors had conducted the business under the terms of the will, and had receipts in gross $600,000.00 and net receipts $300,000.00. They had deducted and retained their commissions amounting to $28,000.00 upon the theory that they were entitled to be paid for the gross income. The Court, however, held that they were entitled only to their statutory commissions on the net income, or the amount by which the estate had been increased:

"In the case of such business, the commissions are to be computed on the net income only which came to the corpus of the estate as an increase thereof. If this rule does not in all cases give adequate compensation to the trustees, no great injustice can flow from its operation, as trustees are not obliged to act and thus execute a trust which would be unprofitable or burdensome to them; and that the rule will operate beneficially in most cases and subserve the best public policy cannot be doubted."

If a man runs a business for the benefit of an estate as administrator, it is no special credit to him that he use his best efforts in making a success of it. Certainly he cannot claim legally that by reason of his success, he should be given all the profit which his efforts have realized, any more than any ordinary employee in general lines of business could make such claim. It would be a rule likely to cause great opportunity for fraud which would allow an executor to use the capital of his testator in business, saving the estate harmless only from loss, and giving him all the profits arising by reason of a successful continuance of the trade which had been profitable before he assumed charge.

In a well considered case by the Essex Orphans' Court in re *Will of Hugh Mullin,* 35 N. J. L. J., 43-46, Martin, J., decides that no salary outside of commissions should be allowed executors who continued business of testator, saying:

"No authority is presented which even attempts to support the theory that there is any

difference between a case in which the business is carried on by consent of the parties interested and where the business is carried on by the executors without such consent. It may be the fact that the executors are morally entitled to compensation in excess of that allowed by Sec. 129 (Orphans' Ct. Act) for the services rendered by them for the benefit of the persons interested in carrying on the business; this court, however, cannot allow the executors commissions on income other than net income from the business which represents the net increase of the estate."

The Executor was allowed 4% and the executrix 1% of the increase.

I trust that the court in reading the brief of counsel for complainant-appellant will give no weight to such expressions used therein as "those greedy claimants"; "shifty Joe"; "ingrates" and the like, for which there is no basis whatever in the evidence, but the use of which shows what difficulties we have encountered with complainant and his counsel in carrying this case through the courts.

The gross income for 11 years was admitted after an exhaustive examination of complainant's books to be $277,345.77. The cost of articles sold, of which complainant had kept no record, was estimated by him to be $184,403.24, leaving a gross profit for 11 years of $92,943.53, or a yearly gross profit of $8,449.32. Against this there was a claim of annual expenditures for operating the business of $5,600.00.

The defendants disputed the amount of gross profit and also the annual business expense; and after taking a large amount of testimony, it was

found that upon a comparison of the evidence of William given in court as to the percentage of profit on sales, it differed largely from the estimated profits in the account, being much in excess thereof, and that it was in fact nearer to the amount estimated by J. Constam Audit Co., the accountant for the defendants, namely, $119,310.73 (p. 410). The defendants were fortunate in finding some bills for funeral supplies, caskets, &c., on the estate premises after the sale, and were able to identify those bills with certain accounts on the books for funeral charges to patrons; in this way showing that the profit on caskets instead of being 125% as testified to by the administrator, was in some cases actually as high as 300%; and after the production and identification of these, the complainant was glad enough to admit an additional gross profit of $13,477.59, making in all $106,420.12, with which the defendants contented themselves, as it saved the necessity of going over a great number of exhibits. And that is the sum and substance of the agreement and admission which counsel makes so much of in his brief.

Now the Master refused to allow the administrator his claims for expenditures, wages of two men at $17.00 a week, but did allow $25.00 a week on the claim; also refused allowance for Program and ticket donations, $500 a year; drinks, cigars, dinners, $1,560.00; but did allow the expense of wagon and horse 150 funerals a year at $4.00, $600.00, although it was shown conclusively by the testimony of William himself that he had never included such a charge in his livery bills against the business during the whole time of his management, as shown by Ex. D-20 and D-38, p. 407, and had never paid same to any one. Through an oversight the

following testimony was omitted from the printed case, when counsel eliminated considerable by agreement in order to cut down the bulk:

WILLIAM F. MULLIN Cross-examination, p. 289-90, May 9, 1913:

Q. I show you a bill from William F. Mullin to William F. Mullin, evidently a livery stable bill, dated 3/1/08, totaling $635.90; that was a bill which you will notice was to the Estate for undertaker's expenses for that month, wasn't it?

A. Rendered to the business of William F. Mullin, not rendered to the estate.

Q. Wasn't that the undertaker's bill?

A. That is the undertaker's bill, that is the livery bill, against the business at what was 228 Lafayette Street.

Q. Against the undertaking business?

A. Against the business of William F. Mullin in March, 1908, or January.

Q. When you say William F. Mullin you mean the undertaking business?

A. Yes, sir.

Q. Instead of making it the Estate of Peter

A. Against the business of William F. Mullin?

A. It was William F. Mullin, as I supposed.

Q. The total of that bill was $635.90?

A. Yes.

Q. Do you see in there any entry of any charge for extra wagons?

A. No, sir.

Q. Did you make any charge for extra wagons in that bill, for extra attendance at funerals?

A. Not at that time, no, sir.

Q. Did you before that time?

A. I don't recall that I did.

Q. When did you begin to do so?

A. When I was asked to submit my cost of the maintenance of the business.

Q. That was only here since this proceeding has been begun?

A. Yes, sir.

Q. Then you put in this additional charge for extra horses?

A. Use of vehicles for business purposes, supplied to this business.

Q. And I think you make it, as shown on page 11 of the report of Du Bois & Company, wagon and horse, 150 vehicles per year at $4, $600; in Exhibit D, on the Du Bois Report, page 11.

A. That is a charge of $2 apiece.

Q. You made that charge in those words?

A. Yes.

Q. But nowhere in the bills which you rendered to this business does any such charge appear?

A. It does not in the bill, I don't suppose; it does in the rest.

(Bill dated 3/1/08, William F. Mullin to William F. Mullin, for $630.80, marked Exhibit D-20 for identification), page 297.

See also Bill dated Jan. 2, 1911, Estate of P. M. Mullin to William F. Mullin (Dr. Fashionable Livery & Boarding Stable), marked Exhibit B-38 for identification, page 358. Representing Coach Hire charges for that month, showing no charge for wagon.

Joseph L. Mullin testified at page 312, l. 35, that this was a wrong charge, and that there is no cost to an undertaker from the livery for a horse and

wagon to attend his burials with. Joseph J. Mullin testified at p. 321, that in all his forty years' experience he had never paid for the use of a horse and wagon; that the trade which an undertaker gives to a liveryman is considered sufficient to offset the charge for a wagon, which is used to deliver the box at the cemetery and such errands, and James Mullin testified at page 363, line 25, that such an expense was never incurred.

It is very plain from this that in the transactions of the livery stable business with the undertaking business, William followed the usual custom of the trade and furnished extra wagon without charge on account of the business which he received, and only made the charge as an afterthought when he found he would have to account. Whatever may be said about it, it is certainly a fact that he never disbursed any of the estate funds for that purpose, and he should not be allowed a credit for it in discharging his accou... This matter was argued before the Master and was not waived by the defendants.

It would seem as though this item of expense should be disallowed, or be set off against any other item of expense which the administrator claims to have incurred and was not allowed.

As to the item of Wages for two men at $17.00 per week, it is shown that he retained one man regularly to whom he paid as he alleged $17.00 per week, and had an occasional man from his stable for extra help to whom he would give perhaps fifty cents or a dollar. See Test. J. L. Mullin, p. 312, l. 26; also W. F. Mullin, p. 214, l. 20. But when it is considered that when James Mullin worked for

William more than two years and he was his only regular man, he only paid him $15.00 a week for two months, and after that $16.00 a week (p. 364), it will be seen that an allowance of $17.00 a week for two men during the whole time is unwarranted by the evidence. Besides all that William and Joseph drew while in business together was fifteen dollars a week.

The Master in allowing $25.00 a week was liberal enough.

As to the item Donations, tickets, &c., $500, James Mullin testified at page 363 that the administrator may have spent $300 a year, but that it was taking a chance and could not be shown to be necessary. The Master disallowed this item on the ground that there was no tangible evidence upon which to base it, and no necessity shown for it.

But far more astonishing is his claim for allowance for Dinners, cigars, drinks, &c., $1,560.00 a year, $30.00 a week, refreshment in various places, p. 213, and more than $10.00 a funeral for the average of 150 per year as estimated by him. His own witness, John Mooney, testified that he never found it necessary either to spend money in entertainment of the "boys" coming from funerals, and did not know that it was customary to do so (p. 267). Joseph J. Mullin said it was all wrong, and that in his experience he never had such an expense as drinks and cigars in connection with funerals (p. 320). While Joseph L. Mullin testified, p. 311, that some undertakers entertain people, and that it would cost $30.00 a week if he did a big enough business. James S. Mullin said at p. 362 that about $15.00 a week would be reasonable, but he

did not believe such large expenditures necessary; that he had to spend a few dollars once in a while, but not all the time.

If the court will notice, the administrator claims the following items for advertising the business: Three newspapers, $90.00 a year; Programs, tickets, &c., $500.00; Drinks, cigars, dinners, &c., $1,560.00, making a total of $2,150.00 a year, or about 40% of the whole estimated business expense and 23% of the gross annual profit, about $9,600. There should be convincing evidence indeed for making such an allowance; and even if it were shown to have been spent there is such grave doubt of its necessity, beyond the advertising in three newspapers, that it should not be allowed.

William F. Mullin himself was a total abstainer, and as the Master said, he has not shown that he was under any obligation to make such outlays. If he wished to make a good fellow of himself, it was up to him to pay for it and not charge the business with such expense.

Mr. Mullin thinks he should have received $6,000 a year for his services, and says that he was offered $5,000 a year to sing in comic operas, p. 219-222; but he says on cross-examination, p. 223-224, that he had no assurance that the theatrical people could make good their offer, while in a business like the undertaker business, it depended entirely upon himself to make good. Here vanishes any illusion that his refusing his singing offers was pure self-sacrifice; and I think we may leave the subject where it is so far as it affects the question of salary which he ought to get for managing the business. Assuming that the business expense was $5,600.00

a year and the salary of the manager $5,000.00, it would amount to $10,600.00, or $1,000.00 more than the estimated annual gross income, and the computation would seem to be sufficient answer to any such demand.

Now another computation: Mr. Mullin claims that he spent about $2,000.00 a year for the children. Adding this to $5,600 a year makes $7,600.00, to which if we add $5,000, will make $12,600 a year gross income necessary to meet these expenditures. Somebody must have fallen short, or the income must have been very much more than has appeared so far.

Peter M. Mullin in his lifetime supported his family well, including William, had apparently plenty of money for his own uses, and at his death had a property free and clear to leave to his family worth five thousand dollars, besides business accessories worth at least $1,000, and enough money in bank, $1,600, to pay all his business debts, also book accounts of unascertained value. Besides this during his lifetime he had paid interest on his property mortgage until it was paid off, a few months before his death; he had paid premiums on $5,000 insurance in the Mutual Benefit, and $5,000 insurance in the Benevolent Legion, which must have amounted to a considerable sum. In the lifetime of the widow the family was supported, costing $4,000 a year, the business expenses were paid to about the same amount William testified, as in later years, William and Joseph had fifteen dollars a week each, and there was still $2,100 to be divided up at the breaking of the partnership which had existed less than a year. During William's sole management of the business, with business disbursements of

$5,600 a year and a family expense of, as he claims, $2,000 a year, and without paying any rent, he has but $2,000 a year left, figuring on the basis of $9,600 gross annual income, from which, of course, if he pays himself, there will be nothing as surplus left for division, as in his mother's days, or in his father's time. So he has not done so well as either his father or his mother did, although he claims to have done a much larger business.

Now how has the estate benefited from his management? He claims to have earned a gross income of $9,600.00 a year, and to have paid therefrom, excluding his own salary and the maintenance of the family, $5,600.00 a year, so that there was a net increase to the estate of $4,000 a year, from which, however, he must be paid his allowance. Suppose now he should be paid $6,000 a year, which he thinks he earned, or even $5,000 a year, which he claims he could have gotten eleswhere? It needs no great intellect to discover that the estate would in fact reap no benefit from his services, but would rather go behind from $1,000 to $2,000 a year.

The Master has allowed him one-half the profits which he found to be net, which gives him the sum of $36,776.06, or $3,316 per year, which, deducted from the amount that he claimed as net increase, $4,000, would leave $684 per year for the support of the children, instead of the $2,000 a year which he claimed he spent; and would be paying more than $3,000 a year to realize a net benefit to the estate of less than $700 a year.

I believe that the amount allowed by the Master was entirely too high, and that as upon the statement of William his net income was the difference

between $9,600 a year and $5,600 a year, or $4,000, his allowance should not be more than 25% of this, or $1,000 a year, being about $20.00 a week for his services, $5.00 more than he was getting as a partner in his mother's lifetime.

It may be said that besides the salary, he was getting three-sixths of the profit during that time; but it must be remembered that he is also entitled to one-eighth of the net profit as a child's share in case the court's finding that the releases which he and the others gave did not extend to their interest in the business.

Upon this basis, assuming that the gross income for 11 years is $106,420.12, and the gross business expense for that time is $61,600.00, the net increase to the estate will be $44,820.12, from which if we deduct his allowance, 25%, $11,205.03, will leave for division in the estate $33,615.09, which is $3,160.97 less than the Master found to be due the estate as one half of the net profits. And it goes very far to show that the Master's findings were very close to being reasonable and proper, and should therefore not be disturbed.

It must be further remembered that Mr. Mullin acquired a livery business in 1900, from which he cleared a profit of $70,000, paying therefrom the entire cost of the stable property and equipment (p. 282), and to which business he paid such attention as was necessary (p. 221 and p. 266) and derived profit by renting vehicles to the undertaking business of the estate (p. 215). Besides this he made about $60,000 in buying and selling stocks (p. 374), and all the funds used for these purposes came from the bank account in the National New-

ark Banking Company, which stood in the name of the Estate of Peter Mullin (p. 220-221). The Livery business only was run separately. He said at page 221: "I ran the livery business conclusively as mine individually, of course separate from the other business." It was further shown that he had drawn out of the account moneys traceable to himself and for his own use, Building Loans, Savings Bank account, Stock purchases, &c., $28,660.

The cross bill of defendants alleged that William had used the estate money in his private transactions and had made large profits therefrom, and prayed that he account therefor (p. 47). The replication of complainant did not deny that he had used the profits of the business as alleged, but claimed that they were his own (p. 52). It is insisted that these defendants are entitled to any profits which accrued through such investments.

The Court is referred on the question of salary to

Lillard vs. *Oil Co.*, 70 N. J. Eq., 197-212.

Gardner vs. *Butler*, 30 N. J. Eq., 702.

Fougeray vs. *Cord*, 50 N. J. Eq. 185; on app. ib. 756-759.

Hayes vs. *Pierson*, 45 Atl. 1091; 65 N. J. Eq. 355.

Now as to the children's board. It is in evidence that they boarded with their sister, Mrs. Coburn, from the time of their mother's death, and that she got $15.00 a month for them until the time of starting this case, which was in May, 1911 (Beginning of preliminary proceedings to compel an accounting), and thereafter no board was paid until the

court order was made in November, 1911, for the payment of $5.00 a week (p. 324). The payments under the court order do not appear in this accounting, which goes only up to August, 1911, and therefore need not be considered in estimating the total. They were sent to St. Vincent's Academy, which was not an expensive school. Exh. C-2, p. 403, shows that there was a charge made for five months' board and tuition for Anna, $75.00, and for Marie three months' board and tuition, $45.00, showing that the charge for board and tuition was only $15.00 a month each; and that the music was $15.00 a quarter; and that during five months there was spending money for both of them charged at $15.00. The total bill for both during the five months, everything included, was $203.28, allowing a credit of $7.50 when Anna was away during Christmas vacation. There was even a charge for shoe-mending, 50 cents, showing that the girls must have been mainly supplied with necessities through the school.

In another bill, Exh. C-2, p. 402, is shown charges for dress goods and making, $9.75; and waist material and blue waist, $2.50, and a black skirt, 98 cents. The total of this bill for both girls for five months is $199.43.

It is entirely plain from this that the average expenditure during school times for both girls was $200 for five months, or $40 a month, $20 a month each, including spending money and everything. It is also plain that the dresses which they got were very inexpensive; indeed, this is positively shown by a reference to Ex. C-2, p. 405, where a bill for Marie's dress is shown April 16, 1906, where the entire charge for two waists, one skirt

and one dress, including material and making, was $13.58. The next bill, dated Dec. 20, 1906, shows that about eight months elapsed before she got another dress, and then the entire thing, evidently a good dress, cost, material and all, $12.30. A reference to bill on same page dated Nov. 19, 1906, shows a dress made, including trimmings, for Anna, costing $7.50; and again on page 406 a bill for making suits for both girls, including material, $21.00.

Looking at doctor's bills, p. 404, it will be seen that Dr. Eagleton's bill from May 22, 1904, to March, 1905, although it does not appear who had his services, amounted to $7.00; that James Mullin paid for treatment to June 2, 1906, $25.00 without saying how long; and a further bill from Dr. Bleyle appears dated Jan. 2, 1906, making a charge for three years' attendance from March 1st, 1903, of $24.00.

Could there be any better demonstration than these that this family had very little expense put upon them? Could there be any better demonstration of the truth of Mrs. Coburn's testimony of Mrs. Coburn, 324-332, and of the testimony of Marie and Anna, pp. 332-350, than this?

Peter worked since 1908 or 1909 and bought his own clothes and paid his other expenses from his earnings, except that William paid $15.00 a month for his board (p. 350-357). He was only two years at St. Benedict's Academy. St. Benedict's was not an expensive school. Bills for everything, including lunch, amounted to $21.63 a quarter (p. 401). He got two suits a year, costing together $30; hats costing $2.00; four pairs of shoes, costing $15.00 (p. 328); underwear and shirts, costing about

$12.00 a year. He wore William's cast-off underwear, and so it did not cost him very much. p. 328 l. 12 Including vacation money, his total expense outside his board was $60 to $75 a year; $180 for board plus $75 equals $255 per year, about $5.00 per week.

The policy of the family was strict economy. Anna was obliged, in order to get some of the things she needed, to draw some of the money coming to her from her father's estate before she was twenty-one (p. 341). When they wanted a dress they would have to do without a vacation (p. 337). He was not wildly anxious to respond to their every need (p. 344, l. 20). Bella was at St. Vincent's from 1901 to 1904; Anna from 1900 to 1906, except 1905, when she was sick; and Marie from 1900 to 1906.

The schooling for the girls at St. Vincent's Academy ended in 1906. Between school terms he paid $15.00 a month for the children's board, and after 1906 up to the time of the making of the order for support, Nov. 28, 1911, there was no schooling to pay except for Peter, and from 1909 Peter only received $15.00 a month. It is very plain, therefore, that averaging up the cost of maintenance of the children during the years that they were dependent, $5.00 a week as found by the Master is about right. Mr. Mullin's estimate of $1.00 a day would be $7.00 a week, or $364.00 a year; while his claim of an average of $500.00 a year to maintain the children would be $9.62 a week. p. 218–244

He had the means in his own hands from which he might have made up a reasonably accurate estimate for at least a year. The best he has done in that regard is $1.00 per day, according to the testimony of himself and Mr. Du Bois as expert, but this

was based upon a board charge of $5.00 a week, which we have shown was not paid, and therefore the difference would bring down his estimate to conform with that of the Master, namely, $5.00 a week.

The Master has made a computation showing the times during which different numbers of children were supported as follows:

5	children	for	41	months	—1	child	for	205 months
4	"	"	36	"	—1	"	"	144 months
3	"	"	6	"	—1	"	"	18 months
2	"	"	32	"	—1	"	"	64 months
1	"	"	17	"	—1	"	"	17 months
								448 months

This equals one child for

This is equivalent to one child for 37 years and 4 months, or 37 1/3 years.

If this combination is taken as a basis for estimating the total amount paid for the children, it will be seen that at: $5.00 a week, the amount would be $9,706.58; $7.00 a week, the amount would be $13,589.33; $9.60 a week, the amount would be $18,756.67.

The last two estimates are Mr. Mullin's and differ very widely from each other, as may be seen.

In the case of *Gilligan* v. *Daly*, 80 Atl. Rep. 994, at p. 997, Vice-Chancellor Emery said:

> "As against the $600 and any other payments claimed to have been made for the benefit of the estate by carrying on the business, the

children are clearly entitled to offset their claim to a fair rental for the premises. Rental is an expense of the business, and should not be contributed by the beneficiaries. * * * During the time the executors carried on the business and up to July, 1907, no rent whatever was paid for the Pavonia Ave. property."

Elsewhere in this brief is shown that he occupied the upper floors of the building with his family, the rental of which was worth about $28.00 a month, and occupied the lower floor for the undertaking business, the rental value of which floor was not stated, but considering the size of the premises, must have been worth at least $30.00 a month. For this occupancy no rent was paid, either for his family or the business. This certainly should be set off against any claim which he has for excess expenditure on behalf of the children, whether for board or other things.

Rent for rooms eleven years, 132 months, at $28 a month	$3,696.00
Rent of undertaking rooms, 132 months, at $30	3,960.00
Total	$7,656.00

The administrator in this case in every way resisted an account, and claimed adversely to the cestui que trustent. He should not only not be allowed a counsel fee for his own counsel, but in fact should be obliged to pay all counsel fees and expenses of the claimants himself personally, instead of charging the same against the estate.

Brokaw vs. *Brokaw,* 41 N. J. Eq. 304.

King vs. *Foerster*, 61 N. J. Eq. 584.

In re *Woolsey's Est.*, 67 N. J. Eq. 574.

The court will not set aside a Master's report unless it is so clearly wrong as to be without evidence to support it.

Hill vs. *Hill*, 79 N. J. Eq., 521 at 526.

Bohle vs. *Hasselbrock*, 19 Dick. 334-336.

Marshall vs. *Carson*, 38 N. J. Eq., 250-256 Err. & App.

Marr vs. *Marr*, 73 N. J. Eq. 643-646.

These cases are properly cited on page 64.

These defendants are satisfied to have the Master's report as it stands confirmed in order to save time and further trouble.

Respectfully submitted,

MICHAEL J. TANSEY,
Of Counsel with Respondents.

The cases on setting aside Master's Reports are:
Christopher v Mattlage
60 Att 1124
Vanness v Vanness 32 Eq. 669-729
Meyer v West Side Dev Co. 78 Eq. 415-422
Nat Bank v Sprague 8 C.E.Gr. 82
Clark v Condit 6 C.E.Gr. 322
Haulenbeck v Cronkwright 8 C.E.Gr. 412
Holmes v Holmes 3 C.E.Gr. 141
Esp. Warner v Hill 74 Att. 973
Bagley v Traders' Paper Co. 86 Att 1029

It was precisely the conclusion that V.C. Stevens came to, saying that revision would only be putting his guess against that of the Master.

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Bill of Complaint.

(Filed September 26, 1911.)

In Chancery of New Jersey.

To the Honorable Mahlon Pitney, Chancellor of the State of New Jersey:

Humbly complaining shows unto Your Honor, your orator, William F. Mullin, of the City of Newark in the County of Essex and State of New Jersey, individually and as administrator with the will annexed of Peter M. Mullin, deceased.

1. That on or about the fourth day of November, in the year of Our Lord, Eighteen hundred and ninety-one, Peter M. Mullin, late of the said City of Newark, departed this life leaving his last will and testament in writing, in manner and form following:

"In the name of God, Amen—

I, Peter M. Mullin of the City of Newark and State of New Jersey, do make & publish this my last will and testament as follows:

First:—I hereby order my just debts and funeral expenses to be paid as soon as possible after my decease.

Second:—I hereby give and bequeath to my children share and share alike my property of every kind and description.

Third:—I hereby direct that my business be continued for the benefit of my wife and children and under the direction of my wife and brother Joseph J. Mullin.

Fourth:—I hereby appoint and constitute my wife Annie E. Mullin and my brother Joseph J.

Mullin guardian of my children and Executors of this my last will and testament with power to sell, if necessary for the best interests of my wife and children.

In witness whereof I have hereto set my hand & seal this fourth day of November, Eighteen hundred and ninety-one.

PETER MULLIN.

Signed sealed and published and declared by the said testator, Peter M. Mullin as and for his last will and testament, in our presence who at his request and in his presence and in the presence of each other have hereunto signed our names as witnesses.

M. M. MULLIN
JOS. J. MULLIN."

2. That said last will and testament of Peter M. Mullen, deceased, was duly admitted to probate by the Surrogate of the County of Essex on or about the seventeenth day of November in the year Eighteen hundred and ninety-one, and letters testamentary thereon issued to Annie E. Mullin, one of the executors therein named, who took upon herself the burden of the administration of the said estate; that your orator has in his possession a probate copy of the said will ready to be produced as this Honorable Court may direct.

3. That the said Peter M. Mullin left him surviving his widow Annie E. Mullin in said will named, and nine children, to wit: Joseph L. Mullin, James S. Mullin, Grace T. Mullin, Louis Mullin, Isabella Mullin, Anna Mullin, Marie Mullin, Peter M. Mullin and your orator.

4. That the assets of the estate of the said Peter M. Mullin, the father of your orator, so far as your orator has been able to ascertain, consisted of an insurance policy in the Mutual Benefit Life Insur-

ance Company for the sum of Five thousand dollars, a policy of insurance in the Benevolent Legion for the sum of Five thousand dollars, the amount received in settlement of death claim amounting to about Seventy-five hundred dollars, the sum of about Sixteen hundred dollars, deposited in the National Newark Banking Company, and the land and premises known as No. 91 Lafayette Street in the City of Newark, and now known as No. 228 Lafayette Street in said City; that your orator is informed and verily believes that the moneys deposited in bank as aforesaid, were all exhausted in the payment of the debts of your orator's father.

5. That in addition to the assets mention in the preceding paragraph, the said Peter M. Mullin died seized of the assets of the business of undertaking carried on by him in his lifetime; that the said assets were of little or no value; and the obligations of the business were about equal to the value of all of the assets thereof; that your orator was familiar with the condition of the business at the time of the death of his father, having been engaged in assisting the said father in the conduct thereof prior to his death.

6. That the uncle of your orator, Joseph J. Mullin, did not qualify as an executor under the will of the father of your orator; that after the probate of the said will the said Annie E. Mullin, the executrix therein named and the mother of your orator, proceeded to conduct the business of undertaking, pursuant to the direction in the third paragraph of the will of the said testator, for the benefit of herself and her children; and that the said Annie Mullin, the executrix therein named, did not file an inventory of the personal estate of the said testator.

7. That your orator, after the death of his father, continued the conduct of the undertaking business at the request of and under the direction of his mother, and assisted his mother in every possible

way in and about the conduct of said business; that on or about the twenty-fourth day of September, Eighteen hundred and ninety-five, an agreement was entered into between the said Annie E. Mullin, as sole acting executrix of said last will of Peter M. Mullin, deceased, Joseph L. Mullin, the brother of your orator, and your orator, whereby it was agreed that the undertaking business should be continued by the said Joseph L. Mullin and your orator for the period of one year from the first day of October, Eighteen hundred and ninety-five, and wherein and whereby it was further agreed that from the net profits of said business the family of your orator's father should be maintained and educated, and that the profits which should remain after the payment of the expense and maintenance of the family, should be divided as follows: To your orator, three equal sixth parts; to said Joseph, brother of your orator, two equal sixth parts; and to the mother of your orator, as executrix, the remaining one sixth part; and it was further agreed that your orator and the said Joseph should be entitled to draw from said business the sum of Fifteen dollars per week, and that said weekly payments should not be charged against their respective shares of the profits of the business; that the said agreement is in the possession of your orator ready to be produced as this Honorable Court may direct, and a copy of which is hereunto annexed and marked "Exhibit A" and made part of this your orator's bill of complaint.

8. That after the making and execution of the aforesaid agreement, the said Joseph L. Mullin, brother of your orator, before the time fixed for the termination thereof, and during the month of May, Eighteen hundred and ninety-six, refused to be further bound thereby and ceased to co-operate with your orator in the conduct of the said business and withdrew therefrom and established himself in busi-

ness in the City of Morristown in the state aforesaid; that after your orator's said brother Joseph had so withdrawn from the said business, your orator was requested by his mother, the executrix aforesaid, to continue the business of undertaking, to support the mother of your orator and the infant children at home, and it was agreed between said executrix and your orator that the balance of the profits of the business remaining after the support and maintenance of the mother of your orator and the said infant children, should belong to your orator in payment of his services; that thereafter your orator continued to conduct the said business and did from the conduct thereof and as a result of his personal efforts therein, derive the funds for the support and maintenance of his mother and the said infant children and did so continue to support them under the said arrangement with his said mother to and until her death on the eighteenth day of July, Nineteen hundred.

9. That on or about the nineteenth day of May, A. D. Eighteen hundred and ninety-six, the said Joseph L. Mullin, who was then of full age, requested his said mother, Annie E. Mullin, executrix of the said last will of Peter M. Mullin, deceased, to pay him his share and interest in the estate of the said Peter M. Mullin, deceased, and on said last mentioned day the said executrix paid to the said Joseph L. Mullin the sum of Thirty-seven hundred and fifty dollars, as his share in said estate, and the said Joseph L. Mullin did thereupon make, execute and deliver to the said Annie E. Mullin, executrix as aforesaid, a general release of all his claims and demands against the said executrix and the said estate existing at said date excepting only his share and interest in the premises known as No. 91 Lafayette Street in said city; that said release is now in the possession of your orator ready to be pro-

duced and proved as this Honorable Court may direct, a copy of which is hereunto annexed and marked "Exhibit B" and made part hereof.

10. That on the said nineteenth day of May, A. D. Eighteen hundred and ninety-six and at the time that the said Annie E. Mullin, as executrix, made payment as aforesaid to the said Joseph L. Mullin, your orator received from his said mother, as executrix, the sum of Thirty-seven hundred and fifty dollars on account of his interest in the estate of the said Peter M. Mullin, deceased, and thereupon your orator made, executed and delivered to said executrix a general release of all his claims and demands against the said executrix and the said estate, excepting his share in the premises known as No. 91 Lafayette Street in the said City of Newark; that said release is in the possession of your orator and ready to be produced as this Honorable Court may direct, and a copy of which is hereto annexed and marked "Exhibit C" and made a part hereof.

11. That on or about the fourth day of April, A. D. Eighteen hundred and ninety-nine, Grace T. Mullin received from said Annie E. Mullin, executrix as aforesaid, the sum of Thirty-seven hundred and fifty dollars, and thereupon said Grace T. Mullin made, executed and delivered to the said executrix a general release of and from all claims and demands against the said estate and the said executrix, excepting her interest in the premises known as No. 91 Lafayette Street in the said City of Newark; that the said release is in the possession of your orator ready to be produced as this Honorable Court may direct, and a copy of which is hereto annexed and marked "Exhibit D" and made a part hereof.

12. That at the time of the payments so made to the said Joseph L. Mullin and your orator, the executrix of said will after consultation with counsel, estimated the estate would be sufficient to pay

to each of the children as they became of age the said sum of Thirty-seven hundred and fifty dollars; that your orator has no inventory of the assets as of the date of such distribution, and has no information with respect to the exact character of the assets or the amount thereof during the lifetime of the said mother.

13. That on or about the eighteenth day of July, A. D. Nineteen hundred, the said Annie E. Mullin, executrix as aforesaid, departed this life intestate, leaving her surviving the said children of your orator's father, with the exception of Louis, who predeceased her, as her only next of kin and heirs-at-law; that thereafter and on the first day of August, Nineteen hundred, letters of administration with the will annexed of the said Peter M. Mullin, deceased, were granted your orator by the Surrogate of the County of Essex; that the said letters are in the possession of your orator ready to be produced and proved as this Honorable Court may direct; that prior to the granting of said letters, the said Joseph J. Mullin, the surviving executor named in the said will of Peter M. Mullin, renounced in writing his right to act as executor of said will.

14. That at the time of the death of the mother of your orator, five of the said children were still infants, to wit: James Mullin, born April seventeenth, Eighteen hundred and eighty-two; Isabella Mullin, born March thirteenth, Eighteen hundred and eighty-five; Annie E. Mullin, born July twenty-sixth, Eighteen hundred and eighty-six; Marie Mullin, born March twenty-eighth, Eighteen hundred and eighty-nine; and Peter M. Mullin, born April twenty-fourth, Eighteen hundred and ninety-two.

15. That on or about the twenty-first day of December, A. D. Nineteen hundred and three, James S. Mullin made, executed and delivered to your orator as administrator with the will annexed of Peter M.

Mullin, deceased, in consideration of Thirty-seven hundred and fifty dollars, a general release of and from all claims and demands against your orator, as such administrator, and the estate of said Peter M. Mullin, which said release is in the possession of your orator ready to be produced as this Honorable Court may direct, and a copy of which is hereto-annexed and marked "Exhibit E" and made part hereof.

16. That on or about the tenth day of December, A. D. Nineteen hundred and six, the said Isabel R. Mullin made, executed and delivered unto your orator as administrator as aforesaid, in consideration of the sum of Thirty-seven hundred and fifty dollars, a general release from all claims and demands against your orator as such administrator, and the estate of said Peter M. Mullin, which said release is in the possession of your orator ready to be produced and proved as this Honorable Court may direct, and a copy of which is hereto annexed and marked "Exhibit F" and made a part hereof.

17. That the said Annie E. Mullin, who is now of full age, has received from your orator sums of money from time to time on account of her share and interest in the estate of her father, which said sums now aggregate Two thousand and seventy-five dollars.

18. That at the time of the appointment of your orator as administrator with the will annexed of Peter M. Mullin, deceased, the assets of the said estate consisted of a deposit in the National Newark Banking Company amounting to Seventeen hundred and thirty-nine dollars and eighty-two cents ($1739.82), a bond and mortgage of John F. Herman and wife for Three thousand dollars ($3000), a bond and mortgage of Marie Kalmbach for Thirty-five hundred dollars ($3500), a bond and mortgage of Cecilia Brennan amounting to Eight hundred and

seventy-five dollars ($875), and a bond and mortgage of F. Bronson Monell amounting to Eight hundred and ninety dollars ($890); that in addition thereto said premises now known as No. 228 Lafayette Street remained a part of the assets of said estate, and of which said Peter M. Mullin died seized; that the said Annie E. Mullin, as executrix, held title at the time of her death to lots Nos. 12, 16 and 17 on a certain map entitled, Map of Homestead Park, Essex County, Clinton Township, New Jersey, filed in the office of the Register of the County of Essex on the twenty-sixth day of June, Eighteen hundred and ninety-four; that the said lots constitute a part of the assets of the said Peter M. Mullin, deceased; that at the time of the appointment of your orator as such administrator, there were certain debts of the business and debts incident to the maintenance of the family which remained to be paid; the exact amount thereof, however, is unknown to your orator.

19. That since the death of your orator's mother, your orator has proceeded to conduct the said undertaking business and to support and maintain his infant brothers and sisters until they have arrived at the age of twenty-one years; that all of said children have attained their majority with the exception of Peter M. Mullin, who was born on the twenty-fourth day of April, Eighteen hundred and ninety-two; that since the death of your orator's mother, your orator estimates that he has spent as much as Five hundred dollars per year on each of the infant children in their maintenance, education and support; that such sum was vastly in excess of the income of any interest that the said children possesed in the estate of their father, and that the money so paid and laid out by your orator for the benefit of said children, was in reality the earnings of your orator and the result of his personal efforts;

that the assets of the undertaking business carried on by your orator were of absolutely no value and would have produced nothing upon sale; that the said business existed and realized results only by reason of the personal efforts of your orator therein and of the reputation and good will established and maintained by your orator and, at the solicitation of his mother, devoted to the maintenance and support of said children.

20. That subsequent to the appointment of your orator as administrator as aforesaid, he discovered that the assets of the estate of his father would not be sufficient to pay to each child, upon attaining its majority, the sum of Thirty-seven hundred and fifty dollars without including in the value of the premises known as No. 288 Lafayette Street, and your orator insists and charges the truth to be that it will be impossible to effect any equality of distribution among all the children of the testator, without disposing of the said real property, and your orator shows that it will be necessary to make sale of said property and convert the same into money in order to effect such equality of distribution, and that in order to effect such equality of distribution the said Joseph L. Mullin, Grace T. Mullin and your orator should have only such interest therein as may be necessary to equalize their shares in the estate of the said Peter M. Mullin, deceased.

21. And your orator further shows that the said Annie E. Mullin, Marie Mullin and Peter M. Mullin have by their proctor, caused citations to issue out of the Orphans Court of the County of Essex directed to your orator commanding him to file an inventory of the goods, chattels, rights and credits of Peter M. Mullin, deceased, and account as administrator with the will annexed of the said deceased, which said citation was returnable on the eighth day of September, Nineteen hundred and

eleven, but has been continued to the twenty-ninth day of September, Nineteen hundred and eleven.

22. That at the present time the assets of the estate of the said Peter M. Mullin, deceased, consist of a certain bond and mortgage of Cecilia Brennan and husband to secure the sum of Eight hundred and seventy-five dollars; lots Nos. 12, 16 & 17 on a certain map entitled "Map of Homestead Park, Essex County, Clinton Township, New Jersey" filed in the office of the Register of the County of Essex on the twenty-sixth day of June, Eighteen hundred and ninety-four; that the title to the said lots stands in the name of Annie E. Mullin as executrix, who died intestate seized thereof as aforesaid, and that your orator believes no change has been made in the title thereto since her death; that in addition thereto the said Peter M. Mullin died seized of the premises then know as No. 91 Lafayette Street in the said City of Newark and now known as No. 228 Lafayette Street in said City, and that the said lands and premises still remain undisposed of and are assets of the estate of the said deceased.

23. That the lots in Homestead Park above mentioned are particularly described as follows:

All those certain lots or parcels of land and premises situate, lying and being in the Township of Clinton in the County of Essex and State of New Jersey and known and distinguished upon a certain map entitled "Map of Homestead Park, Essex County, Clinton Township, New Jersey" filed in the office of the Register of the County of Essex on the twenty-sixth day of June, Eighteen hundred and ninety-four, as lots numbers twelve (12), sixteen (16) and seventeen (17).

Being the same premises described in a certain deed bearing date the fourth day of January, Eighteen hundred and ninety-six from the Homestead Park Company to Annie E. Mullin (Executrix) and re-

corded in the Register's Office of the County of Essex in Book R 29 of Deeds for said county on pages 117-119.

24. The Lafayette Street property hereinabove mentioned is more particularly described as follows:

All that tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey:

BEGINNING on the southerly side of Lafayette Street at the northeasterly corner of a lot heretofore conveyed by Charles Borcherling, Jr. and Elizabeth L. his wife and Cortlandt Parker and Elizabeth W. his wife, to one Michael O'Meara, which corner is at a point on Lafayette Street distant seventy-three feet two inches westerly from the corner of the same and Jefferson Street; thence running along Lafayette Street westerly twenty-four feet four inches; thence southerly parallel with Jefferson Street one hundred feet; thence easterly parallel with Lafayette Street twenty-two feet nine inches to the line of lot conveyed to O'Meara; and thence along the last mentioned line one hundred feet to the southerly line of Lafayette Street and the place of beginning.

Being lot No. 1 on a map of the Duncomb property in the then Fifth Ward of the City of Newark.

Being the same premises conveyed to the said Peter M. Mullin by Michael A. Mullin by deed dated June 1st, 1886 and recorded in Book A 23 of Deeds for said County on pages 378 and 379.

25. That the mortgage of Cecilia Brennan and husband hereinabove mentioned, is alien upon a certain tract of land described as follows: All that certain tract or parcel of land and premises hereinafter particularly described situate, lying and being in the City of Newark in the County of Essex and State of New Jersey:

BEGINNING at a point on the westerly line of Clinton Place distant four hundred and twenty-six feet and sixty one-hundredths of a foot northerly from the corner of Hawthorne Avenue and Clinton Place; thence westerly nearly at right angles to Clinton Place and along the line of lot No. 16 on said map ninety-nine feet and seventy-two one-hundredths of a foot to the line of lot No. 14 on said map; thence northeasterly and along the line of lot No. 14 and parallel with Clinton Place fifty feet to the line of land of Clark; thence in an easterly direction and parallel with the first line ninety-nine feet and seventy-two one-hundredths of a foot to said westerly line of Clinton Place; and thence in a southwesterly direction and along said line of Clinton Place fifty feet to the place of beginning. Being known and distinguished as lot No. 15 on Map entitled "Map of Homestead Park, Essex County, Clinton Township, N. J." filed June 26, 1894.

That the said premises were conveyed to Loretta A. Mullin, wife of your orator, by Mary Finley and Frank J. Finley, her husband, by deed dated the twenty-first day of May, Nineteen hundred and two, and recorded in Book I 35 of Deeds for Essex County on pages 298-299, and that said conveyance was made subject to all duly recorded mortgages; that your orator shows that the said premises subject to the encumbrances thereon are assets of the estate of the said Peter M. Mullin, deceased.

26. That Louis Mullin, son of Peter M. Mullin, deceased, and a brother of your orator, was born on the fifth day of November, Eighteen hundred and eighty, and departed this life on the twenty-seventh day of November Eighteen hundred and ninety-four, intestate, leaving him surviving his mother and his eight brothers and sisters hereinabove mentioned as his next of kin and heirs at law.

27. That the said Joseph L. Mullin is married and his wife's name is Grace G. Mullin; that the said James S. Mullin is married and his wife's name is Nellie Mullin; that the said Grace T. Mullin is married and her husband's name is John J. Coburn; that the said Isabella Mullin, daughter of said testator, is married and her husband's name is Charles C. Mulvihill; that your orator is married and his wife's name is Loretta A. Mullin; that the said Anna Mullin, Marie Mullin and Peter M. Mullin are unmarried; that the said Peter M. Mullin is an infant of the age of nineteen years.

28. That your orator has been and is desirous of accounting for his administration of the estate of the said Peter M. Mullin, deceased, and is desirous of making over and paying to the several persons interested in the estate, their respective shares therein, and has been and now is desirous of the aid of this Honorable Court in the premises, and the direction of this Honorable Court with respect to his duties under the said will of Peter M. Mullin, deceased, and particularly that an ascertainment should be made of the interests of the several beneficiaries thereunder, and that your orator may be directed with respect to the lands held in the name of Annie E. Mullin as executrix, and in the name of Loretta A. Mullin, and that the said lands may be sold and converted into money for the benefit of the estate of the said Peter M. Mullin; and that your orator is advised by counsel that it would be impossible to effect an equitable distribution and division of the estate of the said Peter M. Mullin among the beneficiaries under his last will, without the aid and direction of this Court with respect to the interests of all the beneficiaries under said will.

In consideration whereof and inasmuch as your orator is without remedy in the premises at the common law, and cannot have adequate relief except by the aid of this Honorable Court:

To the end therefor, that the said Anna E. Mullin, Marie Mullin, Peter M. Mullin, Joseph L. Mullin and Grace G. Mullin, his wife, James S. Mullin and Nellie Mullin, his wife, Grace T. Coburn and John J. Coburn, her husband, Isabella Mulvihill and Charles C. Mulvihill, her husband, and Loretta A. Mullin, the defendants hereto, may without oath (answer under oath being hereby expressly waived) to the best and utmost of their knowledge, remembrance, information and belief, full, true and perfect answer make to all and singular the matters aforesaid, and that as fully as if the same were here again repeated, and they thereunto particularly interrogated;

(1) That the premises known as lots Nos. 12, 16 & 17 on the map of Homestead Park and hereinabove particularly described, standing in the name of Annie E. Mullin, executrix, may be decreed by this court to constitute assets of the estate of the said Peter M. Mullin, deceased, and that the beneficiaries under the last will and testament of said decedent are in equity the owners thereof, and that the said Annie E. Mullin was seized thereof to the use of the beneficiaries under said will; and

(2) The said Loretta A. Mullin may be decreed to hold the lands above described conveyed to her as aforesaid in trust for the use and benefit of the beneficiaries under the said will of Peter M. Mullin, deceased, and that the said lands may be decreed to be assets of the estate of the said Peter M. Mullin, deceased, to be distributed according to the terms of his last will and testament.

(3) That the property and assets of the estate of the said Peter M. Mullin, deceased, both real and personal, consisting of lands and real estate above mentioned and described, and also all goods and chattels, choses in action of said estate and all rights and interests both legal and equitable, may be sold

under the direction and by the order of this Honorable Court, and that the money so realized may be distributed to the beneficiaries under the will of the said Peter M. Mullin, deceased, in such manner that the said beneficiaries may share equally in the property, real and personal, of which the said testator died seized, and that your orator might have the aid and direction of this Honorable Court in the premises.

(4) That this court may determine by its decree, the value of the shares of the several beneficiaries under the said will of Peter M. Mullin, deceased, and may by its decree effect an equality of distribution of the property of which said testator died seized, according to the terms of his last will and testament.

(5) That in case of the sale of the said lands above mentioned, the same may be decreed to be sold, including the inchoate rights of dower of Grace G. Mullen, wife of Joseph L. Mullin, Nellie Mullin, wife of James S. Mullin and Loretta A. Mullin, wife of your orator.

(6) That the said Anna E. Mullin, Marie Mullin and Peter M. Mullin may be enjoined and restrained from further proceeding against your orator for an inventory and accounting before the Orphans' Court of the County of Essex.

(7) That your orator may have such further relief as the nature of the case may require and as may be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your orator, not only the State's Writ of Injunction issuing out of and under the seal of this Honorable Court to restrain the said Anna E. Mullin, Marie Mullin and Peter M. Mullin from proceeding against your orator for an inventory and accounting of the estate of Peter M. Mullin, deceased, before the Orphans' Court of the County of

Essex, but also a writ or writs of subpoena also issuing out of and under said seal, to be directed to the said Anna E. Mullin, Marie Mullin, Peter M. Mullin, Joseph L. Mullin and Grace G. Mullin, his wife, James S. Mullin and Nellie Mullin, his wife, Grace T. Coburn and John J. Coburn, her husband, Isabella Mulvihill and Charles C. Mulvihill, her husband, and Loretta A. Mullin commanding them and each of them on a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this Honorable Court then and there to answer all and singular the premises aforesaid, and to stand to, abide by and perform such order, direction and decree therein as to your Honor shall see meet.

And your orator will ever pray &c.

LUM, TAMBLYN & COLYER,
Solicitors for and of Counsel with Complainant.

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

William F. Mullin, the above named complainant, being duly sworn according to law on his oath saith, that he has read the foregoing Bill of Complaint and knows the contents thereof and that the same is true on his own knowledge except as to the matters that are therein stated to be on his information and belief, and as to those matters he believes them to be true.

Deponent further saith that on or about the fourth day of November, Eighteen hundred and ninety-one, Peter M. Mullin, the father of this deponent, departed this life, leaving his last will and testament in writing in manner and form as is set forth in said bill; that said last will and testament of Peter M. Mullin, deceased, was duly admitted to

probate by the Surrogate of Essex County on the seventeenth day of November, Eighteen hundred and ninety-one, and letters testamentary thereon issued to Annie E. Mullin, one of the executors therein named.

Deponent further saith that the said Peter M. Mullin left him surviving his widow, Annie E. Mullin in said will named, and nine children, to wit: Joseph L. Mullin, James S. Mullin, Grace T. Mullin, Louis Mullin, Isabella Mullin, Anna Mullin, Marie Mullin, Peter M. Mullin and this deponent.

Deponent further saith that the assets of the estate of the said Peter M. Mullin, the father of this deponent, are as set forth in the fourth paragraph of the foregoing bill so far as deponent has been able to ascertain.

Deponent further saith that in addition to the assets mentioned in said paragraph the said Peter M. Mullin was possessed of assets of the business of undertaking carried on by him in his lifetime and was possessed of the same at the time of his death; that the assets of said business were of little or no value, and the obligations of the business were about equal to the value of all the assets thereof; that deponent was familiar with the condition of the business at the time of the death of his father, having been engaged in assisting his father in the conduct thereof prior to his death.

Deponent further saith that Joseph J. Mullin, the uncle of the deponent, did not qualify as an executor under the will of deponent's father; that after the probate of the will of his said father, the said Annie E. Mullin, the executrix therein named and mother of this deponent, proceeded to conduct the business of undertaking, pursuant to the direction of the will of the said testator, for the benefit of herself and her children; and that the said executrix did not file an inventory of the personal estate of said testator.

Deponent further saith that after the death of his father he continued the conduct of the undertaking business at the request of and under the direction of his mother, and assisted his mother in every possible way in and about the conduct of said business; that on or about the twenty-fourth day of September, Eighteen hundred and ninety-five, an agreement was entered into between the said Annie E. Mullin, as executrix, and Joseph L. Mullin, the brother of this deponent, and this deponent, as set forth in said bill, and that a copy of such agreement is annexed hereto.

Deponent further saith that after the making and execution of said agreement the said Joseph L. Mullin, the brother of this deponent, before the time fixed for the termination thereof and during the month of May, Eighteen hundred and ninety-six, refused to be further bound thereby and ceased to cooperate with this deponent in the conduct of said business and withdrew therefrom and established himself in business in the city of Morristown in the State aforesaid; that ofter deponent's said brother had so withdrawn from the said business, deponent was requested by his mother, the executrix aforesaid, to continue the business, to support the mother of this deponent and the infant children at home, and it was agreed between the said executrix and the deponent that the balance of the profits of the business remaining after the support and maintenance of his said mother and the said infant children should belong to this deponent in payment of his services; that thereafter deponent continued to conduct said business, and as a result of his personal efforts therein he derived the funds for the support and maintenance of his mother and the said infant children, and did so continue to support them under the said arrangement with his said mother to and until her death on the eighteenth day of July, Nineteen hundred.

Deponent further saith that on or about the nineteenth day of May, Eighteen hundred and ninety-six, the said Joseph L. Mullin made, executed and delivered to the said Annie E. Mullin, as executrix, a release as set forth in said bill of complaint, and a copy of which is hereto annexed; and that on said last mentioned day this deponent made, executed and delivered to the said executrix, a release as set forth in said bill, and a copy of which is hereto annexed; that on or about the fourth day of April, Eighteen hundred and ninety-nine, Grace T. Mullin made, executed and delivered to the said executrix a release as set forth in said bill, and a copy of which is hereto annexed.

Deponent further saith that at the time of the payments so made to the said Joseph L. Mullin and this deponent, the said executrix of said will, after consultation with counsel, estimated that the estate left by deponent's father would be sufficient to pay to each of the children as they became of age the sum of Thirty-seven hundred and fifty dollars; that deponent has no inventory of the assets of said estate as of the dates of such payments and has no information with respect to the exact character of the assets of said estate or the amount thereof during the lifetime of his said mother.

Deponent further saith that on or about the eighteenth day of July, Nineteen hundred, the said Annie E. Mullin, executrix as aforesaid and mother of this deponent, departed this life intestate, leaving her surviving the children of deponent's father, with the exception of Louis who predeceased her, as her only next of kin and heirs at law; that on the first day of August, Nineteen hundred, letters of administration with the will annexed of the said Peter M. Mullin, deceased, were granted to this deponent by the Surrogate of Essex County, and that prior to the granting of said letters the said Joseph J. Mullin, the

surviving executor named in the said will of Peter M. Mullin, renounced his right to act as executor.

Deponent further saith that at the time of the death of his mother, five of the said children of Peter M. Mullin, deceased, were infants, as set forth in said bill.

Deponent further saith that on or about the twenty-first day of December, Nineteen hundred and three, James S. Mullin made, executed and delivered to this deponent as administrator as aforesaid, a release as set forth in the foregoing bill, a copy of which is hereto annexed; that on or about the tenth day of December, Nineteen hundred and six, Isabel R. Mullin made, executed and delivered to deponent as such administrator a release as set forth in said bill, and a copy of which is hereto annexed; that the said Anna E. Mullin, who is now of full age, has received from deponent sums of money from time to time on account of her share and interest in the estate of her father, which sums now aggregate Two thousand and seventy-five dollars.

Deponent further saith that at the time of the appointment of the deponent as administrator with the will annexed of Peter M. Mullin, deceased, the assets of his estate consisted of the property set forth and described in the foregoing bill, and that at that time there were certain debts of the business and debts incident to the maintenance of the family which remained to be paid, the exact amount thereof, however, is unknown to deponent.

Deponent further saith that since the death of his mother he has proceeded to conduct the said undertaking business and to support his infant brothers and sisters until they have arrived at the age of twenty-one years; that all of said children have attained their majority with the exception of Peter M. Mullin; that since the death of deponent's mother, deponent estimates and firmly believes that he has

expended as much as Five hundred dollars per year on each of the infant children in their maintenance, education and support; that such sum was vastly in excess of the income or any interest that the said children possessed in the estate of their father, and that the money so paid and laid out by deponent for the benefit of said children was in reality the earnings of his deponent and the result of his personal efforts; that the assets of the undertaking business carried on by deponent were absolutely of no value and would have produced nothing upon sale; that said business existed and realized results only by reason of the personal efforts of deponent and by reason of the reputation and good will established and maintained by deponent and, at the solicitation of his mother, devoted to the support and maintenance of said children.

Deponent further saith that subsequent to the appointment of this deponent as administrator as aforesaid, he discovered that the assets of the estate of his father would not be sufficient to pay each child, upon attaining its majority, the sum of Thirty-seven hundred and fifty dollars, without including therein the value of the premises known as No. 228 Lafayette Street, and deponent believes and charges the truth to be that it will be impossible to effect an equal distribution among all of the children of the testator without disposing of said real property, and deponent believes that it will be necessary to make sale of said property and convert the same into money in order to effect an equal distribution.

Deponent further saith that the said Anna E. Mullin, Marie Mullin and Peter M. Mullin have, by their proctor, caused citations to issue out of the Orphans' Court of the County of Essex directed to this deponent, commanding him to file an inventory of the goods and chattels of Peter M. Mullin, deceased, and account as administrator with the will

annexed of said deceased, as in said bill mentioned.

Deponent further saith that the assets of the estate of the said Peter M. Mullin, deceased, now consists of the property particularly set forth and described in the foregoing bill of complaint and mentioned in the twenty-second, twenty-third, twenty-fourth and twenty-fifth paragraphs thereof.

Deponent further saith that Louis Mullin, the brother of this deponent, was born on the fifth day of November, Eighteen hundred and eighty and departed this life on the twenty-seventh day of November, Eighteen hundred and ninety-four, intestate, leaving him surviving his mother and his eight brothers and sisters hereinabove mentioned as his next of kin and heirs at law.

Deponent further saith that the said Joseph L. Mullin is married and his wife's name is Grace G. Mullin; that the said James S. Mullin is married and that his wife's name is Nellie Mullin; that the said Grace T. Mullin is married and that her husband's name is John J. Coburn; that the said Isabella Mullin is married and that her husband's name is Charles C. Mulvihill, and that deponent is married and that his wife's name is Loretta A. Mullin; that the said Anna Mullin, Marie Mullin and Peter M. Mullin are unmarried and that the said Peter M. Mullin is an infant of the age of nineteen years.

Deponent further saith that he has been and is desirous of accounting for his administration of the estate of the said Peter M. Mullin, deceased, and is desirous of making over and paying to the several persons interested in said estate, their respective shares therein, and has been and now is desirous of the aid of this Honorable Court in the premises, and the direction of this Honorable Court with respect to his duties under the said will of Peter M. Mullin, deceased, and particularly that an ascertainment shall be made of the interests of the several benefi-

ciaries under said will; that deponent is advised by counsel that it will be impossible to effect an equitable distribution and division of the estate of the said Peter M. Mullin among the beneficiaries under his last will without the aid and direction of this Honorable Court.

WILLIAM F. MULLIN.

Sworn and subscribed to this 25th
day of September, A. D. 1911,
before me

CHARLES F. LANDMESSER,
Notary Public of New Jersey.

EXHIBIT A.

THIS AGREEMENT made and entered into this twenty-fourth day of September, A. D., Eighteen hundred and ninety-five, by and between Annie E. Mullin, sole acting executrix of the last will and testament of Peter M. Mullin, deceased, party of the first part; William F. Mullin, party of the second part; and Joseph L. Mullin, party of the third part, all of the City of Newark, in the County of Essex and State of New Jersey, witnesseth as follow:

WHEREAS, the said Peter M. Mullin, deceased, in and by this last will and testament duly admitted to probate in the Surrogate's Office of said County of Essex, did provide in and by his last will and testament that the undertaking business carried on by him in his lifetime at number ninety-one (91) Lafayette Street in the said City of Newark, should be conducted for the benefit of his family and the said William F. Mullin and Joseph L. Mullin, since the decease of the said Peter M. Mullin, have carried on the same successfully and have increased said business and the profits arising from same, and have managed the same to the entire satisfaction of the said Annie E. Mullin, and have supported out of said business the family of the said Peter M. Mullin, and

WHEREAS, the said Annie E. Mullin desires to retain the services of the said William F. Mullin and Joseph L. Mullin in the conduct and management of said business;

NOW THEREFORE, in consideration of the premises the said parties have agreed to and with each other as follows:

The said business shall be continued by the said William F. Mullin and Joseph L. Mullin in the name of the Estate of Peter M. Mullin.

Said William and Joseph hereby agree to devote their undivided time and attention to said business and to do their utmost for its success.

Said business shall be continued for one year from the first day of October, Eighteen hundred and ninety-five, at which time this agreement is to go into effect, unless terminated as hereinafter mentioned.

It is expressly understood and agreed that said Annie may terminate this agreement at any time by giving one month's notice in writing to the said William and Joseph of her desire for said determination.

It is understood and agreed that from the net proceeds of said business the family of said Peter shall be maintained and educated as at present.

The profits of said business which shall remain, after payment of the expense of the maintenance and education of said family, shall be divided between said parties as follows: Said William shall be entitled to three equal sixth parts; said Joseph shall be entitled to two equal sixth parts; and said Annie as executrix, shall be entitled to the remaining one-sixth part.

Profits shall be divided at the end or termination of the year.

It is expressly understood that in case the proceeds arising from said business shall not be sufficient to support, maintain and educate said family, that there shall be no liability or loss to said William and Joseph.

It is also understood and agreed that said William and Joseph shall each be entitled to draw from the said business, the sum of fifteen dollars per week weekly, and that said weekly payments shall not be charged against their respective shares of the profits of said business.

Full, true and perfect books of account shall be at all times kept, in which each of said parties agrees to

enter promptly any and all transactions to which she or he may be a party, and to which books all of said parties shall at all times have free access.

Said parties agree that they will not during the continuance of this agreement, become an accommodation endorser, guarantor or surety without the consent of the others in writing first had and obtained.

In Witness Whereof the said parties have hereunto set their hands and seals the day and year aforesaid.

ANNIE E. MULLIN, *Ext.* [L. S.]
WM. F. MULLIN, [L. S.]
JOSEPH L. MULLIN, [L. S.]

Signed, sealed and delivered (in triplicate) in the presence of

Jos. J. Mullin,
Oct. 2, 1895.

EXHIBIT B.

Know all Men by These Presents, That I, Joseph L. Mullin, of the City of Newark, in the County of Essex and State of New Jersey, do hereby acknowledge the receipt from Annie E. Mullin of the same place, sole acting executrix of the last will and testament of Peter M. Mullin, late of the said city, deceased, of the sum of three thousand, seven hundred and fifty dollars in full discharge and satisfaction of all my right, share and interest of every name and nature in the estate of said Peter M. Mullin, deceased, and in consideration thereof, I have released and discharged and do by these present release and forever discharge the said Annie E. Mullin, sole acting executrix as aforesaid, and also the estate of the said Peter M. Mullin, deceased, of and from any and all further or other accounting or reckoning in

respect to my interest in said estate, and of and from any and all distributive share, debts, dues, claims and demands which I ever had, now have or hereafter can, shall or may have against said estate by reason of anything existing at the date hereof; excepting only my share or interest in the house and premises situate and known as number ninety-one (91) Lafayette Street in said city.

And I do hereby covenant, promise and agree to and with said Annie E. Mullin, sole acting executrix as aforesaid, that I will at any time hereafter, when reasonably required, make, execute and deliver any and all such further or other instrument or instruments of writing as may be necessary to fully effectuate and carry into effect the true intent and meaning of these presents.

In Witness Whereof I have hereunto set my hand and seal this nineteenth day of May, A. D., Eighteen hundred and ninety-six.

JOSEPH L. MULLIN, [L. S.]

Signed, sealed and delivered in
the presence of

Charles M. Lum.

State of New Jersey, }
County of Essex. } *ss.*

Be it remembered that on this nineteenth day of May, A. D. Eighteen hundred and ninety-six, before the undersigned, a Master in Chancery of New Jersey, personally appeared Joseph L. Mullin, who I am satisfied is the releasor in the foregoing release named, and who executed the same; and I having first made known to him the contents thereof he acknowledged that he signed, sealed and delivered

the same as his voluntary act and deed for the uses and purposes therein expressed.

CHARLES M. LUM, *M. C. C.*

EXHIBIT C.

KNOW ALL MEN BY THESE PRESENTS, That I, William F. Mullin, of the City of Newark, in the County of Essex and State of New Jersey, do hereby acknowledge the receipt from Annie E. Mullin, of the same place, sole acting executrix of the last will and testament of Peter M. Mullin, late of the said City deceased, of the sum of three thousand, seven hundred and fifty dollars in full discharge and satisfaction of all my right, share and interest of every name and nature in the estate of said Peter M. Mullin, deceased, and in consideration thereof I have released and discharged and do by these present release and forever discharge the said Annie E. Mullin, sole acting executrix as aforesaid, and also the estate of the said Peter M. Mullin, deceased, of and from any and all further or other accounting or reckoning in respect to my interest in said estate, and of and from any and all distributive share, debts, dues, claims and demands which I ever had, now have or hereafter can, shall or may have against said estate by reason of anything existing at the date hereof; excepting only my share or interest in the house and premises situate and known as number ninety-one (91) Lafayette Street in said City.

And I do hereby covenant, promise and agree to and with said Annie E. Mullin, sole acting executrix as aforesaid, that I will at any time hereafter, when reasonably required, make, execute and deliver any and all such further or other instrument or instruments of writing as may be necessary to fully

effectuate and carry into effect the true intent and meaning of these presents.

In Witness Whereof, I have hereunto set my hand and seal this nineteenth day of May, A. D. Eighteen hundred and ninety-six.

WILLIAM F. MULLIN, [L. S.]

Signed, sealed and delivered in the presence of

Fred H. Lum.

State of New Jersey, } *ss.*
County of Essex. }

Be it remembered that on this nineteenth day of May, A. D. Eighteen hundred and ninety-six, before the undersigned, a Master in Chancery of New Jersey, personally appeared William F. Mullin, who I am satisfied is the releasor in the foregoing release named, and who executed the same; and I having first made known to him the contents thereof he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

FRED H. LUM, *M. C. C.*

EXHIBIT D.

Know all Men by These Presents, That I, Grace T. Mullin, of the City of Newark, in the County of Essex and State of New Jersey, do hereby acknowledge the receipt from Annie E. Mullin, of the same place, sole acting executrix of the last will and testament of Peter M. Mullin, late of the said city, deceased, of the sum of three thousand, seven hundred

and fifty dollars in full discharge and satisfaction of all my right, share and interest of every name and nature in the estate of said Peter M. Mullin, deceased, and in consideration thereof I have released and discharged and do by these presents release and forever discharge the said Annie E. Mullin, sole acting executrix as aforesaid, and also the estate of the said Peter M. Mullin, deceased, of and from any and all further or other accounting or reckoning in respect to my interest in said estate, and of and from any and all distributive shares, debts, dues, claims and demands which I ever had, now have or hereafter can, shall or may have against said estate by reason of anything existing at the date hereof; excepting only my share or interest in the house and premises situate and known as number ninety-one (91) Lafayette Street in said city.

And I do hereby covenant, promise and agree to and with said said Annie E. Mullin, sole acting executrix as aforesaid, that I will at any time hereafter, when reasonably required, make, execute and deliver any and all such further or other instrument or instruments of writing as may be necessary to fully effectuate and carry into effect the true intent and meaning of these presents.

In Witness Whereof, I have hereunto set my hand and seal this fourth day of April, A. D. Eighteen hundred and ninety-nine.

GRACE T. MULLIN, [L. S.]

Signed, sealed and delivered in
the presence of

Chas. M. Lum.

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

Be it remembered that on this fourth day of April, A. D. Eighteen hundred and ninety-nine, before the undersigned, a Master in Chancery of New Jersey, personally appeared Grace T. Mullin, who I am satisfied is the releasor in the foregoing release named, and who executed the same; and I having first made known to her the contents thereof, she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed for the uses and purposes therein expressed.

CHARLES. M. LUM,
Master in Chancery of New Jersey.

EXHIBIT E.

KNOW ALL MEN BY THESE PRESENTS, That I, James S. Mullin, of the City of Newark, in the County of Essex and State of New Jersey, do hereby acknowledge the receipt from William F. Mullin, administrator with the will annexed of Peter M. Mullin, late of the said city, deceased, of the sum of THREE THOUSAND SEVEN HUNDRED AND FIFTY DOLLARS ($3,750) in full discharge and satisfaction of all my right, share and interest of every name and nature in the estate of said Peter M. Mullin, deceased, and in consideration thereof, I have released and discharged and do by these presents release and forever discharge the said William F. Mullin, administrator as aforesaid, and also the estate of the said Peter M. Mullin, deceased, of and from any and all further or other accounting or reckoning in respect to my interest in said estate, and of and from any and all distributives share, debts, dues, claims and demands which I ever had, now have or here-

after can, shall or may have against said estate by reason of anything existing at the date hereof.

And I do hereby covenant, promise and agree to and with said William F. Mullin, administrator as aforesaid, that I will at any time hereafter, when reasonably required, make, execute and deliver any and all such further or other instrument or instruments of writing as may be necessary to fully effectuate and carry into effect the true intent and meaning of these presents.

In Witness Whereof, I have hereunto set my hand and seal this twenty-first day of December, A. D., Nineteen hundred and three.

JAMES S. MULLIN, [L. S.]

Signed, sealed and delivered in the presence of

Charles M. Lum.

State of New Jersey, } *ss.*
County of Essex. }

Be it remembered, that on this twenty-first day of December, A. D., Nineteen hundred and three, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared James S. Mullin, who, I am satisfied is the releasor in the foregoing release named, and who executed the same; and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

CHARLES M. LUM,

A Master in Chancery of New Jersey.

EXHIBIT F.

KNOW ALL MEN BY THESE PRESENTS, That I, Isabel R. Mullin, of the City of Newark, in the County of Essex and State of New Jersey, do hereby acknowledge the receipt from William F. Mullin administrator with the will annexed of Peter M. Mullin, late of the said city, deceased, of the sum of THREE THOUSAND SEVEN HUNDRED AND FIFTY DOLLARS ($3,750) in full discharge and satisfaction of all my right, share and interest of every name and nature in the estate of said Peter M. Mullin, deceased, and in consideration thereof, I have released and discharged and do by these presents release and forever discharge the said William F. Mullin, administrator as aforesaid, and also the estate of the said Peter M. Mullin, deceased, of and from any and all further or other accounting or reckoning in respect to my interest in said estate, and of and from any and all distributive share, debts, dues, claims and demands which I ever had, now have or hereafter can, shall or may have against said estate by reason of anything existing at the date hereof.

And I do hereby covenant, promise and agree to and with the said William F. Mullin, administrator as aforesaid, that I will at any time hereafter, when reasonably required, make, execute and deliver any and all such further or other instrument or instruments of writing as may be necessary to fully effectuate and carry into effect the true intent and meaning of these presents.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this tenth day of December, A. D., Nineteen hundred and six.

ISABEL R. MULLIN, [L. S.]

Signed, sealed and delivered in
the presence of
CHAS. M. LUM.

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

Be it remembered, that on this tenth day of December, A. D., Nineteen hundred and six, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Isabel R. Mullin, who, I am satisfied is the releasor in the foregoing release named, and who executed the same; and I having first made known to her the contents thereof, she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed for the uses and purposes therein expressed.

CHARLES M. LUM,
A Master in Chancery of New Jersey.

Answer and Cross Bill.

(Filed December 23, 1911.)

IN CHANCERY OF NEW JERSEY.

Between WILLIAM F. MULLIN, *Complainant,* and ANNIE E. MULLIN, *et. als.*, *Defendants.*	*On Bill for Injunction, etc.* / *Answer and Cross Bill.*

The joint and several answer of Peter M. Mullin, an infant, under the age of twenty-one years, by Joseph J. Mullin, his Guardian, and of Annie E. Mullin, Marie Mullin, Joseph L. Mullin and Grace G. Mullin, his wife, James S. Mullin and Nellie Mullin, his wife, Grace T. Coburn and John J. Coburn, her husband, and Isabella Mulvihill and Charles C. Mulvihill, her husband, defendants, to the bill of complaint of William F. Mullin, complainant, in the above stated cause:

These defendants now and at all times hereafter, saving and reserving to themselves all, and all manner of benefit and advantage of exception, to the many errors, uncertainties and inperfections in the said bill of complaint contained, for answer thereunto, or unto so much thereof as these defendants are advised it is material or necessary for them to make answer unto, answering severally say:

1. They admit that Peter M. Mullin, late of the City of Newark, departed this life, leaving his last will and testament, at the time and to the effect as stated in paragraph "one" of said bill of complaint.

2. They admit the statements of paragraph "two" in said bill of complaint regarding the proof of the will of said Peter M. Mullin, and the issuing of letters testamentary thereon to Annie E. Mullin, widow and one of the executors therein named, and that she took upon herself the burden of the administration of said estate; further they admit the statements of paragraph 3 of said bill of complaint regarding the surviving family of said Peter M. Mullin, deceased, with the exception that Peter M. Mullin, Jr., was not born until April twenty-fourth, Eighteen hundred and ninety-two, following the death of said Peter M. Mullin, his father, of November eighteenth, Eighteen ninety-one. They neither admit nor deny the statements in paragraph 4 of said bill of complaint, relating to the assets of the estate of Peter M. Mullin, deceased, but leave said complainant to make such proof thereof as he may be advised is necessary and proper under the circumstances.

3. These defendants further answering, admit that said Peter M. Mullin died seized of the assets of the business of undertaking carried on by him, in his lifetime, as stated in paragraph 5 of said bill of complaint. They deny that said assets were of little or of no value and that the obligations of the business were about equal to the value of all the assets thereof, but on the contrary thereof allege the fact to be that said business had been established for many years, and was one of the very best paying undertaking businesses in the City of Newark; that the good-will of said business was very valuable from the fact that said Peter M. Mullin, in his life-time, had acquired the confidence and affectionate regard of great numbers of the substantial and well-to-do citizens of Newark and Essex County, who in his life-time were accustomed to retain him for their

family burials, and after his death, in an accidental and tragic manner, were moved by sympathy to continue business relations with the undertaking establishment left by him. That in addition there was on hand a very complete stock of supplies, consisting of embalming boards, embalming tops, candle sticks, chairs, rugs, stools, pedestals and like articles appertaining to the undertaking business, which would cost large sums of money to install, and which were in excellent condition for use, and which continued to be used in the said business. Moveover, there were several thousand dollars of good and collectible accounts outstanding on the books of said Peter M. Mullin at the time of his decease, in addition to the assets set forth in paragraph 5 of said bill.

4. These defendants further answering, admit that as stated in paragraph 6 of said bill, said Joseph J. Mullin did not qualify as executor of said will; and that, after the probate thereof, Annie E. Mullin, the executrix, proceeded to conduct the said business of undertaking, for the benefit of herself and children, and that she did not file an inventory of the personal estate of said testator.

5. These defendants further answering, admit that said William F. Mullin, after the death of his said father, continued the conduct of the undertaking business, and assisted his mother therein; but they further say that other of these defendants, to wit: Joseph L. Mullin and James S. Mullin, and later on Peter M. Mullin also assisted in the conduct of said business, it being considered a family matter and operated for the benefit of all. Further they admit that as therein stated, an agreement was made between Annie E. Mullin, executrix, this defendant, Joseph L. Mullin, and said complainant, to the effect and for the purposes set forth in said paragraph 7.

6. These defendants further answering, neither admit nor deny that as stated in said paragraph 8 said Joseph L. Mullin, before the time fixed for the termination of said agreement, refused further to be bound thereby, and established himself in business in Morristown, New Jersey, but leave the complainant to make such proof thereof as he is advised may be necessary or proper under the circumstances. They deny that as in said paragraph 8 stated, said Annie E. Mullin, executrix, agreed with said complainant that the balance of the profits of the business remaining after the support and maintenance of said Annie E. Mullin and the said infant children, should belong to said William F. Mullin, complainant, in payment of her services in conducting said business after the withdrawal of said Joseph L. Mullin, or at any time, but on the contrary thereof allege the fact to be that no further, or other agreement, was ever made by said executrix, with said complainant, than the agreement made as aforesaid, with said complainant and said defendant, Joseph L. Mullin, and that said complainant continued his services in said business, assisted by said James S. Mullin, and afterwards, by said Joseph L. Mullin, and said Peter M. Mullin, only upon the same footing as the other members of the family of said Peter M. Mullin as to sharing in the profits thereof, as a work in which all of said family were interested and in the profits of which all should participate.

7. These defendants further deny that as stated in said bill of complaint, in paragraph 8 thereof, said complainant, as a result of his personal efforts in said business, derived funds for the support and maintenance of his mother and her children, or that he did so to continue to support them under arangement with his mother until her death; but on the contrary thereof, allege the fact to be, that all of said children, as soon as they were able, were required to and did render assistance in the conduct

of said undertaking business equally with said complainant, and the female members of the family were required to and did seek and secure positions of various kinds from which they derived incomes to support themselves; being driven thereto by the continual nagging of said complainant in his capacity as elder brother, and by his harsh and parsimonious conduct.

8. These defendants further answering, admit the statements contained in paragraphs 9, 10 and 11 of said bill of complaint regarding the payment of shares and the giving of releases by said complainant, and these defendants, Joseph L. Mullin and Grace T. Coburn, except that these defendants say that said releases were intended to and did apply only to the value of the bonds and mortgages and money left in specie by their father, Peter M. Mullin, at the time of his death, and were not intended to and did not affect their rights in the real estate of said Peter M. Mullin or in his undertaking business left by him for the benefit of his family as aforesaid; their rights in said business being held subject to a future accounting thereof.

9. These defendants further answering, neither admit nor deny the statements in paragraph 12 of said bill of complaint, but leave the said complainant to make such proof thereof as he may be advised is necessary or proper under the circumstances. They further admit the statements of paragraph 13 thereof, regarding the death of Annie E. Mullin, executrix, and that all the children of said Peter M. Mullin survived her, with the exception of Louis, who predeceased her, without leaving him surviving lawful issue. Further they admit that letters of administration, with the will annexed of said Peter M. Mullin, deceased, were granted unto said William F. Mullin, and that prior to the granting of said letters to said complainant, said Joseph J. Mullin re-

nounced in writing his right to act as executor of said last will. These defendants further answering, admit the statements of paragraph 14 of said bill of complaint, regarding the infancy of certain of the children of Peter M. Mullin at the time of the death of said Annie E. Mullin, executrix; they having been born at the times stated in said paragraph.

10. This defendant, James S. Mullin, further answering for himself, admits that as stated in paragraph 15 of said bill of complaint, he executed a release of his rights against the estate of said Peter M. Mullin, but alleges the fact to be that said release was executed upon information furnished by said William F. Mullin and without making an acounting of said estate, and without giving this defendant an opportunity to examine into the condition of said estate; and that said information as to the value of said estate, given by said William F. Mullin to this defendant, as an inducement for him to sign said release, was misleading and false and intended so to be by said William F. Mullin; in that his share would well amount to the sum of Thirty-seven hundred and fifty dollars without regard to the value of the real estate of said Peter M. Mullin, as was the case in the settlement with his brothers and sisters as aforesaid; and this defendant further alleges the fact to be that in executing said release he believed it had no reference to the undertaking business belonging to the estate of Peter M. Mullin, deceased, but he has since been advised that said William F. Mullin claims that this defendant, in executing said release, gave up all his rights in the said undertaking business and all other property of the estate of Peter M. Mullin, as aforesaid; but this defendant denies that such was ever his intention in executing said release.

11. And this defendant, Isabella R. Mulvihill, formerly Mullin, further answering for herself, admits that as stated in paragraph 16 of said bill of

complaint, she executed a general release of her claims as therein stated, for the sum of Thirty-seven hundred and fifty dollars; but further charges the fact to be that in executing said release she believed it had no reference to the said undertaking business of Peter M. Mullin, but that same was subject to a future accounting by the said administrator, in the division of which business, upon such accounting, she would participate as one of the children of said Peter M. Mullin. And she further charges the fact to be that said William F. Mullin refused to make an accounting of said estate upon her request before the signing of said release, alleging that her other brothers and sisters had received Thirty-seven hundred and fifty dollars and she must be satisfied with what they had received; whereupon this defendant executed said release, but under protest claiming, which was and is the fact, that her share in the estate of said Peter M. Mullin was of considerably more value than the aforesaid sum, and insisting that upon a future accounting she must receive what was properly due her.

12. And this defendant, Anna E. Mullin, further answering for herself, admits that as stated in paragraph 17 of said bill of complaint, she has received certain sums from said complainant as administrator, on account of her share in said estate, and further alleges that she executed a release to said William F. Mullin, administrator, but that the same was done under protest, and after demanding that said William F. Mullin make a proper accounting of the said estate, so that her share might be exactly ascertained, which accounting said William F. Mullin refused to give, claiming that she must take what her other brothers and sisters had received; and this defendant alleges the fact to be that said release was executed practically under compulsion, and the threat of said William F. Mullin to with-

hold from her all money due on her said share indefinitely unless she executed the said release. And further this defendant says that in executing said release, she believed the same had no reference to her rights in the undertaking business belonging to the estate of her father, but that upon settlement of the same she would receive her proper share therein regardless of said release.

13. These defendants, further answering, neither admit nor deny the statements contained in paragraph 18 of said bill, regarding the assets of the estate of said Peter M. Mullin, at the time of the appointment of said complainant as administrator with the will annexed, but leave the said complainant to make such proof thereof as he shall be advised is necessary or proper under the circumstances. Except that in regard to lots numbers 12, 16 and 17 on map of Homestead Park, mentioned in said paragraph, they say that the same were purchased by the said William F. Mullin, with money taken from the estate of Peter M. Mullin, and without the consent of any of the heirs thereof; and that said William F. Mullin should account for the amount of money so applied to the purchase of said lots, and should be compelled to reimburse the said estate for any loss sustained by the purchase of said lots as aforesaid.

14. These defendants, further answering, deny the statement in paragraph 19 of said bill of complaint, that said complainant supported and maintained his infant brothers and sisters from the time of his mother's death until they attained the age of twenty-one years; but on the contrary thereof allege the fact to be that immediately after the death of his said mother, said William F. Mullin insisted that as many of said infant children as were able should go to work and help to maintain themselves; and this defendant, James S. Mullin, has constantly

worked and supported himself from the time he was ten years old, first in assisting in conducting the said undertaking business, and from the time of his mother's death, when he was eighteen years old, until he was twenty-one years old he worked and supported himself at other employments. This defendant, Anna E. Mullin, for sometime after her mother's death, was maintained by said William F. Mullin at boarding school, etc., but he was so parsimonious in supplying money to her that she was almost constantly in need, and finally obtained a position in which she earned money sufficient to maintain herself. Said Peter M. Mullin, defendant, since he was seventeen years of age, has been in business in which he received wages sufficient to support himself, except that said William F. Mullin had paid fifteen dollars per month for his board with his sister, Grace T. Coburn, one of these defendants. Said Marie Mullin, defendant, after her mother's death, was sent to boarding school by said William F. Mullin, who paid for her board and tuition, and in addition thereto furnished her clothes, and provided for her wants, but so scantily that she was very frequently in need and if it were not for the fact that she was preparing for the profession of teaching, she would have been obliged to give up school and seek a position where she could earn money to provide for her maintenance.

15. These defendants, further answering, neither admit nor deny that said William F. Mullin has spent as much as five hundred dollars per year, on each of the infant children, in their maintenance, education and support, as in said paragraph 19 set forth, but leave the said complainant to make such proof thereof as he may be advised is necessary or proper under the circumstances. But they deny that the sum spent by him for such maintenance, education and support, was in excess of the income of any in-

terest said children possessed in the estate of their father, and they deny that the money so paid, laid out and expended was in reality the earnings of said William F. Mullin and the result of his personal efforts; and they deny that the assets of the undertaking business carried on by said William F. Mullin were of absolutely no value, and would have produced nothing upon sale; and they deny that the said business existed and realized results only by reason of the personal efforts of said William F. Mullin, and of the reputation and good-will established and maintained by said William F. Mullin; but on the contrary thereof, allege the fact to be that the interest of the said infant children in the business of their late father, and the income therefrom, was a very large sum of money, and said income was amply sufficient to provide for their proper maintenance and education if properly applied thereto, without the necessity of compelling them to work and support themselves before completing their schooling and reaching their majority.

16. And further, these defendants, aver the fact to be that the assets of said undertaking business were of great value, as hereinbefore set forth, and the good-will thereof established by said Peter M. Mullin in his life-time, was an asset of tremendous value before said William F. Mullin was born, and was no less valuable at the time said complainant assumed control of said business after being appointed administrator with the will annexed of the estate of Peter M. Mullin, deceased.

17. And these defendants, further answering, neither admit nor deny that as therein stated in paragraph 20, said complainant, after his appointment as administrator, discovered that the assets of the estate of his father would not be sufficient to pay to each child, upon attaining its majority, the sum of Thirty-seven hundred dollars, without in-

cluding therein the value of the premises known as 228 Lafayette Street, Newark, N. J.; or that it would be impossible to effect any equality of distribution among all the children of the testator, without disposing of the said real property and converting the same into money; or that said Joseph L. Mullin, Grace T. Coburn and said complainant, should have only such interest therein as might be necessary to equalize their shares in the estate of said Peter M. Mullin, deceased, but leave the said complainant to make such proof thereof as he may be advised is necessary or proper under the circumstances.

18. These defendants further answering admit all the statements contained in paragraph 21 of said bill of complaint. These defendants, further answering, neither admit nor deny the statements contained in paragraphs 22, 23, 24, 25, 26 and 27 of said bill of complaint, but leave the said complainant to make such proof thereof as he may be advised is necessary or proper under the circumstances.

19. These defendants, further answering, neither admit nor deny the statements contained in paragraph 28 of said bill. But further they say that they too are desirous that said complainant should account for his administration of the estate of Peter M. Mullin, deceased, and should make over and pay to the defendants interested in said estate, their respective shares therein, and that the same may be done by the aid of this court, in this suit, after the same have been properly ascertained by this court, in this cause.

20. And these defendants, further answering, say that as to the alleged agreement set forth in paragraph 8 in said bill of complaint whereby said complainant was to have and receive for his services the balance of the profit of the business remaining after the support and maintenance of his mother and the said infant children, the same was illegal and not

binding upon these defendants; and particularly such of them as were under age at the time of the making of said alleged agreement; and these defendants hope that they shall have the same benefit of this defense as if they had demurred to the complainant's bill in that particular.

21. All which matters and things these defendants are ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges, in this behalf, most wrongfully sustained.

22. And these defendants, Peter M. Mullin, by his said guardian, and Marie Mullin and Anna E. Mullin, by way of cross-bill, exhibited against the complainant, show unto your Honor:

1. That said William F. Mullin, disregarding the terms of the will of said Peter M. Mullin, deceased, and the duties of his said office as administrator with the will annexed, and against the protests of these defendants, has lately claimed the said undertaking business to be his own, and has refused to account for the profits arising therefrom while the same has been under his charge as administrator with the will annexed, upon the pretense that by some agreement with Annie E. Mullin, executrix of the last will and testament of Peter M. Mullin, deceased, he became entitled as in his own right to said profits, and the rights and interests of these and other defendants, the children of Peter M. Mullin, deceased, in the business aforesaid.

2. That said William F. Mullin has habitually taken the funds belonging to said estate, and used them in the prosecution and conduct of private business ventures and speculations of his own, acquiring therefrom, in some instances, large profits which he applied to his own use; and in other instances sustaining great losses which he has charged against

the estate of said Peter M. Mullin, deceased. That the extent of these transactions is wholly unknown to these defendants, but they are informed and believe that they have been numerous and large.

3. And these defendants further show that the gross income of said undertaking business, from August first, Nineteen hundred, when said William F. Mullin assumed control thereof as administrator with the will annexed, will average about Twenty-five thousand dollars per year, and that the net income was upwards of Twelve thousand, five hundred dollars per year; the whole of which, with the exception of the very small sum not exceeding Five hundred dollars per year spent by him, as alleged, for the support and maintenance of these defendants, is claimed by the said William F. Mullin as belonging to him by virtue of the agreement aforesaid, or some other right. But these defendants show that said complainant conducted said business, and was authorized to conduct it, since the death of said Annie E. Mullin, only by virtue of his office as administrator with the will annexed of Peter M. Mullin, deceased; and as such, had no right or authority to use the funds thereof in his own business enterprise for his own purposes, nor to claim therefrom any portion thereof more than his proper compensation allowed by law, for his services as such administrator with the will annexed; and that in using said funds for his own purposes, and in claiming the entire profits of said business, and refusing to account therefor as administrator, he is acting contrary to law and in derogation of the rights of these defendants and others, the children of said Peter M. Mullin, deceased.

23. All which actings, doings and pretenses are contrary to equity and good conscience, and tend to the manifest, wrong, injury and oppression of these defendants in the premises. In tender consideration

whereof, and for as much as these defendants are without adequate remedy in the premises, at and by the strict rules of the common law, and can only obtain relief in this Honorable Court, where matters of this nature properly cognizable and relievable.

24. To the end, therefore, that the said William F. Mullin, complainant, both individually and as administrator with the will annexed of Peter M. Mullin, deceased, may without oath, true and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here again repeated, and he distinctly interrogated thereto; that the said William F. Mullin, both individually and as administrator with the will annexed as aforesaid, be required to account for all the business of Peter M. Mullin, deceased, conducted as aforesaid, since August first, Nineteen hundred, and the rents and profits of the same; that the same may be ascertained by this Honorable Court and may be decreed to be the property of the estate of Peter M. Mullin, deceased; and upon being so ascertained and determined, may be divided among these defendants and others, the children of Peter M. Mullin, deceased, notwithstanding any release or releases secured from them as aforesaid by false and fraudulent pretenses or otherwise; that said William F. Mullin may be required to account for all the moneys belonging to the estate of Peter M. Mullin, deceased, applied by him to his own use and for his personal business ventures, and may be required to turn over the profits arising therefrom to the estate of Peter M. Mullin, deceased, after the amount thereof has been ascertained; and that also any and all property, real or personal, acquired by him by using the funds of said estate as aforesaid, whether the same remain and be in the name of said William F. Mullin or in the name of Loretta A. Mullin, wife of said William F. Mullin, or their

assigns, when discovered, may be decreed to be held by them, or any or either of them, only in trust for these defendants and others, the children and heirs-at-law of said Peter M. Mullin, deceased, and only for their use and benefit; and that these defendants may have such other and further relief as the nature of the case may require, and as shall be agreeable to equity and good conscience.

25. May it please your Honor, the premises considered, to grant unto your orators, the State's Writ of Subpoena, issuing out of and under the seal of this Honorable Court to be directed to the said William F. Mullin and Loretta A. Mullin, and their assigns, when discovered, commanding them, and each of them, by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor, in this Honorable Court, then and there to answer all and singular the premises, and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet, and as shall be agreeable to equity and good conscience. And your orators, as in duty bound, will ever pray, etc.

MICHAEL J. TANSEY,
Solicitor for and of Counsel with Defendants.

Replication and Answer to Cross Bill.

(Filed February 19, 1912.)

IN CHANCERY OF NEW JERSEY.

Between WILLIAM F. MULLIN, *Complainant,* *and* ANNA E. MULLIN, *et. als.*, *Defendants.*	*On Bill, etc. Replication and Answer to Cross-Bill.*

The replication of William F. Mullin, complainant, to the answer of the defendants.

The complainant joins issue on so much of the defendants' answer as is not in the nature of a cross-bill, and as to that part of said answer which is in the nature of a cross-bill, he says:

1. That he admits that he has claimed the said undertaking business to be his own and that he has refused to account for the profits arising therefrom since his appointment as administrator with the will annexed of his father, but this complainant denies that the said undertaking business has been under his charge or conducted by him as administrator with the will annexed but under the circumstances hereinbefore set forth in his bill of complaint filed in this cause; and that this complainant insists that upon the death of his mother the assets of the undertaking business were of little value and that the business existed and realized results only by reason of the personal efforts of this complainant, and that

the relations of this complainant to the said business are as set forth in his bill of complaint herein.

2. That this complainant denies each and every allegation contained in the second paragraph of the said cross-bill.

3. That this complainant denies that he assumed control of the said undertaking business as administrator with the will annexed as alleged in the third paragraph of said cross-bill; but he admits that the gross income of the said undertaking business carried on by him as aforesaid will average about Twenty-five thousand dollars per year, as alleged in said cross-bill, but he denies that the net income was upwards of Twelve thousand, five hundred dollars per year, as alleged in said cross-bill; and this complainant admits that the whole of that income is claimed by him as belonging to him by virtue of the agreement and arrangement set forth in the bill of complaint herein; and this complainant denies that he conducted said business and was authorized to conduct it since the death of his mother only by virtue of his office as administrator, as in said cross-bill alleged; and this complainant denies that he used any funds belonging to the estate of his father in any of his own business enterprises, but this complainant insists that the profits derived from said undertaking business were his own property and were the result of his own personal efforts and the income of a business which he had built up and maintained by his own personal activity therein; that all the profits of said business are the property of this complainant and that the said defendants have no interest therein, and that this complainant has expended considerable moneys in the maintenance, education and support of the infant children of his parents, and that the moneys laid out by him for said purposes is vastly in excess of the income of any

interest that the said infant children had in the estate of their father.

Wherefore, this complainant, the defendant to said cross-bill, prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

LUM, TAMBLYN & COLYER,

Solicitors for and of Counsel with Complainant.

Replication to Answer to Cross Bill.

(Filed February 23, 1912.)

IN CHANCERY OF NEW JERSEY.

Between WILLIAM F. MULLIN, *Complainant,* *and* ANNA E. MULLIN, *et. als.*, *Defendants.*	*On Bill for Injunction, etc.* *On Answer to Cross-Bill.* *Replication to Answer to Cross-Bill.*

The replication of Anna E. Mullin, Marie Mullin, Grace T. Coburn and John J. Coburn, her husband, Joseph L. Mullin and Grace G. Mullin, his wife, James S. Mullin and Nellie Mullin, his wife, Isabella Mulvihill and Charles C. Mulvihill, her husband, and Peter M. Mullin, by his guardian, Joseph J. Mullin, to the answer of complainant to the cross-bill of said defendants in the above stated cause.

The said defendants join issue on the complainant's answer to the cross-bill of defendants in the above stated cause.

MICHAEL J. TANSEY,
Solicitor for Defendants.

Order of Reference.

(Filed March 14, 1912.)

IN CHANCERY OF NEW JERSEY.

Between WILLIAM F. MULLIN, *Complainant,* *and* ANNIE E. MULLIN, *et. als.,* *Defendants.*	*On Bill for Injunction, etc.* *Order of Reference to Vice Chancellor.*

It is on this 13th day of March, Nineteen hundred and twelve, on motion of Michael J. Tansey, of counsel with the defendants, ordered, that the above stated cause be referred to Hon. F. W. Stevens, one of the Vice-Chancellors to hear the same for the Chancellor and to report thereon to him and advise what order or decree should be made therein.

MAHLON PITNEY, *C.*

Consent is hereby given on the part of the complainant to the making and entry of the foregoing order.

LUM, TAMBLYN & COLYER,
Solicitors for Complainant.

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM F. MULLIN,

Complainant,

and

ANNA E. MULLIN and others,

Defendants.

Before His Honor Vice Chancellor Stevens.

Messrs. Lum, Tamblyn & Colyer, appearing for the complainant.

Mr. Michael J. Tansey, appearing for the defendants.

Transcript of shorthand report of the evidence given upon the trial of the above stated cause, on Friday, June seventh, Nineteen hundred and twelve, at Chancery Chambers, Newark, New Jersey.

WILLIAM F. MULLIN, sworn.

Direct examination by Mr. Lum.

Q You are the complainant in this case?

A Yes, sir.

Q And your father's name was what?

A Peter M. Mullin.

Q Your mother's name?

A Annie E. Mullin.

Q I show you a probate copy of the will of Peter M. Mullin; you recognize it as such?

A Yes, sir.

Mr. Lum. I offer this in evidence.

Marked exhibit C 1.

Q I show you a certified copy of your appointment as administrator, c. t. a. of the estate of Peter M. Mullin; do you recognize it as such?

A Yes, sir.

Mr. Lum. I offer that in evidence.

Marked exhibit C 2.

Q I show you what purports to be an agreement between Annie E. Mullin, yourself and Joseph L. Mullin, dated September 24, 1895; do you recognize that as such?

A Yes, sir.

Mr. Lum. I also offer that in evidence.

Marked exhibit C 3.

Q This agreement, C 3, refers to the conduction of a business; was this agreement undertaken?

A Yes, sir.

Q At the time when this agreement was entered into on September 24, 1895, how many children were living of Annie E. and Peter Mullin?

A Seven, I think, I forget whether Lewis died before that time or after that.

Q Who was the oldest?

A Myself.

Q How old are you now?

A I will be thirty-nine the twenty-first of this month.

Q The next oldest?

A Joseph L.

Q The next?

A Grace.

Q The next?

A James.

Q The next?

A Lewis, if he was alive, was ahead of James, then James, then Isabella and Anna, Marie, Peter was born five months after my father's death.

Q Your father died when?

A November 4th, 1891, 4th or 5th, 4th I think.

Q When this agreement was entered into in 1895 was the business being conducted?

A Yes, sir.

Q At the death of your father where was this business being conducted?

A At the same address under which it is being conducted now, in the same building.

Q Lafayette street?

A Yes, sir.

Q Number?

A 228; 91 at that time, the number has been since changed.

By the Court.

Q Who owned the real estate in which it was conducted?

A Peter M. Mullin.

Q Were you at all familiar with the business at that time?

A I was working for my father at that time.

Q And had for how long?

A Had ever since I was a little over fourteen, nearly three years, fifteen, sixteen or seventeen years of age.

Q Which of your brothers was also working there at that time?

A None of them.

Q Of what did the business consist, on the death of your father?

A Some few caskets, hardware, at that time he owned his own horse and wagon and a buggy we had, carriage, single carriage.

Q How many caskets?

A Oh, probably ten, eight or ten, the outside a dozen.

Q Were you familiar with the price of those articles at that time?

A Yes, sir.

Q What, in your best judgment, was the value of the caskets at that time?

A Well, they were the cheaper grade of goods that we always carried in stock, we never carried any high priced, never did then and never have since; probably a hundred and seventy-five dollars.

Q For the lot?

A Would cover the lot.

Q And the horse and carriage and buggy?

A Oh, five hundred dollars.

Q What was the value of the other assets of the business that were there, aside from the good will?

A Couple of hundred dollars.

Q Do you think those prices are fair, in your best judgment?

A Oh, yes, I know they are.

Q Now this agreement, C 3, how long was this acted under?

A Less—

By the Court.

Q One moment. At your father's death how old was your mother?

A Well, my mother would be, I think, fifty-six when she died, she was about forty-seven, no, she was about forty years of age probably.

By the Court.

Q Forty years of age at the death of your father?

A Yes, about that.

By the Court.

Q In good health?

A Well, no, she wasn't in good health, she had always been troubled, for years before his death suffered with rheumatism, shortly after his death the baby was born, and from that time on she was practically helpless until she died, had to have a special chair constructed, had to take her out bed, etc.

By the Court.

Q Did she engage in the business actively herself?

A Not in the least.

By the Court.

Q Did she understand it?

A No, sir.

By the Court.

Q She had not assisted your father?

A No, sir.

By the Court.

Q Had she lived in the same house in which the business was carried on?

A Yes, your honor, she had.

By the Court.

Q Then she saw the workings of the business but she did not help in its conduct, is that it?

A No; she knew many of the things that were done in connection with the business, but I mean she was never directly a part of it, other than answer the telephone, something like that, while she was able, but from my infancy, a number of years on, she wasn't able to do any of those things much.

By the Court.

Q Well, did she understand the business?

A She didn't understand anything about the details of the business in any way.

Q How long was this agreement acted under?

A Less than a year, I recall that from the fact—

The Court. When you say "this agreement."

Q C 3 I refer to.

A —my brother left; of course he was working in New York at the time of my father's death, and after consulting with my mother I advised her to let me take him to work with me in the business, and

he left the job, working in Oppenheimer & Company in New York, to come and work here with me in the business.

Q How long did he stay, under this agreement?

A That was before this agreement, up to the time of this agreement, that was about four or five years he was working there when this agreement was made, then we entered into this agreement of partnership in the business, that agreement that you have there; after that agreement had been in effect less than a year my brother left and went to Morristown in the undertaking business for himself, and asked for a settlement; my mother, in an effort to settle with him, interviewed the firm of Guild & Lum at that time, who had been counsel and drew my father's will or probated the will, and everything, and Mr. Fred Lum, my uncle Michael A. Mullin, my mother and myself, we had a conference and Mr. Lum suggested an appraisement of the estate at that time; the appraisement was made, which included all moneys which we had at that time, arriving from insurance, railroad settlement, etc., as a result of his death; some of the money at that time had been converted into bonds, etc., but the estate was appraised, including the real estate, the bonds and mortgages held at that time, and it inventoried something like thirty odd thousand dollars; this of course was after my brother went to Morristown and wanted a settlement of his share of the estate, and upon the advice of Mr. Lum an appraisement was made, and it was divided into, I think, eight parts of thirty-seven hundred and fifty dollars apiece; Mr. Lum suggested that we take our settlements, and the rest of the children, after the agreement that if I stayed and conducted the business and supported the children and educated them out of it, that whatever profits there were to be were

mine, assuring her I would take care of the children until the youngest was of age, which was Peter; we accepted our thirty seven hundred and fifty dollars apiece, myself, my brother Joe, and my sister Grace at that time; the others has been settled with by me on that basis, since her death.

Q I show you certain paper purporting to be a release from Joseph L. Mullin to you, dated the 19th day of May, 1896; do you recognize that as such?

A Yes, sir.

Mr. Lum. I offer this in evidence.
Marked exhibit C 4.

Q I show you what purports to be a release from Grace T. Mullin to Annie E. Mullin, dated the 4th of April, 1899; do you recognize this as such?

A Yes, sir.

Mr. Lum. We offer this in evidence.
Marked exhibit C 5.

Q I show you release from James S. Mullin to you as administrator with the will annexed, dated December 21, 1903; do you recognize that as such?

A Yes, sir.

Mr. Lum. We offer this in evidence.
Marked exhibit C 6.

Q I show you release from James S. Mullin to you as administrator with the will annexed, dated December 21, 1903; do you recognize that as such?

A Yes, sir.

Mr. Lum. Offered in evidence.
Marked exhibit C 7.

Q I show you release from yourself to your mother, as sole acting executrix of Peter M. Mullin, dated also the 19th day of May, 1896; do you recognize that as such?

A Yes, sir.

Mr. Lum. Offered in evidence.

Marked exhibit C 8.

Q I show you what purports to be receipts from Anna Mullin with reference to her settlement in the share of the estate of Peter Mullin, they are annexed; do you recognize them as such?

A Yes, sir.

Mr. Lum. Offer those in evidence.

Marked as one exhibit, C 9.

Q Now, Mr. Mullin, what time did you expend on this business?

A Practically all of my time.

Q Have you been in any other business since this time?

A I acquired a livery business since that time also.

Q And is that used incident to or in connection with the undertaking business at all?

A Oh, no, it is entirely separate.

Q Has this undertaking business grown since the death of your father.

A Oh, yes.

Q Who is at this time directing it?

A At this time?

Q Yes.

A Myself.

Q Under what name is it being conducted?

A The Estate of Peter M. Mullin.

Q Is there any reason for that, any reason why it has not been changed, or why it should be changed in the future?

A No particular reason, other than I felt there wasn't any use changing it; I made this agreement with my mother to stay until the children were of age; I thought the name could stay there until I changed it after the youngest one became of age,

as I understood the agreement under which I was working.

Q When your brother ceased to operate under this agreement, C 3, did you have any further agreement with your mother?

A As I stated in my explanation, I had the verbal agreement with my mother as the result of the conference held by Mr. Fred Lum, Michael A. Mullin, my uncle, my mother and myself.

Q Give that agreement just as definitely and distinctly as you can?

A After Joe had made his, I will say demands, of course requests, but he wanted his settlement, and as a result of it Mr. Lum suggested that the appraisement be made, etc., which was done; I told my mother at that time that I did not think, if Joe could quit and break his agreement, discontinue to have any connection with the business, that I should stay there and work for nothing and have no object to gain by staying there, and nothing to look forward to, and all that; as a result of that statement to her we had this conference, uncle Mike, Mr. Fred Lum, my mother and myself?

Q What was the agreement?

A And we agreed—

Q Your mother and you?

A The agreemnt was that I was to support these children out of this business, educate, clothe and feed them until they became of age, whatever profits arising from the business were to be mine and the business mine after the children had arrived at their majority.

Q Were you married at that time?

A No.

Q When were you married?

A Eighteen hundred and ninety-eight.

Cross examination by Mr. Tansey.

Q How old were you, Mr. Mullin, when your father died?

A Eighteen.

Q And how old were you when this agreement in writing was made in 1896, 1895?

A Twenty-two or twenty-three, twenty-two I think, twenty-two I guess, yes.

Q. How old was your brother Joseph when your father died?

A Fifteen months younger than I was.

Q After your father died you brought him to work in the business with you, didn't you?

A As I stated, my mother and I had talked and brought him to work with us.

Q He had previously worked in the business before, hadn't he?

A No, sir, never.

Q You and your father operated it?

A Yes, sir.

Q Did you have any helpers, besides yourself and your father?

A Well, not at the time of his death, previous to that, part of the time I was with him we had had helpers.

Q Did you personally conduct funerals before your father died?

A Yes, sir.

Q At the churches, etc.?

A Yes, sir.

Q For how many years had you done it?

A Three years.

Q Ever since you were fifteen?

A Yes, sir.

Q Did you make estimate on charges, etc.?

A Yes, sir.

Q What did you father do in the business?

A He did some of that, but I did it when he wasn't there.

By the Court.

Q He was a healthy vigorous man up to the time of his death?

A Oh, yes, accidentally killed.

By the Court.

Q Killed in a railroad accident?

A Yes, your honor.

Q You were not, however, depended on to do it all, were you?

A When he wasn't there I was.

Q And only when he wasn't there?

A Well, with other assistance that I might get from the stable or different places, help that I would engage.

Q But what I mean is when he was there he looked after all that himself?

A Sometimes he did, some times he didn't.

Q Conducting funerals, etc.?

A Some times, even when he was there I did it.

Q How long had he been in the undertaking business?

A Since eighteen hundred and seventy.

Q In the same location?

A In the same building.

Q He was quite a popular man, wasn't he?

A Oh, yes, oh yes.

Q He was a singer, too, wasn't he?

A Yes.

Q Sang in the church choirs?

A Yes, sir.

Q He had a large circle of friends?

A Oh, yes.

Q Wasn't he a Freeholder or something?

A Yes, sir, at the time of his death.

Q How long had he held public office?

A I think, if my memory serves me right, about three years.

Q He had been elected, of course, to that office?

A Yes, sir.
Q What ward was that in?
A Fifth ward.
Q He was well known all over that section, wasn't he?
A Yes, sir.
Q And in fact all through the city?
A Practically, yes.
Q Mr. Mullin was well known, I was going to say, throughout the county of Essex?
A Oh, yes.
Q Now, wasn't it true that his being so well known attracted a lot of business to his undertaking establishment?
A Well, I don't recall that we derived very much business as a result of it.
Q At the time of his death you took charge, together with your brother Joseph, in the business, I understood you to say?
A My brother Joseph, we took him from New York to come to work with me in the business.
Q And Mr. Joseph Mullin used to conduct funerals too, did he?
A My brother Joseph, after he came with me?
Q Yes?
A Oh, yes, shortly after, after he was broken into the business, in a little while.
Q He worked then four or five years with you?
A Up to the time he had left under that agreement.
Q Then I understood you to say you told your mother that you didn't want to stay there any further because you didn't have any future ahead of you, and you wanted some ararngement made?
A Yes.
Q And as a consequence of that an agreement was made between you and your mother?
A Yes.

Q And also between your uncle, Michael Mullin, and Mr. Lum?

A They were there at the time.

Q Was that the time when they made this inventory of the value of the business, etc.?

A Yes, sir.

Q And at that time it was figured thirty odd thousand dollars?

A Something like that, yes.

Q That was outside the value of the business?

A Didn't consider the value of the business at that time at all.

Q But you said, I think, that it considered the value of the real estate?

A Yes.

By the Court.

Q Did you put it in the inventory; you say you took an inventory, did you assign any value to the business in that inventory?

A No.

By the Court.

Q The inventory is not in existence?

A No.

Q That was a verbal arrangement between you?

The Court. Well, the inventory itself must have been in writing.

Mr. Lum. No inventory was ever filed.

The Court. No, but there were figures.

A I submitted figures, yes.

The Court. And those figures of course were on paper.

Mr. Lum. Undoubtedly, but we haven't the paper now.

The Court. As I understand the witness they did not figure in the sum total the value of this business.

Mr. Lum. No, did not.

A No.

Q As a result of that you figured that each child was entitled to thirty-seven hundred and fifty dollars?

A In that appraisement, at that time the money that had been saved during the period from the time of my father's death until that time was in that adjustment.

By the Court.

Q Saved out of the business?

A Yes.

By the Court.

Q So that the business had been prosperous.

A Yes.

Q Was it any more prosperous up to that time than it had been at the time before your father died?

A Yes, sir.

Q How much, for instance?

A Well, if I will be permitted to explain that, I can't answer it yes or no directly.

Q Yes.

A My father had been in business up to that time twenty-one years, and the result of his efforts for all that period was the house that we owned at Lafayette street, that we are living in now, that is all he owned at the time of his death, outside of the paraphernalia, as I have mentioned, in connection with the business, the horse and wagon, etc.; now twenty years it had taken him to accumulate that; I saved, I say I—

By the Court.

Q How much was the house worth?

A We valued it at five thousand dollars in that appraisement, in the appraisement I remember I put it down as five thousand dollars.

Q Was there any mortgage?

A No mortgage, we had just completed a mortgage with the Tenth Ward Building & Loan about

seven or eight months before his death, up to that time there was a mortgage on it.

Q You mean he had just paid it off?

A Just paid it off, so that it was just clear seven or eight months before his death, and at the time of the appraisement of the estate, in addition to that house and other holdings we had, resulting from the money received from insurance companies as a result of his death, and the railroad money as a result of the adjournment that the Judge here is familiar with, and moneys that I had saved with Joe's assistance, of course, up to that time was in that appraisement, and the amount of money that had been saved from the time of his death, and added to that estate, was a great deal more than we valued the house at; that covered a period of five years; so that he had taken twenty to accumulate that much. I only state that to show that we were doing a more profitable business.

Q Of course you don't include in your estimate the amount of money which was received as a result of his death, do you?

A Oh, all included.

Q I am talking now about how you arrived at your idea that the business was better after your father died than before?

A Well, I know the amount that was added to our holdings exclusive of the amount earned.

Q What was the amount?

A The amount earned in that time—

Q You said exclusive of the amount earned; I am asking you if you know?

A It amounted to the value of the Lafayette street house, which we valued at five thousand dollars, Legion Insurance money, five thousand dollars; Mutual Benefit Life Insurance, five thousand dollars; settlement with the Pennsylvania Railroad, if

I remember correctly, netted about seven thousand or seventy-five hundred dollars, and a deposit in the bank which was used up in payment of bills.

Q How much was that?

A I think sixteen or seventeen hundred dollars, thereabouts.

Q Well, what did you put the value of the Lafayette street property in at?

A Five thousand dollars.

Q Now your father had sixteen hundred dollars in bank at the time of his death, and he had five thousand dollars in the value of the property?

A Sixteen hundred dollars was due on bills, we had bills to cover that much or more; we owed M. A. Mullin stable one thousand dollars of that, about a thousand dollars at the time, I know we owed him a large two months bill.

Q Did you have any accounts collectable on the books at that time?

A A few, not much.

Q How much did they amount to?

A I haven't any idea.

Q You could of course show that from your books?

A Possibly.

Q But that does not answer the question which I asked you; I asked you how you knew that your business was more profitable after your father died than before?

A The amount of money that we had saved in that period against the amount of money he had accumulated in a period covering four times as long.

Q How much money had you saved in that period?

A Well, the difference between what I enumerated there and the approximation of the estate, eight

times three thousand seven hundred and fifty dollars, I can't give you that in mental figures.

The Court. It is practically thirty thousand dollars, something around that.

Q And the amount you had was twenty-two thousand five hundred dollars?

A That would be seven or eight thousand dollars I saved in that period, in about four years.

Q That you had saved in four years?

A In about four years; we were then drawing fifteen dollars a week in addition to that; that is what the business had made in that time.

Q Did your father have any bonds and mortgages on investment when he died?

A No, sir.

Q No money at all, except what you said?

A Nothing at all except the house in Lafayette street and the deposit in the National Newark Banking Company.

Q You are valuing the house in Lafayette street at five thousand dollars?

A Yes.

Q You figure out you had saved about seventy-five thousand dollars in the four years was it?

A Little over four years there, the period from November, 1891, until this agreement in 1896.

Q Now, if it were true that you included the value of the real estate in that estimate why did you in signing the release of your interest exclude the real estate?

A I didn't remember that that was there until we noticed it in a later release, and I don't remember just now whether Mr. Fred Lum was alive at that time or not, but it wasn't put in the other releases for the reason that it had to be part of that estimate.

Q Why did you set forth in your bill of complaint that it was later discovered that the estate would

not be sufficient to make three thousand seven hundred and fifty dollars, without including the real estate?

A The fact that that condition existed possibly is the reason.

Q You said you later discovered it, it was later discovered?

A Yes.

Q It was not discovered until after you had released, reserving the real estate, and your brother Joseph had released reserving his interest in the real estate, and your sister Grace had released reserving her interest in the real estate, it was not discovered until after your mother died, was it?

A I don't believe it was; I never claimed my interest in the estate because I never expected to get it, and understood I had released by right to that portion of the estate.

Q The matter was fresh in your mind at that time, and if the real estate were included in your release or in your estimate why should you not have released the real estate too?

A I certainly should have and intended that I should, expected that I did.

Q And yet Mr. Lum drew the releases, didn't he?

A Yes.

Q He was present when the estimate was made?

A Oh, yes.

Q You may be wrong about saying that the value of the real estate was included in that, may you not?

A I am positively not, because there was nobody else but myself submitted the list of the holdings of the estate; from time to time we had invested those moneys, some of them on the advice of my uncle Mike, we bought water bonds on his advice with some of the proceeds from my father's death, and those and other things which I mentioned were enumerated

in the list supplied by me; I was taking care of those things, my mother didn't know what they were, she hadn't them in charge, she knew because I reported to her, but I was acting for her and I took charge of those things, and I submitted the list, and I remember distinctly that part of the appraisement was the valuation of the Lafayette street house.

Q Can you tell me in what year it was that you and Mr. Lum and your uncle, Michael Mullin, and your mother met and figured up the value of the estate?

A At the time that we appraised it, shortly before the first releases were signed there, in May of 1896 if I am correct, or 1906, 1896.

Q Was that after the first agreement had been broken by Joseph?

A Yes.

Q Up to that time you had no arrangement at all except the first agreement?

A The partnership agreement between ourselves, Joseph and myself.

Q What was the occasion of entering into that, Mr. Mullin?

A Why, Joe and I were getting along then and I thought that we ought to have some interest in the estate, that we ought to get some interest in the business rather, and have something more than fifteen dollars a week, when I realized we were saving quite an amount of money for the children that we were not deriving much benefit from; I discussed the matter with Joe and my mother, and we entered into that agreement.

Q How old were you in 1895 when that agreement was made?

A I said I think about twenty-two, if I was eighteen in 1891; I was born in 1873, now you can figure that out.

Q Shortly after you became of age?

A Yes, sir.

Q And you, as a result of that arrangement, desired to get some compensation for yourself out of the business?

A Yes.

Q You figured you didn't want to be working there for nothing?

A Yes.

Q And you went on under that agreement, by which you got three-sixths of the profits?

A Yes.

Q For, you say, a year?

A Less than a year.

Q Wasn't it really more than a year that you went on under that agreement?

A Off-hand I can't answer that; the date of the agreement explains itself.

Q Wasn't it really in 1897 that Mr. Joseph Mullin went to Morristown?

A I don't remember that, I say it was about that time, I think it was less than a year that the period of our partnership existed, because I think when I gave him his check in settlement of his share of the profits it was less than a year.

Q But he did get his share of the profits from you?

A He got his share that was coming from the business; I paid him, yes.

Q And that was over and above all the children's support and your mother's support and running of the business, and there was some profit to divide?

A Oh, yes.

Q Do you recall how large that check was?

A If my memory serves me right the check was seven hundred and some dollars.

Q And that was for one-sixth of the profit?

A No, two-sixths.

Q Two-sixths of the profit, after paying all expenses out for one year?

A It was practically a year, little less than a year I think.

Q For less than a year?

A Yes.

Q And was there any question then as to whether he was entitled to profit, having served only part of a year?

A Oh, I don't imagine there was, we settled with him, he wanted his money and I suppose we decided to give it to him.

Q Well, now, after he had left why was it that your mother, you were then getting three-sixths of the profits, why was it that your mother gave you six-sixths of the profits?

A Because I told her that I didn't think if I was to stay there and be utilized to maintain the business, conduct it, manage it and hold it together and look after it, that Joe could quit and go in business and help himself, with no regard or consideration for the children, and I was expected to stay there and give my life to them, that I should work for nothing, and I told her there would have to be some arrangement made which would be interesting to me.

Q That is the reason?

A That is the reason she made that proposition to me, and I agreed to it.

Q What did your profit the first year amount to, under the arrangement for three-sixths.

A I don't recall that.

Q Can you give me anywhere near your estimate?

A If he had practically seven hundred dollars, on two-sixths, why you can figure my three-sixths.

Q That would be about twelve hundred dollars, wouldn't it?

A Probably.

Q You figured up about ten hundred and fifty dollars for your share of the profits?

A Yes.

Q Now when you made this arrangement with your mother for six-sixths of the profit were you still to draw fifteen dollars a week?

A No.

Q That was all done away with?

A That was eliminated, I drew no salary from that day to this.

By the Court.

Q Now can you tell how much at that time, approximately, was actually needed for the support of your mother and the family?

A It then ran, our expenses at that time ran nearly four thousand, about four thousand dollars a year for running the house, keeping the children, medicine, doctor, etc.

By the Court.

Q And sending them to school?

A At that time they had not as yet arrived at an age where they could go to other than the parochial schools; it was after her death I sent them to boarding schools.

Q What was the gross income of the business at that time?

The Court. That does not make any difference, we will not go into that now. The important point is how much did the family cost, and how much was his profit.

A Support of the family was at least four thousand dollars a year, a conservative estimate, four thousand dollars.

William F. Mullin, cross.

By the Court.

Q You were all living together?

A Yes, sir.

Q And you were not married?

A No, sir.

Q Well, after your marriage did the family continue to live together?

A The family, after my marriage, yes, they lived together until my mother's death; I lived in the next street.

Q That is after your marriage?

A After I was married, until the time of my mother's death.

Q You lived with your mother?

A No, sir.

Q You lived in the next street?

A Lived around the corner in another building; my mother and the children still lived at home, lived in the homestead.

Further cross examination.

Q There were no other of the children there, of course, at the time this agreement was made between you and your mother, I mean present?

A No.

Q Who else was present besides you and your mother?

A Mr. Fred Lum and Michael A. Mullin.

Q When this agreement was made for six-sixths?

A For whatever was left after I had supported the children, that was the understanding I had with my mother, provided I stayed and supported and educated and looked after them and brought them up whatever the business would make would be mine.

Q Was Mr. Michael Mullin present at that time?

A He was.

Q And Mr. Frederick Lum was present at that time?

A Yes.

Q None of the family was present?

A None of the others.

Q And nobody else?

The Court. Well, the mother, as I understand it.

Q Except your mother?

A Yes.

Q Your uncle Joseph wasn't there?

A He was not.

Q When your mother died, Mr. Mullin, and you came to apply for letters of administration how was it then that you did not speak for your right to continue the business as your own?

A I didn't think it was necessary, I had that arrangement with my mother, I didn't consider anybody else.

Q You remember you had a conversation with Mr. Joseph Mullin at that time about his renouncing his right as executors?

A He had agreed to renounce when my mother qualified as my father's executor; there was a reason for him not qualifying at that time.

Q Well, you remember you had a conversation with Mr. Joseph Mullin at that time, do you?

A I don't recall any specific conversation, no sir.

Q Do you remember why it was that he renounced?

A I remember why he didn't qualify at my father's death.

Q Well, do you remember why he renounced just before you were appointed?

A Probably for the same reason, I don't recall.

Q Why was it that he renounced or refused to qualify at your father's death?

A Didn't refuse; I told my mother—

The Court. I do not think that makes any difference.

Q When you told your mother that you wanted some arrangemnt for yourself did you not also say you would leave the business and go across the street?

A I told her in the conversation that we had—let me understand the question again.

Q Didn't you threaten to leave the business and open up across the street?

A When my mother made the arrangements?

Q Yes.

Mr. Lum. I object to the characterization "threaten."

A I didn't altogether threaten.

Q Didn't you say you would?

A I told her if Joe could walk out and leave the children on her hands I had the right to do the same thing.

Q Didn't she then tell you that you might go if you wanted to, that she would get someone else to run the business?

A She pleaded and begged with me, and sent for Father Cody to come and talk to me and ask me to stay.

Q Was that the time also that this agreement was made?

A As a result of our conversation or first talk, and then we had another.

Q Well, Father Cody wasn't present when this other agreement was made?

A Oh, no, no.

Q When you, as a result of that agreement which you say, continued on in the business, you worked in it right up to the time of your mother's death?

A Yes.

Q Your furnished the money from the business for the support of the family?

A Yes.

William F. Mullin, cross.

Q Did Joseph Mullin come back again to work in the business?

A No, sir.

Q After he had been at Morristown?

A No, sir.

Q Did James Mullin work in the business?

A He worked for me, yes.

Q How long did James Mullin work in the business?

A Oh, a short period, then he left.

Q I am asking you if you know how long?

A I couldn't tell you off-hand.

Q How old was James Mullin when he worked in the business?

A About, I should say, eighteen, maybe seventeen or eighteen.

Q What did he do there?

A He worked for me and helped as an assistant.

Q Did whatever work was necessary in that line, didn't he?

A He couldn't do the work that was necessary at that time, he was a boy, didn't know much; delivered boxes.

Q He was eighteen?

A Yes.

Q He was the same age as you were when you took charge?

A I was doing at fifteen what he could not do at twenty-one.

Q You were a brighter boy than he was?

A I was schooled in the business a good deal younger.

By the Court.

Q When did he commence to work there, at what age?

A I should say about eighteen, for a short period, then he left.

Q Was that before your mother died?

A I don't remember whether Jim worked for me before my mother died or after.

Q What were you paying him at that time?

A That I don't remember; he worked for me in the undertaking business at two different times.

Q I am talking now about the first time?

A I don't recall what I paid him.

Q Do you remember whether you paid him anything?

A Oh, I paid him something, yes.

Q Wasn't he really working there in the interest of the family getting his board?

A Well, while he was a minor.

Q While he was a minor I am saying?

A He got some pay, I don't remember what it was.

Q But it wasn't the same as you were paying to any other man?

A Oh, no.

Q Do you recall what period it was that he worked there at all?

A I don't recall the first period, no.

Q But it was while he was under age?

A Yes.

Q When was it that he worked the second time?

A After he had received his settlement and had gone in a business for himself, in an express business.

Q That was after the release was signed?

A That was after he had released the estate.

Q And he had gone in the express business?

A He worked after that for the Telephone Company, then he came back to work for me from the Telephone Company, and worked for me until the period when he quit and went in business for himself.

Q And when was that?

A Oh, that is about four years ago I guess now, three or four years ago.

Q How long did he work for you when he left the Telephone Company?

A The period between he left the Telephone Company and went in business for himself?

Q Yes.

A Oh, eight or nine months, something like that.

Q What were you paying him then?

A Seventeen dollars a week.

Q You remember that, do you?

A Yes, sir, seventeen or eighteen, I forget.

Q Now, Peter Mullin?

A Yes, sir.

Q Did he work for you any time in the undertaking business?

A No, sir, never.

Q Didn't he do anything at all in the undertaking business?

A Oh, he may have helped around, as a boy around the office; he went to school at St. Vincents Academy after my mother's death, and I paid his board at my sister's home, Mrs. Coburn, from that period on, so that he was never connected in the undertaking business after that time.

Q How much did you pay for his board?

A I paid her, I think, twenty dollars a month, if I remember.

Q Did you ever pay more than fifteen dollars a month?

A For his board?

Q Yes.

A Well, I am paying twenty dollars for some of them, I think maybe his was fifteen dollars a month.

Q You are paying twenty dollars now, under an order of the Court?

A I am paying twenty dollars for his board, yes.

Q You are paying him five dollars a week, under an order of the Court?

A The estate is paying it.

Q You say Peter Mullin didn't work any in the business at all?

A Not in the undertaking business, he didn't work in it, no, sir.

Q Did he work anywhere at all before he was of age?

A Oh, yes.

Q He is not of age yet, is he?

A No.

Q How long has he been out of school at St. Vincents Academy, or rather St. Benedicts?

A Well, he went to St. Benedicts College after he went to St. Vincents.

Q How long since he has been out of school?

A About a year and a half, because he would not go any longer.

Q And he has been working a year and a half, hasn't he?

A Yes.

Q Since the time he left school?

A I guess he has.

Q Before he left school he used to be doing errands, you say, as a boy around the undertaking shop?

A Oh, no, no, from the time of my mother's death I didn't see very much of him, only when he would come down to visit us; he lived on Fifth street.

Q Then didn't he do anything at all for you in the shop?

A Not unless he happened to be down there and I asked him to bring a plate up, and if he hadn't any school, or something, and was hanging around there, might go to the cemetery with a box, something like that, after he got big enough.

William F. Mullin, cross.

Q What have you been paying for him besides fifteen dollars a month, for Peter?

A His education, cost of his schooling, clothes, board, spending money, everything he needed.

Q Did you give him more than fifteen dollars a month?

A Oh, yes.

Q Now, Anna Mullin, did Anna Mullin work before she was twenty-one?

A I don't remember, probably she did.

Q Do you know where she worked?

A The only place that I ever knew of her working was the Telephone Company?

Q You knew about her working there?

A Yes, sir.

Q And of course she didn't do anything in the undertaking shop?

A No, no.

Q Before she was twenty-one you paid her board, did you?

A I paid her board for a year after she was twenty-one and supported her for a year after she was twenty-one.

Q You furnished her clothes?

A Furnished everything for her until she was twenty-two.

By Mr. Lum.

Q How did that happen?

A Because they didn't tell me that she was twenty-one until after a year and I went to the baptismal records and found she was twenty-one a year before they told me she was.

Q You didn't know your sister was twenty-one?

A No.

Q You didn't keep her age in your mind?

A No; it was an accident I found it out.

Q You didn't know until you had gone to the records?

A I went to the baptismal records of St. James Church and found she was twenty-one a year before I discovered it.

Q Marie Mullin, did you also pay her board up to the time she was twenty-one?

A Yes; found the same condition existed with her, that she was twenty-two before I knew she was twenty-one, and had paid for her keep for a year more.

Q And you felt that was an imposition upon you?

A Yes.

Q As soon as she was twenty-one you thought you should have been released?

A Yes.

Q When James Mullin signed the release to you, that is the first release where the land or interest in the land is also released, isn't it, the first of the releases?

A I guess it is.

Q And that release was given to you after your mother's death?

A Yes.

Q Now didn't James F. Mullin refuse to sign the release for to take thirty-seven hundred and fifty dollars for his share of the estate?

A Did he refuse to?

Q Yes, did he not?

A He did not.

Q Did he not tell you that he wanted also an accounting of the business?

A No, sir.

Q Did he not say to you that he wanted his share of the business, as well as his share of the rest of the estate?

A No, never any question about him signing that release, he signed it and Mr. Lum explained it to him.

Q Didn't you tell him there was nothing more than the thirty-seven hundred and fifty dollars coming?

Mr. Lum. I object to this.

Mr. Tansey. I understand those releases are in evidence, and there is an allegation there of course that they signed them because they were satisfied with them, and it seems to me important to bring out the fact whether or not they demanded an accounting of the business, and if they did it would show their idea of any agreement, and also his idea of any agreement made with his mother.

The Court. Well, of course, on cross examination, with a view of showing that that was not the agreement, perhaps that is competent, but I do not think it is really of very much consequence just now.

Q When the release was signed by James Mullin didn't he object to signing it?

The Court. Well, he was of age, and he did sign it.

Mr. Tansey. We set up in our answer that those releases were obtained on certain statements, etc., and I supposed that that question might be gone into.

The Court. I do not see how this is going to throw any light upon the present question, it may be material hereafter, if there is more to divide than appears, but it does not strike me now that it is worth going into.

Mr. Tansey. I won't take time now, but I reserve the right, so that I won't be cut off on that point; as I understand we are restricted to the question of these agreements, and I will confine myself to them.

Q Now, Mr. Mullin, in this agreement that you say you made up with your mother, you didn't then have any weekly salary at all?

A After the agreement?

Q After this agreement was made with your mother?

A No, sir.

Q And the reason the agreement was made with your mother was because you threatened to leave?

A I didn't threaten to leave.

Q Well, you said you would, didn't you?

A No, sir.

Q You said if Joe had a right to you would?

A If Joe had a right to there wasn't any reason why I should not do it too.

Q And your mother begged and pleaded with you to stay?

A Yes.

Q It wasn't a fact then that she said she could get it run by anybody else as well as you?

A She told me she could not.

Q And on that arrangement you stayed and took all the profits, after supporting the children?

A Yes, sir.

Q After she died you still continued under the same arrangement?

A Yes.

Q Then if that were the case why did you administer on your father's estate?

A Because on the advice of counsel it was necessary, that is the only reason I know of.

Q If the business was yours, under an agreement, why should it be necessary?

The Court. Is not that a question of law?

Q Isn't it a fact, Mr. Mullin, that at that time you did not allege that there was any agreement between you and your mother that you should have all the profits?

A I didn't think it was necessary; to whom would I allege it?

Q Did you tell it to any of your brothers and sisters?

A What for?

Q Well, that is a matter for you to say, what for; why didn't you?

A Didn't think it was necessary.

Q But you didn't anyhow?

A No, I didn't.

Q Isn't it a fact that you never made claim to that business in its entirety until about a year ago?

A I never became necessary to tell any of the children that until they asked for an accounting, which was a couple of years ago, that is the first time I ever had any of them make a demand on me for an accounting, was at that time.

Q Didn't James Mullin make demand on you for an accounting?

A Never at any time.

Q Didn't Isabella Mullin make demand on you for an accounting?

A No.

Q Didn't Grace Mullin make a demand on you for an accounting?

A No.

Q Didn't Anna Mullin make a demand on you for an accounting?

A It was Anna or Marie, it was Anna I think was the first one started that talk, and it was then that I told them what my position was.

Q It was then that you insisted the business was yours?

A It was then I stated my position.

Q And that was only about two years ago, you say?

A Oh, about that, or a little less, at the time Anna commenced to talk settlement.

Q At the time you and Joseph J. Mullin were talking about your appointment as administrator you did not tell him then that you claimed the whole business, did you?

A I don't suppose I did.

Q Didn't you tell him at that time that you were going to run the business for the benefit of the children and the estate?

A Oh, no, no.

Q Didn't you tell him at that time that you were running the business to support the children and in the interest of the estate?

A No; might have told him I was supporting the children out of the business and intended to, which I have done.

Q Didn't you tell him at that time that if he renounced that you would support the children at home, and account as you were required by law?

A He knew better than that.

Q I say, didn't you tell him so?

A No; he knew better; he didn't ask me that; he knew better.

Q Didn't he at that time on that condition say, then I will renounce and let you be administrator?

A No; he hadn't qualified for the same reason that he didn't renounce, he hadn't qualified for the same reason, rather, that he renounced.

Q What was to prevent him from that time from going into that business and running it?

A Do you mean after my mother's death?

Q Yes?

A Why didn't he?

Q Would you have objected?

A Why certainly.

Q Upon what ground?

A I would have quit.

Q You would have qnit?

A Yes.

Q But you would not have said that he as executor did not have a right to go on with that business?

A I don't know whether he had any right or not, I know I wouldn't have stayed there.

Q If you had made that agreement with your mother why you would claim he hadn't any right, wouldn't you?

A I didn't think he had, that is probably why I never discussed it with him.

Q You say you would have quit?

A Certainly, I would never have worked under him.

Q Wasn't it on this arrangement between you and Joseph Mullin that you went on and ran the business and he quit?

A Not at all, it was never a consideration with me, Mr. Joseph Mullin wasn't, after my mother's death or from the time I made the arrangement with her, or after my father's death and she had qualified.

Q And this arrangement that you made with Joseph J. Mullin, which he says you made, was never made?

A I never made any arrangement with him; the arrangement under which I am working now, and at that time, was made with my mother, not with Joseph J. Mullin directly, indirectly or in any way.

Q The net profits of the business, Mr. Mullin, are something like twelve thousand dollars a year, aren't they?

A No, sir.

Mr. Lum. Is there any possible object in going into this at this time?

The Court. No, I do not think there is.

JOSEPH J. MULLIN, sworn.

Direct examination by Mr. Tansey.

Q You were a brother of Peter Mullin;

A Yes.

Q Were you his oldest brother, or how?

A The youngest brother, Michael A. is much older.

Q You were, however, the executor named in the will of Peter Mullin?

A Yes, sir.

Q After Peter Mullin died what interest did you take in the business affairs of the family?

A Well, I took a brotherly interest, and advised with my sister-in-law and with my nephew in conducting the business, in many ways.

Q With your nephew, Mr. William F. Mullin?

A Yes.

Q You were called into consult with Mrs. Mullin occasionally?

A Well, I was there very often.

Q How often, for instance?

A Never necessary to call me.

Q How often were you there?

A Oh, possibly three or four times a week, and some times every day in the week.

Q Why did you go there?

A Well, being interested in the business, and my brother's business.

Q What is your business?

A I am an undertaker.

Q Were you an undertaker at that time?

A Yes, sir.

Q How long had you been an undertaker?

A Well, I had been working in the business since I was a boy.

Q You had been some years at that time as an undertaker?

A Yes, sir.

Q And after you were called in from time to time by Mrs. Mullin, do you remember any arrangements made for the running of the business?

Mr. Lum. I don't think you mean to put that question in that unfair form; he says he was never called there, that he stopped there; now in your last question you ask about his being called there, and are assuming contrary to what he has testified to.

Q Did Mrs. Mullin consult you from time to time about the business?

A Very, very often.

Q Was there any arrangement made for the conduct of the business between Mrs. Mullin and some of her sons?

A Yes; when it came to arranging for a division there was a certain proportionate amount suggested by, William F. Mullin I think it was.

Q Were you called in at that time to discuss the matter?

A Yes, sir, I was asked my advice, and I came to the conclusion that I thought if the profits were divided up into sixths it would be better, and I think it was my suggestion that it was changed from a tenth to a sixth.

Q You were there at the making of this agreement for the sixth division?

A Yes.

Q As well as your brother Michael Mullin?

A No, sir, Michael Mullin wasn't there at that time.

Q Michael Mullin wasn't there?

A Wasn't there.

Q What arrangement was made at that time?

A That the profits of the business were to be divided up into sixths, William was to receive three-

sixths, Joseph two-sixths, and the one-sixth was to remain for the estate.

Q That is set forth in agreement, C 3, made in 1895?

A I guess that is the agreement.

Q After that agreement was made was there any subsequent agreement that you knew about?

A No, no other agreement that I knew of at that time.

Q When did you have any further knowledge about the business?

A Well, I had constant knowledge, being there almost daily.

Q Did you still continue to go there after this agreement was signed?

A Yes, sir.

Q And for what purpose?

A Advising with my sister-in-law.

Q Did your sister-in-law run or have control of the business?

A I was connected with the church down there for a long while after my brother died, which called me to the place.

Q Did Mrs. Mullin take a controlling interest in the business?

A Well, under her son, of course he was manager of the business, managing under her.

Q Didn't Mrs. Mullin sign the checks?

A That I couldn't say positively.

Q Well now, Mr. Mullin, after Mrs. Mullin's death did you have any conversation with William Mullin about the running of the business?

A Yes.

Q And do you recall where that was?

A Well, it was upstairs in the building over the office.

Q Their building?

A Yes, sir.

Q Where they were running their business?

A In Lafayette street.

Q How long after Mrs. Mullin's death was that?

A Oh, not many days, probably,—I spoke of a contingency arising that I might have to assume control of the business under the will, I acting as executor, I spoke to Mrs. Coburn, Grace Mullin, and finally had a talk with William F. Mullin; there was nothing said then for a day or two, and he came to my office with a renunciation.

Q What was the talk you had with William F. Mullin first?

A Well, only in a casual way, that I supposed there would have to be some arrangement made, I would either have to renounce or act; I didn't suppose it would be agreeable to him, and I know by his manner it was not agreeable; it wouldn't be very agreeable to me either.

Q That you should act in the business?

A Act as executor.

Q In the business?

Mr. Lum. I object; if you want to testify take the stand. It don't do any good before this Court to put leading questions in that form; that is three times you repeated it, and the witness will not stretch for you.

The Court. Well, he says, act as executor.

A (Continuing) I was thinking if I had to act as executor I would have to take control of the business, with somebody's assistance, act as the mother did, with William F. Mullin as manager, running the business, or somebody else, Joseph L. Mullin, or some outsider.

Q As a result of that conversation did anything happen?

A After a conversation with Grace—

By the Court.

Q What took place?

A Well, after a conversation with Grace and having her consent to remain and take charge of the family—

Q Why did you talk to Grace first?

A Because after her mother's death she didn't seem to think it would be satisfactory between them to have her remain there at the house.

Q Remain where?

A In the house, to take charge of the family that was there.

Q Was she married at that time?

A Yes.

Q What arrangement was made after you talked to her?

A The arrangement then, I consented to renounce, with the understanding that the family—

Q No, I am talking about what arrangement did you make with Grace Coburn?

A Well, I didn't make any arrangement only with her consent to remain there I consented to renounce.

Q When did William F. Mullin come to see you at your place?

A Oh, I don't know, probably two weeks after his mother's death.

Q What took place there?

A Well, at my office I of course declined to renounce until I had seen Grace and had some talk and some understanding as to how she was satisfied about the managing of the family.

Q Who asked you to renounce?

A William F.

Q Is that when he came to your office?

A Yes, sir.

Q After that did you see Grace Coburn?

A Yes, sir.

Q So then, when you just testified to, was it then that you made the arrangement about her staying?

Mr. Lum. How could he make any arrangement about her staying?

A After getting her ideas and her consent to remain if I renounced, and William F. was satisfied, that was the arrangement and the understanding before we got together.

Q Then you met William F. Mullin and what was done about renouncing?

A I decided that, Grace, William F. and myself were together, and I told him I would renounce if he was satisfied to conduct the business as it had been conducted for the benefit of the estate, and that the family would remain there in the house, as they had, with Grace in charge.

Q Was anything said further about his right to the business?

A That is all; I never supposed there was any right in the matter; only ran as the estate of Peter M. Mullin.

Q In pursuance of that agreement was anything done?

A I renounced and he assumed administratorship.

Q How was the business being run at that time, in whose name?

The Court. Well, it has always been run in the name of Estate of Peter M. Mullin.

Q Was anything subsequently done about the signs on the building, Mr. Mullin?

A I was informed at one time, between my visits—

The Court. One moment. You can put in evidence any statements made by William F.

Mullin, and that is all you can do; now if this witness had a conversation with William F. Mullin in regard to these signs or in regard to this alleged agreement why he may state that. Did you ever have any conversation with William F. Mullin in reference to the sign over the door?

A The sign on the window, your honor.

By the Court.

Q What was the conversation?

A I heard that he had—

By the Court.

Q No, never mind what you heard, just say what he said?

A Well, I asked him if he was going to change the name from the estate to his own name.

By the Court.

Q Yes.

A And he answered that that was his intention, to that effect; I said I objected to that, that the name ought not to come off there, that it should be removed legally; I objected; I don't know whether it was my objection, but the name of the Estate of Peter M. Mullin remained at that time.

Q Was that, how long after Mrs. Mullin's death, if it was so?

A Possibly two years, I don't know exactly, I couldn't tell when now.

Q Did he at that time give any reason for taking the sign off?

A No; I didn't ask him any reason.

Q Changing the sign?

A I didn't ask him any reason.

Mr. Tansey. Are we permitted to go into the question of the value of the good will of that place?

The Court. Oh, no, I think not.

Joseph J. Mullin, cross.

Q Was anything further said or done about agreements to run that business, by William F. Mullin?

A Nothing that I recall.

Q Now after you renounced and William F. Mullin was appointed administrator what was done about the family?

A I don't just understand.

Q What was done with the family?

A Oh, the family remained for a very short while, and finally Mrs. Coburn moved to another section with the family.

Q What was the reason of that, if you know?

The Court. If Mr. William F. Mullin gave any reason.

Q Do you know why they moved?

The Court. If he knows it from Mr. William F. Mullin.

By the Court.

Q Did you ever have any conversation with Mr. William F. Mullin about that?

A No, I did not.

Q Now in this agreement which you say was to run the business for the estate, what else was said, if anything?

A Only that William F. consented, said yes, he would carry out that agreement, and that is all that was ever said.

Q Did he then make any claim on the business?

Objected to.

Cross examination by Mr. Lum.

Q You are engaged in rival business to this, are you not, Mr. Mullin?

A Engaged in the same business, undertaker.

Q Well, you are?

Joseph J. Mullin, cross.

The Court. Whereabouts is your place?

A Washington near Bleeker street, and the other is in Lafayette and Congress street.

By the Court.

Q How far away?

A About a mile and a half.

Q You recognize them as rival businesses, do you not?

A No, sir.

Q Did William F. Mullin ever call on you for any advice in connection with the estate matters?

A I can't recall that he did.

Q Have you stated to us the reason why you did not qualify under this will?

The Court. Now you are going into that matter; I do not think it is of any consequence.

Q You have had no connection with the church there since the death of Mr. Mullin, your brother, have you?

A With St. James' Church?

Q Yes?

A Yes, sir.

Q What?

A I took his place in the choir for one year.

Q Since then Mr. William F. Mullin has taken his place and does to-day, as baritone?

A Yes, sir.

Q When did you have this conversation with Mr. Will. Mullin regarding the change of the name at the establishment?

A Possibly two years after his mother's death, I don't recall just when.

Q Where did the conversation take place?

A Down in the office.

Q What office?

A In the office of the estate, Lafayette street.

Q What brought it up?

A I went down, or called, my usual call, and asked if it was true that he was going to change the name.

Q The family wasn't there at that time, were they?

A Not living there, no.

Q How did you come to ask him whether he was going to change the name?

A I can't recall who told me that it was contemplated or remarked, and I took it on myself to ask.

JOSEPH L. MULLIN, sworn.

Direct examination by Mr. Tansey.

Q You are a son of Peter Mullin?

A Yes, sir.

Q Brother of William F.?

A Yes, sir.

Q You worked in the undertaking business?

A Yes, sir.

Q And do you remember an agreement made between your mother and yourself and William F. Mullin?

A Yes, sir, I do.

Q And that was in writing?

A Yes, sir.

Q And it has been produced here and marked as an exhibit?

A Agreement there in 1895.

Q That was the agreement?

A Yes, sir.

Q And after that agreement was made did you work there some time?

A Year and a half, about.

Q Then where did you go?

A To Morristown.

Q Was any subsequent agreement made between your mother and William F. Mullin?

A That is the only agreement I ever heard of.

Q Did you frequently see your mother?

A Yes, very often.

Q Did you know anything about the business that was being done?

A Nothing other than there was a good business being done, that is all.

Q Did your mother ever discuss the matters with you?

A No, she didn't, not after I left.

Q After you left. What, if anything, do you know about any subsequent agreement?

A I know nothing at all of any other agreement other than the one that was made between William F. Mullin, my mother and myself and the executor, uncle Joe, that was in 1895.

Q Do you know of any agreement which was made after your mother died?

A No, sir.

Q Or any agreement?

A No, sir.

Q Did you discuss with William F. Mullin any interest he had in the business after your mother died?

A Well, we used to talk things over once in a while in the stable, while I was working in the livery business.

Q When was that?

A We used to talk about the business down neck, once in a while, but simply in a casual way, never referring to anything particularly.

Q Did William F. Mullin,—did you work for William F. Mullin after you came back from Morristown?

A Yes.

Q In the undertaking business?

A No, sir.

Q Where did you work for him?

A In the livery business.

Q You have talked with him about the undertaking business casually, you say?

A Yes.

Q Do you remember any conversation between you and him as to what was said about the business?

A Never, nothing at all, only in a general way about the care of the children, talking about sending them to school or something of that kind, or what they were going to do with them, but nothing in reference to any change other than the way the business had always been running as the Estate of Peter M. Mullin, that is all, nothing different.

Q Was there anything said relating to Mr. William Mullin's interest in the business?

A No.

Q Now, do you recall a conversation with Mr. William F. Mullin within a year or two?

A I do, just about a year ago.

Q Where did that conversation take place?

A In the bank down the street, the Federal Trust Company.

Q What was that in relation to?

A In relation to this action being brought now in reference to an accounting of the estate, wanted to know what the children wanted, "Well," I said, "I don't know, I suppose they want to know something about this business, if they are interested, if they are entitled to any interest in the business they want to know it, and if they are not they want to know something about it."

Q He asked you that question?

A He asked me the question, yes.

Q And what then was said, if anything?

A Well, I told him, he simply said then that they had nothing to do with the estate, the business belonged to him; that was the first remark of that kind he had ever made to me.

Q That was about a year ago?

A Just about a year ago, exactly.

Q After these proceedings were started?

A Yes.

Q Did you know what arrangement was made, if any, for the running of the business after your mother died?

A No; he ran the business, that is all I know, don't know of any agreement was made.

Q Do you know anything about the changing of the signs?

A Well, I don't remember now much about the signs.

Cross examination by Mr. Lum.

Q Mr. Joseph Mullin, you never discussed the business matters with your mother after you ended this partnership arrangement, did you?

A Never ended the partnership arrangement.

Q Well, after you left?

A No, well, I did once or twice come down there and speak to her about it, about my interest in the business at that time, which was never disposed of.

Q Do you recall stating in your direct examination, about a minute and a half ago, that your mother and you never discussed business matters after you left?

A Well, I probably may have said that in my other statement.

Q Which is true, what you told Mr. Tansey or what you are telling me?

A Well, both would be true, I never sat down particularly to discuss it.

Q Then you didn't discuss it with your mother, and you did discuss it with your mother; is that correct?

The Court. What is the fact?

A I didn't come down to discuss any particular point with my mother at any time, but when I called in there to see her, under ordinary circumstances, as my mother, I would talk in a general way about little things in the business, referring particularly, now what I refer to is the agreement which was made between William F. Mullin, my uncle Joe as executor of the estate, my mother, William Mullin and myself, I spoke to her about the agreement.

Q What do you mean by referring to your uncle Joe as executor of your father's estate?

A I know he was executor at that time, he was appointed executor by the will, and he was the recognized executor as far as I know up to the time I left and went to Morristown.

Q Do you mean to say you understood he joined in that agreement with you?

A He was consulted as to the making of that agreement.

Q He wasn't a party to it, was he?

A He was by virtue of the fact that he was to be executor of the estate, was appointed that by my father.

Q It was your demand, when this partnership arrangement ceased, for a settlement, that led to the giving of the release, wasn't it?

A No, sir.

Q Did you ever make any demand at that time?

A No, sir,—yes, I did, at that time.

Q Yes, you did, you demanded your share in the estate, didn't you?

A No, sir.

Q What did you demand?

A Demanded my share in the business.

Q The result of your demand was a conference at the office of Guild & Lum, wasn't it?

A I don't remember any.

Q You never remember being there, I suppose, in your life time?

A Oh, yes, I was at Guild & Lum's office in my life.

Q Many times?

A Several times that I remember.

Q Do you recall distinctly being there for the purpose of signing a release?

A I think I was, I think I can remember being at Guild & Lum's office.

Q You recall signing that release, don't you?

A What has it reference to?

Q Releasing all of your interest in the estate, excepting the real estate 91 Lafayette street?

A Yes.

Mr. Tansey. I object to this line of questioning because we know that when this arrangement was made all reference to the business was eliminated, because we said the business was not considered.

The Court. That is a question of law; Mr. Lum is asking as to the fact now.

GRACE COBURN sworn.

Direct examination by Mr. Tansey.

Q You are the daughter of Peter Mullin, Mrs. Coburn?

A Yes, sir.

Q And a sister of William F. Mullin?

A Yes, sir.

Q Do you remember the time before your mother died, you remember the time before your mother died?

A Yes, sir; I was with her all the time.

Q How long were you with her?

A Why, I was with her from the time, I have taken care of my mother since I was fifteen years old.

Q You were not away from home at that time?

A Before she died I wasn't away for two weeks, I lived on the next street and I was over there every day and all night some times.

Q Well, you did not live at the Lafayette street house at the time your mother died?

A Only for two weeks, no, I lived in Jefferson street.

Q But you lived there for two weeks before your mother died?

A Before she died, all the time.

Q Did you know anything from her about how the business was being conducted?

A Well, she was never very much satisfied, she said, but I—

Mr. Lum. I object.

Q I am saying about any arrangement between her?

A No arrangement at all.

Q How do you know what arrangement was made?

A I only know what I heard about uncle Joe and Joe and him, about that agreement, about the money to be divided into three parts, that is all I heard.

The Court. The evidence must necessarily be confined to conversations by this witness with William F. Mullin, or with reference to anything he said in her presence.

Q Did you have any conversation with William F. Mullin in regard to his interest in the business?

A No, sir, never.

Q After your mother died was any conversation

had between you and William F. Mullin as to the running of the business?

A Only that one with uncle Joe.

Q Was William F. Mullin present at that time?

A Yes, sir.

Q When was that?

A A month from the day my mother died.

Q Where was the conversation?

A Upstairs, in Lafayette street.

Q What was the conversation?

A It was that I was to stay there and take care of the children and he would run the business, if uncle Joe would give up his right to him.

Q What was said further about what he was to get for running the business?

A He didn't say anything to me about what he was to get.

Q What further was said about his running the business, if you know?

A I never heard any more about the business; I had to get out in May, that is all I know.

Q Well, why did you have to get out?

A Well, because I couldn't get along with him, he thought I was making too much on him by staying there.

Q Where did you go?

A I went to Roseville, and the children went to school, and when they came home their home was with me, and I took Petey because he was too young to put in any school.

Q Have you kept him ever since?

A I have always kept them.

Q What has been contributed by William F. Mullin to the board of the children?

A Fifteen dollars a month for Petey, and a few of the first years fifteen dollars for the girls and then he raised it to twenty.

Grace Coburn, cross.

Q And what else?

A Well, he bought their clothes some times when they needed them and some times when they needed them they had to wait until he felt like getting them.

Q When you were there, Mrs. Coburn, was anything said about your interest in the business, or any of the other childrens' interest in the business?

A No, the children were never considered in anything, the children didn't dare say anything about the business.

Q Do you remember when the settlements were made each time?

A No, I never was told anything about them.

Cross examination by Mr. Lum.

Q Did anyone ever tell you that you settled?

A Yes, I settled.

Q Then you did know about that, didn't you?

A About my own I did, but not the children.

Q And you understood what you were signing when you signed this paper, didn't you?

The Court. I shall assume that.

Q You don't mean to intimate to this Court that your brother Will. didn't pay, for instance, the school bills amounting to several hundred dollars in St. Vincent's and St. Benedict's, do you?

A Well, Petey only went to St. Benedict's two years; he has been working since he was sixteen.

Q You said your brother paid nothing excepting the clothes and the twenty dollars board; now he paid a great deal besides that, didn't he?

A He paid for their education.

Q Did you make any demand on him for anything reasonable, in the way of support, which he refused to these children?

A He always made a fight about every cent they ever had to have spent on them.

Q The question I asked you to answer is this, will you give us any item which was reasonable in your judgment, that you asked him to provide for the children, that he refused to provide?

A Why he would refuse, if I got clothes and the price didn't suit him, they were a little bit higher than he thought they ought to be, he would send them back, and I had to go back and get what would suit him.

ANNA MULLIN, sworn.

Direct examination by Mr. Tansey.

The Court. If the testimony of the other witnesses will be the same as the testimony of those already called you can have the benefit of that on the notes, without calling them.

Mr. Tansey. Then I won't call them.

The Court. It is quite proper, I think, to show that he did not consult these children, that they did not know of any arrangement other than the written agreement, and that he did not mention the fact of his verbal agreement to them; now I understand that they will all testify in that direction?

Mr. Tansey. Yes, sir.

The Court. Well, if that is material I will reserve the liberty of calling them on that point hereafter. The testimony given by the others would be merely cumulative on the point that they were not consulted and not told of this last arrangement.

Mr. Lum. We of course reserve the right to rebut that by other evidence.

The Court. Yes; the right will be reserved to either party to call other witnesses on the ques-

tions that have been testified to by the last three witnesses, if it shall become material.

Mr. Tansey. I suppose, if your honor please, if there is anything else that is material that we haven't taken up, beyond the agreements, we also have the privilege to put that in.

The Court. Oh, yes.

Exhibit C. 1.

Exhibits Submitted Before V. C. Stevens.

EXHIBIT C. 1.

WILL OF PETER M. MULLIN.

In the name of God, Amen—

I Peter M. Mullin of the City of Newark and State of New Jersey, do make and publish this my last will and testament as follows:

First:—I hereby order my just debts and funeral expenses to be paid as soon as possible after my decease.

Second:—I hereby give and bequeath to my children share and share alike my property of every kind and description.

Third:—I hereby direct that my business be continued for the benefit of my wife and children and under the direction of my wife and brother Joseph J. Mullin.

Fourth:—I hereby appoint and constitute my wife Annie E. Mullin and my brother Joseph J. Mullin guardian of my children and Executors of this my last will and testament with power to sell, if necessary for the best interests of my wife and children.

In witness whereof I have hereto set my hand and seal this fourth day of November, Eighteen hundred and ninety-one.

PETER MULLIN.

Signed sealed and published and declared by the said testator, Peter M. Mullin as and for his last will and testament, in our presence who at his request and in his presence and in presence of each other have hereunto signed our names as witnesses.

M. A. Mullin.

Jos. J. Mullin.

Exhibit C. 2.

STATE OF NEW JERSEY.
ESSEX COUNTY SURROGATE'S OFFICE.

I, John B. Dusenberry, Surrogate of the County of Essex, do certify the annexed to be a true copy of the Last Will and Testament of Peter M. Mullin late of the County of Essex, deceased, and that Annie E. Mullin the Executrix therein named, proved the same before me, and is duly authorized to take upon herself the Administration of the Estate of the Testator, agreeably to the said Will.

WITNESS MY HAND AND SEAL OF OFFICE,
(L. S.) the Seventeenth day of November, in the year of our Lord one thousand eight hundred and ninety-one.

J. B. DUSENBERRY:
Surrogate.

EXHIBIT C. 2.

Certified Copy of Appointment of William F. Mullin Administrator c. t. a. of Estate of Peter M. Mullin.

STATE OF NEW JERSEY.
ESSEX COUNTY SURROGATE'S OFFICE.

To All To Whom These Presents Shall Come, Greeting:

Whereas, Peter M. Mullin late of the County of Essex, in the State of New Jersey, departed this life, having made and executed a Last Will and Testament, which has been duly proved, according to law, before the Surrogate of said County of Essex:

And Whereas: Annie E. Mullin, the acting Executrix thereunder has departed this life; and Joseph J. Mullin, the surviving Executor named in said Will

Exhibit C. 3.

has renounced in writing, his right to act as Executor of said Will.

Therefore, I, Joseph W. Ellor, Surrogate of the County of Essex, do hereby appoint William F. Mullin Administrator of all and singular, the goods, chattels and credits of said deceased, left unadministered, who is duly authorized to administer the same agreeably to said Will.

In Witness Whereof, I have hereunto (L. S.) set my hand and seal of office at Newark, this first day of August nineteen hundred.

J. W. ELLOR,
Surrogate.

EXHIBIT C. 3.

Agreement between Annie E. Mullin, Joseph L. Mullin and William F. Mullin, dated September 24, 1895.

This agreement made and entered into this twenty-fourth day of September, A. D. Eighteen hundred and ninety-five, by and between Annie E. Mullin, sole acting executrix of the last will and testament of Peter M. Mullin, deceased, party of the first part; William F. Mullin, party of the second part; and Joseph L. Mullin party of the third part, all of the City of Newark, in the County of Essex and State of New Jersey, witnesseth as follows:

Whereas, the said Peter M. Mullin, deceased, in and by his last will and testament duly admitted to probate in the Surrogate's Office of said County of Essex, did provide in and by his last will and testament that the undertaking business carried on by him in his lifetime at number ninety-one (91) Lafayette Street in the said City of Newark, should be conducted for the benefit of his family and the

Exhibit C. 3.

said William F. Mullin and Joseph L. Mullin, since the decease of the said Peter M. Mullin, have carried on the same successfully and have increased said business and the profits arising from same, and have managed the same to the entire satisfaction of the said Annie E. Mullin, and have supported out of said business the family of the said Peter M. Mullin, and

Whereas, the said Annie E. Mullin desires to retain the services of the said William F. Mullin and Joseph L. Mullin in the conduct and management of said business;

Now therefore, in consideration of the premises the said parties have agreed to and with each other as follows: The said business shall be continued by the said William F. Mullin and Joseph L. Mullin in the name of the Estate of Peter M. Mullin.

Said William and Joseph hereby agree to devote their undivided time and attention to said business and to do their utmost for its success.

Said business shall be continued for one year from the first day of October, eighteen hundred and ninety-five, at which time this agreement is to go into effect, unless terminated as hereinafter mentioned.

It is expressly understood and agreed that said Annie may terminate this agreement at any time by giving one month's notice in writing to the said William and Joseph of her desire for said determination.

It is understood and agreed that from the net proceeds of said business the family of said Peter shall be maintained and educated as at present.

The profits of said business which shall remain, after payment of the expenses of the maintenance and education of said family, shall be divided between said parties as follows: Said William shall be entitled to three equal sixth parts; said Joseph shall be entitled to two equal sixth parts; and said

Exhibit C. 3.

Annie as executrix, shall be entitled to the remaining one-sixth part.

Profits shall be divided at the end or termination of the year.

It is expressly understood that in case the proceeds arising from said business shall not be sufficient to support, maintain and educate said family, that there shall be no liability or loss to said William and Joseph.

It is also understood and agreed that said William and Joseph shall each be entitled to draw from the said business, the sum of fifteen dollars per week weekly, and that said weekly payments shall not be charged against their respective shares of the profits of said business.

Full, true and perfect books of account shall be at all times kept, in which each of said parties agrees to enter promptly any and all transactions to which she or he may be a party, and to which books all of said parties shall at all times have free access.

Said parties agree that they will not during the continuance of this agreement, become an accommodation endorser, guarantor or surety without the consent of the others in writing first had and obtained.

In Witness Whereof the said parties have hereunto set their hands and seals the day and year aforesaid.

ANNIE E. MULLIN, *Exr.* (L. S.)

WM. F. MULLIN. (L. S.)

JOSEPH L. MULLIN. (L. S.)

Signed, sealed and delivered (in triplicate) in the presence of

Jos. J. Mullin.

Oct. 2, '95.

Exhibit C. 4.

EXHIBIT C. 4.

Release from Joseph L. Mullin to William F. Mullin
Dated May 19, 1896.

KNOW ALL MEN BY THESE PRESENTS, That I Joseph L. Mullin of the City of Newark, in the County of Essex and State of New Jersey, do hereby acknowledge the receipt from Annie E. Mullin of the same place, sole acting executrix of the last will and testament of Peter M. Mullin, late of the said city, deceased, of the sum of three thousand, seven hundred and fifty dollars in full discharge and satisfaction of all my right, share and interest of every name and nature in the estate of said Peter M. Mullin, deceased, and in consideration thereof I have released and discharged and do by these presents release and forever discharge the said Annie E. Mullin, sole acting executrix as aforesaid, and also the estate of the said Peter M. Mullin, deceased, of and from any and all further or other accounting or reckoning in respect to my interest in said estate, and of and from any and all distributive share, debts, dues, claims and demands which I ever had, now have or hereafter can, shall or may have against said estate by reason of anything existing at the date hereof; excepting only my share or interest in the house and premises situate and known as number ninety-one (91) Lafayette Street in said city.

And I do hereby convenant, promise and agree to and with said Annie E. Mullin, sole acting executrix as aforesaid, that I will at any time hereafter, when reasonably required, make, execute and deliver any and all such further or other instrument or instruments of writing as may be necessary to fully effectuate and carry into effect the true intent and meaning of these presents.

Exhibit C. 5.

IN WITNESS WHEREOF I have hereunto set my hand and seal this nineteenth day of May, A. D. Eighteen hundred and ninety-six.

JOSEPH L. MULLIN. (L. S.)

Signed, sealed and delivered in the presence of

CHARLES M. LUM.

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

Be it remembered that on this nineteenth day of May, A. D. Eighteen hundred and ninety-six, before the undersigned, a Master in Chancery of New Jersey, personally appeared Joseph L. Mullin, who I am satisfied is the releasor in the foregoing release named, and who executed the same; and I having first made known to him the contents thereof he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

CHARLES M. LUM,
M. C. C.

EXHIBIT C. 5.

Release from Grace T. Mullin to Annie E. Mullin, Dated April 4, 1899.

KNOW ALL MEN BY THESE PRESENTS, That I, Grace T. Mullin of the City of Newark, in the County of Essex and State of New Jersey, do hereby acknowledge the receipt, from Annie E. Mullin of the same place, sole acting executrix of the last will and testament of Peter M. Mullin, late of the said city, deceased, of the sum of three thousand, seven hundred and fifty dollars in full discharge and satisfaction of

Exhibit C. 5.

all my right, share and interest of every name and nature in the estate of said Peter M. Mullin, deceased, and in consideration thereof I have released and discharged and do by these present release and forever discharge the said Annie E. Mullin, sole acting executrix as aforesaid, and also the estate of the said Peter M. Mullin, deceased, of and from any and all further or other accounting or reckoning in respect to my interest in said estate, and of and from any and all distributive share, debts, dues, claims and demands which I ever had, now have or hereafter can, shall or may have against said estate by reason of anything existing at the date hereof; excepting only my share or interest in the house and premises situate and known as number ninety-one (91) Lafayette Street in said city.

And I do hereby covenant, promise and agree to and with said Annie E. Mullin, sole acting executrix as aforesaid, that I will at any time hereafter, when reasonably required, make, execute and deliver any and all such further or other instrument or instruments of writing as may be necessary to fully effectuate and carry into effect the true intent and meaning of these presents.

In witness whereof I have hereunto set my hand and seal this fourth day of April, A. D., eighteen hundred and ninety-one.

GRACE T. MULLIN. (L. S.)

Signed, sealed and delivered in the presence of

CHARLES M. LUM.

Exhibit C. 6.

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

Be it remembered that on this fourth day of April, A. D., eighteen hundred and ninety-nine, before the undersigned, a Master in Chancery of New Jersey, personally appeared Grace T. Mullin, who I am satisfied is the releasor in the foregoing release named, and who executed the same; and I having first made known to her the contents thereof, she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed for the uses and purposes therein expressed.

CHAS. M. LUM,
Master in Chancery of N. J.

EXHIBIT C. 6.

Release from James S. Mullin to William F. Mullin, Dated December 21, 1903.

KNOW ALL MEN BY THESE PRESENTS, That I, James S. Mullin of the City of Newark, in the County of Essex and State of New Jersey, do hereby acknowledge the receipt from William F. Mullin, administrator with the will annexed of Peter M. Mullin, late of the said city, deceased, of the sum of THREE THOUSAND SEVEN HUNDRED AND FIFTY DOLLARS ($3,750) in full discharge and satisfaction of all my right, share and interest of every name and nature in the estate of said Peter M. Mullin, deceased, and in consideration thereof I have released and discharged and do by these present release and forever discharge the said William F. Mullin, administrator as aforesaid, and also the estate of the said Peter M. Mullin, deceased, of and from any and all further or other accounting or reckoning in respect to my interest in said estate, and of and from

Exhibit C. 6.

any and all distributives share, debts, dues, claims and demands which I ever had, now have or hereafter can, shall or may have against said estate by reason of anything existing at the date hereof.

And I do hereby covenant, promise and agree to and with said William F. Mullin, administrator as aforesaid, that I will at any time hereafter, when reasonably required, make, execute and deliver any and all such further or other instrument or instruments of writing as may be necessary to fully effectuate and carry into effect the true intent and meaning of these presents.

In witness whereof I have hereunto set my hand and seal this twenty-first day of December, A. D. Nineteen hundred and three.

JAMES S. MULLIN. (L. S.)

Signed, sealed and delivered in the
presence of

CHARLES M. LUM.

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

Be it remembered, that on this twenty-first day of December, A. D. Nineteen hundred and three before me, the subscriber, a Master in Chancery of New Jersey personally appeared James S. Mullin, who, I am satisfied is the releasor in the foregoing release named, and who executed the same; and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

CHARLES M. LUM,
A Master in Chancery of New Jersey.

EXHIBIT C. 7.

Release from Isabella R. Mullin to William F. Mullin, dated Dec. 10, 1906.

KNOW ALL MEN BY THESE PRESENTS, That I, Isabel R. Mullin, of the City of Newark, in the County of Essex and State of New Jersey, do hereby acknowledge the receipt from William F. Mullin, administrator with the will annexed of Peter M. Mullin, late of the said city, deceased, of the sum of THREE THOUSAND SEVEN HUNDRED AND FIFTY DOLLARS ($3,750) in full discharge and satisfaction of all my right, share and interest of every name and nature in the estate of said Peter M. Mullin, deceased, and in consideration thereof I have released and discharged and do by these present release and forever discharge the said William F. Mullin, administrator as aforesaid, and also the estate of the said Peter M. Mullin, deceased, of and from any and all further or other accounting or reckoning in respect to my interest in said estate, and of and from any and all distributive share, debts, dues, claims and demands which I ever had, now have or hereafter can, shall or may have against said estate by reason of anything existing at the date hereof.

And I do hereby covenant, promise and agree to and with the said William F. Mullin, administrator as aforesaid, that I will at any time hereafter, when reasonably required, make, execute and deliver any and all such further or other instrument or instruments of writing as may be necessary to fully effectuate and carry into effect the true intent and meaning of these presents.

Exhibit C. 8.

In witness whereof I have hereunto set my hand and seal this tenth day of December, A. D. Nineteen hundred and six.

ISABEL R. MULLIN, (L. S.)

Signed, sealed and delivered in the presence of

CHAS. M. LUM.

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

Be it remembered that on this tenth day of December, A. D. Nineteen hundred and six, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Isabel R. Mullin, who, I am satisfied is the releasor in the foregoing release named, and who executed the same; and I having first made known to her the contents thereof, she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed for the uses and purposes therein expressed.

CHAS. M. LUM,
A Master in Chancery of New Jersey.

EXHIBIT C. 8.

Release from William F. Mullin to Annie E. Mullin, dated May 19, 1896.

KNOW ALL MEN BY THESE PRESENTS, That I, William F. Mullin of the City of Newark, in the County of Essex and State of New Jersey, do hereby acknowledge the receipt from Annie E. Mullin of the same place, sole acting executrix of the last will and testament of Peter M. Mullin, late of the said city, deceased, of the sum of three thousand, seven hun-

Exhibit C. 8.

dred and fifty dollars in full discharge and satisfaction of all my right, share and interest of every name and nature in the estate of said Peter M. Mullin, deceased, and in consideration thereof I have released and discharged and do by these presents release and forever discharge the said Annie E. Mullin, sole acting executrix as aforesaid, and also the estate of the said Peter M. Mullin, deceased, of and from any and all further or other accounting or reckoning in respect to my interest in said estate, and of and from any and all distributive share, debts, dues, claims and demands which I ever had, now have or hereafter can, shall or may have against said estate by reason of anything existing at the date hereof; excepting only my share or interest in the house and premises situate and known as number ninety-one (91) Lafayette Street in said City.

And I do hereby covenant, promise and agree to and with said Annie E. Mullin, sole acting executrix as aforesaid, that I will at any time hereafter, when reasonably required, make, execute and deliver any and all such further or other instrument or instruments of writing as may be necessary to fully effectuate and carry into effect the true intent and meaning of these presents.

In witness whereof I have hereunto set my hand and seal this nineteenth day of May, A. D. Eighteen hundred and ninety-six.

WILLIAM F. MULLIN. (L. S.)

Signed, sealed and delivered in the presence of

FRED H. LUM.

Exhibit C. 9.

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

Be it remembered that on this nineteenth day of May, A. D. Eighteen hundred and ninety-six, before the undersigned, a Master in Chancery of New Jersey, personally appeared William F. Mullin, who I am satisfied is the releasor in the foregoing release named, and who executed the same; and I having first made known to him the contents thereof he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

FRED H. LUM,
M. C. C.

EXHIBIT C. 9.

Receipts from Anna Mullin with reference to the settlement of her share of the Estate of Peter M. Mullin.

Newark, N. J., Aug. 3rd, 1908.

Received from Wm. F. Mullin on account of settlement of my share of Estate pending settlement to be deducted at time of same. $30.00/100.

(Signed) MISS ANNA E. MULLIN.

Witness: J. L. Mullin.

Newark, N. J., Sept. 12, 1908.

Received from Wm. F. Mullin adm. of Est. of Peter M. Mullin 20.00/100 on a/c of settlement of Est from Peter M. Mullin Est.

MISS ANNA E. MULLIN.

Exhibit C. 9.

Newark, N. J., Oct. 3rd, 1908.

Received from Wm. F. Mullin on account of $3,-750.00/100 being part payment on same which is due from Est. of Peter M. Mullin in settlement Twenty Five 00/100 $25.00/100

Witness Received.

James S. Mullin MISS ANNA E. MULLIN.

Newark, N. J., Oct. 10th, 1908.

Received from Wm. F. Mullin on a/c of share of Est of Peter M. Mullin Ten 00/100 $10.00/100.

Witness. Received.

James S. Mullin ANNA E. MULLIN.

Newark, N. J., Oct. 22nd, 1908.

Received from Wm. F. Mullin on a/c $15.00/100 Part Payment on Settlement of $3,750.00/00 Thirty Seven Hundred and Fifty 00/100 Settlement of Est of Peter M. Mullin.

Witness. Signed.

James S. Mullin ANNA E. MULLIN.

Newark, N. J., Nov. 6th, 1908.

Received from Wm. F. Mullin on a/c as part of my share in settlement of Est of Peter M. Mullin.

Fifteen 00/100 $15.00/100

(Name of witness cannot be read)

ANNA E. MULLIN.

Newark, N. J., Dec. 4th, 1908.

Received from Wm. F. Mullin on a/c of share of Est of Peter M. Mullin on principal 3750.00/100 $40.00/100 Forty Dollars

Witness. Signed

Frank M. OConnell. ANNA E. MULLIN

Exhibit C. 9.

Newark, N. J., Jany 7th, 1909.

Recd from Wm F. Mullin Adm of Est of Peter M. Mullin on a/c Fifteen 00/100 15 00/100 for Anna Mullin.

PETER M. MULLIN.

Newark, N. J., Feby 2nd, 1909.

Recd from Wm F. Mullin on a/c of Amt due from Est of Peter M. Mullin $10.00/100.

ANNA E. MULLIN.
LORETTA A. MULLIN.

Newark, N. J., Mar. 10th, 1909.

Received from Wm F. Mullin Adm of Est of Peter M. Mullin on a/c my share of Estate Fifty Dollars 00/100 $50.00/100.

Witness. ANNA E. MULLIN.
Loretta A. Mullin

Newark, N. J., April 26th, 1909.

Recd from Wm F. Mullin Adm of Est of Peter M. Mullin Payment on a/c of my share in estate same to be charged to me $20.00/100

Signed.

ANNA E. MULLIN.

Newark, N. J., May 25th, 1909.

Recd from Wm F. Mullin on a/c of my share in Est of Peter M. Mullin Twenty 00/100 $20.00/100

Witness. ANNA E. MULLIN.
Loretta A. Mullin.

Newark, N. J., July 2, 1909.

Rec'd of Wm F. Mullin, Admnr of Peter M. Mullin Dec'd, seventeen hundred and thirty Dollars on account of my share in the Estate—(Making in all $2000. received by me) $1730.

ANNA E. MULLIN.

Exhibit C. 9.

Newark, N. J., Jany 21, 1911.

Received from Wm. F. Mullin Twenty Five 00/100 on a/c of Bal of $1750.00/100 due.

Witness. Signed.

A. MULLIN.

Newark, N. J. Feby 4th, 1911.

Received from Wm F. Mullin Twenty 00/100 Dollars on account. $20.00/100.

ANNA E. MULLIN.

April 14th Advanced to Anna Mullin on a/c $30.00

Order for Maintenance.

(Filed Nov. 28, 1911.)

IN CHANCERY OF NEW JERSEY.

Between	*On Bill for Injunction, etc.*
WILLIAM F. MULLIN, *Complainant,*	*On Petition for Maintenance, etc.*
and	
ANNIE E. MULLIN, Et. Als., *Defendants.*	*Order of Maintenance, etc.*

This matter coming on to be heard upon the petition of Joseph J. Mullin, guardian of Peter M. Mullin, a minor, and Marie Mullin, two of the defendants in the above stated cause, and upon reading and filing the said petition and the affidavit thereto annexed, good reason appearing therefor, it is on this Twenty-eighth day of November, Nineteen hundred and eleven, on motion of Michael J. Tansey of counsel with the said petitioners, ordered, that said William F. Mullin, administrator with the will annexed do make payments from the funds in his hands belonging to the estate of Peter M. Mullin, deceased, and to the credit of said petitioners: to said Joseph J. Mullin as guardian of said Peter M. Mullin, five dollars ($5.00) each and every week and to said Marie Mullin five dollars ($5.00) per week to meet the expenses of maintenance of said persons during the pendency of this suit: said payments to begin on Friday, the first day of December, Nineteen hundred and eleven, and to continue until the further order of this Court.

Order for Maintenance.

And it is further ordered that said William F. Mullin, administrator with the will annexed, do make such further payment from the funds of the said estate of Peter M. Mullin, deceased, in the hands of said administrator, to the credit of the said petitioners as may be sufficient to cover the expenses of the examination of the books of account of the undertaking business, conducted by said William F. Mullin as administrator, by the expert accountants appointed by this court, in this cause; such payment to be made immediately upon the presentation of a bill by said accountant, properly approved by said petitioners, or their solicitor.

It is the intention of this order to deal with the aforesaid allowances and payments only in a preliminary manner: the question of the fund or funds to which they are properly chargeable being expressly reserved until final hearing.

Respectfully advised:

JAMES E. HOWELL,
V. C.

Consent is hereby given on the part of the complainant to the entry of the foregoing order.

LUM, TAMBLYN & COLYER,
Solicitors for Complainant.

Conclusions of V. C. Stevens.

(Filed Oct. 4, 1912.)

IN CHANCERY OF NEW JERSEY.

Between
WILLIAM F. MULLIN,
Complainant,
and
ANNIE E. MULLIN, Et. Als.,
Defendants.
Conclusions.

Mr. Ralph Lum, for complainant.

Mr. Michael J. Tansey, for defendants.

Stevens, *V. C.*

William F. Mullin files this bill individually and as administrator, with the will annexed, of Peter M. Mullin, deceased, to restrain proceedings in the Orphans' Court looking to an accounting. The defendants are seven of the children of Peter M. Mullin, and the complainant is the eighth. The defendants concede the propriety of the complainant's accounting here and file an answer and cross-bill.

Peter M. Mullin was an undertaker. He died in 1891, leaving widow and nine children. By his will he made his brother, Joseph, and his widow his executors. He therein provided as follows:

"Third. I hereby direct that my business be continued for the benefit of my wife and children and under the direction of my wife and brother, Joseph Mullin."

The widow, with the help of the complainant, her eldest son, then about eighteen years old, continued

the business with success. In 1895 she entered into a written agreement, by the terms of which the complainant and her next eldest son agreed that they would devote their undivided time and attention to the business for one year: that from the net proceeds thereof the family should be maintained and educated and that the profits remaining should then go, one-half to William, two-sixth to Joseph, and one-sixth to the widow, as executrix. Joseph became dissatisfied with the arrangement and left before the end of the year. William continued to carry it on under an arrangement which lies at the foundation of this controversy. The arrangement (whatever it was) continued until the death of the widow, in 1900. Then Joseph, having renounced, William, the complainant, became administrator, *cum testamento annexo*. From 1900 to the present time he has carried on the same business with very considerable success. The question is whether it is his individual business, or the business of the estate.

The only witness who testifies to the terms of the arrangement with the widow is William himself. As he gives different versions of it, I shall state them in his own words.

In the bill he says, "that after your orator's said brother, Joseph, had so withdrawn from the said business, your orator was requested by his mother, the executrix aforesaid, to continue the business of undertaking, to support the mother of your orator and the infant children at home and it was agreed between said executrix and your orator that the balance of the profits of the business remaining after the support and maintenance of the mother of your orator and the said infant children should belong to your orator in payment of his services."

In his affidavit annexed to the bill, he states the agreement in the same way.

In his testimony he first says that Joseph, when he left, asked for a settlement and that an appraisement was made and "it inventoried something like thirty odd thousand dollars" (the value of the business, and of its good will not being taken into the account.) Mr. Lum, he further says suggested that we take our settlement, and the rest of the children, after the agreement that if I stayed and conducted the business and supported the children and educated them out of it that whatever profits there were, were to be mine, assuring her (his mother) I would take care of the children until the youngest was of age."

Further on he was asked again to state what the agreement was and he testified: "The agreement was that I was to support these children out of this business, educate, clothe and feed them until they became of age. Whatever profits arising from the business, were to be mine and the business mine after the children had arrived at their majority."

On cross examination he says, "for whatever was left after I supported the children and educated and looked after them and brought them up, whatever the business would make would be mine."

In the absence of any corroboration and of complainant's very obvious interest, I think I am justified in accepting the concise statement found in the bill and in the affidavit annexed to it, as the nearest approximation to the truth of the matter. The addition to it, "the business mine after the children had arrived at their majority" being only complainant's present construction of what he then agreed upon.

Mr. Mullin says that in the four years between his father's death and the partial distribution of the assets he figured out that the family accumulated $7,500, after paying all household expenses. This shows a very prosperous state of things. It demon-

strates that in 1896 the business was valuable. It has been growing ever since. In this situation, is it likely that the family would have understandingly relinquished all interest in its good will?

As complainant states the agreement in his bill, he was only to have the profits remaining after the support of his mother and the infant children. Counsel argues that the agreement made with the widow was really a sale. The argument is untenable, first, because no disposition was made of the corpus: second, because the agreement, as William states it, was such as the executrix could not lawfully have made; for net earnings and corpus were to go, under the will, to *all* the children,—not merely to those who were under twenty-one.

I do not think, however, that complainant's liability to return part of the compensation for his services during the lifetime of the widow, if excessive, and if at this late date, he is under any liability to do so, is properly before the Court. The issue is limited to his conduct as administrator. When he became such, the business belonged to the estate and he could not treat it as his own. Having no authority to carry it on, he should have disposed of it for the benefit of the estate. But having carried it on he is entitled to the compensation which is awarded to an unauthorized administrator. Vice Chancellor Emery, in Gilligan v. Daly, 80 Atl. Rep., 995, states the rule. "But the right of the executor to compensation is based on other principles where the carrying on of the business is unauthorized. In such case the general rule is that the beneficiaries have the option to charge the executor either with the value of the estate and interest, or with the amount of the net profits from the business. And the beneficiaries have the right to an account of the profits for the purpose of determining this option. In estimating profits the general rule for charging

trustees is that so far as ascertainable, they should include only the profits resulting from the employment of the testator's estate as capital, and due allowance should be made for other elements creating the profits, such as the business skill and credit of the executor in carrying it on."

"'Compensation for executors' services may be allowed as part of the expenses of the business and be deducted in ascertaining the net profits with which he is chargeable."

There will be a reference to a master, who will take this rule for his guidance. The question of the effect, if any, of the releases given by some of the legatees can be more properly determined upon the coming in of the master's report.

Decree for Accounting and Order of Reference.

(Filed Oct. 22, 1912.)

IN CHANCERY OF NEW JERSEY.

Between	
WILLIAM F. MULLIN, *Complainant,*	*On Bill for Accounting, etc.*
and	*Decree for Accounting, etc.*
ANNIE E. MULLIN, *et. als., Defendants.*	

This matter coming on to be heard on bill, answer, cross-bill, replication and proofs in open Court in the presence of Ralph E. and Ernest C. Lum, of counsel with the complainant, and Michael J. Tansey, of counsel with the defendants, and it appearing that the said complainant, individually and as administrator with the will annexed of Peter M. Mullin, deceased, should account in this Court, in this cause, for his transactions as such administrator with the will annexed, and particularly for the net profits arising from the undertaking business, late of Peter M. Mullin, deceased, the testator, which was conducted by said William F. Mullin as administrator with the will annexed, from the time of his appointment as such administrator, to wit, August first, Nineteen hundred.

It is thereupon, on this twenty-second day of October, Nineteen hundred and twelve, ordered, adjudged and decreed that it be referred to Halsey M. Barrett, Esqr., one of the special masters of this Court, to take an account of all the dealings and

transactions of the said William F. Mullin, as administrator with the will annexed of Peter M. Mullin, deceased, while in the conduct and control of the business of said Peter M. Mullin since his appointment and qualification as such administrator with the will annexed, and therefrom to ascertain the net rents, issues and profits realized from the said business; and for the better taking of which account the said William F. Mullin is to produce before the said master, upon oath and affirmation, if required, and leave with him, all books and writings in his custody or power relating thereto, and is to be examined upon interrogatories as the said master shall direct; and the said master is also to have power to examine other witnesses in relation to said account, and in taking of said account he is to estimate the profits so that as far as ascertainable they should include only those resulting from the employment of the testator's estate as capital in the business, and due allowance should be made for other elements creating the profits, such as the business skill and credit of the executor in carrying it on, and he should allow such compensation for the administrator's services as part of the expenses of the business, as may be reasonable and proper, and deduct the same from the gross income of said business in ascertaining the net profits with which he is chargeable; and the said master is to make his report touching the matters hereby referred with all convenient speed. And if in taking the said account, any special matter shall arise, he is at liberty to state the same to the Court. All other questions, including the effect, if any, to be given to the releases of some of the legatees, are reserved until the coming in of the master's report.

Respectfully advised,

E. R. WALKER, *C.*

FREDERIC W. STEVENS, *V. C.*

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM F. MULLIN,

Complainant,

and

ANNIE E. MULLIN, *et. als.,*

Defendants.

Transcript of testimony taken in the above entitled cause before Halsey M. Barrett, Esquire, one of the Special Masters in Chancery, pursuant to an order of reference, at the Chancery Chambers, Newark, New Jersey, on Wednesday, January 22nd, 1913, at 10 A. M.

Appearances:

Mr. Ralph Lum and Ernest Lum, of Lum, Tamblyn & Colyer, for complainant.

Mr. Michael J. Tansey for defendants.

It is stipulated and agreed by and between the counsel for the respective parties, that the testimony of the witnesses may be taken down in shorthand and afterwards reduced to typewriting, the signatures of the witnesses being waived.

WILLIAM F. MULLIN, complainant, sworn.

Direct examination by Mr. Lum.

Q. Mr. Mullin, what was the date of your appointment as the administrator of the estate of Peter M. Mullin?

A I think it was August first, 1900.

Q At that time what was the value of the undertaking business that had been left by Peter M. Mullin at the time of his death?

A The value of the stock that was there, that was all.

Q What was that?

A It comprised a few caskets, office furniture and things of that kind.

Q Just describe that as particularly as you can.

A There were probably a dozen caskets there.

Master. Peter M. Mullin died in 1891 and this witness was appointed administrator with the will annexed in August, 1900. Had there been any accounting by the previous executors for any period between 1891 and 1900?

Mr. Lum. None whatsoever. It has appeared in the previous testimony taken before the Vice Chancellor, and upon which his decree was based, decreeing an accounting, that the estate had been settled by agreement between themselves as to all of the children who had become of age, and as rapidly as they became of age, they were paid a sum which was fixed by agreement.

Master. $3,700 and some odd dollars each?

Mr. Lum. Yes, as a sum to which they were entitled from the estate, and releases were given by the children as they became of age, to their mother, and subsequently that agreement was continued and releases were given.

Master. That was all done before Mr. William F. Mullin became administrator?

Mr. Lum. Part of it was. It was done as to all of the children who became of age in the mother's lifetime, and after her death, then the children as they became of age, continued to make a settlement with Mr. Mullin on the same basis, and releases given. The Vice Chancellor in his decree and in his opinion specified that this accounting shall commence

with the date of the appointment of Mr. Mullin as administrator, and there shall be no account—

Mr. Tansey. We are not looking for any account back of 1900.

Master. Then that is understood. Then your inquiry of Mr. Mullin as to what the estate consisted of, relates to the time of his appointment as administrator, August 1, 1900?

Mr. Lum. Yes, sir.

Master. I do not care for any information that is not pertinent or of service to me, except to get the matter well in my mind.

Q Will you particularize as to those items?

A At the time of my mother's death the business consisted of what stock there was on hand, a few caskets, I suppose about a dozen, I don't know whether there were ten or fourteen exactly, we took no account of stock; a few dozen pairs of handles, how many, I don't remember; the office furniture, desk, chairs and safe. Did I understand you to say the business or the estate—what the estate consisted of at the time of my mother's death?

Q No, the business

A That was all.

Q What was the value of that, in your judgment?

A Between $400 and $500.

Q Who had been conducting that business up to that time, actively in charge of it?

A I had.

Q How did you come to be conducting it at that time?

A Well, after my father's death, which dated ten years earlier, of course, I was working for my father at the time of his death, and I continued

to manage the business, my mother qualifying as the administratrix of the estate. My brother Joe, who was working in New York at that time, came on to work at the undertaking business and assist me. He remained there for some time, until a partnership was made between my mother, as the estate, myself and Joseph L. Mullin. He remained, I think, a little—a little over a year, under that arrangement, when he decided to discontinue his connection with the concern, and went in business for himself in Morristown. Shortly after that, upon his request, I imagine, I think it was his request, that he wanted a settlement or money or something, and upon a discussion with my mother that I felt I hadn't ought to stay any longer working for a very small salary, as I had been doing, Mr. Fred Lum, my uncle Michael Mullin, my mother and myself had a conference, and Mr. Lum suggested as the best solution of the situation, to appraise the estate as it was at that time. The estate was appraised, and appraised at something like $30,000—$3,750 eight times, eight children. That was in 1898. This arrangement I was working under was settled about a year and a half or two years before my mother died. They appraised the estate, and on an agreement with my mother that I would stay and support these children out of the business, I at that time told them I had a couple of offers of $5,000 a year to go with operatic companies; I had an offer with the Emma Yuck Opera Company, an offer of $5,000 to go with them, to do the comedy work, and that was principally what caused the discussion with my mother. I had another offer from the Castle Square Company at the time; I was doing a lot of work with the Newark Opera Company then, and as a result of that discussion and dissatisfaction, this proposition was made and my mother

agreed if I would stay and support the children out of the business, whatever was left after the support of the children, would be mine in lieu of salary. Of course I told her that would not make $5,000, according to the previous earnings of the business, but upon the advice of my uncle and Mr. Fred Lum and her and Father Cody, our pastor—he wasn't at the conference, but I went and discussed the matter with him—I decided to stay, and I have worked under those conditions ever since, until this proceeding started, and the Vice Chancellor decided that something was wrong about that agreement.

Q At the time of your mother's death what were the liabilities of the business, as nearly as you can recollect; what accounts did it owe?

A It owed a stable account and various merchants' accounts, and family expenses, etc.; just what the accounts were, I don't remember.

Q What was the relationship between the accounts of the liabilities and the accounts due to the business?

A About the same; I do not believe that there was as much due the business as it owed. I guess the balance was against the business, if any.

Q Then the value of this business at the time of your mother's death was about $500, as you have given it to us?

A Not any more than that.

Mr. Lum. It occurs to me that the proper time has come to raise what seems to me the main question under this decree for an accounting. Mr. Mullin fixes the value of the business at the sum of between $400 and $500. Let us take the largest figures. The order of the Vice Chancellor is that you, as Master, are "to estimate the profits so that as far as ascer-

tainable they should include only those resulting from the employment of the testator's estate as capital in the business, and due allowance should be made for other elements creating the profits, such as the business skill and credit of the executor in carrying it on." It seems to me we are bound, therefore, to account only for such profits as $500 would create in the normal course of business of this nature.

Master. The Vice Chancellor made no decree of any sort except the one which has in it the order of reference?

Mr. Lum. No other.

Master. Everything else is simply the statement of his conclusions?

Mr. Lum. That is all.

Master. This order of reference to me directs me to take an account of all the dealings and transactions of the said William F. Mullin, as administrator with the will annexed of Peter M. Mullin, deceased, while in the conduct and control of the business of said Peter M. Mullin since his appointment and qualification as such Administrator with the will annexed, and therefrom to ascertain the net rents, issues and profits realized from the said business; and for the better taking of which account the said William F. Mullin is to produce before the said Master, upon oath or affirmation, if required, and leave with him, all books and writings in his custody or power relating thereto, and is to be examined upon interrogatories as the said Master shall direct; and the said Master is also to have power to examine other witnesses in relation to said account, and in taking of said account he is to estimate the profits so that as far as ascertain-

able they should include only those resulting from the employment of the testator's estate as capital in the business, and due allowance should be made for other elements creating the profits, such as the business skill and credit of the Executor in carrying it on, and he should allow such compensation for the Administrator's services as part of the expenses of the business, as may be reasonable and proper, and deduct the same from the gross income of said business in ascertaining the net profits with which he is chargeable."

Mr. Lum. It is limited to the profit produced by $500 in this business.

Master. Was there any other capital employed in the business at that time than the $500; did the business consist at that time of anything more than this $500 of capital and the skill and ability—

Mr. Lum. That is all.

Master. Mr. Lum, is it your suggestion that Mr. Mullin should only account for, say legal interest on a thousand dollars from 1900, without regard to the profits that were made from the use of that $500 in that business?

Mr. Lum. That is my idea.

Master. I have no right to exclude any testimony. It is not before me as an advisory master. I do not think that I am saying anything that is not proper, but Vice Chancellor Stevens told me of this order of reference and explained to me the substance of his conclusions, at the time that he asked me whether I would permit him to make an order of reference to me, and he stated that he had found as a matter of fact, that there was to be an

accounting of the profits of the business; he didn't say interest on any sum, on such an accounting of the profits of the business, and he said that in view of the personal skill of Mr. Mullin in developing that business and making it prosperous, and realizing large sums for the support of his brothers and sisters, that that was to be regarded in determining what interest or sum should be allowed Mr. Mullin; it wasn't to be treated as a mere salary; and that is exactly the view that he expresses in his conclusions and in the order of reference, so that on that, while I would not exclude any testimony, I understand that my duty will be to consider all of the profits from the business, and those are to be produced before me for the accounting, and then I am to give Mr. Mullin credit for his personal service and successful service in doing it.

Q Of what was the estate composed at the time of your mother's death, as nearly as you can recall?

A Her estate consisted at the time of her death, of the Lafayette street house.

Q Her estate, you mean, or your father's estate?

A I mean the estate that she was the administratrix of; she had no estate personally.

Q (*By the Master*) Wasn't she the executrix?

A Yes. It consisted of the Lafayette street house, a house and lot at Clinton Place, three other lots at Clinton Place, vacant lots, fifty foot front, and—

Q (*By the Master*) The Lafayette street house, what size lot was that?

A 25 by 100, we appraised that at $5,000. At Clinton Place there was a lot 50 by 100—

house and lot. That was at the time of my father's death—I don't know whether it was then or since then I acquired it, but if it wasn't, it was changed since in the form of mortgages.

Q (*By the Master*) And there were three additional lots 50 by 100; was any value assigned to them?

A We figured them at that time—I am not positive, I think about a thousand dollars each, because it never increased much; and there were some mortgages to make up the balance; I forget just what they were; there is a list of them here; there is a statement of the estate; that is all there was.

Q Have you stated the amount that was realized from the accident case against the railroad, resulting in your father's death?

A I understood at the time of my mother's death—I was asked the value of the estate at the time of my mother's death—it was stated that sum was to be $10,000.

Q What was the amount realized?

A $7500. $10,000 less $2500.

Q Why less $2500?

A Mr. Kalisch's fee out of the settlement, if I remember correctly, was $2500; we realized about $7500.

Mr. Lum. That is all the examination of Mr. Mullin, at this time. I want to withdraw him and put another witness on; he will be called again.

Cross examination by Mr. Tansey.

Q You said, Mr. Mullin, that that $2,500 fee on the railroad case was as you remember it; have you any clear recollection on that subject?

A I remember that we got $7,500 from the railroad company through Mr. Kalisch.

Q Why was it you testified, then, you received $10,000?

A The settlement was for $10,000 as I remember it.

Q Why did you testify that that settlement was $10,000, and was included at $10,000 in your figure of estimating the value of the business or the value of the estate?

A I do not remember that I did.

Q Did you?

A I don't remember that I did.

Q Was not the settlement actually $10,000 free and clear of any bill of the attorney at all?

A I do not think it was, I am satisfied it was not.

Q Wasn't the attorney paid in addition his fee from the railroad?

A I do not think so.

Q As to the life insurance, are you quite sure that the life insurance of the Mutual Life was not $10,000 instead of $5,000?

A The Mutual Life I am positive was $5,000.

Q Are you quite positive that the life insurance in the Benevolent Legion was $5,000 and not $10,000?

A Positive.

Q In regard to the business of your father, your father had been an undertaker many years before he died, hadn't he?

A Yes, sir.

Q At the same stand?

A Yes, sir.

Q Lafayette street?

A Yes, sir.

Q He was an undertaker probably there before you were born, wasn't he?

A Yes, sir.

Q At the time of his death he had how many children?

A Eight children at the time of his death; one born after his death and one died before this adjustment took place, leaving eight.

Q After his death?

A Yes.

Q So that at the time of his death he had eight children?

A At the time of his death, yes, there were eight living.

Q You were a boy under age at the time?

A Yes, sir.

Q Fifteen or sixteen years old?

A I was seventeen or eighteen next birthday.

Q You had lived home with your father?

A I had been working with my father for a couple of years previous to that; I was fifteen when I started to work for him.

Q You had lived home with your father?

A Yes.

Q And the rest of the family lived home with your father?

A Yes.

Q And he maintained and supported you, didn't he?

A Yes.

Q Did he have any other business besides the undertaking business then?

A Other than a political position that he held at the time he was killed.

Q What was that?

A Freeholder.

Q What salary did he get as freeholder?

A I don't remember exactly.

Q Did he have any other business or income

besides the undertaking business and the free-holdership?

A No, sir, not that I know of.

Q And at the time of his death did he leave any money on mortgage?

A No, sir.

Q Did he leave any money in bank?

A The amount I think was $1,600 or $1,700, and we owed more than that after he died. We paid a stable bill of over a thousand dollars that was due, and some other things.

Q Was there any money due to him on his books when he died?

A I don't recall exactly, very little.

Q At any rate, he did have money enough in bank to settle up all his debts, didn't he?

A Practically, yes, sir.

Q And he left the Lafayette street property free and clear?

A Yes, sir.

Q You say that was worth $5,000?

A Yes, sir.

Q Did he leave any other property?

A None at all.

Q Any horses and wagons?

A At the time of his death there was a horse and wagon, but there was no horse and wagon at the time of my mother's death.

Q He maintained his family in good style, didn't he, at that time, during his life they were always well provided for?

A Yes, sir.

Q Sent to school, and high school?

A No, none of them had reached that station yet. They all went to parochial schools during his lifetime.

Q At the time he died you were put in charge of the business?

A I continued, I was practically running the business; when he died I was working at the business; the night he was killed, I had an arrangement to meet him to lay a body out that night.

Q Under his instructions at the time?

A Yes.

Q During the time you ran the business after your father's death, it was under the name of the Estate of Peter M. Mullin?

A Yes.

Q And it actually is so yet?

A I never changed the name on the window. I ain't had the name on the wagon or bill heads for years. I haven't had the name on the wagon, "Estate of Peter M. Mullin," since 1896, 1897 or 1898, just that year that setlement was made; my name has been there about—

Q What became of the wagon of the Estate of Peter M. Mullin?

A It wore out.

Q When did it wear out?

A Before my mother died.

Q What was the name on that wagon?

A That was on a plate, that was my father's name.

Q And was the plate allowed to remain on the wagon all the while until it wore out?

A The name was changed on the wagon when my brother Joe and I became partners in the business, we used the name of W. F. & J. L. Mullin.

Q That was on the wagon?

A Yes, sir, that was on a plate.

Q Didn't you have "Managers of the Estate of Peter M. Mullin" on it?

A Not on the wagon.

Q Where did you have that?

A That was on the bill heads and note heads during that period.

Q But you still kept the name "Estate of Peter M. Mullin" with yourself and Joseph L. as managers?

A Not on the wagon.

Q I am talking now about your bill heads.

A Probably on the bill heads, I think it was, I am not positive about that now.

Q The partnership agreement provided that the business should be run as the estate of Peter M. Mullin, didn't it?

A I don't know whether that enters into the partnership or not; it is there.

Mr. Tansey. The partnership agreement will speak for itself.

Mr. Lum. Yes, and it does not so provide, but it clearly indicates that they are to manage the business of Peter Mullin.

Mr. Tansey. The agreement provides that the business shall be carried on in the name of the Estate of Peter M. Mullin.

Master. The agreement by its terms was to continue for only one year, and it actually only continued as far as Joseph Mullin was concerned, for about six months.

Q So that while you have a partnership agreement, as you say, you changed the name on the wagon. At the time you entered into the partnership agreement, you were running the business actually under the name of the Estate of Peter M. Mullin?

Mr. Lum. I object to that, the sale will determine conclusively that fact; there will be

no use of our taking testimony as to the value of the land.

Master. It is not apparent yet just what bearing the answer to that question will have, but it is certainly a proper question.

Q While you say, Mr. Mullin, you took the name off the wagon at the time you and Mr. Joseph Mullin went into this partnership agreement, nevertheless you were running the business under the name of the Estate of Peter M. Mullin, under that agreement?

A Under the partnership agreement we were running the business, yes.

Q Under that name?

A Under the name—well, not altogether; the permits for burial service were not signed as the Estate of Peter M. Mullin, they never were; the name on the wagon was not the Estate of Peter M. Mullin, it never was. My mother signed the checks for payment of all bills as the administrator of the Estate of Peter M. Mullin.

Q Do you mean to tell me that you didn't have the name of Estate of Peter M. Mullin on your wagon, never?

A Never.

Q Recollect very carefully on that.

A The name of Peter M. Mullin, the plate was on the wagon at the time of my father's death, remained there until we changed it for the name of W. F. & Joseph L. Mullin, and after that my name went on.

Q And even while your name was on the wagon, you still were running the business under the name of the Estate of Peter M. Mullin, weren't you, regardless of burial permits or anything else?

A The issuing of permits and those things are part of the management of the business. I suppose

it was a dual arrangement, if you might call it that, but there was that condition existing, that the Estate of Peter M. Mullin did not appear on the burial permits or on the wagon.

Q I suppose for one reason, because the rules of the department require those permits to be issued to individuals, don't they?

A They did not then, I don't think, now they must be issued in the name of a licensed undertaker or concern, firm name.

Q Wasn't that the same at that time?

A No, sir.

Q The Estate of Peter M. Mullin could not be a licensed undertaker or concern?

A There was no licensed undertakers at that time; there was no law in effect then.

Q This wagon you had the name of William F. Mullin put on, wasn't your own wagon, was it?

A One of them was and one was not; both of them were for a time, and then one was and one was not. We owned an open wagon, that was our own; latterly we did not own a top wagon.

Q You said your father only had one wagon and you didn't get another one?

A I got another one after that.

Q Immediately after?

A No, some time after.

Q Was that the one you put "William F. Mullin" on?

A No, it was on both of them.

Q What was the other wagon you refer to?

A An open wagon.

Q When did you put that on?

A I don't recollect just when.

Q After your father's wagon wore out, what wagon did you use?

A Wagon supplied by the stable.

Q Whose name was on those wagons?

A My name.

Q Your name then was put on the stable wagons?

A A plate that the stable put on the wagon.

Q And that is the common practice among undertakers to have their names put on regular stable wagons?

A No, some undertakers own their own vehicles.

Q I am asking where they do not own their vehicles?

A Sometimes.

Q The stable man furnishes wagons which are used by various undertakers by merely changing the plate?

A Sometimes.

Q Haven't they done that for you?

A They did, yes, occasionally; oh, yes, occasionally.

Q In your father's lifetime he was quite interested in church, wasn't he?

A Yes.

Q And he was quite a singer, too, wasn't he?

A Yes.

Q He used to sing in St. James' Church?

A Yes.

Q And didn't he sing all around Newark occasionally in other churches?

A Yes.

Q He had a reputation in the city for singing?

A Yes.

Q And he was very widely known in the city, wasn't he?

A Yes, sir.

Q Among the Catholic residents of the eastern section particularly, wasn't he?

A Oh, yes.

Q As well as the other people; didn't a large part of his trade come from the Catholic families of that neighborhood?

A Oh, yes.

Q And did he derive any trade from the rest of the city, other than around in that particular locality?

A He might occasionally get a call from other sections of the city.

Q Was he not the undertaker doing the largest business in the sections of the city east of the railroad, in his lifetime?

A No, sir.

Q Who did more than he did?

A Mr. Dowling did a great deal more than he did; below us was Mr. Englehorn, at the time of my father's death; Mr. Dowling had the biggest Catholic trade at that time.

Q Is Dowling still in business?

A His son is continuing that business.

Q Was Mr. Dowling alive in your father's lifetime?

A Yes.

Q About how long after your father died did he die?

A I don't remember exactly.

Q Had he been established before your father went in business?

A I don't recall that.

Q What do you base your estimate on, that he did a larger business than your father?

A Well, at those times we got reports every six months.

Q From whom?

A Issued by the City Clerk's office, a record of the number of funerals each undertaker had every

six months. Mr. Dowling exceeded us a great deal in those years.

Q By how many?

A He did twice as much business as we did.

Q How much business did he do?

A He had probably 350 funerals a year.

Q How much did your father average?

A About 120.

Q At that time?

A About 110 at that time.

Q And that was right previous to his death?

A Yes; I think the last report we had of six months was 66 funerals.

Q That would be on an average of 125 a year?

A I said the average was about 110.

Q And Mr. Dowling would do, you said, on an average of 150 in six months?

A He did twice as much as we did, usually.

Q Who was the other undertaker you named?

A Mr. Englehorn was there at the time.

Q What was he doing?

A I don't remember exactly what he did.

Q He went beyond your father, too?

A Yes.

Q Have you any idea as to how Englehorn did beyond your father?

A No, I do not recall that.

Q Is Englehorn still in business?

A His business was continued by his nephew until very recently, and he has gone out of the business and it is being continued by someone else.

Q Who is running Mr. Dowling's business at present?

Q At the same stand?

A Yes, sir, I think it is the same place.

Q When your father was alive he was quite a popular man in that section, wasn't he?

A Yes.

Q He had been elected freeholder from that very Ward, hadn't he?

A Yes.

Q What Ward?

A Fifth Ward.

Q How long had he been freeholder?

A I don't know whether it was his second term or not; there were three terms at that time.

Q He was freeholder at the time of his death?

A Yes, sir.

Q He was killed accidentally, I believe, wasn't he, on the Pennsylvania Railroad at Market street?

A Yes, sir.

Q And at the time he left, you say, eight children, none of them of age?

A No, sir.

Q Immediately after his death, when you were in charge of the business, did you keep any record of the number of funerals that you had during the first six months?

A Not specially; we have the record of course.

Q Can you give me an estimate of the number of funerals you had?

Mr. Lum. That will all be given by Mr. DuBois.

A I haven't any idea now.

Q Immediately after your father's death?

Objected to.

Master. I agree with Mr. Lum that if a witness who is to be subsequently examined, will give the record, that probably you would get all the information you need, and Mr. Mullin evidently would have to rely on his memory somewhat, and that might easily be at variance.

A I can answer that in this way, that since the time of my father's death we have averaged probably 155 funerals a year.

Q I am putting it at the point six months immediately after his death.

A I cannot give you that.

Q Will your records give you that?

A No; I know what the average has been.

Q Has it averaged that every six months since he died?

A I said every year.

Q Every year has it averaged that since he died?

A Some years it was 180, some years 170, some years 183, and it has averaged about 155 a year.

Q That is, every year since that time he died?

A The average has been that.

Mr. Lum. We have no records except after the date of the death of the mother.

Witness. But the average would be about the same.

Q From the time of your father's death?

A It will go to make up about the same average; the last years have been a little light, we have had competition.

Q I will ask you just once more about this sign; didn't you have a sign on the open wagon reading as follows: "William F. Mullin, Manager Estate of Peter M. Mullin?"

A It may have been that way for awhile before it was changed; it had nothing on but "William F. Mullin" for some years; just how many, I cannot remember.

Q That was before or after your mother died?

A Before my mother died.

Q You had a stable on Plane street, didn't you, Mr. Mullin, at the time your mother died?

A Yes, sir.

Q You used to have your own livery horses there and so on?

A Yes, sir.

Q You supplied horses and wagons for other undertakers, didn't you.

A Yes, sir.

Q Isn't it a fact that you had a sign such as I have just read, on the wagon which you used at the time of your mother's death?

A No, sir, it is not.

Q You had a morgue there at the time your father died?

A No, sir.

Q When did you get the morgue there?

A I was appointed morgue keeper—I don't know, I am in my third or fourth term now of three year appointments.

Q You have been morgue keeper since what year?

A I cannot tell you exactly; I say I have been appointed three or four times, a three year appointment.

Mr. Lum. After your mother's death?

Witness. That I do not recall.

Master. Is is nine or ten years?

Witness. Nine or ten or eleven years.

Q You bought the morgue there yourself?

A Yes.

Q What was the cost of building that?

A About $750.

Q It is now attached to your property at Lafaeytte street, isn't it?

A Yes, sir.

Q And is there some emolument attached to morgue keeper?

A Only a payment of $15 for burial of the city dead or morgue bodies, where we bury them.

Q Is there very much of that business during the year?

A Very little for the morgue keeper; that work costs more than you get to bury the bodies sometimes.

Q What is the benefit of having a morgue?

A Once in awhile you get a funeral out of it.

Q You mean where you can make regular fees?

A Yes.

Q But in keeping the morgue for the burial of the city dead, there isn't much money in it?

A The burial of county dead, there isn't much money in it.

Q Where do you get this occasional funeral that you spoke of from the morgue?

A Families identifying bodies and instructing us to bury them, where we get such a call.

Q Bodies that are found dead, or anything of that kind, brought there?

A Ordered by the County Physician there.

Q Or accidental death or anything of that kind?

A Ordered by the County Physician; no bodies are brought to the morgue unless ordered by the County Physician.

Q You haven't rendered any account in this case yet?

Mr. Lum. We are accounting now.

A I guess they have got something ready for you.

Q You haven't rendered any account of the business?

A I think they have got everything that I know.

Q In mentioning the property of the estate this morning which was standing at the time of your mother's death, you didn't mention candlestitcks, did you?

A We got that all in our accounting; that is ready there.

Q I am talking of the estimate which you gave before the Master this morning.

Master. There has been no reference to candlesticks.

A Stocks, etc. I said not more than four or five hundred dollars, that will include everything. They are better today than they were, and see what they will bring the thirty-first; then you can tell what it is worth.

Q Have you kept them in good condition all these years?

A Absolutely.

Q And have you added to the stock in any way from what you had then?

A Yes, sir.

Q In what way?

A New goods, replenished the old stock, upkeep of paraphernalia, changing of new pedestals.

Q How many caskets have you on hand now?

A Probably a dozen.

Q About the same as you had when your mother died?

A About the same.

Q So there hasn't been increase in that stock?

A We always carry about the same stock.

Q And has there been any increase in any other particular that you recall now?

A In the paraphernalia of the business?

Q Yes.

A No.

Q It is about the same now as it was at the time of your mother's death?

A About the same.

Q Has there been any increase since the time your father died?

A Yes.

Q In caskets?

A In caskets, of paraphernalia of all descriptions.

Q Did he have any caskets on hand when he died?

A I presume he had a few; we always carried a little stock.

Q Do you know whether he had more than you had?

A Twenty-one years ago, I cannot remember.

Q Do you know whether or not the stock which he had on hand at the time compared in any way with the stock you have now?

A I don't know; I guess it is about the same; there might be a little difference; goods cost more now than they did then, that is all.

Q Was Father Cody rector of St. James' Church at the time your father died?

A Yes, sir.

Q He was well acquainted with your father in his lifetime?

A Yes.

Q And he is still rector of St. James' Church?

A Yes, sir.

Q It is quite an important factor in an undertaker's success to have the friendship of the rector of the parish, isn't it?

A I don't know.

Q I am asking you that.

A I don't know.

Master. I think that the court can take notice of the fact that in any business of that sort, friendship of any influential person, whether clergyman or politician or an office holder or an active business man, is of course valuable. I can see readily that the rector of any church, Roman Catholic or Protestant, or of any church, must be able to be of service to an undertaker whose services he admires and appreciates, or who for motives of friendship he would be glad to help. That I understand readily. Very many have had no business relations with undertakers, and the rector of a church can direct them where they will get the service that he thinks they desire.

Mr. Lum. Mr. Mullin is simply leaving the stand in order to make room for Mr. DuBois to go on and lay the basis for further testimony.

FRANK G. DUBOIS, sworn for complainant.

Direct examination by Mr. Lum.

Q What is your business?

A Certified public accountant.

Q How long have you been such?

A I have been a public accountant for about thirty years. I have been certified since the law went into effect in the nineties.

Q Where have you been engaged in that business?

A New York and Newark.

Q Did you examine the books of Mr. William F. Mullin from the date of August 1, 1901, until 1911 or 1912?

A August 1, 1900.

Master. From what period to what period did you examine the books?

Witness. From August 1, 1900, to August 1, 1912.

Q In making up that report, which you have before you, what sources of information did you avail yourself of?

A The books, certain bills, inquiries from the trade, and any source that I could get hold of, that I thought would answer the questions that I wanted to ascertain as to the nature of the business and the carrying on of the business.

Q Is this a copy of your original report in this matter to us?

A It is.

Mr. Lum. I offer that report in evidence. (Marked Exhibit P 1.)

Q The report is endorsed "To August 11, 1912;" what is the date of the report?

A It is dated December 31, 1912.

Cross examination by Mr. Tansey.

Q In making that report you compared it with another report rendered by the Constam Audit Company?

A Yes.

Q And you have a schedule marked Exhibit A, showing Constam's reports and your own comparison, haven't you?

A That Exhibit A, column 1, shows from Constam's report, a list of receipts of sales that I did not go into for the time being, and to save expense we assumed that to be satisfactory.

Q In figuring the profits that you have there, you have found the profits as estimated by the

Constam Audit Company, in some instances correct, haven't you?

A Yes.

Q Notably in the case of the last item on the list, "sundry charges"?

A I will have to get my notes before I answer that question; I think you are right.

Mr. Lum. The Constam report is the report of an auditor by the other side, earlier.

Witness. (After examining Constam report) I say yes.

Q And the Constam estimate of profits and sundry charges $6340.45, you agreed with?

A I took his to be correct; I didn't go into it at all to any extent.

Q Taking the first item on the list that you have, for coaches, comparing that with the Constam report, and showing a gross profit of $5112.97, you agreed with that too, didn't you?

A I assumed that to be correct, for I was informed that the usual practice is that ten per cent is the profit, and $5,112.97 is ten per cent of the gross amount.

Q And therefore you agreed with him on that item?

A Yes.

Q And taking the item for horses in the Constam report, showing a profit of $1365.45, you agreed with that item too?

A Yes, for the same reason.

Q And the item of profits for buses, bus hire $730.80, you agreed with Constam's report?

A Yes, sir.

Q Also the item for opening graves and for masses and for advertising, where no profit is

shown on the Constam report, you also agreed with that?

A Yes, sir, for the reason that I didn't go into it; as I stated to you before, the prices on sales were made up by Constam, and we have assumed for the time being that they are correct, and I understand there is no profit on those two items.

Q Where you begin to differ is the item of outside boxes in your list; your estimate in that case is a profit of $1266.50, while Constam's estimate of profit is $2699?

A That is the case.

Mr. Lum. If you are going to put in the Constam report, won't those figures speak for themselves?

Master. He has a right to call attention to differences or discrepancies.

Q The matter of caskets, the estimate of profit in Constam's report is $75,762.75, and your estimate of profit is $58,880.83; that is a different estimate?

A Yes.

Master. Are both their estimates of sales $106,000?

Mr. Tansey. Taking the same estimates, the same.

Q The next item which you take up is embalming; your estimate of profits on that is $11,257.63, while Mr. Constam's estimate is $12,990; that is the estimate?

A You are reading that correct, yes, sir.

Q The next item is candles; your estimate on that, as I see it, is $2229.26, while Constam's estimate is $2366.72?

A You read that correctly, yes, sir.

Q The use of candlesticks, the sales, you have the same as Constam's report, and you estimate no profit, while Constam estimates the use of the candlestick is all profit, $1109.90; what is the reason for that, Mr. DuBois?

A I will have to look into my papers to give you that answer; do you want it right now?

Q I am asking you whether the cost or the amount marked "sales" for the use of candlesticks, is the amount charge for their temporary use?

A .Yes.

Q You have here in the item of costs $1,109.90; where did you get that from?

A That I will have to refer to my papers to tell you.

Mr. Lum. I think this item is in the wrong column.

Witness. It looks that way to me. I think it was copied wrong; I think that is in the wrong column, although I would like to look into it before I say so positively.

Q It really is $1109.90 profit?

A It looks so on the face of it. I think that has been copied in the wrong column; I cannot explain that just at the moment. I will have to take the time to hunt it up.

Q Doesn't it strike you that that is really rental?

A It strikes me that that is in the wrong column, on first blush.

Q It ought to be over in the profit column, as it is in the Constam report, ought it not?

A No, I do not think it is all profit.

Mr. Lum. You have the up-keep in another place, that is all profit.

Witness. I guess it is right.

Q You think it is all profit?

A It is in the wrong column.

Q The use of candlesticks should be over in the profit column?

A I think so, yes, sir; I think that is a mistake in copying this over.

Q For clothing, Mr. Constam has estimated a profit of $7908.25 and you have estimated profit of $3415.75?

A You read that correctly.

Q For chairs, Mr. Constam's estimate of profit is $1900.89 and you have estimated a profit of $1402.39?

A Yes.

Q For clothes, Mr. Constam has estimated a profit of $1023.55 and you have estimated a profit of $940.55?

A Yes.

Q On the question of outside boxes, Mr. Constam has estimated a profit of $2699 and you have estimated a profit of $1266.50, haven't you?

A Yes.

Q So that your total estimate of profit covering the reports of sales for the period of years that you examined is $92,942.53?

A That is right.

Q And Mr. Constam's estimate of profit for the years that he examined, being from 1900 to 1911, is $119,310.73?

A That is what his report states.

Q A difference of $26,368.20?

A I haven't the difference.

Q In making up this report, you show on page 10, Exhibit 3, corpus of estate, the estimate of value to be $30,000, and after making certain payments from that, you leave on hand a balance of $9,175, which is to be divided between Anna E. Mullin, to whom was due $1675 of that; Marie Mullin $3750 of that, and Peter M. Mullin, when he comes of age in 1913, $3750, making the total balance of $9,175?

A Right.

Q You found that that balance was on hand from the corpus of the estimated value of the estate $30,000?

A I found that; that is what would be the balance if the corpus was $30,000, and these payments haven't been made; whether it is on hand, I don't know.

Q You say the corpus of the estate, you do not say the corpus was on hand, you say the corpus of the estate.

Master. He isn't chargeable with determining what the corpus was, but is chargeable with showing in his report what he treated as corpus. It appears on the face of it, that is what he was to understand was the corpus of the estate.

Q Who gave you that corpus?

A By reading over the papers in the case I got that, the evidence and so on.

Q You treated that corpus, then, as correct?

A I assumed it to be as stated.

Q Then you went on, Exhibit D, page 11, and made an estimate of the average yearly outgo?

A Yes.

Q Making $5600 by reason of the possible expenses and output, and $1929.28 estimated yearly

average for the support of the family of Peter M. Mullin?

A Yes, as per Exhibit E, that states how that average is made up; that is an estimate, of course.

Q Making total of $7529.28 estimated outgo from the profits of the business?

A Without any compensation to William F. Mullin, as stated.

Q Exhibit E shows how you made up the average expenses for the children?

A Yes.

Q And you made up those expenses by going back to 1891, didn't you?

A Yes.

Q From the time of Peter M. Mullin's death?

A Correct.

Q You did not compute the expenses since William F. Mullin took charge in 1900?

A Yes, it is all here.

Q You didn't do that exclusively, you went back and combined the expenses when the family was larger in 1891, with the time that the family was comparatively small, in 1900?

A I covered the whole period from the death of Mr. Mullin up to the date when the youngest child would be of age, so as to get an average for the entire time, and for all of the members of the family who had been supported through that estate, including the mother, and at one time nine children; I averaged by the length of time.

Q When there were nine children, the expenses would necessarily be heavier than when there were three?

A Not necessarily, because when there were nine children, they were young children; education, music lessons and things of that kind, accomplish-

ments, were not taken into consideration, or rather, they were taken into consideration, but there were no expenses for those years, the children were very small.

Q But you would depend upon the incidentals, like education, etc., to increase the average?

A It certainly would.

Q But without taking account of those things, the expenses with nine children would be much more on an average than with two, wouldn't it?

Master. That goes without saying.

Q Now, you come to a point where you say that this estimate of the expense of the business and of the maintenance of the family of Peter Mullin took no account of compensation to William F. Mullin at all during that time, and you figure that for the twelve years that you examined, the average expense, leaving out his compensation, at $7,529.28 a year?

A Yes.

Q That is true, isn't it?

A Yes.

Q Have you shown anywhere here an account of the money actually drawn by Mr. William F. Mullin for his purposes from that business?

A I have not.

Q Have you looked over the books and ascertained that?

A I have looked over the books, but I haven't ascertained that fact, and I do not think I can.

Q Why can't you ascertain the amount of money actually drawn by Mr. William F. Mullin from that business during the time that he has had charge of it?

A For the same reason I cannot tell the exact amount of money that has been paid out by William

F. Mullin for maintenance of the family and children, for the reason that a great deal of the money paid out has been in currency, and there is no account of it, and no account kept of it.

Q Could you find any statement of the amount which has been drawn by William F. Mullin on check from the estate for his own account?

A I haven't gone into that. I have a list of checks drawn in certain periods for the others—for the maintenance of the family.

Q You didn't get any checks that he drew for himself?

A No, I haven't gone into it.

Q You didn't get an item where he drew say $3600 and evidently bought stock of the Public Service Corporation with it?

A No.

Q You didn't get the item where at frequent intervals he has drawn $500 or a thousand dollars from the business for deposit in the Howard Savings Institution?

A No, sir.

Q Then how can you say that you have a complete estimate to go before this court as to the income and outgo of that business?

A I haven't said that.

Q Then you do not pretend that this is a complete or accurate estimate?

A Of the income and outgo of the business?

Q Yes.

A No, I do not think it is a complete record; in fact, I know a complete record cannot be made—a complete account cannot be made from the records.

Q You haven't attempted to make up an account from the records, either of the amount drawn

by the children or the amount drawn by Mr. Mullin?

A I have for the account of the maintenance of the family as best I could, I made an average of it.

Q I am talking about the actual cash drafts, as shown by the checks.

A I have that here for four periods.

Q Is that embodied in your report?

A Yes, it is on Schedule E; money paid for the family is made up from the several checks shown as follows; the first period, from August to October, 1900, the second period July 1901 to 1902, third period May 1904 to May 1905, and the fourth period is January 1909 to 1910, and that makes a period altogether of three and one-quarter years, shows an average of $2606.53. No account is made in the foregoing for items paid out in currency, as no record has been kept of such payments. The same applies to any payments that Mr. Mullin may have made for his own account in currency.

Q You mean the family drew on an average $2606.53 a year?

A I mean that there was that much used on an average for the support of the family.

Q As shown by the check books?

A As shown by the calculation.

Q And you haven't made any estimates as to the amount drawn by Mr. Mullin on check for himself?

A No.

Q Why didn't you do that?

A Because I didn't think it was necessary.

Q You can make such an estimate, can you?

A I don't know if I can or not.

Q Can't you take the same process you used in this case?

A It is possible, I haven't looked for it.

Q And find out how much he actually drew for himself?

A The account is kept in the name of Mr. William F. Mullin, so I presume that all the money that is in the bank or has gone into the bank was Mr. Mullin's, and what he did with it was none of my business further than what he took out of that to support the family, because the money in the bank came from other sources besides this business; it is not the estate account, it is the account of William F. Mullin.

Q Where did you get this estimate for the children, from what check books?

A From these same check books I have here.

Q Were they William F. Mullin's or the estate?

A William F. Mullin.

Q Were they the check books which were kept down in the safe in the Mullin shop?

A I presume so.

Q Were they William F. Mullin's check books since 1900?

A Yes, I think they were.

Q Isn't it a fact that the account was kept in the name of the Estate of Peter M. Mullin until very recently?

A What do you mean by "very recently"?

Q Within the last year or so?

A No, I should say not.

Q Do you know when the account was changed?

A I haven't the date here when the account was changed or when it started as William F. Mullin, but the pass book would show that.

Q I show you pass book of the National Newark Banking Company entitled Estate of Peter M.

Mullin, and ask you whether you saw that pass book before?

A I do not recall having seen that book.

Q That is a pass book of the National Newark Banking Company with the Estate of Peter M. Mullin, isn't it?

A Yes, that is what it says on the outside.

Q When does the account begin in that book?

A May 7, 1902, and ends apparently September 6, 1905.

Q And what is written there after that?

A "Balance transferred to new book".

Q How much is the balance stated?

A $1975.98. I do not think I saw that book at all.

Q Do you know whether the check books which you examined covered any period between 1902 and 1905 of the estate?

A Yes.

Q So that there was an account, as shown by this pass book, with the Estate of Peter M. Mullin at that time in the National Newark Banking Company?

A All I know is what you see there; I haven't seen any book that shows that, other than what you have shown me.

Mr. Tansey. I would like to have this bank book marked for identification.

(Marked D 1 for identification.)

Q. Did you see any check book with the name of the Estate of Peter M. Mullin on it?

A No.

Q On the check stubs?

A No.

Q Nor the checks?

A No.

Q During all this time you saw the checks marked William F. Mullin only?

A The checks I handled were of William F. Mullin.

Q And even the checks between this period of 1902 and 1905?

A The checks between those periods I have made up here, I have not examined the checks closely, I have examined the stubs of the check books.

Q Then it may be possible that you could make up a statement of the amount of money drawn from the Estate of Peter M. Mullin by William F. Mullin?

A I could with the assistance of Mr. Mullin; without it, I could not.

Q By going over the same check books you examined?

A Yes, with his assistance.

Q He didn't refuse you his assistance?

A No, he gave me all the assistance he could.

Re-direct by Mr. Lum.

Q Would the examination of these books and stubs, etc., as Mr. Tansey has indicated, enable you to tell any better the amount of profits of this business than the data that you have now examined?

A No, sir, absolutely not.

Q And it would be necessary, in order that any such examination as suggested would be of any value, that you should know from what sources the fund came that went into that bank?

A Yes.

Q Could you possibly ascertain that by any amount of investigation?

A Accurately, I think not.

Q Then this data that you have examined is all the data which in your judgment is necessary to be examined in order to determine as approximately as at this time can be done reasonably, the profits of this business?

A Yes.

Re-cross by Mr. Tansey.

Q You are not able to say until you go over these check books with Mr. Mullin's assistance, as to how much he has really drawn from that business?

A No, I cannot.

Q And before being able to tell the profits of the business, you would want all such information, wouldn't you?

A Not necessarily, no; we have on one side the receipts of the business, and I have endeavored as best I could to find out what has been paid out for the maintenance of the family and the expense of the family; the money that was in the National Newark Banking Company or any other bank, to the credit of Mr. William F. Mullin, how it got there, where it came from, I don't know, and I do not think the books will show it.

Q Where, for instance, did you get the figures showing the outgo for the expenses of the business?

A For the cost of caskets and things of that kind?

Q Yes.

A The cost of caskets and boxes and things of that kind I went through certain bills and made inquiries of dealers in those kinds of goods that he was buying from, and then questioned Mr. Mullin and his assistant down there and others in that line of business, to ascertain what those things cost approximately.

Q You didn't then go over his check books to find out what he actually paid for these particular articles?

A I examined certain stubs to see what amounts had been paid, but to get an accurate account of what had been paid out, no, I did not; it couldn't be done, because the records were not complete enough to make it.

Q Did you follow the same plan in getting the estimate of the other possible outgo for other charges, like clothing, candles and various other things?

A Yes.

Q So that for none of the items which you have of the outgo of the business, for none of those I say, have you gone over the check books to find out what he actually paid for the articles?

A Not completely, no, it couldn't be done.

Q You say the records are not complete; didn't you find check books belonging to the Estate of Peter M. Mullin running from August 2, 1900, to July 31, 1911?

A I found certain check books there between the dates that you have mentioned, but not all of them. There was, I believe, one or two—I don't recall just at this moment—one or two of them were missing.

Q Didn't you find a complete record of checks paid out between those dates?

A I did not.

Q Did you make a note of the books that were missing?

A I took a note of it, I haven't it in my mind.

Q Can you find the note?

A I am not sure whether I can or not; I don't seem to have that note here; I know that one

book was missing. The numbers of the checks taken from that book I do not recall, but there was one book missing, which would be about 300 checks.

Q You think there wasn't any more than one book missing with 300 checks?

A That is my impression now.

Q Have you a record so you can find out accurately what book was missing?

A I think I have somewhere; I have had it, I do not know whether I have it now, but the books are here, we can find out which one was missing.

Q If you have the books here why not look over them and see which one is missing?

A All right.

Master. This report which you offer in evidence is not signed by anybody.

Mr. Lum. I offer it as a copy of the report; the original is in my office. I will offer the original in substitution for it.

Q Are the books numbered?

A Yes.

Q Give me the dates and numbers of the books you have.

Master. These are the check book stubs of checks that were drawn against the account standing in the name of Estate of Peter M. Mullin, is that right; is that what you are inquiring about?

Mr. Tansey. I am asking what check books of the Estate of Peter M. Mullin he has, and I am trying to identify them by showing that there was an account in the National Newark Banking Company up to 1905 in the name of the Estate of Peter M. Mullin, with drafts against it.

Mr. Lum. This account all through was in the National Newark Banking Company.

Witness. The book missing seems to be No. 2486, October 9, 1900, to 2724, July 24, 1901.

Q From July 24, 1901, is your record complete?

A Yes, I guess it is.

Q To what date?

A This book goes to March 8, 1911. There is another book following this, that there are some checks still in; that book is not here.

Q Is that the book at present in use down there?

A I judge it is.

Q It is in the office of Peter F. Mullin?

A William F. Mullin.

Q I mean the Estate?

A Yes.

Mr. Tansey. I would like to have those check books produced offered in evidence, nine books.

Master. The testimony shows that they cover the consecutive period from July 21 to a date in 1911, up to the one which is now in current use, and that the book missing covers the period from October 9, 1900, to July 24, 1901.

Q And so far as your record is complete from July 24, 1901, you could not by going over these check stubs, find out the amount of money paid out by William F. Mullin by check to run that business down there?

A Yes, with the assistance of Mr. Mullin; some of these stubs are not explicit enough to tell what the checks are for.

Frank G. DuBois, examined by the Master.

Q There were no other checks used for that business down there but those?

A Not that I know of.

Examination by the Master.

Q This report which is marked December 31, 1912, which has been put in evidence, when was the work done, the results of which are embodied in this report?

A December 1912 and January 1913; perhaps some of it might have been done as early as November—in the latter part of 1912 and in January 1913.

Q You assumed the sales for the period stated to be the same as the Constam report, $277,345.77?

A I did.

Q Did you assume that, with Mr. Mullin's concurrence, as being probably correct?

A Yes.

Q The cost of articles sold is reported by you under Schedule A $184,403.24; that aggregate cost for this period of about ten years, I understand, is not made from an actual record of bills paid and disbursements, is that correct?

A That is right.

Q And I understand from the report itself and from your testimony, that it is made by assuming that the articles sold or services rendered, as covered in the Constam report, aggregating $277,345.77, would have involved an actual disbursement of $184,403.24, by reason of the estimated profits on the different items of merchandise sold or furnished and of work done; am I correct about that?

A That is right.

Q And when you report a gross profit, Exhibit A, of $92,942.53, that represents a gross profit, which from all the information you could get, and from the best judgment of Mr. Mullin, ought to have been made on the volume of business, which his records show he did; is that right?

A That is right.

Q From what source did you get your information as to the probable cost or average cost of the items shown under Exhibit A, column 2, entitled "Costs"; for example, "Coaches $4616.78", from what source did you get information that led you to put down those figures?

A I got that partially from Constam's report, and more particularly from what Mr. Mullin told me, which I understand from others in the business that is the usual practice that the undertaker makes ten per cent profit on these articles.

Q I see under column 3, Gross Profits, you have allowed ten per cent?

A Yes.

Q Then you had actually no figures except the figures under the column of Sales, and from such information as you had, you allowed that the business was chargeable with a profit of ten per cent?

A Yes.

Q Would that ten per cent be the profit in excess of any allowance to Mr. Mullin or any other person as a manager of such a business?

A No, the proportion for the management of the business and the expense of running the business would have to come out of this ten per cent.

Q How many other undertakers or persons in the business did you consult besides Mr. Mullin, in order to reach that conclusion?

A Four or five, I think.

Q Who were they?

A I cannot recall the names, because I took them from the bills that Mr. Mullin had there on his file, and telephoned to the parties. I could tell that probably. I don't keep any record, I just called them up. One I recall was the cemetery; there were four or five; I would have to refer back to give you the names; I didn't think that was important, and didn't keep it. I consulted the catalogues.

Q Do you know whether all of the persons whom you consulted agreed that ten per cent was the usual gross profit on coaches?

A Yes.

Q There was no difference in their practice or judgment?

A No.

Q The furnishing of hearses is the same, ten per cent?

A Yes.

Q Would that ten per cent differ, would the profit be greater if the undertaker owned and maintained his own hearse and teams and driver for it?

A That is merely a question of opinion.

Q You did not inquire about that?

A No, that would depend largely on the amount of business done.

Q But you don't know yourself?

A No.

Q What is meant by "bus", is that the large carriage for pall-bearers?

A Yes, it carries six or eight.

Q That is also ten per cent?

A Yes.

Q Your estimate of the profits on caskets is that it is about 55% of the gross expenditure, and that the cost is about 45%; where did you get that figure of the cost?

A From the books in this way: I took the year 1900 and 1901, the year 1905 and 1906, and 1910 to 1911, in each of those years they ran from August 1 to August 1, half of one year and half of the other, and went through the books and counted the number of funerals and the different kinds of funerals, and how many there were at approximately the different costs of funerals.

Q There were records as to the cost of caskets from which you made up that figure?

A Yes, records and by using the catalogues.

Q And the books of Mr. Mullin's business showed what had been charged or received for caskets?

A Yes.

Q Do you know how much difference there was between your statement "estimate of profits on caskets" and the Comstan report?

A No, I didn't, for I haven't figured it at all. $16,881.92.

Q What do you make the Constam report's profits on caskets?

A $75,762.75.

Q Then by that report, on a basis of sales of $106,718.75, the profits are about 70%?

A On the Constam.

Q As shown on the Constam report?

A Yes, it would be upon the selling price.

Q Did you find in your examination of the prices charged by Mr. Mullin and the list or cost prices of caskets, any on which a profit of 70% was shown?

A Yes, and some higher and some a good deal less.

Q Is it true that the percentage of profits is higher on the lower priced and cheaper articles?

A No, not when you get way down to the very cheap ones.

Q But I mean the lower prices—the reason is that they are stock and great many more of them used?

A No.

Q When you made that estimate of profits about 55%, did you have before you the Constam report which showed their estimate of such profits at 70%?

A Yes.

Q Did you notice a difference of about $15,000?

A I noticed there was a difference; I didn't stop to figure out what the difference was. I was not aiming at that, I was trying to get the facts.

Q Did you make any special inquiry to find out which of those two estimates was more nearly acurate, your estimate of 55% or Constam's of 70%?

A I think Mr. William F. Mullin talked of that after I got all through; we noticed that there was quite a difference here; he said it was too high.

Q Then you practically took this estimate of costs of profits on caskets from Mr. Mullin's knowledge and experience in the business?

A That together with the books. My aim was not to try to prove Constam's report, but try to get at the true facts as they existed, irrespective of whom they might hit.

Q Where did you get your information which led you to conclude that there was a profit of 75% on the charge for embalming?

A By inquiring of Mr. William Mullin how much material was used in embalming a body and the prices that they cost, the articles.

Q You have shown under the item of cost exactly 25% of the item of sales on receipts for embalming; did that 25% represent only the cost of material, or did it include the service of embalming?

A It did not include service.

Q How do you know it didn't?

A Because I haven't figure service in.

Q I understand that, but if you were asking Mr. Mullin how much profit to allow under that item, how do you know that he did not treat it as a real profit, including service as an item of expense?

A Because I have figured here the number of funerals, or number that there were embalmed, and the quantity of material that it took to embalm them.

Q You had such figures before you, did you?

A Yes, so many quarts per person.

Q That was what I asked you, whether you had any figures to show that the material used for embalming or the cost of embalming, exclusive of the service of the operator, is 25% of the charge for such purpose?

A Yes, I have such figures, I don't know that it figures just 25% though.

Q Your report is exactly 25%, but you are quite confident that that 25% represents the cost of material only and not the time of service?

A Yes, sir, that I am sure of, that figures just 35%. It is only a coincidence.

Q With reference to clothing, 1011 suits; did you have figures before you to show what those

suits cost, that they actually cost $11,215.75, or did you only take that from the Constam report?

A I got those figures from talks with Mr. Mullin as to what he paid for clothes and suits of different kinds and averaged them up. I took Constam's selling prices or sales right straight through.

Q Were there any figures presented to you to show what those 1011 suits cost?

A No.

Q What information did you have from which you concluded that they cost $7,800?

A I got those figures by inquiring from Mr. Mullin as to what he paid for clothes, and then averaging them up, the number of funerals.

Q Do you remember what he told you?

A Suit of clothes costs all the way from $3 to $22; $3, $5, $7, $11 and $22 are the different prices for a suit.

Q That is the cost that the undertaker pays?

A Yes.

Q Not the selling price?

A The cost to the undertaker.

Q How did you conclude that an average of $7.50 was right?

A By going over the books and counting up the funerals; we found that about 25% of them were $3 suits, 15% $5 suits, 35% of them were $7 suits, and 15% were $11 suits, and about 10% were $22 suits.

Q. You are reading now from the figures on which you reached that conclusion?

A Yes.

Q I understood you to say that you took that gross figure from Mr. Mullin's information that he gave you?

A Only as to the price of the suits, that he paid for different classes of suits.

Q That you took from the Constam report, you said?

A No, I didn't; you misunderstood me; what I took from the Constam report was the sales, the amount of money the business received for the goods.

Q It is because you have it under the heading of "Cost" that I use that language.

A Column 1, headed Constam Report, is all Constam; column 2, headed "Cost", and column 3, headed "Gross Profit", are all mine.

Q I will ask you the question over again: From what source of information did you conclude that $7,800 was a proper sum for the aggregate cost to the undertaker of 1011 suits used in the business?

A By information from Mr. William F. Mullin, corroborated by looking at the bills, counting up from the books the number of funerals, and segregating the different kinds as to approximately what percentage were applicable to each of the different prices.

Q At the time that you reached the conclusion about that $7,800 for cost and $3,415.75 for profit, did you know that by the Constam report, based on the same amount of clothing, the figures were almost exactly reversed, and that the Constam report made the cost $3,307.50 instead of $7,800, and the profit $7,908.25 instead of $3,415.75?

A No.

Q Did you know the figures you were adopting as between cost and profit were almost the reverse of the Constam figures?

A At the time that I made the figures?

Frank G. DuBois, examined by the Master.

Q Yes.

A No, sir.

Q Have you ascertained it since, until I now call your attention to it?

A Yes, we compared the whole thing after I got through.

Q When did you discover the wide discrepancy as to the cost of an article of clothing? Did you make any additional investigation for the purpose of verifying your own conclusions?

A I did, I called Mr. Mullin's attention to it, and we both went over the matter again, the entire subject of clothing, went all over it again two or three times, to be sure.

Q Then as a result, it is your conviction that the Constam report underestimates the cost of this clothing and correspondingly overestimates the profit?

A Yes.

Q There is an item of sundry charges which represents something more than ten per cent of the column headed "Sales", about eleven per cent, and aggregates $31,840.08; what expenditures are included in that and not included in any of the detailed items mentioned above it?

A Well, it is burial permits, opening graves.

Q Opening graves is a special item?

A The easiest way to answer that question is to say that there is everything in there that is not in any of the others; it covers a multitude of sins.

Q That does not answer the question.

A Telegrams, postage, telephones, carfares, all other things of that kind.

Mr. Lum. Washing bodies?

Witness. Yes.

Mr. Lum. Shaving bodies?

Witness. Yes.

Mr. Lum. Removal charges?

Witness. Yes; I didn't make any list of those things, but there are all kinds of things.

Q Would it include everything in the nature of personal service?

A Yes, it would include service.

Q Whose service?

A Any extra service for pallbearers or attendants of that kind.

Q You only refer to extra service and not to personal service?

A Not to personal service; you mean the services of the undertaker himself?

Q Yes.

A No, nothing of that kind, there is no special charge made for that.

Mr. Tansey. He agrees with the Constam report as to the profit.

Master. I wanted to find out—here are subdivisions, fourteen details, which cover the known and usual necessary expenses, and I didn't know, and couldn't have thought, without the suggestion which has been made, of probably half of these perfectly legitimate and proper expenses that have been suggested.

Mr. Tansey. We will show what that includes by reference to the books.

Master. If you are not differing about it, I shall be entirely satisfied that those amounts are correct.

Mr. Tansey. Will you produce the bills and papers that you worked with to make up those various estimates?

Witness. You will have to bring up the bill files.

Mr. Tansey. Whatever bills you worked with and marked.

Witness. I didn't mark any. I took them right out of the files and put them back again.

Mr. Tansey. You specified some certain things that you used, bills, and any bills referring to your estimates I would like you to produce.

Mr. Lum. We will bring up the bill files.

RECESS.

Re-direct by Mr. Lum.

Q You state that you made up this report from your own examination and information supplied by Mr. Mullin and by others in that line of business, from whom you inquired, and that in doing it, you used bills from the flies. On these bills being produced, will it be possible for you in any way to identify the bills that you used?

A No, it would not, for I didn't mark the bills.

Q Will you just explain a little more in detail to the court your method with reference to an item like clothes or candles, any particul thing?

A I asked William F. Mullin what he paid for those articles and he gave me prices, and I asked him if he had anything that would show or prove what he had said, and he said "Why, the bills", and we would go to the files and pull out a bill and look at it. I did that to satisfy myself that what he had told me was correct, and put it back again.

Q Did you satisfy your own mind when you made your report?

A I certainly did.

Q Was it possible from the data that you had or could obtain, to make a complete statement of all expenditures for such things as men's wages?

A No, I couldn't do that, no record of it.

Q You found nothing to show it?

A There is practically no record of items paid out in currency, in bills.

Q Was there anything to indicate that such items must have been paid?

A Certainly, he couldn't run the business without it; the help has got to be paid.

Q Will the opening and examination of the bills and papers contained there (referring to package of bills) help you to elucidate this matter?

A I don't think it would.

Mr. Lum. There they are, Mr. Tansey.

Re-cross by Mr. Tansey.

Q Do you know that cash items were paid out, currency items?

A I only know that by statements of Mr. Mullin, that they were, and the fact that they continued the business, it would necessarily follow that they would have to be.

Q But you didn't have any record of such payments, only his statement?

A There is record.

Q What did you base your estimate on, where you stated here in Exhibit D, page 11, "wages of two men $17 each per week and expense of $1 per week"?

A I got that price from Mr. Mullin, that that was the wages that he was paying to the man he

kept there; I asked one of the men he had, a man named John, what his wages were, and he told me; the one dollar a week, I estimated that myself by talking with Mr. Mullin, that it would undoubtedly cost that much to run another town-carfares, luncheons and one thing and another.

Q You didn't have any records except that?

A That is all.

Q What did you learn about the other man?

A In talking with Mr. Mullin, he told me that he kept one man all the time; at other times he would have two or three men, sometimes more, sometimes a couple, so that I figured that it would have averaged at least one man for the entire year, making two altogther.

Q You say two men?

A There was only one that was there all the year round, and we estimated that the extra help that he had was equivalent to one man for the entire year.

Q Making up the two men?

A Making up the two men.

Q And so far as you know, the wages of the man that you spoke about, other than this man John that you talked to, would have averaged up what was paid to three or four men in the year?

A Yes, I took that from Mr. Mullin, I figured that as one man.

Q And you have taken these items, up-keeping and consumption of supplies, printing, stationery, etc., $250, also from Mr. Mullin's statement?

A Somewhat. From that somewhat, but more from my own experience, in general, going around in different places; that is an estimate.

Q Did you have any experience with candle sticks, pedestals, &c?

A Not directly, but I know it costs money to keep those things in repair, keep them polished up and keep the dents out of them, and supply broken parts.

Q That is how you arrived at $250?

A Yes.

Q How about wagon and horse, 150 funerals?

A In talking with Mr. Mullin and with other experience that I have had, I know that it takes two and three, and sometimes four calls of a wagon to go to a funeral, or to take charge and care of a funeral, to get the stuff there and take it back, and we call it two calls on an average, that would be about right, $2 each.

Q That was your estimate on that?

A Yes.

Q Did you know that in certain cases those wagons are furnished by the stable free for the sake of getting the work of that undertaker?

A Yes, I know that.

Q Did you know whether this was the case in Mr. Mullin's matters?

A I positively do not know, no.

Q Did you make inquiry as to that?

A I did.

Q What did you learn from inquiry?

A I learned that part of the time was charged for and part of the time it was not charged for, so I concluded that it was a safe and fair charge to make as against the business, so we took an average of two calls for a wagon, instead of three or four.

Q Making it for each funeral, that is, that he paid every time?

A Yes, on an average.

Q Sometimes he paid and sometimes he didn't, according to his own estimate?

A Yes, but if he didn't pay out of the business down there, he did pay for it out of his other business, so it is a proper charge against the estate.

Q We are talking now about the business.

A In my estimation the business should be charged with an average of two calls for a funeral.

Q It should be charged; I am asking whether he actually paid for that?

A Yes, it was paid for either by the business or by Mr. Mullin.

Q You haven't any record of it than that?

A None at all.

Q Your estimate as to the coal consumed, the same way?

A Yes, a ton of coal a month.

Q Here we have this item of "Programs, donations, tickets, &c", page 11, Exhibit D, of your report?

A That is based upon a statement of Mr. Mullin's, and it seemed to me, from what I know of the way in which business is done generally, that it was about correct, so I took it as such.

Q Drinks, cigars, dinners &c.?

A The same thing applies to that.

Q $30 a week, $1560?

A That is a less amount that Mr. Mullin thought should be chargeable to the business, or that he paid out, but this is the amount that we finally decided to use.

Q Do you think a man in business of that kind would spend $30 a week on those things?

A I most certainly do.

Q $1560?

A Yes.

Q You have no record of it, of course?

A No.

Q He didn't produce any vouchers for those things?

A He couldn't, that is practically all cash, I take it.

Q We have "Expense of William F. Mullin, transportation, meals &c., answering calls, $1 per day"?

A That is estimated.

Q I thought you said that you allowed the men here $1 per week for answering the calls and things of that kind?

A They would do as much running around as Mr. Mullin does.

Q You allow him something for the same thing?

A Sure.

Q You allow him $1 a day, $365?

A Yes.

Q "Telegrams, telephones, postage &c. $200", that was also estimated?

A Of course we could find the telephone bills or contract; telegrams and postage is estimated.

Q And in none of those cases did you trace up the actual outgo for any one year?

A All cash, I couldn't do it.

Q Cash or anything else, by the bills or by the checks?

A No, sir.

Q And you claim that that is impossible?

A I wouldn't quite say that it is impossible, but it is—yes, it is impossible, because there is no record; it is impossible, you cannot do it.

Q Suppose he produced all his bills for the year?

A I do not believe that you could do it then, because a good many items are paid out in cash, for which there are no bills and never were any bills.

Q Then you wouldn't have any reason to take account of that?

A I couldn't very well.

Q You cannot take account of anything you haven't before you?

A Not very well.

Q Taking the bills for a year, would you be able to tell what those bills showed about the outgo from the business?

A Of course I could tell what those bills showed.

Q That would be possible, wouldn't it?

A I think it would be.

Q But you didn't make any attempt to do that?

A No.

Q And these bills which you produce here now are the bills covering all the period that you made examination of those books for?

A No, they do not cover the whole period.

Q What do they cover?

A A good many bills have been destroyed; I don't know how far back those bills go.

Q Do you know whether Mr. Mullin has any other bills affecting the business?

A I do not.

Q Can you find out?

A I can ask him; he is there.

Mr. Tansey. Are they all, Mr. Mullin?

Mr. Mullin. That is all the bills I have left. There are very few bills there, proportionately.

Frank G. DuBois, examined by the Master.

By the Master.

Q Who prepared this report for you?

A Who did the typewriting copy?

Q Who dictated the contents of it?

A I did all of it.

Q All of it?

A Yes, sir.

Q Without any suggestion from other people?

A Yes.

Q On page 33, the first paragraph recites: "William F. Mullin claims that he agreed to support the infant children and at their majority pay to each of them the sum of $3750, and they in turn to relinquish any and all claims or claim, interest or interests in the estate of their parents and the remainder if any and the business to belong to William F. Mullin." How did you know that that was William F. Mullin's claim?

A I got the first inkling of that in the papers in the suit which I had before me and read, and then I asked Mr. William F. Mullin about it.

Q The second paragraph, you say: "The facts as they exist, certainly bear out and support the correctness of the foregoing claim." How was that any business of yours as an auditor; that was the very question before the court, wasn't it?

A Yes, I presume it was.

Q Why did you volunteer to give a judicial opinion that Mr. Mullin's claims as you understood them were supported by the facts?

A I suppose that was part of my duty, to state my opinion.

Q To argue the question?

A Not to argue, to state my opinion.

Mr. Lum. That report was not made under any order of the Court, nor for the purposes of

the Court, further than as we might submit it. It was made by Mr. Dubois, at the request of Lum, Tamblyn & Colyer, as appears, and for Mr. Mullin. With your Honor's permission, I think it would be advisable to simply have the report, for the purposes of the Court, amended so as to include nothing but figures.

Master. We will keep what we have got. This report is largely argument.

Mr. Lum. It was submitted to his own counsel.

Master. I was asking him why he did it.

Q Then you felt bound to advise Mr. Mullin's counsel that the facts as you understood them, supported Mr. Mullin's claims as to his rights?

A Yes, sir.

Mr. Tansey. I have only the report from page 8.

Q In the next paragraph you say: "The children have been supported, clothed and well educated by William F. Mullin. (See Exhibit E.)" Do you know anything about that as to the facts, except the figures that you have put down as expense for the family and support?

A I got that from answers to questions that I asked Mr. William F. Mullin.

Q Then you are supporting Mr. William F. Mullin's claim on his own statements made?

A Borne out by the figures and checks and things that I found in the books that I went through.

Q Why do you say in your report on this page: "Owing to the foregoing arrangement or agreement, Mr. Wm. F. Mullin has considered that the undertaking business formerly conducted by his father has passed to him and that he (Wm. F. Mul-

lin) was the sole owner thereof and he has therefore kept only such books and accounts as he deemed necessary for his own interest and has not kept a complete set of books and has no record of many payments made in currency and many vouchers or bills have been destroyed;'' why do you say that condition was owing to the foregoing arrangement or agreement by Mr. Mullin?

A Because in talking with Mr. Mullin on that subject and putting the questions to him, I drew out those facts.

Q Was it of any importance whether you agred with his statement of facts or not?

A I thought it was quite some importance.

Q It was mere information on your part?

A Yes.

Q Have you been furnishing reports as an expert accountant for years?

A Yes.

Q Do you usually embody in your report judgment of people's motives and reasons for their conduct?

A I do, if I am so instructed.

Q Who so instructed you in this case?

A Mr. Ernest Lum wished me to make an examination of that and give him all I could find.

Q And did he ask you to certify as to what Mr. Mullin's conduct had been and what reasons had operated to control his conduct?

A Yes, I so understood it.

Q You say on page 5: ''I do not think that an increase of $7500''—that is in the bulk corpus of the Mullin estate—''really existed, for the reason that Mr. Peter M. Mullin, during 20 years of business had saved only his investment of Lafayette street property valued at $5000, or at the rate of

$250 a year." Do you know anything about what Mr. Mullin had saved during his twenty years of business?

A I merely knew it by the papers in the case and the information that I got from questioning Mr. William F. Mullin, that at the time Peter M. Mullin died he left the Lafayette street property worth $5000.

Q Didn't you know he also had property on Clinton place?

A He didn't have that at the time of his death; that was 1900, nine years afterwards.

Q You had no knowledge of what Mr. Mullin had saved at all; he might have saved it out of his business and lost it in other investments, so far as you were concerned?

A That may be, but I was informed—

Q Why did you express any opinion on that subject in your reports?

A Because I thought it was my duty to do so.

Q What was it that made you think it was your duty?

A My instructions from Mr. Ernest Lum.

Q Then you were asked to give your judgment as to Mr. Mullin's conduct and property entirely aside from the facts as you found them as an accountant?

A Perhaps, if you will excuse me, I will state just what my instructions were. My instructions were, that here is the estate of Peter M. Mullin, it has been conducted for a number of years by his widow, afterwards by the son; the books have not been kept in an up-to-date systematic plan; now, Mr. DuBois, we would like to have you go down there and look over the accounts and the books, and talk with Mr. Mullin, and make a report to us of just what you can find, or what you do find, and

also what your opinion is of the whole case, and Mr. William F. Mullin's conduct of the business. Those were the general instructions given to me. On those general instructions, I performed the work and made this report.

Q Here is a paragraph, page 7, under the figure 8, "Final," in which you say: "It does appear that Wm. F. Mullin has fulfilled all his agreements, either expressed or implied and with great injury to himself."

A Yes, sir, that is my opinion, borne out by the facts as I could gather them.

Q Mr. DuBois, as I understand your testimony, you used the Constam Audit Company's figures wholly for the first column of Exhibit A, showing sales?

A Yes, sir.

Q All the other figures shown on Exhibit A, under the column of 2, with the heading "Costs," and column 3, with the heading "Gross Profit," are mere estimates based upon the volume of business shown in column 1, entitled "Sales," and formed after consultation and conference with Mr. Mullin and such other persons as you consulted?

A That is right, yes, sir.

Q Is there a single statement or conclusion of fact, not opinion but of fact, in this report, that is based upon any figures which you made up from records or bills or other sources of record?

A Made up entirely from that source?

Q Yes.

A No, sir.

Q Did you have any records whatever that were consecutive and which purported to show for any definite period the receipts, disbursements and expenses of this business?

A If you confine that to receipts, I say yes, sir.

Q But not as to disbursements or expenses?

A No, sir.

Q Then as to disbursements and expenses and the necessary expense of conducting the business, that is wholly estimated, isn't it?

A Not wholly, but largely.

Q In what respect is it not wholly?

A We have the checks and I took certain periods.

Q But single checks or certain periods, how would they be serviceable in determining a result for a long period?

A Only by average.

Q For purposes of an average you would have to have something else with which to make comparison?

A Ought to have, but don't always have it.

Q Did you have it in this case?

A No.

Q I have during my lifetime paid a good many undertakers' bills, some of them in my own family, some of them in estates of which I was executor, and seen a great many more in estates for which I was counsel; my impression is that in almost every instance—so general, that it might be said to be a uniform practice—there is a reasonable charge in addition to the items of the bill, for personal service and attendance. Do you know whether Mr. Mullin made a charge of that sort in his business?

A I don't think he did.

Q Did you ever ask him whether he did or not?

A I am not quite clear on that; I think Mr. Mullin and I had that subject up.

Q But you have no clear recollection of it?

A No, I haven't.

Q You have seen other bills of that class?

A I have seen bills as you allude to, and I have seen them both ways; my experience is the same as yours.

Q I have seen a good many bills for burials, and I have noted that in some there is a charge for service, but in most of them, that there is no extra charge for services of the operator, he gets his pay out of the profit. You don't know what was the practice of Mr. Mullin?

A My recollection is that he made no charge for his own services; he got that out of the profits.

Q From what source did you satisfy yourself that the item of sales, column 1, Exhibit A, $277,-345.77, is correct? I understand you to say that you made no verification of that, but simply accepted the Constam report?

A Well, that is practically correct. I might explain that in this way: I spoke to Mr. Mullin about that and he told me, and I also knew from talking with Mr. Lum, that that account had been prepared by Mr. Constam at quite considerable expense to Mr. William F. Mullin, and the account was mainly for receipts. Mr. William F. Mullin informed me that he thought it was about right and he would be willing to let it go at that and not to waste any more time or money to go into the receipts, and it was accepted.

Q Then as to that as well as all the rest of the report, I understand that it is all based on what you have been told and by estimates or judgment that you have exercised?

A Yes, verifying what I have been told.

WILLIAM F. MULLIN, recalled for further

Direct examination by Mr. Lum.

Q What was your custom in the conduct of this business in reference to the charges for extra services?

A Well, we never made—I speak of "we"—I never made a charge for service probably more than a dozen times in my life, in twenty years.

Q Will your books that you have here bear out that statement?

A Yes, sir. You won't find many charges for bills, on the funeral items.

Mr. Lum. We offer the books in evidence.

Master. They will be admitted in evidence.

Q You have gone over these figures in this report of Mr. DuBois?

A Yes, sir.

Q Did you keep complete books and transactions of the business?

A No, sir.

Q Why not?

A I considered, of course,—during my mother's period, as manager for her, I didn't keep any different books or records than I kept since her death; I never kept any cash account or things of that kind.

Q During your mother's life time to whom did the profit go after the support of the family?

A From the time I had the arrangement with her, whatever there was went to me, and I have continued since her death the same way.

Q Did any of your brothers and sisters as they became of age and signed these releases for three thousand and odd dollars, demand accountings or

want to go over the books, or ask about any of those things?

A Not until the last one, Miss Marie Mullin; she was the first one that made any demand of that kind.

Q Are these bills and vouchers you produce here in any way complete?

A Not at all.

Q Did you attempt to keep all your papers and bills, going back twenty odd years?

A No, not for any period of the twenty odd years.

Q Turning to page 8 of the report, under the head of "1. Constam Reports Sales," will you state why you instructed Mr. DuBois to accept the Constam figures?

A Well, the fact that I had been put to the expense of over $500 by order of the Court, as I understand it, to pay that charge, to be deducted from the interest of the estate of these children, and feeling that they had made a very exhaustive and careful inquiry into the receipts—they were working there about eight weeks on the books, or more, at least eight weeks—I felt that they had probably got every bit of income there was to the business, and felt that that would suffice. They surely got all they could, and I thought that that would be enough, there was no use of going to any more expense to get the income, they had it, and I had to pay for it, and I thought once was enough.

Q You understood the Constam report was being made by those who were fighting you, did you?

A I was ordered to have it done by the Court that way.

Q Did you refuse to supply any papers, checks, bills or anything of that kind that you had, to Constam?

A No, sir.

Q Did he make any complaint about desiring anything that you didn't supply to him?

A Oh, no, I helped him all I could and offered our services in every way down there. I think they will agree with that.

Q Has your experience in this business given you some direct knowledge as to the costs and profits in the various items that go to make up the business?

A Yes, sir.

Q And when you hear an order given for a funeral and know the articles that are required and the kinds, can you form an accurate opinion as to the cost and the profit?

A A very close estimation, yes, sir.

Q Has that been a large part of your business?

A Very largely, yes.

Q Has there been any one else who has attempted to perform that part of the business except you?

A Very seldom, only when I was incapacitated or happened to be away.

Q Taking the item of caskets and passing the smaller items in which the difference is slight, the sales, under the Constam report, show sales of $106,718.75; what would you say as to the item of costs on these of $47,837.92, using the knowledge as gained by you in connection with the business, and the bills that you had received, as to whether that was a fair charge of cost or not, as given there?

A Well, if I remember correctly, this column 2 is the approximated cost of these goods of the DuBois Auditing Company, isn't it?

Q Yes.

A That is as near an approximation of cost as we could arrive at from my knowledge of cost of goods, etc.

Q In your best judgment in this business is that fair?

A Yes, sir.

Q And the item of profit of $58,880.83, is that fair, in your judgment; that is the difference between the sales and the cost?

A Well, with a large volume of that kind, I cannot say offhand. When you ask me about the difference on a funeral, I can give you the profit on an individual funeral, but to approximate the profit on 1700 funerals offhand, I cannot very do it. If that column 2 are the figures taken by Mr. Du Bois, I could answer you that we had gone into that very carefully and those figures are as near correct as we could make them. If the difference is $58,000 between the DuBois figures of $47,000 as cost, and the selling price of the Constam people as $106,000, those figures are correct as near as I could make them.

Q Going to the figure of embalming, selling price practically $15,000, cost $3,697.37, gross profit $11,257.63, that shows a large profit in the embalming; does that include anything in the way of service?

A No, sir, that is the simple actual cost of the goods supplied for the work, fluid and material used for the preservation of the body.

Q It was brought out this morning that your father had a good voice; will you tell us whether you were considered to have a good singing voice?

A I always have been, I think, yes, sir.

Q Did you ever have any opportunity at the time you were managing this business for your mother, to make money out of your voice?

A Oh, many times.

Q Did you have any offer?

A Yes, many of them.

Master. Vice Chancellor Emery decided in a case five or six years ago—it was a case where a large sum—gross sum, as compensation was voted by the directors of a company to an officer, and it was attacked on the ground that it was an unwarranted appropriation of funds that should have gone to the stockholders. Vice Chancellor Emery in that case held that it was not permissible to show that this particular officer had made personal sacrifices of compensation which he might have earned in something else, for the purpose of remaining with that company and attending to its business, and even if they were true, it afforded no justification for the compensation that was otherwise excessive, and so here, I think the fact that Mr. Mullin perhaps could have made a very much larger income, and perhaps in a more agreeable manner, by accepting some offers that were made to him, the fact that for motives of regard for his family and obligation to them he decided to reject them, I do not think that would have any bearing.

Mr. Lum. I think it is important for three reasons. In the first place, I think this is distinguished clearly from a case such as you mention, where an officer of a corporation had been voted by directors an unduly large salary, because there was no question there but what

he understood clearly that he was working for the company, and there is entirely a different element introduced here, because Mr. Mullin understood that he working for himself. In the second place, there is no amount determined here, and it seems to me that is one of the main things and difficult things you will have to determine,—what allowance should be made to this man for his services. It certainly seems to me, aside from any Court proceedings, that in getting at that, the way we would approach it, to find the value of the services of a man, would be to find out the different things he could do—what capacity he had generally, and in that way we can form some idea of the value of the man. If he could have made $5,000 a year singing, but stayed at this business, it is not necessary to prove that he was worth more than that a year in it, but it is some evidence to consider at least. And then again, in the corporation case it would not perhaps have been permissible at all, but you must bear in mind that we are in a Court of equity here, and that a Court of equity is a Court of justice, and that even though this man had no legal right to go on acting as the father of those children and bringing up this family of eight children, and instead of forcing this business out for a thousand dollars and going on with his own business, he did that, they have received the entire benefit of it, and my knowledge of the Court of equity is such that I cannot possibly believe that he is going to be put in a much worse position than if he had gone, which he is bound to be, but he is going to be very severely and heavily punished.

Master. The order of reference expressly directs me to have regard for that. I will ad-

mit that testimony, because I understand I have no right to reject it, but I thought I would say to you what I know about that decision, and I will be glad to hear your views. I can see the distinction you suggest, that it was not where a man had already done the work under an employment, as an officer of a corporation has, but here there was no employment; it is not even a *quantum meriut;* it is a compensation; not what he earned, but what he ought to have by way of compensation.

Mr. Lum. There is one other feature; they dwell on the good will established by Peter Mullin. I want to say that this man, with his voice, and showing how much it is worth, would give you some idea on the question. He stayed in the business instead of getting out; that he did for the benefit of this business.

Master. I take it that if Mrs. Mullin at the time of her husband's death had found it impossible or impracticable to contine the business, the good will would have had a very moderate value to a successor, but if Mrs. Mullin had concluded to sell that good will to a successor, and this young man as he was then known to his father's patrons, to his friends and to the parish, had made arrangements to start up a business on his own account at that time, that good will, whatever anybody paid for it, would have been simply so much in excess of its real value. I think that is undoubtedly the fact.

Mr. Lum. Then I will touch that very briefly.

Q What was the amount of that offer?

A I had many offers during the period—I will just state from the time that this arrangement took place with my mother?

Q Yes.

A Which was brought about from the fact that I had been offered $5,000 to do the comedy work with two opera companies; I refused that; Mr. Corwin and myself—he was a tenor singing with me at the time—we were both offered that by the representatives of the Yuch Opera Company. Since then I have been offered the baritone soloist position in the Jewish Synagogue in Newark; the Presbyterian Church, in which a young lady, whom I could mention if necessary, is holding the soprano position; at the same time I was offered the baritone position in Morristown; I have been offered the position of baritone soloist in the Cathedral in Newark, and one of the churches down here on Broad street, one of them offered me $1200 a year, two or three of the others was $1000 a year, another one was $800 and a dollar apiece for requiems, ranging probably $1500 a year. I sang all these years since my father's death, twenty-one years, in St. James' Church without salary.

Q That is in the parish?

A In the St. James parish.

Q Did you have the business in mind at all?

A Always.

Q In doing that?

A Always.

Q And with your best judgment was that sacrifice that you made of distinct and direct advantage and benefit to the business?

A Always felt that it was a great adjunct to the business, for the reason that I gave my services to the church gratis, and I have done concert

work and church work all around the city without any charge, for the same reason.

Q It was stated, among other things, that one of the advantages of the business before your father's death was the friendship, etc., of Father Cody; do you hold that?

A I believe I do.

Q Do you drink liquor?

A Never did since before my father's death—not since before my father's death have I taken a drink.

Q I call your attention to the fact that on the stubs of these check books are shown items of money for liquor; was any of that for you or your purpose or your household?

A Not personally, no, sir.

Q For what was it in connection with?

A In connection with the business.

Q I call your attention to the fact that there are expenditures running to considerable sums, I think it is $30 a week, for cigars, drinks and other items of that kind; first, in your best judgment, were these expenditures advisable in managing and handling this business?

A I would like to answer, if I may be permitted, this way: I think that $30 a week, as far as I can figure it, is very conservative. I have acquaintances in the business who are considered very successful men in this line, who have told me they spend a great deal more than that, twice as much, every week, and they think it is good business to do it, and they are men who do not drink to excess, and are always able to attend to their business and are successful.

Q Did you, in your best judgment, spend at least $30 a week on drinks, cigars, dinners, etc.?

A Refreshments of various kinds around different places; I think it figured up at least that.

Q And in your best judgment, was it advisable to spend that amount?

A Oh, surely, I always thought so.

Q And the item of $250 for supplies and printing, candlesticks, etc., is it possible for you to estimate that to a dollar in any way?

A Not possible to estimate it; I think it is a very conservative cost for upkeep; that means the purchase of new chairs from time to time, keeping up eight or ten dozen chairs, relacquering and finishing of candlestitcks and pedestals and repairs to floor rugs and all that paraphernalia that has to be kept up, and the purchase of new stock, replenishing, I think is very low at $250.

Q The item of wages, two men at $17 per week, will you explain that?

A I have one man, I have had a man for years at $17 a week, and we employ one or two men many times, sometimes three men, if we have got two or three calls on, and I figured that at a very conservative estimate that would figure the wages of one other man. We have, of course, many other cases I know of. I suppose we will be able to show by other concerns, that that is a conservative figure. I know of several concerns that do not do any more business than we do, that have more help than we do. I think that is a very conservative estimate of cost for help.

Q "Wagon and horse 159 funerals @ $4," is that proper charge in your opinion?

A A very conservative one; it only figures two calls a funeral; the average calls for a funeral will be not less than three, one on the first call to lay out the body, another when you casket the body, and another call to clean the house and bring the stuff

home; many times some undertakers use another call to take the box to the cemetery. We have only figured that in as one of the calls and made it an average of two calls a funeral. This business not owning any vehicles of its own, I figure that I have a perfect right to make a charge for the use of my vehicles for that business.

By the Master.

Q Did you say that your business owned no vehicles?

A The undertaking establishment on Lafayette street has no vehicles of its own. I am in the livery business in addition to the undertaking business.

Q "Light and heat $120," is that reasonable?

A For a floor 25 by probably 60, comprising a front office, funeral parlor, trimming room, stock room, couple of stock rooms, I think a ton of coal a month, with gas and electric bill, is very, very conservative. I told Mr. Constam I thought he had me way low on that; I agreed to it and let it go. It surely cost that.

Q "Programs, donations, tickets, etc., $500," was that expenditure advisable in the continuation of this business?

A I think so; I have expended $32 in the last seven days on programs alone, without tickets, not because I am crazy anxious to do it, but because I think it is good business. I felt I had to do it, from the people that solicited the ads., and $500 a year is pretty conservative.

Q Your own expenditure in answering calls, meals, transportation &c. $1 per day, is that in your judgment fair?

A I feel it is, yes.

Q "Telephones, telegrams, postage &c. $200", is that fair?

A That is below what it actually costs; I am satisfied it is very conservative; until very recently my flat contract was $150 a year, with an extension in my living rooms upstairs, that was $36 a year more, without any out of town calls, and since that time I have made the cost a little less, but it surely is over $200, and telegrams and those things to be included in that item of $200, is to my mind very conservative.

Q "Incidentals, estimated $43", what does that include?

A It might include cotton, needles, threads and things of that kind.

Q Is that, in your judgment, fair and reasonable?

A Yes.

Q "Support of family of Peter M. Mullin", did you keep an accurate account of all you extended for that family as they were growing up, any more than you had been the brother of those children, or you do of your own family now?

A Not a bit.

Q Was there money paid out of pocket, cash paid to them at any time?

A Plenty of it.

Q Did you keep any memorandum of account of that.

A No, sir.

Q Can you figure it exactly now in any way?

A No, I cannot.

Q I show you a bunch of bills for schooling, doctor's services and printing bills, and all manner of things; they are in recent years; are they a portion of the receipts that you happened to find?

Q Where did any of these children go to school?

A Yes.

A Immediately after my mother's death—I say immediately, I don't know just how many weeks it was after—my married sister who was living home at the time of my mother's death, decided to move, purchased property on Fifth street and moved. We concluded then to send three of the children to St. Vincent's Academy, boarding school, and one of the others. I do not remember when it was, just then or a little later, went to St. Benedict's College. That was four, and the balance of them, I don't know now whether one or two, I paid board for at my sister Grace's. Part of the board of this boy that went to St. Benedict's College, I paid his board either with my sister Grace or with my brother Joe, and he lived with me a little while, I think. I do not recall that exactly, but I paid their board at my sister Grace's. These children that went to boarding school, during vacation periods or holiday seasons when they had no school at St. Vincent's Academy and they visited her for a few days during the interim, I always paid their board while they were there, so there was no time that there was board not paid for any one day in the year, no matter where they were; they got piano lessons, musical education, doctors and medicine and clothes, spending money, vacation money, education and board.

Q The estimate taken by Mr. DuBois of one dollar a day for each child, to include everything of every kind, character and description, in your judgment was that reasonable or not?

A It is. Of course I did not know how in the world to arrive at that, and Mr. DuBois said that that was probably the best way in the world of getting at it, taking the average number of years for each child, or number of days, taking it from the number of days when there were eight children down to one, and he arrived at that

conclusion. I am not a mathematician; I don't know how he figured it, but I did tell him I am dead positive I never supported that family for any average of $1900 a year; it was greatly in excess of that. When my mother was alive, one year I did try to figure out how much it cost me for the family, and it was something like $3800.

Q Then you are very sure that you are doing more than justice to them, figuring at $1900?

A I do not think it is hard to figure out, when you figure that I averaged $5 a week for their board, and in addition to that to pay the doctors and medicine, clothing, musical education, spending money and everything else, to figure $2 more is pretty conservative. I am sure I didn't do it, not with the money I handled.

Q For your services in managing and conducting this business, taking an average of this entire period, with your skill, ability, experience and talents, what would you consider an extremely reasonable salary or charge?

A What I am worth and what I could get out of what I have made is two different things. I certainly expected to be able to do better after than I have, when I made this arrangement with my mother. I am positive I could have gotten $5,000 a year, and I haven't any reason to believe that I could not have made and probably gotten a good deal more in another profession. I hoped that I might work this business up to get that much profit a year out of it, while I knew we never had made it; that is proven by the amount of money that I show I saved during the first four years of my management of the business after my father's death. It only shows a saving of about $1600 a year. But my mother pleaded with me to stay and support the children, and not leave; she felt if I quit them they would

be in trouble and all that. Well, I stayed. I refused an offer of $5,000 a year, and with all the other moneys that I have sacrificed, I figured I would be pretty cheap at $6,000 a year. I do not figure I would be a high priced man at $6,000 a year, if they could afford to pay it to me.

Q Have you any other business?

A I have the livery business, yes, sir.

Q When did you acquire that?

A June of 1900.

Q Who manages it and runs it?

A My brother Joseph was with me for a number of years as manager, up until a year ago last May, when he became disconnected with me.

Q (*By the Master*) How old are you? A Forty years old next birthday.

By the Master.

Q When your father died in 1891 you were seventeen years old?

A Seventeen years old.

Q You are married?

A Yes, sir.

Q Since when?

A Fifteen years I will be married next June.

Q A family of your own?

A Yes, sir.

Q How many children?

A One child.

Q One of your brothers and sisters have lived with you in your own home since you were married?

A My brother Jim lived with me a period of time; I guess that is since I was married, it was a short time.

Q Did you live yourself in the Lafayette street house?

A I have lived there ever since my sister moved.

Q When was that?

A It might be six months, eight months, seven months after my mother's death—the last ten or eleven years.

Q Then you have lived in apartments on the second floor of the Lafayette street house for the past ten or eleven years?

A Yes, second floor, and the latter part of the period we have used the whole house; part of the top floor we couldn't get a tenant for very well.

Q Where did your father live at the time of his death?

A I was born in that house and he lived in that building; we were all born there.

Q Your father's family continued to live there until the time you took possession there?

A Yes.

By Mr. Lum.

Q You testified that your brother Joseph acted as manager of the livery stable for a number of years; have you managed it since your brother left?

A I have employed another manager.

Q Did you then employ someone else to manage it, or did you manage it yourself?

A No, I employed a manager.

Q What amount of your time then was devoted to the undertaking business?

A Practically all that was necessary. I always employed a manager at my stable so I could give my practically undivided attention to the undertaking business so it would not be inconvenienced or hampered in any way. Otherwise, I could have saved considerable expense there.

Q Some reference has been made to an account in the National Newark Banking Company that stood in the name of the Estate. What moneys were put in that account?

A I used that account for everything—when I say everything, I ran the livery business conclusively as mine individually, of course, separate from the other business. Previous to my mother's death she signed the checks, the account continued in the name of the Estate and I never considered changing it after that for some time, and if I had purchases of various kinds to make, I often times deposited money in there and drew a check against it—a business check looked a little better than using a savings bank or federal check, where I had an account, that I had no printed checks at—for that reason, for better appearances, I would use a regular business check, and make deposits in there and draw against it, for which there probably will be shown many many checks, if you go through the books and find them, where you cannot find where the money came from, but the checks will show as being drawn against that account; and in that way I used that account as an accommodation until such time as I thought it was advisable to change it. I think it was at the suggestion of some of the people in the bank I did that. During Mr. Tunis' life, Mr. Tunis suggested I ought to change the account; he did that, in fact, sevral times to me, suggested that I ought to change the account. He says "If anything happens to you, you ought to have this account here", and I let it run that way for a long while, and I don't know just when I changed it, but one day I changed it.

Q Is it possible for you to account more fairly and more fully and completely than is shown by the figures submited in the report which is offered in evidence?

A No, sir.

William F. Mullin, cross.

Cross examination by Mr. Tansey.

Q You spoke about these contracts or engagements for singing which you rejected; was it one or two that you rejected?

A It was two.

Q What year was that when you received those offers?

A About 1896, around that time.

Q You say you received two offers; what was the first offer?

A Well, Mr. George Corwin and I—that came about through our doing considerable work at that time with the Newark Opera Company, and we had a representative wait on us from the Emma Yuch Opera Company, and they offered me $5,000 a year—I do not remember the term, whether it was for more than one year—to do the comedy work for the company, take on a repertoir of operas &c. At that time either the Manhattan or the Castle Square Opera Company, another concern that was playing in the American Theatre, 8th Avenue and 42nd street, New York, I had an offer from them of about the same figure. I had another proposition, that I forgot to state, to do the singing parts of Joseph Murphy, who is alive yet, and go under his name and do the Irish family work that he was doing at that time. The proposition submitted then was a salary and percentage of the profits. That is the thing I often wished I had done.

Q Was the Yuch Opera Company a salary and commission too?

A No.

Q Was that an assured salary of $5,000 a year?

A That was the proposition.

Q What else was attached to the proposition?

A That is the proposition.

Q Were there any seasons you were to work?
A I said I don't remember whether it was one year contract or more than that.
Q What time were you to devote to that contract or engagement?
A I presume it would have meant my undivided attention to it.
Q Did you consult your family about those offers?
A I talked to my mother about it.
Q Any of the other members of the family?
A Oh, no.
Q You didn't make a family conference of it at all?
A No.
Q It wouldn't surprise you if they had not heard anything about it?
A Why, no.
Q Why did you not accept that $5,000 a year offer?
A Simply sentiment, I suppose. I listened to the pleading of my mother and the advice of Father Cody as much as anybody, to remain and stay with the children.
Q Did it have any reference to your own future, your reasons for remaining?
A Well, I probably didn't consider that very much.
Q As to whether you would do better by remaining?
A I do not know that I concluded I would do any better; I simply agreed with their requests; that was about what happened.
Q Were you sure, for instance, of the permanance of your engagement with the Opera Company?
A I have told you I wasn't assured.
Q As to their ability to carry out their agreement with you?

A I could hardly have expected any such guarantee as that; I don't imagine I could.

Q You mean, then, that their guaranteeing it to you was one thing and their paying it to you was another?

A Their paying it to me would be one thing, and their guaranteeing would be another; that is something theatrical people cannot do, guarantee you much.

Q You have got to take some chance?

A You surely have.

Q And with a settled business your chances are not so precarious?

A In a business of this kind it depends entirely upon yourself; that is the way I felt about it.

Q These engagements which you have to sing in the Church of St. Patrick's Cathedral in Newark, Presbyterian Church &c., what times would that require you?

A That would mean Sunday service in some of them; one of the church was one service, another church would mean two services, morning and afternoon service; in another church it meant morning and evening service on Sunday; in another church, it meant morning and evening service on Sunday and all the requiem masses through the week that I would be called upon to perform.

Q Was that in St. Patrick's Cathedral?

A I do not recall just where I was offered that, whether it was St. Patrick's or St. Columbus' for the requiem work.

Q What time do you devote to St. James?

A Up to recently I devoted all the time required for Sunday services, requiem masses, concerts and all other affairs connected with the musical program required by the church. For some time back I found it absolutely impossible to do the requiem work, because of inconvenience

connected with having to be in church, when I was needed in the office for consultation or something about funeral arrangements, and I had arrangement with Mr. Thomas Bott, who has been my substitute in St. James' Church, those years. Our pastor, Father Cody, agreed to pay him for his services through me. I paid Mr. Bott and charged it to Father Cody, but I have never at any time received one penny for my services, which Father Cody can bear out.

Q During this time you did concert work around the city?

A Yes.

Q Did you ever get paid for your services?

A Never accepted a nickel for it.

Q That proposition with the Castle Square Opera Company, what was that?

A About the same as the other; I do not remember the details just now.

Q When you were taking charge of this business, Mr. Mullin, and you say you paid out money for the support of your brothers and sisters and kept no account of it, did you ever take money out for your own purposes?

A Out of this account?

Q Out of the business?

A Since 1896?

Q If you want to go back to 1896, do, but I am talking now from 1900?

A Certainly I did.

Q Did you keep an account of the money that you took out for your personal purposes?

A No.

Q So you didn't keep any tabs on yourself any more than on the children at that time?

A No, I thought it was mine, that was the reason.

Q Who is Loretta Mullin?

A My wife.

Q Do you also call her Lottie?

A Yes.

Q If you have an entry made on a check stub, so many dollars for Lottie's dresses, or anything of that kind, does that mean your wife?

A Yes.

Q And wherever such entries appear on your check book, that means that money was used for the benefit of your wife?

A Yes, I presume so.

Q And wherever "self" is used, that means for your own benefit?

A Probably, more than likely.

Q Have you ever gone over your check books which you have, to ascertain the amount of money which was drawn on checks of that kind?

A No.

Q Don't you think that that would have been a wise thing for Mr. DuBois to have done, to find out how much that sort of drafts amounted to?

A I cannot see where that would help him, for the reason that even though I did draw that money, it does not signify but what there was a great deal of it spent for those children, because I spent the money out of my pocket for them just the same as though it was by check or any other way.

Q If, for instance, the check stub appears in your book with an entry on it for the children's board, what children would that mean?

A My brothers and sisters.

Q And that would mean that the money was spent for their board?

A Yes.

Q And if such an entry appeared on a check stub as for Marie's vacation expenses, would that mean your sister Marie?

A Yes.

Q You have a great many such items in your check books, haven't you?

A Probably, I guess I have.

Q Don't you think it would have helped this inquiry a great deal if Mr. DuBois had gone over and footed up those items, with your assistance?

A It might have shown him some of the expenditures, but he couldn't by any means in the world, nor could I, tell you all the expenditures.

Q At the present time you have none of those figures at all, you haven't made any calculation of that kind?

A No, I have not.

Q So we are worse off than if you had attempted that, aren't we?

A I don't think you are, no.

Q You mean we are better off without any figures than we would be with some?

A You cannot get what I haven't got.

Q Wasn't it a fact you were paying about $3 a week for each of the children's board?

A I never paid $3 for any one of their board, except Peter for a short period. I paid $5 a week for all of their boards, except Peter's, boarding at my sister's.

Q Didn't you pay $9 for three weeks of the girl's board at different times, three girls?

A There were one of two boards while they were not at school, during vacation periods, when they were being boarded and educated at St. Vincent's Academy, that my sister Grace thought she ought to be paid for the time they were home with her, and two or three of those periods she

did make it $9, I think; I don't recall positively, but when they boarded there after they left St. Vincent's Academy, their board was $5 a week.

Mr. Lum. I desire to substitute the original report of the auditor, Mr. DuBois, for the one submitted the other day.

Master. I now see that you simply gave me a report which the auditor made to you as counsel, in which the auditor made to you as counsel, in which it was entirely proper for him to make any suggestion or any conclusion that he reached.

WILLIAM F. MULLIN, recalled for further

Cross examination by Mr. Tansey.

Q In your account as exhibited here, you set forth under Exhibit C, corpus of the estate, and I am asking you whether any of that corpus was subsequently invested in mortgages?

A It was afterwards invested in mortgages.

Q In the name of whom?

A That I do not recall.

Q Was it Annie E. Mullin, executrix?

A She made the loans; the transactions were done through her and myself.

Q And did you make some investments on your own account?

Mr. Lum. Identify the date.

Q After your father's death?

A Not of that money, no, sir.

Q Of your own money?

A Later on, when I had some of my own money, I did.

Q And did you assign those mortgages you which had to Annie E. Mullin, executrix, in some instances?

Mr. Lum. I object.

Master. I do not see what relevancy Mr. Tansey sees in it. The witness testified that he took certain mortgages in his own name, with his own money. Unless he can show that they were subsequently treated as part of the estate, I should regard that as his own personal transaction.

Mr. Tansey. I want to show they were afterwards assigned to Annie E. Mullin, executrix, and the money of the estate used for taking the assignments.

Master. I do not see any objection to that.

Mr. Lum. It hasn't any relation to the profits of this business.

Master. Except that it would show how the estate's funds, exclusive of the business, were invested, although he assigned it in his mother's lifetime, while she was the administrator of the estate. Mr. Tansey, suppose that subsequently came into his hands as substituted or succeeding administrator with the will annexed?

Mr. Tansey. That is it.

Master. That is admissible.

A I don't remember.

Q I call your attention particularly to a mortgage of John F. Herman and wife to William F. Mullin, dated September 13, 1893, and later assigned by William F. Mullin to Annie E. Mullin, executrix, September 14, 1893, for $3,000; do you recall that mortgage?

A I recall such a mortgage.

Q Do you remember now whether it was assigned to Annie E. Mullin, executrix?

A I do not recall that just now, no.

Q I call your attention to a mortgage of James A. Berry to William F. Mullin, dated February 21, 1894, and later assigned by William F. Mullin to Annie E. Mullin, executrix?

A There was such a mortgage.

Q For $3500?

A Yes, sir.

Q Do you remember assigning it to Annie E. Mullin, executrix?

A I do not remember how they were treated. They were realized on to make settlements with these children; that was part of the estate that I had to sell to get the money to settle with these children, some of them, as they became of age.

Q Then it got back into the estate in some way?

A Yes.

Q And if the records show it was assigned to Annie E. Mullin, that is the way it got back into the estate?

A Probably; I don't know.

Q Did you receive payment of a mortgage from Jacob George Deneck and Ottellie, his wife, amounting to $4200; was that mortgage paid in to you?

A There was such a mortgage, I think, named Daneck.

Q And the amount was $4200?

A I don't remember that now.

Q Was this mortgage paid in to you on September 11, 1912?

A Oh, no.

Q When was it paid in to you?

A All these mortgages were cashed and used before my mother's death, all those mortgages that you have mentioned.

Q The Daneck mortgage too?

A Yes.

Q How was it the Daneck mortgage was not cancelled until September 11, 1912?

A I do not know anything about that.

Q You did not receive the money for it at that time, September 11, 1912?

A I certainly did not.

Q You think all those mortgages were paid off before your mother died?

A I do not think so, I know so.

Q The Berry mortgage wasn't paid off before your mother died?

A I do not recall whether the Berry mortgage was mine personally or whether it had anything to do with the estate.

Q Wasn't it assigned to the estate?

A I do not remember.

Q Let me refresh your memory. The mortgage from James A. Berry to William F. Mullin, dated February 21, 1894, for $3500, assigned by William F. Mullin to Annie E. Mullin, executrix, March 12, 1894, do you recall that was canceled September 14, 1908?

A I do not know when it was canceled.

Q If the record shows that it was canceled September 14, 1908, would that mean that you got payment of it at that time?

A I do not know.

Q The mortgage of John F. Herman and wife to William F. Mullin dated September 13, 1893, assigned by William F. Mullin to Annie E. Mullin, executrix, September 14, 1893, for $3000, canceled January 7, 1903; do you recall that mortgage?

A I recall the mortgage, yes, sir.

Q Do you recall its cancellation in 1903?

A I do not recall when the cancellations took place.

Q That was after your mother died?

A There was some money used after my mother died to settle with some of those children. I paid off three of them, you know.

Q Then you are wrong in saying that all those mortgages were paid off during your mother's lifetime?

A I said all you had mentioned I thought were.

Q Here is one that I have mentioned that was cancelled January 7, 1903.

A I do not recall what the mortgages were.

Q That was during your incumbency as administrator?

A If it was that date, that was during my incumbency.

Master. There isn't anything to show that Mr. Mullin owned that mortgage in 1903. Have you looked to see whether it had been assigned; the record of cancellation would only show that it was produced before the register on a certain date by a certain person, duly receipted, and thereupon was canceled. Have you looked?

Mr. Tansey. The record does not disclose any other assignment than the one I mentioned.

Q Mortgage of F. Bronson Monnell to the Homestead Park Company for $890, dated March 1, 1896, assigned by William F. Mullin to Annie E. Mulin, executrix, June 25, 1900?

A That was before her death.

Q Was the Monnell mortgage paid off in your mother's lifetime?

A I do not recall just when that was; that was foreclosure proceedings to get payment for a certificate of stock that we held in the Homestead Park Company. We accepted for a certificate of $2,000 held by the Homestead Park Company, when I

started pressure against the gentlement who managed that concern, second mortgages in payment for the certificate; that Monnell mortgage was one of them.

Q And in that way it was cancelled?

A Later on that was used in the transaction, realizing settlement of one of those three children.

Q Was that in your mother's lifetime?

A I think the settlement of that child took place after my mother's death.

Q That mortgage was cancelled and paid off after your mother's death?

A In the deal something was done like that with it.

Q Cecilia Brennan to the Homestead Park Building Company, and assigned later by William F. Mullin to Annie E. Mullin, executrix, $875.

A That is a mortgage that was on that house that was sold.

Q That is still in existence?

A I do not know; I do not hold it against the property in any way. If it has not been canceled, I cannot answer that.

Q I am asking you whether it has been paid in to you as administrator?

A It was transferred with that property, as I understand it.

Mr. Lum. The estate took title to the property on which that mortgage was a lien.

Witness. My wife took title to that and we—

Mr. Lum. For the estate?

Witness. For the estate. We put it in the other day, in the estate's sale, you understand that.

Q The mortgage is still in existence then?

A I do not know how you hold that, if you hold it against the property, or if you feel that it is still against the property, held by me; I now own the property, of course; I hope to, if the sale goes through.

Q The mortgage has not been paid off, so far as you know?

A I supposed it was disposed of. In the transfer of the property, I accepted the mortgage as in settlement for that certificate, as part settlement for the certificate that I spoke off; that was one of the second mortgages that we accepted.

Q Isn't this one of the mortgages you set forth in your inventory as belonging to the estate of William F. Mullin, Cecilia Brennan's mortgage?

A That does not show any place that I have here. We show $30,000 at the time of the appraisement of the estate.

Q I ask you in your inventory filed in this court, if you have not set forth that Cecilia Brennan mortgage as one of the assets of the estate?

A I have got it in front of me now; whatever it was, that is what it was.

Q If it were so set forth, you haven't received payment of it since that time?

A I do not expect to.

Q You haven't actually?

A It was disposed of first, I told you, I never expected to be paid for it.

Q Whatever it is, you haven't realized money on it for the estate?

A It has been disposed of.

Master. He says that it has never actually been paid off, but his idea is that it was disposed of in subsequent transfers of the property.

Q Now we come to the mortgage to Marie Kalmback, widow of Patrick J. Kalmback, dated December 22, 1897, and you recall that as one of the assets of the estate?

A No, indeed, I do not.

Q $3500?

A That was my personal mortgage.

Q That was your own personal mortgage?

A Yes, sir.

Q Had nothing to do with the estate?

A Nothing in the world.

Q That was canceled January 29, 1907?

A I do not remember the date; it was canceled, I suppose.

Q Frederick G. Collin and Christine Collin, do you recall that mortgage for $2200?

A I do not remember any such name as that ever having a mortgage

Q And that was canceled March 24, 1899; that was in your mother's lifetime?

A I do not remember any such name as that, of ever having had any such transaction in the mortgage line with anybody with any such name.

Q Mortgage of Lottie E. Elberson to Annie E. Mullin, executrix, dated November 5, 1897, for $2,000?

Mr. Lum. Where did you find that to Annie E. Mullin, executrix?

Mr. Tansey. That is on record.

A I think you will find that was my personal mortgage.

Q How did it come to be your personal mortgage?

A I do not recall that it was in that name; if you took it from the records, I do not suppose I ought to dispute it.

Q You might as well dispute it, if you want to.

A You say you found it there; I do not recall it that way.

Q Do you know whether that mortgage has been paid off?

A Yes, sir, it has been paid.

Q And has that gone into the estate?

A I do not recall. If it belonged to the estate, it did, but my impression is it did not belong to the estate.

Q Will you look that matter up and let me know later what became of that mortgage?

A Yes, sir.

Q And how it came in that name, &c.?

A Yes, sir.

Q You are perfectly sure that you didn't get any payment of the Daneck mortgage which was $4200, made to Annie E. Mullin, executrix, and cancelled September 11, 1912; you are absolutely sure you didn't get payment September, 1912?

A I am positive I did not get payment then, September 12, 1912; that was one of the first mortgages that was cancelled.

Q You are quite sure that that was cancelled in your mother's lifetime?

A Pretty sure, yes.

Q And if that record shows a cancellation in 1912, there is evidently a mistake in that record?

Objected to. Objection sustained.

Mr. Tansey. As near as I can make out, Mr. Mullin has presented an account here which he states is made up only from estimates &c. It am constrained to except to certain items in the account. Isn't that the proper way to proceed?

Master. The testimony of Mr. DuBois, who made that account, was, that he took the

account of the Constam Audit Company as being correct for the period covered by that account, which I believe was about eleven years, and that then he got information from Mr. Mullin as to what the estimated profits were on certain items, all the items of the business into which the account was divided. I do not know that you to be bound by that testimony. It is not an accounting strictly, but it is only the testimony of Mr. DuBois, which impressed me as being in the nature of hearsay. He hadn't made his account from the books. I understood him to say that he didn't have any data on which to make it, and with Mr. Mullin's consent and approval, he accepted the Constam Audit Company account as showing sums which at least had been received. Then he estimated along the same lines for the future period subsequent to that account; then he took Mr. Mullin's estimate as to what the profits should be; so that that really isn't an accounting at all.

Mr. Lum. We are apparently hopeless on the question of actually accounting for the disbursement of the money received.

Master. There are no records from which you made it, and you simply say it cannot be done.

Mr. Lum. That is the situation; we bring in all the records we had.

Mr. Tansey. It seems to me that my proper course is to except to all these items of discharge which he sets forth, as being absolutely unreliable.

Master. I do not think you will have to except to them at all. You would if it were in the Orphans' Court, so as to define the issue

in the Orphans' Court, but here they simply stand as estimates, and you can show by any evidence that is admissible and pertinent that the estimate so made by Mr. Mullin is erroneous. I do not think you need take any exceptions or get anything on the record. You are free to show that however carefully those estimates may have been made, they still are not correct, or are larger or smaller than would be proper.

Mr. Tansey. Then actually excepting to all of those items, as I have here in Exhibit D, I am not obliged to set anything on the record as to the specific items that I object to, except it be understood that I am excepting to them all?

Master. No, sir, you will not; that is headed, "Estimated average yearly business expense, exclusive of fees, salary or compensation to William F. Mullin as administrator or manager"; it is put in as an estimate by Mr. Mullin. The good faith of it is not attacked, but it can be shown by any admissible evidence, that Mr. Mullin's estimate is either too large or too little.

Mr. Tansey. Then Mr. Mullin's estimate as to the profits on the caskets in Exhibit A—

Master. That is open to the same construction.

Mr. Lum. It all is; it is the only way in which we can reach a figure.

Master. It must be from the nature of the case. If there is no original data on record from which figures can be made, then it is all estimate, and subject to proof as to whether the estimate is fair and reasonable.

Q I think we questioned you the other day in regard to your estimates of profits on caskets, and you then told me that in looking over your records you could come very nearly to a correct statement of the profits arising from each item in a funeral supplied?

A My particular business, yes, sir.

Q Your brother Joseph L. Mullin, worked with you, I think you said, a year in the Peter M. Mullin place?

A He worked four and a half years, something like that.

Q And Joseph L. Mullin assisted you in every part of the funerals, didn't he?

A In a general way, covering that period, yes, sir.

Q He made estimates as to the prices of caskets used, didn't he?

A Covering that period, yes, sir.

Q And he also made estimates as to the various items used besides caskets, didn't he?

A He made prices on the sales of those caskets many times.

Q And he would conduct a funeral for you?

A Yes.

Q As a matter of fact, he took care of all the items that you took care of in certain instances?

A Oh, yes.

Q And was competent to do it, wasn't he?

A Yes, sir.

Q He has since that time on occasions assisted you in the business there, hasn't he?

A Once in a great while, yes.

Q And he at present is an undertaker in business for himself, isn't it?

A Yes, sir.

Q And has been for a number of years, hasn't he?

A A year and a half. The period that you spoke of when he was my assistant was fifteen years ago, fourteen or fifteen.

Q On those items, say fifteen years ago, when he was your assistant, if he were to go over these items making up your entries in your books as to the particulars of a funeral and the charges, could he, with the aid of a catalogue, determine pretty nearly the value, or the price of those articles used?

A If his memory would serve him on the goods that he sold, he probably would.

Q Within the last ten years, during the time that you were administrator, could he go over your book where you had those entries and determine the style of casket used and the various other styles used pretty accurately?

A I do not think he could.

Master. Is that the usual way to qualify an expert witness, to try and have the other side admit his skill and ability?

Mr. Tansey. I thought it would help matters.

Master. Counsel frequently say we will admit that this man is an expert; we have all done that so as to save time, but it seems to me that it is not the best way nor the right way, if you wish to call Mr. Joseph L. Mullin as a witness, to endeavor to strengthen and establish the reliability of his testimony, by friendly admissions on the part of his brother William F. Mullin. They are friendly admissions—he appears to be wholly friendly with him—but it does not seem to me that

Mr. Mullin ought to be bound by his own testimony as to his brother's experience; let his brother establish that himself.

Q Has Mr. Mullin assisted you any since your mother died?

A Very seldom, a few times.

Q How lately, for instance?

A Probably—he was in my employ eleven years as my stable manager, during the period you spoke of, and a few times when I was ill or happened to be away, he would go down and help my assistant sometimes make arrangements; he has done that on three or four, or half a dozen probably, during that period.

Q He would in that way become familiar with your prices or charges?

A Oh, no, he wouldn't.

Mr. Lum. We are back to the same thing; he should qualify himself, it seems to me.

Master. I think so.

Q We will come to this item of discharge, Exhibit D, drinks, cigars, dinners, fees, &c., $30 per week; did you keep any record at all of those items?

A No, sir.

Q Did you ever spend anything for drinks, cigars, dinners, fees &c. on your own account?

A Oh, yes.

Q Aside from this $30 a week?

A Yes, sir.

Q Can you make any estimate as to how much you paid for dinners and various other things altogether a week?

A It might average $45 or $50 a week.

Q So you didn't saddle all the expense of dinners, drinks, cigars &c. on the business?

A No, $30 a week is less than $5 a day; I figure that is very conservative.

Q You think that $5 a day would be properly chargeable against that business for expenses?

A $30 a week I think would, that isn't $5 a day.

Q In addition to this you have "Expense of William F. Mullin, transportation, meals, answering calls &c. $1 a day, $365"?

A Yes, sir.

Q What do you mean by that expense, carfare?

A Carfare, telephone calls; I spent forty cents this morning for telephone calls.

Q For the business?

A Yes, between the time I left here and going down to St. Columbus' Church with a funeral and getting to the court, I have called up places in connection with my undertaking business that cost me 45 cents, ten cents for carfare, fifty-five cents, that is so far today.

Master. You need not go into those details about today; you are only asked whether an estimate of $1 a day for 365 days in a year is a fair estimate, from your knowledge of the demands made on you of that character.

Witness. I think it is very conservative.

Q Didn't you charge those telephone calls &c. to the funeral that you were operating at the time, usually?

A No, sir.

Q Didn't you make any item of telephone charge to any funeral?

A Only where it necessitated an out-of-town telephone call in connection with that specific funeral.

Q You have an additional item, "Telephone, telegrams, postage, &c. $200"; is that in addition to your—speaking now about telephones?

A The last day on the stand I said my telephone rate was $150 a year for the telephone connected with the undertaking business, exclusive of out of town calls, and the extension telephone which is in my bedroom for the purpose of answering night calls in connection with the business, and I said $200 was a great deal below what it actually cost the business.

Q In addition to this telephone charge which you claim, you are asking for telephone charges in that item which you have just spoken about.

A The item of telephone charges—there is only one item of telephone charge, isn't there?

Q But you are just telling me where your expense of $1 a day comes in?

A That comes in outside calls. I cannot charge up my own bills on the telephone calls I make from the public stations.

Q That means telephone calls from public stations?

A Yes.

Q What have you in "incidentals, estimated?"

A The cost of cotton, cosmetics, needles, oil-cloth, things used in the business, $43 a year; it is very conservative, I think.

Q Coming to Exhibit E; you have here an estimate for widow and nine children, November 1891 to November 1894, three years times ten; what did you go back and make that estimate for?

A If my memory serves me right, Mr. DuBois explained how he arrived at the average of the cost of maintaining this family.

Q You go clear back beyond the time when you qualified as administrator, do you?

A He went back that far to strike an average of cost, I think nineteen hundred and some dollars a year for bringing up that family; that is a dollar a day for each child, which is a very conservative estimate. When I stated that I paid their board of $5 a week, in addition to that I educated, clothed them, gave them spending money and gave them summer vacations &c. I didn't possibly do it for a dollar a day, but to be conservative and fair, I estimated it to go in on Mr. DuBois' estimate.

Q When we called your attention to items of $3 a week for each of the children, was that their board?

A I told you when you asked me that question, that it was not; that happened on two or three occasions when the children were home from boarding school, and through vacation periods they remained with my sister and stayed a week or two at a time, and she thought she ought to be paid while they were there, and she agreed to take them for $3 a week, and I paid it; those were the only periods that it was $3 a week.

Q That was all you were paying at that time, wasn't it?

A I am telling you those were during periods when they were going to boarding school.

Q Was it or wasn't it all you were paying at that particular time?

A I was paying a great deal more than $5 a week at the boarding school.

Q At the times they were home, were you paying for their keep at the boarding school?

A Yes.

Q In addition to the $3 a week?

A Yes.

Q How much were you paying altogether?

A I do not just remember the cost at the boarding school, but the periods were quarterly, and I paid both quarterly.

Q It included tuition also, did it?

A Yes.

Q You could tell accurately whether your board charged at the boarding school was $5 a week or not?

A No, I cannot tell you that now.

Q Why do you say you were paying $5 a week for their maintenance?

A Because I know it averaged more than that; just what the exact figures were, I do not recall.

Q What were you paying for tuition?

A I do not recall; there are some bills there that will settle that question.

Q Did you at any time separate their board from their schooling?

A Not while they were at school.

Q And the only time that you made any separate charge for board was when they were away from school?

A Yes, of them that went to school, yes.

Q Did you every pay for their board to your sister any more than $3 a week, each of them?

A Yes.

Q When?

A After they left school.

Q When was that?

A I do not remember that exactly.

Q How much did you pay, if you paid over $3 a week.

A I paid $5 a week for their board.

Q For each of the children?

A Each of the children, except Peter for one period; one period Peter was $15 a month;

that is the only one; the rest were all $5 a week, and we had a special price for Peter when he was so much younger, of $15 a month.

Q Did you ever change that from $15 a month?

A I think it was after he started to go to St. Benedict's College; I sent him there to college and I paid his board with my sister, and I think she increased the price of the board at that time to $5 a week.

Q I believe you told me the other day that you didn't keep any account of what you yourself took out of the business at all?

A No, sir.

Q You have no way of estimating that at this time, have you?

A No, sir.

Q You do not know whether you took out a thousand dollars each year or whether you took out more than that?

A No, sir, I do not.

Q Could you have taken out as high as $5,000 a year?

A If I did, I put it in another way, to draw against it. I did that; I told you I used that account as my personal account.

Q You mixed your own funds with the estate's funds?

A Yes.

Re-direct by Mr. Lum.

Q During this period you paid a great many other bills for those children, did you not?

A Yes, sir.

Q I show you certain vouchers here; I show you a bill of J. Marshall & Ball, dated July, 1906, item there of $6 for boy's suit for Peter?

A Yes, sir.

Master. Mr. Lum, you said a good many other bills; other than what?

Mr. Lum. Other than the items that Mr. Tansey asked about, the board and school expense.

Q I show you a bill of Dr. Joseph S. Vinson of $16.50; $13 of that is labeled for Belle and $3.50—

A Yes, Belle was one of my sisters who was being supported by me.

Q I show you an item of St. Benedict's College for Peter Mullin, dated November 15, 1906, tuition $15, lunch $5, physical culture $1; stationery, 63 cents; that bill was paid by you?

A Yes, sir.

Q St. Benedict's College bill, total $30.40, dated October 1, 1906; was that bill paid by you?

A $30.40, yes, sir.

Q The next bill is for music of Anna and Maude Mullin at St. Vincent's Academy, $30.50, was that bill paid by you?

A Yes.

Q And were these two bills of St. Benedict's Academy, $203.38 and $195.43 both paid by you?

A Yes, sir.

(Package of bills referred to are offered in evidence and marked Exhibit C 2.)

Q This account to which Mr. Tansey called your attention, was treated by you wholly as an individual account in the National Newark Banking Company?

A Yes, sir.

Q You deposited both the income from this business and any other income that you might have, in this account, did you?

A I did.

Q Turning to the account that you have submitted here, is there any item on that for expenditures that you may have made in connection with the estate property, in the upkeep or improvement of it?

A No, sir.

Q There was a morgue mentioned by Mr. Tansey as having been built in the rear of the premises on Lafayette street, which were used by you as an undertaking establishment?

A Yes, sir.

Q Is there any charge in that account for that?

A No, sir.

Q Who paid for the installation of that?

A I did.

Q Do you recall how much it was?

A $700.

Q Were there any other improvements made in the property during the time you have occupied it?

A During the time of my period as administrator, I have made probably $2500 worth of improvements there.

Q Is there any charge in this account for them?

A Not a cent.

Q Under this item in your account of expense for chairs and profit on chairs, what does that mean?

A That means the profit we derive from the hire of chairs or hiring of chairs, chairs that we hire.

Q You mean chairs that you hire out?

A Yes.

Q How do you fix that cost of chairs at $480; what does that mean exactly?

A We have approximated the cost of handling &c.

Q And of purchasing?

A No, there is no charge in there for what I paid for chairs that we had to hire from time to time outside; that is an item I forgot.

Q There is no charge for other chairs that you hired from other undertakers?

A No, sir.

Q Have you any idea how much you paid for other chairs during this period?

A I haven't looked that up; I do not know that I could approximate that offhand.

Q Do you think you could make an appropriation of it?

A It might average $100 a year.

Q Is there any charge in there for legal expenses of any kind?

A No, sir, I made none.

Q Have you had legal expenses in connection with this business?

A Yes, sir.

Q You think by examination of such vouchers as you have, you could make an approximation of that?

A I could make an approximation, yes, sir.

Q How much do you think it would have amounted to per year?

Master. Isn't that going to be a mere random estimate? If he showed, for example, that in any particular year he had large legal expenses, as for example, if he had the foreclosure of a mortgage or suit he had to defend, or any litigation with respect to building operations, or anything of that sort, that would be proper.

Mr. Lum. Perhaps I can show it more clearly for him that he can.

Q You have had legal expenses in connection with this business?

A Yes, sir, a great many.

Mr. Lum. As to this question of the mortgages that Mr. Tansey went into, I cannot go over that with Mr. Mullin, and I would like an opportunity to examine into that and the right to examine Mr. Mullin further in connection with that hereafter.

Master. Certainly.

Re-cross by Mr. Tansey.

Q Referring to the bills you have offered in evidence, marked Exhibit C 2, referring to this one of Peter Mullin, St. Benedict's College, November 15, 1906, tuition, lunch, physical culture, stationery, total $21.63, with a memorandum reading as follows "This covers, as a I understand it, December 1906, January and February, 1907", can you tell me whose memorandum that is on there?"

A That looks like my writing.

Q With the answer to it "Yes", signed P. E., whose memorandum is that?

A I do not know, I suppose some of the Brothers or clergy at the college; that covers a quarter.

Q So that for three months the charge was $21.63 for Peter at St. Benedict's College?

A For that particular three months.

Q $21.63?

A His board was paid in addition to that at my sister's home.

Q And that was when you were paying—?

A $15 a month.

Q So that the charge for board is $15 a month and his schooling was $21.63?

A That particular quarter; the next quarter was thirty dollars and odd cents.

Q I show you a bill from Mrs. A. Harris, where certain items for dresses &c. are marked Bella, Nan, Marie, Mrs. M. and Winter; that was the dressmaker's bill?

A No, that was the milliner's bill.

Q Were your milliner's bills marked that way all the time?

A Where do you find that?

Q On the margin.

A That says "fixing over Mrs. M.'s winter bill"; the winter bill was paid.

Master. These particular items are not of service to us when we have not a detailed account.

Mr. Lum. They show the payments and the number of payments.

Mr. Tansey. It is a detailed statement in so far as it goes.

Master. How will it help me to conclude what sum he should be charged with; we know he spent and paid large bills for a long period, and they must have included, since the family were clothed and fed and educated, many items for that class of disbursements. How can he prove that a particular bill was paid when there is no claim based on that particular disbursement? How is it going to help me?

Mr. Tansey. It will help in this way; if we show that those bills were regular items, and the items indicated as belonging to certain individuals, we can show that if he had bills enough of those he could make up a proper account.

Master. Yes, and the reason that they are of no distinct value is that they are not a

part of a made up account. If you had a made up account, then it would be possible to show whether these particular items were either included or omitted from that account.

Mr. Tansey. Would it not help the court to see that he could make up a regular account if he wished to?

Master. No, the very fact that he can testify as to particular items goes to show that he cannot do any more than that. Suppose Mr. Mullin should present a correct detailed account for a definited period, say one year, that he had actually kept such a detailed account, that wouldn't enable me either to charge or discharge him; in the final adjustment that would only be valuable to me for purposes of comparison as to whether he could say whether that represented an average year's disbursements, or whether it was more or less.

Mr. Tansey. I suppose it might assist your Honor—if you found out he really could make up an account, I suppose the court would make him make up an account.

Master. If your object is to show that Mr. Mullin could make up an account, it might be competent for that purpose, but he has no records from which he could prepare the account. If your object is to show that he has records from which such an account can be made, I will admit it, but to simply show that he has partial records that would be incomplete, that just corroborates expressly that he does not say that he has no items at all; he says that he hasn't kept books, and

that he has been obliged by reason of that, to estimate to the best of his ability both his receipts and his disbursements.

Mr. Tansey. If we could show that he actually had records of every transaction, he wouldn't have to resort back for his statement.

Master. If you can show he has actual records for every transaction, then I shall want that brought before me.

Mr. Tansey. It is not for me to show that.

Master. No, it is not for you to show it, unless you can.

Mr. Tansey. We think that we could show by these records that he could make a better effort at discharge account than he has done.

Master. Suppose Mr. Mullin admits he had a large number of items, that wouldn't enable him to prepare a comprehensive and correct balance sheet.

Mr. Tansey. He could prepare it as far as he can and then estimate the balance; it seems to me that would aid the court.

Master. Ask him what he has; his identification of particular bills as having been paid partly for his father's family and partly perhaps for himself or Mrs. Mullin, wouldn't help us at all, but you can ask him what account he has. He says he has no detailed or complete account, and that when he has presented this estimate he has done the best he can. If you can show that isn't true, then we want that shown; but if it is true, then it seems to me your only line that is serviceable will be to show that his estimates which he admits are estimates are too large or too small.

Q Mr. Mullin, these bills, for instance, to Mrs. A. Harris, were they paid by check or in cash?

A Sometimes by check, sometimes in cash.

Q And the bills paid St. Benedict's Academy for the schooling of the children, were they paid in check or in cash?

A They probably were all paid by check, though I cannot say positively all of them.

Q Did you keep the bills or did you destroy them when they were paid?

A Some of them were kept; I do not know that I intentionally destroyed any of them.

Q Do you know how many of them were not kept?

A No, sir.

Q Did you ever look through your records to find them?

A Oh, yes.

Q When, for instance?

A I produced every thing I have; you have every record, every bit of record that I have since the time since my mother died, in that bunch of receipts and books &c.

Q Have you gone through them to see which are missing?

A Your bookkeeper did all of those things, too; I guess we worked with him on this and got everything we could find.

Q On the question of discharge account; you went over the items of charging, to show your receipts?

A Yes.

Q Did you go over the items to show your disbursements?

A I do not recall that they were there for them; I do not know whether they did or not.

Q Has your expert gone over these bills?

A Yes.

Q Has he shown which ones are missing?

A I don't think so.

Q If you went over these bills, as you have all the bills here, would that be a complete record of your payments during all these years for the children and for the support of the family?

A No.

Q Why not?

A Because the bills are not all there, and the receipts for payments that I have made of various items in cash, you will not find very many of them.

Q Where are they?

A I do not suppose I ever had some of them.

Q Have you gone over your bills to find out which are missing?

A I cannot tell you what ought to be there; some of them.

Q I asked you if you had gone over your bills to find out which are missing?

A How can I tell you which are missing, when I do not know what ought to be there?

Q Have you gone over them to find out?

A I cannot find out if I don't know what I am looking for.

Q Have you made any effort to find out whether those bills made a complete record?

A I have done the best I could.

Q What have you done?

A Went over these bills that I have and struck an average from what we could find of the various costs and approximated the cost of the support of the children, which I suppose you are trying to get at now in the way we have presented it to you, which is a very conservative estimate.

Q If you went over the bills for the entire period which you have, can you tell us—I believe that you haven't, for what periods haven't you bills, what years?

A We have only receipts, if I remember correctly, from 1906; the bills, receipts &c. previous to that time and for all the period of my father's life were lost in a little fire that we had.

Q Was that fire before you took hold as administrator?

A It was after, I guess.

Q You guess; what year was it in?

A I don't remember exactly.

Q What did it burn?

A It burned up a lot of receipts and books; a few of the books, receipts and coach lists that we had a record of, funeral item slips.

Q Any receipts for the children's expenses?

A They were all entered during that period.

Master. Can't you tell when that fire was? If you had receipts since 1906 and it burned previous receipts, it must have been about 1906.

Witness. Some of the receipts were burned; it was a little fire in the trimming room.

Master. When was it?

Witness. I think about three years after my mother's death, about 1903—no, it was a little later than that.

Mr. Lum. Did you have any insurance; can you ascertain by any records?

Witness. No.

Mr. Lum. Is there any record in which you can find out definitely to the day?

Master. He thinks it was after 1903 and before 1906.

Mr. Tansey. I think Mr. Lum's suggestion that you look up the insurance record is a good one.

Witness. We didn't get any insurance.

Q Did you make application for insurance?

A No.

Q It wasn't a serious fire?

A No.

Q What did it burn in the trimming room besides the receipts you spoke of?

A We had a cabinet in which those receipts and things were filed, and they were partly destroyed, and we burned the rest of them along with the receipts; that had been an accumulation of thirty years probably.

Q You yourself burned them?

A I did or my assistant did under my instruction.

Q Do you recall that that was after or before the fire?

A About the time of the fire; it was due to some of them being partly burned.

Q So what hadn't been burned you burned afterward?

A Up to that period around 1906.

Q Will you look at the bills that you have from 1906 to see whether you could make a complete record from that time?

A Yes.

Q What bills are missing in that time?

A There are ever so many payments made for which there have been no bills, and for which there are bills missing, that I cannot tell you what are missing.

Q By check for instance?

A Some by check and some by cash.

Q Have you the checks for those which were paid by check, but no receipts taken?

A I don't know.

Q Have you looked to see?

A All the checks that we have are there.

Q Have you looked to see whether the checks which you have represent checks on payments which were made but no receipts taken?

A Yes, there are many of those.

Q Have you looked to see what they were?

A Various items of them, yes, sir, we found many of them.

Q Did you notice whether you could make a complete and consecutive record from 1906?

A I know I could not possibly do it; that is why we didn't attempt to do it.

Q You never attempted to do it?

A We knew that it would be absolutely impossible to do it.

Q You cannot tell me now what items are missing, except in this general way?

A I certainly cannot.

Q You haven't attempted to make any search for such items?

A The items that would be in evidence of having made payments for, we did look into, to find if the receipts were complete, and, as I told you, we found many of them for which there were no receipts, but when you ask me to find items of expenditure for which there are no receipts, or tell you what those items may have been, without any evidence of payment, I cannot tell you what items I may have spent money for, that I have no evidence at all showing whether I had paid them or received receipts for. I cannot imagine what items might be missing.

William F. Mullin, re-cross.

Q Did you in making payments for the children in any instance, for clothes, for schooling or for board, make a payment without taking a receipt, when it wasn't by check?

A Oh, yes, lots of times, I paid many dressmaker's bills and things of that kind that I never got a receipt for.

Q And didn't get a bill for?

A Didn't get a bill or receipt.

Q And you didn't keep any voucher at all for such payment?

A. No.

By the Master.

Q You conducted this business from your father's death in 1891 in behalf of the estate until your mother's death in 1900?

A Until that arrangement was made, I think 1896, wasn't it, or something like that, when the agreement was made, when the estate was appraised and the distribution decided upon.

Q That was September 24, 1895?

A Up to that period I conducted it absolutely under the estate.

Q When did you go into another business on your own account, the livery business?

A June 30, 1900.

Q You had no partners in that?

A No, sir.

Q And that had no relation to the estate?

A No, sir.

Q Had there been a livery business conducted by you in behalf of the estate before that?

A No, sir.

Q Have you been in any other business than the livery business and the undertaker's business since June 1900?

A I haven't been in any special business; I have been in no other business.

Q That required either your services or your capital?

A No, sir.

Q Have you kept any books in connection with your livery business that would show what the profits of that business were year by year from 1900?

A In a general way, the livery business, if you would like me to explain to you about the livery business.

Q Did you keep books in your livery business?

A Not a complete set of books. The livery business paid for itself since that time, that is how I purchased it.

Q I was going to ask you whether you have any idea of the net profits of your livery business from 1900; I am not asking what they were.

A Yes, I can tell you that; the net profits after the cost of upkeeping, etc., in my livery business, have been about $70,000, about $67,000.

Q From what time?

A From June 30, 1900, to January 1, 1913, an approximation of about $67,000.

Q Did you withdraw and use all that profit either for living expenses for yourself or for investment?

A Well, I used some of it to make the stable clear, notes and the chattel mortgage which was on the stock when I purchased it.

Q You practically drew it all out to use in either paying debts or living expenses?

A Yes.

Q Is there any way, knowing that you have that profit or income from that source, by which you can estimate how much you drew for your personal

expenses or your family expenses or for your individual use, and by way of investment, during that period from the undertaker's business?

A Well, from the money made on the stable and other investments, I made other investments which made me money, other than the undertaking business and the livery business.

Q Is there any way that you can estimate how much you probably drew out of the undertaker's business from the period referred to in the Vice Chancellor's decree, which I think was August 1, 1900?

A I could make some estimate of that; I do not know that I could make an accurate estimate at all.

Q An estimate never is expected to be entirely accurate; my idea was, if you knew substantially the sources of your income for the last twelve or thirteen years, and knew what you had from certain specific sources, all except the undertaking business, that the different must be about what you drew out of the undertaking business.

A I drew very little out of the undertaking business, from the earnings of the undertaking business I drew very little; I made money out of my stable business, I have made money out of other investments; I have lost some of that money also.

Q If it was lost outside, it wouldn't be pertinent.

A I made it. I didn't make it out of the undertaking business.

Master. Mr. Tansey, this Constam report comes down to August first, 1911?

Mr. Tansey. Yes, sir.

Master. Is there any estimated extension beyond August 1, 1911, or any evidence respecting that?

Mr. Tansey. No, sir, we are expecting him to account here.

Q This suit which was brought for an accounting and to settle these questions seems to have been filed September 26, 1911; have you kept any accurate account for the year 1912 with respect to the undertaking business?

A No, sir.

Q Didn't you undertake to be accurate and keep books during the pendency of this settlement?

A Not any more than I had during the rest of the period.

Q Then will it be necessary to estimate the profits from August 1, 1911, to such time as we cover?

Mr. Lum. May I make a slight explanation there? It became apparent some time ago, from the Vice Chancellor's attitude, that ultimately the moment the memorandum was filed, we were going to sell the business; that business was sold a week ago today and brought, as Mr. Mullin had estimated, $500. My thought was that we should account down to that time because there would be a point terminating our liability.

Master. I thought perhaps after it became apparent that an accounting was sought and would perhaps be required, that Mr. Mullin might have kept accurate figures for a definite period, as for example, the year 1912, and that that would be very helpful to corroborate his estimates for the previous years, having regard to the difference in the character or amount of business done, but he says he didn't keep any such account.

Re-direct by Mr. Lum.

Q How old is your son?

A He will be fourteen years old in April.

Q Can you tell us the amount that you have expended for his board and clothing and food, etc., in the last six or eight years, other than by a general estimate?

A No, sir.

Q Did you make any distinction whatsoever in your manner of dealing and keeping accounts with reference to your own son from that with reference to your younger brothers?

A No, sir.

Q Did you purposely destroy any accounts whatsoever, or any checks or vouchers, so as to prevent accounting?

A I positively did not.

Q When these receipts were being kept, did you ever have any thought of using them in reference to any accounting?

A No, sir.

Q Is there any voucher or any way in the world in which you can determine better than any parent the amount expended for growing children from week to week for food and clothing, milk and groceries?

A No, not any better than I have done.

Re-cross by Mr. Tansey.

Q During the time you have been administrator you have been in the house of the Peter Mullin Estate?

A During the time from the time that my sister left, I have lived there.

Q That was shortly after you were appointed administrator?

A I do not remember; I said I do not recall whether it was some weeks or some months after.

Q Was it a year after?

A I don't remember exactly.

Q Five years?

A It wasn't five years after.

Q Wasn't it the same year you were appointed administrator?

A It probably was.

Q Since the time of your occupancy of the house, you haven't paid any rent?

A No, sir.

Q What rent was that drawing before you went there?

A None.

Q What is the fair rental of the property?

A A fair rental of the whole property, the living apartments about $25, and $27 a month, if you could rent them.

Q And the rental of the store?

A I haven't any idea what that would bring, what it is worth. The business hasn't been charged with any rent.

Master. That isn't important, if on the theory that that business was being carried on in the interest of the estate, he would have had a right to use it for the business purposes. Of course, the apartments which he occupied for his family might perhaps be looked at a little differently, although it was all incidental.

Mr. Tansey. He is seeking to charge us with the upkeep.

Master. If he paid for the upkeep of the property he would have a right to do that. It must, from the nature of the case, have been true, that if he occupied the estate's real estate either for his own home or for the purposes of the business, he met all the necessary annual charges on that property. It is not claimed that everybody else ever did anything, so that he would be entitled to charge

that, not for the purpose of getting it back, but for the purpose of showing that it was one of the necessary disbursements made by him in conducting the business.

Mr. Tansey. At the same time he must show a collection either of rent or charge himself with it, I should think.

Master. That is one of the questions, an undertaker very often finds it absolutely necessary to live in conjunction with his business; I think a good many of them do. He did have, as I understand it, for a part of the time, his father's family there—a long time, didn't they, after his father's death?

Mr. Tansey. We are talking only of the time he was administrator. I believe not.

Master. After his mother's death, I understand you, for a little while his sister stayed there in the apartments over the undertaking establishment, and then Mr. Mullin moved there.

Q Do you fix that time as to when your sister left?

A I have answered that a dozen times to the best of my ability.

Master. He thinks it is probably the same year his mother died.

Q When you paid for the morgue and the various other things, do you know whether you drew that money out of the business?

A I do not think I did; I thought I was paying for them myself, figuring that it was my business.

Q When did you build this morgue?

A I built it some time shortly after 1900 or 1901, I think.

Q Can you tell whether you had taken that out of the business or stable profits?

A I took it out of my personal funds.

Q You had the stable at that time, in 1900 or 1901?

A Yes.

Q You were devoting considerable time to that stable business at that rate?

A I had to devote some.

Q You were not devoting all your time to the undertaker's business then?

A I was, all that it required; I gave my personal attention to the undertaking business.

JOHN J. MOONEY, sworn for complainant.

Direct examination by Mr. Lum.

Q What is your business?

A I am an undertaker; an old fashioned undertaker, not a funeral director.

Q How long have you been in that business?

A About thirty-seven or thirty-eight years.

Q Where?

A 34 and 35 Mulberry street.

Q Is that anywhere near 228 Lafayette street?

A No, it is almost a mile and a half away.

Q Have you done business for any people of any particular religious faith?

A All kinds, some Catholics, some Protestants, some Jews.

Q What is the majority of your trade?

A Roman Catholic, Irish.

Q You do about the same class of work as Mr. Mullin?

A I guess about the same, I should judge.

Q Do you do any work for people in the same territory that Mr. Mullin resides?

A I do sometimes, when I am called there.

Q About how many funerals do you do a year?

A I do not average as much as I used to do, I do about 75 or 80 a year. I used to do more. Between 75 and 80.

Q Do you know what your profit is per year upon 80 funerals a year, 75 or 80?

A After paying my expenses I ought to have maybe a couple of thousand a year, clear.

Q What do you mean by your expenses?

A That is after paying my help, my caskets, my coffins, livery stable, church services.

Q Do you know whether it is customary for an undertaker to spend any money in entertaining?

A Well, I do not know what other people do, I know I do not; I never did anything.

Q Do you know whether other people do?

A No, only what I hear.

Q What do you mean by that?

A Sometimes I hear they stop in and give the boys coming home from the cemetery a little lunch or something like that.

Q You don't do it?

A No, sir; I never will do it.

Q Do you know whether other people consider it advisable to do it?

A I know my own business.

Master. I do not think that is material.

Q Do you positively know whether other people do such things?

A I do not know positively, no, only what I hear.

Cross examination by Mr. Tansey.

Q So, Mr. Mooney, you do not know whether a man might spend $30 a week for drinks, cigars, dinners, etc.?

A No, sir, I do not.

John J. Mooney, cross.

Q What do you know about advertising and premiums and one thing and another?

A I don't do it, I do not know what others do.

Q You don't do it?

A No, sir.

Q You do not consider it is necessary for your business?

A No, sir, I do not.

By the Master.

Q I understood you to say that your profit on funerals averaged about $25 for each funeral?

A About that, sometimes more and sometimes less.

IN CHANCERY OF NEW JERSEY.

Between
WILLIAM F. MULLIN,
Complainant,
and
ANNIE E. MULLIN, *et. als.,*
Defendants.

Continuation of testimony in the above entitled cause before Hon. Halsey M. Barrett, Special Master, at the Chancery Chambers, Newark, New Jersey, on Friday, May 9th, 1913, at 10 A. M.

Appearances:

Mr. Ralph Lum and Mr. Ernest Lum, for complainant.

Mr. Michael Tansey, for defendants.

Mr. Lum. At the last session the testimony had closed of Mr. Mullin and we had requested an adjournment, having no further witnesses. Mr. Tansey objected to going on and there had

been argument as to the question of preparing more detailed estimates for the years of this accounting. Your Honor ruled that we would not be required to prepare more detailed estimates, and that we might rest if we desired. You subsequently wrote a letter to Mr. Tansey and to myself stating that you wished we would prepare more detailed estimates, funeral by funeral, for the three years of 1910, 1911 and 1912, and I now offer such statements prepared for the years 1910, 1911 and 1912.

Court. You had better call a witness to prove the statement.

FRANK G. DUBOIS called and proved statement.

WM. F. MULLIN recalled for further cross examination by Mr. Tansey.

Q When you were working as partner of Mr. Joseph L. Mullin you had, according to your evidence, some money to divide up at the end of the time that you were in partnership?

A Yes, sir.

Q If you recall, you testified that your share amounted to $1250?

A I don't recall that.

Q And that the whole amount to be divided between you and Joseph L. Mullin and the estate was about $2100?

A I don't remember exactly, but I don't think it was that much.

Q Do you remember testifying as follows:

Q And that was over and above all the children's support and your mother's support and running of the business, and there was some profit to divide?

A Oh, yes.

Q Do you recall how large that check was?

A If my memory serves me right the check was seven hundred and some dollars.

Q And that was for one-sixth of the profit?

A No, two-sixths.

Q Two-sixths of the profit, after paying all expenses out for one year?

A It was practically a year, a little less than a year I think?

Q For less than a year?

A Yes.

Q You remember testifying that way, don't you?

A I remember some such testimony; I do not recall exactly now the testimony.

Q If two-sixths of the profits were $700, one-sixth would be $350, wouldn't it?

A I said if my memory served me right.

Q And six-sixths would be about $2100, wouldn't it?

A I think about that; those figures as to the settlement—

Q That means when you and your brother Joseph were in partnership in the business?

A Doesn't that show somewhere in your figures accurately as to the settlement and the amount he received?

Q I am talking of the income from the business.

A That is what I mean, at that time.

Q I am asking you whether you remember testifying that way?

A I do not remember my testimony exactly; I remember some such testimony; I cannot tell it to you accurately.

Q You remember also that you and your brother Joseph at that time were drawing $15 a week; you testified to that?

A Yes, sir.

William F. Mullin, further cross.

Q Do you remember also testifying as follows:

Mr. Lum. We will admit the testimony; read it.

Q —(continuing—reading)

By the Court.

"Q Can you tell how much at that time approximately was actually needed for the support of your mother and the family?

A It then ran, our expenses at that time ran nearly four thousand, about four thousand dollars a year for running the house, keeping the children, medicine, doctor, etc.

By the Court.

Q And sending them to school?

A At that time they had not as yet arrived at an age where they could go to other than the parochial schools; it was after her death I sent them to boarding schools.

Q What was the gross income of the business at that time?

The Court. That does not make any difference, we will not go into that now. The important point is how much did the family cost, and how much was his profit.

A Support of the family was at least four thousand dollars a year, a conservative estimate, four thousand dollars."

Q Now, Mr. Mullin, your family at that time was costing you $4,000 a year to support?

A I presume it was.

Q Your business to run don't cost you any less than it has lately, did it, since you have been administrator?

A Is that the period that my brother was with me?

Q Yes.

A Our salaries were less.

Q You were getting $15 a week and he was getting that?

A Yes.

Q You are paying now a man $17 a week, so you claim, and you have enough additional men to make an additional man for $17 a week?

A Yes.

Q So the difference would be $4 a week?

Mr. Lum. That figures right.

A Yes.

Q In what other particular has your expense of running the business increased beyond what it was at that time?

A I do not know that any other particulars exist; the same conditions as to management, etc., are there.

Q So that your business runs practically at the same expense as it did then?

A The business for the management.

Q I am talking about your undertaking business expense, outgo.

A Practically.

Q Then your business at that time must have been costing you what you say in this report that Mr. DuBois has offered in evidence, estimated, costing you $5600 a year to run, as shown on page 11, Exhibit D, of this report, without any charge for your services?

A The cost of the business?

Q Yes.

A Exclusive of the family maintenance?

Q Yes.

A And my income?

Q Yes.

A At least $5600 a year.

William F. Mullin, further cross.

Q You have been doing practically as much business of late years as you were during the time that you and Mr. Joseph Mullin were in business together?

A No, sir.

Q How much less?

A That is all tabulated, you have the figures there.

Q We can depend on this tabulation?

A Yes, sir, that is correct.

Q Have you been doing less since you took hold in 1900 than in 1896?

A I have been doing less since 1905—1907, than I was doing the years previous to that.

Q Let us make a computation. If your business was costing you $5600 to run a year at that time and you were paying for the support of the family, including your own support, at the time you were not married, when you and Mr. Joseph L. Mullin were in business, in 1897?

A I was married in 1898.

Q You were then living at home?

A Yes.

Q You spent $4,000 for the maintenance of the family?

A I should say it was at least that.

Q You had $2100 to divide between you?

A Yes.

Q That would make $5600, plus $4000 would be $9600, and $2000 would be $11,700?

Mr. Lum. That addition is correct.

A We had the income from funds of the estate those years which applied to that.

Q $11,700 it would cost you to run your family and maintain the business at that time?

A Not out of the business.

Q Where else did it come from?

A That was during the period of my mother's administration; she had access of course and the use of the income from the holdings of the estate in addition to the profits of the business.

Q How much was that?

Mr. Lum. I object.

Court. I will admit the question.

Q What funds were there that your mother had that she derived an income from except the business?

A Bonds and mortgages and other holdings I don't remember just now.

Q That is what you said was the $30,000, wasn't it?

A I presume it was.

Q Coming down to the present day; you claim your brothers and sisters cost about $2,000 a year to support; you claim that your business expenses are $5600 a year?

A Yes, sir.

Q How can you harmonize that with your statement that your gross income is only $6100 in one year, according to these statements, and $7,000 in another year?

A It looks as though I had been working for nothing.

Q That is what it would amount to?

A Yes, sir, it looks like it.

Q In other words, it would be impossible, wouldn't it, to perform, unless you were paying the money out of your own pocket?

A It looks like that.

Q And if it be true that at a certain time in your business it actually cost you over $11,000 a year to live and conduct the business, you must

have gotten, as you say, some funds from outside of business in order to run it, or you must have gotten that much gross profit out of your business?

A That is the period that my mother was handling the business, you are speaking of, I take it?

Q Yes.

A Yes.

Q Your contention was that after you took charge of the business you built it up. What have you to say on that subject.

A The figures ought to prove that, they are there.

Mr. Lum. I object to that; the figures show from 1900 on.

Court. I think counsel should refer to a specific period and refer to any figures that he wishes the witness to testify concerning.

Q You haven't submitted any figures here for the period when your mother was running the business, have you, in this statement prepared by Mr. DuBois?

A It covers the whole—yes.

Q After your mother died and you got married you didn't live at home with the family?

A For the period between the time of my marriage and the time that my sister moved to Fifth street, I did not live home, I lived around the corner.

Q And you supported your younger brothers and sisters until they reached the age of twenty-one years?

A Yes.

Q But did it ever cost you any more than $4,000 a year to support them?

A During that period?

Q From the time of 1900 down to 1913?

A I do not suppose it did.

Q It never cost you any more than it did to support your mother's family before she died?

A No.

Q And up to 1905 you were doing more business, according to your statement, than your mother's business amounted to in her lifetime?

A Up to 1905—

Mr. Lum. It strikes me we should have a statement; my recollection is that his statement was that he increased the business, acting for his mother, after his father's death.

Q Did you increase the business any after your mother's death?

Court. Between what dates?

Mr. Tansey. Between 1900 and 1905.

A The business averaged along about the same up to 1905; I had to hustle a good deal harder, of course.

Q And then it began to decrease?

A Yes.

Q And your hustling was to keep it upon the same level it was during your mother's lifetime?

A Yes, sir.

Q Since 1905 do you know whether you have spent more for the children than you did in your mother's lifetime to maintain the family?

A I do not think I did, no.

Q Do you think that your estimate of about $2,000 a year would be a fair estimate?

A Covering the whole period, I think so.

Q From 1905 to date?

A 1900 to date, on the basis of the way it was figured. I hadn't any means of getting at it accurately; I accepted that being a reasonable figure.

William F. Mullin, further cross.

Q Did you have any money to divide up as profits since 1905?

A I never kept any account or record of my expenses until I approximated them. It does not look as though I had any money much.

Q Did you have any profit to divide up over and above the expenses from 1900 to 1905?

A Whatever that statement shows, is what I had.

Q What statement?

A Statement as to the cost and the receipts.

Q This shows that you had no profit at all if you take the cost of the business and maintaining the family?

A Then I had none.

Q Then you were not getting as much out of the business as you were during your mother's lifetime, were you?

Court. He did not get much out of the business as she was getting out of it in her lifetime.

A Evidently not.

Q What becomes of this great influence which you had on the good will, if that is the case?

Mr. Lum. I object; is that material? The business has been sold, lock, stock and barrel, with its good will, and realized $500.

Court. He has testified to that.

Q Do you know whether your father in his lifetime had more funerals by the year than you had?

A I am satisfied he had less.

Q I think the highest number of funerals which you have listed in any one year from 1900 to 1912 was 182 funerals in 1906. Would it surprise you that your father the last year before he died had 184 funerals?

William F. Mullin, further cross.

A No, that wouldn't surprise me; I don't think he had; I was working for him two years before he died.

Q I show you certificate of James F. Connolly, City Clerk of the City of Newark, dated April 8, 1913, showing the funerals of Peter M. Mullin, Undertaker, from November 1, 1888, to November 1, 1891, also showing the funerals listed to Peter M. Mullin, Undertaker, from November 1, 1891 to November 1, 1893; also the funerals for Peter M. Mullin, Undertaker, from July 20, to July 21, 1902, and ask you if that is or is not the statement of the funerals covering those periods?

A 1888 134 funerals; 1889 187 funerals, and 1891 122 funerals.

Q And the average for those three years was what? The total was what?

A 443 funerals for three years preceding my father's death.

Q For the three years after your father's death?

A 445 funerals.

Q How much had it increased?

A Two funerals in three years.

Q And the next?

A 492 funerals, increased 47 funerals in three years.

Q So that for the years just preceding your father's death there was an increase in three years of two funerals, and in the year 1900 to 1902, when you took hold for yourself or the estate, as administrator, there was an increase over your father's time, of 13 funerals a year?

A Yes, sir.

William F. Mullin, further cross.

Q Do you know whether or not the City of Newark had increased in population in those ten years?

Court. That isn't material.

A The number of undertakers had increased in the neighborhood, too, that made the going harder.

Q But you managed to hold the trade your father had and add a little more to it?

A Yes, with a great deal of work.

Mr. Tansey. I offer in evidence this certificate as a statement of the funerals of Peter Mullin.

Court. It will be admitted as a certification of the record.

(Marked Exhibit D 35.)

Q It was the duty of the City Clerk to keep tract of the permits issued?

A Yes, sir.

Q And each funeral would be supposed to have a permit issued from the City Clerk's office?

A Many permits that are issued, charged as permits against this business, were not funerals; we would have to have permits issued in transfers.

Q That is so today, isn't it?

A Yes, sir.

Q And that same situation would enter into the estimate after you took charge?

A Yes, sir.

Q So that one offsets the other?

A Just about the same.

Q And therefore the average would remain the same?

A Yes.

Q And if we get from the City Clerk's office a record of the permits, we come pretty close to having a record of the funerals?

William F. Mullin, further cross.

A Yes, pretty near. The difference in the two statements, I don't know that there will be very much difference—my books will show about the same number of funerals as the permits show.

By the Court.

Q If you had a funeral for a person who died outside of the city of Newark, that funeral wouldn't show on this certificate of the county clerk, would it?

A Sometimes; the law requires you where it is out of the state to have your burial permit changed in the City Clerk's office here.

By the Court.

Q Suppose you were employed to conduct a funeral for a resident of Orange, New Jersey; that funeral would not appear in this certificate of the City Clerk of Newark at all?

A No.

Further cross by Mr. Tansey.

Q You said, as I understood it, that you didn't keep books in this business, because you expected and understood it was your own business?

Court. He testified he didn't keep accurate books of his receipts and disbursements, because after his mother's death he regarded the business as his own and mingled it with his own affairs.

Q And therefore you could not tell the profit from the undertaking business?

A I don't remember such a question; I have told the profit.

Court. It has been apparent there has been no concealment of it that in this accounting Mr. Mullin had no records of costs which he

could use, and so couldn't produce an accurate statement of the cost of conducting that business; the only figures that he has that are definite are the figures showing the volume of business he did, with the items of the cost of each, and everything else, including all the tabulations by experts with respect to expenses and disbursements are based on information which he has given them, which is his best judgment, or his memory, and not from records.

Mr. Tansey. Didn't he testify the reason he didn't accurately keep account of the profits of the business was he considered it his own?

Court. That has been admitted all aolng.

Mr. Tansey. And used it as his own business.

Court. That is the theory on which he is liable; he thought it was his own, and the Court said it wasn't.

Q You also remember testifying that you knew the profits of the livery stable business to be about $67,000?

A I don't recall that statement; I know I was asked the question.

Court. If you want to call the witness' attention to that, you ought to turn to his testimony and advise him of the period that you have in mind when the profits were $67,000.

Q On the tenth day of February, 1913, "I was going to ask you whether you have any idea of the net profits of your livery business from 1900; I am not asking what they were." This is by the Master. The answer is "Yes, I can tell you that; the net profits after the cost of upkeeping, etc., in my livery business, have been about $70,000, about

$67,000. Q From what time? A From June 30, 1900, to January 1, 1913, an approximation of about $67,000."

Court. Why do you want to cross examine about that?

Mr. Tansey. If he is able to tell us the profit on that business, which was his own business, why could he not tell us the profit on a business which he was running as his own, the undertaking business?

Witness. The reason for my being able to answer the question as to profits on my stable business is this: The way I bought my stable business was a $26,000 price, evidenced by chattel mortgage and notes coming due every six months, interest on the principal to be paid. I paid these notes as they came due, with the interest on the principal; eliminated the mortgage. As the period elapsed I put in new stock in my stable, I increased the volume of stock and I did all those things, and that is where the profit off the business that I did, amounting to $70,000, has gone. A great deal of it went in the payment of interest and in the purchase of new stock, and increasing the volume of my stock in the livery business, and some of that $70,000 profit is evidenced now in coaches and horses, harness, etc., but the business during most of that time, up to two years ago, my brother Joseph supervised, and looked after that income, so he is familiar with it.

Q That is the way you arrived at that profit?

A There were no accurate set of books kept in the undertaking business any more than I have kept in the livery business which my brother Joseph also took care of and can certify to.

William F. Mullin, further cross.

Q Did you ever have any notes in bank from the undertaking business?

A I never gave any notes in connection with the undertaking business, no, sir.

Q And the loans which you spoke about were in the National Newark Banking Company for the stable business?

A There weren't any loans in connection with the stable business as to those goods or the purchase price.

Q What were the loans for?

A I have made many loans in the National Newark Banking Company, I cannot say.

Q Was it in connection with the stable business?

A There was a loan when the owner of the mortgage—defaulted in the payment of interest—at one payment demanded a settlement of the whole amount and threatened to foreclose the mortgage and I had to go and get $8,000 and settle with him.

Q That was the only note you had?

A I don't know what the note was; I got some money, but I don't recall how much.

Q It all had reference to the livery stable business?

A That note would have reference to the livery business.

Q I show you receipt June 6, 1907, from Eisele & King for $3620 to you in payment of 40 shares of Newark Consolidated Gas stock, and ask you whether you paid that out of the undertaking business?

A I cannot answer you that; I may have.

Q It was stock sold to you, wasn't it?

Mr. Lum. May I ask the object of this?

Court. On an accounting almost anything that he bought it would be proper to ask whether he bought it out of his own money or business.

A Evidently, yes, sir.

Q What did you do with it?

A I cannot tell you.

Q Have you the stock yet?

A No, sir.

Q Do you know whether you sold it?

A I sold it.

Q Did you make any profit on it?

A No, I guess not.

Q When did you sell it?

A I cannot tell you.

Mr. Lum. Can you refresh your memory by looking up your records?

Witness. I have no record of when I sold it.

Q I show you receipt of September 18, 1908, from Joseph M. Byrne for $930.28 for a bond of $1000 for the Orange & Passaic Valley Traction Company; was that sold to you?

A I guess that was.

Q Did you pay that out of the undertaking business?

A I don't remember where I paid for it from.

Q Do you still hold it?

A No, I don't hold it.

Q Did you sell it?

A I sold it.

Q When?

A I don't know. I sold some holdings I had—all I had—to make an improvement on my stable property, three years ago.

Q Did you make any profit on this?

A Not on anything I sold. I was forced to sell it.

Q You used the money to improve your stable?

A Yes, sir.

Q In both instances?

A I think so.

Q Consolidated Gas stock and the Orange and Passaic Valley bond?

A I cannot tell you positively.

Q You didn't lose any money on it?

A I say my recollection serves me I lost money on all the stuff I had to sell at this time to get this money.

Q You used that in your stable?

A Yes, to make improvements.

Q If you paid for that out of the undertaking business, could you say whether it was out of your money that was in the undertaking business or out of the undertaking business money?

A It was out of my money if it came out of the undertaking business account.

Q Why?

A Because I must have had money in there of mine to pay it.

Q How did you get it in?

A I deposited much money in the undertaking account that didn't come from the undertaking business.

(Receipt dated June 6, 1907, from Eisele & King, marked Exhibit D 36 for identification.)

Receipt from Joseph M. Byrne, dated September 18, 1908, marked Exhibit D 37 for identification.)

Q Referring to the bill of January 2, 1911 (which is offered and marked Exhibit D 38 for identification) from the livery stable of William F.

Mullin to the Estate of P. M. Mullin, that represents the coach hire charges for that month, don't it?

A Yes, sir.

Q And was rendered by you as keeper of the livery stable to the Estate of Peter M. Mullin as the undertaking business?

A Yes, sir, made out by my brother Joseph.

Q And paid by you from the undertaking business?

A Yes, sir.

Q Do you still say that that was your money you were using in paying that bill?

A Yes, sir.

Q But you don't know how much was yours or how much was the undertaking money?

A I guess from the appearance of things it was all mine, from figures we found.

Adjourned to Monday, May 19, and Wednesday, May 21, 1913.

Master. Is there any evidence which shows what Mr. Mullin received or drew from the business for his personal services during the period that his mother lived and was the executor of Peter Mullin's Estate?

Mr. Lum. There is evidence he received $15 a week up to the time the agreement was made and after that he received three-sixths of the profits during the period that Mr. Joseph L. Mullin was with him, and that after that he received the total income after the support of the mother and children, up to the time of her death.

JACOB CONSTAM, sworn for defendants.

Direct examination by Mr. Tansey.

Q What is your business?

A I am president of the J. Constam Audit Company.

Q What is their business?

A Public accountants, auditors and systematizers, Essex building, Newark.

Q Did you have some work in your line to do in the matter of the case of Mullin vs. Mullin?

A Yes, sir.

Q What was the nature of that work; what did you do?

A Going over the accounts of the estate of Mullin.

Q Do you know when that was?

A In the winter of 1910-1911, I believe; I will refer to my report to refresh my memory.

Q When you went over the books, what did you do?

A I compiled the available records and rendered a report thereon.

Q What records did you use?

A All the records which were submitted to me, consisting of several day books, check books, bank pass books; that about covers it.

Q What was the period that you examined for?

A The period I was instructed to examine the books, was for the year—will you submit the report to me, to refresh my memory, to be exact?

Q I show you report from the J. Constam Audit Company to the Estate of Michael F. Mullin; you made a mistake; it was Peter M. Mullin, wasn't it?

A Yes.

Q Dated January 24, 1912, and I ask you whether that is the report made by you?

A Yes, sir, dated January 24, 1912.

Q Referring to that report, can you tell us what dates you examined the books between?

A Yes, sir, beginning August 1, 1900, up to August 1, 1911, a period of eleven years.

Q What items did you make examination for?

A The business done.

Q Did you tabulate it?

A Yes, sir, I did.

Q Have you your tabulations there in the report?

A Yes, sir.

Q Kindly refer to your tabulations which you have.

A We find business done for the eleven years ending August 1, 1911, amounting to $279,827.44, as per day book.

Q What do you mean by business done; how was that made up?

A By charges appearing on the day books submitted to us.

Q After you found the business done what else did you find?

A Then we tabulated the deposits.

Q The bank deposits?

A Yes, sir.

Q How much did you find the bank deposits to be?

A Inasmuch as the records relative to bank transactions covering the period of August 1, 1900, up to May 7, 1902, were not available, our records do not cover this period just referred to, and amounting to 21 months.

Q You mean that there was no bank deposit book available?

A Yes, sir.

Q And the bank deposit book you had covered only from 1902?

A From May 7, 1902, up to August 1, 1911.

Q In that period how much was the bank deposits?

A $227,756.01.

Q Did you in addition to that figure up the profits of the business?

A Yes, sir.

Q How did you go to work to figure that up?

A We figured out the cost with the assistance of your clients, Mr. Tansey.

Q Who were they?

A The Mullin family.

Q Mr. Joseph L. and Joseph J. Mullin?

A Yes, sir.

Q After you figured out the profits, how much did the profits amount to for the eleven years that you were examining the books, according to your schedules?

A $119,310.73.

Q Did you take into consideration the various items which went to make up the cost?

A Yes, sir, the unit cost was furnished us by the clients just referred to, and we did the clerical work, compiled it, and thereby arriving at a cost of $158,035.04; deducting this from the total charges referred to a few moments ago by me, of $277,345.77, you arrive at the profit of $119,310.73 just referred to by me.

Q Did you find any difference in the income of the various years that you made up?

A Yes, sir.

Jacob Constam, direct.

Q What were the years that were different?

A They all differed, there are no two years exactly alike.

Q Beginning with the first, what do you make the income from the first year?

Master. You mean gross business done?

Mr. Tansey. Yes, gross business charged for.

A For the year ending August 1, 1901, the amount of business done as to funerals amounted to $22,301.63; miscellaneous charges, such as are comprised in charges outside of funerals, such as hiring coaches only or hiring chairs and all that, amounts to $1805.10.

Q What was the total for the year? What was the amount to be paid?

A Frequently discounts were allowed, and in this case reducing the figure to $23,571.99.

Q To be paid?

A Yes, sir.

Q And the amount actually paid on account?

A $22,909.84.

Q In 1902?

A Funerals $22,950.76.

Q Miscellaneous?

A $1,378.40.

Q Amount to be paid?

A $23,794.90.

Q Amounts paid on account?

A $23,591.05.

Q 1903?

A Funerals $24,882.87.

Q Miscellaneous?

A $1,370.25.

Q Amount to be paid?

A $25,475.95.

Q Amount paid on account?
A $25,330.40.
Q 1904?
A Funerals $26,889.34.
Q Miscellaneous?
A $1,488.30.
Q Amount to be paid?
A $27,677.18.
Q Amount paid on account?
A $27,276.56.
Q 1905?
A Funerals $27,502.17.
Q Miscellaneous?
A $1,530.25.
Q Amount to be paid?
A $28,477.77.
Q Amount paid on account?
A $27,839.52.
A Funerals $26,253.16.
Q 1906?
Q Miscellaneous?
A $1,535.50.
Q Amount to be paid?
A $27,145.90.
Q Amount paid on account?
A $26,881.20.
Q 1907?
A Funerals $29,071.35.
Q Miscellaneous?
A $1,670.82.
Q Amount to be paid?
A $30,134.22.
Q Amount paid on account?
A $29,793.72.
Q 1908?
A Funerals $25,599.20.

Q Miscellaneous?
A $1,522.75.
Q Amount to be paid?
A $26,554.62.
Q Amount paid on account?
A $26,304.97.
Q 1909?
A Funerals $17,915.13.
Q Miscellaneous?
A $1,337.50.
Q Amount to be paid?
A $18,921.73.
Q Amount paid on account?
A $18,312.07.
Q 1910?
A Funerals $21,242.36.
Q Miscellaneous?
A $1,323.50.
Q Amount to be paid?
A $22,183.92.
Q Amount paid on account?
A $21,427.72.
Q 1911?
A Funerals $19,094.30.
Q Miscellaneous?
A $1,162.80.
Q Amount to be paid?
A $19,956.00.
Q Amount paid on account?
A $18.133.85.

Q So that you found less amount of business done in 1911 than you found in any other year except 1909?

A Yes, sir.

Q And in the last three years, 1909, 1910 and 1911, the business was less than all the other preceding years?

A Compared with all the preceding years.

Q After you had done this and figured up the profits, you have entered your findings on the last page, page 3 of the report?

A Yes, sir.

Q And you show there a total cost of the various articles figured $158,035.04?

A Yes, sir.

Q As against the price charged $277,345.77?

A Yes, sir.

Q Leaving a balance or profit of $119,310.73?

A Yes, sir.

Q Does that represent gross or net profit?

A It represents the cost of the merchandise and material.

Q That is without taking out the business expenses?

A Yes, no salaries.

Mr. Lum. Nor any other kind of expense?

Witness. It covers the cost price of the items enumerated in my report, such as coaches, outside boxes, caskets, hearse, bus, embalming, advertising, candles, use of candlesticks, clothing, chairs, opening graves, mass, gloves and sundry charges.

Master. And it does not include rent, fuel, light, labor, special services of any description or any other ordinary expenses of the business?

Witness. No.

Q In other words, out of that gross profit all the running expenses of the business would have to be paid?

A Yes, sir.

Q Aside from the cost of the material?

A Yes, sir.

Q Did you subsequently make a schedule of the checks used?

A Yes, sir.

Q As shown by the various check books?

A Yes, sir.

Q Did you make a report on that?

A Yes, sir.

Q I show you such a report, dated May 7, 1913, and ask you whether you can show from that the amount of checks drawn from the business account?

A Yes, sir. The amount of the checks withdrawn as per check books submitted to us was $253,423.35.

Q How does that compare with the amount of expense as against the total income of the business?

A You mean with regard to our report dated January 24, 1912?

Q Yes.

Master. Those checks withdrawn do not cover the same period; there is a difference of eighteen or twenty-one months.

Witness. Yes, there is a difference of twenty-one months; I will refer to that later on.

A As previously stated we show disbursements, as per check books amounting to $253,423.35; of course these disbursements just referred to contain all personal withdrawals as well as paying for merchandise and all that. We have subdivided the various disbursements into seven different captions.

Q What are the captions?

A We used the letter "U" for the purpose of specifying disbursements referring directly to

the undertaking business; that is to say, cost of merchandise, material, coach hire, salaries and all that—anything pertaining directly to the undertaking business; we used the identification mark "W. F. M." for withdrawals by Mr. William F. Mullin; another caption "W. F. M. & U", being joint withdrawals made on account of Mr. William F. Mullin as well as the undertaking business; in other words, certain bills could have been used in the undertaking business as well as by Mr. Mullin personally, where we couldn't draw the line fine enough.

Q What is the next caption?

A Another caption "Both", standing for withdrawals on account of William F. Mullin and the children. Another caption "Grace", being payments to Miss Grace Mullin. Last caption of "miscellaneous" being items not clearly defined. By the remark "items not clearly defined", I mean such items which could not enlighten us exactly where they are used; they may have been for the undertaking business, they may have been personal, and they may have been for some other use.

Master. That would include all items which you were not able to classify?

Witness. Yes, sir.

Q Under the undertaking caption what did you find the disbursements?

A The disbursements for the eleven years ending August 1, 1911, on account of undertaking, amounted to $142,340.59. In this connection I wish to state that the date available for the year ending August 1, 1901, covers only the period of August 2 to October 9, inclusive—then again, only one day, July 24, 1901—being approx-

imately one-fifth of one year, about ten weeks, are available, and in another part of my report I use the approximate means, four-fifths, for the purpose of positively getting at a full year's result. For instance, my report shows that the withdrawals on account of expenditures on account of the undertaking business for the year ending August 1, 1901, amounted to $2443; and thereto four times this amount of $2443, resulting in the figure of $9772, will bring the total disbursements for the year ending August 1, 1901, to about $12,000, which is practically in conformity with the result of the years for which the entire records were available.

Q And taking that method, what did you find as the total disbursements by check for the undertaking business as you arranged it, between 1901 and 1911?

A $142,340.57 is the aggregate of the available records; adding thereto this estimated amount of four times $2443, being $9772, brings the expenditures up to $152,112.57.

Q That is the total amount for the undertaking business?

A Yes, sir, as per available records.

Master. It is the total amount that this witness could identify as being exclusively for the business?

Witness. Yes, sir.

Q How does that compare, Mr. Constam, with your statement of January 24, 1912, on page 3, as to the cost of material &c.?

A Our report of January 24, 1912, shows an estimated cost of $158,035.04 as compared with our present figures from the records of $152,112.57, leaving a total discrepancy for the eleven years of $5,922.47, or an average of $538.41 per year.

Q That is the difference between your estimate of the amount of checks used for the undertaking business and the cost of all the undertaking business as estimated on page 3 of your report?

A Yes, sir. I wish to repeat that the first report, dated January 24, 1912, does not contain expenditures, such as salaries, which however, are contained in this amount just referred to in my report dated May 7, 1913.

Q Did you find in your report the amounts drawn by William F. Mullin in that time?

A Yes, sir; the amounts withdrawn by Mr. William F. Mullin during the eleven years, subject to the missing 42 weeks, was $83,703.03.

Q Did you find out what was withdrawn for the children by check in that time?

A The children withdrew in the same period just referred to, $9,588.86.

Q Have you some statement there of W. F. Mullin and the undertaking business?

Master. Would that $9,588.86 include any sums of money paid by Mr. William F. Mullin to his brothers or sisters in settlement of their shares in the estate of their father?

Witness. No, sir, these were for maintenance of the children.

Q Are you sure of that, Mr. Constam, or does it merely mean that those checks were drawn for their names?

A Between recess I would like to refresh my memory on that; I have a copy of those checks; I will have to refer to my original records; I may be mistaken.

Q So you want an opportunity to investigate?

A To re-examine my working papers.

Q The other schedule which you have relating to William F. Mullin and the undertaking business, how much was that?

A For the same period it amounted to $3747.82.

Q Why did you make it W. F. Mullin and the undertaking business together?

A Those were items which we were unable to charge directly to either of them; in other words, those were withdrawals made jointly, they may have been used by Mr. Mullin as well as by the undertaking business, such things as—I have a copy of the checks here which we have made—there is an item under date of October 14, 1901, for a check to the order of H. B. Claflin Company for goods to date $28.07; this was marked by the parties referred to, Mr. Tansey's clients, as U. & W. F. M., meaning undertaking and W. F. Mullin.

Q The next schedule which you find?

A The next schedule headed "Both", standing for joint withdrawals on account of Mr. W. F. Mullin and the children.

Q How much was that?

A $8,179.54.

Q How did that come about?

A Those were checks drawn in payment of bills used jointly by Mr. W. F. Mullin as well as the children.

Master. For what class of expenditures?

Q Was that for department store charges?

A Mostly department store charges.

Q Where the bills were not separated?

A Yes, sir, such as Stoutenburgh, Bamberger, Hahne or Plaut, such items as that.

Q What is you next schedule which you found?

A "Grace", being an item—during the year 1901—amounting to $317.

Q Was that on August 16, 1900, "Grace Coburn 1/8 share as heir of Estate of Annie E. Mullin against check deposited in this account 317"?

A Yes, sir, that is the item.

Q So that would be for a check settlement on the estate of her mother?

A Yes, sir.

Q Next schedule?

A The next, entitled "Miscellaneous", and previously testified to by me as not being clearly defined. I wasn't clear in my mind as to under which caption to charge it, and for that reason I have made a separate schedule of it, enumerated the check number, the date, to whose order, and such explanatory remarks as were found on the stub end of the check book.

Q What does the miscellaneous amount to?

A Miscellaneous amounts to $5,546.53.

Q And the total of these combined will foot up the total amount of withdrawals by check from that account in the bank?

A Yes, sir.

Q After you figured up the amount withdrawn by checks, what can you say as to the amount which was deposited in bank in that account?

A The deposits for the period which is shy twenty-one months in eleven years amounted to $227,756.01.

Q That was shown by this bank book?

A Yes, sir.

Q (*By the Master*) Were there any checks drawn which appear to have been used for the purpose of withdrawing cash from the bank, or were they all payable to some other person?

A When they were withdrawn for the purpose of being cash, they were always drawn for a specified purpose, they were marked; assuming

Mr. Mullin drew wages for John Dowd, one of the helpers, he would so state on the stub end of the check book.

Q *(By the Master)* What I mean is, suppose Mr. Mullin wanted cash to use for either his individual purposes or for the cash purposes of the business, were there checks drawn payable to his own order or to cash or in such a way that it was clear that they were used to withdraw cash from the bank?

A And if they were only for the purpose of withdrawal, without giving a specified purpose for it, they would appear under the caption of "miscellaneous".

Q (*By the Master*) Were there such checks?

Q I call your attention to the date of September 11, 1901, check 2764, marked "bearer" for Tom $10; have you seen such checks as that frequently or not?

A Yes, sir; this check here referred to by you was marked W. F. M., and in my mind clearly chargeable to Mr. W. F. Mullin.

Q You have charged "Both" here, L. S. Plaut & Co. for August first account, in August 1901, $14.78; is that where you marked them "Both"?

A That is one of the instances where they were marked "Both".

Q You didn't have the bills to separate the charges?

A No, sir, simply went by the stub entry.

Q When I refer to this bank book, I mean the bank book of the National Newark Banking Company, in account with the Estate of P. M. Mullin, beginning May 7, 1902, and ending September 6, 1905, with a memorandum "Balance transferred to new book"; do you refer to that book as your first start off?

A Yes, sir, this is one of the books.

Q You say there is a difference between the time noted in this account and the time when you began the account of twenty-two months?

A Yes.

Q The differences between August 1, 1900, and May 7, 1902?

A Yes, sir.

(Bank book referred to, just shown witness, heretofore marked D 1 for identification, marked Exhibit D 1.)

Q Let me call your attention to the item November 26, 1901, Bearer for deposit in Howard, $50.08, to whom did you say that referred?

A We charged that to Mr. W. F. Mullin, inasmuch as we have not made any reference in our accounting to the Howard Savings Bank deposits.

Q For instance, December 31, 1901, bearer for deposit in Howard, $599?

A We charged that to Mr. W. F. Mullin as a withdrawal from the business.

Q For instance, if you come to December 31, 1901, you have the item "bearer Lottie for January H. K. 1902 $70"; who did you charge that to?

A To Mr. W. F. Mullin.

Q Who is Lottie, Mr. Mullin's wife?

A Yes, sir.

Q Then where you have it charged here on December 31, 1901, "Bearer Grace for three girls board two weeks ending January 5, $18", who have you charged that to?

A This is one of the disbursements made for the maintenance of the children referred to by me and put under the caption of "children".

Q When you come to the item on December 10, 1901, "Hornthall & Co. for November account $31.23", to whom did you charge that?

A The cost of the undertaking business, "U" it is marked.

Q You have followed that plan all the way through in this account?

A Yes, sir.

Q I show you schedules dating from August 2, 1900, to July 31, 1911, and ask you what these schedules are?

A These schedules are a copy of the stub ends contained in the check books submitted to us when we asked for the available records by Mr. W. F. Mullin.

Q And did you then make copies of the stubs?

A Yes, sir, they were made under my supervision.

Q And afterwards those stubs copies were submitted to the defendants?

A Yes, sir.

Q And by them marked as to which items various accounts or statements belonged?

A Yes, sir.

Q And that is where you got that information from?

A Yes, sir, from that we tabulated.

Q After going over these accounts, how do you harmonize the total disbursements as shown by your check stubs with the deposits in the bank as shown on the books?

A We show deposits for the eleven years less one year and nine months, amounting to $227,-756.01; we show withdrawals for the same period as per pass book, which would be eleven years less one year and nine months, of $228,501.25. Inasmuch as we tabulated the calculations on account of the business done from the records, such as the ledger, we took the ledger and dug out from that the amounts credited as cash to

the purchasers—if I may use that expression—to the customers, tabulated those and found them to amount to $267,800.90; that was for the entire eleven years under investigation, and as previously stated, we found deposits for nine years and three months amounting to $227,756.01, thereby leaving an apparently undeposited amount of $40,044.89. This seeming discrepancy of some forty thousand dollars we seem to account for by the missing one year and nine months, for which no records were available. What I mean is this, the deposits amounting to $227,000 were compiled from the pass books which covered only a period of nine years and nine months instead of eleven years, being shy by one year and nine months; the apparent discrepancy between business collections as shown by the books and deposits as available of $40,000, can easily be accounted for, for the reason that the records for that one year and nine months was not available, or would just about approximate it.

Q (*By the Master*) Taking the relation of amounts deposited to the receipts for the period of which you have full records, and using that as a basis, the period of twenty-one months for which your record of deposits is not available, would about cover and correspond with the $40,000 difference betwen amounts apparently received and amounts actually deposited?

A Yes, sir. I will add further; our original report of January 24, 1912, shows collections for the year ending August 1, 1901, actual collections as shown by the ledger, of $22,909.84; for the year ending August 1, 1902, collections of $23,-591.05, making total for the two years of approximately $46,000. We show $40,000 missing.

Jacob Constam, cross.

Q (*By the Master*) What deposits do you show for that period of two years?

A For the last three months of the two years—do you ask what the deposits were as shown in the available pass book for those three months ending August 1, 1902?

Q (*By the Master*) Yes.

A The deposits covering the period of May 1902 to August 1, 1902, amounted to $6296.19, which is practically the difference between the $40,000 which I have shown and the total business of $46,000 done for the two years ending August 1, 1902.

RECESS.

Q What do you conclude from the investigation that you have made of the moneys taken in and the moneys deposited in bank, as to whether the amounts taken in from the business were deposited in bank or nearly so?

A They nearly jibe—agree.

Q Have you ascertained whether any of those sums which were marked as having been given to the children were paid on account of their interst in the estate?

A Yes, sir.

Q What have you found out about it?

A My schedule entitled "children" does not contain any such amounts as just mentioned by you.

Cross examination by Mr. Lum.

Q Did you in those figures you have just given and in this statement you made, take the sum of all of the figures found in this bank book in the way of deposits?

A Yes, sir.

Q Regardless of what source they came from, or did you assume that they all came from the undertaking business?

A I have taken the figures as they appear in the bank pass book marked Exhibit D 1.

Q And you assume that all of the moneys represented by these deposits come from the undertaking business?

A Yes, sir.

Q Did you make any effort to ascertain what certain particular sums were or from what source they came?

A No, sir.

Q Then in September, 1904, referring you to the first deposit above the red line on this page, this item of $5450, you simply assumed that that came from the undertaking business, did you?

A Yes, sir, had no records to show the contrary.

Q Of course if it was shown to you that many thousands of dollars of the money deposited in this book did not come from the undertaking business, that would in turn affect the value of your figures all the way through, would it not?

A It would simply affect my figures in that respect, that there was less deposited than the pass book shows on account of the undertaking business.

Q That would in turn affect your comparisons with the other estimate that you made?

A Yes, sir.

Q Do you know who made up the list of checks, that is, who decided under what letter they should go, whether they should go under "U" or "W. F. M."?

A What I am told.

Q You know nothing about it personally?

A They were furnished me that way by Mr. Tansey's clients; we merely did the mathematical part.

Q You have no knowledge as to the accuracy of any of those figures?

A No, sir, I wouldn't testify to that.

Q Of course you have no knowledge at all as to what amounts were paid by cash?

A No records there, no, sir.

Q Nor what amount was taken in by cash? This does not purport to touch any of that?

A My records are merely based on the available records, consisting of a check book and bank pass books; the only records which were submitted to me.

Q (*By the Master*) You took the actual records of the business done and charged for, didn't you?

A There was no cash book kept, the only record which in my opinion was absolutely accurate was the day book or these books here (ledger) recording funerals and miscellaneous business done, but there was no cash book in a commercial sense. The ledger is accurate also, which is made up from the day book, and the ledger also shows the actual cash transactions relative to receipts. It credits the customer with the cash paid.

Q Taking the year 1911 in your first statement, you show an amount taken in as $18,133, do you not?

A Yes, sir.

Q Will you check up these totals with me? For the years 1911 you show under the head of undertaking $10,453, do you not?

A —Disbursements—where you have reference to receipts.

Q Follow me, if you will. Put down $10,453; that is the amount you show as charged against the undertaking business in that year?

A In 1911, yes, sir.

Q Taking the amount for W. F. M., you show $6,236.55, do you not?

A For the year 1911.

Q Put that down.

A Yes, sir.

Q On account of children you say $365?

A In 1911, yes, sir.

Q On account of W. F. M. & U. you show $259.29?

A Yes, sir.

Q On account of "Both", you show $694.81?

A Yes.

Q And you total amounts to what?

Master. Miscellaneous.

Witness. Miscellaneous $332.36. Total $18,341.96.

Q So there was more paid out in the year 1911 than was taken in, was there, with checks, regardless of cash?

A If you want a mathematical result, it would show that, but it does not recognize the initial balance nor the determinating bank balance, nor the amount collected on account of outstanding accounts, or accounts outstanding at the terminating period.

Re-direct by Mr. Tansey.

Q When you spoke about not having any records, did you forget the records in the day book of the cash paid?

A Yes, but that isn't what I would term a cash book.

Q It would show, however, in the day book cash paid, wouldn't it?

A Yes.

Q On various funerals?

A Yes, it shows the payments.

Q I call your attention to the entry on August 11, 1903, page 582 of the day book, the entry of M. H. funeral, the charge $125.30, with the mark "Paid" on it?

A Yes, sir.

Q Such records as that are all the way through the day book?

A Yes, sir. They are not compiled in cash book form, but they are there.

Q But you got such items as that from the day book?

A Yes, sir.

Q And that is where you got your amount collected from?

A Yes, sir.

Mr. Lum. Mr. Constam was paid out of the estate and it was understod particularly that we were to have the result of what he did, as well as Mr. Tansey. This long statement which was handed to us this morning for the first time, I would like to reserve the right to cross examine further on it after I have examined and checked it.

Master. I will reserve that right to you.

Mr. Tansey. I have hardly had an opportunity to go over it myself.

Q These schedules running from August 1, 1900, to July 29, 1911, are the schedules which you made up your bank drafts from?

A Yes, sir.

Q By check.

A Yes, sir.

Q And the memorandum in lead pencil on these schedules "U" or "Both" or "W. F. M." or "C. H. R." are the memoranda your referred to as guiding you in making up the schedule?

A Yes, sir.

Q "W. F. M." meaning William F. Mullin?

A Yes, sir.

Q "U" meaning undertaking?

A Yes, sir.

Q "C. H. R.," the children?

A Yes, sir.

Q And "Both" of course meaning the undertaking and William F. Mullin?

A Yes, sir.

Q Or meaning William F. Mullin and children?

A Yes, and "W. F. M. & U." meaning Mr. Mullin combined with the undertaking business.

JOSEPH L. MULLIN, sworn for defendants,

Direct examination by Mr. Tansey.

Q Are you a son of the later Peter M. Mullin?

A Yes, sir.

Q What is your business?

A Undertaking business.

Q Where are you engaged in the undertaking business?

A 549 Orange street, Newark, New Jersey.

Q How long have you been an undertaker?

A About twenty-three years.

Q Did you work in the business of your late father after his death?

A Yes, sir.

Q How long?

A About five years.

Q And was William F. Mullin there at that time?

A Yes, sir.

Q What years was that work done by you in?
A About 1891 to the early part of 1896.

Q Have you since 1900 done any work in that business?

A Yes, sir.

Q Upon what occasions?

A Whenever William F. Mullin was away from his office, they telephoned to the stable for me; at that time I was connected with the stable for him and went down there and took care of the business when he was away.

Q What did you do?

A Made arrangements for funerals, sold the stock, sold caskets, embalmed bodies, attended funerals, everything in connection with the business, with the burial of any body.

Q Were you familiar with the prices of goods kept in stock by William F. Mullin?

A Yes.

Q Were you familiar with prices of caskets?

A Yes, sir.

Q And coffins?

A Yes, sir.

Q Were you familiar with the price of suits?

A Yes, sir.

Q And the various accessories to a funeral?

A Yes, sir.

Q Do you know of your own knowledge anything as to the profits on the stock kept or sold by Mr. Mullin during the time you were there?

A Yes, sir.

Q And do you know about the profits on the stock sold since 1900?

A Yes, sir.

Q How do you know about that?

A From seeing the actual goods, from selling some of them at different times, attending the funerals and knowing just exactly what was used by selling them myself on some occasions, and by attending the funerals and knowing the goods.

Q You know something about running the business of undertaking, Mr. Mullin?

Master. He has testified that he has been in the business, both in the employ of his brother and in business in his own behalf. I will assume that Mr. Mullin knows something about the undertaking business.

Q What have you to say as to the necessity of expenses as shown on the report of DuBois, accountant, on page 11, for drinks, cigars, dinners, fees, &c., $30 a week?

A I wouldn't question that; I don't know. It is customary with a great many undertakers to entertain people; it would cost $30 a week if he did a big enough business; I don't know that it is necessary; it is done on occasions; there are times it is not done.

Q What have you to say of the item of $250 for upkeep of candlesticks, pedestals, supplies, &c., by the year?

Mr. Lum. That is purchase of new goods also replace old ones.

Q It says upkeep and consumption of supplies, printing, stationery, rugs and furniture?

A I wouldn't question that; that is all right, I do not think there is anything wrong about that paricularly.

Court. You think that is a fair estimate for such incidental expenses?

Witness. Yes.

Q As to the general calls for telephones, telegrams, postage &c., $200, what have you to say about that?

A I don't know anything about that; it seems a little high; it is possible.

Q Are those telephones, telegrams, postage &c. charged to the funerals, or are they—

A All telegrams are charged on funeral bills.

Q It would not then be an incidental charge in the business?

A No.

Mr. Lum. There is no charge on Mr. Mullin's books for telegrams.

Master. He is only testifying to the custom.

Q What about "expense Mr. William F. Mullin answering calls, $1 per day"; what would you say about an expense of that kind?

A I don't doubt that, I don't question that.

Q Will you kindly look at the various items on Exhibit D, page 11 of the account of DuBois & Company, and give your information as to the reasonableness of each charge?

A The first, "supplies", I wouldn't question at all, for upkeep $250.

Q "Wages of 2 men $17 per week"?

A You could cut off at least $9 of that—$8 of it; he employs one man and the other man would be an extra man that he would pay a dollar or dollar and a half when he would use him.

Q The next item, "Wagon and horse"?

A Wagon and horse 150 funerals at $4 a funeral, that is wrong; there is no cost to any undertaker for the use of a horse and wagon to attend to his undertaking business with.

Q The next one, "light and heat"?

A I don't know anything about that.

Q "Advertising"?

A Advertising is necessary.

Q "Programs, donations, tickets &c. $500 a year"?

A That is something that runs up into money, I don't question that.

Cross examination by Mr. Lum.

Q How long were you in association with your brother after your father's death?

A Six years.

Q Continuously?

A Yes, sir.

Q And then you went to Morristown?

A Yes, sir.

Q You refused to go on longer under the agreement with your mother and brother, did you not?

Objected to as wholly unimportant in this case.

Mr. Lum. I think I may be able to cross examine somewhat as to this witness's knowledge.

Master. I will exclude that question.

Q Did you refuse to continue under that agreement?

A I did not.

Q You left in what month?

A First of April or May, I am not sure which.

Q Was the agreement under which you were proceeding completed when you left?

A The agreement had been running a year and was going on the second year.

Q Was it the end of the second year?

A I presume it was about the middle of the second year.

Joseph L. Mullin, cross.

Q And then you opened up an undertaker establishment of your own in Morristown?

A Yes, sir.

Q How long did you have the Morristown establishment?

A Two years.

Q And how did that end?

A I left there and came back to Newark.

Q How many funerals did you have during those two years?

A I should judge I had about—

Mr. Tansey. Objected to.

Master. I will admit the question.

A About 65 funerals.

Q The business at Morristown, was it successful financially?

A No, sir, not altogther successful.

Q Quite unsuccessful, wasn't it?

A Yes, sir.

Q Did you ever figure the profit on the average funeral at Morristown?

A Yes, sir.

Q How much was it?

A The average funeral at Morristown would be about the same as here?

Q About how much was that?

A About $80.

Q You are quite sure of your figures of $80 a funeral?

A Yes, sir.

Q Which is apt to be more accurate, that figure or the figure you gave Constam?

A Mr. Constam's figures are accurate.

Q Do you realize that there is a difference of approximately $20,000 between the figures that you gave Constam and the figure of $80 a funeral?

Objected to.

Q Your figures of $80 a funeral, on 1744 funerals, makes $139,520 profit; according to Constam's figures, which it is reported that you gave to him, the profits amount to $119,310, some $20,000 less; which guess do you think is the more accurate?

Objected to.

Master. I understand the 1744 funerals are the aggregation of funerals as shown in the Constam report?

Mr. Lum. Yes, sir.

Master. If they are, Mr. Lum's question is entirely proper.

Mr. Lum. The aggregate receipts going to make up the total sum of receipts used in the DuBois report made up the sum of $277,000 prices charged.

Master. Mr. Tansey' objection is based on the use of the figures of 1744 funerals; where did you get that number?

Mr. Lum. That number was taken from the testimony of Mr. Mullin and Mr. DuBois as to Exhibit B of the DuBois report, in which he showed that from August 1, 1900, to August 1, 1911, which is the time exactly on which the Constam receipts are based, of 1744 funerals, which is the number of funerals shown on the books.

Q At any rate, your business in Morristown was unsuccessful?

A Yes.

Q You think that the average price charged for funerals there was the same as you figured for us this morning?

A About the same.

Q Then you opened up, did you, an undertaking establishment on South Orange avenue?

A Yes, sir.

Q How long did you run that?

A I only kept it open two months.

Q Was it successful or unsuccessful financially?

A It couldn't be successful in two months time.

Q Then you closed that place?

A Yes, sir.

Q That was when?

A About 1900.

Q And then were you employed by Mr. William F. Mullin?

A Yes.

Q In charge of the stable?

A Yes, sir.

Q You were provided with a house and given a wage of $20 a week, were you?

A Yes, sir.

Q You worked for your brother at that rate for how many years?

A For about nine years.

Q And then the wages were increased by $1000 a year?

A Yes, sir.

Q The change came in 1906, did it not, of a $1000 a year more?

A It may have been that; that would only make a difference of a year.

Q What were your duties at the stable?

A Manager.

Q And it was a pretty extensive establishment, good sized stable?

A Yes, sir.

Q And that took quite considerable of your time?

A Yes, sir.

Q And your only connection during that time with the Mullin undertaking business was when Will was away or for some special reason you were called to the place?

A When he was away and when he was working away or had more than one funeral I went down town and took care of the funeral for him.

Q When you say you took care of funerals, just what did you do?

A I embalmed bodies, made arrangements for the funerals and ran the funerals.

Q How many in the course of a year did you take care of to that extent?

A Probably twenty-five anyhow.

Q Then you took care on an average, you think, of about one out of every six or seven, do you, of the funerals, adults and children?

A I say about twenty to twenty-five. I don't say I took care of them completely; I say I had some connection with the funerals, and some of them, took care of them all the way through.

Q You had some connection with a great many of the funerals because you were in charge of the carriages most of them, were you not?

A At all the big funerals, yes.

Q And at most of the big funerals that was the sum total of your connection with it?

A No, sir.

Q Do you think that you took care of a funeral in its entirety on an average of five cases a year?

A Yes, sir.

Q Will you name to us any five funerals you took care of in the year 1909 and 1910, in entirety?

A I cannot call them by name.

Q That is not many; I am only asking you to name five.

A I cannot call them by name; I could recall more than five during a month where Mr. Mullin was away.

Q Mr. Mullin, did you ever fix a price on a mahogany casket for your brother Will?

A No, sir.

Q Not one?

A No.

Q While you were managing the livery business I don't presume that you kept track of the prices of mahogany caskets, did you?

A Yes, I did.

Q Did you study the catalogues at nights?

A No, not at night, didn't have to.

Q Did you study the catalogue during the day time?

A I very often looked over it.

Q Have catalogues up at the livery place?

A I was familiar with the prices.

Q Had catalogues up at the livery place?

A No, but had access to the catalogue in Lafayette street.

Q You had access to everything entirely at Lafayette street, didn't you?

A Yes.

Q All books and bills were always open for you, weren't they?

A Yes, sir.

JOSEPH J. MULLIN, sworn for defendants.

Direct examination by Mr. Tansey.

Q Mr. Mullin, where do you live?

A 105 Washington street, Newark, N. J.

Q What is your business?

A Undertaker.

Q How long have you been in business as an undertaker?

A For myself twenty-two years.

Q And what was your other experience outside of your own business?

A I worked in the undertaker business before that for twenty-four years.

Q And have you bought funeral supplies like caskets, boxes, etc?

A Yes, sir.

Q And you have estimated on the cost of funerals?

A Yes, sir.

Q And for a number of years you have been at that?

A For forty-four or forty-five years.

Q Were you called upon in this matter to make an estimate of the prices charged in the business of the Estate of Peter M. Mullin?

A Yes, sir.

Q Did you make such an estimate?

A In conjunction with my nephew, Joseph L. Mullin.

Q I show you book, Exhibit D-42, also a book Exhibit D-43, and ask you if you have seen those books before?

A Yes, sir, I have.

Q Those books contained accounts of caskets, boxes, etc., in the business of the Estate of Peter M. Mullin?

A Yes, sir.

Q And what have you done with those statements before this time?

A I went over several items in conjunction with my nephew, Joseph L. Mullin, and we agreed on the several prices.

Master. What period does this relate to Mr. Mullin?

Witness. I can't give you the exact date until I look at the book. I don't know the period really; I can't say.

Mr. Tansey. Does your Honor want the witness's information on this?

Master. If the witness is going to testify on charges that he has reviewed, I should like to know what period it relates to. It might have been before 1901; he says it relates to the Estate of Peter M. Mullin.

Mr. Tansey. It was beginning August, 1900 —these books begin August, 1900, and August, 1911.

Q You say you and your nephew, Joseph L. Mullin, estimated the costs?

A Yes, sir.

Re-direct examination by Mr. Tansey.

Q By the way, Mr. Mullin, I don't think I asked you about this: Taking the statement of DuBois, page 111, the estimated yearly business expense, Exhibit D, we have an item of estimated expense, drinks, cigars, dinners, fees, etc., $30 a week, total $156.00 a year. What do you say as to the reasonableness of such a charge as that?

A I consider it wrong

Master. Why do you mean wrong; wrong to charge it or the estimate is too high?

Witness. I don't know how to answer that.

Master. Just tell us what you think about it. court.

Witness. In my experience I never had such an expense, drinks or cigars in connection with funerals.

Master. That answers it; from the best of his experience.

Witness. Yes, of forty years of business.

Q As to the wagon and horses, 150 funerals at $4.00; that's for extra attendance at funerals; what have you to say about that charge?

A I consider that wrong too; that I have never paid—for the use of horse and wagon for funeral work to a liveryman.

Q How is that obtained?

A The horse and wagon?

Q Yes.

A From the liveryman with which you deal.

Q Don't you have to pay for it?

A I never paid for it.

Q Why not, Mr. Mullin?

A The trade we give to the livery—horses and coaches—is considered sufficient to offset that.

Master. Then it is your experience it is not customary for the liveryman to charge the undertaker for the use of a horse and wagon for the errands of the case?

Witness. Yes, sir.

Q Do you know whether Mr. Mullin paid wages to two men at $17.00 a week each?

A No, sir, I do not know.

Q Now as to the expense of transportation, meals and answering calls, one dollar per day—William F. Mullin—Can you say as to the reasonableness of that charge as a day's expense?

A I consider it very high.

Q For what reason, Mr. Mullin?

A From my own experience; I never had such expense for each funeral—two dollars a funeral.

Q In estimating 150 funerals a year and over?

A Yes, sir.

Q Are those generally charged against the business or are they charged against the funeral—transportation, meals, answering calls?

A I can't understand just what those items mean; I don't use them in my business.

Q Are you supposed to pay for the meals of the men or man who is running the business?

A No, sir.

Q Do you pay him wages?

A Generally paid wages.

Q And he gets his own meals, is that it?

Master. That isn't important, Mr. Tansey, and does not relate to such meals as that. It undoubtedly relates to extra meals while out in the service.

Mr. Tansey. I am asking him whether this is—

Master. He says he doesn't know.

Re-cross examination by Mr. Lum.

Q Mr. Mullin, you have one man in connection with your business?

A Yes, sir, one man.

Q And you pay him about $17.00 per week?

A No, sir.

Q How much do you pay him?

A I pay my assistant now $16.00; raised from $14.00.

Q You make a charge on your bills and in connection with your business—your funerals—for certain extras as has been done by Mr. William F. Mullin?

Master. Mr. Lum I don't think that is fair. You can ask him in a general way, but I think—I feel he is entitled to some privacy and some protection as to his own details of his business. That won't help us on this.

Mr. Lum. Not unless the expense he figures as profits on funerals is to be considered. He says this: He says in giving his testimony he bases his figures on his own business as well as on the books of Mr. William Mullin.

Master. That only relates to his general qualification to testify as a practical expert. It was all right to ask him the quality of his business, but I think the details of his business, what he charges and what he pays his own help are matters of his own concern and ought not to be made a record in this proceeding.

Mr. Lum. But if he charges in his bills for items such as carting services etc., he might very easily get a larger profit than Mr. William F. Mullin, who doesn't make any charge for this service.

Master. It isn't a question as to how much profits he made in this business a year. I should have ruled the question out had any objection been made to it.

Q Mr. Mullin, do you still own your own wagons?

A Yes, sir.

Q And you pay for all your out-of-town teams?

A. Some of it; it depends on distance.

That's all.

GRACE COBURN, sworn on behalf of defendants.

Direct examination by Mr. Tansey.

Q Mrs. Coburn, you are a sister of Mr. William F. Mullin?

A Yes, sir.

Q And for a number of years you have had the children, your younger brothers and sisters to board with you?

A Yes, sir.

Q Do you know what board was charged for each?

Mr. Lum. This has already been testified to before Vice Chancellor Stevens, and testified to on just this line of question.

Mr. Tansey. I don't think so.

Master. Have I got to read all the testimony taken before Vice Chancellor Stevens?

Mr. Lum. I presume not; it is very little.

Witness. I got $15.00 a month up to the time this case started, then the court estimated $5.00 a week for each child; before that I got $15.00 a month for each child.

Q And when was it you were getting $3.00 a week?

A Before the court started this case—$15.00 a month, $3.75 a week.

Q Do you know how many years that continued?

A Well this has been going on only three years and continued up to that time and the court ordered $5.00 a week.

Q When did your mother die?

Master. That is all in the evidence.

Witness. Thirteen years this July.

Q And when did you have the children to board with you?

A Next May after my mother died.

Q How long did they continue?

A Well up to last month.

Master. How many children did she have?

Q How many children were there with you?
A Four all the time and sometimes five.
Q Who were they?
A Bella, Anna, Marie and Peter, and sometimes James.
Q Were you paid for board for James?
A No, sir.
Q You were paid board for Bella?
A Yes, up until she got old enough to pay her own.
Q How were the payments made to you, by Mr. William F. Mullin for their support?
A Sometimes Peter's board was paid six months in advance, but the rest were paid by the month.
Q By cash or how?
A Check.
Q Do you recall any payments in cash for their board?
A Never.
Q As to their clothing, how was that paid for?
A By check.
Q And was that paid to you?
A No, sir, everything was sent C. O. D. to the office.
Q And from there—
A —He would send the check to the place where they came from.
Q Do you know as to how they received money for vacations or things of that kind?
A Well, if they got too much clothes they got no vacation.
Q Well I am asking now how is the money for vacation given when they get any?
A Not more than $50 in a check.
Q Not in cash?
A No, sir.

Q What do you mean by too much clothes?

A If he thought they got more than they ought to have, they would have to give up their vacation money.

Q Do you know, Mrs. Coburn, how much by the year the clothing of these children cost?

A Well no, I don't know just how much.

Q Well have you any means of estimating?

A I know they got very little clothing, but I don't know how much they were. His charges are on the book; maybe I could tell you that way.

Q Do you know how many dresses each of the girls got a year?

A Well they would get about four.

Q And what would be the average cost of those dresses?

A Summer dresses would only cost from $3.00 to $4.00, and of course winter dresses are more expensive, they would come generally in suits, $12.00 or $14.00 a suit.

Q What would be the average now between the cheap dresses and the more expensive suits that they would spend by the year?

A I never counted just how much was spent by the year.

Q You say there are four dresses each one would get by the year and they would run from $3.00 for summer dresses to $12.00 for winter suits. Will you give us the average, about what they would cost by the year?

A Well it didn't cost over $100 a year to dress them.

Master. Each one?

Witness. No, that's between the three youngest. The other one has been working a couple of years and old enough to take care of herself a couple of years before that.

Q Does that include shoes, Mrs. Coburn?
A Yes.
Q And underwear?
A No, underwear would be separate.
Q How much would that figure up in the year?
A About twenty-five dollars.
Q Now as to hats?
A Well that wouldn't cost more than $25.00 either for the whole year for the three girls.
Q So that you figure that $100 for dress and shoes, you said?
A Yes, sir.
Q And twenty-five dollars for underclothing?
A Yes, sir.
Q And $25.00 for hats, a matter of $50.00 for the three girls for the year?
A Yes, sir.
Q Now as to Peter, what would his expenses be?
A Well Peter would get about two suits a year.
Q How much would that average?
A Of course he was smaller in the beginning—average about $9.00.
Q And what would be his shoes?
A Oh that would be around $15.00.
Q How many pairs of shoes would he get?
A He would have to have about five pairs a year.
Q That would average how much a pair?
A $2.50 to $3.00.
Q Now as to hats?

Mr. Lum. We have had the hats.
Mr. Tansey. Not for Peter.
Witness. His hats wouldn't cost over $4 or $5.00.

Q Altogether during the year?
A Sure.

Q That's $18.00 to $20.00 for suits, $15.00 for shoes, $5.00 for hats and—

A Yes, sir.

Q —and what for underwear?

A Well the underwear, up until he was seventeen years old would cost about $6.00 or $7.00 a year, and after that I didn't know what it cost because he didn't get it new.

Q He didn't get it new?

A No, he had to wear Willie's.

Q How long did that continue?

A Ever since he has been seventeen until he got old enough to work for himself.

Q What about his shirts?

A About $5.00 during the year.

Q So that his total expense runs up to about $60.00 a year; that is outside of his board?

A Yes, sir.

Q Now what was spent on the girls for schooling, do you know?

A I don't know those bills.

Q Do you know what was spent on Peter for schooling?

A Two years at St. Benedicts.

Q What schooling did the girls get?

A They were at St. Vincent's Academy.

Q How long?

A Seven or eight years.

Q It has been estimated here that each child cost about $500 a year. What have you to say about that Mrs. Coburn?

A On my part of it they didn't; I don't know what the schooling cost, but their schooling and taking care of them didn't cost that much.

Q You had a full, fair knowledge of what they wore etc?

A Oh yes, for I bought it.

Q Now in case you were asked to dress them yourself at the price which you have stipulated, could you have dressed them as good as they were dressed during that time?

A At the same price which you have named?

Master. That is exactly what she has testified to; dressed as they were cost so much a year and she bought it. Of course that means if she thinks they could be dressed exactly that way for exactly that price.

Mr. Tansey. I didn't understand her to say that.

Witness. I had to buy the things to suit the prices I was allowed to have.

Q Who told you about the money you were allowed to have?

A Mr. Mullin.

Q What did he tell you would be allowed to have?

A He would tell me just how much to pay for each dress, and then I would pay pretty near that or a little cheaper.

Q What did he tell you to pay?

A If he told me to pay $4.00 or $5.00 for any, and I should go above that he would send it back.

Q Did I understand you to say that you bought Peter's clothing for him too?

A Up until he was fifteen.

Q Then you know from that the prices that were paid?

A Yes, sir.

Q And after he was fifteen, who bought his clothes?

A Himself.

Grace Coburn, cross.

Cross examination by Mr. Lum.

Q In the year 1902, how much would you estimate was spent for the three children?

A That's the year my mother died, isn't it?

Q No that's two years later.

A Well I don't know just how much that year, but it was always about the same.

Q About how much in your judgment did it amount to in a year?

Mr. Tansey. Did you say the year?

Mr. Lum. Expended for the support of the children in the year 1902.

Mr. Tansey. Including schooling?

Mr. Lum. I cannot make it more clear. I said the amount expended for the children in the year 1902.

Witness. I don't know what they charged at the school while they were there, but they were only home during Christmas time and during the summer.

Q Did the board continue fifteen dollars a week for the girls?

A Up to the time of this case.

Q Are you sure of that?

A Not while in school, only the time they were home.

Q Do you recall being asked before Vice Chancellor Stevens what had been contributed by William F. Mullin for the children, and you answered $15.00 for Peter and $5.00 for the girls, and then he raised it to $20.00 when this case started?

Master. When you say $20.00 you mean $5.00—

Mr. Lum. I call your attention to the fact to the time this testimony was given no order had been made by the Court for the payment of any amount.

Mr. Tansey. No that's not true, an order had been made at that time; it had been running from the preceding fall.

Mr. Lum. This testimony was taken June 12th.

Mr. Tansey. And the order was made October or November 1912.

Mr. Lum. That can be subject to verification; I don't recall it.

Q You don't know the amount that Peter charged at Marshall & Ball and other stores, do you?

A I knew when he got any clothes; we had to telephone and ask permission to get them.

Q Did you go with him?

A No not after he was seventeen; up to when he was sixteen.

Q How old is he now?

A Twenty-one last month.

Q You say the clothing was sent to the office C. O. D.?

A Yes, sir.

Q Were you present always when clothing came?

A I don't live up there.

Q How do you know whether Mr. Mullin paid by check or cash was something sent?

A I know everything was paid by check.

Q How do you know?

A He never paid cash; I lived long enough with him.

Q When did you cease to live with him?

A About twelve years now.

Q And your statement that everything was paid by check was made on your understanding as to his course at the time you lived with him?

A Yes, sir.

Master. Are you the oldest daughter?

Witness. Yes sir.

MARIE M. MULLIN, one of the defendants, sworn.

Direct examination by Mr. Tansey.

Q Miss Mullin, you are a sister of Mr. William F. Mullin?

A Yes, sir.

Q And one of the defendants in this suit?

A Yes, sir.

Q Your brother William paid your board for some time at your sister's?

A Yes, sir.

Q When did you cease living with your sister?

A Not quite two months ago when we lived down town.

Q That is Mrs. Coburn?

A Yes, sir.

Q And during that time did Mr. Mullin also pay for your clothing and schooling?

A You mean during the full term?

Q I mean during the time from the death of your mother up to the beginning of this suit?

A Yes, sir.

Q And after a certain order was made by the Court, he paid you $5.00 a week?

A Yes, sir.

Q Under that order?

A Yes, sir.

Q Now during that time, Miss Mullin, do you remember how much it cost you to get clothing during the year?

A Of course it was different in different years. When I was younger it was less than when I was older. About 1907 I began to buy more clothes and I paid more for them then when I was younger.

Q From 1906 on, do you know how much it cost you during the year to buy clothing?

A Well that would be different in different years. If I got an expensive suit one year I would wear it two years.

Q Do you remember how many suits you got during the year?

A Generally got a winter suit.

Q What would be the cost of that?

A It would average about—well as I said before, that would be different in different years. Do you want me to take just one year?

Q The fair average price?

A Probably twenty-five dollars.

Q And would you get another suit besides?

A I would possibly get a school dress.

Q Well, what would that cost you?

A Probably from $10.00 to $15.00.

Q What would be the other dresses that you would get for the year?

A I would get a spring dress of some kind costing about generally—about $15.00.

Q And what other dress?

A Then summer dresses would average about $9.00 or $10.00.

Q Each?

A Oh, no, all together, except in cases where made, and then the dressmaker's bill would come in.

Q Now you have a winter dress and school dress, spring dress and some summer dresses?

A Yes, sir.

Q Did you get any dress for the fall?

A I generally have the spring dress for that.

Q So that you limited your dresses to the amount that you are now telling?

A As far as I remember, yes, sir.

Q Now your hats?

A I got a winter hat.

Q How much would that cost?

A That I could not say because the bills were generally sent straight to the office from the milliners.

Q Did you price the hats at all?

A I didn't until about two years ago, because I knew that the milliner had been making hats since we were children and knew just about what to furnish.

Q And the hats that you priced two years ago, how did they compare in prices and quality with the other hats?

A Higher.

Q How much higher?

A Probably double.

Q What were the hats then when you priced them?

A That hat I believe was $10.00.

Q Then you think that the hats formerly purchased for you would run about $5.00?

A I believe so.

Q How many hats of that kind would you get during the year?

A I got a winter hat and I would get a spring hat for the summer.

Q Would that be as expensive as the winter hat?

A I should judge so; and then a very cheap school hat for the winter, and probably an every day hat for the summer; that would be four hats.

Q Two hats now you figure would be $5.00 a piece, and one hat for the summer would be how much?

A You mean every day.

Q Yes.

A That might be—that one might be $3.50.

Q What would be this cheap school hat that you speak about cost?

A $1.50, something like that, probably $2.00.

Q Then your total hat expense would run to about $15.50 in a year?

A About that.

Q Now as to your shoes?

Master. We don't care for details. Have you any idea what it cost you for shoes during the past ten years?

Witness. I will have to stop and think a minute.

Master. Yes, take your time and think.

Witness. (Figuring). I should judge in ten years about $150.00; that averaging about $16.00 a year, possibly more than that, but I should think that would be a good average.

Master. Now you have to have in addition to outer garments—coats, hats, shoes and dresses—you had to have outside wraps and underclothing. Are you able to tell us about what you think your supplies of clothing of all sorts cost a year?

Witness. Well the years I get a suit I generally don't get a dress—

Master. Yes, I understand, but every other year it would be more expensive than the other?

Witness. Suppose I add on two this year—these additional things—is that all right?

Master. Yes.

Witness. I should say about $22.00 probably, counting gloves and the other extras. That's counting probably, as I say, for the last year or two.

Master. In addition to what you said?

Witness. That's the last year or two; about that, I didn't get these extra things when I was younger.

Master. Let us find out how long you were likely called a child. How old are you?

Witness. Twenty-four.

Master. Then from the time of your mother's death in 1900 you were over eleven years old?

Witness. Yes, sir.

Q Now as to cash payments Miss Mullin, do you know whether payments were made for you in cash by Mr. Mullin?

A I don't know for sure, I know he paid me in cash $5.00 a month when I was going to school—high school—for lunch, car fare and spending money.

Q Not by check?

A No, sir.

Q And do you know as to any other payments he made to you?

A In cash?

Q Yes.

A Possibly three or four times a year I would get money for theatre tickets or some little odd thing of that kind.

Q How much would that amount to?

A Ten dollars at the most.

Q During the year?

A Yes, sir.

Q Now about vacation money?

A Check.

Q —— was that ever paid to you in cash?

A I never remember having received it in cash.

Q When do you remember receiving vacation money?

A Well every year he advanced vacation money until the year my sister Bella was married.

Q When was that?

A I believe 1909.

Master. What do you mean by vacation money?

Witness. Generally he would give us money to use for daily trips or to go away for about two weeks.

Master. In the summer?

Witness. Yes, sir.

Q In 1909 did you get a vacation?

A Why that was the year my sister was married and I wanted a dress, and he said I couldn't have that and spending money. He would give me money and I could use it for what I wanted, and I got a dress.

Q How much money did you get by the year for vacation?

A Twenty-five dollars that year.

Q Is that the average you got each year?

A About that, and occasionally towards the end of the summer we would get $25.00 or $30.00 more for all of us.

Q Do you know as to the amount expended among the other children?

A For what?

Q Your other sisters for yearly expense?

A I think the average may have been lower.

Q For the others?

A Yes, sir.

Q Since 1909 has the charge been for a less number of children?

A Yes, sir.

Q How many from that time?

A Why I believe just Marie and me; one boy went to work and Will didn't buy his clothes.

Q When was that?

A That's since he has been—if I remember right, about eighteen or so.

Q How about his clothes then?

A He had to buy them himself.

Q Well do you know whether Mr. William Mullin paid for them?

A I am quite certain he didn't.

Cross examination by Mr. Lum.

Q Let's see, in the year 1905 and 1906 you went to St. Vincent's Academy?

A I believe I left in 1906 sometime.

Q And while there Will paid for your tuition and board, etc.?

A Yes, sir.

Q You took music lessons?

A Yes, sir.

Q And they were $15.00 a quarter.

A I don't know.

Q You also had music there?

A I don't know what you mean by that.

Q You had use of the piano.

A That included the music lessons.

Q You think it did?

A I couldn't play the piano without using it.

Q You don't know whether separate charges were made by your brother for that too?

A I am not positive.

Q And for the sheet music, etc.; do you know whether separate charges were made?

A Certainly.

Q In the year 1906 how much do you estimate were your dressmaker's bills?

Master. Do you mean dressmaking or clothing bills?

Mr. Lum. Just dressmaking?

Witness. I had no item for that.

Mr. Tansey. If your Honor please, they have the bills for that.

Master. This question is perfectly proper to test the accuracy of this witness.

Witness. I don't remember.

Q How much would you estimate?

A I couldn't estimate, I don't remember what I got in that year. Some years I bought dresses already made and some years I had them made.

Q Assuming you had them made, what would they come to in your judgment?

A If I saw some of the bills I might tell.

Q You have been very accurate on coats, hats, etc., dresses for all seasons; if you could do all that for Mr. Tansey, you certainly could give me an estimate—

A If I remember, what I would have made would be about $8.00 or $9.00.

Q For you and Marie?

A Yes, sir.

Q Who usually made your dresses?

A Mrs. D. Lynch did the dressmaking at that time.

Q Do you recollect the items mentioned there—dresses, etc., quite some time ago—seven years ago; does that bill bring back to your recollection—

A That isn't for dressmaking; that's for goods and dressmaking.

Q Goods and dressmaking?

A Yes, sir.

Q And this bill of December 20th is also for—

A —— Goods and dressmaking also, yes, sir.

Q I show you this item for making a suit for Marie—$8.00; findings $1.00. Is the finding just for material?

A Little odds and ends.

Q Do you recall them?

A I don't recall it, but I suppose it was for Marie.

Mr. Tansey. Do you offer those bills—

Mr. Lum. I do not.

Mr. Tansey. You might help us out by showing them.

Master. There is no occasion to offer them.

ANNA MULLIN, one of the defendants, sworn.

Direct examination by Mr. Tansey.

Master. If this witness is to be examined along the same lines as the other witness, it is important to get her age to know whether she can be classified as a child or a young woman.

How old are you?

Witness. Twenty-six in 1912.

Master. Then you were fourteen years old after your mother's death?

Witness. Yes, sir.

Q You are a sister of William F. Mullin?

A Yes, sir.

Q And one of the defendants in this suit?

A Yes, sir.

Q And do you know what your expenditures for clothing, etc., were during the first year after your mother's death?

A Why I couldn't very well tell you that, because my sister really took it upon herself to pay for those articles of clothing.

Q Mrs. Coburn, you mean?

A Mrs. Coburn.

Q Did she make the purchase for you?

A The bills were paid for by check, but she had the things sent sometimes C. O. D. and paid for by check. She helped me buy the things, select the articles of clothing; I wasn't able to do it myself, I was a little too young.

Q She made the purchases for you?

A Very often.

Q Since you began to make the purchases for yourself, can you tell the average amount of money spent for you during the year for clothing?

A For five years I have been buying my own things, and before I was of age I was compelled to take some of my money that I was to have received when I was of age in order to buy some of the things I needed.

Q Since you have been of age you, of course, have not been getting any money from Mr. Mullin?

A No, sir.

Q Now before that time you were compelled to take money that was coming to you?

A Since I have been of age; before that time do you mean?

Q Yes.

A For three or four months I was drawing different amounts; I think it was nearly $200 in different amounts, in small amounts of $25.00 and $10.00 at a time; I don't just remember.

Q And charged against your interest in the corpus of the estate?

Master. That's not material; what we are trying to find out here is what it cost to maintain her during the years her brother contributed for her support.

Q Referring to the time you began to buy your own clothes, between that and the time you reached twenty-one years of age, do you remember how much it cost you during the year for clothing?

A Maybe about one hundred dollars.

Q Does that include shoes and things?

A Shoes, hats and dresses, because I was very economical; I always wore the one suit two years.

Q Did you make any of your own clothes?

A I didn't make them at that time; I used to fix them over, kind of repair them and help to preserve them as it were.

Q That is your estimate?

Master. That's what she said, one hundred dollars a year she thinks would represent the outlay for clothing for her.

Q Now Miss Mullin, you went also to St. Vincent's Academy?

A Yes, sir.

Q How long were you to school there?

A From the time I was fourteen, after my mother died, until 1906 I graduated from there.

Master. That would be from fourteen to twenty?

Witness. I left school; I had to leave school in October. I was very ill at the time and I was away from the school one year.

Master. And there most of the time, with the exception of one year from 1900 to 1906?

Witness. Most of the time.

Q Do you know, Miss Mullin, anything about what your tuition cost there at that time?

A Well I cannot say accurately, but the bills will tell; I believe you have some of the bills. I believe the tuition was $15.00 a quarter; I am not sure about the board.

Q What spending money did you get from Mr. Mullin, if any?

A While I was at boarding school?

Q Yes.

A Well I couldn't state just how much I got because sometimes I got $3.00, sometimes $2.00 and sometimes a dollar once in a while, but that was put in the bill and paid by check.

Master. You mean the money was given you by the school authorities and he paid the school?

Witness. He paid that in with the tuition bill.

Q Where did you get the money from the school?

A The sisters loaned us the money and then that was charged on the bill.

Q How much would that average?

A Oh the year I graduated my brother allowed me $5.00 a month for spending money—in 1906.

Q Was that also paid by the sisters?

A The sisters loaned me that money and put it on the bill and he paid it by check in with the other.

Q Were there any vacations?

A Yes, from June until September every year.

Q Did you have any money for going away, or anything of that kind?

A Twenty-five dollars my brother would give us for vacation.

Q Was that $25.00 each for vacation, and what spending money?

A That was between us; three of us, not $25.00 each.

Q For the three?

A Yes, sir.

Anna Mullin, cross.

Q How much more was given?

A I don't remember any more; an odd dollar once in a while.

Q What have you to say about the estimate of $500 a year for the expense of each child? That's the amount Mr. Mullin says it averaged. What do you think of that estimate?

A Before, of course, I was able to take care of myself—

Q He is making the estimate all the way through; before you were of age; you don't know, I suppose, what the school was?

Master. She doesn't know what the school was.

Mr. Lum. And any figure you give us isn't worth that. (Snapping finger.)

Master. If she remembered Mr. Mullin say what he expended—

Witness. When we would want anything, Mr. Mullin was so domineering we couldn't get it. I am only telling the truth, just what he would say and what we would have to listen to when we would want anything.

Cross examination by Mr. Lum.

Q You took music lessons at St. Vincent's Academy?

A Yes, sir.

Q Do you know what they cost a quarter?

A I haven't any idea.

Q Do you know whether elocution was extra?

A I suppose it was.

Q Do you know how much?

A I do not.

Q Do you know whether any charge was made for the use of the piano?

A Yes, but I don't know how much.

Q And charged for use of the library?
A I believe so, I don't remember.
Q All your school books, geography, physics and latin?
A Yes, the books were an extra charge I believe.
Q And the cash advanced at school there was $5.00 a month?
A During the year 1906.
Q How about the year 1905?
A 1905? Part of 1905 and the remainder of the year until I graduated.
Q And if you had to break the study hall window?
A That was $5.00.
Q And all these little incidentals which happened in childhood's happy days were all paid for by your brother, I presume.
A Yes, sir.
That's all.

ISABELLA MULVIHILL, one of the defendants, sworn.

Direct examination by Mr. Tansey.

Q Mrs. Mulvihill, you are a sister of William F. Mullin, are you?
A Yes, sir.
Q And you are one of the defendants in this suit?
A Yes, sir.
Q You are older than Marie?
A Yes, sir.
Q Do you remember when your mother died?
A Yes, sir.
Q And from that time did you live with your sister, Mrs. Coburn?
A I did, yes sir.

Q Up to what time?

A I lived with her until 1910, but my brother paid my board until I became twenty-one in 1905, I believe it is; I am not just sure.

Q Up to 1905 did he also furnish your clothing?

A Yes, sir.

Q After that time did he do so?

A No, sir.

Q Did he pay your board after that time?

A No, sir, not after I came of age.

Q Do you know, Mrs. Mulvihill, how much was spent for your clothing in a year?

A I don't know exactly how much; I usually got a dress in the winter that cost about—well not more than $15.00; and a dress in the spring that cost around the same, if not less, and two hats a year. Of course our every day hat we generally fixed over from the year previous; and underclothing—very cheap underclothing it had to be—and a few dresses in the summer not amounting to more than $3.00 a piece.

Q Well now then, what did you have for wraps?

A —but I generally bought a suit in the spring —some years I bought the goods.

Q And shoes?

A Shoes.

Q Do you know what it cost during the year to supply you with clothing, shoes and all accessories?

A I don't exactly.

Q Well I am talking about your knowledge of what you had.

A Well some years it was—it would only cost $60.00 and other years it might cost more. The year I graduated I had to get extra things.

Q But when you got extra things, how much would it cost you a year for your clothing?

A Well I don't exactly remember; there were a few items at school we paid for extra at graduation time.

Q You mean items of clothing?

A Other items that come up at those times.

Q I am talking now about your clothing?

A Only that the dress would cost a little more; maybe $5.00 more.

Q What was the outside average expenditure for clothing and wearing apparel generally?

A Sixty dollars a year.

Q Do you know what your schooling charges were?

A I don't know, the bills would show that.

Master. How long were you at boarding school?

Witness. Four years.

Master. From what time to what time?

Witness. From 1901 to 1904.

Master. You went just after your mother died?

Witness. Yes, sir.

Master. Did you graduate?

Witness. Yes, sir.

Master. At St. Vincent's?

Witness. Yes, sir.

Master. The same school your sisters attended?

Witness. Yes, sir.

Master. After you became of age, which I understand you was in 1906—

Witness. —1905 I believe it was—1906.

Master. —who supported you after that?

Witness. Myself.

Master. Did you work?

Witness. Yes part of the time I was at home and then I went to training in the hospital.

Master. Did you get paid for that while in the hospital, or was that expense to you?

Witness. We got a very small allowance.

Master. But you received nothing from William F. Mullin after 1906?

Witness. Nothing.

Master. You had some property of your own when you became of age?

Witness. Yes, sir.

Master. Did you complete your course at training school?

Witness. No, sir.

Master. When were you married?

Witness. In 1910.

Master. How long did you continue with Mrs. Coburn?

Witness. Until 1910.

Master. Until your marriage?

Witness. Yes, sir.

Cross examination by Mr. Lum.

Q When was your birthday?

A March 13th, 1906.

Q You were twenty-one in March 1906?

A Yes, sir.

Q You don't remember about notifying your brother Will promptly the time you arrived at age, do you?

Mr. Tansey. I object.

Master. I will exclude the question.

Q When did you have the trouble with your ear?

A I had one operation immediately after my mother's death—a couple of months after—and two others later on that I paid for myself.

Q Did you have any in 1906?

A Yes sir, the first one.

Q Did you pay for that yourself?

A I did not.

Q In 1906 you say was the first one?

A That was the first one.

Q And you went to the Eye and Ear Infirmary?

A Yes, sir.

Q What was the operation for?

A For mastoiditis; I was operated on October 9th by Dr. Eagleton.

Q Do you know what the expense of this operation was?

A I don't know exactly, I believe he paid $15.00 a week and I had to go to the doctors for a good while after.

Q And Will paid that?

A He paid that.

Re-direct by Mr. Tansey.

Q Did you at that time have money coming to you from the Estate?

A Not at that time.

Master. Mr. Lum didn't you make a mistake about the date? She was of age then.

Mr. Lum. Mr. Mullin paid the bills and started in to reimburse—

Mr. Tansey. No he didn't pay the bills in 1906, he paid the bill in 1903?

Master. Your mother died in 1900?

Mr. Lum. And the first operation was in 1903?

Witness. Yes.

Master. And when you said the operation was the year after your mother died, which would be 1901, you are mistaken. Should it not be 1903?

Witness. It must have been in 1901; it was a few months after her death.

Mr. Lum. That was the first big operation?

Witness. The first big operation.

Mr. Lum. And the bills of 1906 for Dr. Eagleton were also paid by Will?

Witness. Also paid by myself.

Q Who paid them, you or Mr. Mullin?

A Why I paid them in cash.

Q With your own money?

A My own money.

Q Had you at that time received any installments from the Estate of money coming to you?

A Yes, sir.

Re-cross by Mr. Lum.

Q How many weeks were you in the hospital; can you tell me off-hand what year?

A In 1901, I believe it was about three weeks.

Q And you went to the doctors about twice a week for how long?

A A year or more.

PETER M. MULLIN, one of the defendants, sworn.

Direct examination by Mr. Tansey.

Q Mr. Mullin, how old are you?

A Twenty-one.

Q When was you twenty-one?

A The 24th of April this year.

Q You are a brother of William F. Mullin?

A Brother of William F. Mullin, yes sir.

Q One of the defendants in this suit?

A Yes, sir.

Q You were a baby at the time of your mother's death?

A Yes, sir.

Q And since that you have lived at—

Master. What do you mean by a baby; his mother died in 1900 and he is 21 now.

Witness. I was about eight years old at the time of my mother's death.

Q You lived with your sister, Mrs. Coburn, from that time?

A Yes, sir.

Q Up to what time?

A Up until we went down neck about a month ago.

Q Did you in that time do any work?

A Up until I went downtown; yes I have been working since I left St. Benedict's College, a little over three years ago.

Q How long were you at St. Benedicts?

A Two years, about two years.

Q What work have you been doing since leaving there?

A I have worked with the Telephone Company, at the mason trade and at the leather business.

Q Did you make any money at this?

A I didn't make much money at the mason work or at the Telephone Company; I made fair money at the leather business?

Q What money did you make at the mason work?

A Five dollars a week.

Master. When did you commence to board yourself?

Witness. Since I started work three years ago?

Master. And you had nothing from your brother?

Witness. Except paying my board.

Master. Has William F. Mullin paid your board during the last three years?

Witness. He paid until the case started.

Master. And when was that?

Witness. Four years ago I think.

Master. Although you were working you didn't pay your own board during the last three years?

Witness. No sir.

Q You have been getting from Mr. Mullin since 1911 $5.00 a week under a court order?

A Yes, sir.

Q You say he paid your board—who furnished your clothes?

A While I was working?

Q Yes.

A Myself.

Q Did you pay the bills for your clothes yourself?

A Yes, sir.

Q Do you know how much it cost you in a year to buy your clothes?

A To buy my own clothes?

Q Yes.

A It cost me about two suits a year, a summer and a winter suit cost me about $30.00; I never paid more than $15.00 for a suit.

Q Is that now since you have been working you mean?

A Since I have left school.

Q Do you know about your clothing before that time?

A Yes sir, you mean what I paid for suits?

Q Yes.

A Yes, sir.

Q What did you pay for them?

A Up until the last year or two before I left school I used to pay around $14.00 or $15.00 for a suit at Marshall & Balls.

Q Do you remember how many suits you got, and when?

A Never more than two suits a year, and sometimes a suit would last me part of the next year.

Q How about your hats?

A I'd buy two hats a year, maybe a cap.

Master. Make it general and let him say how much about it costs for his clothing a year.

Q Answer the question the Master has asked.

A Everything?

Master. Everything you wear, including your shoes.

Witness. About $70.00 to $75.00 a year.

Master. Before you were of age; did it cost as much as that when you were a boy eleven or twelve and on up until you were eighteen?

Witness. Well no, I shouldn't think it did, I didn't buy my own clothes then.

Master. You only bought them since—

Witness. Since I got out of St. Benedict's College about three years ago. I worked for my brother also since I got out of St. Benedicts; that's how I got to get out of there.

Q I omitted to ask you that; your brother William F. Mullin?

A Yes, sir.

Q What did you do?

A I worked down there in the office.

Q In the undertaker business?

A Yes, sir.

Q How long did you work there?

A Three or four months; until he had a man down there.

Q Do you know anything about the business from your experience in it? Do you know anything about the business?

A Yes, I know something about the business. I wouldn't say I know an awful lot; I know more now than then.

Q Did you do any embalming?

A No, sir, I never did any, he did the embalming while I was down there.

Q Do you know beyond the expenses for your clothing which you told the Master was the expense during the year; do you know anything about vacation money?

A Why vacation money; a couple of summers there we went away for two weeks; that would be about $25.00—eight dollars a week board, maybe ten.

Q Was that for you personally?

A Yes for myself.

Q And was any cash money given to you?

A Oh, a dollar a week spending money.

Q During what time?

A During my school time in St. Benedict's College.

Q Was any given you since that time?

A No, sir.

Peter M. Mullin, cross.

Cross examinaiton by Mr. Lum.

Q You would simply go into Marshall & Balls and order what you wanted and have it sent to the house?

A According to what Mr. Mullin told me to pay for the suit, or what the price would be for the suit.

Q Do you recall in September 1906 getting two suits of clothes at the same time?

A No I never got two suits at the same time.

Q Do you remember what time you went on a vacation in 1906?

A No I don't remember, I generally went away the latter part of July or the first part of August.

Q Just glance over that (handing witness a paper) and see if it would help your recollection. Do you remember getting two suits of clothes in 1906?

Mr. Tansey. I think this bill presented to the witness ought to be offered for identification.

Master. This is to refresh his memory.

Mr. Lum. I would be very glad to put them in if he had them. I wish we could fill out a year with bills of this kind.

Witness. I don't see any clothes.

Q "Suit Peter $12.50; suit $10.00"?

A No, sir, I never got two suits.

Q Do you remember the week following getting a hat at $2.00?

A I never got a hat for $2.00 in 1906.

Q Do you recall getting these collars for seventy-five cents?

A Yes sir, two for twenty-five.

Q Do you recall getting shoes for $1.25 at that time?

A I might have.

Q And a cap at sixty cents?

A Maybe.

Q And sneakers at that time?

A Perhaps.

Q Do you recall in December following—two months later—getting shoes again at $2.95?

Master. Mr. Lum how is this material? The only question is whether he got two suits at one time; that's all that is material.

Mr. Lum. I withdraw the question. That's all.

Mr. Tansey. Now if your honor please we rest, except that we have Mr. James Mullin to call.

Master. Recess will be taken until two o'clock.

Mr. Tansey. If your Honor please, I want to call your attention to a matter apparently of misapprehension. At the hearing the 19th of May, page 367, your Honor asked: "Is there any evidence which shows what Mr. Mullin received or drew from the business for his personal service during the period that his mother lived, and was executor of Peter Mullin's Estate?", and Mr. Lum replied "There is evidence he received $15.00 a week up to the time the agreement was made, and after that he received three-sixths of the profits during the period that Mr. Joseph Mullin was with him, and that after that he received the total income for the support of the mother and children, up to the time of her death." The error in that statement is as to the time

he received $15.00 a week. He did receive $15.00 a week during the time of the agreement with Mr. Joseph Mullin and himself and the executors of the estate; during that time they received $15.00 a week as their salary, and besides that received three-sixths and two-sixths of the profit.

Master. In addition to each of them receiving $15.00 a week, William F. Mullin got three-sixths of the profit and Joseph two-sixths and the estate one-sixth, and that was the period between what dates?

Mr. Tansey. Covered by the agreement of partnership; up to the time of the expiration of that agreement when William Mullin took charge then.

Master. That was during the mother's lifetime?

Mr. Tansey. Yes.

Master. This account only covers the period during the mother's death. I asked what his services were worth for that time.

Mr. Tansey. They received that then. In addition to the profits they received $15.00 a week each.

CHARLES W. JEROLEMON, sworn for complainant.

Direct examination by Mr. Lum.

Q You are connected with the National Newark Banking Company?

A Yes, sir.

Q And have been for how long?

A Thirty years.

Q Do you know William F. Mullin?

A Yes, sir.

Charles W. Jerolemon, cross.

Q Do you know whether there has been an account in the National Newark Banking Company for some years in the name of the Estate of Peter F. Mullin?

A Yes, sir.

Q Was there at that time an account in the name of William F. Mullin individually?

A Not that I remember.

Q Do you know whether checks come to the order of William F. Mullin?

A Frequently.

Q What was done with them?

A Credited to the Estate of Peter F. Mullin.

Q Were any checks drawn out signed William F. Mullin, Executor or Administrator?

A The checks all had to be signed by him as Executor of the Estate.

Q I don't suppose you can remember individual items; or can you remember, can you recall checks passing through your bank apparently not connected with the undertaking business?

A Frequently. From time to time checks deposited lead me to think they had no connection with the business; checks to his order indorsed by him, and then indorsed for deposit to the credit of the estate.

Q Do you have anything to do with loans at the bank?

A No, sir.

Cross examination by Mr. Tansey.

Q You had no means of knowing whether they were connected with the undertaking business or not, except in Mr. Mullin's individual name, had you?

A You mean items deposited? I testified that frequently items were being deposited payably to Mr. Mullin as an individual, and by him indorsed over to the credit of the estate.

Q And you had no means of knowing whether a check to his order should be credited to the undertaking business or to his own name?

A No sir; sometimes there would be checks of a character I should think did not belong to the undertaking business; simply the character of the check.

Q And you only looked at the character of the check?

A That's the only way I could make any conclusion, of course.

Q And you of course were acting as paying teller at the time?

A I have been acting as paying teller and receiving teller both during the time this account was opened.

Q You don't mean to say you receive all the money received from Mr. Mullin?

A Oh no, we have had three receiving tellers most of the time and two a part of the time; since I have been back in the receiving cage we have had three.

Q I suppose, Mr. Jeroleman, that your books would show just the amount of deposits—the amount of drafts against those deposits, since August, 1900, up to the present time on that account?

A Our ledgers would show it, yes sir.

Q And such a statement could be furnished?

A Only as to the figures, we couldn't give any details, because there is no records made of deposits as to what they are constituted.

Q You don't know whether Mr. Mullin had accounts in other banks?

A No sir, I do not.

Re-direct examination by Mr. Lum.

Q Would that book which you speak of show any details?

A No, sir.

Q Would it be of any advantage in finding out the sources of the money?

A The pass book is simply a transcript of the ledger only.

Q Can you recall a Byrne check?

A I have a faint recollection of a large check drawn to William F. Mullin; I wouldn't be willing to swear; I have an idea. A check so large that it led me to wonder what Mr. Mullin was buying or selling, or whatever he was doing with it. I asked no questions about it.

Re-cross examination by Mr. Tansey.

Q Of course you don't know where the check came from, whether it was for a mortgage that was paid off?

Master. Mr. Tansey, he says he don't know; he simply says the size of the check attracted his attention.

JAMES MULLIN, one of the defendants, sworn.

Direct examination by Mr. Tansey.

Q Mr. Mullin, you are a brother of William F. Mullin?

A Yes, sir.

Q Are you one of the defendants in this case?

A Yes, sir.

Q What is your business?

A Undertaker.

Q And how long have you been an undertaker?

A I have been in business for myself about five years the first of next November—this coming year—this present year.

Q How long were you connected with the undertaking business before that time?

A On and off throughout my life in a way.

Q How many years do you figure it?

A At different times about ten or twelve years; in fact all my life on and off at different times. Sometimes I would be there in my younger years all the time, between that and the stable, and at other times I worked for different firms.

Q By there you mean the business of William F. Mullin?

A Yes, sir.

Q Then you assisted in the business?

A Yes, sir.

Q How long were you with him?

A Well I was the last time two years—two years previous to going in business his steady assistant; previous to that time I was working around as an assistant and helper around the place in general as a boy—helped out.

Q As such assistant did you have experience in embalming?

A What time was that?

Q Those last two years you were there?

A Yes sir, I did all the embalming.

Q Did you have any experience in other lines of the undertaking service?

A Yes, sir.

Q What, for instance?

A General assistant in knowing about the price of goods, although I never sold much goods for him; knew the prices of goods, knew what was paid and where he was buying the majority of the time.

Q Did you know the class of goods he kept for sale generally?

A Yes, sir.

Q And knowing the class of goods, could you tell the cost of them?

A Pretty near.

Q Did you know anything about percentages of profit on caskets, for instance?

A I know pretty near what the percentage of a general funeral is, yes sir. I know the profit on general funerals.

Q Do you know what the profit is in percentage on caskets, for instance?

A About.

Mr. Lum. One minute; whose profits, his, Will's or his uncles, or general profit.

Q Now Mr. Mullin, let me call your attention to the DuBois report on page 11, in which there is an item under Exhibit D of expenditures of William F. Mullin for drinks, cigars, dinners, fees etc., $30.00 a week—$1560 a year. What have you to say as to the reasonableness of that charge in the business?

A Well from my own experience, or from the time he was there—

Master. In your observation of your business, what could you say as to the reasonableness of that charge made by him?

Witness. Cut that in half, about $15.00 a week I would say.

Q Do you find it necessary to make large expenditures?

A Not as large as that, no sir. I find it necessary to spend a few dollars once in a while, but not all the time, not regularly.

Q Referring to the matter of programs, donations, tickets etc. $500 a year, do you know whether Mr. Mullin spent that much in his business?

A I figure he spent about—I couldn't exactly figure, but I don't think he spent $500. He spent a lot of money, but not $500 in a year.

Master. How much do you suppose he did spend?

Witness. About $300.

Master. Was that expenditure necessary, or was it simply in his judgment necessary?

Witness. It was his judgment. He couldn't prove it necessary; it was simply a question of taking a chance; advertising is all well and good but you don't know—

Q Are drinks, cigars, etc., advertising?

Master. It doesn't make any difference what he thinks about that.

Q About this wagon and horse, 150 funerals at $4.00 for special attendance.

A What do you mean by special attendance?

Master. Put it this way. By the DuBois report, Mr. William F. Mullin has estimated that he incurred an expense of $600 for wagons and horses for 150 funerals; that's $4.00 for each one. Do you know whether he did incur such an expense, and whether it was usual in his business to have an expense and charge for a wagon and horse for his funerals?

Witness. Never, no sir.

Q Now telegrams, postage, etc., $200; it is estimated about that much.

A What, is that a year?

Q Yes.

A I figure about $150 on that—the business he was doing at that time. I am talking from my own experience.

Q Now as to the wages of two men $17.00 a week?

A He never had two men when I was there.

Master. What did he pay you while you were there?

Witness. Fifteen dollars right along after two months then I got $16.00.

Master. Was there anyone employed there regularly while you were there?

Witness. No, sir.

Q At the present time how many men has he?

A One.

Q Has that man been with him since you left?

A I guess he has, yes sir.

Q Do you know whether he has anybody else?

A At times he has an assistant like myself from the stable. I generally used to have to do all the little things around. Once in a while he would get a man at the corner that didn't cost him anything.

Q And the stable men, when they helped, were they paid special?

A So much for days work or trip. If they had a job or helped out, I forget. Generally they got a dollar—generally about a dollar.

Q How often does that occur in the course of a year?

A He would possibly call or want him several times on account of having the morgue to go and get the bodies from the river; that's morgue work.

Q You say several times?

A I say several times; maybe possibly every week; I don't just know about on an average—maybe once, maybe three or four times a month.

Q Would it average $17.00 a week?

A No, sir.

Q How much does it cost for a man for that extra work on a job, do you know?

A What do you mean, a man each job?

Q Yes.

A About a dollar.

Cross examined by Mr. Lum.

Q You have been in business for yourself five years?

A I will be five this first of November.

Q How many funerals did you have last year?

A About 130.

Q Last year 130?

A Yes, sir.

Q How many the year before?

A 100.

Q How many the year before that?

A About 60.

Q You are quite sure about that number?

A I am pretty near, yes sir.

Q And you have an assistant?

A Yes, sir.

Q And have had for how long?

A Ever since I went in business.

Q Do you recall that while you were still with Will there was a fellow by the name of O'Rourke there?

A Yes, sir.

Q He was on salary?

A Not on salary that I know. Whatever work we had, funerals, he paid so much a week.

Q Paid so much a week?

A Yes, sir.

Q And sometimes there were two and three men a day down at the stable?

A I don't remember of there ever being three.

Q Do you remember two?

A Possibly a man like a coachman.

Q Quite frequently?

A Only once in a while.

Q While you were there, how many times on an average a week was Joe called down to help out with the rush of work?

A While Will was away on business or out of town, Joe would be down there to run the funeral, and I would go out and do the work.

Q How often?

A Possibly that might have happened one time or maybe twice every day for maybe a week. That's only twice I remember in two years. I cannot swear to more than twice, but not more than twice, and other times he might have come down once a month.

WILLIAM F. MULLIN, complainant, recalled for further examination by Mr. Lum.

Q Will you tell us how many $500 or $600 funerals you have had in the last ten years, if you have looked at it?

A In the last ten or 23 years?

Master. Confine yourself to the question; the last ten years.

Witness. I have had one $600 funeral in my lifetime. I have had three $500 caskets, possibly four—I can only remember three—in all my business experience.

Q In the bank book of September, 1904, there is a deposit of $5,450. Was that the proceeds of the undertaker business?

A No, sir.

Q Did you ever, in the course of the undertaker business as you can recall, make deposits of $1,000 and upwards in a single day as the proceeds of the undertaker business?

A It don't amount to that much; the undertaker business deposits wouldn't amount to that much.

Master. Listen to what the question was. Can you recall a single occasion when you made a deposit of $1,000 as the proceeds of the undertaking business?

Witness. No sir, I can't.

Q I show you an item here of January 8, 1903; $3,242.92. Was that from the undertaking business?

A No, sir.

Q You recall the testimony of the witness from the bank as to the Byrne check; do you remember that check?

A Yes, sir.

Q Was it or was it not the proceeds of the undertaking business?

A No, sir.

Q I show you this list of checks which is made up by Mr. Tansey and labeled with various letters "For undertaker, etc." Have you gone over that list, Exhibit D-60?

A Yes, sir.

Q You have gone over that?

A Yes, sir.

Q And you have noted the letters?

A Yes, sir.

Q I don't want to take advantage of any time on it. First, will you tell us whether or not the lettering is correct?

A Many charges against me are incorrect.

Q Will you refer to the first page, and call our attention to any item hurriedly?

A Here's a check here—August 15, 1900—"Item cash for exchange checks; stable account William F. Mullin, $20.00." The check was returned to the account. It was an exchange check.

Q Turn to the next item.

A Here's one, August 17 to bearer—myself—to make exchange for Phelan check; charged to William F. Mullin for $50.00. That's $50.00 I loaned, and should be charged to the business.

Q That is under date of August 17, 1900?

A Yes, sir.

A Here's William F. Mullin, September 18, 1900—William F. Mullin, proprietor—that's supposed to be a check for the month of August, stable account, $371.00. It should be charged to the business. Here is another item, September 27, 1900: "Cash advanced on Cullen's check, $50.00". Should be charged to the business.

Q Why?

A Loaned to Cullen at the time of the funeral and paid with the funeral bill and charged to them in the funeral account.

Master. What is it charged to?

Mr. Lum. On these schedules it doesn't say whether charged to one account or the other, and how will it make any difference on the question? Now September 16, to loan for H charged to William F. Mullin. Can you say to what account that should be charged?

Witness. Undertaker business, because I loaned the people money and it was paid back

to the business by the people when they paid the bill. Here's another one, November 6, 1901; this is a large item; there are many of them— charged to William Mullin, $150, given to Father Cody. It should be charged to the business.

Q Are there many such items?
A Many of them.
Q Are they all charged to William F. Mullin?
A Many charged to William F. Mullin; some charged to the undertaker business.
Q All should be charged to the undertaking business?
A Yes.
Q Explain why?
A I advanced Father Cody money from time to time. I gave the money in return for Masses, which is credited against that account. There are many of those through here.
Q Do you find on each of these pages several items running from one to three dollars, which in your judgment are charged wrong?
A At least a half dozen on each page. April 2, 1902; William Gallagher; I advanced him on a note of $200; April 2, 1903, charged to William F. Mullin, and should be charged to the undertaking business for $86.00. That was for the payment of a funeral bill, and I gave him the difference in cash on his note. It shows on the credit of that funeral.
Q April 16, 1907; St. James Hospital donation, William F. Mullin $25.00. To whom should that be charged?
A Undertaking business.
Q Did you get any personal gain?
A The business did.

Q Here's an item of April 29; Joseph H. Ellor, fees etc., William F. Mullin, $9.65. To whom should that be charged?

A Undertaking business.

Q Here is one of May 19th, Mr. Thomas George H ; loan charged to William F. Mullin. To whom should that be charged?

A Undertaking business. It was put in the funeral bill and paid back when I buried him. Here's one the 21st of May; Father Cody, charged to William F. Mullin. It should be charged to the undertaking business.

Q Will you tell us whether these pages you have gone over are fair proportions; that is, whether many of the pages contain about the same rate of excess charges against you?

A Yes, sir.

Q Turn to page 12; January 12, 1903. Let's check a few very large items now. Do you find an item there (No. 3) "To deposit in Howard Savings Banks account, belonging to the Estate for settlement of the Herman mortgage, charged to William F. Mullin? Was that deposit to your account or to the Estate account?

A Estate account; it should be charged to the business.

Master. Why charged to the business if it is a mortgage paid off? He says it should be charged to the business?

Q To whom has it been charged?

A Charged to William F. Mullin, making it appear that I used the money personally.

Master. It appears to be the payment of a mortgage.

Witness. It was money received for a mortgage and I drew it out to be used to pay off the children.

Q Turn to page 22; September 16, 1904, Fidelity Trust Company—for loan $37.84—Fidelity Trust Company advanced on fifty shares of stock $1,000. Will you explain this to the Master?

A This money I deposited in this account as I did a great deal of other monies, and drew against it.

Q Did that money you deposited in the account come from the undertaking business?

A No, sir.

Q Did these transactions have anything to do with the undertaking business at all?

A No, sir.

Q Turning at random to any page that you have checked; will you tell us the items improperly charged to you?

A Here's another one, October 22, 1904; charged to William F. Mullin $50.00 which should be charged to the business—Father Cody again. Here's another one for—here on the 21st and 22d of November, 1904, for $25.00 a piece loaned to Louis LeBlank, charged to William F. Mullin.

Q I call your attention to item of October 10, charged to the account of William F. Mullin, $330.00. To whom should that be charged?

A The business.

Q Do the other pages continue at about the same ratio?

A Yes sir, here's some more.

Q Mr. Mullin, after the bills disappeared from your place, which your brother Joe referred to, were you able to find any bills of any other years?

A I found no bills at all after you asked me to look for them. I discovered they were all missing.

Q Did you see them again—any of them?

A Not until used by Mr. Tansey.

Q And the bills for any other years were you able to find after that?

A Not since that time; Mr. C. had everything I had. I handed the data to him to use; bills, pass books, check books and everything I had in my business. I had them in a box and supposed they were moved when we moved everything next door, and I went back to look at that box myself and there was nothing in the box. We kept funeral items, bills, cash list and all those things together in that box, and my assistant and myself moved everything into the new building, and I supposed these papers were among them. That's where they were. I didn't know we didn't have them when I told Mr. Lum I couldn't find them when he asked me to produce them here for the last three years—1910, 1911 and 1912.

Cross examination by Mr. Tansey.

Q Referring to this entry under date of September 16, 1904—the Fidelity Trust Company for loan of Public Service stock, is it?

A Yes, I guess so.

Q Apparently to make good this loan, there is a difference in the account of $3784.96; where did that money come from for that check?

A The sale of some other bonds; stocks probably, or mortgage that I had myself. Some deal I was in where I made some money.

Master. Don't you remember exactly where it came from, that particular item?

Witness. I think that money came from the sale of White Line bonds; that particular lot of stock.

Q And did you deposit that amount of money from the sale of White Line bonds in this account.

A I deposited the proceeds from that sale and many other sales in this account.

Q A large amount of money like that ought to be easily traced in your bank account, hadn't it?

A Probably.

Q Well then, if that is the case, can you show where you deposited that $3784.96 around September 16, 1904? Showing you the bank book of the National Newark Banking Company, Exhibit D-1.

A Here's a deposit in 1904 of $5,450.00 which certainly did not come from the proceeds of the undertaking business.

Q Was that the proceeds of the sale of the bonds you spoke of?

A Probably might be the bonds and something else?

Q So that is the way you identify that $5450.00?

A Yes, sir.

Q How is it, Mr. Mullin, that the September deposit of the $5450 is entered here way after December 20th of that year?

A I couldn't answer that; that's the bank's figures.

Q And yet you say that the money was deposited in the bank account before you drew against it for deposit in the Fidelity Trust Company?

A Yes.

Q Do you know where you got the money to buy White Line stock from?

A There was deals; all kinds.

Master. No, Mr. Mullin; your answers all through have been very general. The question

is this: Do you know where you got the money with which to buy the White Line Stock? Answer that yes or no.

Witness. Some of it.

Master. Tell us where you got some of it, and how much.

Witness. I made money in the transaction of purchases of various railroad stocks, selling them on the market. I made probably $50,000 or $60,000 that way; Southern Pacific, Northern Pacific, Atchison & Topeka, lead stock and other stocks.

Q You had quite an extensive stock buying experience during those years?

A Some.

Q Do you recall testifying one day here that you never made any money on your stock transactions?

A In reference to local stocks was that?

Q Generally speaking.

A Wasn't the question on local stocks?

Q Do you recall your testimony?

A I don't recall such a statement as that.

Q Do you now say that if you made a statement that you didn't make money on stock that you were mistaken in it?

A General stocks; if I made such a statement I certainly was mistaken.

Q After you now say you made about $60,000 in stock dealing?

A Yes, sir.

Q And that was outside of any undertaking at all?

A Yes, sir.

Q Where did you get the money to buy your first stock with?

A Settlement—partly the settlement I had in my mother's estate—my father's estate, rather.

Q Now on the 7th of September—on the 16th of September, 1904, there is an item, Fidelity Trust Company, advanced on fifty shares of Paterson and Passaic stock, $1,000, charged to William F. Mullin. Should not that be so charged, Mr. Mullin?

Mr. Lum. There is no question about the propriety of the charge in that item.

Master. Let him answer that question. Should not that be so charged, Mr. Mullin?

Witness. I suppose it should; the money was placed there to cover it.

Mr. Lum. Listen to the questions and answer them; or you will never get through if you don't.

Q Do you identify that thousand dollars as having been deposited in that $5450 item?

A Probably it was.

Master. No, that isn't the point; do you identify that item?

Witness. I cannot positively identify it.

Q On September 20th, the statement appearing "Doesn't belong in this account—$1065.04"; do you know where that would belong?

A I couldn't tell you where it would.

Q It is charged to William F. Mullin; do you know whether that should be so charged?

A I don't know.

Q Have you gone through all these accounts, Mr. Mullin, as refer to this check book?

A Yes, all I have here I have gone over. (Referring to Exhibit D-60).

Q You have gone through all those checks as they are written?

A Yes, sir.

Q If you went through those checks, could you not give us a statement as you are doing on the witness stand now, showing where those checks should be properly charged?

A Other than the notations I have made on here?

Q You have been able to make notations on them, haven't you?

A On such of them that I thought should not be charged to me, yes sir.

Q In making those notations, you have gone through the whole list, have you?

A Yes sir, looked the whole list over.

Q Have you made a summary of the charges that you think should have been charged to you?

A No, sir.

Q There would be no difficulty in doing it, would there?

A I guess there would.

Mr. Lum. In other words, a physical impossibility for you to do it?

Witness. I don't see how I could.

Q How are you able to say that in going through these accounts certain items should be charged to you and certain ones not to you?

A There are certain items charged to me that I know positively should be charged to the business, and should not be charged twice in any one place.

Q Could you not with the aid of your books and your recollection, give us a complete statement of the whole result of the check stubs?

A No, sir.

Q —As we have undertaken to do in Exhibit D-60?

A No, sir.

Q Now I will call your attention to the transcript of the record of the bank book from the Howard Savings Institution, account No. 138,933, and ask you whether that is a true copy of all the deposits you made in that bank for the Estate?

A It is a transcript given by the bank.

Q Do you know whether a true copy of the—

Master. That answers the question. He says it is a transcript given by the bank. Unless you conclude to call the bank with their books we will have to accept it.

Q This account runs from August 1900 to December 1st, 1911—

Mr. Lum. So it says.

Mr. Tansey. How do you know?

Master. I have got to stop promptly at four o'clock; go ahead.

Q —and the amount deposited is $5,376.64?

A Is that what it says; I suppose that's the amount.

Q The drafts against that are from the beginning, July 22, 1901, running—

Mr. Lum. I object as being stated in the papers—

Master. He can recite it to the witness to recall it to the witness.

Q —running down to January 26, 1912, at which date there was a balance of $96.64. I call your attention to deposit of January 28th, 1903, $2850, and ask you where that deposit came from?

A I can't tell you now.

Q Do you recall that you testified a short time ago in relation to one of these checks, that it was from the settlement of the Herman mortgage?

A That's your statement here.

Master. Now the question is, do you recall testifying a few moments ago that that sum was from the Herman mortgage?

Witness. Yes, from this statement. Yes, I recall making it from this statement.

Q And that was used in settlement of one of the houses, probably?

A Probably.

Master. Do you know "Probably" doesn't mean anything?

Q I call your attention to October 1st, 1908, an item of $2,000; have you any reference to it in your check stubs; check 5600, October 1st, 1908, taken from the business account to the Howard Savings account to be used in settlement of Nan? Where do you show that that went into the business account; that $2000.

A I don't remember that I show it went into the business account.

Q Do you know where you got the $2000 to put into the business account?

Mr. Lum. Do you know?

Witness. I don't remember now.

Q Turn to your bank book around October 1st, 1908, if you have such an entry, and see whether you made a deposit of $2000 or not?

A September 15th, $3199.32.

Q And do you identify that as part of the amount that you used this $2000 from?

A I cannot identify it.

Q Now any other deposits that you made in the Howard Savings Institution, outside of this statement here, were for your own account, were they not?

A Some of them; I had charge of other accounts in the Howard Savings Bank.

Q I call your attention to 1901, December 31st, $500. Is that a deposit to your account?

A Yes, sir.

Q Check number?

A No check number here.

Q Yes, No. 2861, bearer for deposit in Howard account. August 9th, 1902; turn to that.

Mr. Lum. May it please your Honor, I object to this.

Master. I do not see any point in this at all. If you can explain, Mr. Tansey—

Mr. Tansey. We have a number of items here where he made deposits in his own account or somebody's account in the Howard Savings Institution. We have a statement from the bank showing all deposits. The inference is that deposits to his account are from the business account.

Master. You won't get it by going over particular items; you will have to examine three accounts, I think.

Mr. Tansey. I certainly have to ask him as to individual deposits, whether to his account or not. It appears that out of the business account certain monies was separated from the business and deposited to another account in the Howard Savings Institution. If he did that, will he show where that money came out of the business? If you admit that all the money deposited in the Howard Sav-

ings Institution, beyond a stated amount belonged to the business, I am satisfied to stop right here.

Master. I cannot admit that.

Mr. Tansey. Then, if your Honor please, I think we ought to call attention to every item here.

Mr. Lum. I object as being immaterial, irrelevant and incompetent, and of no possible advantage.

Master. You are asking him about checks drawn by William F. Mullin, executor, on the National Newark Banking Company and deposited in the Howard Savings Institution to some account other than the account of the Estate of Peter Mullin. How will that have any bearing on this, in view of the undisputed fact proved by Mr. Jeroleman and undisputed, that the executors' account in the National Newark Banking Company, includes not merely the property of the estate or of the business, but a great deal of money that belonged to William F. Mullin personally.

Mr. Lum. That's admitted, isn't it?

Mr. Tansey. No, sir.

Master. That's been proved, you don't have to admit it.

Mr. Lum. It's not disproved.

Master. It has been proved as any other fact in this case. If he put his own money or any other money in the executor's estate, he could withdraw it and deposit it where he pleased, provided he didn't overdraw the estate's balance. As we have no balance sheet, the mere proof as to particular items would be of no service.

Mr. Tansey. Except to this extent, if your Honor please; that we would have some definite information of the amount of money he drew for himself and deposited to his account. If he doesn't show where it came from, then your Honor please, you might assume that the money was taken from the business and deposited to his personal account.

Master. I might, but the proof does not separate that to a degree so as to enable me to pick out particular items. This account is as far from being an account as anything ever was in giving details. The fact is, that barring the single admitted accuracy of the Constam charge for receipts from the business, nothing else is separated in detail. We have shown methods; very bad ones—we have shown degrees of inaccuracy and irregularity, and of using personal and estate funds, and mingling them to a degree where this witness cannot tell what they amounted to, and doesn't try very well. He doesn't remember a great many things, and the other witnesses have all been giving merely their best judgment. I will not allow this time to be taken in referring to particular items, when it isn't possible to classify or prepare them.

Mr. Tansey. If your Honor please, I was going to ask him about them. It would seem that would test his knowledge on the subject, which we have a right to test; as to what fund—

Master. He has confessed almost absolute ignorance.

Mr. Tansey. Then, if your Honor please, we have shown that $267,000—$277,000 was brought into the business. We have shown

that around that amount was deposited in the bank. It seems to me immaterial to us whether he used any funds of someone else to make up that amount, unless he can show us definitely what funds are—

Master. That is argument, Mr. Tansey. I will hear you about that when you sum up the case.

Mr. Tansey. I now ask that your Honor consider the evidence before you as to the deposits to Mr. Mullin's own account in the Howard Savings Institution, as shown by these checks.

Master. You can put those statements in evidence if you got them. Have you got them?

Mr. Tansey. Yes, sir.

Master. Well then, put them in evidence now.

Mr. Tansey. Showing a matter of savings bank and personal deposits of $21,500; showing stocks and bonds $3760, loan to—

Master. Well what are you reading?

Mr. Tansey. I want to put in evidence—

Master. Offer it in evidence and the record will show.

Mr. Tansey. And Building & Loan stock $1250, making a total statement of $28,660.

Mr. Lum. Those are figures.

Master. That don't mean anything at all; just offer in evidence whatever you want, but I cannot have you simply read a memorandum and then expect me to treat that as being proof.

Mr. Tansey. I haven't had Mr. Constam go over this memorandum, but I have gone over it myself.

Master. But your reading from the memorandum don't prove anything. Who made it?

Mr. Tansey. I made it.

Master. Well take the stand and testify what it means. Are you through with Mr. Mullin?

Mr. Tansey. Yes, sir.

MICHAEL J. TANSEY, sworn for defendants.

I have gone over the check stubs as shown in the statement here, Exhibit D-60, and have taken from the checks as shown on the check stubs a statement of the amount of deposits in the Howard Savings Institution, either personally to William F. Mullin, or to bearer, and find that between December 31st, 1901, and May 2d, 1911, there was a total of such deposits of $21,500 taken from the business account and put in the Howard Savings Institution either to William F. Mullin personally or just to bearer.

Master. You say this sum of $1,500 was withdrawn from the National Newark Banking Company by checks of William F. Mullin, Executor, payable either to him or to bearer, or to the Howard Savings Institution, and were deposited in the Howard Savings Institution?

Mr. Tansey. Yes, sir.

Master. Now then, to whose credit in the Howard Savings Institution?

Mr. Tansey. I don't know sir; that's what I was trying to find out from Mr. Mullin.

Master. You will have to get then, from the Howard Savings Institution, statements. He has been able to identify a few, but cannot prove all.

Mr. Tansey. I found between those dates that Mr. Mullin had drawn out from the account for Building and Loan stock and various societies he held membership in, $1250.

Master. You mean drawn from the bank to pay dues?

Mr. Tansey. $1250; I found he had drawn out for bonds $3260; for stock $500; for Public Service loan $3784.96, and for the Fidelity Trust Company advanced $1,000, and for the Berry mortgage $1199.32, making a grand total: Stocks and bonds $3760; Duffy loan $2150; savings bank and personal deposits $21,500, and building and loan $1250, making a total of $28,660 drawn from the business during this time. A great many of those checks were indorsed personally, which was, of course, drawn by Mr. William F. Mullin for his personal use; that is the memorandum of the information contained in the checks under Exhibit D 61.

Mr. Lum. Do you know from what source that money came that went into the National Newark Banking Company?

Mr. Tansey. No, sir. I offer this in evidence.

Master. It will be admitted.

Mr. Tansey. We want to put in evidence, if your Honor please, besides the memorandum we submitted this morning of Joseph L. Mullin the addition of that memorandum to be made by Mr. Constam.

Master. They will be put in with the footings; they will be accepted that way. You have no objection to that, Mr. Lum?

Mr. Lum. Not at all.

Master. I have expressed very plainly within the last five minutes my conviction that the accounting is very incomplete and very far from being serviceable; that the estimates of disbursements are almost wholly estimates with some data. I am almost overwhelmed at the idea, difficulty and burden of undertaking to advise the Court as to the points that have been referred to me, because the evidence is so inconclusive. I do not dispute the evidence; some is clearly mistaken, some is undoubtedly true, and much of it matters of opinion. Now for that reason I want to ask counsel to have a day fixed for argument, which will be far enough in the future to enable them to prepare; and I would like them to come with as near an analysis of what they think I ought to hold and find and report to the Court on the evidence which is before you, and before me as well. Now the only question about the day is that I am going to Europe on the second of July, and I would like to dispose of it before I go; and yet it is very difficult; there are hundreds of pages of testimony, and I am crowded with other things, partly because I am going away. Now if you want to help and see whether I can dispose of it before the second of July, I will do my best.

I will give you Wednesday, June 18th for argument.

Exhibit P. 1.

EXHIBIT P. 1.

REPORT IN THE MATTER OF THE ESTATE OF PETER M. MULLIN, DECEASED, WILLIAM F. MULLIN, ADMINISTRATOR, C. T. A., NOVEMBER, 1891 TO AUGUST 11th, 1912.

In the matter of

ESTATE OF PETER M. MULLIN, Deceased.

WM. F. MULLIN, Administrator, C. T. A.

BRIEF.

It appears that Peter M. Mullin did for a period of upwards of twenty years and until his death carry on the business of undertaker or funeral director at the address, then known as No. 91, but known now as No. 228 Lafayette St., in this City.

Peter Mullin departed this life November 4th, 1891, and left a widow and nine children to be provided for and taken care of, the ages of these children ranged from about seventeen years, the eldest down to a son born about six months after the death of Mr. Peter M. Mullin.

It does appear that the net result from the business as carried on by Peter M. Mullin was the support of his family and himself during his life time and further a surplus or savings which he had invested in his combined residence and place of business on Lafayette St. and it appears that the Lafayette St. property was free and clear and worth about Five thousand dollars.

Exhibit P. 1.

The value of Peter M. Mullin's Estate at his death appears to have been:

A. The undertaking business whose Assets and Liabilities were about equal.

B.	Property at Lafayette St. valued at	$ 5,000.00
C.	Life Insurance Policies	10,000.00
D.	Settlement with Railroad	7,500.00
	Total	$22,500.00

Further it appears that Mrs. Annie E. Mullin, Widow, did qualify and act as Executrix until her death which occurred on or about July 18, 1900.

Louis Mullin, a son, died Nov. 27, 1894, so that Mrs. Mullin left surviving her eight children.

A certain agreement bearing date September 24, 1895, for the conduct of the undertaking business by and between Annie E. Mullin, William F. Mullin and Joseph L. Mullin, and to continue for one year, was entered into, but in May 1896, Joseph L. Mullin withdrew from the agreement and the business, and it would appear made demand for his share of the Estate, for on May 18, 1896 there was paid to Joseph L. Mullin the sum of three thousand seven hundred and fifty dollars ($3,750.00).

On the same date a like amount was paid to Wm. F. Mullin and like amounts have since been paid to Grace T. Mullin on Apr. 4, 1899 (by the Executrix) and to James S. Mullin on December 21, 1903 (by William F. Mullin) and to Isabella Mullin on December 10, 1906 (by William F. Mullin) and to Annie E. Mullin on account in the sum of two thousand and seventy-five dollars ($2,075.) (by Wm. F. Mullin).

Exhibit P. 1.

THE FOREGOING PLAINLY INDICATES TWO FACTS, VIZ:

FIRST. That the Estate of Peter M. Mullin as the same existed as of May 1896 and in the opinion of the Executrix and all other interested parties was worth Thirty thousand dollars ($30,000.) to be divided into eight equal shares of $3,750.00 each.

SECOND. That the corpus of the Estate had increased between November, 1891 and May 1896 from $22,500. to $30,000. being $7,500. or at the rate of $1,666.67 per year for the period of four and one-half years.

William F. Mullin claims that he agreed to support the infant children and at their majority pay to each of them the sum of $3,750. and they in turn to relinquish any and all claims or claim, interest or interests in the estate of their parents and the remainder if any and the business to belong to William F. Mullin.

The facts as they exist, certainly bear out and support the correctness of the foregoing claim.

The children have been supported, clothed and well educated by William F. Mullin (See Exhibit E.).

Five of the children have each been paid their respective shares of $3,750, a sixth child has been paid $2,075.00 and Wm. F. Mullin stands ready to complete his part of the agreement (See Exhibit C.).

Owing to the foregoing arrangement or agreement, Mr. Wm. F. Mullin has considered that the undertaking business formerly conducted by his Father had passed to him and that he (Wm. F. Mullin) was the sole owner thereof and he has therefore kept only such books and accounts as he deemed necessary for his own interest and has not kept a complete set of books and has no record of

many payments made in currency and many vouchers or bills have been destroyed as the same were considered by him of no value; therefore at this time and under the existing circumstances it would be impossible to make up a complete, accurate, detailed accounting of disbursements; however an estimate, which would seem to meet all requirements can be made and the same is presented herewith.

The Constam Audit Co. made an examination as to the "Prices Charged" is the supposed receipts of the business Aug. 1, 1900 to Aug. 1st, 1911 and state the gross amount to be $277,345.77. For the present at least and in order to save unnecessary expenses and delay, we will assume this amount of $277,345.77 to be correct, although there appears no allowance to have been made for bad debts. (See Exhibit A. Column 1.).

The same report states the costs of the various articles "charged" or sold as $158,035.04, how these cost figures have been made the Constam Audit Co. Report fails to show. As a matter of fact this $158,035.04 amount of cost is much less than the actual cost.

With the assistance of Wm. F. Mullin, together with inquiry of dealers and manufacturers, reference to bills for goods purchased and such other means as developed during our investigation, and by the rule of averages and estimates, we arrived at costs which we are confident are just and nearer to conformity with the facts. (See Exhibit A, Column 2).

Exhibit P. 1.

Exhibit A.	Column 1 shows the Sales (Constam)	$277,345.77
	Column 2 shows the Costs (DuBois)	184,403.24
	Column 3 shows the Gross Profit	$92,942.53

Thus it appears that there was an average Gross Yearly Profit of $8,449.32.

Exhibit B. shows the number of funerals for each year of the eleven years and a total of 1,744 funerals for eleven years or Gross Profit per funeral of $53.29.

Further this Exhibit B. shows a material falling off in the business, beginning with the years 1907-8, owing at least in part to close competition by members of the family.

Exhibit C. shows the Corpus of Estate at it was assumed to be in May 1896, also payments to beneficiaries and the remainder at the dates of the several payments.

Exhibit D.	Estimated Average Yearly Expense of conducting the business exclusive of compensation for services to Wm. F. Mullin	$ 5,600.00
	Support of Family Yearly average Exhibit E	1,929.28
	Total	$ 7,529.28

Exhibit F. Calculation based on 5% of the Gross Receipts.

SUMMARY.

Peter M. Mullin died Nov. 4, 1891	
Value of Estate November, 1891	$22,500.
Assumed Value Estate May 1896	30,000.
Assumed Increase to May 1896	7,500.

Exhibit P. 1.

I do not think that an increase of $7,500 really existed, for the reason that Mr. Peter M. Mullin, during 20 years of business had saved only his investment of Lafayette St. property valued at $5,000. or at the rate of $250. per year.

Appears (May 1896) to have been an agreement made, dividing the Estate into eight parts of $3,750. each, payable at majority of each of the children and several of the shares have been paid

(SeeExhibit C.)		$ 20,825.
Sales (as per Constam Report) Exhibit A		277,345.77
Cost of Articles Sold Exhibit A		184,403.24
Gross Profit Eleven years Exhibit A		92,942.53
Gross Profit Yearly average		8,449.32
Funerals, eleven years Exhibit B		1,744.
Gross Profit per funeral		$ 53.29
Yearly Expense Operation (Estimated) D	$5,600.	
Support of Family, yearly average (Estimated) (21 years) E	1,929.28	
Gross Receipts 5% of same yearly average F (15¼ years)	1,656.66	
Cost of conducting business & supporting family yearly average		$ 9,185.94

CONCLUSIONS.

1. Peter M. Mullin during his lifetime and for 20 years prior to his death conducted the undertaking business, with a Net Result of

A. Support of his family and himself.

B. Surplus as invested in Real Estate $5,000. being an average of $250. per year.

C. The oldest child being about 17 years, the cost of education was at the minimum.

Exhibit P. 1.

2. Real Estate.

Taxes, Repairs and Assessments have about equalized any receipts from Rent and Interest. A portion of Lafayette St. property has been continuously used for the business.

3. Net Receipts.

Making no account of compensation for services to Wm. F. Mullin, average yearly net profit has been $920.04.

OR

Assuming an allowance of 5% to Wm. F. Mullin for services, average yearly result would be loss or deficiency $736.62.

4. Assuming Wm. F. Mullin consumates his part of the agreement made with his Mother in May 1896 to support family and eventually pay out eight shares of $3,750. or $30,000. and then become sole owner of the business and other assets of the Estate, Mr. Wm. F. Mullin would receive for his services and care an average yearly amount of $920.04.

5. Average yearly amount of $920.04 is $736.62 less than 5% on Gross Receipts.

6. Good Will.

Has been made through the energy and ability of Wm. F. Mullin and belongs to him.

7. Estate consists of

Property #228 Lafayette St. valued at	$ 5,000.
*Clinton Place House and Lot equity	2,000.
†Clinton Place 3 lots cost	3,000.
Total	10,000.

*Net Revenue very small.

†No Revenue but an expense to carry.

There is due three of the children if May 1896 arrangement is to be carried out $9,175. (See Exhibit C.).

Exhibit P. 1.

An apparent surplus of $825. to go to Wm. F. Mullin on account of services and family maintenance.

8. Final.

It does appear that Wm. F. Mullin has fulfilled all his agreements, either expressed or implied and with great injury to himself.

I hereby certify that I have examined into the affairs of the Estate of Peter M. Mullin, deceased and of Mrs. Annie E. Mullin, deceased, who in lifetime was sole Executrix of the will of Peter M. Mullin, deceased and of William F. Mullin, Administrator of Mrs. Annie E. Mullin, deceased and of the undertaker business as carried on by William F. Mullin.

Having used due care and diligence, I verily believe the foregoing report to state the facts as they have existed and do now exist and with justice to all parties concerned.

FRANK G. DU BOIS, C. P. A.,
Certified Public Accountant.
(N. J. No. 1 and N. Y. No. 177.)

DECEMBER 31, 1912.

Exhibit P. 1.

EXHIBIT A.

Showing Sales, Cost and Gross Profit.

		1 Constam Reports Sales.	*2* Costs.	*3* Gross Profit.
10	Coaches	51,129.75	46,016.78	5,112.97
	Hearse	13,654.50	12,289.05	1,365.45
	Buss	7,308.	6,577.20	730.80
	Caskets	106,718.75	47,837.92	58,880.83
	Outside Box	10,662.	9,395.50	1,266.50
	Embalming	14,955.	3,697.37	11,257.63
	Candles	3,649.37	1,420.11	2,229.26
	Use of Candle-sticks	1,109.90		1,109.90
	Clothing (1011			
20	suits)	11,215.75	7,800.	3,415.75
	Chairs	2,242.39	840.	1,402.39
	Opening Graves	5,013.62	5,013.62	
	Mass	14,136.80	14,136.80	
	Advertising	1,932.56	1,932.56	
	Gloves	1,777.30	836.80	940.50
	Sundry Charges	31,840.08	25,499.63	6,340.45
		$277,345.77	$184,403.24	$92,942.53

30

40

Exhibit P. 1.

EXHIBIT B.

Funerals for Eleven Years.

	Adults.	Children.	Totals.
1900-1	114	63	177
1901-2	110	59	169
1902-3	115	58	173
1903-4	126	55	181
1904-5	125	61	186
1905-6	111	60	171
1906-7	127	55	182
1907-8	112	40	152
1908-9	84	26	110
1909-10	99	29	128
1910-11	90	25	115
	1,213	531	1,744
1911-12	95	23	118
	1,308	554	1,862

Exhibit P. 1.

EXHIBIT C.

Corpus of Estate.

Nov.	1891	Real Estate, Insurance, etc.	22,500.	
May,	1896	Estimated Increase (4½ yrs.)	7,500.	
		Assumed value of Estate		30,000.
		Paid out assumed share		
		1. Joseph L. Mullin	3,750.	
		2. William F. Mullin	3,750.	
				7,500.
		Remainder		22,500.
Apr. 4,	1899	3. Grace T. Mullin		3.750.
		Remainder		18,750.
Dec. 21,	1903	4. James S. Mullin		3,750.
		Remainder		15,000.
Dec. 10,	1906	5. Isabelle Mullin		3,750.
		Remainder		11,250.
To Apr. 14, 1911.		6. Annie E. Mullin on account		2,075.
		Remainder		9,175.
		6. Due Annie E. Mullin	1,675.	
		7. Due Marie Mullin	3,750.	
		8. Due in 1913 Peter M. Mullin	3,750	
				9,175

Exhibit P. 1.

EXHIBIT D.

Estimated Average Yearly Business Expense, exclusive of Fees and Salary or Compensation to William F. Mullin as Administrator or Manager.

Upkeep and consumption of	
Supplies, Printing, Stationery, Rugs, Furniture, Candlesticks, Pedestals, etc., etc.	250.
Wages of 2 men @ 17.00 each per week and Expense of same @ 1.00 per week	1,872.
Wagon and Horse 150 Funerals @ 4.00	600.
Light and Heat.	
1 Ton coal per month @ 6.00	
Gas and Electric Light per month @ 4.00	120.
Advertising.	
3 papers @ 7.50 per month	90.
Programs, Donations, Tickets, etc.	500.
Drinks, Cigars, Dinners, Fees, etc. $30. per week	1,560.
Expense of Wm. F. Mullin, Transportation, meals, etc.	
Answering Calls, etc., etc., $1.00 per day	365.
Telephone, Telegrams, Postage, etc.	200.
Incidentals, Estimated	43.
Average Yearly Business Expense	5,600.
Support of Family of Peter M. Mullin, Deceased	
Yearly Average as per Exhibit E.	1,929.28
	7,529.28

Exhibit P. 1.

EXHIBIT E.

Maintenance of Family, Including Clothing, Education, etc., Worked down to an equivalent of one person.

Maintenance &c. &c.	Equals one for
1. Widow and 9 Children Nov. 1891 to Nov. 1894 3 years x 10 When Louis Mullin died.	30 years
2. Widow and 8 children Nov. 1894 to May 1896 1 6/12 yrs. x 9 When shares of Joseph & Wm. were paid to them.	13 6/12 years
3. Widow and 6 children May 1896 to April 1899 2 11/12 yrs. x 7 When Grace T. share paid	20 5/12 years
4. Widow and 5 children April 1899 to July 1900 1 3/12 yrs. x 6 Death of Mrs. Mullin, widow	7 6/12 years
5. Five Children July 1900 to Dec. 1903 3 5/12 yrs x 5 When James S. share paid	17 1/12 years
6. Four Children Dec. 1903 to Dec. 1906 3 yrs. x 4 When Isabelle share paid	12 years
7. Three Children Dec. 1906 to July 1907 8/12 yrs. x 3 When Annie E. Mullin reached her majority	2 years
8. Two Children July 1907 to Mch. 1910 2 8/12 yrs. x 2 When Marie reached her majority	5 4/12 years

Exhibit P. 1.

9. One child
March 1910 to Apr. 1913 3 1/12 yrs. x 1 — 3 1/12 years
When Peter M. Mullin will reach his majority

Equivalent to one person for 110 11/12 years

Taking a low average allowance of One Dollar per day would be $365.00 per year or $40,515.00 for the twenty-one years and making a yearly average of $1929.28 which is certainly a very conservative estimate, probably below the actual amount expended for support, edcuation, &c. of the family and during the period under review this would amount to $21,214.08.

Money paid for the family as made up from the several checks show as follows:

			Average
Aug. to Oct. 1900	1/4 yr.	2,158.75 6 children	359.79
July, 1901 to 1902	1 yr.	2,364.12 6 children	394.02
May, 1904 to 1905	1 yr.	2,449.03 4 children	612.26
Jan. 1909 to 1910	1 yr.	1,499.31 2 children	749.65
3 1/4 years		8,471.21 average per yr.	$2,606.53

No account is made in foregoing for items paid out in currency as no record has been kept of such payments.

Exhibit P. 1.

EXHIBIT F.

A Calculation based on 5% of Gross Receipts being 2½% for receiving and 2½% for disbursing. May, 1896, and August, 1911, 15¼ years. During this period no allowance having been made or paid for services to William F. Mullin.

Constam Audit Co. Receipts for 11 years	277,345.77
Add on same basis for 4¼ years	107,156.31
Receipts 15¼ years	384,502.08
Allowance of 5% would be	19,225.10
An average for one year of	1,656.66

This Exhibit is merely to show what 5% would produce and is by no means to be considered an adequate compensation to Wm. F. Mullin for his services in managing the business and caring for the family of Peter M. Mullin, deceased.

Mr. William F. Mullin devoted practically all his time to the business and sacrificed for the benefit of the business, money which he was offered and refused to accept for his vocal ability, prefering to use such ability in the way of advertising for the benefit of the business.

Further, Wm. F. Mullin paid a salary to another to run his livery business, so that he (Wm. F. Mullin) could devote his entire time and energy to the undertaking business.

Exhibit C. 2.

EXHIBIT C 2.

Newark, N. J., Dec. 1906.

Mr. Wm. Mullin

To JOSEPH S. VINSON, D.D.S., DR.

20 Pennington Street

For Professional Services Rendered

13.00 Belle

3.50 Self

16.50

J. S. V.

Received Payment,

J. S. VINSON.

Thanks.

Newark, N. J., Nov. 15, 1906.

Mullin, Peter

To ST. BENEDICT'S COLLEGE, DR.

No. 522 High Street.

Tuition	15.00	
Lunch	5.00	
Phys. Culture	1.00	
Stationery	.63	$21.63

Paid Dec. 20, '06.

Thank you: P. Ernest, L. B.

This covers as I understand it Dec. 1906, Jan. & Feby 1907. Yes. P. E.

Newark, N. J., October 15, 1906.

Misses Anna and Marie Mullin

To SAINT VINCENT'S ACADEMY, DR.

Sept. 12	One Quarter's Music	Marie	15.00
	One Quarter's Music	Anna	15.00
	Book		.50
			30.50

Nov. 13 Received payment.

Sisters of Charity Thanks.

Exhibit C. 2.

Mr. William Mullin

Newark, N. J., June 26, 1906.

Misses Anna & Marie Mullin.

To ST. VINCENT'S ACADEMY, DR.,
Wallace Place, Newark.
Terms: Payable in Advance.

1906.				
Feb. 1	5 Months' Board & Tuition—			
	Anna		75.00	
	2 Quarters' Music		30.00	
	Elocution 1/2 yr.		5.00	
	Use of Piano 1/2 yr.		2.00	
	Use of Library		1.00	
	Cash, Dec. 22, 5.00; Jan 6, 2.50		7.50	
	Cash, Feb. 3, 2.50; Mar. 31, 5.00		7.50	
	Cash, Apr. 25, 5.00; May 1, 5.00; June 5.00		15.00	
	Dress goods, 5.75; Making & Guimpe 4.00		9.75	
	Waist Material 1.50; Blue Waist 1.00		2.50	
	Black Skirt		.98	
	Violin Bow & Strings, 1.40; Sheet Music 2.80		4.20	
	Medicine .30; Choruses, .50		.80	
	Sheet Music .50; Breaking Kindergarten table .50		1.00	
	Breaking Study Hall Window		4.00	
Feb. 1	2 Quarters' Music—Maria		30.00	
	Sheet Music		3.20	
				199.43
June 26	Bill rendered			
	July 14, check		195.43	
	Balance due		4.00	
	Balance due		4.00	
	Tickets for Commencement		7.50	

Exhibit C. 2.

Sept. 19, 1906.

	Amount due	11.50	
	Cash to balance of account		11.50

Paid.

Sisters of Charity.

Sept. 19, 1906.

Newark, N. J., December 8, 1905.

Misses Anna & Marie Mullin,

To ST. VINCENT'S ACADEMY, DR.

Terms Payable in Advance.

Sept. 7	5 Months' Board & Tuition —Anna	75.00	
	2 Quarters' Music	30.00	
	3 Months' Board & Tuition —Marie	45.00	
	2 Quarters' Music—Marie	30.00	
	Elocution 1/2 yr.	5.00	
	Use of Piano 1/2 yr.	2.00	
	Use of Library	1.00	
	Geometry 1.25; Physics 1.00 Latin prose .80	3.05	
	Music Method .50; Sheet Music .90; Shoe mending .60	2.00	
	Stationery Marie	.57	
	Anna: Stationery .31; Music 1.85	2.16	
	Cash—Spending Money	15.00	
	By Xmas Vacation—Anna		7.50
Dec. 8	Bill rendered	203.28	
Feb. 16	Received payment. Sisters of Charity Many thanks.		

Exhibit C. 2.

15 Lombardy Street,
Newark, N. J.
Mr. Wm. F. Mullin, Esq.,
91 Lafayette St.,
To Dr. WELLS P. EAGLETON, DR.
For Professional Services
From May 22, 1904
to March 1905.
$7.00

Feb. 5, 1906.
Received payment,
W. P. Eagleton,
Feb. 6, 1906.

Thanks.

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15 Lombardy Street,
Newark, N. J.
Mr. J. M. Mullin, Esq.,
228 Lafayette St.,
to Dr. WELLS P. EAGLETON, DR.
For Professional Services.
To June 2, 1906.
$25.00
Received payment
W. P. Eagleton,
Aug. 23, 1906.

Thanks.

Newark, N. J., Jan. 2d, 1906.
Mr. Wm. F. Mullin
To Dr. H. C. BLEYLE, Dr.
For Medical attendance, from March 1st,
1903, to Jan. 1st, 1906 $24.00
RECEIVED PAYMENT.
Herman C. Bleyle.

Exhibit C. 2.

Dec. 20th, '06.

For Making Marie Dress	5.00
Waist	1.00
Silk—3 yds at 1.00	3.00
Trimmings	.30
Velvet, 5 yds. at .10	.50
Lining	2.50
	$12.30

Mrs. C. A. Lynch
paid

Newark, N. J.,
Nov. 19/06.

Mr. W. F. Mullin, Ex.
To Mrs. C. A. Lynch, Dr.

To making dress for Miss Anna	5.00
To trimmings	2.50
	$7.50

Mrs. C. Lynch
paid

Newark, N. J., April 16/06.

Mr. Wm. F. Mullin, Ex.
To Mrs. D. Lynch, Dr.

To making White Waist for Miss Marie	1.00
To making Under Waist for Miss Marie (yellow)	.50
To making Princess Skirt for Miss Marie	4.00
To making Princess Dress & underslip	5.00
To Lawn for slip	1.50
To Lace	.78
To Findings	.80
	$13.58

Paid Mrs. Lynch.

Exhibit D. 36.

Will i should like it if you could leave a check for me as i need it very much will call tomorrow eve Mrs. Lynch.

Newark, N. J.

Wm. F. Mullin, Executor—

To Mrs. C. A. Lynch, Dr.

To making suit for Miss Marie	8.00
To findings for Miss Marie	1.00
To making suit for Miss Anna	7.00
To material 8 yds at 50c per yd.	4.00
To findings	1.00
	$21.00

Mrs. C. A. Lynch
paid May 31

EXHIBIT D-35

I, JAMES F. CONNELLY, City Clerk of the City of Newark, Essex County, State of New Jersey, do hereby certify that the following is a true and correct statement of the number of permits issued for interments, as taken from the stubs in my office and issued to "Peter M. Mullin, undertaker".

November 1st, 1888 to Oct. 31, 1889—134 November 1st, 1889 to Oct. 31, 1890—187 November 1st, 1891 to Oct. 31, 1891—122	443
November 1st, 1891 to Oct. 31, 1892—178 November 1st, 1892 to Oct. 31, 1893—154 November 1st, 1893 to Oct. 31, 1894—113	445
July 20, 1900 to July 20, 1901—172 July 21, 1901 to July 20, 1902—165 July 21, 1902 to July 20, 1903—155	492

Exhibit D. 38.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said City this eighth day of April A. D., 1913.

(SEAL) JAS. F. CONNELLY,
City Clerk.

EXHIBIT D-38

STATEMENT.

Newark, N. J., Jan. 2, 1911.

Est. P. M. Mullin

TO WM. F. MULLIN, DR.

233-235 High Street.

1910					
Dec.	2	B H Buss 8 C	53.10		
	3	1 C	4.50		
	5	B H Buss 5 C	39.60		
	9	B H Buss 6 C	44.10		
	10	B H Buss 10 C Land.	66.60		
	11	1 C	4.50		
	12	1 C	4.50		
	13	B H Buss 6 C	44.10		
	17	B H Buss 16 C Land.	93.60		
	18	1 C	4.50		
	19	B H 5 C	32.40		
	20	1 C	4.50		
	21	B H Buss Land. 9 C	62.10		
	22	B H Buss Land. 9 C Coupe Call	66.60		
	23	B H 2 C	18.90		
	25	2 C	9.00		
	31	B H Buss 10 C	62.10	614.70	

Rec'd Payment,
Wm. F. Mullin,
J. L. M.

J. CONSTAM AUDIT CO.
Newark, N. J.

Michael J. Tansey, Esq.,
Newark, N. J.

Dear Sir:

Pursuant to instructions we have made an examination of the accounts of Estate of Peter M. Mullin, for the period of August 1st, 1900, to August 1st, 1911, covering eleven years in all, and beg to report as follows:

The books of account submitted to us are not kept on a double entry basis, but to the contrary, are kept rather crudely.

With the exception of some check books and pass books no cash book was kept.

From the day book we have compiled the following information, showing the business done for each year as well as the total:

AS PER DAY BOOK

Year Ending August 1st.	Funerals.	Miscellaneous.	Amount to be Paid.	Amount Paid on Account.
1901	22,301.63	1,805.10	23,511.99	22,909.84
1902	22,950.76	1,378.40	23,794.90	23,591.05
1903	24,882.87	1,370.25	25,475.95	25,330.40
1904	26,889.34	1,488.30	27,677.18	27,276.56
1905	27,502.17	1,530.25	28,477.77	27,839.52
1906	26,253.16	1,535.50	27,145.90	26,881.20
1907	29,071.35	1,670.82	30,134.22	29,793.72
1908	25,599.20	1,522.75	26,554.62	26,304.97
1909	17,915.13	1,337.50	18,921.73	18,312.07
1910	21,242.36	1,323.50	22,183.92	21,427.72
1911	19,094.30	1,162.80	19,956.00	18,133.85
	263,702.27	16,125.17	273,834.18	267,800.90
		263,702.27		
	Total	279,827.44		

You notice thereby the total business for the eleven years, amounting to $279,827.44, subject to some corrections and discounts, as shown by the books, reducing this amount to $273,834.18, on which up to August 1st, 1911, $267,800.90 has been paid on account, thereby leaving $6033.28 outstanding accounts still unpaid as of August 1st, 1911.

We also find that there were book accounts outstanding on August 1st, 1900, as per detailed list, amounting to $5,443.52 on account of which the amount of $2,922.46 was subsequently collected or paid.

Relative to the bank account wish to state that the bank pass book handed to us and issued by the National Newark Banking Co., covering the period of May 7th, 1902, to September 6th, 1905, is in the name of "Estate of Peter M. Mullin"; the pass book now in use appears to cover the account of the Estate, as well as Wm. F. Mullin.

In connection with this matter we beg to report as follows:

Inasmuch as we were informed that there was no pass book on hand prior to May 7th, 1902, we were unable to investigate the same prior to that period, but from the information we have compiled the following figures:

May 7th, 1902, Balance in Bank.....	2,085.34
Add, thereto deposits from May 7th, 1902, to August 1st, 1911 (as per pass book	227,756.01
	229,841.35
Deduct, withdrawals, during that period amounting to	228,501.25
Leaving balance in Bank on August 1st, 1911 (as per pass book) of.....	1,340.10

Owing to the fact that Wm. F. Mullin's accounts are mixed in with the accounts of the Estate, and no proper accounting system had been kept, we were unable to compile the expenses of the Estate during the eleven years mentioned. We have, however, with the assistance of your clients, prepared the following statement:

	Prices Charged.	Cost.	Profit.
Coaches	51,129.75	46,016.78	5,112.97
Outside Box	10,662.00	7,963.00	2,699.00
Caskets	106,718.75	30,956.00	75,762.75
Hearse	13,654.50	12,289.05	1,365.45
Buss	7,308.00	6,577.20	730.80
Embalming	14,955.00	1,965.00	12,990.00
Advertising	1,932.56	1,932.56	
Candles	3,649.37	1,282.65	2,366.72
Use of Candlestick	1,109.90		1,109.90
Clothing	11,215.75	3,307.50	7,908.25
Chairs	2,242.39	341.50	1,900.89
Opening Graves	5,013.62	5,013.62	
Mass	14,136.80	14,136.80	
Gloves	1,777.30	753.75	1,023.55
Sundry Charges	31,840.08	25,499.63	6,340.45
Totals	277,345.77	158,035.04	119,310.73

This statement shows the total business done during the eleven years mentioned, properly analyzed and amounting to

Total charges of $277,345.77

Deducting therefrom the cost as furnished us by your clients amounting to 158,035.04

Leaving a gross profit of..... $119,310.73

The discrepancy between $279,827.44 previously mentioned and the present amount.... 277,345.77

amounting to 2,481.67

is caused partly by clerical errors on the part of Wm. F. Mullin, and partly through discounts and allowances granted.

Very truly yours,
J. CONSTAM AUDIT CO.
L.S. J. Constam,
President.

Newark, N. J.
January 24th, 1912.

Exhibits D 1-D 34 inclusive, D 36, D 37, D 39-D 43 inclusive, and D 45-D 60 inclusive, omitted by agreement of counsel.

Report of Special Master.

(Filed May 2, 1914.)

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM F. MULLIN,
Complainant,

and

ANNIE E. MULLIN, *et. als.,*
Defendants.

Report of Halsey M. Barrett, Special Master.

To the Honorable Edwin R. Walker, Chancellor of the State of New Jersey.

Halsey M. Barrett, one of the Special Masters of this court, do hereby report that by an order of reference made in this cause October 22nd, 1912, it was referred to me, the subscriber, to take an account of all the dealings and transactions of the complainant William F. Mullin, as administrator with the will annexed of Peter M. Mullin, deceased, while in the conduct and control of the business of said Peter M. Mullin since his appointment and qualification as such administrator with the will annexed, and therefrom to ascertain the net rents, issues and profits realized from the said business, and in taking of said account, to estimate the profits, so that as far as ascertainable they should include only those resulting from the employment of the testator's estate as capital in the business, and due allowance should be made for other elements creating the profits, such as

the business skill and credit of the executor in carrying it on, and the Master should allow such compensation for the administrator's serices as part of the expenses of the business as may be reasonable and proper, and deduct the same from the gross income of said business in ascertaining the net profits with which he is chargeable.

The hearing of this matter was begun on January 22nd, 1913, and was resumed on February 10th, and May 9th, 19th, 21st and June 2nd. The case was argued the latter part of June and subsequently briefs were furnished to the Master by the respective counsel in the Fall of 1913.

The amount of testimony taken was 639 pages, a large proportion of which testimony was designed to show the profits of the undertaking business carried on by William F. Mullin as administrator *cum testamento annexo* of Peter M. Mullin, deceased. The period covered by the accounting is from August 1st, 1900, the date of the appointment of said William F. Mullin as administrator of said estate, to August 1st, 1911, and I do find and report as facts either proved, admitted or undisputed:

a. That the complainant William F. Mullin conducted an undertaking business at No. 91 Lafayette street (now No. 228 Lafayette St.) in the City of Newark, N. J., from August 1st, 1900, to August 1st, 1911.

b. That the business so conducted by him had been conducted for many years by his father, Peter M. Mullin, and that after the death of the said Peter M. Mullin in 1891 the business was continued by the widow of Peter M. Mullin, executrix of her husband's estate, until the date of her death shortly prior to August 1st, 1900.

c. That William F. Mullin had been working for his father assisting him in the undertaking

business, for about two years prior to his father's death in 1891, and that William F. Mullin was nearly eighteen years old in 1891; and that he continued to manage and conduct said business by arrangement with his mother, for nine years thereafter until his mother's death shortly prior to August 1st, 1900.

d. That the value of the business or capital employed therein on August 1st, 1900, was five hundred dollars ($500). (Testimony p. 7.)

e. It was stipulated and agreed that the volume of business done during the period of eleven years under review amounted to the sum of two hundred and seventy-seven thousand three hundred and forty-five dollars and seventy-seven cents ($277,345.77) as shown on the Constam audit. (Testimony p. 31 & p. 77). It was stipulated and agreed that the gross profits arising from this business for the same period, was one hundred and six thousand four hundred and twenty dollars and twelve cents ($106,420.12). This was stipulated at the argument.

f. It is proved and is undisputed, that during this period of eleven years William F. Mullin conducted this undertaking business as if it were his own private business, in the belief that he was under no obligation to account to any person for the net profits of such business, and that his only obligation with respect to the use of such net profits, was to support and maintain or to contribute such sum as might be necessary toward the support and maintenance of his brothers and sisters during their minority.

g. That on August 1st, 1900, there were five of complainant's brothers and sisters who were minors, namely, James S., Isabelle, Annie E., Marie and Peter M. Mullin, Jr. (See DuBois report

pages 12 & 13. This report bears no date but a duplicate of it was offered in evidence at the hearing.)

The five children were supported in whole or in part by the complainant from August 1st, 1900, to January 1st, 1904, three years and five months—41 months, at which time some sort of settlement was made with James S., presumably on his becoming of age.

Four children were supported in whole or in part by the complainant from January 1, 1904, to Jan. 1, 1907, three years—36 months, at which time some sort of settlement was made with Isabelle, presumably on her becoming of age.

Three children were supported from January 1, 1907, to July 1, 1907—six months, at which time Annie E. Mullin became of age.

Two children were supported from July 1, 1907, to March 1, 1910, two years and eight months—32 months, at which time Marie Mullin became of age.

One child, Peter M. Mullin, Jr., was supported from March 1, 1910, to August 1, 1911, one year and five months—17 months, and Peter M. Mullin, Jr., was at that time still a minor.

The agreement and stipulation of counsel that the gross profits were $106,420.12, made up of the following items:

Use of Coaches	$5112.97
Use of hearse	1365.45
Use of bus (for pall-bearers)	730.80
Sundry Miscellaneous charges	6340.45
Use of Candlesticks	1109.90
Use of candles	2366.72
Embalming	11257.63
Clothing furnished	6729.45
Use of chairs	1793.91
Gloves furnished	1023.55
Outside boxes furnished	1266.50
Caskets furnished	67322.79
	$106420.12

greatly simplifies the work of the Master and makes it unnecessary to consider the large volume of testimony taken with a view to determining these profits, and leaves out three matters to be considered:

1. The legitimate and necessary expenses of conducting the business, which deducted from the gross profits, will show the net profits of the business.

2. The compensation to be allowed the complainant for services in conducting the business, which is to be treated as a part of the expenses of the business.

3. What sums should be allowed the administrator for actual expenses incurred by him or contributed by him toward the support of his minor brothers and sisters for the several periods hereinbefore stated.

Before going into the consideration of these details it is proper to state that although the

decree in this case directs the complainant William F. Mullin to make an accounting in respect to the business conducted by him as aforesaid, no such accounting has been attempted, and nothing in the nature of an account which should show charges and discharges has been made. The reason for this situation is that Mr. Mullin kept no books of account of any description excepting his charge book or sales book, as it might be called, showing the amounts charged, from day to day, against his customers. The witness was asked (p. 78) on direct examination:

Q Did you keep complete books and transactions of the business?

A No, sir.

And in answer to the next question, said: "I never kept any cash account of things of that kind."

The business as shown by the Constam account, aggregated $277,345.77. The accountant DuBois, employed by Mr. Mullin and produced as a witness in behalf of the complainant, accepted these figures as shown in the Constam report, and accepted them by the direction of Mr. Mullin.

On page 77 the witness DuBois was asked:

Q From what source did you satisfy yourself that the item of sales, column 1, exhibit A, $277,345.77, is correct? I understood you to say that you made no verification of that, but simply accepted the Constam report." A. "Well, that is practically correct. Mr. William F. Mullin informed me that he thought it was about right, that he would be willing to let it go at that, and not to waste any more time and money to go into the receipts, and it was accepted."

The testimony of the accountant, Frank G. DuBois, with respect to the report which he made of the business conducted by Mr. Mullin during

these eleven years, is of very slight service and has little, if any, probative force. He accepted the Constam account as to the amount of business done, and he took William F. Mullin's statements and estimates as to substantially all the other details upon which he made his report. He found and examined some check books, a large number of bills and other memoranda, but these were so incomplete as to be of no service in the nature of an accounting, and nearly all of his testimony is based upon what William F. Mullin told him in respect to these matters, very little of which was susceptible of any verification or proof. This appears all through his testimony. On page 72 the following questions were asked by the Master.

Q Mr. DuBois, as I understand your testimony, you used the Constam figures wholly for the first column of exhibit A showing sales?

A Yes, sir.

Q All the other figures shown on exhibit A under the column of 2, with the heading "costs" and column 3, with the heading "gross profits" are mere estimates based upon the volume of business shown in column 1 entitled "sales" and formed after consultation and conference with Mr. Mullin and such other persons as you consulted? A That is right, yes sir.

Q Is there a single statement or conclusion of fact, not opinion, but of fact, in this report (referring to DuBois's report) that is based upon any figures which you made up from records or bills or other source of record? A Made up entirely from that source?

Q Yes. A No, sir.

Q (p. 74). Did you have any records whatever that were consecutive and which purported to show for any definite period, the receipts, disbursements

and expenses of this business? A If you confine that to receipts, I say "yes".

Q But not as to disbursements or expenses? A No, sir.

Q Then as to disbursements and expenses and the necessary expense of conducting the business, that is wholly estimated, isn't it? A Not wholly, but largely.

Q In what respect is it not wholly? A We have the checks and I took certain periods.

Q But single checks, or certain periods, how could they be serviceable in determining the result for a long period? A Only by average.

Q For the purpose of an average you would have to have something else with which to make comparison? A Ought to have, but didn't always have it.

Q Did you have it in this case? A No.

With reference to the disbursements for the business, which, being deducted from the gross profits will show the net profits, Mr. Mullin claims allowance for the following items of expense per year during this entire period of eleven years, as shown on page 11 of the DuBois report.

Up-keep and consumption of supplies, printing, stationery, rugs, furniture, candlesticks, pedestals, etc.	$ 250.00
Wages of two men $17 each per week, and expense of same $1 per week, making $36 per week	1872.00
Wagon and horse 150 funerals at $4....	600.00
Light and heat, one ton of coal per month at $6, gas and electric light per month $4	120.00
Advertising in 3 newspapers at $7.50 per month	90.00
Programs, donations, tickets, etc.	500.00
Drinks, cigars, dinners, fees etc. $30 per week	1560.00

Expense of William F. Mullin, transportation, meals, answering calls, etc., $1 per day	365.00
Telephone, telegrams, postage, etc	200.00
Incidentals, estimates	43.00
Average yearly business expense	$5600.00

There was very little testimony produced in support of these estimates. Mr. Mullin, on pages 87 to 90, testified that he thought these were conservative and moderate estimates, but he had no record on which to form an opinion, and even after this suit was commenced, for the year 1912, Mr. Mullin kept no accounts of any sort which would have served as a basis for an accurate estimate of similar expenditures in previous years, and in reaching a conclusion in this report the Master is obliged to use his own judgment as to the reasonableness of these claims.

The item of wages for two men claimed by Mr. Mullin, seems to me excessive. Mr. Mullin's own testimony is (on page 88) that he had one man for years at $17 a week, and from time to time employed one or two and sometimes three other men. There is other testimony which leads me to conclude that he did not have the expense of two men for the entire period of eleven years, and I think it will be fair to assume that the weekly wages for his help did not exceed $25 per week.

With this explanation, I report that in my judgment the following items of expense of conducting the business should be allowed:

Supplies per year as claimed by Mr. Mullin	$ 250.00
Wages $25 per week	1320.00
Wagon and horse for say 150 funerals per year at $4 for each occasion	600.00

Light and heat	$ 120.00
Advertising	90.00
Personal expenses of W. F. Mullin $1 per day	365.00
Telephone, telegrams, postage, etc	200.00
Incidentals	43.00
Making in all	$2988.00

per annum, which, for the period of eleven years amounts to $32868.00.

The following items claimed by Mr. Mullin, program, donations, tickets, etc., $500, I cannot see any basis for allowing. It is of course probable that Mr. Mullin, from time to time, did expend money in that way and for this purpose, and he calls it advertising, and if there were any records showing just what sums were so spent and from which it would appear that such expenditure was reasonable and of advantage to the business, it is possible that some portion of it should be allowed, but as it is a mere guess by Mr. Mullin, and such expense, whatever it was, would appear to have been made merely from good nature, I cannot see my way clear to allow any part of it.

The item of drinks, cigars, dinners, fees etc., $30 per week, $1560, is likewise a mere guess, and it seems incredible that more than $4 a day including Sundays could have been spent for eleven successive years in this way. Mr. Mullin has testified that he himself is a total abstainer, and he was under little or no obligation to expend any considerable sum for this purpose. I do not believe that he spent any amount approximating such sum in this way, and in my judgment the item should not be allowed on a mere guess, with no testimony to support it other than Mr. Mullin's statement that he did spend something in this way.

If from the gross profits of	$106,420.12
we deduct this sum of expenditures which I think, as stated above, should be allowed as legitimate expenses of conducting the business, namely, $2988 per year for eleven years, aggregating,	32,868.00
we have left as net profits	$ 73,552.12

From this sum the order of reference directs me to allow such compensation for the administrator's services as may be reasonable and proper. Mr. Mullin testified on this point, that he thinks he could have earned five or six thousand dollars a year in some other business; that he has a fine voice, and was at one time offered a salary of $5,000 per year to sing in comic opera; that this offer was made during the lifetime of his mother, and that he declined it out of regard for her and her desire to have him continue to manage the business. This is undoubtedly true, but there are authorities in this state which hold that in determining the reasonable compensation of a man for services, evidence as to what he might have earned in some other capacity, is too remote to be a basis of calculation. The question in this case is what sum should be allowed to Mr. Mullin as a proper compensation for his services during these eleven years, and regard is to be had to the business skill and credit of the administrator, Mr. Mullin, in carrying it on.

It appears by the testimony that the business has not increased materially during the eleven years preceding August 1, 1911. It varied from year to year, both as to receipts and the number of funerals conducted. The greatest number of funerals was in 1904-1905, 186; and between the years 1901 and 1906-1907 there were not less than

169 and not more than 186, and the total was 1239. This divided by seven makes an average of 177, which shows a noticeable uniformity. After 1906-1907 there was a marked diminution namely, 1907-1908, 152; 1908-1909, 110; 1909-1910, 128; 1910-1911, 115; or for those four years an average of 126. These figures are shown on page 9 of the DuBois report, and are submitted in behalf of Mr. Mullin.

The business per year prior to 1900 was about the same as it was for the first five years succeeding 1900. From this data it appears that the business skill and credit of the administrator was barely sufficient to retain the business up to the standards prior to the death of his mother, and that during the last four or five years it has fallen considerably short of reaching that standard. Mr. Mullin was, during most of these eleven years, the owner and proprietor of a livery stable, and although he did not give that business all of his time, he did give it such attention as he deemed necessary. The undertaking business was conducted in a building owned by his father's estate. No charge for rent has been suggested or claimed. The total number of funerals during these eleven years is 1744 which makes an average of 158 or about three funerals per week. Mr. Mullin had no capital in the business himself, and he has testified that the stock of merchandise on hand did not vary in any marked degree from time to time; that supplies were ordered for each funeral in accordance with the wishes of the customer. that the business was his own, had the use of and did use all of the net profits of the business as if it were his own individual property.

Under these circumstances, having consideration to his skill and credit, I am of the opinion that if Mr. Mullin is allowed one-half of these net

profits of $75,552.12 as compensation for his personal services, that sum, amounting to $36,776.06, will be fair and reasonable and just.

This is at the rate of $3316 per year, or about $276 per month.

Mr. Lum, the counsel for Mr. Mullin, stated in his argument that if the net profits of the business were $4500 per year, Mr. Mullin should receive $2500 per year. This is exactly 55% of such net profits. As I said before, in my judgment, 50% of these net profits is sufficient.

If, then, from the net profits	$73,552.12
we charge as an expense of the business, the compensation of Mr. Mullin,	36,776.06
there remains to be accounted for the remaining half of such profits, namely,	$36,776.06

This brings us to the consideration of what allowance should be made to Mr. Mullin in this accounting, for sums of money expended by him in the care, maintenance and support of certain of his brothers and sisters during their minority, to which I have already referred. Here again, embarrassment arises from the fact that there is absolutely no data on which to form a judgment as to such expenditures. The testimony conflicts considerably on this point. Mr. Mullin claims that he should be allowed the sum of $1929.28 per year as a fair average for the entire eleven years. These figures are shown on the DuBois report (p. 11) based on details which appear in the following pages, 12 and 13. The figures in this report extend from November, 1891, down to April, 1913; but we are only to consider the eleven years from August 1, 1900, to August 1, 1911, and during this time the number of children so supported was five in August 1900, and then diminished as

hereinbefore stated, down to one on August 1, 1911. The average reached by DuBois in his report cover, as before stated, nearly twenty years, and the number of persons supported in 1891 was the widow and nine children, making ten persons in all. The figures suggested by Mr. DuBois' report, furnish no basis for an average, and as there is no data, it becomes simply a question of judgment on the part of the Master.

Mr. Mullin claims that during most of the period of eleven years above stated, he paid board at the rate of $5 a week for such of his brothers and sisters as he was from time to time maintaining, and that in addition to this, he incurred considerable expense for clothing, instruction at schools, music, vacation expense, pocket money etc. The testimony of Mrs. Coburn, a sister of Mr. Mullin, on page 556, is, that a number of her brothers and sisters boarded with her in the May following the death of her mother; I think Mrs. Mullin, the mother, died in the summer of 1901, so that this was probably May, 1902; and that these brothers and sisters continued to board with her as the witness says, "up to last month;" her testimony being given on Monday, June 2, 1913. This would mean to May, 1913. That four children all the time, and sometimes five, boarded with her, namely, Bella, Anna, Marie and Peter, and sometimes James; that she was paid no board for James (p. 557); that she was paid board for Bella until she got old enough to pay her own; that she was paid by check (presumably of Wm. F. Mullin); and on page 556, this witness testifies that before this suit was started she received $15 a month, or, as she says, $3.75 a week board for each of the children, and that that had been going on only three years and continued up to the time that the court ordered $5 a week for the support

of each child. She further testifies, on page 558, that the children got very little clothing; that each of the girls got four dresses a year; that these dresses were very cheap and would only cost from three to four dollars each, and that their winter dresses cost from $12 to $15 per suit. She says in the last line of page 558, that it did not cost over $100 a year to dress all three of the youngest children. That would be $33.33 for each child. That this included shoes but not underwear. This witness was asked on page 561: Q What have you to say about the estimate that the support of each child cost about $500 a year? A "On my part of it, they didn't; I don't know what the schooling cost, but their clothing and taking care of them didn't cost that much;" and that she knew what clothes were bought for them. On page 562 she testifies that she bought the clothing to suit the prices to the sum of money she was allowed to have for that purpose, and that Mr. Mullin would tell her just how much to pay for each dress; also that she bought Peter's clothing until he was fifteen years of age.

Annie M. Mullin, a sister, testified (p. 569) that their clothing was very inexpensive, and that they had little more than what was barely sufficient.

The testimony of the other brothers and sisters whom Mr. Mullin supported in whole or in part, is similar, and I am satisfied that they were maintained in a very economical and inexpensive manner.

It appears by the testimony that at some time in the progress of this cause, the learned Vice Chancellor, upon application in behalf of the minor children, made an allowance of $5 a week for their support, from the time of the making of such order. In view of this, and in view of the testi-

mony to which reference has been made, I am of the opinion that an allowance of $5 a week for the support of each child during the period that they were so supported respectively, by Mr. Mullin, will be fair and just, having regard to the entire period from 1900 to 1911. The children were each eleven years younger at the beginning of this period, and one of them was a minor at the time the order of reference was made. None of them became of age until January, 1904, so that their ages varied from eight or nine to seventeen or eighteen, and although the school expense as they grew older, was an added charge, I think this would be compensated for by the fact that $5 a week would be much more than sufficient for their support while they were quite young. At all events, I am of the opinion that the judgment of the Vice Chancellor, when that question was before him, should control my own conclusions, and as before stated, I regard that as a liberal allowance.

As previously stated in this report, Mr. Mullin supported, in whole or in part: (pages 3 & 4 of this report.)

5 children	for	41 months	—1 child	for	205 months
4 children	for	36 months	—1 child	for	144 months
3 children	for	6 months	—1 child	for	18 months
2 children	for	32 months	—1 child	for	64 months
1 child	for	17 months	—1 child	for	17 months

this equals one child for 448 months

This is equivalent to one child for 37 years and 4 months, or 37–1/3 years. $5 per week is $260 per year, and $260, multiplied by 37 1/3 amounts to $9706.58, and I do report that this sum should be allowed to Mr. Mullin for the support of the minor children during the period stated.

The half of the net profits with which Mr. Mullin would be chargeable is, as before stated,	$37,776.06
From this should be deducted for the support of the children as above stated,	9,706.58
which leaves	$27,069.48

I summarize the conclusions contained in this report as follows:

Mr. Mullin has not claimed any reduction of the receipts of the business by reason of bad debts or other uncollectable accounts, but has conceded that the gross profits of the business were	$106,420.12
I find that the expenses of the business were	32,868.00
leaving net profits of	$73,552.12
Mr. Mullin should be allowed for his personal services in conducting the business, one half of these net profits	36,776.06
this leaves	$36,776.06
I allow Mr. Mullin for the support of his brothers and sisters, as hereinbefore stated,	9,706.58
This leaves Mr. Mullin chargeable with	$27,069.48

Respectfully submitted,
April 30, 1914.

Exceptions to Master's Report.

(Filed June 12, 1914.)

IN CHANCERY OF NEW JERSEY.

Between	
WILLIAM F. MULLIN, *Complainant,*	*On Bill, etc.*
and	*Exceptions to Master's Report.*
ANNIE E. MULLIN, *et. als., Defendants.*	

Exceptions taken by the Complainant in this cause to the report made herein on the Thirtieth day of April, Nineteen hundred and fourteen by Halsey M. Barrett, Esquire, one of the Special Masters o fthis Court, by virtue of an Order of Reference, made to him in this cause on the Twenty-second day of October, Nineteen hundred and twelve.

First Exception. For that the said Master has reported as follows:

"The following items claimed by Mr. Mullin, programs, donations, tickets, etc., $500, I cannot see any basis for allowing. It is of course probable that Mr. Mullin from time to time did expend money in that way and for this purpose and he calls it advertising and if there were any records showing just what sums were so spent and from which it would appear that such expenditure was reasonable and of advantage to the business it is possible that some portion of it should be allowed,

but as it is a mere guess by Mr. Mullin and such expense, whatever it was, would appear to have been made merely from good nature, I cannot see my way clear to allow any part of it."

And the complainant insists that the said item of Five hundred dollars mentioned by the said Master should be allowed to him and that the said sum is a reasonable allowance as established by the testimony produced by the defendants and particularly by such testimony of Joseph L. Mullin at pages 479-481 of the testimony and by the evidence of James Mullin on page 609 of the testimony.

Second Exception. For that whereas the said Master has reported as follows:

"The item of drinks, cigars, fees, etc., $30 per week, $1560, is likewise a mere guess and it seems incredible that more than $4 a day, including Sundays, could have been spent for eleven successive years in this way. Mr. Mullin has testified that he himself is a total abstainer and he was under little or no obligation to expend any considerable sum for this purpose. I do not believe that he spent any amount approximating such sum in this way, and in my judgment the items should not be allowed on a mere guess with no testimony to support it other than Mr. Mullin's statement that he did spend something in this way."

And the complainant insists that the said item should have been allowed to him on the ground that in addition to the complainant's own testimony the fairness and reasonableness of said item is established also by the witnesses produced by the defendant and particularly by the testimony of the said Joseph L. Mullin on page 479 of the testimony and also by the testimony of James Mullin on page 609.

Third Exception. For that whereas the Master reports as follows:

"The item of wages for two men claimed by Mr. Mullin seems to me excessive. Mr. Mullin's own testimony (on page 88) is that he had one man for years at Seventeen dollars a week and from time to time employed one or two and sometimes three, other men. There is other testimony which leads me to conclude that he did not have the expense of two men for the entire period of eleven years, and I think it will be fair to assume that the weekly wages for this help did not exceed $25 per week."

And the complainant insists that the item of wages claimed by him should have been allowed to him in full for the reason that the amount of such expenditure was established by the testimony of the complainant and that no evidence was produced to contradict the testimony of the complainant and that the only testimony produced by the defendants indicated that such item of expense might be reduced Eight dollars per week, in the opinion of the witnesses.

Fourth Exception. For that whereas the Master reports as follows:

"Under these circumstances, having consideration to his skill and credit, I am of the opinion that if Mr. Mullin is allowed one-half of these net profits of $73,552.12 as compensation for his personal services, that sum, amounting to $36,776.06, will be fair and reasonable and just. This is at the rate of $3316 per year or about $276 per month."

And the complainant insists that the amount allowed to him for his personal services is unreasonable and unjust and unfair, for that it appears by the said Master's report and by the testimony

presented in the cause that the value of the business, including the good will, did not exceed at any time the sum of Five hundred dollars, for which it was ultimately sold, and further that due allowance has not been made for the various elements creating the profits of said business, as directed in the Order of Reference to said Master, such as the business skill and credit of the complainant in carrying on said business.

Fifth Exception. For that whereas the Master reports as follows:

"Mr. Lum, the counsel for Mr. Mullin, stated in his argument that if the net profits of the business were $4500 per year, Mr. Mullin should received $2500 per year."

And the complainant insists that his counsel did not make the statement alleged in said Master's report nor does it appear in the record in this case that any such concession was made.

Sixth Exception. For that whereas the Master reports as follows:

"It appears by the testimony that at some time in the progress of this cause the learned Vice-Chancellor, upon application in behalf of the minor children, made an allowance of $5 a week for their support from the time of the making of such order. In view of this and in view of the testimony to which reference has been made, I am of the opinion that an allowance of $5 a week for the support of each child during the period that they were so supported respectively by Mr. Mullin will be fair and just, having regard to the entire period from 1900 to 1911. The children were each eleven years younger at the beginning of this period, and one of them was a minor at the time the order of reference was made. None of them became of age until January, 1904, so

that their ages varied from eight or nine to seventeen or eighteen, and although the school expense as they grew older, was an added charge, I think this would be compensated for by the fact that $5 a week would be much more than sufficient for their support while they were quite young. At all events, I am of the opinion that the judgment of the Vice-Chancellor, when that question was before him, should control my own conclusions, and as before stated, I regard that as a liberal allowance."

And the complainant insists that the allowance made for the support, maintenance and education of the minor children is unfair and unjust for the reason that the amount allowed by this court, pending the determination of the cause, had no bearing, directly or indirectly, upon this item of expense and was purely an arbitrary sum fixed by the order of the court merely for the convenience of the applicants, and further because testimony produced in this cause and the proofs offered by complainant, amply justify the allowance claimed by him of a yearly average of One thousand nine hundred and twenty-nine dollars and twenty-eight cents ($1,929.28).

Seventh Exception. For that whereas the Master reports as follows:

"This leaves Mr. Mullin chargeable with $27,069.48."

And the complainant insists that the Master's report is contrary both to law and equity for the reason that the said Master has failed to make to the complainant due allowance for items of discharge as claimed by him and mentioned in the said Master's report.

Exceptions to Master's Report.

Whereas the said Halsey M. Barrett, Esquire, Special Master as aforesaid, has not reported properly or in accordance with the terms of the said order or with the principles of equity.

In which said several matters and respects this exceptant prays the judgment of this court.

LUM, TAMBLYN & COLYER,

Solicitors for and of Counsel with Complainant.

Opinion of Vice-Chancellor.

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM F. MULLIN,

Complainant,

and

ANNIE E. MULLIN, *et. als.,*

Defendants.

April 28th, 1915.

Mr. Ralph E. Lum, for William A. Mullin.

Mr. Michael J. Tansey, for defendants.

STEVENS, *V. C.* (Orally)) The testator, Mullin, died in eighteen hundred and ninety-one; the widow died in nineteen hundred. During the lifetime of the widow three releases were given; one by William Mullin, another by Joseph Mullin and another by Grace Mullin.

Now the first thing to consider is what is the effect of those releases—assuming that they have all the effect that complainant has argued for. The effect of them is to transfer, as I understand it, to Mrs. Mullin, in her character of executrix, whatever residuary interest William, Joseph and Grace might have; she would hold that as executrix for the benefit of her *cestuis que trust.* The question is who are those *cestuis que trust.* They are not the persons who have executed the releases, because they have released their interest; consequently they must be the others. Mrs. Mullin

did not by virtue of those releases acquire any personal right in the property released; she acquired it in her character of executrix. Certainly they did not enure to the benefit of William, for he was one of the releasors. Well, Mrs. Mullin died. What happened? Why, William was appointed administrator *cum testamento annexo,* in her stead, and he, as I understand, has, according to the bill, obtained two releases from two of the other children, and I believe another, from another child, since the bill was filed.

Mr. Tansey. He took James' and Isabels', and another release was executed by Anna, but I don't know that it was ever acted upon or considered a release, not as a final release.

The Court. Was it ever delivered?

Mr. Tansey. I think not.

The Court. Then it can be left out of the case. Now he took two releases, one from Isabel and the other from James, and he took them immediately after they came of age. He stood, as to them, in a position of a trustee, and it was his duty to explain fully what the situation was, and if he did not tell them that there was this interest in the undertaking business, it may be doubtful whether they would stand in equity, as far as this fund is concerned. But that is not the issue in this case. What is in issue is that these releases were made to him as administrator, and not to him personally. They released him from any liability which he might have incurred as administrator toward the releasors. Now what was the situation? William, in the first place, took all the estate that came to him from Mrs. Mullin; he took it as administrator, and he held it, and the estate since accumulated, in trust for those entitled to it. Who are the persons entitled to the

residue of the estate unadministered? According to complainant's contention they are the three remaining children who have not as yet executed releases. If those releases have the effect that counsel imputes to them, then the consequence would be that the whole estate would go to the three younger children. They have never claimed it.

The situation must be viewed in a two-fold aspect. First, what is the liability of William Mullin toward the *cestuis que trust,* and second, who are these *cestuis que trust.* Assuming all that is said about the releases, he has not become possessed personally of any interest; he holds the whole as administrator. As to the estate, speaking generally, his liability is for the whole amount of the money in his hands.

Then we come to the question of who is to have this fund, as among the children. According to the contention of complainant's counsel, if my decision be right in the other matter, his client, William F. Mullin would not be entitled, even to one-eighth of the fund. The three children have never asked for the whole fund, and it seems to me that if they will unite in stating that all that each one claims is one-eighth, that will eliminate all further question on this point.

I have been discussing this matter on the theory that the release is an absolute release. But I do not think it is absolute. There is a very singular clause in all these releases, which counsel have no doubt observed, not in the form books; in Nixon's forms, in Corbin's forms, the release is in terms that are absolute; whereas, in this case, Mr. Fred Lum—no doubt with some object in view—inserted this clause: "In consideration whereof, I have released and discharged, and do by these presents release and forever discharge

the said executrix, and also the estate of Peter Mullin, of and from any and all further or other accounting or reckoning in respect to my interest in said estate, and of and from any and all distributive shares, debts, dues, claims and demands, which I ever had, now have, or hereafter can, shall, or may have against said estate, by reason of anything existing at the date hereof." Now, why did Mr. Lum put in these last words: "existing at the date hereof"? Evidently he did not intend the release to be absolute; he intended to protect the children; he intended that it should apply to everything that was existing at the date thereof, and to nothing that existed after that date. That would seem to be the only intelligent construction. What else could he have meant?

Mr. Lum. He meant that they did not release the real estate, he still kept their interest in the real estate.

The Court. No, as adminstrator he had nothing to do with the real estate. The realty, under the will, vested absolutely, on the death of Peter Mullin in the children, and as administrator he had absolutely no concern with it, and so it cannot relate to the real estate. The words related to something else, and I take it that the Court must, in view of the circumstances, construe that something else as meaning such right as they might acquire, or as might come into being after the release was given. Now all this right of the children—so far as the first three releasors are concerned—has come into being since that time. Consider the position of Mrs. Mullin when she took this release. The children were then, almost all of them, minors, except I suppose Joseph and William, and they were being supported out of the business, and there was an argument between

the executrix and William that they should be supported out of the business. Is it at all reasonable to suppose that the release was intended to include the only source from which they could be adequately supported, a source which was then bringing in some seven or eight thousand dollars a year. Is it at all likely that Mr. Lum—careful advisor as we know him to have been—would have intended to cut off that source? I take it that Mr. Lum had in view the very situation which we now find existing when he wrote those words. They appear in every release since that time—they must have some meaning, and I cannot attach any meaning to them except the meaning that I have indicated. So it would seem to me that whatever view may be taken of this matter, William F. Mullin is still responsible for the whole estate. There never has been any transfer to him of any share of any of these children in that estate; the utmost that could be said is that they have agreed that they would not make any further claim upon the estate, existing or that might thereafter accrue; an agreement that would redound to the advantage of those who have not made any such claim. But I do not understand that the position of the three children has ever been that they are entitled to the whole; they have not claimed it in their answer, and I presume, Mr. Tansey, that they do not.

Mr. Tansey. No.

The Court. Well, they are of age and able to speak for themselves. If there is a claim of that sort it will have to be litigated between the children.

Mr. Tansey. If the Court takes the view that those releases did not cut off the releasors from rights in the estate, why of course my clients do not contend that the shares came to them.

The Court. That strikes me as the reasonable construction, but Mr. Lum has been taking the opposite view; he has been taking the view that a fair construction of those releases includes the partnership interest. If that is the proper construction, it would seem to follow that those three children are entitled to the whole, but, as I say, I do not think that is a reasonable construction.

Mr. Tansey. Your Honor will remember that there was a Western case cited in my brief which seemed to take up the idea which your Honor is touching on now.

The Court. Well, that is a different case altogether.

Mr. Tansey. I want to make it plain to the Court that I was arguing the case of the remaining releasors, as well as my own special clients; I am representing the other persons as well, and I feel as though they are entitled to their share of the business.

The Court. I think the matter could be simplified very much by their all agreeing that the proper construction of the release is that it was not intended to deprive any child of any share in the undertaking business; that it was merely intended to relate to the property which was then being distributed.

Mr. Tansey. My clients are willing to do that, they would be willing to take that view of it, because that is the view which they have been contending for.

The Court. How many do you represent?

Mr. Tansey. I represent all of them.

The Court. And you are willing that that view should be taken.

Mr. Tansey. Yes.

The Court. Then that simplifies the matter. Now what do you say to that view of the situation, Mr. Lum?

Mr. Lum. I think it is entirely wrong, sir. I do not understand the effect of a release in that way at all; your Honor, as I understand it, is construing a release as in effect an assignment.

The Court. What I want to know is how it is Mullin personally acquired any interest in the estate by reason of those releases. You take the ground that they are an assignment to him personally. You must go that extent. You must contend that they are not what they appear to be on the face of them, merely a release to him as administrator, discharging him as such from paying anything further than those particular heirs; you are considering them as an assignment of all the residuary interest of the different children to him personally.

Mr. Lum. That is the legal effect of it. It seems to me if I am trustee and hold property for ten *cestuis que trust,* they are each entitled to one-tenth; they cannot under any circumstances get more than that, because that is all that is given to them in the will, and we could not, by getting releases from nine of them, give the other one, instead of one-tenth, which the will gave him, ten-tenths. It does not seem to me that the children, under any circumstances, can get more than an eighth.

(Further discussion)

Mr. Lum. I suppose we can put it in this form, that the decree would be that the fund the three-eighths would go to those who are the three complainants in this case, leaving the re- belonged to the estate, and specifically decree that

mainder in the estate later to be determined, because there might be a specific offset to any one.

The Court. Yes, I would not of course while this matter is pending make any order of distribution. You and Mr. Lum can probably agree on the form of a decree, which will enable you to present this matter fairly to the Court of Errors. The Court of Errors will pass upon this question. If the Court of Errors affirms the finding of the Master, and affirms the view that I have just taken, that these releases are releases, made in the first instance, to the executrix in her character as executrix, and in the second instance to the administrator in his character as administrator, I do not believe Mr. Lum will ever contend that that excludes his client from participation.

Final Decree.

(Filed May 24, 1915.)

IN CHANCERY OF NEW JERSEY.

Between	
WILLIAM F. MULLIN, *Complainant.*	*On Bill, etc.*
and	*Final Decree.*
ANNIE E. MULLIN, *et. als.*, *Defendants.*	

This matter being opened to the Court in the presence of Lum, Tamblyn & Colyer, of counsel with the complainant, and Michael J. Tansey, Esquire, of counsel with the defendants, and it appearing to the Court upon exceptions taken by the complainant in this cause to the report made herein on the thirtieth day of April, Nineteen Hundred and Fourteen by Halsey M. Barrett, Esquire, one of the Special Masters of this Court, by virtue of an Order of Reference made to him in this case on the twenty-second day of October, Nineteen Hundred and Twelve, that the said exceptions should be overruled and the report of the said Master in all things be ratified and confirmed; and it further appearing that the question of the effect, if any, of the releases given by certain of the legatees under the will of Peter M. Mullin, deceased, to wit, William F. Mullin, Grace Coburn, Joseph L. Mullin, James S. Mullin and Isabel Mulvihill, was reserved until the coming in of the

Master's report; and argument thereupon being heard upon said question, and it being considered that the said releases did not extend to or affect any interest which said releasors or any of them had in the undertaking business belonging to the said estate or the proceeds thereof as accounted for under said decree, and that the said releases should be held and decreed to be of no effect as against their rights in the said undertaking business and the proceeds thereof;

It is thereupon on this Twentieth day of May, Nineteen Hundred and Fifteen, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed and the said Chancellor doth by virtue of the power and authority of this Court order, adjudge and decree that the exceptions aforesaid be and the same are hereby overruled and the report of the said Master be in all things ratified and confirmed, and that the proceeds of the conduct of the said undertaking business, as reported by the said Master, are a part and portion of the assets of the estate of the said Peter M. Mullin, deceased; and that the several legatees under the last will and testament of the said Peter M. Mullin, deceased are entitled to share therein, pursuant to their interests under the said last will and testament; and that the said releases heretofore given by certain of the said legatees, to wit, William F. Mullin, Grace Coburn, Joseph L. Mullin, James S. Mullin, and Isabel Mulvihill do not extend to or affect any right of the said releasors in the proceeds derived from the conduct of said undertaking business of the estate of the said Peter M. Mullin, deceased.

And it is further Ordered, Adjudged and Decreed that there be allowed to Michael J. Tansey, solicitor for the defendants, their cost of the suit to be taxed

together with the sum of Three Thousand Dollars, to be paid to Michael J. Tansey out of the fund, as a counsel fee and that there be allowed to the complainant his costs of suit payable out of the fund.

And it is further Ordered that complainant do within twenty days from the date hereof file his accounting of the corpus of the estate aside from the undertaking business.

Respectfully advised,

E. R. WALKER, *C.*

Respectfully advised,

FREDERIC W. STEVENS, *V. C.*

Notice of Appeal.

(Filed June 7, 1915.)

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM F. MULLIN,
Complainant,

and

ANNIE E. MULLIN, *et. als.,*
Defendants.

On Bill, etc.

Notice of Appeal.

The complainant hereby appeals from the final decree made in this Court in the above stated cause on the twentieth day of May, Nineteen hundred and fifteen, and from the whole and every part thereof to the New Jersey Court of Errors and Appeals in the last resort in all causes.

Dated June 3, 1915.

LUM, TAMBLYN & COLYER,
Solicitors for and of Counsel with Complainant.

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

RALPH E. LUM,
Of Counsel with Complainant.

Petition of Appeal.

(Filed June 24, 1915.)

New Jersey Court of Errors and Appeals

Between

WILLIAM F. MULLIN,
Complainant-Appellant,
and
ANNIE E. MULLIN, *et. als.,*
Defendants-Respondents.

On Bill, etc.
Petition of Appeal.

To the Honorable, the Court of Errors and Appeals in the last Resort in all Causes.

The petition of William F. Mullin, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by the final decree made in the Court of Chancery by His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the Twentieth day of May, A. D. Nineteen hundred and fifteen, wherein the said William F. Mullin, individually and as administrator with the will annexed of Peter M. Mullin, deceased, was complainant and Annie E. Mullin, *et. als.,* were defendants, in this respect, to wit, that the said decree adjudges that the exceptions taken by the complainant to the report made herein on the Thirtieth day of April, Nineteen hundred and fourteen, by Halsey M. Barrett, Esquire, one of the Special Masters of the

Court of Chancery, be and the same were thereby overruled and the report of the said Master was in all things ratified and confirmed, and that the proceeds of the conduct of the said undertaking business, as reported by said Master, were a part and portion of the assets of the estate of the said Peter M. Mullin, deceased, and that the several legatees under the last will and testament of the said Peter M. Mullin, deceased, were entitled to share therein, pursuant to the interests under the said last will and testament, and that the said releases heretofore given by certain of the said legatees, to wit, William F. Mullin, Grace Coburn, Joseph L. Mullin, James S. Mullin and Isabel Mulvihill, do not extend to or affect any right of the said releasors in the proceeds derived from the conduct of the said undertaking business of the estate of the said Peter M. Mullin, deceased.

And your petitioner humbly appeals from the whole and every part of the said decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous for that the said exceptions taken by the said complainant to the said report of the said Special Master should have been allowed and sustained and that the said report of the said Master should only be ratified and confirmed as modified by the exceptions so as aforesaid filed by the complainant; and also for that the proceeds of the conduct of the said undertaking business, as reported by the said Master, are not a part and portion of the assets of the estate of the said Peter M. Mullin, and that the several legatees under said will are not entitled to share therein for that the said alleged proceeds of said undertaking business are the private property of the said complainant, William F. Mullin, and further for that the releases given by the said legatees extinguished

and released any rights that the said legatees may have had in the proceeds derived from the conduct of said undertaking business.

Your petitioner therefore prays that the said decree of the said Chancellor may be reversed and set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

LUM, TAMBLYN & COLYER,
Solicitors for and of Counsel with Appellant.

RALPH E. LUM,
Of Counsel with Appellant.

Answer to Petition of Appeal.

(Filed July 23, 1915.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between	
WILLIAM F. MULLIN, *Complainant-Appellant,* *and* ANNIE E. MULLIN, *et. als., Defendants-Respondents.*	*On Bill, etc.* *Answer to Petition of Appeal.*

The Answer of Annie E. Mullin, Marie Mullin Rafter, Peter M. Mullin, Joseph L. Mullin, Grace Coburn, James S. Mullin and Isabel Mulvihill, respondents to the Petition of Appeal of William F. Mullin, appellant:

These respondents not acknowledging all or any of the matters which in the said petition of appeal are contained to be true for answer thereunto say and admit that a decree was on the Twentieth day of May, Nineteen hundred and fifteen, made and entered in the Court of Chancery, in the cause for the purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced.

And these respondents are advised and believe that the said decree is agreeable to equity, and they pray that the same may be affirmed with costs to be adjudged to these respondents.

MICHAEL J. TANSEY,
Solicitor for and of Counsel with Respondents.