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New Jersey Court of Errors and Appeals

PETITION ON ACCOUNTING

(Filed April 7, 1930)

MERCER COUNTY ORPHANS' COURT

In the matter of the estate of } PETITION ON
WILLIAM J. ROESSLER, deceased. } ACCOUNTING

To the Orphans' Court of the County of Mercer,
New Jersey: 10

The petition of George H. Webb respectfully shows that he is the administrator of the Estate of William J. Roessler, deceased, late of said County of Mercer;

That the names and addresses of all persons interested in the annexed accounting are as follows, to wit:

Sarah Roessler, widow, 892 South Broad Street, Trenton, New Jersey.

John Roessler, brother, 3812 N. Marshall Street, Philadelphia, Pa. 20

Ella Humes, sister, Nottingham Way, Mercerville, New Jersey.

Charles Roessler, brother, 4408 N. 18th Street, Philadelphia, Pa.

United States Casualty Insurance Company, Fred W. Bradshaw, Agent, 1137 Hamilton Ave., Trenton, N. J.

That the names of the persons mentioned above, who are minors, together with the names and addresses of their respective guardians, parents, or persons standing in loco parentis to said minors, are as follows, to wit:

None.

Your petitioner further shows that the following is a summary of said account:

	Total receipts, including certain real	
10	estate sold	\$17,123.06
	Amount of expenditures	17,114.87
	Balance in hands of accountant from	
	which are to be deducted commissions,	_____
	court charges and counsel fee.....	8.19

Your petitioner therefore prays for the allowance of said account, and also for the allowances of commissions and counsel fee.

Dated April 7, A. D. 1930.

GEORGE H. WEBB.

20

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

GEORGE H. WEBB

being duly sworn says that he is the petitioner named in the foregoing petition, and that the matters and things therein set forth are true, to the best of his knowledge, information and belief.

30	Sworn and subscribed this 7th	} GEORGE H. WEBB.
	day of April, A. D. 1930, be	
	fore me.	
	HENRY M. HARTMAN,	
	M. C. C. of N. J.	

FIRST ACCOUNTING

(Filed April 7, 1930)

MERCER COUNTY ORPHANS' COURT

In the matter of the estate of }
WILLIAM J. ROESSLER, de- }
ceased. }

To the Honorable GODFREY W. SCHROTH, Judge of
the Mercer County Orphans' Court

George H. Webb, administrator C. T. A. of the 10
estate of William J. Roessler, appointed by the Sur-
rogate of the County of Mercer and State of New
Jersey, hereby makes his first accounting of the goods
and chattels, rights, credits and effects, together
with the real estate which has come into his hands
as administrator aforesaid, and also in his capacity
as Trustee for creditors of the estate, as well as his
disbursements from the same.

1. In the course of the administration of this
estate, the administrator respectfully reports that it 20
was evident to him at the time he assumed his duties
that the personal property would be insufficient to
pay debts of the decedent in full. Your administra-
tor secured a deed to himself, as Trustee, from all of
the heirs of the estate, including their respective hus-
bands and wives, to all of the real property to which
William J. Roessler died seized. Your administra-
tor further reports that this real property consisted
in part of several partly completed homes, together
with certain unimproved property which the de- 30
cedent, during his lifetime, was purchasing on an
installment basis. Your administrator considered it

for the best interest of the creditors that the proceeds derived from the sale of the personal estate, as hereinafter set forth, should be used by him for the purpose of completing the construction of the unfinished properties to preserve the equity therein to the creditors; that said proceeds should also be used for the purpose of completing the payments on the installment contracts for the purchase of the unimproved property so that there would be no default in the payments under said contracts by reason of which the creditors would lose their equity in previous payments made thereunder.

10

2. Your administrator, therefore, accounts as follows, to wit:

HE CHARGES HIMSELF WITH

	Amount received from sale of personal property as per inventory and appraisalment...	\$2,302.60
20	Hanover Trust Company, bank account	2.38
	Mercer Trust Company, bank account	2.07
	Proceeds of policy in the Carpenter Union of Philadelphia, Pa.	300.00
	Received from Thomas A. Auld on insurance policy	100.00
	Wilbur Trust Company, bank account	693.37
30	Total received from Personal property	\$3,400.42

Proceeds from the sale of real estate known as 107 Tuttle Avenue\$3,021.81

Total rents received from all real estate held by the ad- ministrator as Trustee	3,164.00	
Proceeds of sale of real estate known as 2566 Nottingham Way	6,292.08	
Proceeds of sale of lot at Cad- walader Terrace	600.00	
Received as payments in reduc- tion of second mortgage, 105 Tuttle Avenue	384.75	10
Received from State Highway condemnation	120.00	
Additional payments of sale of Auto Truck	140.00	
	\$13,722.64	
 Total received from realty and per- sonalty	 \$17,123.06	

. HE ASKS ALLOWANCE FOR 20

August 3, 1928, House of the Good Samaritan of Water- town, N. Y.	\$189.50	
August 3, 1928, Calbins and Farmers Clinic	15.00	
August 3, 1928, Dr. Yazujian .	20.00	
August 3, 1928, Dr. Gregor	20.00	
August 3, 1928, Myrtle Vallier, Nurse	35.00	
August 3, 1928, W. H. Hart, flowers	29.00	30
August 3, 1928, N. J. Bell Tele- phone	11.33	
August 3, 1928, Public Service Co.	18.78	

	September 19, 1928, Trenton Water Works	52.50
	September 19, 1928, Trenton Stove and Repair Company ..	98.64
	September 20, 1928, Ideal Wall Paper Co., papering Cadwala- der Terrace	35.00
10	September 22, 1928, W. M. Dick- inson Co., cost of continuing mortgage on 110 Vincent Ave- nue	110.50
	September 22, 1928, First Nat. Bank, to lift release of mort- gage on 107 Tuttle Avenue ..	688.20
	September 22, 1928, Ideal Wall Paper Co., 107 Tuttle Avenue.	55.00
	September 25, 1928, E. F. Sut- phin, Hardware, 107 Tuttle nue	22.05
10	September 25, 1928, R. W. Ken- nedey Lumber Co., 107 Tuttle Avenue	12.00
	September 26, 1928, Alfred Jack- son, labor on cesspool, 107 Tuttle Avenue	24.90
	September 26, 1928, Connor Mill- work, two doors, 35 Cadwala- der Terrace	29.92
20	September 28, 1928, Sarah Roes- sler, advance	40.00
	September 29, 1928, Victor A. Wozciechowski, finishing floors, 107 Tuttle Avenue	62.70
	October 2, 1928, interest due on 107 Tuttle Avenue, George Gleaves	105.00
	October 5, 1928, Public Service Co.	16.56

October 5, 1928, N. J. Bell Telephone Company	11.78	
October 5, 1928, Trenton Water Works	6.00	
October 10, 1928, Chas. F. Danser	13.90	
October 16, 1928, Algot Hooglund	39.00	
October 16, 1928, Shirkey Electric, fixtures 107 Tuttle Avenue	55.75	10
October 17, 1928, George H. Webb, completion of all carpentry work and finishing of 107 Tuttle Avenue	211.85	
October 17, 1928, George H. Webb, expenses 708 Norway Avenue	25.00	
October 19, 1928, Webb & Bradshaw, pay part of mortgage at 107 Tuttle Avenue	1,100.00	20
October 19, 1928, Harvey E. Roger, tax on lots 18 to 25 Tuttle Avenue	56.40	
October 19, 1928, Webb & Bradshaw, securing mortgage, 107 Tuttle Avenue	72.00	
October 20, 1928, George H. Webb, advance to Mrs. Roesler	25.00	30
October 22, 1928, John D'Arcy, water	11.70	
October 22, 1928, John S. Bannerman, settlement inexchange	16.44	
October 23, 1928, John H. Conard, plumbing	298.56	

	October 26, 1928, repairs at 708 Norway Avenue	77.55
	October 31, 1928, Richard J. Carey, interest on 708 Norway Avenue	90.00
	November 2, 1928, John Worob, interest first mortgage, Home- crest Avenue	75.00
10	December 4, 1928, Public Serv- ice Co.	38.96
	December 11, 1928, George Gleaves, interest first mort- gage Vincent Avenue	90.00
	December 11, 1928, Fidelity Mortgage Finance Co. Pay- ment 257 Homecrest Avenue.	72.00
	December 12, 1928, Shirkey Elec- tric Co. Supplying ground wire, 107 Tuttle Avenue	3.00
20	December 13, 1928, Trenton Stove and Repair Co. Stove 114 Vincent Avenue	38.00
	December 19, 1928, Charles L. Conard	10.80
	December 19, 1928, Charles L. Conard	27.85
	December 19, 1928, Fred W. Bradshaw, appraiser's fee, personal property	10.00
30	December 28, 1928, Charles W. Schultz, interest first mort- gage, 2566 Nottingham Way .	150.00
	December 28, 1928, Ella L. Cul- lington, interest first mort- gage, 106 Tuttle Avene	75.00

1929

January 9th, N. J. Bell Telephone	9.03	
January 15, N. J. Bell Telephone	9.03	
January 31, Trenton Water Works	5.70	
January 31, Trenton Water Works	5.70	
February 1, Public Service Co..	8.02	
February 6, Philip J. Zapp, re-repair 257 Homecrest Avenue	19.80	10
February 18, Greenwood Cemetery Association	3.20	
February 18, Public Service Co.	10.10	
February 18, N. J. Bell Telephone	6.89	
February 25, Tindall & Cumberly, settlement of lot on Nottingham Way	122.48	
February 25, Harvey Rogers, tax on Nottingham Way	12.62	20
March 5, Public Service Co. 2566 Nottingham Way	7.85	
March 5, N. J. Bell Telephone Co., Nottingham Way	4.14	
March 29, Charles R. Mulford, personal tax	6.90	
April 3, Samuel D. Lenox, expense in foreclosure of 708 Norway Avenue	310.24	30
April 3, cash, recording deed of correction, Tuttle Avenue ...	3.80	
April 5, John Worob, interest 257 Homecrest Avenue	75.00	
April 18, N. J. Bell Telephone Co.	3.89	
April 18, John D'Arcy, water..	2.70	

	April 27, Richard Carey, interest 708 Norway Avenue	90.00
	April 30, Public Service Co.	4.85
	May 3, Philip J. Zapp	8.69
	May 3, Ideal Paper Co.	27.50
	May 8, Charles Schultz, interest 2566 Nottingham Way	150.00
	May 14, George Gleaves, interest on 114 Vincent Avenue	90.00
10	May 18, Trenton Water Works, 35 Cadwalader Terrace	9.50
	May 21, Phil. J. Campbell, coal 2566 Nottingham Way	28.50
	May 23, Ella L. Cullington, interest 106 Tuttle Avenue	75.00
	May 31, Prudential Insurance Co. interest on 110 Vincent Avenue	81.00
	May 31, George H. Webb	15.00
20	June 3, George H. Webb, paid for insurance	117.32
	June 4, Walter Carson, construction of fence	12.32
	June 10, Prudential Insurance Company, interest 35 Cadwalader Terrace	165.00
	June 14, George H. Webb, placing mortgage 257 Homecrest	124.30
30	June 17, Webb & Bradshaw, insurance and commissions	531.35
	June 19, Public Service Co	3.15
	July 18, N. J. Bell Telephone	14.02
	July 2, Samuel D. Lenox	10.50
	July 3, George H. Webb	93.82
	July 9, Harvey Rogers, taxes	95.26
	July 10, Harvey Rogers, taxes	1.06

July 18, Fred W. Brindley, concrete, Tuttle Avenue	174.08	
July 18, Trenton Water Works, 2566 Nottingham Way	5.40	
July 22, Trenton Water Works, 110 Vincent Avenue	3.00	
July 22, Clinton J. Swartz, receiver, taxes on lot Cadwalader Terrace	22.68	
July 23, Dr. E. Brown, interest in full on mortgage on lot 80 Cadwalader Terrace	57.50	10
July 26, W. M. Dickinson Co. for continuation of searches..	29.92	
July 26, Fred Brindley, balance on concrete work, Austin Ave.	222.65	
July 31, Public Service Co.....	12.91	
August 1, Prudential Ins. Co., interest on Vincent Avenue..	74.25	
August 2, Fred Brindley, payment on concrete work, Tuttle Avenue	140.80	20
August 9, Prespect B. & L. Assn. fee on Homecrest Avenue ...	6.00	
August 9, Charles L. Conard, Service on sale of household effects	37.39	
August 9, Charles L. Conard ..	8.40	
August 13, C. Andreas Electric Co., repairs Vincent Avenue.	9.90	30
August 16, Harvey Rogers, tax search	2.00	
August 17, Brown Bros., repairs to gutters and leaders	51.25	
August 21, George H. Webb, commissions on sale of 2566 Nottingham Way	266.75	

	August 29, Builders Finance Corporation, on 257 Homecrest Avenue	70.50	
	August 29, Harvey Rogers, taxes	592.91	
	September 19, Public Service Co.	6.20	
	September 19, Standard Fire Insurance Co.	25.88	
10	September 20, Henry Schweder settlement on exchange of Sweets Avenue for Homecrest Avenue	93.50	
	September 23, George H. Webb commission on sale of Homecrest Avenue	205.77	
	October 2, George Gleaves, interest on 107 Tuttle Avenue.	90.00	
	October 7, George H. Webb, searches for Homecrest Ave.	44.31	
20	October 8, Martha W. Smith, interest on 43 Sweets Avenue.	24.00	
	October 9, J. L. Herbert, collector, 257 Homecrest Avenue	112.82	
	October 15, Trenton Water Works	3.38	
	October 15, Trenton Water Works	7.13	
	October 17, C. Andrews Elec. Co., 114 Vincent Avenue	2.85	
30	October 17, Richard Carey, interest 708 Norway Avenue...	90.00	
	October 17, George H. Webb for ins. 2566 Nottingham Way..	92.20	
	October 21, Trenton Water Works, 2566 Nottingham Way	11.75	
	October 24, Builders Finance Corp	80.00	
	Sub total		\$9,662.75

December 13, George Gleaves, interest 114 Vincent Avenue.	90.00	
December 20, Ideal Wall Paper Co., 708 Norway Avenue	20.05	
December 21, Charles Megules, papering Vincent Avenue and one room in 43 Sweets Avenue	39.40	
3 short cerificates for Surro- gates office	1.50	
January 3, 1930, returned to George H. Webb borrowed money for which checks are in file	257.63	10
January 3, 1930, paid George H. Webb a part of commission due on 2566 Nottingham Way	250.00	
January 22, stain and turpen- tine, 110 Vincent Avenue	1.85	
January 22, 2 gallons paint, 110 Vincent Avenue	7.50	20
January 5, general repair at 110 Vincent Avenue	94.20	
February 14, tax search, 2566 Nottingham Way	2.00	
March 19, search cost 2566 Not- tingham Way	10.27	
February 27, payment on sec- ond mortgage and interest due Wilbur Trust Co.	1,201.62	
February 28, payment on second mortgage and interest due Wilbur Trust Co.	557.66	30
February 28, payment on second mortgage and interest due Wilbur Trust Co.	3,000.00	
February 28, payment taxes, in- terest and liens against prop-		

	erty No. 35 Cadwalader Terrace	988.90	
	February 28, Water rent 110 Vincent Avenue	5.70	
	March 3, plumbing at 110 Vincent Avenue	34.07	
	March 7, Martin Bros., for block for cesspool	16.62	
10	March 19, J. E. Stevenson, lumber for back step at 708 Norway Avenue	6.81	
	March 25, George Gleaves, interest on first mortgage 114 Vincent Avenue	90.00	
	Sub total		\$16,337.53

DISBURSEMENTS IN CASH

	February 18, 1929, Amos Tindall and Cubberley, difference in settlement on lot Nottingham Way	69.04	
20	November 9, 1929, papering kitchen 104 Tuttle Avenue	9.45	
	August 2, 1928, Samuel Haverstick	40.03	
	September 26, 1928, Harry Estgen, roof repairs, 104 Tuttle Avenue	3.00	
	October 20, 1929, Ideal Wall Paper Co., 708 Norway Ave.	24.00	
30	October 12, 1929, Philip J. Zapp, 110 Vincent Avenue	31.50	
	October 14, 1929, Wm. Pyle, 110 Vincent Avenue	10.95	
	November 28, 1928, Trenton Stove Repair, 114 Vincent Avenue	38.00	

January 19, 1929, Samuel Haverstick, Surrogate, 2 short certificates	1.50	
January 4, 1929, Philip J. Zapp, 708 Norway Avenue	14.25	
February 12, 1929, Philip J. Zapp, 257 Homecrest Avenue	8.88	
February 12, 1929, Philip J. Zapp, 708 Norway Avenue ..	9.00	
May 18, 1929, James Kline, adjusting, greasing car	11.50	10
June 29, 1929, Philip J. Zapp, 708 Norway Avenue	13.50	
June 25, 1929, Yaro Yago, plumbing	4.00	
August 13, 1929, Philip J. Zapp, Nottingham Way	24.62	
September 10, Philip Zapp, 43 Sweets Avenue	5.63	
June 16, 1929, balance due Webb & Bradshaw	64.12	20
July 24, 1929, commission and search expenses, lot Cadwalader Terrace	93.82	
September 19, 1929, permit for Hamilton Township open street	93.82	
July 5, 1928, water service, Tuttle Avenue	52.50	
October 10, 1928, fireplace repaired, 106 Tuttle Avenue ...	2.00	30
April 2, 1929, cesspool, construction, 110 Vincent Avenue	53.00	
November 6, 1929, 104 Tuttle Avenue, repairs to roof	11.75	
June 3, 1929, 35 Cadwalader Terrace, repairs	50.50	

July 17, 1929, recording deed, Bannerman to Webb	2.30
November 16, 1928, drain board in 107 Tuttle Avenue	6.00
July 1, 1929, paid for return of deed of Bannerman	120.00
<hr/>	
Total disbursement as to realty and personalty	\$17,114.87
10 Receipts	\$17,123.06
Disbursements	17,114.87
<hr/>	
Balance on hand	\$8.19

(Filed)

STATE OF NEW JERSEY }
COUNTY OF MERCER }^{ss.}

GEORGE H. WEBB

20 the above named accountant, being duly sworn according to law, on his oath says that the foregoing first account is in all things just and true, both as to the charge and discharge thereof, according to the best of his knowledge and belief.

Sworn and subscribed before
me this 7th day of April,
A. D. 1930.
HENRY M. HARTMANN,
M. C. C. of N. J.

} GEORGE H.
WEBB.

To the Judge of the Orphans' Court of the County of Mercer:

The above account being by me audited and stated, I now report the same to the Court for settlement and allowance.

SAMUEL HAVERSTICK,
Surrogate.

ON ACCOUNTING EXCEPTIONS BY UPDIKE- 10
KENNEDY COMPANY TO FIRST ACCOUNT

(Filed May 15, 1930)

MERCER COUNTY ORPHANS' COURT

In the matter of the Estate of } On accounting Ex-
WILLIAM J. ROESSLER, } ceptions by UP-
deceased. } DYKE - KENNEDY
} COMPANY to first
} account.

To the Honorable GODFREY W. SCHROTH, Judge of 20
the Mercer County Orphans' Court:

1. Updike-Kennedy Company, Inc., a corporation duly organized and existing under the laws of the State of New Jersey, and having its principal office and place of business in No. 1010 East State Street, in the City of Trenton, in the County of Mercer in said state, respectfully shows that:

2. It is a creditor of the above-named decedent, William J. Roessler, and hereby excepts to the first account of George H. Webb, administrator c. t. a. of 30

the estate of said William J. Roessler, deceased, for the following reasons:

3. The accountant unlawfully took title as trustee to the real estate of decedent.

4. The accountant's duty as administrator c. t. a. was to proceed under the statute for the sale of lands to pay debts and this duty he did not observe.

5. All acts and doings of the accountant in relation to said estate in any other capacity than as administrator c. t. a. were illegal, because he did not follow the procedure provided in the statutes.

6. Every expenditure set forth in said account is illegal, excepting Surrogate's fees, because the accountant unlawfully took title to the real estate, as trustee, instead of reporting to this court the assets and liabilities of the estate and procuring the statutory orders for the proper liquidation and distribution of the estate.

7. The accountant illegally used the personal estate in completing unfinished properties and in completing payments for unimproved real estate.

8. The accountant illegally paid the debts set forth in the allowances prayed, because he thereby preferred those creditors whose debts were paid, without having had determined by the court his right to do so, to the prejudice of the creditors of the estate whose claims have not yet been paid.

9. These exceptions are made generally, because all the acts and doings of the accountant as set forth in his account are contrary to the provisions of the Orphans' Court Act of this State, and Contrary to law.

10. Each allowance (excepting Surrogate's fees) prayed by the accountant, is hereby incorporated in these exceptions, for the reasons herein set forth, as fully as if copied here verbatim.

11. The action of the accountant in taking title to

the real estate as trustee, was illegal, in that it deprived the estate and the creditors of the protection of the security provided in the statutes.

12. The accountant unlawfully conveyed the real estate of decedent.

13. The accountant unlawfully paid to himself and to Webb & Bradshaw, of which firm he was a member, the items set forth in his account, thereby illegally preferring himself to the other creditors of the estate. 10

14. The account is improper and illegal, in that it does not disclose to this Court the present condition of the estate, and whether or not it is insolvent.

Respectfully submitted,

UPDIKE-KENNEDY COMPANY, Inc.,
By JAMES J. McGOOGAN,
Attorney.

Dated May 14, 1930.

20

ORDER ADJUDICATING EXCEPTIONS TO
ACCOUNT

(Filed September 4, 1930)

MERCER COUNTY ORPHANS' COURT

In the matter of the Estate of } Order Adjudicat-
WILLIAM J. ROESSLER, } ing Exceptions
deceased } to Account.

The surrogate having reported to the court that

George H. Webb, administrator c. t. a. of the above-named William J. Roessler, deceased, filed an account in his office on April 7, 1930, which was reported to the court on May 16, 1930, for allowance and settlement; and it having been proved to the satisfaction of the court that notice of his intention to settle his said account on said 16th day of May, 1930, was given by said accountant according to law:

10 And exceptions against the allowance of said account having been filed with the Surrogate on May 15, 1930, by Updike-Kennedy Company, Inc., one of the creditors of said decedent, and the hearing of said exceptions having come on before this court on June 23, 1930, and September 4, 1930, in the presence of Samuel D. Lenox, attorney for the administrator, Louis B. Levine, appearing for Huston Dixon, attorney for United States Casualty Company, the surety on said administrator's bond, and
20 James J. McGoogan, attorney for said Updike-Kennedy Company, Inc., and the proofs, allegations and arguments of said parties having been heard and considered by the court:

And it appearing that said administrator has disbursed all the personal estate that came into his hands, without warrant of law, and has taken into his title and possession as trustee all the real estate of said decedent, and has sold and conveyed a portion thereof, and has included in his said account the proceeds of such sales as charges and has paid
30 some of the debts of decedent and expenses purporting to be administration expenses, from the funds in his hands, and has disbursed \$17,114.87, excepting \$43.03 Surrogate's fees, without warrant of law:

It is on this 4th day of September, 1930, on motion of James J. McGoogan, attorney for Updike-Kennedy Company, Inc., ordered that said exceptions be allowed, and that said administrator's account be

restated by striking therefrom all the items (excepting Surrogate's fees of \$43.03) for which he claims allowance, amounting to \$17,071.84, and that said administrator be charged with the balance of \$8.19 shown by his said account, and \$17,071.84, making a total sum of \$17,080.03, to be administered according to law.

And it is further ordered, that said George H. Webb, administrator as aforesaid, pay to James J. McGoogan, attorney for said exceptant, within thirty 10 days from the date of service of a copy of this order on him, or his attorney, a counsel fee of \$500.00 and the costs of this proceeding, to be taxed by the Surrogate, including lawful disbursements.

A. O. ROBBINS,
Acting Judge.

ON PETITION OF APPEAL 20
NOTICE OF APPEAL

(Filed October 17, 1930)

MERCER COUNTY ORPHANS' COURT

In the matter of the Estate of } On Petition of Ap-
WILLIAM J. ROESSLER, } peal. Notice of
deceased. } Appeal.

30

George H. Webb, administrator c. t. a. of the estate of William J. Roessler, deceased, hereby appeals to the Prerogative Court from the order adjudicating exceptions to account entered herein on

the 19th day of September, 1930, and from every part thereof.

Dated, Trenton, N. J., October 16, 1930.

SAMUEL D. LENOX,
Proctor for Appellant.

ON PETITION OF APPEAL
PETITION OF APPEAL

(Filed November 18, 1930)

10 NEW JERSEY PREROGATIVE COURT

In the matter of the appeal of
George H. Webb, adminis-
trator, c. t. a. of the estate of
WILLIAM J. ROESSLER, deceas-
ed, from an order of the Or-
phans' Court of the County
of Mercer adjudicating ex-
ceptions to administrator's
first account.

On Petition of Ap-
peal. Petition of
Appeal.

20 To the Ordinary of the State of New Jersey:

The petition of George H. Webb, of the City of Trenton, County of Mercer and State of New Jersey, respectfully shows that:

1. He is administrator cum testamento annexo of the estate of William J. Roessler, deceased, duly appointed by the Surrogate of the County of Mercer and State of New Jersey.

2. On the 7th day of April, 1930, he presented his

first accounting as administrator c. t. a., which accounting was reported to the Court on May 16, 1930, for allowance and settlement.

3. Updike-Kennedy Company, Inc., one of the creditors of said estate, through its proctor duly filed exceptions to the said accounting, and on the 19th day of September, 1930, the Orphans' Court of the County of Mercer did make its order adjudicating said exceptions, which order has been duly entered.

4. Your petitioner hereby appeals from the said Order on the ground that the same and every part thereof is erroneous. 10

Dated, Trenton, N. J., November 17, 1930.

SAMUEL D. LENOX,
Proctor for and of counsel with appellant.

ON APPEAL
ANSWER OF UPDIKE-KENNEDY
COMPANY, INC.

(Filed November 18, 1930)

20

NEW JERSEY PREROGATIVE COURT

In the matter of the appeal of George H. Webb, administrator of WILLIAM J. ROESSLER, deceased, from an order of the Mercer County Orphans' Court, adjudicating exceptions to administrator's first account.)
On Appeal of Answer of UPDIKE-KENNEDY COMPANY, INC.

The answer of Updike-Kennedy Company, Inc., respondent, to the petition of appeal of George H. 30

Webb, appellant:

1. This respondent answering, admits the allegations contained in paragraphs 1, 2 and 3 of appellant's petition of appeal filed herein.

2. This respondent is advised and believes, and submits that the order complained of by appellant is just and lawful, and this respondent denies the allegations in paragraph 4 that said order, and every part thereof, are erroneous, and alleges that said
10 order and every part thereof are legal, proper and correct.

3. This respondent therefore respectfully prays that said petition of appeal may be dismissed, with costs.

JAMES J. McGOOGAN,
Proctor for respondent.

ON PETITION OF APPEAL
ORDER EXTENDING TIME FOR FILING
20 TRANSCRIPT

(Filed November 18, 1930)
NEW JERSEY PREROGATIVE COURT

In the matter of the appeal of
George H. Webb, administrator, c. t. a., of the estate of
WILLIAM J. ROESSLER, deceased, from an order of the Orphans' Court of the County of Mercer adjudicating exceptions to administrator's
30 first accounting. } On Petition of Appeal. Order Extending Time for Filing Transcript.

This matter being opened to the Court by Samuel D. Lenox, proctor for George H. Webb, administrator, c. t. a., of the estate of William J. Roessler, deceased, the appellant herein, and it appearing to the Court that the appellant needs additional time for the preparation and filing of an authenticated transcript of the proceedings before the Mercer County Court, and James J. McGoogan, Esq., proctor for the exceptant-respondent having hereunto subscribed his consent to the making and entering of this Order. 10

IT IS, on this 17th day of November, 1930, ORDERED, that the appellant have until the 30th day of November, 1930, within which to file the authenticated transcript of the proceedings before the Mercer County Orphans' Court.

E. R. WALKER, C.

I hereby consent to the making and entering of the above order.

JAMES J. McGOOGAN,
Proctor for Exceptant-Respondent. 20

TESTIMONY

MERCER COUNTY ORPHANS' COURT

In the matter of the Estate of WILLIAM J. ROESSLER, deceased.	}	Testimony
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Transcript of proceedings in the above-entitled cause before Honorable ADAM O. ROBBINS, Judge, on Wednesday, July 23, 1930, at Trenton, New Jersey.

APPEARANCES:

JAMES J. McGOOGAN, Esq., for Updike-Kennedy Co., Exceptant.

SAMUEL D. LENOX, Esq., for Administrator.

LOUIS B. LEVINE, Esq., for U. S. Casualty Co., Administrator's Surety.

(Mr. McGoogan opened the case to the Court on behalf of the Exceptant.)

(Mr. Lenox opened on behalf of the Administrator.)

10 GEORGE H. WEBB, called on behalf of the exceptant, being duly sworn, testified as follows:

DIRECT EXAMINATION—By Mr. McGoogan:

Q. Mr. Webb, you are the administrator of the will in the case of William J. Roessler, deceased, and the respondent in this matter?

A. I am.

Q. Where do you live?

A. 708 South Olden Avenue.

20 Q. Trenton?

A. Yes.

Q. Are you in the real estate business?

A. Yes.

Q. How long have you been in that business?

A. In Trenton, about nine years.

Q. Were you formerly in partnership with George Bradshaw?

A. Fred W. Bradshaw.

Q. With Fred W. Bradshaw?

- A. Yes.
- Q. In the real estate business in Trenton?
- A. Yes.
- Q. When did your partnership with him begin and when did it end?
- A. It began on the first of September, 1922, and ended on March 1st, 1929.
- Q. Before William J. Roessler's death had you done considerable real estate business for him?
- A. Yes; practically all of it. 10
- Q. At his death, I understand from your petition, that you took title to his real estate by deed from the heirs of the decedent to yourself as trustee?
- A. That is right.
- Q. How soon after his death did you take that deed?
- A. I don't remember what the date of the deed was, but I should judge four or five months.
- Q. Who drew the deed?
- A. The attorney, Mr. Lenox. 20
- Q. Was there any other instrument drawn at the time the deed was drawn and signed?
- A. An agreement between the heirs and myself in case they demanded the return of the title to the property they could have it.
- Q. Was that agreement in writing?
- A. Yes.
- Q. Will you produce it please?
- A. I haven't it here.
- Q. Where is it? 30
- A. I think there is a copy of it in my office.

MR. LENOX: It is on file.

- Q. Is it recorded in the Mercer County Clerk's Office?
- A. That I don't know; I am not certain.

MR. LENOX: It is, yes; the trust agreement is on file, on record.

MR. McGOOGAN: I will ask counsel, if your Honor please, if he has a copy of it.

MR. LENOX: I don't think I have.

Q. Did the decedent leave any other real or personal property other than that which you have mentioned in your first accounting?

A. No.

10

Q. Was there a funeral bill?

A. Yes.

A. Who paid that?

A. It has not been paid.

Q. Does it appear in your first accounting?

A. I have it in mine, \$641.25, fourth item from the bottom.

Q. On what page?

A. First page. There is only one page to the accounts receivable. All the pages are not numbered.

20

Q. Who is the creditor?

A. Of the funeral bill?

Q. Yes.

A. Swayze & Margerum.

Q. Here is the copy that your counsel furnished me. Will you point it out in that copy (handing paper to witness)?

A. This is just a copy of receipts and disbursements, it is not in there; there is no inventory or no creditors' list in there.

30

MR. McGOOGAN: I will ask the Surrogate to produce the original of the first accounting.

THE COURT: I have it here. I have no such item so far in it. What was the amount?

THE WITNESS: \$641.25. It is under the heading of Bills Payable.

THE COURT: I may have overlooked it. Will you show it to me?

MR. McGOOGAN: Mr. Lenox explains he has not paid it.

MR. LENOX: This is not a final accounting. We have seventeen or eighteen thousand dollars' worth of real estate on our hands. That is not in here either. 10

THE COURT: He just said there were no other assets.

MR. LENOX: He means personal property.

MR. McGOOGAN: I said personal or real estate.

THE WITNESS: That were not accounted for.

THE COURT: He asked you whether there were any other assets of this estate that were not set forth in this accounting and your answer was "No, Sir," just a few minutes ago. 20

MR. LENOX: I will have to—

THE COURT: Your answer at that time was "No, sir."

THE WITNESS: I misunderstood the

question then. In addition to the personal property was the thought I had in mind.

Q. You then have not scheduled in your first accounting which you filed with the Surrogate any debts of the decedent?

A. In the first accounting?

Q. Yes.

A. He must have been given a list of those accounts receivable.

10 Q. Isn't a funeral bill a bill payable?

A. Yes. And there are others in that list, too, that I must have given him.

MR. LENOX: If I may just give this to the witness. He is looking at an accounting which we offered which Mr. McGoogan did not want filed. You have the wrong accounting.

THE WITNESS: Yes. This one includes everything (indicating.)

20 THE COURT: Here is your account that has been filed. (Handing paper to witness.)

MR. LENOX: He has got the wrong one. This is a complete list of everything which we submitted to Mr. McGoogan, and he said not to file it. He didn't want it filed just that way, so in turn this was filed. His answers are confused.

30 THE WITNESS: There are many questions which can be asked which cannot be answered from this accounting here except for the disbursements and receipts.

Q. Did you as trustee sell his residence after he died?

A. Yes.

Q. How long did you sell it after he died? How soon was the deed given after his death?

A. I believe title was given last September, last October.

Q. From the date of the decedent's death until you conveyed the property last year you say, who occupied it?

10

A. The widow lived there.

Q. Anyone else?

A. A sister, one of the heirs; sister of Mr. Roessler.

Q. Just the two ladies occupied this house until you conveyed it?

A. That is right.

Q. Do they still live there?

A. No; the property was sold and occupied afterwards.

20

Q. Did they move as soon as title was passed?

A. Absolutely.

Q. What rent did you collect from the widow or the sister during that period?

A. None whatever. It was agreed between the creditors, I mean the heirs, there would be no rent charged to them, and it was also very acceptable to your client, Updike-Kennedy Company, that they did remain there until a meeting which we had at the Wilbur Trust Company approximately a year after the death of the deceased.

30

Q. What representative of Updike-Kennedy Company made this agreement with you?

A. Mr. Updike himself.

Q. Which one?

A. Charles H.

Q. You say Charles H. Updike agreed with you

that it was proper for the widow and the sister of the decedent to live in the property until it was conveyed?

10 A. No; that is not it. Up until about a year, until this first meeting was held, and it was one of the purposes of the meeting, he wanted to know at the end of the year what could be done with it. If it could be rented or sold, and he thought at that time it should be rented or sold, something should be done with it with which to bring in revenue. Just as soon thereafter as we could we sold it.

Q. I understand that Mr. Updike, Mr. Charles H. Updike, about a year after the decedent died inquired of you about renting or selling this property, and up to that time the two tenants had remained there rent free?

A. That is right.

Q. And then it was agreed by him and the other creditors and yourself that it should be sold?

20 A. Yes; he was the man, the person that furnished that information. He thought it would be the best thing. We had a meeting of creditors, but there were only two there.

Q. After that first meeting about a year after the decedent died did you then make efforts to sell the Nottingham Way property?

A. We made efforts immediately on receipt of the administratorship to sell the property and others, and advertised it.

30 Q. When you did get a buyer for this property you submitted the offer to Updike and he said it was a fair offer, and to sell?

A. Yes; perfectly agreeable to him.

Q. I understand from your accounting there are no personal assets whatsoever in your hands now?

A. Except a second mortgage which we are making collections from every three months. That was

one of the parcels of personal property that was included in the personal appraisal in the beginning.

Q. Do you know how much is due on that mortgage now?

A. Approximately \$1,625.00, I think it is.

Q. Well, is that the mortgage on 105 Tuttle Avenue?

A. That is right.

Q. And you charged yourself in your accounting with this item received as payments in reduction of second mortgage, 105 Tuttle Avenue, \$384.75. 10

A. That is right.

Q. You do not charge yourself with the balance due and unpaid on the mortgage, do you?

A. Not in this accounting; no.

Q. Why not?

A. Because it is counted as one of the assets.

Q. You don't enter it as an asset, do you?

A. Not in this accounting, no. I have it here in mine. 20

Q. Why not?

A. This is an accounting of receipts and disbursements only.

Q. You filed no inventory, did you, Mr. Webb. I mean by that, you filed no inventory with the Surrogate?

A. Yes; there was an inventory filed; must have been.

MR. McGOOGAN: Will the Surrogate please produce the inventory? 30

THE SURROGATE: If there was an inventory filed it would probably be sent up to the State House. It is not here.

THE WITNESS: The inventory was filed at the State House.

THE SURROGATE: Our inventory goes to the Secretary of State's office.

MR. McGOOGAN: Has the Surrogate any record of any inventory having been filed in his office?

THE SURROGATE: I haven't the record here, but I can send for the docket and find out.

10 Q. Up to date, you have not charged yourself with the balance due on this second mortgage, have you, Mr. Webb?

A. Yes; but I can't do it in a receipts and disbursements accounting.

Q. We have got now the only item that is undisclosed in your accounting as an asset, personal asset, is the balance due on this second mortgage on 105 Tuttle Avnue?

A. No.

Q. Are there other assets?

20 A. The accounting you are looking at, Mr. McGoogan, is the accounting of the receipts and disbursements only. The assets are not included in that.

A. Are there any other assets that you have not disclosed here?

A. Yes; there are.

Q. What are they in the way of personalty?

A. My accounting shows there is a lot on the corner of Tuttle and Austin Avenue.

30 Q. Excuse me, Mr. Webb; I said personalty.

A. Personalty. None.

Q. When you took this office of administrator did you open a bank account in your own name as administrator?

A. Immediately, and one as trustee.

Q. Have you had two bank accounts?

A. Yes.

Q. In what bank?

A. Wilbur Trust Company.

Q. You opened a bank account as trustee and a bank account as administrator?

A. Yes.

Q. How did you separate the funds, the funds to be deposited; in other words, what would you put in the trustee account and what would you put in the administrator's account? 10

A. The amount of money that was deposited in the administration account was money received from the sale of personal property, and there were times when there was trustee money placed to that account because the bills, the money there was not sufficient to pay the bills of the trustee account. They can be segregated very easily by myself, but they were mixed in order to supply funds to carry on the estate. 20

Q. When the trustee account was depleted you gave a check to yourself as trustee from yourself as administrator to make up the deficiency in the trustee account?

A. Yes, paid from that account.

Q. And vice versa, if the administrator's account was low?

A. Yes.

Q. You checked from the trustee account into that? 30

A. That is right. I did that because I thought it was all the same, the interest to the creditors would have to be paid from either one, it would not make any difference as far as the heirs were concerned; we could take care of those later.

Q. What became of the \$3,400.42 that you charged yourself with in the personal estate column?

A. That is a long answer to that, Mr. McGoogan.

Q. Can you tell me briefly?

A. Yes; it went for interest, taxes, the different running expenses as they came along on the estate; there were taxes accrued, interest accrued at the death of Mr. Roessler that had to be satisfied on mortgages on the properties.

Q. Did you make one payment of about \$3,500.00 to the Wilbur Trust?

10 A. It was more than that; it was \$4,500.00.

Q. That payment of \$4,500.00 to the Wilbur Trust was made out of the funds you have received either as trustee or administrator?

A. That is right.

Q. Didn't that payment or those payments discharge a note of the deceased?

A. A note and a mortgage.

Q. A note. He had given a note, had he, to the Wilbur Trust?

20 A. He had given three notes.

Q. He had given three notes aggregating about \$4,500.00 to the Wilbur Trust?

A. Yes.

Q. Were there any endorsers on those notes?

A. Yes; endorsers on one of them was his brother John Roessler, another by the name of James.

Q. And who else? You and Mr. Bradshaw?

A. No.

Q. You?

30 A. No, neither of us.

Q. Were you on any of his notes?

A. No.

Q. Then these three notes held by the Wilbur Trust were secured by a second mortgage?

A. Yes, on 2566 Nottingham Way.

Q. On his home?

A. Yes, and at the time that the sale was really confirmed verbally by Mr. Updike he was under the impression that that \$4,000.00 would be available for distribution to the creditors.

Q. But instead of being available for distribution to the creditors it went to one creditor, one preferred creditor, the Wilbur Trust?

A. When he found out the Wilbur Trust Company had a mortgage it disturbed him.

Q. I understood your counsel to say, of course, 10 you have not yet testified that 107 Tuttle Avenue had been started by the decedent and was partially completed when he died?

A. That is right.

Q. And that you used the funds of the estate, either the administrator funds or the trustee funds, to complete it and then sold it and then you took a mortgage, I mean you paid off a mortgage of \$1,100.00 which you held?

A. No. Originally when the purchase was made 20 of the property by the present owner there was a \$3,500.00 first mortgage, and the buyer had enough cash to pay off a portion of that principal, and in making settlement we received this actual amount as it is reported in this report of the attorney, \$3,021.81, the \$1,100.00 to pay off that portion, that amount of the first mortgage.

Q. Who held the first mortgage?

A. George Gleaves.

Q. I understood your counsel to say in his open- 30 ing that \$1,100.00 of the purchase price was used to pay a mortgage you held, you or Webb and Bradshaw?

A. No, the amount of money, was made payable to our office, the full amount; it was just directed to be made payable to us.

Q. How much did your firm or you yourself take out of purchase price for any purpose?

A. Took the commission out of it only.

Q. Is that all?

A. That is all.

Q. I have made my own total of the amounts paid to yourself or to your firm of Webb and Bradshaw, and my calculation total is \$3,506.42. Of course, that includes the \$1,100.00 which you say was paid on
10 the Tuttle Avenue property.

THE COURT: This account shows the payment of that \$1,100.00

MR. McGOOGAN: Does it?

THE COURT: Yes.

MR. McGOOGAN: To Webb & Bradshaw?

THE COURT: No; to Gleaves.

MR. McGOOGAN: Yes. What misled me was October 19, 1928, Webb & Bradshaw paid part of mortgage 107 Tuttle Avenue, \$1,100.00.

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Does your Honor get that? It is on the fourth page.

THE COURT: To Webb & Bradshaw, paid part of mortgage at 107 Tuttle Avenue. That is what he said they paid to Gleaves, as I understand it.

MR. McGOOGAN: Yes.

THE WITNESS: Yes.

Q. But you see in the accounting it looks as if it were a payment to Webb & Bradshaw.

A. I did it for simplicity; I didn't think there was any question about how the money was handled. It was paid to the proper party.

Q. This item of October 19, 1928, do you have a check voucher for that?

A. What is the amount of it?

Q. \$1,100.00.

A. Yes.

10

Q. Did you transcribe this item from your check voucher; in other words, when you put in this item of \$1,100.00 did you have before you your check voucher which showed a payment to Webb & Bradshaw of \$1,100.00?

A. Yes; I have the cancelled check for that amount to Webb & Bradshaw for \$1,100.00.

Q. What became of the \$1,100.00 when you got the check?

A. It was paid to George Gleaves.

2)

Q. Did you give him a check?

A. Yes.

Q. Have you that check with the vouchers?

A. Webb & Bradshaw have them with their files. I don't have them but I can get them. I don't maintain those files myself.

Q. You are to get now to complete your vouchers a check made by Webb & Bradshaw to George Gleaves for \$1,100.00.

A. All right.

30

Q. What about the balance of the \$3,506.42 deducting the \$1,100.00 which appears to have been paid to you or to your firm; how do you explain that?

A. Let me have your items separately and I will explain them.

Q. October 17, 1928, George H. Webb, completion of all carpentry work and finishing 107 Tuttle Avenue, \$211.85.

A. That was the labor in laying floors and completing all carpentry work at the property.

Q. Did you pay that?

A. Yes, our own labor; we have our own labor to do that with.

Q. October 17th, 1928, George H. Webb, 708 Norway Avenue, \$25.00.

A. There was a second mortgage there at the time of Mr. Roessler's death for \$2,400.00, and it
10 was my idea that it would be possible if we could find the owner of the property whose name was Bradley, Leslie Bradley, who purchased the place to give us a deed in return, in preference to foreclosing the property, the man had absconded and we understood he was in Scranton in the beginning and various other places, and finally heard he was in Atlantic City. I made trips to Atlantic City, stayed there over night and went to Philadelphia and charged the estate \$25.00 to cover the actual expense
20 of me going.

Q. October 19th, 1928, Webb & Bradshaw, securing mortgage 107 Tuttle Avenue, \$72.00.

A. At the time that the \$1,100.00 was transferred to Mr. Gleaves he objected to the payment, and a few days later called his mortgage upon the property, and to effect the sale and put it through we had to secure a new mortgage and we did that by charging the estate the three per cent. for the securing of the \$2,400.00.

30 Q. October 20th, 1928, George H. Webb, advanced to Mrs. Roessler, \$25.00.

A. That was a personal advance to Mrs. Roessler. She was living in the house 2566 Nottingham Way without any revenue whatever at the time.

Q. Did you give her \$25.00?

A. I gave her \$25.00.

Q. And then reimbursed yourself out of the estate funds?

A. Gave it to her from the funds, yes; really gave it to her in cash.

Q. And then gave yourself a check for \$25.00?

A. That is right, and you will find another item of \$40.00 of the same nature.

Q. December 19th, 1928, Fred W. Bradshaw, is that your partner?

A. Yes.

10

Q. Appraiser's fee, personal property, \$10.00.

A. I paid, he was chosen as one of the appraisers for the property, and that was his fee.

Q. Who was the other appraiser?

A. John Conard, Charles Conner.

Q. Did he get \$27.85?

A. What is that for?

Q. Charles L. Conner, December 19th, 1928, that is right, \$10.00.

A. \$10.00?

20

Q. \$10.80 and also \$27.85.

A. \$27.85 was the amount of commission charged for the sale of personal property, either the household furniture or the machinery, I don't know which. I can tell you.

Q. That is part of your administrator expense, you had Conner to sell the personal property and you paid him his commission?

A. Yes; that is right.

Q. May 31st, no year, George H. Webb, \$15.00. 30

A. Any other explanation?

Q. That is all it says here.

A. What is the date again?

Q. I don't know what year, but it is May 31st, George H. Webb, \$15.00, and June 3rd, George H. Webb paid for insurance, \$117.32.

A. Yes. When these various policies expired on these properties we just insured them in our own office.

Q. You can't recall about the item of \$15.00?

A. I am trying to find it right now.

Q. Let us turn to June 14th, George H. Webb, placing mortgage 257 Homecrest, \$124.30; is that a real estate broker's commission you charged the estate for finding the money?

10 A. Yes; we had a new mortgage. Through the criticism of the various ones about the estate the mortgagees became uneasy and all called their mortgages except the Prudential Insurance, and we kept them satisfied for a time, and later on he called their mortgage, Mr. Worob called his mortgage and we were required to get a new one. On May 31st that \$15.00 item was for interest in full for Mr. Worob on that mortgage. That is what it was taken for.

20 Q. July 3rd, George H. Webb, another item appears \$93.82 with no other explanation. Can you explain that?

A. Cost of service and cost of the complete sale of lot on Cadwalader Terrace. The actual commission in this case was \$50.00 and the balance of it was for service, lot No. 80.

Q. August 21st, George H. Webb, commissions on sale of 2566 Nottingham Way, \$266.75. Did you pay that item?

30 A. Paid it to myself as commission for securing a buyer. My deduction for these commissions was made because in most cases we maintained a sales force who made some of these sales, and half of this commission was paid out right to them and the balance was taken by myself, which was the full commission to help pay some expenses of advertising which the estate has never been charged with.

Q. September 23rd, George H. Webb, commis-

sion on sale of Homecrest Avenue, \$205.77.

A. Same thing.

Q. Same answer; commissions. Then this October 7th George H. Webb, service for Homecrest, \$44.31; that was an expense of service that you incurred yourself and paid out of the estate funds?

A. That is right.

Q. October 17th, George H. Webb, for insurance 2566 Nottingham Way, \$92.20; is that for fire insurance policies taken through your firm?

10

A. Yes.

Q. And this is for premiums. January 3rd, 1930, returned to G. H. Webb borrowed money for which the checks are in file, \$257.63.

A. The beginning of that was carelessness on my part of not signing my name properly to those for checks that were given out. I have the list of them here and the vouchers in my file. The total of that was charged to my account at the Wilbur Trust Company.

20

Q. Well, do you mean now after the decedent died you paid out of your own money by mistake \$250.00?

A. That is right.

Q. On checks on your own personal account?

THE COURT: \$257.63.

Q. Oh, yes; \$257.63.

A. Those checks were as follows: Paramount Investment Corporation for a commission due them, \$170.80.

30

Q. Just a minute. For what?

A. Purchase of a property through a tax sale. Where one of the properties went to sale through taxes and we had to redeem it. Charles Crane, a laborer, used in concreting 107 Tuttle Avenue, he

was likewise paid from my account, check not being signed properly and the Finance Corporation, payment of second mortgage on Homecrest Avenue, and the Public Service Electric Company. This \$6.73 was a charge charged to my account evidently, the check being for the service at 2566 Nottingham Way, and I just deducted that amount and put it back in my account.

Q. January 3rd, paid to George H. Webb part of
10 commission due on 2566 Nottingham Way sale, \$250.00. Is that part of the commission?

A. Yes, that is another part of it. There was never enough money available to pay the full amount, and I took it in the installment of those two.

THE COURT: What was your total commission on the sale of that property?

THE WITNESS: \$575.00.

Q. What bills have you paid that the decedent himself owed?

20 A. The accrued taxes and the accrued interest on mortgages only.

Q. What is this item on August 3rd, 1928, House of the Good Samaritan, New York, \$189.50?

A. Upon Mr. Roessler's second marriage he went to visit New York State, and one place was Watertown, where he was taken ill, and they placed him in a hospital, in this House of the Good Samaritan, and their bill was \$189.00.

30 Q. You want to change your answer, don't you, to me. I asked you what bill of the decedent's, that is bills contracted by him before he died have you paid, and you said none except taxes and mortgage interest.

A. That is right.

Q. You say you did pay this House of the Good Samaritan a bill of \$189.50, which was a bill contracted by him.

A. No, it was contracted by his wife. He was too sick to contract anything.

Q. He was alive, wasn't he?

A. Yes, he was alive.

Q. Did you get a verified statement of that bill?

A. Yes, they mailed it to me. I have it in my files.

Q. Calbin's & Farmer's clinic, \$15.00, is that a bill that the decedent contracted either for himself or wife? 10

A. His wife contracted that while they were in Watertown.

Q. And the same with Dr. Yazujian?

A. That was in Trenton; after they arrived here they employed his services.

Q. Dr. Cramer?

A. He was in Watertown.

Q. Myrtle Valier, nurse? 20

A. Watertown.

Q. You do want to correct your answer and say you have paid some bills?

A. If that is your request. Yes, I do.

Q. What others have you paid out of the estate, either trustee or administration funds? What other bills have you paid which Mr. Roessler or his wife contracted while they were alive?

A. The telephone bill and the Public Service and water bills during her occupancy at 2566. That would be included in— 30

Q. He was dead then?

A. Yes, he was dead after July 3rd, but up until that time there were accruals of bills, such as Public Service and telephone and things of that sort.

Q. When he died he not only owed the Watertown

nurses and physicians and the hospital money, but he also owed considerable on the construction work that he was doing, did he not?

A. Yes, he did owe considerable, but those bills have not been paid, Mr. McGoogan.

Q. What?

A. The construction work, there were lots of bills he had contracted for, your client is one of them, for material. That bill was not paid.

10 Q. Didn't you complete some of the houses?

A. They were completed, yes, but none of the bills that were contracted for by him were paid after his death on those. None.

Q. When he died were there not some bills for material and labor unpaid on the houses he was then engaged in constructing?

A. For material only, yes.

Q. And they have not been paid at all?

A. No; they are in this accounts payable.

20 Q. How did you get credit to complete the houses? How many did you complete, by the way?

A. Three.

Q. How did you get credit to complete them?

A. What do you mean credit?

Q. Well—

A. Trust for material?

Q. Yes.

30 A. We didn't get it, we just went ahead; personally, I guaranteed the payment of these accounts for material we purchased, and we used our own labor, or they were contracted for, plumbers' or electrical work; we just went ahead and paid them from the proceeds of the estate.

Q. In which account is this balance of \$8.19 that appears in your account; is that in your trustee's or administration?

A. Administration account, I am quite sure. Of course, that has been altered now.

Q. As of the date of preparing and filing this account you had nothing in your trustee account, had you?

A. No, that was even. I am quite sure the administration account showed that balance.

MR. McGOOGAN: That is all.

CROSS EXAMINATION: By Mr. Lenox:

Q. What assets by way of real estate have you 10
got in your hands now as trustee?

A. I have one building lot on the southeast corner of Tuttle and Austin Avenues valued at a thousand dollars; cost that five years ago.

Q. The valuations that you are about to give; are they your valuations as a real estate expert?

A. They are my valuations. The land on the south side of Tuttle Avenue, totaling 118 feet frontage to a corner, and on the northerly side of the same street opposite the first mentioned, there are 120 20
feet valued at the same price, which it cost.

Q. A thousand dollars?

A. No.

Q. Give it to me.

A. The net valuation of those two parcels is \$2,720.00.

Q. And the encumbrances?

A. That is the net valuation; the encumbrances are \$3,000.00.

Q. You are giving me the net valuation? 30

A. That is the net valuation.

Q. All right.

A. Yes. 104 Tuttle Avenue, the net valuation there is \$2,000.00.

THE COURT: That is the equity in it?

THE WITNESS: That is the equity in it.

THE COURT: How much is the mortgage?

THE WITNESS: \$3,000.00, a \$5,000.00 property. That is very conservative.

A. (Continuing). 110 Vincent Avenue, Mercerville, the value is \$4,600.00, with a mortgage of \$2,700.00, leaving net value of \$1,900.00.

10 114 Vincent Avenue, Mercerville, has a valuation of \$5,700.00, with a first mortgage of \$3,000.00, a net valuation of \$2,700.00.

A lot on Nottingham Way which was contracted for by Mr. Roessler during his lifetime, which we completed paying for and receiving title, \$750.00. That was the purchase price five years ago.

House at 708 Norway Avenue which we foreclosed a mortgage on and accepted in return the property, valued at \$6,000.00, first mortgage of three, equity of \$3,000.00.

20 35 Cadwalader Terrace has a valuation of \$8,500.00, first mortgage upon it is for \$5,500.00, and the net valuation is \$3,000.00.

We had a home at 43 Sweets Avenue that is accepted in a trade, afterwards valued at \$2,750.00, with a mortgage of \$800.00, leaving an equity of \$1,950.00

The total equity in these properties at practically cost is \$19,026.00.

Q. Are these properties rented?

30 A. They are every one occupied and have been.

Q. Are they carrying themselves?

A. Yes.

Q. Each and every one?

A. Each and every one.

Q. What is the total amount of bills outstanding due to creditors of this estate, including all such bills as Mr. McGoogan's client, all the bills that you have still to pay?

A. That amount I have not, but I can make a very good estimation of \$14,000.00. That is a very close estimation.

Q. Now, have you been in touch with the other large creditors of this estate? 10

A. Every one.

Q. And who are they, that is the large ones?

A. The larger ones, John H. Conner, plumber, \$587.00.

Q. Been in touch with him?

A. Yes. Tattersall Company, over two hundred. Shall I give the specific amounts?

MR. McGOOGAN: I object anyhow, upon the ground that anything relating to the other creditors does not bind Updike-Kennedy Company, the exceptant. Mr. Webb may have an arrangement with all of the others that this is satisfactory to them, but it would not bind us because we are not a party. I wanted to save time by not having all the discussion about creditors, whether they are large or small. 20

MR. LENOX: Strike out that last question, then.

Q. You are in a position to turn back this property to yourself as administrator or otherwise? 30

A. Immediately, yes.

Q. As the Court may direct you?

A. Yes, and it has always been that way.

Q. What reason had you, Mr. Webb, for taking this property as trustee, this real estate?

A. There was only one reason for it. The husband of the sister of the deceased was living apart from her, a very, very hard man to control at the time, and we knew that the possibility of giving title to the sale of the real estate would be very much involved, especially with the number of parcels which we had, and it was my own suggestion that they right
10 themselves of that and get title from Mr. Hulme to some other party in order that the title could be given in a more simple way. That is the only reason for it.

Q. You are holding this real estate, first of all, for the payment of the debts, are you not?

A. That is all.

Q. And any excess goes back to the heirs?

A. Every bit.

Q. But until all the debts are paid you are hold-
20 ing this amount as trustee for the creditors?

A. Yes, and all of the heirs are quite willing for it.

Q. You said something about advertising these properties; what did you mean by that?

A. Each week and every week practically, and sometimes more than once one or two of these properties of this estate have been placed in the advertising of the Times and the Gazette for sale, for disposal, and those advertising bills were allowed to
30 go right in with my own account, nothing was ever said about the pay or for the expense of that work. We went ahead with that ourselves.

Q. In the conduct of your office whom do you have, salesmen?

A. We have salesmen.

Q. How many.

A. One.

Q. What is his name?

A. Elwood Voshell.

Q. Was he instrumental in the sale of any of these properties?

A. Instrumental in the sale or exchange of property on Cadwalader Terrace and the house on Homecrest Avenue, those two.

Q. Out of the commissions which you have charged to yourself, those which you are a real estate man have charged to yourself as administrator, as appears in this account, out of that you have paid, you say, your salesman? 10

A. Yes.

Q. Have you charged the estate with the advertising of these properties?

A. Not a penny.

Q. That has been paid out of the commissions, if at all?

A. Yes.

Q. You stand ready, do you not, to reimburse the estate to the extent of any commissions which you have taken and which are not properly allowable to you? 20

A. I do.

Q. Are you able to dispose of this real estate at this time.

A. No; I don't think anyone else is.

Q. For what reason?

A. There is no market, it is not a question of price or values today, it is a question of no market. 30

Q. As a real estate man and as an owner, what is your best business judgment as to the handling of this estate in the situation that it now is, that is in the form of real estate?

A. I might answer that by going back to the condition or the possibilities of revenue in the beginning or at the time of the decease. We had an income

of \$864.00 to carry about \$52,000.00 worth of real estate, on which we had accruals, of course, of interest and taxes. We used approximately \$2,300.00 for the completion of these properties and \$2,100.00, and effected the sale of one and occupied all the others. We now have an income of about \$2,800.00 from rent instead of the \$864.00. The total expenses, not including interest on the accounts payable, which are the creditors', will run \$2,000.00 a year.

10 Q. On all the properties?

A. All the properties. We have supplied tenants, many of them, to these properties, and have never charged a commission for the securing of a tenant; that was at a loss because we could have supplied every tenant we received or put in these places with other properties with the list which we have.

Q. Your net income from this real estate at the present time is about \$800.00?

A. Yes, it runs a little higher than that because
20 we have another income from the payments on this second mortgage on 105 Tuttle Avenue, which brings it pretty close to \$3,100.00 a year.

Q. That is not net?

A. That is not net, no; around a thousand dollars net.

A. Around a thousand dollars' net income as the estate now stands?

A. Yes.

RE-DIRECT EXAMINATION: By Mr. McGoogan:

30 Q. Just a minute. I want to have that second mortgage item cleared up. Who holds the second mortgage that you are collecting on now?

A. I have the second mortgage and the note.

Q. The second mortgage was in the name of Mr. Roessler when he died?

A. Yes.

Q. In whose name is the second mortgage now?

A. William J. Roessler, just the same.

Q. Never been assigned to anybody?

A. No, never was changed.

Q. I ask the administrator if he has now with him the deed to himself as trustee. I think that ought to be offered in evidence to make the record clear.

A. I don't have.

MR. McGOOGAN: Can Mr. Lenox produce 10
it later?

MR. LENOX: The original deed of record?

MR. McGOOGAN: Yes.

MR. LENOX: I think we can stipulate the deed is on record. I recorded it myself. There is an item of \$10.50 for recording fee.

MR. McGOOGAN: May we stipulate there should go in evidence a certified copy of the deed to George H. Webb as trustee, certified copy of the declaration of trust which Mr. 20
Lenox says was recorded:

THE COURT: I think they should go in.

MR. McGOOGAN: Yes, sir, so I will get certified copies of both and submit them to him, and have them marked as exhibits.

I think I ought to offer, too, the Surrogate's record, if it is necessary, from the filing of the will down to date, and also this account that Mr. Webb has been reading from, which to date is not a court record. I would like to 30

have that marked as an exhibit. I think it is called on the outside, "A complete statement of Estate of William J. Roessler by George H. Webb, Administrator, December 1, 1929." I would like to have that offered in evidence.

THE WITNESS: I will make a copy of this. It is the only one I have.

MR. LENOX: Haven't you one?

10 MR. McGOOGAN: I have one, but I want to offer his in evidence.

THE WITNESS: This is my complete record.

MR. McGOOGAN: It will be a court record; it is an exhibit.

MR. LENOX: I think I have a copy at the office. It will be all right.

(Statement received in evidence and marked Exhibit E-1.)

20 (Deed to the trustee received and evidence, to be marked E-2.)

(Declaration of trust received in evidence, to be marked E-3)

An adjournment was here taken to Thursday, September 4th, at ten o'clock A. M.

TESTIMONY TAKEN PURSUANT TO AD-
JOURNMENT, ON SEPTEMBER 4, 1930.

(Appearances as before noted.)

MR. McGOOGAN: If your Honor please, we have a hearing on the exceptions, you may recall, and at the close of the testimony your Honor made the suggestion that the administrator and creditors try to get together and effect some sort of settlement or compromise. Since the hearing the creditors I think had a meeting in the Wilbur Trust Company Bank and in behalf of my client, Updike-Kennedy Company and Watson and Mather, I can say that there is no chance of a compromise or settlement. 10

I think there was a plan suggested at the meeting under which the administrator should continue along as he has in the past, trying to sell the real estate and liquidate the estate.

In his testimony the administrator says that there are about \$14,000 in claims. Now, my claims amount to a little over \$6,000, almost forty-five per cent. of the total claims, and for those two creditors I want to renew my motion which I made at the former hearing, to the effect that the administrator be ordered to refund to the estate the moneys that he has disbursed, as we claim illegally, amounting to about \$17,000. 20

The testimony showed that he had about \$3,400 in the personal estate which has been dissipated entirely without any order of the Court or approval of the Court. In addition to the \$3,400.00 he sold some real estate as Trustee, and that is gone. There is a balance, I think, according to his account, of about \$8.19. He also testified that he had two accounts, 30

one as Trustee and one as Administrator. I think the balance of \$8.19 is in the Trustee's account, I am not sure, but it doesn't make much difference on that score. He also testified and shows in his accounting that he has preferred certain creditors. He has made several payments to creditors of the estate for claims that existed prior to the decedent's death, amounting to several hundred dollars. He also showed that he has paid to himself as a real estate broker from the funds of the estate quite a considerable amount in commissions, I think over a thousand dollars, between \$1,000 and \$2,000.

10 Now, the principal objection that we have, and the basis of our case, is this: that instead of proceeding under the statute the administrator took what I think to be a dangerous proceeding, he took a deed from the heirs of the decedent to himself as trustee, and if the estate were insolvent the statute is plain. He should petition the Court for leave to sell land
20 for payment of debts; if the personal estate were insufficient, as it is shown, to pay debts, he should petition the Court to sell lands to pay debts. All that is designed by the statute to be under the control of the Court with the participation of the creditors in the amounts bid for the properties and the amounts of the sales.

Now, a peculiar feature that has developed since the hearing was this, that when he took a deed as trustee from the heirs he signed a declaration of trust which was recorded, and which is one of the
30 exhibits here, and in that declaration of trust he says he holds the real estate for the benefit of the heirs. That is the written record. It is not for the benefit of creditors, but says "for the sole benefit of the heirs," and he covenants in that to reconvey to the heirs on their demand. So that the statute which gives these creditors a lien for a year against the

real estate after the decedent's death is practically nullified. Now if the—

THE COURT: You could not nullify that statute because there is land there for a year no matter what is done. If it were sold by the heirs to a third party in good faith it was not a fair sale, it could be set aside unless that money was accounted for.

MR. McGOOGAN: Within a year?

THE COURT: Yes.

MR. McGOOGAN: The decedent has been dead 10 more than two years. He died in July, 1928.

Now, they are the salient features of our case, and it appears all of record that one or two small payments were made to the widow out of the estate. There is not much objection to that except it was illegal; it does not amount to much over a hundred dollars, if that.

I have appeared before Judge Marshall for this creditor, Updike-Kennedy Company, whose claim is about \$5,100, and petitioned the Court for an ac- 20 counting and inventory. That was subsequently and eventually filed on our petition. I have gone further than that, I petitioned the Ordinary for leave to prosecute the bond and return a rule to show cause before Vice-Ordinary Buchanan, and between the time of the presenting of my petition and the return day the administrator filed an account, which is now before your Honor, and the result of that hearing was the Vice-Ordinary, I think at my suggestion, con- 30 tinued without a day the proceedings to prosecute the bond pending whatever disposition was made here to my exceptions to the account.

I think that is a picture of the case. My position

is if an administrator is permitted to establish this precedent today or in this case of taking from the heirs a deed for the real estate and administering the real estate as a trustee and not under Orders of the Court for the sale of the land, as provided by the statute, it is going to open an avenue to future acts of the same sort by any other administrator because he can do only one thing under the statute, that is when he finds out his estate is insufficient to pay the
10 debts of the personal estate he should petition and get his orders for sale. That has not been done. He has sold several tracts of real estate, and with the funds realized from sales he has paid some debts. Another item I think that appears in the account is that the Wilbur Trust Company had a note, that makes the Wilbur Trust Company a creditor, but they had a second mortgage and he paid that entirely, forty some hundred dollars. Whether or not that is a preference is a question. I have not looked
20 into it at all.

THE COURT: The mortgage, you mean?

MR. McGOOGAN: Yes, the second mortgage, but they were paid in full. The mortgage secured the note. The Trust Company had a note secured by this second mortgage, and they have been paid in full. The accounting before your Honor is not an accounting at all under the statute.

THE COURT: What have you to say, sir?

30 MR. LENOX: If your Honor please, as I said at the first hearing, we are not very far apart on the facts. What Mr. McGoogan has stated is substantially true, with a few minor qualifications. For instance, this Wilbur Trust Company note he speaks

of—I know his clients were much exercised over the fact that was paid, but that note was a second mortgage note and was paid out of the proceeds of the sale of the property on which the mortgage was held; in other words, it was not a preference at all, it was a payment which had to be made in order to make a sale of that property.

THE COURT: But your trouble is your sales of the property do not seem to comply with the statute in any way, Mr. Lenox. 10

MR. LENOX: No, it does not, your Honor. I say what Mr. McGoogan says is true. The situation is this: This is not an excuse, this is an explanation merely. At the time of Mr. Roessler's death the administrator, before the bills came in, was under the impression that the personal property, together with some insurance which he thought he had, was more than sufficient to pay these bills, and when he took this deed as trustee, we were not under the impression that we were taking title to the property 20 for the benefit of creditors at all; we thought we had plenty of personal property to pay creditors. There was a husband of one of these heirs who was separated from his wife, and we got a deed from him to the administrator as trustee, not thinking it was for the benefit of creditors.

THE COURT: You could have gotten power of attorney just as well.

MR. LENOX: What I am trying to call to the Court's attention is this: We were not trying to get 30 real estate into our hands to pay creditors, we were doing that for the benefit of the heirs at that time. Now, it subsequently turned out, the truth came to

be that the personal property was not nearly sufficient to pay these bills. We don't say now we hold this real estate for the benefit of these heirs. I stated to the Court at the last hearing we are perfectly willing to turn this real estate over either to the administrator as trustee or a committee of creditors, or to anybody, there is no question about that, we are not holding adversely to the creditors at this time, but when this deed was taken to him as trustee and when the deed of trust was executed, the administrator was under the impression at that time we had plenty of personal property to pay all the claim, and then these big claims came in.

I call this to your Honor's attention. Had Mr. Roessler lived these creditors would be in the same position that they are now; in other words—

THE COURT: That does not excuse the administrator for not having complied with the law in the performance of his duty as administrator.

20 MR. LENOX: No. As I say, I am only giving you an explanation of what happened rather than an excuse. I say that after he had this deed as Trustee and after he realized upon receiving these bills that he didn't have enough personal property to pay the debts, holding this real estate and having a sale of it, he got these creditors together. I am informed by Mr. Stout, Vice President of the Wilbur Trust Company, that at a meeting of these creditors—by the way, your Honor, I was not present at these meetings, but Mr. Stout informs me this objecting creditor, Kennedy-Updike, one of the members of the firm was present, I think Mr. Updike, and discussed this proposition of the sale of this real estate, was fully cognizant of the situation at that time, which was a year or so ago, and gave their consent to the sale of

this property, this Nottingham Avenue property, the homestead, in fact, cooperated with the Administrator.

THE COURT: Is such consent in writing?

MR. LENOX: No, sir, it was not. At the meeting of creditors which I am going to tell your Honor about held subsequent to the last hearing, Mr. Stout told me, he said, "Updike-Kennedy Company were here and told the Administrator to go ahead and sell this property, they were satisfied with this 10 price."

MR. McGOOGAN: May I interrupt, your Honor, that is not in the record at all. This is simply a statement of counsel.

THE COURT: There is no record of that kind at all?

MR. McGOOGAN: No testimony at all.

MR. LENOX: Do you deny, Mr. McGoogan, that your client was present?

MR. McGOOGAN: Oh, yes—

20

MR. LENOX: Do you deny he was present?

MR. McGOOGAN: No.

MR. LENOX: And that he consented to it?

MR. McGOOGAN: Yes. I will read the record in a few minutes, just how Mr. Webb explained that. I do take exception to counsel's stating to the Court

as evidence that somebody in the bank told him that we consented. I want a chance to examine on that point.

MR. LENOX: If your Honor please, I would like to recall Mr. Webb, if necessary, on that particular point. As I am informed, that is the fact, and I would like it to be such.

THE COURT: Is there any more testimony that you want to offer today?

10 MR. McGOOGAN: I have none; no, sir.

THE COURT: Have you any testimony, Mr. Lenox?

MR. LENOX: I would like to put Mr. Webb back on the stand as to one or two things.

THE COURT: All right, if you want to recall Mr. Webb you may recall him.

GEORGE H. WEBB, resumed.

DIRECT EXAMINATION (continued) By Mr. Lenox:

20 Q. Mr. Webb, subsequent to your taking title to this real estate as Trustee did you at any time have a conference with creditors at which a member of the firm of Updike-Kennedy was present?

A. I don't recall that we did have any meeting.

Q. Did you ever consult the objecting creditor, Updike-Kennedy, as to the disposition of any real estate in this case?

A. Oh, yes.

Q. When?

A. At the meetings that we had at the Wilbur Trust Company, which were two, approximately six months after the death of Mr. Roessler, and just before the completion of the sale of the homestead for \$11,500.

Q. What member of the firm of Updike-Kennedy was present at the first meeting?

A. At both meetings Updike, Senior.

Q. Do you know his first name?

10

A. No.

Q. Do you know Horace Updike?

A. I do.

Q. It was not Horace?

A. No.

Q. The older—

A. He was not there at any time.

Q. The older gentleman?

A. Yes.

Q. He was present at both meetings?

20

A. Both meetings.

Q. What discussion, if any, was had at the second meeting as to the sale of the Nottingham Avenue property?

A. We discussed the possibilities of getting more than the offer of \$11,500, but in consideration of it being an all-cash proposition Mr. Updike, Senior, and Mr. Stout, of the Wilbur Trust Company, thought it was a very good offer, and we had better take it. They approved it verbally before we ever 30 went ahead and did a thing.

Q. What was said, if anything, about the status of the widow by Mr. Updike?

A. Nothing.

Q. Was there anything said about the widow's living in the property?

A. Oh, about the widow's living in the property,

yes. He thought the possibility of relieving the expense of keeping the property as a home for her, that it would be good to get rid of it because there was an expense of approximately \$800.00 a year.

Q. Mr. Webb, subsequent to the last hearing in this case and in accordance with the suggestion that was given by the Court did you call together a meeting of creditors?

10 A. Called together a meeting of creditors and mailed each one of them a special letter to be present at that time.

Q. This meeting was held on August 5th, was it not?

A. Yes.

Q. 1930, at the office of the Wilbur Trust Company?

A. That is right.

Q. Did the creditors present execute this paper (indicating)?

20 A. Yes, except the representative for Watson and Mather.

Q. Other than Watson and Mather all of the creditors present executed this paper?

A. Yes, sir.

Q. In your presence?

A. Yes.

30 MR. LENOX: I would like to offer this, if your Honor please, as an expression of what the creditors thought at this meeting. This is the heading of the paper executed by the creditors totaling some \$7,600, all in preferred claims. "We, the undersigned—"

MR. McGOOGAN: I object to its being read in the record, for this reason: this is the first time I have seen it. It is self praise of the Ad-

ministrator, signed by probably all the creditors except my two protesting clients. It has no binding effect upon us at all, and even though—

THE COURT: May I see it, please? (Paper handed to the Court.)

MR. McGOOGAN: It ratifies and approves the acts of the Administrator, yet they cannot contravene the Statute in that manner. I, therefore, object to the offer of this paper, but I do consent that it be entered upon the record that the creditors had a meeting in August, of 1930, and that those creditors agreed that the Administrator could go along as he has in the past and administer the estate outside the provisions of the Statute. 10

THE COURT: I don't see that that can legally be admitted, Mr. Lenox, over objection. If he has not complied with the law and all the creditors but one commend him for having done it, a creditor has a right to stand upon his legal rights, and it is certainly virtually admitted by this Administrator that he has not complied with the rules of the statute in the administration of this estate. He admits that, you admit it. 20

MR. LENOX: Would that be true if this protesting creditor himself is present at a meeting and authorizes the sale of this particular property?

THE COURT: I think it would.

30

MR. LENOX: Can this creditor come into this Court, which is virtually a court of equity, and having authorized this administrator to do certain acts, and with full knowledge of the situation—

THE COURT: Wouldn't that be an act that would have to be in writing, affecting the estate?

10 MR. McGOOGAN: I call your Honor's attention to this, too, that obviously when Updike-Kennedy—we don't dispute they approved the sale of this homestead—but they were much exercised when they found the Wilbur Trust got \$4,700.00 out of it. At that time my clients, not having the benefit of counsel's advice, did not know the Administrator was selling as a Trustee, had no knowledge of that. Creditors have a right to say, yes, Administrator, sell such a tract of land, but they had
20 no knowledge he was doing it as Trustee.

THE WITNESS: They did have knowledge.

THE COURT: They didn't know how he was selling.

30 MR. McGOOGAN: No, sir, until I got in the case some time afterwards I had no knowledge Mr. Webb was acting as a Trustee. I had an idea he was acting as Administrator. My examination of the records showed he was not, and that was the first knowledge either of my client or I had of that situation.

THE COURT: You thought he was selling the property under an Order of the Court?

MR. McGOOGAN: Yes, sir. Of course, they attended the meeting, of course they wanted the property sold, of course they consented but they thought they were consenting to a legal sale by a legal fiduciary.

MR. LENOX: Of course, it is pretty hard to probe the minds of Mr. McGoogan's clients, but from what my client tells me that is not the situation at all. His testimony is that they had a meeting of creditors at which this was disclosed, that he was holding it as Trustee and had an offer of such an amount of money free and clear of the mortgage. When the Updike-Kennedy Company learned the Wilbur Trust's second mortgage was paid off instead of getting funds with which to pay their claim, that is what raised the point at issue now. 10 20

THE COURT: Is there anything more you want to ask this witness?

MR. LENOX: I don't think so; no, sir.

THE COURT: Any cross?

MR. McGOOGAN: I don't think so; no sir.

NO CROSS-EXAMINATION.

MR. LENOX: I would like to say just as a matter of conclusion, it is admitted as I say we are not apart on the fact that this Administrator has exceeded his

authority, but we are faced with the situation of where we are holding this real estate, and in the light of the objections to the account we don't know what to do with it. He is holding it as Trustee. We are willing to turn it back to anybody or forward to anybody.

THE COURT: Well, I have given you a month here to try and make some satisfactory arrangement to the objecting creditor, and you have not
10 succeeded in doing anything of the kind.

MR. LENOX: Unfortunately Mr. McGoogan was in the Court of Chancery on the day of this meeting. I didn't get notice of it until the afternoon of the day before the meeting. We immediately called his client and his client simply refused to attend the meeting. We went ahead with all the other creditors, and the expression of their opinion is in this paper. Of course, we can't do anything he has exceeded his authority, and we are just at a standstill. The
20 property is on a paying basis, we have more equity than we have bills, and we don't know what to do with it.

THE COURT: Suppose they agree with you that you have more equity than you have bills.

MR. LENOX: I don't think they dispute that.

THE COURT: What have you to say about that?

MR. McGOOGAN: I have no means of disputing at all. The appraisal set upon the real estate of the Administrator which he gave at the first hearing,
30 namely, that there is about nineteen or twenty thousand dollars in clear equities above the encum-

brances I don't know whether that is five or six thousand dollars above the claims of course; but it is hard now to guess at equities in anything, and it may be a very conservative estimate, but now I think I wrote Mr. Lenox to the effect that while my client would not attend the meeting—I think I have a copy of the letter, maybe he can recall it—that in accordance with the Court's suggestion if they had any sensible, reasonable proposition to offer my client, Updike-Kennedy, we would listen to it and confer on it. I didn't deliberately refuse to attend the meeting. When I left the court at the last hearing I promised to try to effect some settlement. If there had been any other proposition that had any reason at all we might have accepted, but they had the same proposition, let us continue on, let us hold this real estate, but there is \$17,000 gone out, not a thing left in the estate except equities in real estate, which now, of course, are rather, well, doubtful, at least they are not liquid.

10

20

THE COURT: You are asking this Court to make an order directing the Administrator to reimburse the estate to the extent of the moneys that he has dissipated?

MR. McGOOGAN: That he has disbursed. I don't say dissipated, that may be a misnomer. They have been disbursed, with the exception of possibly the payments of some bills contracted, that the decedent contracted, payments by the Administrator to himself of real estate broker's commission, they were all disbursed in an honest fashion. I mean not dissipated, he did not squander them. His accounting shows the money was spent for legitimate bills.

30

THE COURT: But he illegally spent it.

MR. McGOOGAN: Illegally, that is my point; yes, sir.

THE COURT: There is no question about this Administrator's liability there and the liability of his bondsmen.

MR. LEVINE: May I interrupt here? I represent the Bonding Company and my understanding is that if he acts honestly in the performance of his duties that the Bonding Company cannot be held liable.
10 It is only when he does things that he should not do that it can.

THE COURT: He has done things that he should not do. There is no question about that. He had no legal right to sell real estate other than under the order of the Court. Have you such an order prepared, Mr. McGoogan?

MR. McGOOGAN: An order. No, sir; I didn't prepare it, but I can get it ready right away and send it to you.

20 I also wanted at this time to make an application for a counsel fee. We have been put to quite some trouble in bringing the matter to a head. I have appeared before Judge Marshall on a petition and order requiring the Administrator to account after a year had passed. I appeared before Vice Ordinary Buchanan on two occasions in the bond proceeding and I have appeared before your Honor twice representing clients whose claims are over \$6,000. I think a modest application would be for \$500.
30 I think the exceptant is allowed, under the decisions, a reasonable counsel fee where he is successful and where he is in part successful.

THE COURT: What do you say, Mr. Lenox?

MR. LENOX: I can't oppose a counsel fee. I know Mr. McGoogan has put in a good bit of time.

THE COURT: You can't very consistently oppose the granting of the order, can you? Have you anything to say in opposition to the granting of the order?

MR. LENOX: If I were representing other creditors, which I am not, I would, your Honor. I feel the granting of such an order would be unfair to the other creditors. 10

THE COURT: Why?

MR. LENOX: It is going to mean, I think, that the Bonding Company will have to take an assignment of the claim. It means that these creditors will be paid off in full at the expense of other creditors who have not taken this proceeding.

THE COURT: Not necessarily.

MR. McGOOGAN: That is not my purpose at all. We are acting, incidentally, for the benefit of all creditors. 20

THE COURT: If this estate is insolvent it will have to be declared insolvent.

MR. LENOX: It may very well be this is an insolvent estate, and that the creditors who have not taken this proceeding will be out.

THE COURT: These creditors can't get their pay-

ments in full unless the Bonding Company goes in and takes over the final administration of the estate and works it out.

MR. LENOX: I think that is what will happen.

THE COURT: All creditors will then be paid in full, but Mr. McGoogan's clients cannot be paid in full unless the other creditors are paid in full. I am not making any order directing that his clients be paid. I am merely making an order requiring your
10 client to put the estate in the same position that it would have been in if he had followed the rules of law in the administration of it. That is the only order that Mr. McGoogan is asking for, as I understand it.

MR. McGOOGAN: That is right.

THE COURT: It is the only order that I would sign, and it would seem to me it would be a fair order that is an Administrator uses such bad judgment that he has gotten the estate in a hole that he and
20 his bondsmen should be required to put it back in the same status that it would have been in if he had complied with the law in the administration of the estate.

MR. LENOX: That is the law, but as applied to this case I am very much confused as to how it works out, because the estate is in a better position than it was.

THE COURT: Well, it may be, but it is not in a legal position, that is certain. If the creditors had
30 all been willing to wait, your scheme may have been one that would have worked out to the best interest of all of them, but it is not a legal proposition.

MR. LENOX: May I ask what we are to do with the real estate we have now ?

THE COURT: I don't know what you are to do with it.

MR. LENOX: The court is going to make an order, I presume, that we put the estate in the same position it was before?

THE COURT: Practically, yes; I don't know that I should give you any advice as to what to do with it, but I would suppose that you would be in a position to apply to the Court for an order to sell land to pay debts, showing that there was not a sufficient personal property to pay the debts, and, well, you might come in court and account for the proceeds of the real estate that you have illegally sold, because it would seem to me that it must have been illegally sold. 10

MR. LENOX: I was thinking if the court makes an order perhaps there should be embodied in the order some disposition of this real estate which we are holding now illegally as Trustee. 20

THE COURT: I don't think I would have power to make any such order.

MR. LENOX: Because if we are holding it illegally we don't want to dispose of it certainly if it is to be turned back to Mr. Webb as Administrator, and then the proper application made to the Court.

THE COURT: Well you will have to work out your own salvation from that standpoint, Mr. Lenox. If you will prepare such an order, I suggest Mr. 30

McGoogan, that you and Mr. Lenox confer about the order so that it is fair all around and so that I would have no hesitancy in signing it.

May I make this suggestion. It would seem to me that there has been no intent on Mr. Webb's part to defraud the estate or to dissipate the funds in any way, and may I make the suggestion that Mr. Lenox and Mr. McGoogan sort of work together to bring this out so that nobody loses anything if it is possible.

MR. McGOOGAN: I will try, sir.

THE COURT: And I think you will be much better off in the end if you work together on it and not have any more of a legal battle than is really necessary, because there seem to be funds enough, all the creditors will be paid if properly handled. Nobody should suffer from the mistakes that have already been made. Try and see that no further mistakes are made. Counsel fee of \$500 will be allowed.

20 MR. McGOOGAN: And costs? I have had some transcripts made to be taxed by the Surrogate on affidavit.

THE COURT: Yes.

EXHIBIT A-1

THIS INDENTURE, made this Eleventh day of August, in the year of our Lord one thousand nine hundred and twenty-eight, between SARAH E. ROESSLER, widow of William J. Roessler, deceased, of the City of Trenton, County of Mercer

and State of New Jersey, JOHN W. ROESSLER, brother of William J. Roessler, deceased, and ELLA ROESSLER, his wife, both of the City of Philadelphia, County of Philadelphia and State of Pennsylvania; CHARLES E. ROESSLER, brother of William J. Roessler, deceased, and MARGARET ROESSLER, his wife, both of the City of Philadelphia, County of Philadelphia and State of Pennsylvania, and ELLA M. HUMES, sister of William J. Roessler, deceased, of the City of Trenton, County of Mercer and State of New Jersey, and JAMES M. HUMES, her husband, of the City of Philadelphia, County of Philadelphia and State of Pennsylvania, Party of the First Part, and GEORGE H. WEBB, of the City of Trenton, County of Mercer and State of New Jersey, party of the second part, and 10

WHEREAS, William J. Roessler died testate on the third day of July, 1928, leaving him surviving a widow and heirs at law, who are the parties of the first part hereto, and 20

WHEREAS, The said parties of the first part are desirous of conveying the real estate hereinafter described, of which the said William J. Roessler was seized at the time of his death, to George H. Webb, the party of the second part hereto, as Trustee, under the terms and conditions of a Trust Agreement to be executed by the said George H. Webb and duly recorded, now this indenture, WITNESSETH, That the said party of the first part, for and in consideration of the sum of One Dollar, lawful 30 money of the United States of America, and other valuable consideration, to them in hand well and truly paid by the said George H. Webb, Trustee, party of the second part, before the sealing and delivery of these presents, the receipt whereof is hereby

acknowledged, have granted, bargained, sold, aliened, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, release, convey and confirm, unto the said party of the second part, his successors and assigns, All those certain tracts and parcels of land hereinafter described as follows, to wit:

- Tract No. 1, Lots Nos. 18-19-20-21 and part of 22.*
Being known as Lots in Block "B" on a map of the
10 Austin-Hall Tract Hamilton, Mercer County, New Jersey, surveyed and drawn by the Trenton Engineering Company, August 12, 1923, and filed in the office of the Clerk of the County of Mercer on April 3, 1925, which said lots taken together are more particularly bounded and described as follows:

- BEGINNING at the corner formed by the intersection of the southerly line of Tuttle Avenue with the westerly line of Moffatt Avenue as laid down on said map and running; thence (1) Westerly along
20 the said southerly line of Tuttle Avenue, 116.5 feet to a point in the southerly line of Tuttle Avenue; thence (2) Southerly and parallel with said Moffatt Avenue, 100 feet to a point; thence (3) Easterly on a line parallel with the said southerly line of Tuttle Avenue, 116.5 feet to a point in the said westerly line of Moffatt Avenue and thence (4) Northerly along the said westerly line of Moffatt Avenue 100 feet to the point and place of BEGINNING.

- Tract No. 2, Lots Nos. 22 and part of 23.*
30 Being known as Lots in Block "B" on a map of the Austin-Hall Tract more particularly bounded and described as follows, to wit:

BEGINNING at a point on the southerly line of Tuttle Avenue, distant 116.5 feet westerly from the corner formed by the intersection of the southerly line of Tuttle Avenue with the westerly line of Moffatt Avenue, as laid down on said map and running; thence (1) Westerly along the said southerly line of Tuttle Avenue 29 feet to a point; thence (2) Southerly and parallel with Moffatt Avenue, 100 feet to a point; thence (3) Easterly on a line parallel with the said southerly line of Tuttle Avenue 29 feet to a point; thence (4) Northerly and parallel with the second course and also Moffatt Avenue, 100 feet to the point and place of BEGINNING. 10

Tract No. 3, Lots Nos. 25 and the adjoining 4.5 feet of Lot 24.

Being known as lots in Block "B" on said map and more particularly bounded and described as follows, to wit:

BEGINNING at the corner formed by the intersection of the southerly line of Tuttle Avenue with the Easterly line of Austin Avenue as laid down on said map and running; thence (1) Southerly along the easterly line of Austin Avenue, 100 feet to a point; thence (2) Easterly and parallel with Tuttle Avenue, 29.5 feet to a point; thence (3) Northerly and parallel with Austin Avenue 100 feet to a point on the southerly line of Tuttle Avenue; thence (4) Westerly 29.5 feet along the southerly line of Tuttle Avenue to the point and place of BEGINNING. 20

Tract No. 4, Lots Nos. 26-27-37-38 and part of 36. 30

Being known as lots in Block "B" on said map and more particularly bounded and described as follows, to wit:

BEGINNING at the corner formed by the intersection of the northerly line of Tuttle Avenue with the Westerly line of Moffatt Avenue as laid down on said map and running thence (1) Northerly along the said westerly line of Moffatt Avenue 95.02 feet to a point; thence (2) Northwesterly still along the said westerly line of Moffatt Avenue 5.21 feet to a point; thence (3) Westerly on a line parallel with the said northerly line of Tuttle Avenue 121.52 feet to a point; thence (4) Southerly 100 feet to a point in the northerly line of Austin Avenue; thence (5) Easterly along the said northerly line of Tuttle Avenue 120 feet to the point and place of BEGINNING.

Tract No. 5, Easterly 21½ feet of Lot No. 34 and adjoining westerly 2 feet of Lot No. 35.

Being known as lots in Block "B" on said map and more particularly bounded and described as follows, to wit:

BEGINNING at a point on the northerly line of Tuttle Avenue, distant 291½ feet easterly from the corner formed by the intersection of the northerly line of Tuttle Avenue with the easterly line of Austin Avenue as laid down on the said map and running; thence (1) Northerly and parallel with the said Austin Avenue, 100 feet to a point; thence (2) Easterly, 23½ feet prallel with Tuttle Avenue to a point; thence (3) Southerly and parallel with the first course 100 feet to a point in the northerly line of Tuttle Avenue; thence (4) Westerly along the northerly line of Tuttle Avenue 23½ feet to the point and place of BEGINNING.

Tract No. 6, Deed: Henry Realty Company, to William J. Roessler. Dated September 12, 1925, and recorded in Mercer County Clerk's Office.

All that certain tract or parcel of land and premises, situate, lying and being in the Township of Hamilton, in the County of Mercer and State of New Jersey, being known as Lot No. 7 in Block "B" of subdivision 1 on a map or plan of lots of "rosemont" duly filed in the Mercer County Clerk's Office and more particularly bounded and described as follows, to wit:

BEGINNING at a stake at the intersection of the northerly line of Nottingham Way with the westerly line of Vincent Avenue and running; thence (1) Northerly along the westerly side of Vincent Avenue 200 feet to a point in the southerly line of Lot No. 32 in Block "B" on said plan; thence (2) West- 10
erly along the southerly line of Lot No. 32, parallel with Nottingham Way 50 feet to a point in the easterly line of Lot No. 6 in Block "B"; thence (3) Southerly parallel with Vincent Avenue along the easterly line of Lot No. 6, 200 feet to a point in the northerly line of Nottingham Way and thence (4) 20
Easterly along the northerly line of Nottingham Way, 50 feet to the point and place of BEGINNING.

Tract No. 7, Deed Henry Realty Company to William J. Roessler, Dated March 9, 1927, and recorded in Mercer County Clerk's Office. Known as Lots 26 and 27 in Block 3 of Subdivision "Rosemont."

BEGINNING at a point in the southwesterly line of Vincent Avenue distant 340.52 feet southeasterly from a stone standing in the southerly intersection of Vincent Avenue with Hillhurst Avenue and run- 30
ning; thence (1) Southwesterly at right angles with Vincent Avenue 90 feet to a point in line of lot No. 13 in Block "B" on said plan; thence (2) Southerly parallel with Hillhurst Avenue 52.22 feet to a point in line of lot No. 28 in Block "B" on said plan;

thence (3) Northeasterly parallel with the first course 123.58 feet to a point in the southwesterly line of Vincent Avenue; thence (4) Northwesterly along the said line of Vincent Avenue 40 feet to the place of Beginning.

Tract No. 8, Deed Elmer H. Brown to William J. Roessler, recorded March 16, 1927, being known as Lot. 80, Cadwalader Terrace.

10 BEGINNING at a point in the northwesterly line of Cadwalader Terrace distant 296.81 feet northeasterly from the intersection of the said line of Cadwalader Terrace with the northeasterly line of Oliver Avenue and running; thence (1) Northeasterly along the said line of Cadwalader Terrace 50 feet to a point; thence (2) Northwesterly at right angles to the said line of Cadwalader Terrace 120 feet to a point; thence (3) Southwesterly at right angles to the second course 50 feet to a point; thence (4) Southeasterly at right angles to the third course 120
20 feet to the place of BEGINNING.

Tract No. 9, Lot No. 81, Cadwalader Terrace.

30 BEGINNING at a point in the northwesterly line of Cadwalader Terrace distant 246.81 feet northeasterly from the intersection of the said line of Cadwalader Terrace with the northeasterly line of Oliver Avenue and running; thence (1) Northeasterly along the said line of Cadwalader Terrace 50 feet to a point; thence (2) Northwesterly at right angles to the said line of Cadwalader Terrace 120 feet to a point; thence (3) Southwesterly at right angles to the second course 50 feet to a point; thence (4) Southeasterly at right angles to the third course 120 feet to the place of BEGINNING.

The 2 lots herein described being part of the same premises conveyed to William J. Roessler by deed dated March 11, 1927, and recorded March 16, 1927.

Tract No. 10

All that certain tract or parcel of land and premises, situate, lying and being in the Township of Hamilton, in the County of Mercer and State of New Jersey, being known as Lot No. 30 in Block "B" of Subdivision 1 on a map or plan of lots of Rosemont, duly filed in Mercer County Clerk's Office, August 18, 1927, bounded and described as follows, to wit: 10

BEGINNING at a point in the southwesterly line of Vincent Avenue, distant 68.16 feet from a stake set in an angle of said Vincent Avenue, which said stake is distant 219.44 feet northerly from the northwesterly corner of Vincent Avenue and Nottingham Way and running; thence (1) Northwesterly along said Southwesterly line of Vincent Avenue 20 feet to a point corner of Lot No. 29 in Block "B" on said plan; thence (2) Southwesterly along the southeasterly line of lot No. 29 aforesaid, 157.16 feet to a point in line of Lot No. 83.29 feet to a point in line of Lot No. 4 in Block "B" on said plan; thence (4) Easterly along the northerly line of Lot No. 4 in Block "B" on said plan 30.88 feet to a point corner of Lot No. 31 in Block "B" on said plan; thence (5) Northeasterly along the northwesterly line of Lot No. 31, 133.78 feet to the point and place of BEGINNING. 20

Being the same premises conveyed to William J. Roessler by Henry Realty Company, January 27, 1925, and recorded in Mercer County Clerk's Office, February 10, 1925. 30

Being the same premises of which the said William J. Roessler died testate and did by his last will and

testament duly probated in the Mercer County Surrogate's Office, devise all of his said realty to his first wife, Marian E. Roessler, the said Marian E. Roessler, his first wife having predeceased the said William J. Roessler and the said William J. Roessler after her decease having again married to Sarah E. Roessler, his present widow, who is one of the parties of the first part hereto.

10 TOGETHER with all and singular the rights, liberties, privileges, hereditaments and appurtenances to the same belonging or appertaining, and also all the estate, right, title, interest, property claim and demand whatsoever, both at law and in equity, of the said party of the first part, of, in and to the said premises, with the appurtenances, TO HAVE AND TO HOLD the above-mentioned and described premises, with the appurtenances, unto the said party of the second part, his successors and assigns, forever.

20 IN WITNESS WHEREOF, The said party of the first part have hereunto set their hands and seals on the day and year first above written.

Signed, sealed and delivered in }
the presence of }
(s) Helen M. Caminade. }

30 Sarah E. Roessler (L.S.)
John W. Roessler (L.S.)
Ella Roessler (L.S.)
Charles E. Roessler (L.S.)
Margaret V. Roessler (L.S.)
Ella M. Humes (L.S.)
James M. Humes (L.S.)

(s) James M. Moore as to James M. Humes.

State of Pennsylvania, }
 County of Philadelphia } ss:

BE IT REMEMBERED, that on the 11th day of August, in the year of our Lord one thousand nine hundred and twenty-eight, before the subscriber, a Notary Public of the State of Pennsylvania, personally appeared JAMES M. HUMES, husband of Ella M. Humes, one of the heirs in the foregoing Deed mentioned, and I having made known unto him the contents thereof, he did thereupon acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed. 10

(s) JAMES M. MOORE,
 Notary Public.
 Commission Expires April 1, 1931.
 (SEAL)

(Certificate of Pennsylvania Prothonotary attached)

State of New Jersey }
 County of Mercer } ss:

20

BE IT REMEMBERED, That on the eleventh day of August, in the year of our Lord one thousand nine hundred and twenty-eight, before the subscriber, a Notary Public of the State of New Jersey, personally appeared SARAH E. ROESSLER, widow, and JOHN W. ROESSLER and ELLA ROESSLER, his wife, CHARLES E. ROSSELER and MARGARET ROESSLER, his wife, and ELLA M. HUMES, several of the heirs in the foregoing Deed mentioned, and I having made known unto 30

them the contents thereof, they did thereupon acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

(s) HELEN M. CAMINADE,
Notary Public of New Jersey.

The above deed is duly recorded in the Mercer County Clerk's Office in Book 639, pages 203, etc.

10

EXHIBIT A-2

WHEEAS, Sarah E. Roessler, widow of William J. Rossler, deceased, John W. Roessler and Ella Roessler, his wife, Charles E. Rossler and Margaret V. Roessler, his wife, and Ella M. Humes and James M. Humes, her husband, did by deed dated the Eleventh day of August, 1928, duly recorded in the Mercer County Clerk's Office, convey to me, George H. Webb, of the City of Trenton, County of Mercer and State of New Jersey, ten certain tracts of land and premises more particularly described in said deed, being the same lands and premises of which the said William J. Roessler died seized on the third day of July, 1928, and

WHEREAS I, the said George H. Webb aforesaid did accept a conveyance of said ten tracts of land and premises from the aforesaid widow and heirs at law of William J. Roessler, deceased, and

WHEREAS, James M. Humes, husband of Ella M. Humes, one of the heirs at law, has for good and legal consideration released any right which he might have in the said tracts of land and premises aforesaid, and

WHEREAS, We the said Sarah E. Roessler, widow, John W. Roessler and Ella Roessler, his wife, Charles E. Roessler and Margaret V. Roessler, his wife, and Ella Humes, have executed said deed of said ten tracts of land and premises to the said George W. Webb so that the same may be sold and conveyed by the said George H. Webb and the proceeds divided as hereinafter mentioned, now this agreement 10

WITNESSETH, That I the said George H. Webb do hereby declare that I stand seized of said lands and premises mentioned and described in the deed aforesaid in Trust never the less for the said Sarah E. Roessler, widow, John W. Roessler and Ella Roessler, his wife, Charles E. Roessler and Margaret V. Roessler, his wife, and Ella M. Humes, their heirs and assigns, and I the said George H. Webb do hereby agree to convey the same or any part of the same at their request and upon such terms and at such prices and at such times as they shall agree upon in writing with me as Trustee; 20

AND that the said Sarah E. Roessler, widow, John W. Roessler and Ella Roessler, his wife, Charles E. Roessler and Margaret V. Roessler, his wife, and Ella M. Humes, do hereby agree that the said George H. Webb and each of us with each of the others severally, that the said George H. Webb shall hold the net proceeds of said sales for our benefit in the same proportions as our shares to the said real estate 30

exist under the law by reason of the descent of said properties to us as heirs at law of the said William J. Roessler, deceased, and I, the said George H. Webb, do further agree that the request and written consent of the said beneficiaries I will at any time hereafter reconvey the said properties to said beneficiaries in such form and in such manner as they shall mutually agree upon.

10 IN WITNESS WHEREOF we have hereunto set our hands and seals this thirteenth day of August in the year one thousand nine hundred and twenty-eight.

Signed, sealed and delivered
in the presence of
(s) Helen M. Caminade

}

20

(s) Sarah N. Roessler (L.S.)
(s) John W. Roessler (L.S.)
(s) Ella Roessler (L.S.)
(s) Charles E. Roessler (L.S.)
(s) Margaret V. Roessler (L.S.)
(s) Ella M. Humes (L.S.)
(s) George H. Webb (L.S.)

State of New Jersey, } ss:
County of Mercer,

BE IT REMEMBERED, That on this Thirteenth day of August in the year of our Lord nineteen hundred twenty-eight, personally appeared before me, a Notary Public of the State of New Jersey, Sarah E. Roessler, Widow of William J. Roessler, deceased, John W. Roessler and Margaret V. Roessler, his

wife, and Ella Humes and James M. Humes, her husband, and George H. Webb, who are, I am satisfied, the persons named in and who executed the foregoing Agreement, and I have made known unto them the contents thereof they did acknowledge that they signed, sealed and delivered the same as their voluntary acts and deeds for the uses and purposes therein expressed.

(s) HELEN M. CAMINADE,
Notary Public of New Jersey. 10

The above agreement is duly recorded in the Mercer County Clerk's Office in Book 639 of Deeds, pages 209, etc.

NEW JERSEY PREROGATIVE COURT

MEMORANDUM

BUCHANAN, V. O. (Orally):

This is an appeal by the administrator of the Estate of William J. Roessler, deceased, from an order of the Orphans' Court of the County of Mercer, entered upon a determination of the hearing upon exceptions filed by Updike and Kennedy Company, a creditor, to the accounting filed by the administrator in the Orphans' Court. 20

The account filed charges the administrator with \$3,400.42, moneys of the decedent and proceeds of the sale of personal property. It also charges the accountant with numerous items of proceeds of sale of real estate amounting to \$13,722.64. On the discharge side of the account there are a number of items, 30

being amounts paid by the administrator for administration expenses and for debts of the decedent, and there are many more items which are payments and disbursements made with regard to the real estate owned by the decedent.

The exceptions to this account, speaking broadly, object to the account upon the ground that the accountant took title to the real estate and did not follow the statutory procedure subjecting the real estate to the payment of the debts of the decedent. A number of the exceptions to the account are technically not exceptions to the account; they are objections to the acts of the administrator. But, insofar as these exceptions can be considered strictly as exceptions to the account, they, broadly, except to the account because it contains items relating to the real estate. They object to the items of discharge which are prayed for and which comprise payments made with respect to the real estate. To that extent the exceptions are valid. But this creditor cannot object to the items of discharge of real estate and avail himself of the items of real estate with which accountant has charged himself. The accountant is administrator, and there have been no proceedings to declare the estate insolvent and for the sale of the lands to pay the debts.

The fact is that the administrator, as such, had nothing to do with the real estate or the proceeds therefrom. Mr. Webb, who is the administrator, took title to the real estate (by agreement with the heirs and creditors, or most of them, not, however, as administrator, but specifically as "trustee,"—and had been trying to carry, finance, complete contracts and sell, to the best advantage for the benefit of the parties interested. Neither the real estate itself, nor the income therefrom, nor the moneys paid or received by the trustee with respect to it, have any place in the administrator's account.

The decree of the Orphans' Court is erroneous in that it provides that the accountant shall be charged with the full amount of the receipts from the real estate in addition to the amount of receipts from personal property and at the same time disallows the items of discharge for the payment on real estate.

The decree which will be entered in this Court will provide for the modification of the decree in the Orphans' Court to the following extent: that there be stricken from the account all of the items of charge, with the exception of the \$3,400.42 of personal property, and there will be stricken from the discharge side of the account all of the items excepting those items which were proper items of disbursement by the accountant as administrator in the administration of the estate, and those payments of debts due by the decedent, which are preferred claims and would be entitled to priority in payment over the claims of the general creditors. As to just which those items are— Can counsel agree as to which they are? 10 20

(Both counsel said they thought they could so agree.)

(Counsel agreed that the \$310.24 taxed costs in the foreclosure suit is a proper item on the credit side of the account.)

And the decree will further provide that the administrator file the statutory petition in the Orphans' Court in the case of an estate where the personal property is insufficient to pay the debts. It will further provide that the decree shall be without prejudice to the right of the accountant to raise hereafter against the exceptant, either in the further proceedings in the Orphans' Court or in this Court in connection with this estate, or by original bill in Chancery, the question of estoppel either on the 30

ground of participation, acquiescence and consent in what has been done by Mr. Webb in dealing with the real estate of the decedent, or on the ground that the creditor is not entitled to participate in the benefits of what he has done unless he is willing to assume the burdens. The decree will also provide that the administrator shall charge himself with the property known as 708 Norway Avenue, Trenton, N. J., which the administrator took by way of foreclosure on the second mortgage (the first mortgage encumbrance on it now is \$3,000.00); also with a note and mortgage made in the original amount of \$1,950.00, now reduced to the sum of \$1,500.00.

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20
30
His account should charge him with the amount of the inventory and appraisal, which was the sum of \$6,342.46. If there have been any items in that inventory which were sold for more than the inventory value there should be a corresponding additional charge of the excess; and if there were sales for less than the inventory value there should be a charge for such deficiencies; that would leave the account the same as the inventory less the deficiencies and plus the accretions.

I think the decree had better provide for the striking out of the entire account, and that the accountant file within ten days a new account in accordance with what I have said.

(Mr. McGoogan asks for \$150.00 as counsel fee; Mr. Lenox asks for \$300.00.)

30 The exceptant is not here as exceptant. This is a matter on appeal and the appellant has been successful. The proceedings in the Orphans' Court, to my mind, do not justify an allowance of \$500.00 upon the result which should have been reached, as disclosed by the decree here. The allowance in the Orphans' Court to the exceptant will be reduced to \$250.00. There is no provision for the allowance of counsel

fee in the Prerogative Court. I will allow you costs, Mr. Lenox.

NEW JERSEY PREROGATIVE COURT

DECREE FILED MAY 19, 1931

This matter having been duly brought on for final hearing before the Honorable Malcolm G. Buchanan, one of the Vice-Ordinaries to whom this matter was duly referred, in the presence of James J. McGoogan, Esquire, proctor for Updike-Kennedy Company, exceptant-respondent, and Samuel D. Lenox, Esquire, proctor for George H. Webb, administrator, the appellant herein, and the Court having considered the transcript of the proceedings and testimony taken before the Mercer County Orphans' Court which resulted in the making and entering in the said Mercer County Orphans' Court of the order adjudicating exceptions to the administrator's first account, from which order this appeal has been taken; and it further appearing to the Court that in the said administrator's first account, as filed in the Mercer County Orphans' Court, the administrator charged himself with the sum of \$3,400.42 proceeds of the sale of personal property, and also charged himself with the sum of \$13,722.64, proceeds from the sale and rental of certain real estate of the decedent, title to which was taken by the said George H. Webb, not as administrator, but specifically as trustee; and it now appearing to the Court that the accounting as to the sum of \$13,722.64, proceeds of the sale and rental of real estate, is not properly the subject of an accounting by the administrator, no proceedings having been taken to declare the estate

- insolvent or for the sale of the said lands to pay the debts of the decedent; and it further appearing that the order adjudicating exceptions to the administrator's first account charges the said accountant with the full amount of the receipts, both from personal property and from the sale and rental of real estate, and at the same time disallows the items of discharge for the payment made on real estate, and further provides for the payment by the said George H.
- 10 Webb to James J. McGoogan, Esquire, proctor for the exceptants, of the sum of \$500.00 as a counsel fee for the services as proctor for the excepting creditor; and it further appearing to the Court that said order adjudicating exceptions to the administrator's first account is erroneous and should be modified as hereinafter ordered, and that the allowance of said counsel fee by the Orphans' Court is for an excessive amount, in view of the modification hereinafter made.
- 20 It is, on this nineteenth day of May, 1931, by his Honor, Edwin Robert Walker, Ordinary of the State of New Jersey, ORDERED, ADJUDGED and DECREED that the order adjudicating exceptions to the administrator's first account, as entered in the Mercer County Orphans' Court, be and the same is hereby modified to the following extent, to wit: that the entire first accounting as heretofore filed by the administrator in the Mercer County Orphans' Court, be stricken out, and the accountant file within
- 30 ten days from the date hereof a new account charging himself with the inventory value of the personal property left by the decedent and any accretions thereto by reason of sales thereof above the inventory value or otherwise, and shall pray allowance for deductions from the inventory value by reason of sales of personal property for amounts less than said inventory value if any, and further pray allow-

ance for the items of payment which are proper items of disbursement by the accountant as administrator in the administration of the estate and also for the payment of such debts of the decedent which are preferred claims and entitled to priority in payment over the payment of claims of general creditors, and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the administrator file the statutory petition in the Mercer County Orphans' Court which is proper in the case of an estate where the personal property is insufficient to pay the debts of the decedent, and 10

IT IS FURTHER ORDERED, ADJUDGED and DECREED that this decree entered herein shall be without prejudice to the rights of the accountant to raise hereafter against the said Updike-Kennedy Company, exceptant, either in the further proceedings in the Orphans' Court or in this Court in connection with this estate or by an original bill in the Court of Chancery, the question of estoppel either on the ground of participation, acquiescence and consent by the said exceptant in what has been done by the said George H. Webb as trustee in dealing with the real estate of the decedent, or on the ground that the exceptant-respondent is not entitled to participation in the benefits of which the said George H. Webb, as trustee, has done unless it is willing to assume the burdens thereof, and 20

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the allowance of \$500.00 as counsel fee to the proctor for the exceptant, as allowed by the terms of said order, is excessive in view of the modification hereby made and that the said allow- 30

ance be and the same is hereby reduced to the sum of \$250.00 and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Updike-Kennedy Company, the exceptant-respondent, shall pay to the appellant herein his costs to be taxed.

Respectfully advised.

10 MALCOLM G. BUCHANAN, V. O.

E. R. WALKER,
Ordinary.

NEW JERSEY PREROGATIVE COURT

In the matter of the Estate of }
WILLIAM J. ROESSLER, } Notice of Appeal.
deceased.

20 The exceptant Updike-Kennedy Company, Inc., hereby appeals from the final decree made in the above-entitled cause on May 19, 1931, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes.

JAMES J. McGOOGAN,
Solicitor for and of Counsel with
Updike-Kennedy Co., Inc.

Dated, June 10, 1931.

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

30 JAMES J. McGOOGAN,
Of Counsel with Updike-Kennedy Co., Inc.

Service of a copy of the within notice of appeal is acknowledged this 12th day of June, 1931.

SAMUEL D. LENOX,
Counsel for George H. Webb, administrator.

NEW JERSEY
COURT OF ERRORS AND APPEALS

In the matter of the Estate of } On Appeal from
WILLIAM J. ROESSLER, } Prerogative Court.
deceased. } Petition of Appeal. 10

TO THE HONORABLE THE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of Updike-Kennedy Company, the appellant in the above-entitled cause, respectfully shows that:

1. Petitioner finds it is aggrieved by final decree made in the Prerogative Court in this state by his HONOR EDWIN ROBERT WALKER, Ordinary of the State of New Jersey, bearing date May 19, 1931, in a certain cause in said Prerogative Court in New Jersey wherein George H. Webb was appellant and said Updike-Kennedy Company, Inc. was respondent, in this respect, to wit: the said decree adjudges that the order adjudicating exceptions to the administrator's first account, as entered in the Mercer County Orphans' Court, be modified to the following extent, to wit: that the entire first accounting as heretofore filed by the administrator in the Mercer County Orphans' Court, be stricken out, and the accountant file within ten days from the date 20 30

thereof, a new account, charging himself with the inventory value of the personal property left by the decedent and any accretions thereto by reason of sales thereof above the inventory value, or otherwise, and shall pray allowance for deductions from the inventory value by reason of sales of personal property for amounts less than said inventory value if any, and further pray allowance for the items of payment which are proper items of disbursement by the accountant as administrator in the administration of the estate, and also for the payment of such debts of the decedent which are preferred claims and entitled to priority in payment over the payment of claims of general creditors, and that the administrator file the statutory petition in the Mercer County Orphans' Court which is proper in the case of an estate where the personal property is insufficient to pay the debts of the decedent, and that said decree shall be without prejudice to the rights of the accountant to raise thereafter against the said Updike-Kennedy Company, exceptant, either in the further proceedings in the Orphans' Court or in this Court in connection with this estate or by an original bill in the Court of Chancery, the question of estoppel either on the ground of participation, acquiescence and consent by the said exceptant in what has been done by the said George H. Webb as trustee in dealing with the real estate of the decedent, or on the ground that the exceptant-respondent is not entitled to participation in the benefits of what the said George H. Webb, as trustee, has done, unless it is willing to assume the burdens thereof, and that the allowance of \$500.00 as counsel fee to the proctor for the exceptant, as allowed by the terms of said order, is excessive, in view of the modification made by said decree, and that the said allowance be reduced to the sum of \$250.00, and that the Updike-

Kennedy Company, the exceptant-respondent, shall pay to the appellants George H. Webb his costs to be taxed.

2. The petitioner appeals from the decree of the Ordinary which decrees as aforesaid, on the ground that the same is erroneous in that it:

a. Permits the administrator to frustrate the provisions of the statutes regulating the administration of estates, by allowing him to sell real estate of the decedent without an order of the Orphans' Court on petition for leave to sell lands to pay debts. 10

b. Ratifies the illegal acts of the administrator in taking title to lands of the decedent under an agreement to hold them for the benefit of the heirs and not for the creditors of the estate.

c. Allows the administrator to escape the provisions of the statutes requiring security on the sale of decedent's lands.

d. Adjudges that the exceptant received benefits from the administrator's acts, without sharing 20 the burdens.

e. Fails to charge the administrator with interest on funds illegally withdrawn by him.

f. Fails to direct the administrator to refund to the estate the moneys that he illegally used from the proceeds of the sale of real estate, with interest.

g. Deprives the exceptant of the right to object to the terms and prices of real estate of decedent sold by the administrator as self-appointed trustee.

h. Permits and ratifies the sale of real estate of decedent without legal notice under the statutes. 30

i. Reduced exceptant's allowance of \$500.00 for counsel fees to \$250.00.

j. Imposed costs on the exceptant.

k. Permits the administrator to retain rents and profits of the decedent's real estate and to use them for purposes unauthorized by law and unknown to the exceptant creditor.

98 *Petition of Appeal from Prerogative Court*

1. Fails to direct the administrator to account for rents and profits taken by him from the real estate.

m. Fails to decree that the acts of the administrator showed lack of good faith and diligence in administering the decedent's estate.

n. Fails to direct the administrator to refund to the estate the commissions withdrawn from the estate by him for his own use.

10 o. Permits the administrator to file a petition for the sale of real estate where personal estate is insufficient to pay debts, after a large part of the real estate has already been sold and conveyed by the administrator, without such a petition having been filed prior thereto.

p. Permits the administrator to circumvent the statutes providing for the filing of an accounting within one year after his appointment on August 2, 1928.

20 q. Permits the administrator to mingle the personal estate with the real estate of the decedent, without supervision and control of the Orphans' Court.

3. Petitioner therefore prays that the said decree of the said Ordinary may be wholly reversed, set aside and for nothing holden, and that petitioner have such other relief in the premises as to this court shall seem proper.

4. Respectfully submitted this 10th day of June,
30 1931.

JAMES J. McGOOGAN,
Solicitor for and of counsel with appellant.

Service of this petition of appeal is hereby acknowledged this 25th day of June, 1931.

SAMUEL D. LENOX,
Counsel for respondent, George H. Webb.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

In the matter of the estate of WILLIAM J. ROESSLER,
deceased.

ON APPEAL FROM PREROGATIVE COURT.

RESPONDENT'S BRIEF.

FACTS.

William J. Roessler died testate on July 3, 1928, and did, by his last will and testament, bequeath and devise all of his estate to his wife, who predeceased him. In said last will, duly probated in the Mercer County surrogate's office, he gave a power of sale to the executrix therein named, for the sale of all of the real estate of which he died seized. This executrix having predeceased the testator, George H. Webb, the respondent, was duly appointed administrator, *cum testamento annexo*, and filed his administrator's bond in the sum of \$15,000.00, with the United States Casualty Company as surety.

The business of the decedent, during his lifetime

and immediately prior to his decease, was that of contractor and builder of dwelling houses in and around the City of Trenton. At the time of his decease, decedent was seized in fee of several parcels of real estate, some unimproved, some with partly finished dwelling houses erected thereon, and others with completed dwellings. There was also one parcel of unimproved real estate which decedent had been purchasing on the installment plan, title to which was not to pass until the final payment. At the time of death a large percentage of the installment payments had been paid, and after the administrator's appointment, he made payment of the balance and took title.

The claim against the estate of the appellant, who is a lumber dealer in Trenton, is largely for materials supplied to decedent for the construction of the dwellings still owned by decedent at his death.

Following respondent's appointment as administrator, he made an agreement with the heirs of the decedent to take title to all of the real estate in his name as trustee. Such a deed was executed and recorded (Ex. A1, p. 74). At the same time an agreement of trust was also recorded (Ex. A2, p. 84). Thereafter, the administrator was presented with numerous claims against the estate, totaling about \$14,000.00, which amount was several times in excess of what was generally believed to have been owed by decedent. The administrator then called several meetings of the creditors of the estate to discuss the feasibility of carrying the real estate which he held as trustee (State of Case, page 62, *et seq.*), and the appellant herein had a representative present at said meetings, and was fully cog-

nizant of the action to be taken by the administrator with regard thereto.

The administrator sold the personal property of the decedent at public sale, and the proceeds thereof, about \$2400.00, were used partly for payment of preferred claims, partly for the payment of some unpreferred claims and partly for the payment of taxes and mortgage interest on the real estate.

No action was ever taken by the administrator or appellant, or any other creditor, to have the estate declared insolvent or for leave to sell the real estate to pay debts.

On April 7th, 1930, the administrator filed an accounting, which is the subject of this dispute (State of Case, page 3). The Mercer County Orphans' Court, after a hearing on the exceptions to said account (State of Case, p. 25), made its order adjudicating said exceptions (State of Case, p. 19), which ordered the administrator to restate his account and strike out therefrom all the items for which he claimed allowance, excepting surrogate's fees; this adjudication in effect ordered the administrator to charge himself with \$17,080.03.

From this order an appeal was taken by the administrator to the Prerogative Court.

At the hearing on this appeal, both the administrator and the respondent were content to rest on the state of case from the Orphans' Court, no additional testimony being taken. The Prerogative Court thereupon decreed that the whole account be restated by the administrator, who was to account only as to the personal assets which he received and disbursed.

From this decree the present appeal is taken.

QUESTION.

The real question in difference between the parties is whether or not the administrator can be called to account at the present stage of the proceedings for his actions with respect to the real estate of which the decedent died seized and to which George H. Webb took title, not as administrator, but as trustee.

The Mercer County Orphans' Court, by its order adjudicating the exceptions to the administrator's account, in effect held that George H. Webb was before the court not only as administrator, but also as trustee. On the other hand, the Prerogative Court, by its decree, held that the administrator, at this stage of the proceedings, was only before the court as administrator, and not as trustee; that, while he should be called upon to account for the personal property assets which had come into his hands as administrator, yet the Court had no power to adjudicate as to any acts of George H. Webb as trustee under the trust agreement with the heirs of the decedent.

ARGUMENT.

It is respectfully submitted that the decree of the Prerogative Court is correct.

Even a superficial reading of the order of the

Mercer County Orphans' Court adjudicating the exceptions will show it to be erroneous. By said order, the Orphans' Court not only attempted to adjudicate as to the acts of George H. Webb as trustee, when as such trustee he was not before the court, but also refused to allow the administrator credit for monies which he had disbursed in making payment of preferred claims against the estate, such as doctor bills and hospital bills incurred during decedent's last illness, expenses of a mortgage foreclosure suit in the Court of Chancery in which the administrator foreclosed a second mortgage which came into his hands, nursing services for the decedent, auctioneer and appraisal fees on the sale of the personal property assets, and premiums on the administrator's bond.

It needs no citation of authorities before this Court to indicate that these were proper items of allowance to the administrator by the Orphans' Court.

But the Orphans' Court, by its order adjudicating exceptions, went even further. It said to the administrator in effect—You have, as trustee, collected rentals from the tenants in the real estate holdings of which the decedent died seized; you have used these rentals for the payment of municipal taxes and mortgage interest on this same real estate, and the Court now orders you to pay into the estate \$17,080.03, which includes rents you have collected as trustee and which monies you have, as trustee, spent for the payment of taxes and mortgage interest.

Upon presentation to the Prerogative Court on the administrator's appeal from the Orphans' Court

of such a set of facts, the Prerogative Court immediately reversed and modified the order of the Orphans' Court and held that George H. Webb was before the Orphans' Court in his accounting simply as administrator; that neither the Prerogative Court nor the Orphans' Court had any jurisdiction in the then condition of affairs to make an adjudication whatsoever over the acts of George H. Webb as trustee under the trust agreement. The decree of the Prerogative Court from which this appeal is taken, therefore ordered that the administrator restate his account before the Orphans' Court, accounting in said restated account only for the monies which had come into his hands as administrator, and said decree specifically recites that the accounting previously filed before the Orphans' Court as to the monies which George H. Webb had received as trustee and had expended as trustee was not properly before the Court, and that no adjudication could be made thereon.

It is, therefore, respectfully submitted that a careful analysis of the facts, and the proceedings taken before the Mercer County Orphans' Court and the Prerogative Court show conclusively, without the need of citation of any authority, that the decree of the Prerogative Court is correct in all respects, and that the obligation of the administrator is to hold himself responsible for the monies which came into his hands as administrator, and that neither Court had any jurisdiction over Webb as trustee.

It is further respectfully submitted that the foregoing analysis of the facts and proceedings is a good and sufficient answer to each and every one

of the grounds of appeal as specifically set forth in appellant's petition of appeal (State of Case, p. 95).

The whole theory of the appellant's case, as shown by his petition of appeal and the argument thereon in its brief, is based upon the legal conclusion that the acts, or failure to act, of George H. Webb, trustee, were properly before the Orphans' Court and the Prerogative Court. This, it is submitted, is not a proper legal conclusion. Neither Court had jurisdiction of Webb *as trustee*.

It is well established that the Orphans' Court is invested by statute with full jurisdiction over the acts of executors, administrators, guardians and trustees, as well as with all incident powers necessary to effectuate this jurisdiction,

Orphans' Court Act, Section 2, 3 Compiled
Statutes, page 3813,

but the jurisdiction given by this statute does not contemplate jurisdiction over trusteeships created by acts of parties, *inter vivos*. The trusteeship in the present case was created by a conveyance from the heirs of the decedent to George H. Webb, trustee, and is evidenced by the trust agreement on record (State of Case, pp. 84-86). To make this point clearer, let us suppose that the heirs of William J. Roessler had created a similar trusteeship of the real estate with a person *other* than George H. Webb. It is a mere coincidence that George H. Webb is at the same time Administrator of William J. Roessler, deceased, and Trustee under a trust agreement with Roessler's heirs.

Could it be seriously contended that if George H. Webb were administrator only, and the trusteeship resided in some third person, that the Orphans' Court could take jurisdiction of an accounting by said trustee?

The fact that George H. Webb is at the same time administrator and trustee does not give the Orphans' Court jurisdiction over his accounts as trustee. His trusteeship was created *intervivos*, and not by the will of William J. Roessler. He is accountable as trustee, not to the creditors of the estate of William J. Roessler, but to the heirs alone. His dealings with the real estate left by the decedent were in the capacity of trustee. Whether these dealings were proper or whether they were improper is a question which, it is submittd, was not, and could not be, before the Orphans' Court or Prerogative Court, at this stage of the proceedings, and that the decree of the Prerogative Court refusing to adjudicate as to the propriety of his actions as trustee is correct in all respects.

“The Orphans' Court is not a court of common law, but a court partaking of the powers of a Chancery or Prerogative jurisdiction, but the design was not to confer upon the Orphans' Court all the powers which the Court of Chancery has over cases of administration, guardianship and trust. Thus, the Orphans' Court cannot exercise Chancery powers such as compelling a trustee to reconvey property turned over to him by his predecessor in the trust. * * * The Orphans' Court has no jurisdiction to establish or enforce trusts. That jurisdiction resides solely in the Court of Chancery.”

Kocher's New Jersey Probate Law, Volume 1, pages 43-44.

Appeal of O'Callaghan, 64 N. J. Eq. 287;

In re Lippincott's Estate, 68 N. J. Eq. 578.

In Lippincott's case, *supra*, the trust was there created by will, and yet the Prerogative Court, Magie, Ordinary, there holds that no jurisdiction has been conferred upon an Orphans' Court to determine whether a trustee was properly performing his trust. The Court says:

"It is not open to doubt that relief of this kind falls within the jurisdiction of the Court of Chancery. No jurisdiction of that nature can be found to have been conferred upon the Orphans' Court."

It is, therefore, respectfully submitted that the Orphans' Court was without jurisdiction to make its order adjudicating the exceptions to the administrator's account, because it sought to deal with actions, or failure to act, of George H. Webb as trustee, and further is it submitted that the decree of the Prerogative Court in refusing to deal with the actions or omissions to act of George H. Webb, trustee, was, therefore, correct.

This again, it is submitted, is a complete and satisfactory answer to all of the grounds of appeal to this Court, and is, without more, sufficient reason why the decree of the Prerogative Court should be affirmed.

While respondent is content to rest before this Court on the foregoing argument as to jurisdiction, yet, in fairness to the actions of George H. Webb

as trustee in dealing with the decedent's real estate, it is felt that even if the Orphans' Court or the Prerogative Court had jurisdiction over the actions of George H. Webb as trustee, there is a further full and complete answer to the questions raised by the appellant on this appeal.

At Roessler's death, Webb as administrator came into possession of about \$3500.00 worth of personal property. In taking title to the real estate as trustee, there was no thought in the mind of the administrator or of the heirs that this real estate was held adversely to the creditors. It is true that the trust agreement (State of Case, pp. 84-86) recites that Webb as trustee is holding for the benefit of the heirs. Webb as trustee stated to the Orphans' Court (State of Case, p. 49, line 30, *et seq.*) that he was in position to convey immediately the real estate which he held as trustee, either to himself as administrator, to a committee of creditors, or in any other manner that the Court might decree. This position was again stated to the Prerogative Court, and the Prerogative Court thereupon decreed (State of Case, pages 91-94) that the administrator file the statutory petition in the Mercer County Orphans' Court, which is proper in the case of an estate where the personal property is insufficient to pay the debts of the decedent. And that position is again stated to this Court: that George H. Webb as trustee is in a position to reconvey the real estate which he holds as trustee to himself as administrator, to be subject to the order of the Orphans' Court to sell the same to pay debts. In other words, the real estate held by Webb as trustee is not, and

never was, held by him as trustee adversely to the claims of the creditors of this estate.

Now, as stated before, at Roessler's death, Webb as administrator came into possession of about \$3500.00 from the personal property assets. There were filed against the estate claims totaling about \$14,000.00. Taxes and mortgage interest were, at the decedent's death, in arrears on the real estate in question, to the extent of about \$1800.00. Webb was then, and is still, a reputable real estate broker in the City of Trenton, and, with a knowledge of the depression in the real estate market, he realized that if the creditors were to hope for a chance to have their claims paid, it would be absolutely necessary to preserve the equity in the real estate holdings. As any business man would have done, Webb used the monies which he had realized from the sale of the personal property to pay the arrearages in taxes and mortgage interest. In justice to counsel preparing this brief, who was also counsel to Webb as administrator at that time, it should be stated that the actions of Webb in taking the personal property assets and investing them in the real estate were done without the advice of counsel and without his knowledge. It is submitted, however, that while the investment of this money realized from the sale of personal property in the real estate was not strictly justified by the rules of law governing administration of estates, yet said acts were consistent with good business management, and nowhere in these proceedings can it be found that the appellant, or any other creditor, is accusing the administrator of poor business management. The only accusation by the appellant is that Webb as administrator dis-

bursed the personal property assets in a manner not consistent with the statutes governing him as administrator. This, at first blush, might seem to the Court as a deliberate violation of the duties imposed on Webb as administrator, but the real facts are otherwise. The Court will notice that in his testimony before the Orphans' Court, Webb states (State of Case, page 62) that he held meetings with the creditors of this estate, and that a representative of the appellant company was present at these meetings. Webb claims that Updike-Kennedy Company, the appellant herein, through its duly authorized representative, who was present at these meetings, was fully cognizant of the fact that he had invested the personal property assets in the real estate by way of paying taxes and mortgage interest, and, in one case, in finishing a partly completed dwelling, so that it could be offered for sale; and that, being cognizant of these facts, appellant concurred with him in the manner in which he was handling this estate.

The very creditor who now appeals to this Court for a reversal of the Prerogative Court decree, and bases its appeal on the theory that Webb as administrator is accountable for the manner in which he handled the real estate, is the same creditor who had a representative present at creditors' meetings, the same creditor who knew that Webb was attempting to carry along the real estate holdings by using the personal property assets for the payment of the necessary taxes and mortgage interest, and the very creditor who concurred with, and, according to Webb, complimented him on the business-like manner in which he was handling the estate.

Counsel for the appellant now explains this position on the part of his client as being due to a mistaken idea that Webb was holding title to the estate, not as trustee, but as administrator (State of case, p. 66, l. 10). By what possible difference can this make, since Webb as trustee has never held this real estate adversely to the creditors, and is now, and always has been, in a position to turn this real estate over to himself as administrator if it were found necessary so to do.

It is submitted that it is with poor grace that this appellant who concurred in the manner in which Webb was attempting to save the real estate holding for the benefit of creditors, should now come before this Court and complain that Webb has not strictly adhered to the statutory restrictions. This Court will notice that as part of the Prerogative Court decree it is therein ordered:

“IT IS FURTHER ORDERED ADJUDGED and DECREED that this decree entered herein shall be without prejudice to the rights of the accountant to raise hereafter against the said Updike-Kennedy Company, exceptant, either in the further proceedings in the Orphans' Court or in this Court in connection with this estate or by an original bill in the Court of Chancery, the question of estoppel either on the ground of participation, acquiescence and consent by the said exceptant in what has been done by the said George H. Webb as trustee dealing with the real estate of the decedent, or on the ground that the exceptant-respondent is not entitled to participation in the benefits of which the said George H. Webb, as

trustee, has done, unless it is willing to assume the burdens thereof" (State of Case, page 93).

The reason why the decree of the Prerogative Court was so framed is on the ground that the present appellant, having concurred in what Webb was doing, and having met and consulted with him at creditors' meetings, can not now be heard to complain that Webb did not comply strictly with the restrictions set about him by law over his acts as administrator or trustee. And such is not only good law, but good sense.

"It is set down by the Courts that the personal representative who, in a particular transaction, acts in good faith under the direction of all the parties who are interested in the estate, is to be protected, when he renders his accounts, from a claim on their part that he has not administered strictly according to law in respect to such transaction. He may prosecute or defend actions, compromises, claims on the estate, or deal with the estate in a particular case, not usual or strictly legal, as by continuing the property in business; and those present in interest by whose request or assent it has been done, will not be permitted to impute it as maladministration. But parties in interest who give no such assent or authority can, of course, call his conduct to account."

Schouler on Wills, Executors and Administrators, 6th edition, Volume 3, section 2268, page 2132.

It is submitted that what Webb did in the instant case was to carry on the business of the decedent,

because Roessler, at his death, was a contractor and builder. Webb, in effect, carried along Roessler's real estate business. The administrator, in fact, completed a property on Tuttle Avenue, using the assets of the personal estate so to do. He also paid the taxes and mortgage interest on several of the other properties. He also completed payments on an installment contract for the purchase of some unimproved lots. It is submitted that if Webb's acts as administrator in carrying on the decedent's business were done with the knowledge and consent of Updike-Kennedy Company, the appellant, as respondent claims they were, the present appellant will not now be heard in this Court to impute such acts of the administrator to be a maladministration of the estate. It is significant to note that while Webb in his testimony before the Orphans' Court (State of Case, pages 62-63) asserted that the present appellant was present at creditors' meetings and was aware of and consented to the manner in which he was handling the estate, at no time, either before the Orphans' Court or before the Prerogative Court, did the present appellant produce any testimony in an attempt to deny this assertion. It can, therefore, be considered as a matter of fact on this appeal that Webb's acts as administrator and trustee were fully known and consented to by the present appellant.

Poole v. Munday, 103 Mass., 174;

Swaine v. Hemphill, 165 Mich., 561.

The respondent also desires to call to the attention of the Court that in the will of Roessler, duly probated, a power of sale over the real estate was

expressly given to the executrix therein named. Webb, as administrator *cum testamento annexo*, would also have this power of sale, subject to the confirmation of the Court of any sales by him. It is well established that where an executor has a power to sell real estate, such power is held to include the power to repair, insure against fire, pay mortgage interest and otherwise preserve the property until a sale can be made.

Howard v. Francis, 30 N. J. Eq., 444;

Dey v. Codman, 39 N. J. Eq., 258.

It has also been held that an administrator can be required to pay, out of the estate, taxes due on the decedent's real estate and assessed thereon prior to the death.

Shearman v. Cameron, 76 N. J. Eq., 426;

Brown v. Brown, 72 N. J. Eq., 667.

Even assuming jurisdiction in the Mercer County Orphans' Court, no attempt was made to give credit for disbursement made for such taxes, in its order Adjudicating Exceptions (S. C. page 19).

And it has also been held in other jurisdictions, that while generally speaking a personal representative has no power to invest the assets of the estate in real estate yet where such a course of action is absolutely necessary to protect the assets for creditors, such a course will be approved.

See *Schouler on Wills, Executors and Administrators*, 6th edition, Volume 3, Section 2329, page 2166.

The administrator, as such, does not have any rights to the rents of real estate accruing after the decedent's death.

Allen v. Van Houten, 19 N. J. L. 47,

and until the administrator gets power to sell, and does sell, the rents belong to the heirs.

Romaine v. Hendrickson, 24 N. J. Eq., 231-236.

How then can Webb as trustee be called upon to account for these rents and profits of the real estate, or be ordered to refund them to himself as administrator.

This Court will also notice that while the Orphans' Court Act provides a method whereby the present appellant, as a creditor of the estate, could have proceeded to sell the real estate in question to pay debts, no such action was taken by the appellant; the obvious reason being that appellant had concurred with the trustees in the manner in which he had been handling the real estate.

Orphans' Court Act, Section 97, 3 Compiled Statutes, 3847.

And, by the same token, no action has been taken by appellant to set aside the conveyance from Roessler's heirs to Webb as trustee. It is submitted that under appellant's theory, as enunciated in its grounds of appeal, the appellant's proper remedy was and is a bill in Chancery to set aside the conveyance of the real estate in question as a fraud on the creditors of the estate.

Haston v. Castner, 31 N. J. Eq., 697;

Adoue v. Spencer, 62 N. J. Eq., 782.

Even after the expiration of one year, the creditor's remedy is by bill in Chancery.

Incandescent Light & Stove Co. v. Stevenson, 83 N. J. Eq., 482.

This argument as to the proper remedy of appellant is advanced only to show that while the Orphans' Court and Prerogative Court have no jurisdiction over the acts of a trustee, that the appellant is not left without remedy.

Respondent makes no argument as to the reduction by the Prerogative Court in the amount of counsel fee allowed to the counsel for appellant herein, except to say that the reduction made by the Prerogative Court to \$250.00 still allows to counsel for the appellant a sum which is commensurate with the amount of work involved.

CONCLUSIONS

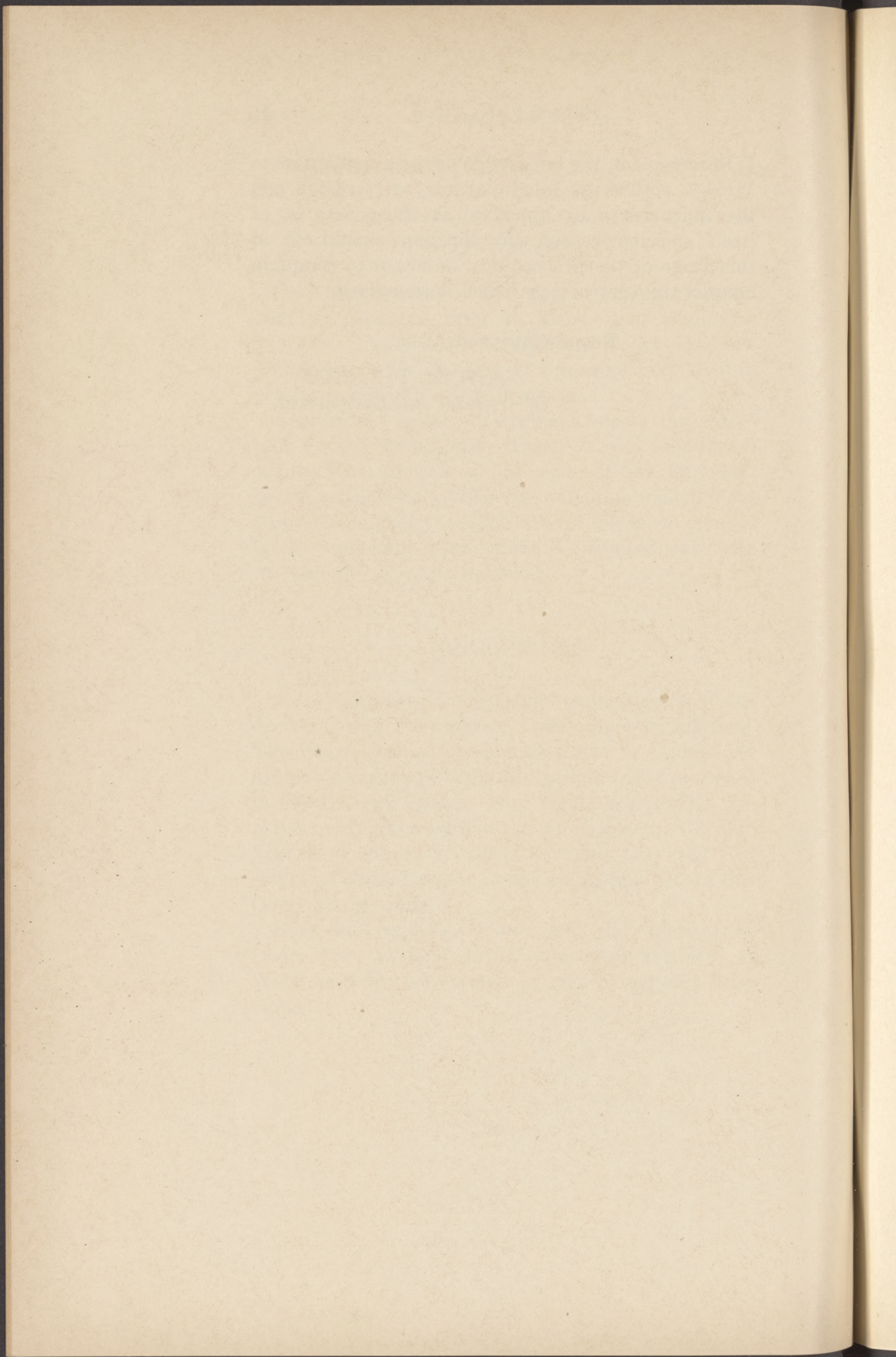
It is, therefore, respectfully submitted that the decree of the Prerogative Court must be affirmed. This decree orders the administrator to account for his acts as administrator and orders him to proceed to sell the real estate. Any rights the present appellant may have against the administrator for negligence or otherwise when he takes over the real estate as administrator is not a question before this Court at this time.

Both the Orphans' Court and the Prerogative Court were without jurisdiction over the acts of Webb as a trustee created by acts of persons *inter vivos*.

In any event, the knowledge of the appellant as to Webb's actions as administrator and trustee and the concurrence by appellant in those acts is, of itself, sufficient reason why appellant should not, at this stage of the proceedings, be heard to complain against the very acts in which it concurred.

Respectfully submitted,

SAMUEL D. LENOX,
Of Counsel for Respondent.



New Jersey Court of Errors and Appeals

IN THE MATTER OF THE ESTATE
OF WILLIAM J. ROESSLER, DE-
CEASED.

ON APPEAL
FROM PREROG-
ATIVE COURT.

BRIEF FOR
APPELLANT.

William J. Roessler died on July 3, 1928, a resident of Mercer County, in this state, his will was probated before the Mercer Surrogate, and on August 2, 1928, letters of administration c. t. a. were granted to George H. Webb, the respondent.

On August 11, 1928, the widow and the next of kin of the decedent conveyed by deed (Exhibit A-1, page 74) to the respondent George H. Webb, certain real estate of the decedent described therein, in fee simple, and with no reservations. This deed was recorded on August 13, 1928, and Webb executed a declaration of trust (Exhibit A-2, page 84) to the grantors in that deed, and therein agreed with them to convey all or any part of the real estate described in the deed, at the grantors' request, and on their terms, and also bound himself to hold the net proceeds of sales for the benefit of the grantors and to reconvey to the decedent's next of kin (Line 14, page 85 to line 8, page 86).

Webb has sold and conveyed under that deed, No. 107 Tuttle Avenue for \$3,021.81, No. 2566 Notting-

ham Way for \$6,292.08, and a Cadwalader Terrace lot for \$600.00, and on April 7, 1930, (page 3) he filed his first account as administrator c. t. a., in which he charges himself with the proceeds of the real estate sales, rents collected from real estate, amounting to \$3,164.00, proceeds of sale of personal property \$2,302.60 and other items (page 4 and 5).

The accountant charged himself with \$17,123.06 (page 5), and on page 16, prays allowance for \$17,114.87, leaving a balance in his hands of \$8.19.

Webb admits on page 49, that unpaid claims against the estate, including appellant's claim of about \$6,000.00 (page 55) amount to about \$14,000.00, so that on the face of the record, it appears that Webb has expended \$17,114.87, which included all the personal estate that he had collected, and all but \$8.19 of the proceeds of real estate sales and rents, and still appellant has received nothing on account of its claim duly filed with the administrator.

Webb still holds title to real estate, the equity in which he values at \$19,026.00 (page 48, lines 27 and 28).

The record is barren of any proceeding taken by the administrator toward having the estate declared insolvent, or the real estate sold by reason of insufficiency of the personal estate to pay debts.

It is obvious that the personal estate was always insufficient to pay debts, and that the estate should have been declared insolvent, or proceedings taken in the Orphans' Court for the sale of real estate to pay debts, which was not done.

It is also obvious that the administrator paid some claims against decedent, and also sold and conveyed real estate without any authority granted by the court.

On September 4, 1930, (page 20) the Mercer Or-

phans' Court, after hearing exceptions filed by appellant to the accounting ordered Webb to refund to the estate \$17,080.03 (page 21).

Webb appealed from the Orphans' Court decree, and the Ordinary decreed (page 91), that the Orphans' Court decree be modified, in that the entire accounting be stricken out, and a new accounting be filed, in effect charging the administrator with personal estate only and praying allowance for preferred debts only.

The Ordinary also modified the allowance of \$500.00 made by the Orphans' Court to appellant's counsel, and all that need be said here on that point is that the allowance was reasonable under the Orphans' Court decree that increased the assets of the estate by \$17,080.03, through the efforts of appellant, the fee of \$500.00 being little less than three per centum of the amount then brought back to the estate. Appellant Updike-Kennedy Company, Inc. takes its appeal from the Ordinary's decree, on seventeen grounds (page 97), and contends that the decree of the Mercer Orphans' Court should remain unmodified and the Ordinary's decree reversed.

The first ground of appeal is that the Ordinary's decree permits the administrator to nullify the statutes, by allowing him to sell real estate without order of the Orphans' Court. There is only one method of administering this estate, and all other similar estates, and it is made mandatory by the Orphans' Court Act, 3 Comp. Stat., p. 3840, Sec. 82, providing that, "When any executor or administrator shall discover or believe that the personal estate of his testator or intestate is insufficient to pay his debts, it shall be his duty to exhibit, under oath, a true account of the personal estate and debts as far as he can discover the same to the Orphans' Court of the county in which the will of said testator

was proved, or letters of administration were granted, requesting its aid in the premises, which petition shall set forth the description of all the land of which the said testator or intestate shall die seized, where the same is situate, its character, condition and value as near as may be, and the said court shall thereupon make an order, requiring all persons interested in such lands, tenements, hereditaments and real estate, to appear before it at a certain day and place * * * to show cause why so much of the said lands, tenements, hereditaments and real estate of the said testator or intestate should not be sold as will be sufficient to pay his debts, or the residue thereof, as the case may require, * * * ." Section 85 (Comp. Stat. Supp. 1924, Vol. 2, page 2617) provides, "The * * * administrator * * * who may be ordered to sell any lands * * * shall after making such sale, report the same to the Orphans' Court of the County in which the land lies, and if the said court shall approve of such sale, it shall confirm the same as valid and effectual in law, and shall by rule of court direct said administrator * * * to execute good and sufficient conveyance in the law to the purchaser * * * ; provided, however, the court shall require the said executor or administrator before executing such conveyance, to enter into a bond with two or more sureties to the Ordinary of the state and his successors, in a penalty double the amount of the value of the lands * * * ordered to be sold, with condition in form and manner following, to wit:

The condition of this obligation is such that if the * * * administrator * * * shall well and truly administer the moneys arising from the sales of any lands, tenements or real estate of the said C. D., directed by the order of the Orphans' Court of the County of M. to be sold according to law, and further do make or cause to be made, a just and true

account of his administration, within twelve months from the date of the above obligation, and the surplus of money which shall be found remaining upon the account of such sale or sales (the same being first examined and allowed by the Orphans' Court of the County or other competent authority), shall distribute and pay unto such person or persons respectively, as is, are, or shall be by law entitled to receive the same, then the above obligation to be void and of no effect otherwise to be and remain in full force and virtue. No further bond shall be required by the Orphans' Court of any other county in which land is situate."

The second ground of appeal relates to the violation of the statute, resulting from the administrator taking title to the real estate in his own name and then making a declaration of trust in favor, not of the creditors and next of kin, but solely of the next of kin. Such action thrust on the creditors the burden of a suit in Chancery to set aside the conveyance and trust, and only the utmost vigilance of creditors would have discovered such a mismanagement of their interests. By the recorded deed and declaration of trust, Webb relieved himself of the duty to report to the Orphans' Court and give the required bond, as provided in the statutes quoted supra, and also in 2 Comp. Stat., p. 2263, Sec. 14, where it is provided that: "No sale of lands hereafter made by an administrator or administrators with the will annexed * * * shall be valid until the terms thereof shall have been submitted to the Orphans' Court, * * * and it shall be the duty of such court * * * to require * * * such administrator * * * to give such additional security by bond to the Ordinary, as said court shall deem advisable, * * * for the proper distribution of the proceeds of the sale of such real estate."

The Prerogative Court has no original jurisdiction to approve sales by administrators. In *re DEVINE*, 62 Eq. 703

The third ground of appeal is based on the latitude given an administrator in escaping the furnishing of security on sales of land ordered by the court. If the precedent is established that sales of lands of decedents be permitted without the supervision of the courts, a wide avenue of maladministration is opened because more than \$17,000.00 worth of real estate was sold by Webb, without submitting any of the offers to the court, and without giving the statutory bond in each instance, and without notice of sales being given to parties interested in the estate.

In *MEEKER V. VANDERVEER*, 15 L. 392, it was held that, to impeach the conduct of an executor, it is necessary to show fraud, or mistake, or that he acted without authority, or contrary to law. Appellant clearly proved that Webb had acted without authority and contrary to the statutes.

In *CAMDEN MUTUAL V. JONES*, 23 Eq. at p. 173, it was held that the sureties on an administrator's bond could not be held for the failure to administer the proceeds of the sale of real estate.

If the estate proves to be insolvent, the administrator failed to proceed under the statute (3 Comp. Stat. p. 3848 et seq), and consequently, being permitted by the Ordinary's decree to have paid some creditors in full, the unpaid creditors, including appellant, may not get their debts paid on an equal footing with the paid claims.

“The estate, real and personal, of a testator, in case the same shall be insufficient to pay all his or her debts, shall be distributed among his or her creditors, in proportion to the sums that shall be due to them respectively, except that the debts which by this act are made preferred debts shall be

first paid." Sec. 99, Orphans' Court Act, 3 Comp. Stat., 3848.

If the estate is insolvent, the creditors have been deprived of their right to question the validity of any disputed claims. *McMAHON V. WEART*, 35 Atl. 444.

The fourth ground of appeal: The record shows no benefit to the appellant by any act of the administrator; on the contrary, it shows that the creditors' source of security, namely the fund of personalty, has been dissipated, and their right to object to prices and terms secured by Webb for the real estate sold was denied by means of the private sales.

The decree obliges Webb to account for personalty only, and leaves in his hands, as an individual, with no supervising power of the Orphans' Court, all the real estate, which was assets in his hands for the payment of debts. The fiduciary must act always for the benefit of the creditors and next of kin.

The authorities hold that interest should be charged against a fiduciary for withdrawals from trust funds, and the fifth ground of appeal goes to the failure of the Ordinary to impose that penalty on the administrator for payment to himself of commissions, and for most all the disbursements of over \$17,000.00. *In re JULA*, 130 Atl. 733.

The Ordinary's decree does not direct Webb to refund the proceeds of the real estate sales, and is made the sixth ground of appeal. "So long as the executor acts in good faith, and with ordinary discretion, and within the scope of his powers, his acts cannot be successfully assailed. An executor may do anything within the scope of his powers, without risk of personal liability for the consequences of his acts, provided he exercises the care and judgment

of a man of ordinary prudence and sagacity." HEISLER V. SHARP, 44 Eq. 167.

The test, therefore, of Webb's responsibility, is thus founded on negligence, in a sense, because the same test is applied at law in tort actions. Applying the standard of conduct so laid down, to the administration by Webb, we find that his course of conduct was not that of an ordinary prudent person, because, if it were, any abject failure of a court appointee to follow the directions of long-established statutes of frequent use, constitutes ordinary prudence. It is difficult to reconcile the status of an ordinary prudent man, who is one guided in the administration of his trust by the statutes regulating his conduct, with that of a man who is not so mindful of his duties.

To hold that a deliberate removal of the real estate from the statutory control of the Orphans' Court, is the act of the ordinary prudent man, is to pave the way for future administrations to run their course outside the pale of the statutes, of which every man must not be ignorant.

Webb asks the court to ratify his non-compliance with the statutes, which was such a departure from the practice in the Orphans' Court, as to warrant a finding that his administration of the estate shows gross negligence in failing to safeguard the interested parties by a speedy collection and disposal of assets to prevent loss and depreciation, which, as a real estate dealer, he must have known to be the ultimate result in a wide-spread failing market for real estate and all other properties.

The seventh and eighth grounds of appeal challenge the deprivation of appellant's right given by the statutes to have some participation in the sales of real estate of decedents. The argument under the sixth reason also applies here.

If the Orphans' Court's decree is reinstated, and the Ordinary's decree reversed, the allowance of \$500.00 to appellant's counsel should be affirmed and costs should not be taxed against the appellant, because the service rendered to the estate warrants the allowance and should relieve appellant from the burden of costs, which is the error specified in the ninth and the tenth grounds of appeal. If, as was held in *Re QUEEN*, 82 Eq. 588, and in *Re BROOKS*, 106 Eq. 242, that the Prerogative Court has no authority to make to appellant an allowance for counsel, it would seem that it has no power to modify or set aside an allowance made by the Orphans' Court.

The unrestricted use of funds of the estate without supervision by the court, and without notice to the creditors, adopted by the administrator and sustained by the Ordinary's decree, is made the basis of the eleventh ground of appeal, and the reasons urged under the sixth ground, have equal force to sustain the eleventh ground.

The twelfth ground of appeal rests on the failure of the Ordinary to direct the administrator to make any accounting of the proceeds of real estate sales. It having been shown that the real estate was assets in the administrator's hands, that he had used the personal estate to pay claims against the real estate for mortgages and repairs, and that the Orphans' Court is the proper tribunal for the allowance of accounts, the Ordinary's decree eliminates from the control of the Orphans' Court, the statutory supervision over expenditures by the administrator, prompting the inquiry: Should the creditor be then obliged to throw the accounting of all that Webb has done with the real estate into a court other than the one erected by the statutes for that purpose? If the answer to that query is yes, then the

creditor is deprived of his remedy on the administrator's bond, because it is given under the statute for the faithful performance of his duties as administrator only, and a decree in Chancery or a judgment at law would not furnish the statutory security, to offset the possible impecuniousness of a fiduciary. If the answer is no, then the Orphans' Court decree was properly made.

Ground thirteen is urged, because the sum total of Webb's administration of the estate is that he removed from the Orphans' Court the statutory supervision over decedent's real estate, in that he failed to file an account within one year, in that he paid himself commissions for sales, in that he mingled the funds of real estate sales with personalty, in that he spent all but \$8.19 of the estate without warrant of law, in that he declared he held the real estate for the heirs, to the exclusion of the creditors: all indicating that he showed such a lack of good faith and diligence, that he should be ordered to refund all that he has spent. One of the results of his administration is the unsettled condition of the estate, for a period, at this writing, of over three years, and the just claims of creditors not favored by the administrator still remain unpaid.

The test laid down in *HEISLER V. SHARP*, 44 Eq. 167, was clearly not met by Webb, because, while he protests in his testimony that he holds the real estate for the creditors first, he has not countermanded of record his declaration of trust that he holds it for the heirs only. Good faith, it is obvious, required that he revoke his trust for the heirs.

The cases hold that a fiduciary make no profit from his office, and the fourteenth ground of appeal complains that Webb was not directed to refund with interest the broker's commissions by which he enriched himself at the expense of the estate. His

commissions as administrator must await the settlement of his account, and are established by the statute, and it cannot be supposed that his statutory commissions will be increased by the Court to the extent of such withdrawals.

That a fiduciary cannot profit from the estate, is too well established a doctrine to require extended argument. Throughout Webb's testimony before the Orphans' Court on the hearing of appellant's exceptions, it is shown, without any equivocation, that Webb withdrew a substantial sum from the assets for his own benefit.

The fifteenth ground of appeal challenges the right of the administrator to file a petition for the sale of the remaining real estate, after much of it has already been sold without that safeguard of the statutes. The duty imposed by law on the administrator required him to petition the Orphan's Court before any sale of real estate was made by him; and if he can dispose illegally of part of the estate, and then escape personal liability by following the statutes in respect to the balance of real estate in his hands, it establishes a precedent of condonation that will result in injurious consequences to creditors.

While ordinarily an accounting may be delayed for good cause shown, yet, under the sixteenth ground of appeal, which questions the determination of the court that an accounting be filed after the statutory period of one year, there appears no valid reason why ordinary diligence could not have brought about the final settlement of the estate within the one year period.

Webb's indiscriminate mingling of his accounts as administrator with his account as trustee shows lack of good faith and diligence sufficient to warrant the affirmance of the Orphans' Court decree, under

the seventeenth ground. Here again the test laid down in HEISLER V. SHARP, 44 Eq. 167, is urged as controlling.

It is therefore respectfully submitted that the Prerogative Court decree be reversed.

JAMES J. McGOOGAN,
Counsel for appellant.

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It is therefore respectfully submitted that the Progressive Court decree be reversed.

JAMES J. McGOOGAN,
Counsel for appellant.