

IN THE ORPHANS' COURT OF PHILADELPHIA COUNTY

No. <sup>54</sup>634.

April Term, 1902.

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Estate of

JOHN MOKEE,

Deceased.  
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PRELIMINARY REPORT OF AMICUS CURIAE

By decree of Bolger, J., dated November 12, 1947, the undersigned, John Blessing, Esq., was appointed Amicus Curiae with the powers of a Master in the above estate with authority to advertise his appointment, conduct hearings and to make such other investigation or inquiry as might enable him to make appropriate recommendations to the Court as to the action it should take respecting distribution of the residue of this estate.

The Third Account of His Eminence, Dennis J. Dougherty, Cardinal Archbishop of Philadelphia, Succeeding Trustee under the will of the decedent, was filed on October 1, 1947, and came before Bolger, J., for audit on November 3, 1947. At the audit Gerald Ronon, Esq., and James E. Gallagher, Jr., Esq., appeared for the accountant, and an appearance was entered by F. Gilman Spencer, Esq., for the Attorney General of the Commonwealth of Pennsylvania pursuant to notice given under the provision of the Act of May 23, 1895, P. L. 114, 10 P. S. 13. The Statement of Proposed Distribution submitted at the audit suggests that the balances of principal and income shown by the account be distributed in such manner as the Court might direct in the exercise of its cy pres jurisdiction. Subsequently, pursuant to a petition filed by the accountant, the undersigned was appointed Amicus Curiae with the powers of a Master as aforesaid.

The testator died a resident of Philadelphia on April 6, 1902, leaving a will dated December 8, 1899, which was duly admitted to probate here. Under the Twenty-seventh Item of his will, the testator directed that the residue of the estate should be held in trust, and, after the death of all his children and his grandchildren who might be living at the time of his decease, the principal and accumulated income should be devoted to the establishment and maintenance of a school to be erected on a tract of land owned by him in Bristol Township, Bucks County, Pennsylvania, to be known as "Colonel John McKee's College"; the school to accomodate at least two hundred poor, male, orphan children, born in Philadelphia, divided as nearly equally as possible between the colored and white races; the age of admission to be between the ages of twelve and eighteen years; and the curriculum to comprehend naval education similar to that taught in the United States Naval Academy at Annapolis, Maryland, in such manner as "to equip skilled men for service upon the various warships of the United States Navy." In addition, the will provided for an elaborate program of conversion of extensive real estate holdings into income producing property and gave meticulous directions concerning the establishment and operation of the school, all of which are immaterial at this time and need not be recited. A copy of the will is annexed to this report.

The Statement of Proposed Distribution sets forth that one Dr. Harry McKee Minton, a grandson of the testator, was the last survivor of testator's children and grandchildren who were in being at the time of his death, and that said Dr. Minton died on December 29, 1946. This is stated to be the reason or purpose of the filing of the present account, and, if the alleged fact that Dr. Minton was the last survivor of the class of children and grandchildren is accurate, then the time is now ripe for

putting into effect the testamentary plan to establish the school. The fund in the hands of the trustee consists of approximately \$650,000 in personalty and about \$150,000 in unconverted real estate, and it is suggested that it is impossible at this time to erect and maintain a school of the character and size specified in the will because the fund is inadequate. Hence, the trustee requests the Court to exercise its cy pres jurisdiction in awarding distribution.

Very recently, after a time and place had been fixed for an initial meeting to hear testimony and receive evidence in support of claims, and after notice of the meeting had been extensively advertised at considerable expense to the estate, information came to light which now leads the Amicus Curiae to believe that Dr. Harry McKee Minton was not the last surviving grandchild who was in being when the testator died, but that another such grandchild is still living. This belief is based on the following statement of facts: on Wednesday, January 7, 1948, the Amicus Curiae was visited by one T. John McKee, who stated that he is a grandchild of the testator, his mother having been the testator's daughter, Abby Ann Syphax, and he being the same person as the Theophilus M. Syphax named in sub-section (C) of the Thirteenth Item of the will of the testator. He further stated that at or about the time of his grandfather's death, or shortly thereafter, by a proper legal proceeding, his name was changed from Theophilus M. Syphax to Theophilus John McKee, and he has been known as T. John McKee since that time. He produced what purports to be a certified copy of a court decree in support of this latter statement. He also had in his possession certain old photographs, one of his grandfather and another

of his mother, and they appear to be authentic. He stated that he is now sixty-seven years of age; that he was about twenty-two years old when his grandfather died in 1902; and that, during all of the time since his grandfather died, he has been completely out of touch with his collateral relatives and has maintained no social contact with them whatsoever. He stated that he was ignorant of the terms of the will, knew nothing of the existence of the estate or of this trust, and never knew that he had been named as a beneficiary in the will. His first knowledge of this estate, he said, came when he recently saw a copy of the published notice of the meeting to be held before the Amicus Curiae, and he then took prompt steps to make his identity known. Apparently the trustee always assumed that Dr. Minton was the last surviving grandchild, and, if Dr. Minton knew of the existence of his cousin, T. John McKee, he never divulged such information to the trustee, who had no other means of knowing the true facts and who therefore acted innocently in filing the account and certifying to the Court that Dr. Minton was the last surviving grandchild.

In his conversation with the Amicus Curiae, the said T. John McKee said that it was his intention to claim whatever share of this estate he might be entitled to receive as heir and next of kin of the decedent under the intestate laws, although no such claim has as yet been formally presented. Apparently the theory upon which he bases this prospective claim is that the cy pres doctrine has no application in this case. In other words, since the will directed the trustee to carry out a specific charitable purpose which it is now conceded is impossible of fulfillment because the fund is inadequate, the whole testamentary plan fails and an intestacy results.

In addition to the foregoing, the Amicus Curiae is in receipt of a letter from Mercer L. Lewis, Esq., in which he states

that he represents four great-grandchildren of the decedent, and they claim an interest under the will by representation of their parents, grandchildren of the decedent, who took an interest in the estate upon the death of their mother, Abbie A. P. Syphax, decedent's daughter. It seems that shortly after the death of the decedent a contest of his will was compromised and settled, and the daughter, Abbie A. P. Syphax, waived all rights she had under the will. At the same time, it appears that the rights of her children were released, as a result of which no income has ever been distributed to any of the grandchildren named in the will as annuitants. Some question is now raised as to whether or not the interests of the grandchildren under the will were ever legally waived, and this is the basis of the claim being made at this time by the great-grandchildren.

If further investigation discloses that T. John McKee is in fact the person he claims to be, then obviously the present application to have the fund distributed cy pres must be dismissed or, at least, action must be postponed, for the will specifically provides that the charitable purpose shall be carried out only after the death of all of testator's children and grandchildren who were living at the time of his decease. In any event, the claim of said T. John McKee, if it is to be presented, should be heard and disposed of before the cy pres aspect of the case is considered. Likewise, the claim being made by the great-grandchildren should be given a hearing in advance of the taking of testimony concerning a cy pres distribution of the fund.

While the decree appointing the Amicus Curiae is broad in its scope, authorizing him to "make such other investigation or inquiry as may enable him to make appropriate recommendations to the Court as to the action which it should take respecting the distribution of the residue of this estate"; yet the petition upon

which it is based refers only to the cy pres feature of the case and is predicated upon the fact that the last surviving grandchild is deceased. For this reason the Amicus Curiae is of the opinion that his authority under the decree embraces only an investigation of the application of the cy pres doctrine, and it does not include authority to investigate the facts concerning the alleged surviving grandson. Furthermore, in the opinion of the Amicus Curiae, the decree under which he is acting certainly does not authorize him to hear and pass upon the merits of the claims being made by T. John McKee and the great-grandchildren represented by Mr. Lewis.

Under all the circumstances outlined above, and for the various reasons stated, the Amicus Curiae recommends to the Court that it take any one of the following three possible actions in the matter:

(1) Enter a decree revoking the appointment of the Amicus Curiae and allowing him compensation for services rendered thus far in the proceeding;

(2) Enter a decree expanding the authority of the Amicus Curiae to include an investigation of and inquiry into the identity of T. John McKee, who claims to be a grandson of the testator, with directions to report thereon to the Court; or

(3) Enter a decree expanding the authority of the Amicus Curiae not only to include an investigation of the identity of said T. John McKee, but to hear and pass upon any claim he or any other claimant might make against the estate as heir and next of kin of the decedent or as legatee under the will, with directions to report thereon to the Court.

Regardless of what action the Court may see fit to take in the matter, it is quite obvious that the hearing fixed by the Amicus Curiae for Wednesday, January 21, 1948, to hear testimony and take evidence regarding cy pres distribution of the fund must be postponed, for if T. John McKee is a grandson of the testator as he alleges the cy pres question is premature and it would be futile to conduct the hearing. In any event, an investigation of his identity will involve a period of time extending beyond the date fixed for the hearing, and the Amicus Curiae is of the opinion that the status of T. John McKee should be settled and, as noted heretofore, his prospective claim heard before the cy pres aspect of the case is considered. Accordingly, the Amicus Curiae is taking the necessary steps to postpone or continue the hearing for a period of three months, or until Wednesday, April 21, 1948, and notice of this postponement is being given to those claimants who have thus far made their claims known to the Amicus Curiae. If the Court decides to adopt the first recommendation as above and the appointment of the Amicus Curiae is revoked, then notice to that effect will be given to all parties in interest in due course.

Services rendered by the Amicus Curiae in this proceeding to the present time may be briefly stated as follows: Shortly after the date of his appointment he conferred with counsel for the trustee, and it was decided to fix Wednesday, January 21, 1948, at 2 P. M., in Room 432 City Hall, Philadelphia, as the time and place of an initial meeting for the purpose of taking testimony and hearing evidence of claimants. A comprehensive notice of this meeting and its purpose was prepared and agreed upon, and this notice was inserted once a week for three successive weeks in The Philadelphia Inquirer, The Evening Bulletin, The Daily News and The Philadelphia Tribune, four newspapers of general

circulation in the City of Philadelphia, as well as in The Legal Intelligencer for the same length of time. The date of the last appearance of this advertisement in each of the newspapers mentioned was December 9, 1947. Proofs of such publication, with a copy of the published notice attached, are annexed to this report.

In addition to the publication of notice as aforesaid, the Amicus Curiae wrote to the Secretary of National Defense, in Washington, D. C., and through him secured a list of thirteen schools or academies which include naval training in their courses of study. Letters were written to these institutions, each enclosing a copy of the published notice, inviting them to appear at the hearing if they were interested and advising them to produce such evidence as they might think relevant to qualify them as claimants. Answers were received from a majority of those so contacted, and a number of them indicated an intention to appear and make claim. Also, the Amicus Curiae has been formally notified in writing by two hospitals, four schools other than those mentioned heretofore, and by the National Association for the Advancement of Colored People that they intend to appear and make claim. In addition, several communications have been received from individual claimants and numerous letters and telephone calls have been received from other persons seeking information. There has also been submitted to the Amicus Curiae a petition signed by more than 1,000 colored persons suggesting that the fund in question be distributed cy pres for the general betterment of their race.

The Amicus Curiae has no means of knowing or ascertaining how many other claimants plan to appear at the hearing, but, because of the extensive publicity given the matter, he is inclined to believe that the meeting, if it were held, would be attended by a great number of claimants as well as others who are indirectly



interested or merely curious. Attached to this report is a list of those institutions and individuals with which the Amicus Curiae has had correspondence up to the present time. In addition to the taking of testimony and evidence of the many claimants, the Amicus Curiae has requested counsel for the trustee to produce evidence in the form of testimony of an architect or an engineer, or both, to support the trustee's contention that the fund available is insufficient to carry out the testamentary purpose.

It is requested that compensation in the sum of \$500 be allowed at this time to the Amicus Curiae on account of services rendered in the matter, and this request meets with the approval of counsel for the trustee.

Respectfully submitted,

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Amicus Curiae

Filed: \_\_\_\_\_

LIST OF PROSPECTIVE CLAIMANTS

- Downingtown Industrial School and College  
William T. Coleman, Jr., Esq., attorney  
2074 United States Court House, Philadelphia, Pa.  
J. Francis Finnegan, Executive Director  
Crime Prevention Association of Philadelphia
- Frederick Douglass Memorial Hospital  
Lewis Tanner Moore, Esq., attorney  
406-08 S. 16th Street, Philadelphia 46, Pa.
- Spring Garden Institute (Automotive Training Center)  
Laird C. Starkey, Esq., attorney  
Packard Building, Philadelphia, Pa.
- Pen Ryn Episcopal School at Andalusia, Bucks County, Penna.  
Louis F. Floge, Esq., attorney  
1719 Packard Building, Philadelphia 2, Pa.
- National Association for the Advancement of Colored People  
Isadore Gottlieb, Esq., attorney  
1114-16-18 Bankers Securities Building, Philadelphia, Pa.
- Mercy Hospital and School for Nurses  
Dr. Eugene T. Hinson,  
1333 S. 19th Street, Philadelphia, Pa.
- Lincoln University  
Near Oxford, Chester County, Penna.  
Horace M. Bond, President
- Admiral Billard Academy  
New London, Conn.
- Admiral Farragut Academy  
Pine Beach, N. J.  
Franklin H. Berry, Esq., attorney  
28-30 Main Street, Toms River, N. J.
- Florida Naval Academy  
St. Augustine, Fla.  
Paul E. Brubeck, President
- Bolles School  
Jacksonville, Fla.  
Fontaine LeMaistre, Esq., attorney  
Greenleaf Building, Jacksonville, Fla.
- The Tabor Academy  
Marion, Mass.  
James W. Sickenden, Headmaster
- Admiral Farragut Academy  
St. Petersburg, Fla.  
Franklin H. Berry, Esq., attorney  
28-30 Main Street, Toms River, N. J.
- Culver Military Academy  
Culver, Ind.  
W. E. Gregory, Superintendent
- Massachusetts Maritime Academy  
Hyannis, Mass.  
Carl F. Schipper, Jr., Esq., attorney  
84 State Street, Boston 9, Mass.

Maine Maritime Academy  
Castine, Maine  
W. W. Warlick, Rear Admiral USN (Ret.), Superintendent

New York State Maritime Academy  
Fort Schuyler, New York 61, N. Y.

United States Merchant Marine Cadet School  
Pass Christian, Miss.

California Maritime Academy  
Vallejo, Calif.

United States Merchant Marine Academy  
Kings Point, N. Y.  
U. S. Maritime Commission, Washington, D. C.  
W. W. Smith, Chairman

Roscoe M. Young  
2331 Nicholas Street, Philadelphia, Pa.  
(Petition by more than 1,000 colored people)

Mrs. Catherine Prisco  
1909 North Hemberger Street, Philadelphia 32, Pa.

Mrs. W. Evelyn Downs  
1913 West Page Street, Philadelphia 2, Pa.