

VOLUME I  
(IN TWO VOLUMES)

Record No. 1431

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In the  
Supreme Court of Appeals of Virginia  
at Richmond

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**VIRGINIA-LINCOLN FURNITURE CORPO-  
RATION, Plaintiff in Error,**

v.

**SOUTHERN FACTORIES AND STORES  
CORPORATION, Defendant in Error.**

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FROM LAW AND EQUITY COURT, PART TWO, OF CITY OF RICHMOND

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The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

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Plaintiff in Error,

vs.

**SOUTHERN FACTORIES AND STORES CORPORATION,**  
Defendant in Error.

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*To the Honorable Chief Justice and Associate Justices of the  
Supreme Court of Appeals of Virginia:*

Your petitioner, Virginia-Lincoln Furniture Corporation, a Virginia corporation, respectfully represents unto the Court that it is aggrieved by a judgment entered against it in favor of the Defendant in Error by the Law and Equity Court of the City of Richmond, Part Two, on the 10th day of February, 1933. (R., p. 141.)

The Southern Factories and Stores Corporation instituted an action against your petitioner and the Virginia Table Company, Incorporated, in the Law and Equity Court of the City of Richmond, Part Two, by a combined notice of motion and declaration in which four separate causes of action were alleged against the defendants. The third count charged that the defendant, Virginia Table Company, Incorporated, requested the plaintiff to obtain options for it on certain stores for which it agreed to pay the sum of One Thousand (\$1,000.00) Dollars, and thereupon the plaintiff obtained eleven options for the defendant for which the defendant became liable to the plaintiff for the sum of Eleven Thousand (\$11,000.00) Dollars. The fourth count of the declaration charged

that after the options had been secured the defendant requested the plaintiff to take certain inventories and do certain other work for the defendant, which the plaintiff did, for which the defendant agreed to pay the sum of Seventeen Thousand Seven Hundred Twenty-Six Dollars and Eighty Cents (\$17,726.80). The fifth count of the declaration, in the first part thereof, charged that the defendant requested the plaintiff to secure extensions of options, to keep a separate and distinct set of books, to change its method of business and vary its methods of sales and operation, to purchase large supplies and increase its inventories, and to operate its business for the benefit of the defendant, which it did, for which it was alleged the defendant undertook to reimburse the plaintiff. The second part of the fifth count charged that on the 19th day of July, 1929, the defendant requested the plaintiff to renew its option and undertook and promised the plaintiff that if it did so it would exercise the said option given to it by the plaintiff and consummate the proposed merger, but that the defendant had failed to do so to the great loss and damage of the plaintiff. The remaining counts of the declaration consisted of the common counts which alleged that the defendant owed the plaintiff the sum of One Hundred and Three Thousand Seven Hundred Twenty-six Dollars and Eighty Cents (\$103,726.80). The first count of the declaration charged that the defendants were separate corporations with the same officers, directors and stockholders, and that subsequent to the incurring of the liabilities by the Virginia Table Company, Incorporated, alleged in the other counts, that it had transferred all of its assets to the Lincoln Furniture Manufacturing Company, Incorporated, which assumed all of the liabilities of the Virginia Table Company, Incorporated, the corporate name of said Lincoln Furniture Manufacturing Company, Incorporated, being thereafter changed to Virginia-Lincoln Furniture Corporation, and that thereafter the Virginia Table Company, Incorporated, had been dissolved.

The defendants, being non-residents of the City of Richmond, filed pleas in abatement which, after a hearing, were overruled. Thereupon the defendants demurred to the declaration on the ground of misjoinder of causes of action, which demurrer was overruled, to which they excepted. Later the plaintiff amended its declaration and the defendants again demurred, which demurrer was sustained, and the plaintiff again amended its previous amendment to the declaration. The defendants pleaded the general issue and certain special pleas.

## STATEMENT OF FACTS.

The plaintiff devoted approximately one thousand pages of the record to the attempted proof of its several claims. The testimony in regard to these several claims is not in consecutive order, however, but is scattered throughout the first one thousand pages of the record, the great bulk of which is devoted to the alleged contract of July 19, 1929, set out in the second part of Count Five of the declaration, which was subsequently stricken from the evidence by the Trial Court in Instruction XY. (R., p. 1473.)

We shall attempt in the discussion of the facts to separate the evidence as to the several causes alleged in the declaration.

## A.

## THE OPTIONS.

Rives Fleming, President of the plaintiff corporation, testified that the President of the defendant corporation employed his corporation to secure options on certain stores for the defendant, Virginia Table Company, Incorporated, for which it agreed to pay the plaintiff One Thousand (\$1,000.00) Dollars for each option secured. He testified (R., p. 9), referring to Mr. Lincoln's offer:

“\* \* \* He told us the stores he wanted should have about \$100,000.00 gross assets and show about 10% profit over a period of five years, this 10% applicable to the assets purchased. I asked this question—I said: ‘Mr. Lincoln, suppose we find a store with only \$78,000.00 assets?’ He said: ‘We will leave that part entirely to you and Mr. Kimbrell.’ However, in every option we secured we got their approval before going into it in order to be certain about it. We would find the assets and get their approval before going into it too deeply.”

Mr. Fleming then testified that the plaintiff obtained the eleven options, mentioned in the third count of the declaration, for the defendant and that all of these options were approved by Mr. Lincoln, the President of the defendant corporation. (R., p. 11.)

C. C. Lincoln, Jr., President of the defendant corporation, testified (R., pp. 1250-1252) that bankers required all stores taken into the consolidation to show at least a 10% earnings over a period of five years as an average while the earnings



for the the year 1928 would have to show above the average, the reason being that it was practically impossible to do any public financing when a downward trend of earnings was shown; that he explained this to Mr. Kimbrell and Mr. Fleming, and that he told Mr. Kimbrell that he would pay him the sum of One Thousand (\$1,000.00) Dollars for options which he secured for the defendant showing all the bankers requirements and which were ultimately exercised in the formation of the proposed merger. Mr. Lincoln denied ever having accepted any of the options. (R., p. 1252.)

It appears from the testimony of H. A. Dykes of Haskins & Sells, one of the auditors who audited the eleven stores on which the plaintiff obtained options, for which it demanded the Eleven Thousand (\$11,000.00) Dollars, that the four stores in the Jones-Kennedy chain either showed a deficit for 1928 or decreased earnings over the year 1927 (R., pp. 1071-1072); that Sam P. Burton & Son showed a deficit for the year 1928 (R., p. 1073); that the net income of the Bledsoe Furniture Company for the year 1928 was less than it was in 1927 (R., p. 1073); that the net income of W. A. Bell & Brother was less for the year 1928 than it was in 1927 (R., p. 1074); that the net income of Wood-Peavy-Furniture Company was less in the year 1928 than it was in the year 1927 (R., p. 1074); that J. M. Van Metre showed a deficit for the year 1928 (R., p. 1075), as did the Cochran Furniture Company (R., p. 1075), and that only Mason Brothers showed an increase for 1928 over the year 1927 (R., p. 1074).

The average percentage of earnings of the four Jones-Kennedy stores over the five year period was only 9.842 (R., p. 1077); the average percentage of earnings of Sam P. Burton over the same period was 6.517; of Bledsoe 6.339; of Bell 7.811; of Mason 21.797, and of Wood-Peavy 11.805. (R., p. 1077.) The Cochran Furniture Company showed an annual net deficit over a period of five years of \$359.64 per year, and Van Metre showed a similar annual net deficit of \$1,002.84. (R., p. 1220.) The average annual combined earnings of the eleven stores in question as applied to the total purchase price of the assets of the same over a period of five years was only 8.2 per cent., and the average for all of the eleven stores combined for the year 1928 was a deficit of 2.9 per cent. (R., pp. 1220-1221.) None of the statements (except Mason) complied with the requirements of Lincoln nor of the bankers who proposed to do the financing.

## B.

## INVENTORIES.

The second cause of action set up by the plaintiff was based on the claim that the defendant had requested the plaintiff to take inventories in certain stores, appraise accounts, etc.

The plaintiff's witness, Wahab, testified that the agreement between the plaintiff and the Virginia Table Company was that "Mr. Kimbrell's organization was to take the inventories and Mr. Lincoln was to pay him for the expense of taking those inventories." (R., p. 486.)

This witness further testified (R., p. 500):

"\* \* \* it was my understanding that the Virginia Table Company was to reimburse Retail Stores Service for the amounts they paid towards taking inventories and doing the work and they were likewise to reimburse the Southern Factories and Stores Corporation for the amounts that the Southern Factories & Stores Corporation expended, but there was no attempt to define cost at that time—what constituted cost."

Pursuant to his understanding the plaintiff corporation rendered the Virginia Table Company a bill for taking inventories, which amounted to the sum of Eight Thousand Eight Hundred Twenty-six Dollars and Eighty Cents (\$8,826.80) (R., p. 295). This bill, the plaintiff's president testified, "Includes our record of the time of the people that worked on inventories according to the definite time and amount". Asked, "How do you arrive at the figure", he testified, "Actual salaries and expenses we paid on our books to the men working on your work". He was then asked, "That represents the actual amount paid by your organization to your men for the work done for Virginia Table Company", to which he answered, "That is for inventories, yes". (R., p. 296.)

The defendant's letter, "Exhibit R. F. No. 63", dated December 19, 1929, introduced by the plaintiff (R., p. 195) written in response to a bill furnished the defendant by the plaintiff based on the actual cost of taking the inventories, accepted the amount of the bill as rendered by the plaintiff, and directed the plaintiff to deduct this amount from a much larger bill which it at that time owed the defendant (R., p. 1240.) The plaintiff declined to do this, however, because

the defendant refused to pay the bill rendered for options which the defendant, as above stated, denied liability for. Subsequent to the defendant's acceptance of the plaintiff's bill for the inventories, the plaintiff padded its bill for taking inventories so as to increase the amount from the actual expenses of taking the inventories of \$8,826.80 to make the bill for the amount of Seventeen Thousand Seven Hundred Twenty-six Dollars and Eighty Cents (\$17,726.80) (Declaration count four, R., p. ).

As will be pointed out in the discussion of the assignments or error, it is the contention of the defendant that the trial court erred in refusing to hold that the plaintiff was not limited in its recovery for this item to the actual expenses incurred by it, namely, the sum of Eight Thousand Eight Hundred Twenty-six Dollars and Eighty Cents (\$8,826.80). The defendant also contended (Instruction No R., p. ) that when it received itemized statement of expense, many items were erroneous.

### C.

#### THE ALLEGED IMPLIED CONTRACT.

In our opinion, the fifth count of the declaration is so drawn as to set up but one cause of action, namely, the alleged promise to exercise the option. The trial court held, however, that this count of the declaration set up two separate causes of action, and the plaintiff contended that the first cause of action set up in this count, embraced in the first part of the count, was based on requests made by the defendant to the plaintiff to secure extensions of options, to keep a separate and distinct set of books, to change its method of business and vary its methods of sales, to purchase large supplies and increase its inventories, and to operate its business for the benefit of the defendant, as directed by the defendant, which the plaintiff at the special instance and request of the defendant did. It is true that the defendant did request the plaintiff to secure extensions of options from time to time and that the plaintiff was requested to keep a separate set of books, which it kept for about two months.

It is equally true, however, that on March 26, 1929, when the plaintiff, like the defendant, thought, without knowledge that the stock market was going to subsequently crash, that a great furniture store and factory consolidation could be effected for the interest of both parties, and with reference to one of these extensions wrote the secretary of the defend-

ant corporation (R., pp. 108-109): "Knowing that you and Mr. Lincoln are having to fight hard and fast, I certainly hope that you will call on me, if in any way I can assist you."

The plaintiff also proved that it retained in its employment two men from July 20, 1929, until either January or February, 1930 (R., p. 887). These men had also been in the employment of the plaintiff from the time the plaintiff corporation had been organized (R., p. 886).

The president of the plaintiff corporation also testified that the defendant had requested it to push sales and make as large profits as possible and that in the pushing of these sales the credit of the plaintiff had become extended. Thereafter, over the objection of the defendant, the court permitted Mr. Hoke Murray, the plaintiff's treasurer, to testify that the plaintiff's profits for the months of May, June and July, 1928, exceeded their profits for the same months in 1929 by the amount of Twenty-four Thousand Eight Hundred Twelve Dollars and Thirty-two Cents (\$24,812.32), and also over the objection of the defendant, that he knew of no reason for this difference in profits except the situation existing between the plaintiff and the defendants (R., p. 1005). This was all the proof as to damages.

#### D.

#### THE ALLEGED PAROL CONTRACT OF JULY 19, 1929.

The Fifth count of the declaration charged that on July 19, 1929, the defendant requested the plaintiff to renew the option on its several stores, and in consideration thereof the defendant promised the plaintiff that it would exercise the said option given to it by the plaintiff and consummate the said proposed merger and that the defendant had failed to comply with its promise.

At the outset of the testimony of Rives Fleming, president of the plaintiff corporation, when he was asked to tell what occurred at the meeting of July 19, 1929, the testimony was objected to (R., p. 16). The jury was excluded and Mr. Fleming then testified that he went to the meeting determined not to renew his option and that C. C. Lincoln, Jr., president of the defendant corporation, "assured us that, if for any reason the bankers would not finance our merger, that he would throw his assets in with the stores on the same basis as they threw their assets in and form an individual merger and finance later. It was only on that consideration that we would think of renewing our options. I never heard a more sacred

promise and we relied on Mr. Lincoln's word to do it" (R., p. 17).

This alleged contract was entirely verbal (R., pp. 17-18). It also appears that on the next day the plaintiff corporation signed a renewal of the option agreement (R., p. 18). This agreement, which is set out in the Record, pages 19-35, contained an express stipulation to the effect that all agreements between the parties were in writing and that there were no verbal agreements or understandings of any kind or character in addition to or in conflict with the provisions of the written agreement (R., pp. 33-34, Section 11). Subsequently another extension was granted (R., p. 40) without any reference to the alleged parol agreement of July 20, 1929.

Thereupon the admissibility of this evidence was objected to on the grounds that the plaintiff was seeking to alter or vary the terms of a written instrument; that the evidence was inadmissible for the purpose of proving the consideration of the contract, because its effect was to change the import of the contract itself; that the testimony as to what the alleged parol contract of July 19, 1929, consisted of showed that it was too vague and indefinite to constitute a contract; and for the further reason that the testimony constituted a fatal variance between the allegations of the declaration and the testimony offered in support thereof (R., pp. 36-39).

On cross examination Mr. Fleming testified (R., pp. 248-252) that there was no agreement as to price and that there was no way or time fixed of measuring how either would go in, and that no terms were discussed; that he thought some kind of a corporation would be organized but no discussion occurred as to how it was to be financed and that he did not know what the plaintiff would have received, if they had gone into the proposed merger.

It also appears from the testimony of this witness, that on October 28, 1929, three months and nine days after the alleged contract between the defendant and the plaintiff to merge their businesses, the same Mr. Fleming wrote a letter to Mr. C. C. Lincoln, Jr., dated October 28, 1929, in which he said:

*"There is one thought that forcibly impresses me that may not have occurred to you, which convinces me that it might be best to consolidate individually such units as are agreeable and underwrite later; that is, some stores might consolidate individually with the prospects of a later underwriting; whereas, if the underwriting has been abandoned, they might not consider it."* (Italics ours.)

This letter had not been introduced in evidence by the plaintiff, but was put in by counsel for the defendant on cross examination of the plaintiff (R., p. 281), and the president of the plaintiff corporation had concealed this letter from his own counsel (R., pp. 282-283), who had not received it when the plaintiff corporation delivered to him the other correspondence in the case. Thereafter from the 19th of July until August 1, 1932, the plaintiff over the objections of the defendant was permitted to introduce testimony with reference to this alleged parol contract, and not until after the evidence had been completed and the case was ready for the jury, did the trial court finally sustain the defendant's motion and strike out this testimony (Injunction XY, R., p. 1473).

During the whole of the trial the plaintiff was permitted to introduce evidence of the alleged parol contract intermingled with its other claims, to the confusion of counsel, the court and the jury, so that when the evidence was finished the several issues had been so badly tangled as to become almost hopelessly indistinguishable.

A certified copy of the transcript of the record to the pages hereof has been made or will be made when the petition is presented herewith.

### ASSIGNMENTS OF ERROR.

Your petitioner assigns as error the following:

*First:* The trial court erred in giving instructions 2, 5 and 7, which authorized the jury to find damages other than on a *quantum meruit* for the breach of an alleged implied contract to pay for personal services.

*Second:* The trial court erred in admitting the testimony of James B. Murphy.

*Third:* The trial court erred in refusing the defendant's instructions M, N, Q, R and S.

*Fourth:* The trial court erred in admitting the plaintiff's evidence as to the alleged breach of an alleged parol contract set up in the second part of the fifth count of the declaration, and its action in subsequently striking the plaintiff's testimony on this point did not cure the error.

*Fifth:* The trial court erred in refusing defendant's instruction "G".

*Sixth:* The trial court erred in refusing to sustain the demurrer to the declaration based on a misjoinder of causes of action.

*Seventh:* The trial court erred in overruling the pleas in abatement to the jurisdiction of the court.

*Eighth:* The trial court erred in refusing to instruct the jury that the plaintiff was bound by the admission of its president, Rives Fleming, and principal witness, and could not recover damages which he denied it had sustained.

*Ninth:* The trial court erred in instructing the jury that under the evidence the Virginia-Lincoln Furniture Corporation was liable for the obligations of the Virginia Table Company.

*Tenth:* The trial court erred in overruling the demurrer to the notice on the ground that the causes of action were misjoined and because more than one cause of action was included in the different counts.

*Eleventh:* The trial court erred in not striking out all evidence as to alleged profits and in permitting the jury to consider such evidence over objections.

*Twelfth:* Such additional errors as may be filed in a supplemental brief.

#### FIRST ASSIGNMENT OF ERROR.

*The Trial Court Erred in Giving Instructions 2, 5 and 7 Which Authorized the Jury to Find Damages Other Than on a Quantum Meruit for the Breach of an Alleged Implied Contract to Pay for Personal Services.*

The first part of the fifth count of the combined notice of motion and declaration (R., p. ) charged that from time to time the defendant, while making financial arrangements for effecting the merger, requested the plaintiff to secure extensions of options and required the plaintiff after January 31, 1929, to keep a separate and distinct set of books, and to change its method of business and vary its method of sales and operation with all possible speed, and to purchase large supplies and increase its inventories, and to operate its business for the benefit of said defendant, which the plaintiff did, "and in consideration of which the said defendant undertook and faithfully promised said plaintiff to reimburse it for all expense, loss and damage sustained by it on account of its compliance with said requests and directions of said defendant".

In support of this allegation the plaintiff introduced, over the objection and exception of the defendant (R., pp. 89-90), a letter from the defendant, Virginia Table Company, Incorporated, to the Cameron Stove Company, not a party to this cause (R., pp. 87-89), in which the following statement is found (R., p. 88):

"There is one thing you can do which will be of inestimable value to the new organization and that is by earnestly pushing sales during the present month to the limit. Your co-operation in doing this will make it possible for this new organization to start functioning in a most progressive manner and I earnestly appeal for your aid and assistance in doing this."

The plaintiff also introduced certain letters from the defendant, or its agents, requesting the plaintiff to secure renewals of options theretofore obtained, which the plaintiff did obtain.

The attention of the Court is called, however, to the fact that in response to these requests the President of the plaintiff corporation wrote the defendant's attorney and secretary (R., p. 109):

"Knowing that you and Mr. Lincoln are having to fight hard and fast, I certainly hope that you will call on me if in any way I can assist you."

The President of the plaintiff corporation also testified (R., p. 182) that the defendant gave his corporation "general instructions about pushing sales and extending ourselves and expanding and doing all the business we could and showing all the profit we could, which, of course, stretched our capital to almost the breaking point."

Over the objection and exception of the defendant (R., pp. 206-209), the Court further permitted the President of the plaintiff corporation to testify that the failure of the defendant corporation to merge its business with that of the plaintiff had demoralized the plaintiff's business.

The President of the plaintiff corporation also testified that the plaintiff changed its method of business at the request of the defendant. (R., p. 211.) How is not shown.

Thereafter, over the objection and exception of the defendant, the Court permitted Hoke Murray, the treasurer of the plaintiff corporation, to testify that the plaintiff's profits for the months of May, June and July of 1929, were Twenty-Four Thousand Eight Hundred Twelve Dollars and Thirty-Two Cents (\$24,812.32) less than they were for the same months in the preceding year, and that no other unusual conditions existed in either of those years outside of the situation between the plaintiff and the defendants to account for such loss. (R., pp. 1004-1005.)

Upon this vague, indefinite and improper testimony the Trial Court, at the request of the plaintiff, gave the jury



Instructions 2, 5 and 7 (R., pp. 1474, 1476-1478), which were objected to and excepted to by the defendant. These instructions read as follows:

### INSTRUCTION NO. 2.

"The Court instructs the jury that the plaintiff is suing the defendant on items in its claim arising from either express or implied contracts alleged to have been made with it by the Virginia Table Company, Inc. An express contract is an agreement between competent parties for a consideration deemed valuable in law to do, or not to do, a certain thing. Any benefit to the party promising, or loss, or detriment to the party to whom the promise is made, is deemed in law to be a valuable consideration. An implied contract arises where one party, without any express agreement by the other party, makes expenditures or performs services for the latter at his request, in which case *the law implies a promise by the party making the request to reasonably reimburse the other party for his expenses, services and natural and direct loss in complying with the request*, unless it can be inferred from the circumstances in evidence that the services were to be rendered without compensation. Where the circumstances raise an implied contract, it is just as binding within the limits to which it applies as an express contract." (Italics supplied.)

### INSTRUCTION NO. 5.

"The Court instructs the jury that if they believe from the evidence that the plaintiff, at the request of the Virginia Table Co., Inc., secured extensions of the options which the plaintiff had secured for it, and after January 31, 1929, at the request of the Virginia Table Co., Inc., operated its business in contemplation of the exercise of said options by the Virginia Table Co. Inc. and for the benefit of the latter in the merger which it proposed to effect, as stated in paragraph No. 5 of the plaintiff's notice of motion for judgment, with either an express or implied agreement between them that the plaintiff should be compensated for its expenses, services, and loss incurred otherwise than for personal services rendered in complying with said requests, and that the plaintiff did comply with said requests and in doing so suffered expense, loss and damage which it would not have incurred but for its compliance with said request, then the jury should find for the plaintiff and include in the amount of

their verdict *such a sum as will reasonably compensate the plaintiff for its expenses and services in that behalf, and for any loss or damage incurred otherwise than for personal services rendered, which the jury may believe from the evidence was suffered by the plaintiff as the natural, direct and proximate result of its compliance with said requests of the Virginia Table Co. Inc.*" (Italics supplied.)

#### INSTRUCTION NO. 7.

"The Court instructs the jury that the general rule of law in awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, as far as money can do it, as he would have been if the contract had been performed by the defendant. Ordinarily a plaintiff will not be entitled to recover profits, or expected gains, for they are generally conjectural and too remote, but if it can be shown that the loss of profits or gains was the natural and proximate result of a breach of contract, and their extent is satisfactorily proved, they may be recovered. Therefore if the jury believe from the evidence in conformity with other instructions that the plaintiff is entitled to recover under the first part of paragraph No. 5 of the plaintiff's notice of motion for judgment, and if they further believe from the evidence that prior to the time the plaintiff received information that the option on its stores would not be exercised the plaintiff suffered *a loss of profits in its business as the natural, direct and proximate result of the failure of the Virginia Table Co. Inc. to perform the implied agreement as charged in the first part of said paragraph No. 5, then the jury, in the exercise of their discretion, may include in any verdict which they may render for the plaintiff under the evidence and other instructions, such an amount as they believe from the evidence will reasonably compensate the plaintiff for such loss of profits.*" (Italics supplied.)

At the time the instructions were first presented Instruction 2 was objected to, among other reasons (R., pp. 1443-1444), on the ground that loss of profits could not be allowed as damages for the breach of an implied contract, but that the amount was governed by the *quantum meruit* for the value of those services, not by the result of them.

Instruction 5 was objected to on the ground that the measure of damages was the value of the services performed. (R., pp. 1445-1446.)

Instruction 7 was also objected to (R., p. 1446) and the

blanket objection (R., pp. 1471-a and b) applied to all of these instructions.

Thereafter, before the instructions were given to the jury the attention of the Court was called (R., pp. 1471-a-1471-c) to *Farrand vs. Bouchell*, Harper's Law (S. C.), 83, 87 (1823), one of the leading cases on the subject, in which it is held that for work and labor performed, or services rendered, the sole measure of recovery is the damages implied by law, namely, a *quantum meruit*.

Notwithstanding these objections in the face of law that is elementary, the Trial Court gave the instructions above quoted which authorized the jury to allow for the breach of an implied contract for the performance of personal services, the actual value of the services and also in addition thereto damages which included loss of profits, instead of limiting the recovery to a *quantum meruit*.

As has been pointed out above, all of the requests made by the defendant of the plaintiff alleged in the declaration were that the plaintiff perform work, labor or services for the defendant. In the absence of an express agreement to pay for such services the only recovery that could be had therefor was on an implied contract arising out of the facts or circumstances of the case, the recovery of which is limited to a *quantum meruit*. An allowance of damages incurred because services were performed, in addition to the value of the services, as was authorized here, has never been allowed by any court anywhere. This is a broad statement, but opposing counsel could produce no authority for the position taken, and none can, upon strict search, be found.

The law on this subject is so elementary few cases are to be found which discuss the question, nor do we believe that the authorities on this question have ever been grouped heretofore. All of the cases on the subject, however, hold that the sole basis of recovery on an implied assumpsit for work, labor or services performed is on a *quantum meruit*, and that loss of profits or other special damages cannot be recovered in an action on an implied assumpsit.

*County of Campbell vs. Howard*, 133 Va. 19, 50 (1922).

*Belmont vs. McAllister*, 116 Va. 285, 308 (1914).

*Fowler vs. Hess*, 88 Va. 506 (1891).

Burks on Pleading and Practice, page 129.

*Farrand vs. Bouchell*, Harper's Law (S. C.) 83, 87 (1823).

*Weeks vs. Holmes, et al.*, 12 Cush. (Mass.) 215, 218-19 (1853).

*Vickery vs. Ritchie*, 202 Mass. 247, 26 L. R. A. (N. S.) 810, 813 (1909).

*McGrew's Executor vs. O'Donnell*, 92 S. W. (Ky.) 301, 302, (1906).

*Merle & Heaney Mfg. Co. vs. Hicks*, 179 Ill. App. 403, 405-406 (1913).

*Crowe vs. Gallenkamp*, 58 Mo. App. 396, 400-401 (1894).

*Wiley vs. Goodsell*, 3 N. Y. App. Div. 452, 455 (1896).

*Klein vs. American Cigar Co.*, 95 N. Y. S. 756 (1905)

*Sutherland on Damages*, Section 679.

5 C. J., title "Assumpsit", Section 91, page 1412.

*Elliott on Contracts*, Vol. 2, Chapter 31, Section 1358, page 593, *et seq.*

In the recent case of *County of Campbell vs. Howard*, 133 Va. 19, 50 (1922), the plaintiffs, two attorneys, performed services for the County of Campbell under a contract which was silent as to the amount of compensation that was to be paid them. In holding that the plaintiffs could recover on a *quantum meruit* only, the Court said (133 Va. 50):

"\* \* \* But where the services involved do not add to the property or wealth of the defendant, but tend merely to save him from loss of property or money which he already has, different principles are involved. And generally, in the class of cases involving only purely personal services, unattended with any actual transferring of tangible property, in the absence of special contract to the contrary, express or implied *in fact* (as distinguished from one which the law implies), the sole measure of the recovery is the value in itself of the work done, on a *quantum meruit*."

In *Belmont vs. McAllister*, 116 Va. 285, 308 (1914), this Court held that the sole measure of recovery for legal services performed by the plaintiff at the request of the defendant was the reasonable value of such services and reduced a judgment for such services from \$4,000.00 to \$500.00.

In *Fowler vs. Hess*, 88 Va. 506 (1891), a suit was brought agtd the latter's farm. It appears that the plaintiff received by one who without a definite contract with the owner managed the latter's farm. It appears that the plaintiff received the entire products of the farm and that his services were worth no more. The Commissioner allowed him additional amounts for his services and board. This Court held that the allowance of additional amounts constituted error and that the plaintiff was limited in his recovery to what "his services were reasonably worth".

In *Farrand vs. Bouchell*, Harper's Law (S. C.) 83, 87 (1823), the Court said:

"\* \* \* But in no case where the action is for money had and received, goods sold and delivered, or for work and labor performed, which, from the nature of the contract itself furnishes the standard of assessment, are the jury allowed to give more than the amount received, with interest, or the value of the article delivered, or the services rendered. *Rose & Rodgers vs. Beatie*, 2 Nott & M'Cord, 538."

*Weeks vs. Holmes, et al.*, 12 Cush. (Mass.) 215, 218-19 (1853), was an action on an implied assumpsit by the father of an infant employed by the defendant and carried off on a fishing voyage. The case was heard on an agreed statement of facts. It was shown that the reasonable value of the son's services was \$5.48 and that he had been supplied by the defendant with equipment to the amount of \$11.52. It was further agreed that the value of the son's services to the plaintiff, if he had not sailed on the voyage, would have been \$79.12. In holding that the sole measure of recovery was the reasonable value of the services of the son to the defendant, Shaw, C. J. said (12 Cush. 218-219):

"This is an action of contract on the implied promise by the defendants to the plaintiff, a promise implied from his relation of father entitled to the earnings of his son. Nothing can be claimed in this action, for any supposed wrong in seducing the plaintiff's son, or employing him without his consent. After the service was done, the father steps in with his legal claim, denies the authority of the son to receive his own earnings, and in effect says to the defendants, that which you would have been bound legally and equitably to pay him, had he been of age, or otherwise competent to contract, I require you to pay me. To this extent, his claim is recognized, and no further. In determining what that allowance shall be, the question is, not what the son would have earned of the plaintiff, but what the son earned of the defendants, in their service. *Quantum meruit*? In considering what he did in fact earn, it appears to us, that the universal custom of the business, to pay by a lay or share, instead of monthly or other wages, is competent and proper. It is not contrary to express contract, as in the case cited of *Homer vs. Dorr*, 10 Mass. 26; nor in violation of duty and public policy, as in the cases of *Hall vs. Gardner*, 1 Mass. 172, and *Randall vs.*

*Rotch*, 12 Pick. 107. Upon the facts, the court are of opinion that the plaintiff is entitled to a fair share or lay; and this, we think, must be fixed as a one hundredth part; not because the minor agreed for it, but because it is shown to be a reasonable and fair lay, and therefore, a just measure of the value of the services sued for. From this is to be deducted the advances of the defendants, for outfit and necessities on the voyage, warranted by the like universal usage of the business; and as these exceed the lay, there are no net earnings to be recovered."

In *Merle & Heaney Mfg. Co. vs. Hicks*, 178 Ill. App. 403: *supra*, the plaintiff installed certain billiard and pool tables on the premises of the defendant under the agreement that the profits were to be divided. The defendant failed to pay and again in April, 1910, requested the removal of the tables and equipment, and in August, 1910, sent the plaintiff a written notice stating that if he did not remove the tables, *et cetera*, within ten days, the defendant would cause the same to be removed and stored at the plaintiff's expense and that he would also expect to be reimbursed for the rent of the premises paid by the defendant from the time that he had first notified the plaintiff to remove said articles. Defendant did not put the goods in storage nor prove the usual and customary price thereof. He proved what charges an unlicensed concern made for storing that class of goods, but did not show that they were either reasonable, usual or customary. As an alternative proof of damage, defendant claiming that the failure to remove the goods had deprived him of an opportunity to rent the premises, proved what he had paid as rent for the same after his notice to remove as aforesaid. In holding that this was not a proper measure of damages to be recovered on an implied assumpsit, the Court said (178 Ill. App. 405-406):

"\* \* \* The proper measure of damages was what it would have cost to store the goods, whether kept on defendant's premises or elsewhere, and not what he paid as rent for the premises, nor what in the meantime they might have been rented for to others. We think defendant failed to present competent evidence of the damage, if any, he sustained from plaintiff's failure to remove the property.

"It is further urged that the court erred in refusing two propositions of law tendered by defendant. The first was based on the theory that what defendant paid as rent for

the premises or could have rented them for if vacated, was a proper measure of damages. As before stated, that was not the proper test. \* \* \*."

In *Crowe vs. Gallenkamp*, 58 Mo. App. 396, 400-401 (1894), the plaintiff brought an action for the value of the services of himself and his wife in nursing and taking care of the deceased and for other items. The declarations in that case set out in the opinion of the Court, 58 Mo. App. 397-399, is strikingly similar to the first part of the fifth count of the plaintiff's declaration in the case at bar. Briefly summarized, the declaration charged that the estate of the deceased was indebted to the plaintiff for the following reasons: That the deceased became ill with a loathsome and fatal disease which subsequently caused his death; that the plaintiff conveyed the deceased to the hospital; that sometime later plaintiff remained with deceased while a surgical operation was performed and made a number of trips to the hospital for the purpose of caring for the deceased during his illness, all of which had been done at the request of the deceased; that at a still later date, at the urgent request of the deceased, it having been determined that the deceased was incurable, the plaintiff took the deceased from the hospital and conveyed him to plaintiff's residence and kept him there until the date of his death which occurred about three months later; that for three weeks after deceased was removed to plaintiff's house, plaintiff and his wife took care of him, which required the attention of someone all of the time and a large part of the time the care of two persons; that the stench from the disease with which the deceased was suffering became so unbearable that plaintiff was compelled to send his wife and child away from home for a period of two weeks; that plaintiff was compelled to employ first one and then two attendants to wait on deceased; that no one could be induced to come to plaintiff's house and do the cooking and consequently plaintiff had to do the cooking himself during the absence of his wife and lost the whole of his time; that he and his family were compelled to live in an atmosphere loathsome to the senses by reason of the stench arising from the disease from which the deceased was suffering; and 'that since the death of the deceased the room in which the deceased remained at plaintiff's residence and in which he died has been thoroughly and repeatedly washed, fumigated, aired and white-washed, but so saturated had it become with the stench arising from said disease that it had been, and is now, entirely unfit for use'. Plaintiff, therefore, demanded recovery for the value of said

care and services, including loss of time, board of attendants, his own service and care and the service of his wife to the deceased, and for the condition of the premises resulting from the injury thereto. On the question of damages the Court instructed the jury as follows (58 Mo. App. 400):

“‘And, in determining the compensation plaintiff is entitled to recover under the second paragraph in the statement, the jury may take into consideration the loathsome character of the disease with which said Breckinridge was suffering, and the inconvenience to plaintiff *and his family*, if any, caused by the stench coming from the disease, *and the injury, if any, to plaintiff's house by reason of the bad odor preventing the use of a room therein*, and also the nature and character of the services rendered by plaintiff and his family in taking care of the deceased under the circumstances shown, and in boarding the deceased and his attendants; and under all the circumstances, or under such of them as the jury may believe to exist, render a verdict for such compensation as they may believe to be reasonable, not exceeding \$1,500.’” (The italics are the italics of the appellate court.)

The case was reversed by the appellate court solely for errors committed in the giving of the above instruction. In reversing the case the Court said (pages 400-401) :

“‘The objection made to the instruction is that the value of the plaintiff's services in nursing and caring for the deceased could not be enhanced by reason of the emission of any disagreeable odor, and that the damage, if any, to the house by reason of such odor could not be considered in determining the compensation to which the plaintiff was entitled by reason of the services performed. The first objection is untenable. The last is, in our opinion, well taken. Mr. Sutherland in his work on damages thus states the rule for the admeasurement of damages in cases like we have here: ‘In actions for compensation on a *quantum meruit*, the inquiry being what the party who has done the work deserves, every fact which will tend to enhance the merit and value of his services is admissible in evidence for his benefit; and every fact which will detract from their merit and value is admissible against him in behalf of the employer.’ 2 Sutherland on Damages (2 Ed.), p. 1531, sec. 679.

“‘The foregoing statement of the rule readily suggests the line of inquiry on both sides of the question. If the nursing



of the deceased was, by the unusual nature of the disease, attended by disagreeable and unpleasant sensations, the plaintiff had the right to show it. This is founded on the principle of adequate compensation, which is the aim and end of the law in all such controversies. But just on what principle the value of the services of the plaintiff in nursing the deceased could be enhanced by proving permanent damage to his residence by reason of the stench, we cannot understand. Suppose that the deceased had taken an axe and chopped down a door of the house, or otherwise injured or damaged it, could the plaintiff have been compensated therefor in this action? We have been unable to find any case giving countenance to such a proposition. The plaintiff's action is for *services rendered*, and his recovery must be confined to *compensation* for such services, including the use of the room by the deceased, and it can not be made to include consequential damages to plaintiff's residence or family by reason of the occupancy of the room by the deceased. For this error in the instruction the judgment must be reversed. In other respects we think the case was properly tried."

In *McGrew's Executor vs. O'Donnell*, 92 S. W. (Ky.) 301, 302 (1906), the Supreme Court of Kentucky in reversing a judgment for the plaintiff because of an erroneous instruction, the nature of which appears from the statement of the Court next quoted, the Court said (92 S. W. 302):

" \* \* \* It was also prejudicial in directing the jury to find for the plaintiff such sum as will reasonably compensate plaintiff for the services rendered. There was proof tending to show that Mrs. O'Donnell neglected her family and household duties to attend to her aunt. What would compensate her for the self-sacrifice involved is not the question to be tried. She is only entitled to the reasonable and fair value of the services rendered. \* \* \* ."

In *Wily vs. Goodsell*, 3 N. Y. App. Div. 452, 455 (1896), the defendant employed the plaintiff to conduct the defendant's business for two months. No compensation was agreed on. Plaintiff instituted an action to recover for the services rendered by him and also for a breach of a contract to arbitrate. The second ground of action has no bearing on the question here. It was shown that the plaintiff was engaged in a somewhat similar business to that which the plaintiff had been employed to conduct for the defendant. On the

trial of the case the defendant sought to examine the plaintiff as to the amount of sales or earnings of the plaintiff's business during the period in which he was engaged in rendering the services. The referee refused to permit the question to be answered and this was assigned as error. In affirming the judgment of the lower court the appellate court said (3 N. Y. App. Div. 455):

“ \* \* \* The defendant sought to examine the plaintiff as to the amount of sales and earnings of his (plaintiff's) business during the period he was engaged in rendering the services. In refusing to allow such examination we think the referee was right for the reason that it was not a question of whether the plaintiff was benefited or injured in his own business, but whether he had performed services for the defendant which entitled him to compensation.”

In *Klein vs. American Cigar Company*, 95 N. Y. S. 756 (1905), the plaintiff was employed by the defendant to set up a machine invented by the plaintiff and to operate it for a period while it was being tested. Plaintiff was a chemist. The Court found that it was fairly to be assumed that the plaintiff was to be paid for his services while the machine was being tested and the sole issue turned on the amount to which he was entitled. The plaintiff testified that his services were worth \$1,300 because he was a chemist, and the value of his time as a chemist was the basis of his testimony. He failed to show the value of his time in operating the machine, and it was not shown that only a chemist could operate it. The Court held that the only basis of recovery was the value of plaintiff's services in operating the machine and not the value of his services as a chemist, unless it were first shown that only a chemist could operate the machine. Therefore, the judgment was reversed as being without evidence to support it.

In *Vickery v. Ritchie*, 202 Mass. 247, 26 L. R. A. (N. S.) 810, 813 (1909), the Court said, with reference to an implied contract for the furnishing of material and the constructing of a house:

“If the law implies an agreement to pay, how much is to be paid? There is but one answer. The fair value of that which was furnished. No other rule can be applied. Under certain conditions the price fixed by the contract might control in such cases. In this case there was no price fixed.”

It further said (26 L. R. A. (N. S.) 814):

“ \* \* \* The right of recovery depends upon the plaintiff's having furnished property or labor, under circumstances which entitle him to be paid for it, not upon the ultimate benefit of the property to the owner at whose request it was furnished.

“It follows that the plaintiff is entitled to recover the fair value of his labor and materials.”

In Burks on Pleading and Practice, page 129, it is said:

“Whenever one person requests or allows another to assume such a position that the latter may be compelled by law to discharge the former's legal liabilities, the law imports a request and promise by the former to the latter—a request to make the payment and a promise to repay—and \* \* \* (Page 130) where one renders services for another at the latter's request the law in the absence of an express agreement, implies a promise to pay what the services are reasonably worth, unless it can be inferred from the circumstances that they were to be rendered without compensation.”

In 5 C. J., title “*Assumpsit*”, Section 91, page 1412, it is said:

“ \* \* \* In no case where the action is for money had and received, goods sold and delivered, or for work and labor performed, which, from the nature of the contract itself furnished the standard of assessment, are the jury allowed to give more than the amount received, with interest, or the value of the article delivered, or the services rendered.”

It is submitted that no authority can be found which would support Instructions 2, 5 and 7, which told the jury that the plaintiff was entitled to recover not only a *quantum meruit*, but in addition thereto for all loss or damage sustained by it in complying with the defendant's request.

It is, therefore, respectfully submitted that the trial court committed error in instructing the jury that they could allow the plaintiff in addition to a *quantum meruit* damages resulting from loss of profits sustained by the plaintiff as the result of the alleged implied contract set up in the first part of the fifth count of the declaration instead of limiting the plaintiff's recovery to the reasonable value of the services performed.

## SECOND ASSIGNMENT OF ERROR.

*The Trial Court Erred in Admitting the Testimony of James B. Murphy.*

James B. Murphy was general counsel for the plaintiff corporation. During the course of the effort to form the merger referred to in the declaration and the testimony, he was employed by the defendant to attend to certain matters for it, for which he was compensated by the defendant. One of the issues before the court and the jury was whether Mr. Lincoln had accepted or approved the options obtained by the plaintiff, for which the plaintiff demanded the sum of Eleven Thousand Dollars (\$11,000). The court instructed the jury in instruction No. 3 (R., p. 1475) to find for the plaintiff on account of the options, if they believed from the evidence that the options obtained by the plaintiff had been "approved by the Virginia Table Compay, Incorporated". Mr. Lincoln was president of the Virginia Table Company. Mr. Murphy was put on the stand very largely for the purpose of attempting to prove that Mr. Lincoln on behalf of the Virginia Table Company had accepted the eleven options obtained by the plaintiff. Thus, when the correspondence between Mr. Murphy and the defendant and its agents was objected to, Mr. Gordon, plaintiff's counsel, stated (R., p. 764), "I think the fact Mr. Lincoln was accepting some and rejecting some is a material fact in the case". Thereafter the court permitted Mr. Murphy to testify that the defendant had employed him to organize some corporations for it in the South to take over the property upon which options had been obtained. The admission of this testimony was objected to (R., p. 765), but the court overruled the objection. Thereupon counsel for the plaintiff asked the witness whether or not Mr. Lincoln had approved or accepted the eleven options (R., p. 770). The witness not being able to give a definite answer to this, he was then permitted to read the correspondence passing between him and the defendant while he was in the employ of the defendant and relating to matters about which he had been solely employed by the defendant and for which he was paid solely by the defendant.

Murphy's testimony was objected to by the defendant on the ground that he had been counsel for the defendant at the time of the transactions to which he testified and at the time of the writing of the documents which he introduced in evidence (R., pp. 755 and 765, *et seq.*). While it is true that Murphy was general counsel for the plaintiff corporation

and a large stockholder therein (R., pp. 824-826), during the course of the negotiations for the merger he was employed by the defendant corporation, as he testified, for the following purposes:

1. To abstract the titles, etc., of the various leases which were being acquired in the South. These leases were not only on store properties in which the plaintiff, either by virtue of ownership or having option, had the slightest interest, but also on stores which the plaintiff had absolutely nothing to do.

2. Mr. Murphy was employed to form corporations in various Southern States and did so capably and well.

3. He was also requested on behalf of the plaintiff to prepare certain papers preparatory to closing out the sale of certain stores (R., pp. 826-827).

In all these matters he was the *sole counsel* of the defendant and was paid by the defendant for his work *in toto*. The plaintiff company had absolutely no interest therein; was not liable to him for any portion of the fees for doing this work and did not pay him anything for any of his services in this connection. They had no control over him or his actions in his employment for the Virginia Table Company. His retention by that Company and the work which he did for that Company was entirely separate and apart from his practice for the plaintiff.

In fact, as he testified, his employment by the defendant company was not in consequence of any relation, professional or otherwise, with the plaintiff company, but because he had previously, in connection with a similar merger in the South by the Fox interests, acted in a similar professional capacity (R., pp. 755 and 756, *et seq.*).

The employment was in no manner, shape or form joint; not only was it not joint, but the plaintiff company had no interest whatsoever, legal or moral, in any of the matters which Mr. Murphy was employed to attend to for the defendant. For instance, he was requested to go to New Orleans to secure an option on a store known as the Max Barnett Furniture Company, with which the plaintiff never had any connection whatsoever.

A reading of the voluminous correspondence between the defendant and Mr. Murphy will demonstrate that every letter was written to him in his capacity as sole counsel for the defendant. The defendant had no reason to communicate with Mr. Murphy as counsel for the plaintiff and did not do so.

We think that the telegram from Buchanan to Murphy (R., p. 774) and Murphy's testimony with reference thereto (R., pp. 774-776), Buchanan's telegram to Murphy (R., p. 789), Buchanan's telegram to Murphy dated April 3, 1929 (R., p. 790), and Murphy's testimony with reference thereto (R., p. 790), Buchanan's letter to Murphy dated April 6, 1929 (R., p. 792), the summary of Buchanan's letter to Murphy dated April 6, 1932, referred to in Murphy's testimony (R., pp. 793-794), his testimony on pages 794-795 relating to the corporations which he was employed by the defendant to organize, his letter to Buchanan dated April 10, 1929 (R., pp. 795-797), his summary of the transaction of April 11th between him and Buchanan (R., pp. 797-798), his testimony about the corporations which he was employed to organize (R., p. 799), Buchanan's telegram to him of April 20, 1929 (R., pp. 799-800), and his testimony following the introduction of the telegram (R., p. 800), Buchanan's letter to Murphy of April 23, 1929 (R., p. 801), Buchanan's letter to Murphy dated April 25, 1929 (R., p. 802), Buchanan's telegram to Murphy of June 5, 1929 (R., p. 803), Murphy's letter to Buchanan of June 5, 1929 (R., pp. 804-808), his testimony on pages 808-809, Buchanan's letter to Murphy of June 14, 1929 (R., pp. 809, 810), Buchanan's letter to Murphy of August 14, 1929 (R., pp. 813-814), Buchanan's letter to Murphy of August 29, 1929 (R., p. 819), Buchanan's letter to Murphy of September 10, 1929 (R., p. 820), and Murphy's testimony as to what he did with the papers prepared by him for the defendant and about his trip to New York in relation thereto (R., pp. 822-824), were inadmissible for the reason that these letters and the testimony referred to related to communications made to Murphy and to information which he obtained as a result of his employment by the defendant and which were, therefore, privileged.

Mr. Murphy testified (R., p. 826) that the Virginia Table Company paid him for his services in connection with getting the leases and with the organization of the corporations. These communications were made to him in the absence of the plaintiff and were made to him as attorney for the defendant and related to the performance of services for the defendant with which the plaintiff corporation had nothing to do. They were extremely damaging to the defendant, as they were introduced for the purpose of attempting to show that the defendant had accepted the eleven options obtained by the plaintiff and obligated itself to pay Eleven Thousand Dollars (\$11,000) therefor.

That communications made by an attorney to his clients

are ordinarily privileged and cannot be produced in evidence cannot be denied. The only reason adduced by opposing counsel that Mr. Murphy's evidence is not privileged is that he happened to be counsel for plaintiff at the same time that he was counsel for the defendant and at the time when the privileged communications were made to him.

In other words, the trial court held in this case that where counsel who desire to testify as to privileged communication happen to represent in entirely different capacities the litigants, the privilege is removed in any litigation between his respective clients. That is, if Mr. A. is counsel for the American National Bank and counsel for the Central National Bank, he can in litigation between the two divulge any confidential communication made by either to him in the course of their separate and distinct employments, because he happened to be counsel for both—not in the same matter nor for the same purpose—not joint counsel to whom both were liable for fees in the same matter, but for the sole reason that he happened to be counsel for both in different matters at the same time.

Before discussing the authorities, certainly there was no one better qualified to determine the confidential and privileged character of these communications than Murphy himself; and he on his examination as a witness for the plaintiff on the issues raised by the pleas in abatement and prior to his examination on the merits, stated voluntarily, before his examination began as follows:

Q. Were you present at a conference in Winston-Salem, North Carolina, with regard to the agreement that had been made by Mr. Lincoln on behalf of his corporation concerning Southern Factories & Stores Corporation concerning the securing of options?

A. If you will allow me to make a preliminary statement prior to answering that, I would like counsel for both sides to please bear in mind that up to February after these options were started in October I was employed by the Southern Factories and Stores Corporation; beginning with February and then on I was employed by the Virginia Table Company and I would like all questions to be confined to those two periods because I don't want to be placed in the position of having to divulge what I myself consider privileged communications. I was present at that conference.

No counsel should be permitted to make a statement such as this, and then in the face of his own conviction as to the confidential character of the communications, deliberately

testify as to the dealings which he himself stated were confidential and privileged and about which he refused to be first examined for that reason, in order to sustain the cause of action of another client.

## RULE IN VIRGINIA.

This Court has not only sustained the general rule, but indeed in its determination to maintain inviolate communications between counsel and client, it has refused to permit any such communications to be divulged, even when counsel is jointly employed, unless all clients agree to waive their privilege.

It is held in Virginia by our Court of last resort that, if he had been counsel (as he was not) for both parties in the same transaction and at the same time, communications made to him by either client in regard to the joint matter upon which he was retained, are privileged without the consent of both, even though made in the presence of each other to either joint counsel.

To state the case plainer, where one attorney is counsel for both parties in the same matter and the two clients consult with that attorney at the same time in regard to that matter, this court held in a well-considered opinion that he cannot in litigation between them, without the consent of both, divulge any communication made in the course of such conference by the other.

*Chahoon vs. Commonwealth*, 21 Gratt. 822, 835-836-837-838-839-840-841-842 (1871). In this case it is stated by Judge Moncure in a long and well-considered opinion on this subject, which was then of first impression in Virginia, the following (p. 841):

“A man may be counsel for two or more parties concerning the same subject-matter and in all such cases confidential communications made to him by one or all of such parties jointly or severally in reference to such matter, are *privileged* and the *privilege* can only be released by consent of the parties; the privilege being that of each and all of them. If all of the parties in this case, Chahoon, Sands and Sanxay had employed Lyon as their counsel *there can be no doubt*, but that the privilege could not have been released by the consent of less than all.” (Italics supplied.)

By this pronouncement of our Court (which has never been criticized or distinguished by this Court) Judge Moncure,



who has always been considered one of the ablest jurists who ever graced our bench, after a long and careful consideration laid down in the plainest language possible the direct statement that where different parties retain the same counsel in the same subject-matter, statement made to such counsel by them, or any of them jointly or severally is privileged without the consent of all.

If this be the law, and it is in this State, Murphy could not testify and, since he was introduced as the star witness of the plaintiff, his testimony should have been excluded and the verdict should be set aside on that ground.

In the foregoing Virginia case Judge Moncure also said (21 Gratt., p. 836):

“There is no rule of law better settled than ‘that a counsel, solicitor, or attorney shall not be permitted to divulge any matter which has been communicated to him in professional confidence’.”

This privilege is not the privilege of counsel to be exercised by him or not, as he may desire, *but it is the privilege of the client* and for his benefit and cannot be released unless he agrees. Judge Moncure says (21 Gratt., p. 836):

“‘This is the privilege of the client and is founded on the policy of the law which will not permit a person to betray a secret which the law has entrusted to him.’ ‘With respect to such communications the mouth of the witness is forever sealed and he cannot reveal them at any time or in any proceeding, although the client be no party to it, however *improbable it may be under the circumstances that any injury can result to him from the disclosure and although the relation of attorney and client has ceased by the dismissal of the attorney.*’” (Italics supplied.)

The learned Judge then continued by saying that the question is a matter of first impression, but that the rule stated has been firmly established elsewhere and has also been adopted here. The opinions of Lord Brougham in two cases and Sir Edward Sugden and Mr. Pepys were then cited and it was said (21 Gratt., p. 837):

“It was decided by a Judge of distinguished ability who though perhaps not so learned a lawyer as some others who have graced the profession in England, yet when he applied his great mind to any subject as he did to the subject of that

case, was sure to illustrate and adorn it. \* \* \* He was assisted by consultation with Lord Lyndhurst. Tindal, C. J., and Parke, J., \* \* \* than whom England can boast of no greater Judges; and the case has been since referred to and relied on as settling the law on this subject. 2 Mees. & Welsb, 100 \* \* \*. We may therefore safely and fairly accept that case as a sound exposition of the rule and the reason of it. 'To force from a party himself,' says the Lord Chancellor, in the case, 'the production of communications made by him to professional men, seems inconsistent with the possibility of an ignorant man safely resorting to professional advice and can only be justified if the authority of decided cases warrants it. But no authority sanctions the much wilder violation of professional confidence and in circumstances wholly different which would be involved in compelling counsel, or attorneys, or solicitors to disclose matters committed to them in their professional capacity and which but for their employment as professional men they would not have become possessed of.' 'If touching matters that come within the ordinary scope of professional employment they receive a communication in their professional capacity either from a client or on his account and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper in the course of their employment on his behalf matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, *but bound to withhold them* and will not be compelled to disclose the information or produce the papers in any Court of law or equity either as party or as witness.''' (Italics supplied.)

The Court then discusses the facts in the case before it.

In that case there was a conference between certain clients and their counsel. The counsel did not represent the clients jointly, but separately, but all the counsel and all the attorneys and all the parties were present. In holding that communications were privileged, the Court said, as we have stated above, that (21 Gratt., p. 841):

"A man may be the counsel of two or more parties concerning the same subject-matter and in *all such cases*, confidential communications made to him by one or all of such parties jointly or severally in reference to such matter are privileged and the privilege can only be released by consent of all the parties, the privilege being that of each and all of them." (Italics supplied.)

The Court then continues (21 Gratt., p. 841):

“They (referring to the parties) might have employed the same counsel or they might have employed different counsel, as they did, but whether they did the one thing or the other the effect is the same as to their right of communication to each and all of the counsel and as to the privilege of such communication, \* \* \* they had a right to consult together \* \* \* and it follows as a necessary consequence that all the information derived by any of the counsel from such consultation is privileged and the privilege belongs to each and all of the clients and cannot be released without the consent of all of them, otherwise what would such right of consultation be worth.”

It is also held in *Tate vs. Tate*, 75 Va. 522 (1881), that the privilege in such cases is the privilege of the client and not of the attorney; and the same rule was laid down in *Chahoon vs. Commonwealth*, *supra*, where it is said (21 Gratt., p. 841):

“Undoubtedly the privilege in question is that of the client, and not the counsel, and the client may therefore release it. \* \* \* .”

The foregoing is the established rule in Virginia where the clients employ the same attorney in the same subject matter or where he is a joint attorney for both litigants. In this case, however, there was no such joint employment. Murphy was counsel, so far as he was employed as such by the Virginia Table Company alone, and certainly communications made to him in the course of such employment are privileged even though he were counsel at the same time in another capacity for the plaintiff. The Virginia Table Company had no interest in his dealings with his clients, the plaintiff, and no authority or control over him. He was their general counsel and they paid him to the exclusion, of course, of any liability on the Virginia Table Company for any debts, just as Virginia Table Company paid him for the exclusive employment in which he was engaged for them.

It would largely destroy the doctrine and wipe out entirely the reason for the rule which has been so long established, to hold that because an attorney happens to be employed by different parties in different capacities at the same time, his communications from one would not be privileged because of his incidental employment by the other.

## THE RULE STATED.

The Court admitted the testimony of Murphy over objection upon the ground that he was counsel for both parties at the same time, although he was not joint counsel, but employed separately and paid separately in separate transactions.

There is authority in other jurisdictions that the doctrine of privileged communications does not extend to communications made by litigants to an attorney who is counsel for both. The court will examine the cases relied upon to sustain this doctrine. It will find without exception that in every single case the attorneys whose evidence was introduced were counsel for the same parties *in the same matter*; that is, they were counsel for both parties in connection with the same subject, and the communications admitted were for the joint benefit of both. *In no case is there authority that communications are privileged, because made to the common counsel for both parties employed in a different capacity and for a different purpose by each.* In fact a number of the jurisdictions—the majority of them—go so far as to require that such communications, in order to be introduced, must have been made *in the presence of both parties* to their joint counsel and it is not sufficient if they were made by one party in the absence of the other, although the same counsel represented both in the same subject-matter.

The reason for the rule, which has such a wide application and is so well recognized, that privileged communications are inadmissible is that a client should be able to speak freely to his counsel without fear of having such evidence introduced. Judge Moncure, in the case we have referred to from Virginia, has given the reason for the rule a great deal better than we possibly could. The only reason for its relaxation in those jurisdictions which do relax it, where the same attorney is counsel for the same parties in connection with the same subject-matter, is that such communications are regarded as for the benefit of both parties and made with the knowledge of both and therefore the reason for the rule ceases. This is not true where the communications are made separately in regard to a separate matter or in connection with a separate employment.

The text writers in Corpus Juris and Ruling Case Law lay down the rule that communications are not privileged where the attorney is counsel for both parties in the same matter, but none of them and none of the decided cases hold that where the counsel represents his clients in different capaci-

ties at the same time, communications by one to such counsel are not privileged. We have been unable to find any case—and we do not believe that opposing counsel can find any case—where the waiver of privilege extends to a case where counsel is simply common counsel and not counsel for both in the same matter. Mr. Taylor, in his able work on evidence, Vol. 1, page 796-97, section 926, says, in speaking of the doctrine of privileged communications where counsel is employed by both parties:

“If a solicitor be employed for two parties as for mortgagor and mortgagee and pursues on behalf of the former his abstract of title, he cannot against him disclose their contents and where a professional man was engaged by a vendor and purchaser to prepare the deeds and the draft conveyance was confidentially deposited with him by both parties, it was held that he could not produce it at the trial against the interest of the purchaser’s devisees, though with the consent of the vendor. \* \* \* . Where two persons having a dispute had a claim made by one of them upon the other went together to a solicitor, when one of them made a statement \* \* \* it was held in a subsequent action between these two persons that both the statement and the letter were admissible in evidence.”

The learned textwriter then in our opinion states what is the rule in those jurisdictions where it is relaxed. He says:

“In all of these cases the question would seem to be; was the communication made by the party to the witness in the character of his own exclusive solicitor? If it was, the bond of secrecy is imposed upon the witness; if it was not, the communication will not be privileged.”

And it seems to us that this is the criterion in the States which adopt this doctrine (which has never, however, been the rule in this State). Under the decision that we have referred to, Judge Moncure states that all must concur before the privilege is released. The mere fact that one party knows that an attorney he employs may be counsel for another does not render statements made to such attorney as his exclusive attorney admissible. In this case, Murphy, in connection with the work which he did as shown by the testimony and by the fact that he was paid solely by the defendant, was the exclusive attorney of the defendant, and as such, communications made to him are privileged.

The Courts have repeatedly said that it is immaterial whether the communications injure the client or not. Their admission is prohibited on the ground of public policy. In discussing this matter, Mr. Wharton, in his work on Evidence, Vol. 1, page 562, Section 588, says:

*"It is easy to conceive of cases in which two or more persons employ a lawyer as their common agent. So far as communications made to him by them are concerned they are privileged against a stranger, but it is otherwise as to themselves as they stand on the same footing as to the lawyer and either can compel him to testify against the other as to communications in the course of employment."* (Italics supplied.)

This strengthens the contention we have made. The employment must be by both in the same matter and they both must be liable for fees and both interested in the result. In this case the employment of Murphy was entirely distinct from his duties to the plaintiff.

Mr. Wharton, however, continues and states this limitation to the rule:

"Papers put in his hands by either party not for the purpose of showing them to the other, but for his exclusive information, he will not be permitted to communicate."

Thus, again, recognizing the fact that although he may be counsel for both, yet he cannot testify as to matters entrusted to him in confidence by either, separate and apart from the other.

The rule appears to be otherwise in Virginia. In *Clay vs. Williams*, 2 Munford 105, 113, 121, 122 (1811), the plaintiff and the defendant employed the same attorney to prepare a bond for them. Litigation subsequently resulted and the deposition of the attorney was taken as to what occurred between the parties. As the case was reversed Tucker and Brooks, JJ., in their opinions mentioned the deposition without deciding whether it was admissible or not; but in the opinion delivered by Roane, J., he said (2 Munford 121-122):

"The sole witness, whom she opposes to the answer of Mr. Clay to the cross-bill is Mr. M'Robert. He was an attorney, confidentially employed, according to his own account, by both the parties, to transact the business between them. He was an attorney; for although this is not said by him or

others in detailing the circumstances of that particular transaction (no question being asked him upon that point), yet, very shortly afterwards, he got a judgment upon the bond, as the attorney of the plaintiff, as appears by the record, but he was at least the scrivener who acted confidentially between the parties, in drawing the bond in question.

"The settled law upon this subject is, that counsel or attorneys, so far from being obliged, are not permitted to give evidence of such matters as come to their knowledge in the way of their profession; that this principle extends even to scriveners acting as attorneys in any particular transaction; nay, even to interpreters going between the attorney and his client; that this is not the privilege of the counsel, etc., but of the client; without which it would be impossible that any business could be done with safety; that a court will even stop a witness of this class seeming desirous or disposed to reveal confidential communications; and that courts of equity will refer the depositions of such witnesses to a master, to expunge so much thereof as shall be found to be of this character. (Such reference was not necessary in the case before us, as the whole of the testimony contained in the deposition is of that character.) All these positions are to be found in 2 Bac. 579 and the cases there cited: they are bottomed upon the soundest propriety, and go to the utter exclusion of the testimony of Mr. M'Robert in the case before us."

The same result was reached by the Supreme Court of Missouri in *Hull vs. Lyon*, 27 Mo. 570, 576 (1858), where it is said:

" \* \* \* Though Hull, the plaintiff, had an interest with Moore in the matter about which the common attorney was consulted, he had no right to any communications Moore might have made. The aim of the evidence was to affect Moore and those claiming under him. Any information Moore may have communicated, or any facts he may have stated, or admissions he may have made, to his attorney, cannot be disclosed at the instance of one who had a hostile interest in the subject of the consultation, although he attended it and employed the same attorney to devise as to his rights and interests in the matter about which they consulted. The consent of both parties was necessary to make the attorney a competent witness. \* \* \* ."

Examination of the leading cases taking the opposite view

from the Virginia doctrine shows that communications made by one client to his attorney are not admissible in favor of another client of the same attorney, unless the attorney was employed in a common matter and the communication was made to the attorney in the presence of the other. The rule is thus stated in *Dominguez vs. Citizens' Bank and Trust Company*, 62 Fla. 148, 56 So. 682 (1911), a case in which the same attorney was employed by both parties, but where the communication was made by one of the parties to the attorney in the absence of the other party (56 So. 683):

"It is doubtless the law that, where an attorney represents both or all the parties in a transaction, conversations and transactions between such parties in the presence of the attorney and each other are not privileged conversations, but such attorney may be required to testify to such conversations and communications; but we think the better rule is that where the facts are such as they may here appear to be, viz., that plaintiff went along to see Mr. Gunby, as he says he did, because he was his retained attorney, and made statements to him in the absence of the other party, and which was apparently confidential, the trial judge committed no error in refusing to allow Mr. Gunby to testify."

In Virginia, as above pointed out, the evidence is not admissible, although the communication was made in the presence of both parties. Murphy was employed to attend to legal matters for the defendant that had nothing whatsoever to do with the alleged transactions between the plaintiff and the defendant. These communications were made to Murphy, not in the presence of the plaintiff, but in the plaintiff's absence and to him as the defendant's attorney. Notwithstanding this fact, the Court permitted Murphy to introduce letters and other correspondence passing between his client, the defendant, and himself, to support the large claim of his client, the plaintiff, and to testify with reference to many disclosures made to him by the defendant to which the plaintiff had no right.

As has been said, it would be a monstrous rule indeed which permitted any attorney to disclose all of the secrets confided to him by one client simply because another client of the same attorney became involved in litigation with the first client.

We submit, therefore, on this particular point, that the Court erred in permitting Mr. Murphy to testify.

If the Court will read his testimony when he was intro-



duced as a witness on the issue before the Court on the plea in abatement, it will find that Mr. Murphy took occasion to preface his testimony with a voluntary statement in which he stated that his relations with the defendants were such as to render such testimony privileged and he made the specific request that he be not asked any questions in connection with such employment (Transcript of first hearing, R., pp. 21-22).

His attitude was changed considerably at this trial, but the reasons which impelled him to recognize the rule at that time apply with equal force today.

He was considered by opposing counsel as his major witness. He introduced a voluminous mass of testimony relating solely to his independent employment in which the plaintiff had not the slightest interest and for which employment they were not liable for a dollar fee. His expenses, his fees for all of this work which was exclusively done for the defendant, were paid for by the defendant to him as its counsel, and he would have been employed as such under the circumstances whether he was counsel for Southern Factories and Stores, the plaintiff, or not.

It would largely destroy the rule to permit or compel counsel who happen to represent the same clients at the same time in different matters to divulge the privileged communications made by any of them to him while he was so employed in connection with widely separate duties.

It is, therefore, respectfully submitted that the trial court erred in admitting the testimony of James B. Murphy.

### THIRD ASSIGNMENT OF ERROR.

#### *The Trial Court Erred in Refusing the Defendant's Instructions, M, N, Q, R and S.*

The fourth count of the declaration charged that the defendant requested the plaintiff to visit various stores upon which it held options, to take inventories thereof, appraise accounts and bills receivable, adjust taxes and insurance, secure lease-holds and do sundry other acts, which the plaintiff did and for which the defendant agreed to pay.

The plaintiff's witness, Wahab, testified that the agreement between the plaintiff and the Virginia Table Company was that "Mr. Kimbrell's organization was to take the inventories and Mr. Lincoln was to pay him for the expense of taking those inventories." (R., p. 486.) He further testified (R., p. 500) " \* \* \* It was my understanding that the Virginia Table Company was to reimburse the Retail Stores

Service for the amounts they paid towards taking inventories and doing the work and they were likewise to reimburse the Southern Factories and Stores Corporation for the amounts that the Southern Factories and Stores Corporation expended, but there was no attempt to define costs at that time—what constituted cost.” (R., p. 500.)

Apparently, pursuant to this understanding, the plaintiff corporation rendered to the Virginia Table Company a bill for taking inventories which amounted to the sum of Eight Thousand Eight Hundred Twenty-six Dollars and Eighty Cents (\$8,826.80) (R., p. 295). This bill, Mr. Fleming testified “includes our record of the time of the people that worked on inventories according to the definite time and amount”. Asked, “How do you arrive at the figures?” he testified, “Actual salaries and expenses we paid on our books to the men working on your work.” He was then asked, “That represents the actual amount paid by your organization to your men for work done for Virginia Table Company?”, to which he answered, “That is for inventories, yes”. (R., p. 296).

On his direct examination Mr. Fleming introduced as “Exhibit R. F. No. 63” a letter written to him by C. C. Lincoln, Jr., under date of December 19, 1929, after the bill had been rendered to the Virginia Table Company, in which Mr. Lincoln said (R., p. 196), “We are anxious to get our books straightened up before the end of the year and I will appreciate it if you will forward me settlement for the balance of Southern Stores account less the bill you rendered for organization expense. It seems that this bill is in order, but rather stiff for us to have to pay along with the other expenses we have met. However, there is no other way out of it and the only thing we can do is to pay it now and try to work something out of it later. \* \* \* .” At that time the plaintiff corporation owed the defendants somewhere in the neighborhood of \$16,000 to \$17,000 (R., p. 1240). As the plaintiff owed the defendants approximately twice the amount that the defendants owed the plaintiff for the expenses connected with the taking of the inventories, Lincoln’s letter of December 19, 1929, was a clear acceptance of the account as rendered him by the plaintiff and contains a clear and unequivocal direction to the plaintiff to apply to its account the amount of the bill so rendered, namely, \$8,826.80. The transaction, therefore, became a binding obligation on the plaintiff and the authorized agent of the defendants. Having rendered an account based on the actual expense of the taking of the inventories, the plaintiff made an irrevocable election

and is now estopped from demanding more on that account than the total of the bill rendered, namely, \$8,826.80.

The defendant, therefore, requested the Court to give instructions M, N, Q, R and S (R., pp. 1495-1498). Instruction M told the jury that, where a party has an election between several inconsistent courses of action, he will be confined to that course which he first adopts, and that the election, if made with knowledge of the facts, was itself binding on the party adopting such course of action; and, therefore, that, if they believed from the evidence that the plaintiff, after the completion of its services in taking the inventories and making the appraisals referred to in count number four of its declaration, rendered to the Virginia Table Company a bill or account therefor based on the actual expenses incurred by the plaintiff in the doing of such work, this constituted an election on the part of the plaintiff to charge only the sum of \$8,826.80, the amount of the bill rendered for its services in and about said work, and that the plaintiff's recovery under that count would be limited to the sum of \$8,826.80. Instructions N, Q, R and S stated the same proposition in varying forms.

It is well settled that where one having an account against another renders a statement therefor, the transaction is binding upon him and thereafter the party rendering the same is held to have made an election which he is estopped from repudiating.

The reason upon which the rule is founded is in the nature of an equitable estoppel. In *Townes vs. Birchett*, 12 Leigh 173, 193-194, the Court of Appeals speaking through Tucker, P., said:

" \* \* \* The rule is founded in good sense and justice. If a party does not deny what his adversary states in his presence and hearing, we infer the truth of the statement from his silence and apparent acquiescence. \* \* \* "

### THE DOCTRINE OF ELECTION AND ESTOPPEL.

In *Georgia Home Insurance Co. vs. Goode & Co.*, 95 Va. 751, 759 (1898), the plaintiff insured his property with the defendant company. At the time the policy was obtained the property was covered by a small mortgage and the agent told the plaintiff that the mortgage was too small to be included in the application; whereupon the plaintiff left it out of the paper. In the proof of loss filed by the plaintiff the facts with reference to the mortgage and the reason why it was omitted from the application were stated. The defendant

company objected to the proof of loss because of certain alleged defects and required new proof of loss to be made, but made no illusion whatever to the existence of the lien nor claimed that it was any ground of forfeiture of the policy. Subsequently it declined to pay the loss, assigning as ground therefore that the failure to mention the mortgage in the application rendered the policy void. The Court held that this was not a good defense and in holding the company estopped on account of its election said (95 Va. 759):

‘It was only upon the theory that the policy was valid that the company had any right to demand a further proof of loss, or to require the invoices to be furnished. If it intended to claim that the policy was void because the deed of trust was not disclosed in the application, it ought to have so stated, and not required the insured to deliver new or additional proofs of loss, and to furnish invoices of the goods destroyed. It will be presumed from these circumstances that the company elected to waive the forfeiture. ‘A party cannot occupy inconsistent grounds or positions; and where he has an election between inconsistent courses of action, he will be confined to that which he first adopts. Any decisive act of the party, done with knowledge of his rights and of the facts, determines his election and works an estoppel.’ Bigelow on Estoppel (3d Ed.), 562; *Webster vs. Phoenix Ins. Co.*, 36 Wis. 57; and 2 Wood on Insurance, Sec. 526.’

In *Arwood vs. Hill’s Adm’r.*, 135 Va. 235, 242, this Court again said:

‘A party cannot, either in the course of litigation or in dealing *in pais*, occupy inconsistent positions. Upon that rule election is founded; a man shall not be allowed, in the language of the Scotch law, ‘to approbate and reprobate’. And where a man has an election between several inconsistent courses of action, he will be confined to that course which he first adopts; the election, if made with knowledge of the facts, is itself binding, it cannot be withdrawn without due consent; it cannot be withdrawn though it has not been acted upon by another by any change of positions. Bigelow on Estoppel, page 733.’

In 21 C. J. Title, Estoppel, page 1111, Section 111, it is stated:

‘If in making a contract, the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact so long as the con-

tract stands, in the absence of fraud, accident, or mistake. There can of course be no estoppel as to matters not included in the contract."

In *Headley vs. Hoopengartner*, 60 W. Va. 626, 640, 55 S. E. 744, 749 (1906), the court said:

"There are two kinds of estoppel by contract—one where the party is estopped to deny the truth of the facts agreed upon and settled by the terms of the contract, and the other is an estoppel arising from the acts done under or in performance of the contract. 'If in making a contract the parties agree upon or assume the existence of a particular fact as the basis of the negotiations, they are estopped to deny the fact so long as the contract stands.' 16 Cyc. 719; *Grand Rapids Fourth Nat. Bank vs. Onley*, 63 Mich. 58, 29 N. W. 513."

It is, therefore, submitted that error was committed in refusing to instruct the jury as requested in Instructions M, N, Q, R and S.

#### FOURTH ASSIGNMENT OF ERROR.

*The Trial Court Erred in Admitting the Plaintiff's Evidence as to the Alleged Breach of an Alleged Parol Contract set up in the Second Part of the Fifth Count of the Declaration, and its Action in Subsequently Striking the Plaintiff's Testimony on this Point did not Cure the Error.*

At the outset of the case the plaintiff undertook to prove that on July 19, 1929, the president of the defendant corporation, Mr. C. C. Lincoln, Jr., assured the plaintiff that if for any reason the bankers wouldn't finance the merger that he would throw his assets in with the stores on the same basis as they threw their assets in and form an individual merger which would be financed later, and that in consideration of this promise the plaintiff renewed the option on its stores theretofore given the defendant. (R., p. 17.)

Before this evidence was introduced it was objected to (R., p. 16), and the objection argued at length. (R., pp. 36-39, 43.)

On July 20, 1929, the plaintiff entered into a written contract with the defendant (R., pp. 19-35), which related to the whole subject matter of the renewal of the option and which contained a stipulation to the effect that there were no verbal

agreements of any kind or character in addition to or in conflict with the provisions of this contract. (R., pp. 33-34.)

This evidence was clearly inadmissible as being at variance with the allegations of the second part of the fifth count of the declaration, and as being an attempt to vary the terms of a written contract by parol testimony, the written contract being under seal, and also on the ground that the alleged offer was so uncertain as to price and as to terms as not in law to amount to a binding contract.

The Court permitted the plaintiff to go into this alleged parol contract fully by witnesses from distant points and thereby compelled the defendant to procure and bring to the point of trial witnesses from Wilmington, Delaware, Bristol, Tennessee, and other remote cities.

A voluminous mass of testimony was introduced on this point, consuming  $1/3$  to  $1/2$  of the entire time of trial. The damages which it is claimed resulted from the breach of this alleged parol agreement were also enumerated at length and commented upon by the various witnesses.

In fact, it is confidently alleged that any damages on the account of the disruption of business was at first claimed solely upon a breach of this parol agreement, and that damages caused by the requests of the defendant was an after-thought. This is not a mere assumption on the part of the defendant, but is borne out in every respect by the very positive direct testimony of Mr. Rives Fleming. This witness, the President of the plaintiff, and moving figure in the prosecution of this action, was asked in the most specific way to enumerate the causes of action his company asserted and the injuries sustained by the alleged breaches by the defendant.

His examination by the defendant began with the statement that it was desired now through him to make plain to the Court and jury the precise contentions of the plaintiff.

He was asked if his company had suffered any injury or claimed any damage by reason of any other acts of the defendant other than (1) failure to pay for options, (2) the failure to pay the reasonable value of services in taking inventories, etc., and (3) for damages following the breach of the parol contract of July, 1929. (R., pp. 246-248.)

He replied specifically that no other injury had been sustained and no other damage claimed. He said positively that no damage was claimed for any breach except failure to pay for options and inventories until the meeting at Marion, when the parol agreement was alleged to have been made in July, 1929. (R., p. 248.)

During the entire trial the theory of the plaintiff was that

damages to its business had resulted from the breach of this alleged parol contract.

The Court had before it when the objection was first made to the evidence in regard to this parol agreement all of the facts upon which to base a decision as to the relevancy and admissibility of such testimony.

The jury, however, was permitted to receive all of this testimony. A considerable portion of it served to contradict the witnesses for the defendant, and in so far as this was the case necessarily resulted in such doubt as to their credibility and truthfulness as such testimony might be calculated to produce. During the entire trial damages were alleged and claimed on account of the breach of this parol agreement.

Jurors are but human. It is respectfully submitted that it is impossible for them to distinguish between evidence which is admissible and evidence which is not admissible at the completion of such a long and tedious trial, even though their attention might be directed to certain testimony and they be required to disregard it in arriving at their verdict.

It is not within the bounds of human nature or in the capacity of the ordinary mind to be able to make the nice distinction in evidence which it is believed the ruling of the Court in this case necessarily compelled the jury to make.

After two weeks trial they could not be expected to differentiate between damages claimed during the first days of the trial and damages for disruption of business due to other causes. This would be beyond the bounds of the most skilled technicians.

When the entire trial was over and the mass of this inadmissible testimony had gone in, the Court attempted to strike it out by Instruction XY (R., p. 1473), and thereby remove from the minds and thoughts of the jury and impression which may have been gained during the trial by reason of its admission.

It is quite possible that the entire verdict may have been based upon the plea for damages alone, and where, in a case of this character, it is impossible to ascertain how the jury arrived at its verdict, then it must be taken as having been arrived at upon any ground alleged.

It is well known that the general rule is that where testimony is excluded or withdrawn, the error in its admission is cured. It is well determined that it is the duty of the Court, where it has all the facts before it, to exclude improper testimony so as to prevent any impression on the jury by reason thereof. The reason for this rule is well founded. But it is not believed to be a practice which is conducive to the

ends of justice to permit such damaging evidence to make its impression which from the very nature of the human mind cannot be eradicated, no matter what the instruction of the Court may be.

This being recognized the exception to the rule is as well established as the rule itself; and that is in a case where it may be considered that such evidence, either from its nature or on account of the circumstances of the particular case, has been so introduced, or is of such a character as to have possibly or probably influenced the verdict, it is considered that its final exclusion does not remedy the error in its wrongful admission.

And this case which continued over a period of such a long time with such a mass of documentary and verbal testimony is upon a far different ground from the usual civil action, which is generally completed within a day or so, where it is comparatively simple for the jury to apply the instructions of the Court to the exclusion of testimony, and remove it from their thoughts in arriving at any verdict.

It is well known without citing authority that there are many cases where the remarks of counsel or the introduction of testimony, if improperly permitted or admitted, are considered to so influence the jury as that instruction to disregard is not sufficient to remedy the error.

In the leading case of *Throckmorton vs. Holt*, 180 U. S. 554; 45 L. Ed. 664, 671, 672, this distinction is well recognized. In that case Mr. Justice Peckham, in delivering the opinion, said:

“The general rule is that if evidence which was taken in the course of a trial be withdrawn from the consideration of the jury by direction of the presiding Judge that such direction cures any error which may have been committed by its introduction.” (Citing several cases.)

“But yet there may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission and in that case the general objection may avail on appeal or writ of error. \* \* \*”

In speaking of the evidence admitted in that case the learned Justice continues:

“This evidence was recorded upon the trial as of con-



siderable importance. The question of its dismissal was raised in the early stages of the trial and the evidence was excluded. It was again raised while the case was with the contestants and the evidence admitted at their instance and several witnesses sworn in regard to it. \* \* \* It is not a case therefore of the introduction of merely irrelevant evidence such as was stated in *Pennsylvania vs. Ray*, 102 U. S. 452; nor like the case of *Hopt vs. Utah*, 120 U. S. 5430; where the testimony of a single witness and physician as to the direction from which the blow was delivered had been admitted and where it was held that if it had been erroneously admitted, the subsequent withdrawal from the case with the accompanying instructions cured the error. *That was a plain question of evidence on a single point and on the part of one witness only.*

"Here was a case where several witnesses gave opinions in regard to the handwriting in the disputed paper \* \* \* which were the witnesses based their opinions largely upon both foundations and the jury could not be expected to accurately recall it after a long trial lasting several weeks. Nevertheless it was called upon to separate and cast aside that portion of the evidence which had been based upon such facts and after excluding that evidence determine as to the value of the remaining opinions based upon the knowledge of handwriting only. It is at least questionable whether the case does not come within the exception to the rule by reason the possible impression produced upon the jury during the long trial in which the evidence of several witnesses upon this point was given after much opposition and long argument as to its admissibility. \* \* \* The witnesses who testified \* \* \* may have made the deepest impressions upon the jury and they may have failed to realize that it was those particular witnesses whose evidence on the subject was to be withdrawn. \* \* \* This was called for by the directions and without naming a single witness or recalling to the jury the fact that it was his particular opinion regarding the handwriting which was withdrawn. This was a somewhat difficult task for any mind and there was no certainty under such general directions that it was properly understood or that with the best intentions it was fully performed. In such a case as this and under the particular facts herein, we think the names of the witnesses should have been given and the specific evidence which was given by them and which they had withdrawn should have been pointed out."

The same rule has been recognized in this State.

*Wash. & O. D. Co. vs. Ward*, 119 Va. 334, 339-40 (1916).

In 29 Cyc., pp. 775-783, cited by the Court of Appeals in *Wash. & O. D. Co. vs. Ward*, *supra*, it is said (pages 782-783):

“\* \* \* Ordinarily error in the admission of evidence is cured if the court orders the evidence to be stricken out and instructs the jury to disregard it. If, however, the prejudicial effect of the evidence upon the jury has probably not been fully overcome by such action, a new trial may be allowed.”

In the case at bar some witnesses testified as to damages both before and after the alleged parol agreement. The principal evidence as to damages was loss of profits, and this evidence consists of one statement which at the time it was introduced was alleged to have been caused *by the breach of the alleged parol agreement*. (R., pp. 887-890.) Just how much of it was claimed from this other cause was not made plain. No evidence of damage solely because of disruption of business on its other cause was introduced.

It is submitted, therefore, that the Court should have promptly overruled the testimony when introduced, refused the evidence of many witnesses who testified in regard to it, and whose testimony it was apparent during the trial had a great impression upon the minds of the jury. These witnesses were repeatedly questioned by jurors themselves upon points on which they differed from the evidence of the defendant, and it is but natural that their evidence had the result that it may reasonably be contemplated to have and justified the reason for its introduction which was to contradict the defendant witnesses and throw doubt upon their credibility, then it is at least within the bounds of probability that such impression remained during the entire trial, could not be eradicated by any instruction of the Court, and contributed to the verdict.

#### FIFTH ASSIGNMENT OF ERROR.

*The Trial Court Erred in Refusing Defendant's Instruction "G".*

Aside from the evidence as to the causes of action relating to the options, the taking of the inventories and the appraising of accounts, the testimony offered by the plaintiff as to the damage sustained by it on account of the alleged implied

contract set up in the fifth count of the declaration was vague and too indefinite to afford the basis of a verdict. This evidence consisted of the testimony of Mr. Hoke Murray, the plaintiff's treasurer, who testified that the plaintiff began the operation of its stores in May, 1928 (R., p. 1004), and that the profits made during the months of May, June and July 1928 exceeded the profits for the same months in 1929 by Twenty-four Thousand Eight Hundred Twelve Dollars and Thirty-two Cents (\$24,812.32), and that he did not know of any other reason outside of the situation between the plaintiff and the defendants to account for this loss (R., pp. 1005-6).

The defendant, therefore, requested the court to give the jury instruction "G" (R., p. 1493), which reads as follows:

"The Court instructs the jury that before they can fix any damages in this case, there must be proof thereof to such an extent as that they can accurately fix the amount of same; that they may not award damages as are conjectural, speculative, or imaginary; and that the plaintiff must prove the amount of his damages with that degree of certainty which enables the jury to accurately fix the same."

The court refused the instruction, however, to which the defendant excepted.

It is axiomatic that the verdict must correspond to the proof. It is true that there is a line of cases relied upon by the Court to sustain the ruling on this subject which hold that *after verdict* the Court will not disturb a verdict because it was unable to tell from the evidence how the jury arrived at the damages and holding that in assessing damages the jury must be given some leeway.

This is a vastly different matter from instructing the jury that they may estimate the damages whether the evidence warrants it or not; by refusing this instruction the Court refused the defendant the right to have the jury told that as a matter of law they could not go outside the evidence in order to assess the damages. The only *damage* proven in the case was loss of profits. There was no other testimony of any pecuniary loss, and since such damages are necessarily *speculative*, it should be the policy of the Court to require strict proof of the right to recover and strict proof of the facts upon which a recovery could be based.

It is undoubtedly true that in effect the Court refused to tell the jury that in assessing damages they must abide by the evidence. Certainly it is not the policy of the law to per-

mit the members of a jury to go outside the evidence in fixing the amount of damages. Damages must be proven with that certainty which the law requires before the jury can base any verdict on the evidence.

In the recent case of *Southern Railway vs. Burton*, 149 Va. 364, 370, Judge Prentis said:

“The Courts have gone far, and we believe none further than this court, in enforcing the verdicts of juries; but there is a limit beyond which we should not go. That limit has been reached in this case. *The burden is always upon the plaintiff claiming damages to show the amount with reasonable certainty.* \* \* \* (Italics supplied.)

This late pronouncement of this Court is not *dictum* but a positive statement of the law in one of the latest Virginia cases. This statement is all that the defendant asked be incorporated in its instructions. The instruction told the jury that the damages must be fixed with sufficient certainty to enable them to correctly ascertain the amount, and if this is not true, the converse must be true, which is, that the jury do not have to have evidence before them which is sufficient to fix damages, but, on the contrary, may assess damages without a sufficient amount of evidence upon which the same may be reasonably based and by which the same may be reasonably ascertained.

*Burruss vs. Hines*, 94 Va. 413 (1897).

*Connelly vs. West. Union Tel. Co.*, 100 Va. 51 (1902).

*Dexter-Portland Co. vs. Acme Co.*, 147 Va. 758 (1926).

All of the cases, as we have said, which refer to this question and relied upon by the Court, are cases where the Court was referring to a situation *after a verdict*. In none of them does the Court say that the jury should not have sufficient evidence before it upon which to estimate damages, and we believe that it would be contrary to every principle of jury trials to refuse an instruction, the only effect of which is to tell the jury that they must have sufficient evidence upon which to ascertain damages before they are warranted in determining the amount. If the contrary were true—and it must be true if the instruction is wrong—then juries are warranted in assessing damages in any amount whether the evidence warrants it or not.

## SIXTH ASSIGNMENT OF ERROR.

*The Trial Court Erred in Refusing to Sustain the Demurrer to the Declaration Based on a Misjoinder of Causes of Action.*

The declaration sets forth that the liabilities alleged were incurred by the Virginia Table Company; that subsequently thereto the Virginia Table Company disposed of all of its assets to the Virginia-Lincoln Furniture Corporation; that that corporation assumed all of the liabilities of the Virginia Table Company, and that subsequently the Virginia Table Company was dissolved.

The plaintiff joined both the Virginia Table Company and the Virginia-Lincoln Furniture Corporation as defendants in its notice of motion. This was a clear misjoinder of causes of action as clearly appears from the decision of this Court in *Langhorne vs. Richmond R. Co., et als.*, 91 Va. 369, 376 (1895). In that case the declaration alleged that the injury had been inflicted by one company, and that subsequently that company had consolidated with a second company, and both companies were made defendants. The defendants demurred to the declaration on the ground that there had been a misjoinder of causes of action.

In a well considered opinion by Buchanan, J., this Court held that there was a clear misjoinder of causes of action and that a demurrer was properly sustained. In so holding, this Court said (91 Va. 376):

“\* \* \* But the defect in the declaration is in joining them as defendants. They are not jointly liable. One is liable for committing the alleged injury; the other is liable by reason of the consolidation proceedings. The plaintiff has the right to sue either, for the injury alleged to have been done, but has no right to sue both in the same action at law. If an action at law be brought against two or more persons, it must appear from the declaration that the contract or tort upon which it is brought is a joint contract, or a joint tort. 2 Tucker 208, 214, 226. It was held in *Sanders vs. Clason*, 3 Minn. 379, that ‘A cause of action against a defendant for the value of goods sold and delivered, and a cause of action against a third person on the promise to such defendant to pay said debt to the plaintiff, are improperly joined, and the complaint is bad on demurrer.’

‘In this case it was necessary to state a good cause of action against the Richmond City Railway Company in order

to state a good case against the Richmond Railway and Electric Company. If the plaintiff had only instituted his action against the last named company, there would have been no misjoinder of causes of action; but as he made both corporations parties to the action, and the declaration states a good cause of action against each, there is a misjoinder of causes of action and of parties."

It is true that at the conclusion of the evidence the trial court did compel an election on the part of the plaintiff, at which time the plaintiff elected to proceed against the Virginia-Lincoln Furniture Corporation only and dismissed its proceeding as to the Virginia Table Company, but this was only after the evidence had been completed and the defendant had been subjected to all of the inconvenience and trouble and expense that resulted from the action of the trial court in refusing to sustain the demurrer in the first instance and in compelling it to defend the case during a two week's trial as fully as if it had been properly joined.

The court could very easily have sustained the demurrer in the first place, and it is submitted that it is not proper for a court to compel a defendant to go to the expense, time and trouble of defending a long and tedious law action when it was perfectly apparent that it was improperly joined in the first instance.

#### SEVENTH ASSIGNMENT OF ERROR.

##### *The Trial Court Erred in Overruling the Pleas in Abatement to the Jurisdiction of the Court.*

It is apparent upon the face of the notice that there are three causes of action specifically alleged.

*First:* To recover on an express contract to pay for options.

*Second:* To recover on an implied contract to take inventories and judge accounts.

*Third:* To recover damages to the breach of an alleged express parol contract to merge made in July.

Although it is not apparent, we submit either from the notice or from any evidence taken in the case until it was submitted, that there was a fourth cause of action, yet the Court held, as we have stated in another assignment, that the notice included a fourth cause of action, as follows:

Fourth: to recover, in addition to a *quantum meruit*, dam-

ages for the breach of an implied contract, which damages were incurred on account of the plaintiff's complying with certain requests of the defendant in connection with the operation of its business.

Pleas in abatement were filed denying that the cause of action, or any part thereof, arose in the City of Richmond where this action was instituted and evidence was taken on the issues so raised. The court held that although the contract sued on was not performed in the City of Richmond, yet this City was the home office of the plaintiff and since no place of payment had been designated the place of payment fixed by law was the residence of the plaintiff, which was the City of Richmond, and, therefore, the court had jurisdiction, as making payment was considered a part of the cause of action.

This was denied, but in any event jurisdiction of the third and fourth causes of action cannot be maintained on that ground as they were actions for damages.

To say that a plaintiff can institute a suit for damages in the City of Richmond when the damages, if any, are shown to have occurred entirely outside of the jurisdiction of this Court and in the states of North and South Carolina, is going far beyond any rule which would confer jurisdiction upon this Court.

Certainly, if an independent action had been instituted in the City of Richmond on either the third or fourth causes of action, it is elemental that the Richmond court would not have had jurisdiction, as no part of the cause of action arose there and the defendant must have been sued at its residence.

As to the fourth cause of action, it is plainly shown in the testimony that the requests were complied with by the plaintiff at its stores in North and South Carolina. It will be remembered that none of these stores were located in the State of Virginia and everything that was done by the plaintiff, which it complained of, was done in those two states. This being true, or if the court was correct in overruling the plea in abatement as to the first and second causes of action (which is denied), it certainly could not have properly held that the Richmond court had jurisdiction of the third and fourth causes of action.

It was contended that since the court had jurisdiction of one cause of action it had jurisdiction of all, but the principle is well settled that where two causes of action are included in the same declaration or notice, of one of which the court has jurisdiction and of the other which it would not have jurisdiction if it were asserted alone, then the jurisdiction of

the court as to the first cause of action does not justify the court in taking jurisdiction of the second.

There are no Virginia cases on this particular subject. In North Carolina, however, in the case of *Kellis vs. Welch*, 158 S. E. 742, the well recognized principle is stated as follows:

"We recognize the principle that a plaintiff cannot change the venue of the action to the prejudice of the defendant and against his will by uniting two causes having different venues."

In the case of *Richmond Cedar Works vs. Roper*, 77 S. E. 770, it is said:

"Plaintiff cannot deprive defendant the right to have a local cause of action brought in the proper county or change the venue to the prejudice of the defendant and against his will by uniting two causes of action having different venues."

See also:

*First National Bank vs. Shriver* (Ia.), 132 N. W. 848.

*First National Bank vs. Gates* (Tex.), 213 S. E. 720.

*Bond vs. Hurd*, 78 Pac. 579.

*Nason vs. Feldhusen*, 168 Pac. 1162.

*Krompatic vs. Butler* (Minn.), 203 N. W. 435.

*Woodward vs. Melton* (Mo.), 194 Pac. 154.

*Smith vs. Morrison*, 212 N. W. 567.

It is respectfully submitted, therefore; first, that the fact that Richmond was the home office of the plaintiff and that no place of payment had been designated, does not confer jurisdiction on the Richmond court and, second, if the court did have jurisdiction on that ground of the first two causes of action it did not authorize the court to extend its jurisdiction to the third and fourth causes of action alleged because if they had been asserted alone that court would not have had jurisdiction.

#### EIGHTH ASSIGNMENT OF ERROR.

*The Trial Court Erred in Refusing to Instruct the Jury that the Plaintiff was Bound by the Admission of its President, Rives Fleming, and Principal Witness, and Could not Recover Damages which he Denied it had Sustained.*

Rives Fleming, President of the plaintiff, was introduced



and examined for the purpose of sustaining the causes of action alleged and to prove the damages alleged to have been sustained by the plaintiff. The notice itself is so confusing and the evidence is so inextricably mixed and interwoven that it was difficult for the defendant, or its counsel, to ascertain exactly what was claimed by the plaintiff.

For the purpose of limiting the issues and ascertaining precisely and with exactness the contentions of the plaintiff, at the beginning of the cross examination of Mr. Fleming, the President of the plaintiff, he was requested to state what the plaintiff actually contended. (R., p. .)

He was asked first if his company, the plaintiff, had suffered any injury or claimed any damage by reason of any other acts of the defendant other than, first, failure to pay for options; second, failure to pay the reasonable value of services in taking inventories, and third, damages following the breach of the parol contract of July, 1929. He replied emphatically and specifically that no other injury had been sustained and no other damage was claimed.

If this statement be true it follows without question that no damages could be claimed on account of any disruption of business occasioned by the plaintiff acceding to the receipts of the defendant.

The court was requested to so instruct the jury, but refused to do so upon the ground that the plaintiff was not bound by the testimony of its President.

A corporation can only speak through its officers. Of these its President is the chief. He is the principal executive of the corporation, supposed to handle its policies, negotiate and carry out its contracts.

When a corporation, speaking through its duly authorized agent, unquestionably denies during the course of a trial when examined as a witness and placed upon the stand by his principal that his company suffered any damage whatsoever by reason of certain actions of the defendant, then the jury should not be permitted to consider any such damage.

It has been held by this Court in a long line of well considered cases that a plaintiff cannot expect the jury to render a verdict except according to his testimony, and that he, the principal, is bound by his own testimony, although there may be in the record testimony upon which a larger verdict could be based coming from outside sources. *Massie vs. Firmstone*, 134 Va. 450, 462 (1922).

It is also held in Virginia in the case of *Maryland vs. Cole*, 156 Va. 707, 717-18 (1931), that where a partnership is a litigant the partnership is bound by the admissions or state-

ments of a partner and cannot recover a verdict which is contrary to the testimony of a partner. If this be true, it follows that a corporation is bound by the admission and statements of its duly authorized officer.

It would, indeed, be inconceivable to hold that an individual or a partnership is so bound and relieve a corporation from the operation of the well established rule.

Mr. Fleming stated as positively as any witness could state that no damages were claimed on account of disruption of business, but merely on account of the alleged contract of July, 1929, which was stricken out by the Court.

It follows, therefore, that in no event could the plaintiff recover more than the reasonable value of the services in taking inventories, etc., and could not recover for damages resulting to its business by reason of taking the inventories and of acceding to the requests of the plaintiff even if proven.

#### NINTH ASSIGNMENT OF ERROR.

*The Trial Court Erred in Instructing the Jury that under the Evidence the Virginia-Lincoln Furniture Corporation was Liable for the Obligations of the Virginia Table Company.*

This question was not permitted to go to the jury and in its instruction (R., p. ) the court directed a verdict on this issue, or used language which amounted to the same thing.

There was conflicting testimony as to what occurred. The Virginia Table Company, a large manufacturing concern, sold all of its assets to the Virginia-Lincoln Furniture Corporation and the latter agreed to pay the liabilities of the former amounting to several hundred thousand dollars, but only such liabilities as regularly appeared upon its books of account, a list of which was furnished.

The books of account of the Virginia Table Company did not show the claims of the plaintiff asserted in this cause of action. It did not show the large amount of damages claimed because at that time it had no knowledge that such damages were claimed.

There were some stockholders who were common to both corporations, but the Virginia-Lincoln Furniture Corporation had a large number of stockholders who had never had any interest whatsoever in the Virginia Table Company.

It is believed, under the statute in Virginia, that one corporation had a right to sell its assets to another, and if there is no merger and a valuable consideration is paid, and there is

no exchange of stock or securities but an outright sale, that the purchasing corporation is no more liable for the general indebtedness of the selling corporation than an individual purchaser is liable for the general indebtedness of an ordinary individual seller.

Corporations in Virginia, by statute, are given the rights and privileges of individual owners of property with the same right to buy and sell and dispose of their assets to another corporation.

It is submitted that there is no principle of law which compels a purchasing corporation, under such circumstances, to assume and pay the liabilities of the selling corporation, and especially to assume and pay a large claim for damages never asserted against the selling corporation before the sale was consummated and of which it had no knowledge and which did not appear upon its books.

It is true that at the time of the sale C. C. Lincoln, Jr., a common stockholder in both corporations, had on his desk the only bill ever sent him, amounting to Eight Thousand (\$8,000.00) Dollars, but it will also be remembered that at that time the plaintiff owed the defendant, Virginia Table Company, approximately Seventeen Thousand (\$17,000.00) Dollars which it had not paid. Under these circumstances, the plaintiff owing the defendant Seventeen Thousand (\$17,000.00) Dollars and the plaintiff asserting the defendant only owed Eight Thousand (\$8,000.00) Dollars, which was not upon its books as a liability when the sale was made, it surely cannot be said that the purchasing corporation assumed responsibility for a large claim for damages alleged to have been incurred by the plaintiff in a transaction with the Virginia Table Company with which the Virginia-Lincoln Furniture Corporation had nothing to do whatsoever.

#### TENTH ASSIGNMENT OF ERROR.

*The Trial Court Erred in Overruling the Demurrer to the Notice on the Ground that the Causes of Action were Misjoined and Because more than one Cause of Action was Included in the Different Counts.*

It is true that the statutory proceeding of notice of a motion for judgment was adopted by the Legislature to simplify pleadings, but as has been said by this Court it was not intended thereby to abolish all of the ordinary rules of pleading.

To what extent the rules of common law pleading have been relaxed by this statute has never been definitely settled, but

it has been stated by this Court that there must be particularity in pleading; that there must be certainty in pleading, and that there should not be misjoinder of causes of action.

The notice in this case is an example of to what extent defendants may be misled by uncertainty in pleading and by joining more than one cause of action in the different counts.

From an examination of the notice it was thought at first that there were only two causes of action: first, for failure to pay for options, and, second, for failure to pay for taking inventories. Coupled with these was a statement more by way of recital than otherwise that certain damages had been sustained.

At the completion of the trial, to their surprise, counsel were advised that damages were also claimed for disruption of business.

The notice also claimed the common counts in assumpsit.

Certainly, in the fifth count of the notice two separate and distinct causes of action are set forth; first, to recover on a *quantum meruit* the value of services performed, and, second, damages because the services were performed.

As has been seen, the court instructed the jury that the plaintiff, if it established its case, could recover not only the reasonable value of taking inventories and acceding to the requests of the defendant, but in addition thereto damages resulting from loss of profits.

In other words, if an attorney should be employed to perform certain services with no fee named, and in performing those services was absent from his office and thereby lost a valuable client who would have paid him a large fee, under this instruction of the court the attorney would be entitled to recover not only the value of the services he performed but also damages because while performing them he was necessarily absent from his office and lost a client who would have paid a large fee.

It is alleged that it was error to join these causes of action in one count.

The options were secured in several Southern states and the plaintiff demanded a thousand dollars for each. The inventories were taken in a number of Southern states also and the value of these services was demanded.

In addition, there was a cause of action alleged, for damages for breach of an alleged contract made at Marion, Virginia, in July, 1929. There was also a cause of action for damages sustained in North and South Carolina to the stores of the plaintiff because they complied with certain requests of the defendant.

Four separate and distinct causes of action, all arising at different points and under different circumstances under contracts made in different places, each single and entire in itself and having no relation to the other.

The trial of this case consumed some two weeks. The evidence, as we have stated, is inextricably mixed. The witness would be examined for a short time for facts in connection with one cause of action and then counsel would jump to another and then to another until the end of the trial. If the jury were situated like counsel for the defendant, it was impossible to recall and reconcile the testimony of the various witnesses, especially when the court waited until all of the evidence was in to require an election by the plaintiff between the two defendants and strike out all of the evidence objected to in the first place in regard to the alleged parol contract of July, 1929.

We believe that it is impossible for any jury of ordinary ability to properly correlate and consider the testimony in this case under these circumstances. It would be impossible for them to remember what occurred some two weeks before and no situation could arise which would better exemplify the necessity of proper pleading and proper trial on the pleading than this.

It was a physical impossibility for human beings of ordinary intelligence to do what the court instructed the jury to do in this case, and that is, strike out of their minds all of the improper testimony and consider only the testimony which remained.

If the court had in the first place, which we submit should have been done, sustained the objection to all evidence as to the parol contract of July, 1929, and restricted the testimony to the other causes of action, the trial could have been completed in two or three days.

If the causes of action had been tried separately each cause of action could have been disposed of in a day or so. Instead, on account of combining all of these different causes of action arising on different contracts, necessitating the introduction of a different set of facts as to each and then attempting to strike out the larger portion from the record, both the jury and counsel were bewildered to such an extent that it is believed impossible for the evidence to have been sifted and considered as it should have been done and as litigants have the right to have it done.

It is submitted, therefore, that there was error to combine all of these different causes of action in one notice, and especially to combine any two in the same count.

ELEVENTH ASSIGNMENT OF ERROR.

*The Trial Court Erred in not Striking out all Evidence as to Alleged Profits and in Permitting the Jury to Consider such Evidence over Objections.*

The plaintiff's witnesses stated that on account of acceding to the requests of the defendant their business was disrupted, their credit extended, and that they lost a large amount of money.

If the Court will examine the record it will find that the only evidence of such requests is contained in letters in which the defendant requested the plaintiff to push sales to make more money, and in one instance to try a new way of book-keeping, which it did for two months. That is all the testimony upon which the court permitted the defendant to prove damages for disruption of business. The only damages proven, or attempted to be proven, was the fact that the plaintiff continued in its employ two employees which it had hired since it was organized, and a comparison between the profits of one period and the profits of another period. It was also shown that the plaintiff had not been in business but a period of about eight months at the time of the transactions in question.

Since this question of profits was evidently considered by the jury under the instructions of the court, it is hoped that this Court will examine the record carefully and consider the evidence upon which the instruction complained of was based. It will be found, we believe, that we state the facts correctly when we say that the only evidence on the subject was as we have stated.

Under certain conditions lost profits may be shown as an element of damages, but the business alleged to have lost profits must be an established business with a history of profit making extending over a considerable period of time, and the loss of profits must be shown by competent evidence to be directly attributable to the breach of the contract by the defendant.

In this case the business was not an established one—it had been in business about eight months. It is universally known that in the latter part of 1929, before the damages are alleged to have been sustained, one of the worst panics this country ever suffered suddenly was experienced.

Strange to say, it is contended by the plaintiff that these great losses were incurred because the defendant requested it to push sales so as to make more money. The testimony

was introduced on this subject consisted of letters urging the plaintiff to use its every effort to make more money. In doing so it says that it suffered great and irreparable losses, and to establish these losses places its auditor upon the stand with a comparative statement of profits during one period in one year of three or four months and a corresponding period in the next year.

Why it suffered this great loss is not shown. There is not a fact shown which caused it to lose anything. There is not a scintilla of testimony as to the reason for the loss which is competent evidence. It is true that the bald statement is made that the loss was occasioned by complying with the the requests of the defendant, but why it does not appear. There is not a single purchase shown to have been made as a result of the requests of the defendant which would not have been made, nor a single sale is shown to have been made which would not have likewise been made. The only act in the entire record shown to have been done by the plaintiff on account of the requests of the defendant is keeping a separate set of books for approximately two weeks, which, of course, could have had no effect upon profits except to the extent that it cost to keep such books, which is not shown nor attempted to be shown.

In the case of *Mount Rogers Furniture Co. vs. Virginia Mirror Co.*, 155 Va. 201 (1930), the plaintiff stated that it had lost a large amount of money on account of loss of profits and attempted to show how the loss was sustained. It was held in that case by this Court that whether the loss was occasioned or not by the acts of the defendant was entirely speculative and that loss of profits must be proven with certainty. If that case be authority, then it was error for the Court in this case to permit any evidence of lost profits to go to the jury.

It is submitted, therefore, that except for the mere assertion that profits were lost on account of the acts of the defendant is not sufficient, and that what the plaintiff did which occasioned the loss must be shown, the loss itself must be proven with certainty, and the reason therefor established.

The court should not have permitted any evidence as to loss of profits to go to the jury.

For the foregoing reasons, and other errors apparent upon the face of the record, your petitioner respectfully prays that it may be granted a writ of error and *supersedeas* to the judgment aforesaid and that the same may be reviewed and reversed.

Your petitioner adopts this petition as its brief, and avers that on July 27, 1933, a copy of the same was delivered to James W. Gordon, Esquire, counsel for the Southern Factories and Stores Corporation, the plaintiff in the court below.

VIRGINIA-LINCOLN FURNITURE  
CORPORATION,  
By JOHN P. BUCHANAN,  
LEON M. BAZILE,  
ALFRED J. KIRSH

JOHN P. BUCHANAN,  
LEON M. BAZILE,  
ALFRED J. KIRSH,  
Counsel.

The undersigned attorney at law, practicing in the Supreme Court of Appeals of Virginia, hereby certifies that in his opinion there is error in the judgment complained of in the foregoing petition, for which the same should be reviewed and reversed by the Supreme Court of Appeals of Virginia.

LEON M. BAZILE.

Received July 31, 1933.

M. B. WATTS, Clerk.

Writ of error and *supersedeas* awarded. Bond \$25,000.00.

PRESTON W. CAMPBELL.

Received Aug. 25, 1933.

M. B. WATTS, Clerk.

## RECORD

### VIRGINIA:

Pleas before the Honorable Frank T. Sutton, Jr., Judge of the Law and Equity Court of the City of Richmond, Part Two, held for the said City at the Courtroom thereof in the City Hall on the 24th day of March 1933.

Be it remembered that heretofore, to-wit: In the Clerk's Office of the Law and Equity Court of the City of Richmond, Part Two, the 16th day of July, 1931: Came Southern Fac-



tories and Stores Corporation, by Counsel, and filed its Notice of Motion for Judgment against Virginia Table Company, Incorporated and Virginia-Lincoln Furniture Corporation, which Notice of Motion for Judgment is in the words and figures following, to-wit:

page 2 } Virginia:

In the Law & Equity Court of the City of Richmond; Part Two.

Southern Factories and Stores Corporation, Plaintiff,

vs.

Virginia Table Company, Incorporated and Virginia-Lincoln Furniture Corporation, Defendants.

To the Virginia Table Company, Incorporated and Virginia-Lincoln Furniture Corporation:

Take notice that on the 10th day of August, 1931, at ten o'clock A. M., or as soon thereafter as it can be heard, the undersigned, Southern Factories and Stores Corporation, a corporation chartered and existing under the laws of the State of Virginia, with its principal office in the City of Richmond in said State, hereinafter called plaintiff, will make a motion in the Law & Equity Court of the City of Richmond, Part Two, at the court room in the City Hall of said City, for judgment against you and each of you, for the sum of One Hundred and three thousand seven hundred and twenty six and 80/100 dollars, for this, to-wit:

1. Prior to December 26, 1929 you were two separate corporations created and existing under the laws of the State of Virginia, with the same officers, directors and stockholders, and theretofore, to-wit, on the 12th day of December, 1929 the said Virginia Table Company, Incorporated transferred all of its assets to Lincoln Furniture Manufacturing Company, Incorporated which assumed all of the liabilities of said Virginia Table Company, Incorporated; and thereafter the corporate name of said Lincoln Furniture Manufacturing Company, Incorporated was changed by amendment of its charter to said Virginia-Lincoln Furniture Corporation; and thereafter, to-wit, on the 26th day of December, 1929, the

page 3 } said Virginia Table Company, Incorporated was dissolved with the consent of all of its stockholders.

2. That heretofore, to-wit, in the year 1928 and theretofore the said plaintiff owned and operated a number of furniture and house furnishing stores in the States of North Carolina

and South Carolina, and the said Virginia Table Company, Incorporated, hereinafter called defendant, was engaged in the manufacture of furniture, and in the year 1928 the said defendant desired to expand its said business by acquiring control of said stores of plaintiff, and of certain other stores in various parts of the country, and by effecting a merger of all of the stores thus acquired under a single organization and central management.

3. That heretofore, to-wit, on the — day of October, 1928, the said defendant, in the said City of Richmond, Virginia, and in pursuance of its said purpose, requested the said plaintiff to secure for it options for the purchase of said stores in various parts of the country, and then and there undertook and faithfully promised said plaintiff to pay it the sum of One Thousand Dollars for each and every such option secured by it for said defendant, and said plaintiff thereafter gave to said defendant an option to purchase its own said stores; and said plaintiff, relying upon said request, promise and undertaking of said defendant, did, at great expense to said plaintiff, to-wit, the sum of Eight Thousand Five Hundred and Thirty-seven and 27/100 Dollars (\$8,537.27), secure for and deliver to said defendant eleven options on the following furniture stores, which said options were approved by said defendant, viz: Jones Bros. and George W. Kennedy Co., of Jacksonville, Florida; M. K. Jones, of Savannah, Georgia; Jones-Kennedy, Cochran Furniture Co. and Mason Bros., of Atlanta, Georgia; Woods-Peavy, of Macon, Georgia; Van Metres, of Columbia, South Carolina; Sam Burton, of Asheville, North Carolina; Bledsoe Furniture Co., of Danville, Virginia and W. A. Bell & Bro., of Fredericksburg, Virginia; yet although often requested, said defendants have failed and refused and still refuse to pay the said agreed price for said options, or said expenses incurred by said plaintiff, or any part thereof.

4. That after the said options were secured and given by said plaintiff for and to said defendant, as aforesaid, to-wit, on the — day of January, 1929, the said defendant, in the said City of Richmond, and at various other places, requested the said plaintiff to visit the various stores on which it held options, and take inventories thereof, appraise the accounts and bills receivable, adjust taxes and insurance, secure lease-holds, and do sundry other acts, preliminary and necessary to the exercise of the said options by said defendant, and then and there undertook and faithfully promised said plaintiff to pay it for its expenses and services in that behalf; and said plaintiff, relying upon said request, promise

and undertaking of said defendant did visit said various stores and take inventories thereof, appraise the accounts and bills receivable, adjust taxes and insurance, secure lease-holds, and do sundry other acts, in anticipation of the exercise of said options by said defendant, and as directed by said defendant, in the doing of which said plaintiff expended and furnished for and on behalf of said defendant money and services to a large amount, to-wit, Seventeen thousand seven hundred and twenty six and 80/100 dollars (\$17,726.80), as shown by the itemized statement thereof which is hereto annexed; yet the said defendants, although often requested, have failed and refused and still refuse to pay the said sum of \$17,726.80 or any part thereof.

5. That after the said options were secured and given by said plaintiff for and to said defendant, as aforesaid, the said defendant assured said plaintiff that it would exercise said options and effect the said merger, and from time to time the said defendant, while making financial arrangements for effecting said merger, requested the said plaintiff to secure extensions of said eleven options, and requested and required said plaintiff after January 31, 1929 to keep a separate and distinct set of books, and to change its method of business and vary its method of sales and operation with all possible speed, and to purchase large supplies and increase its inventories, and to operate its business for the benefit of said defendant, all as directed by said defendant, and which said plaintiff then and there did at the special instance and request of said defendant, and in consideration of which the said defendant undertook and faithfully promised said plaintiff to reimburse it for all expense, loss and damage sustained by it on account of its compliance with said requests and directions of said defendant; and thereafter, to-wit, on the 19th day of July, 1929 the said defendant requested said plaintiff to again renew its said option and to secure renewals of other of said options, which the said plaintiff did, and in consideration thereof and of the compliance by said plaintiff with the said request and directions of said defendant, said defendant then and there undertook and faithfully promised said plaintiff that it would exercise the said option given to it by the plaintiff and consummate the said proposed merger; yet the said defendants, well knowing that their failure to exercise said option and consummate said merger would entail great loss and damage to said plaintiff, and although often requested to comply with said agreements, failed and refused and still refuse to exercise said option and/or consummate said merger or to reimburse

said plaintiff for the expense, loss and damage sustained by it on account of its compliance with said requests and directions of said defendant; and the plaintiff says that by reason of the premises aforesaid its said business was disorganized, and its inventories unduly increased, and its credit impaired, and its sales and profits reduced, all to the great loss and damage of said plaintiff.

6. That heretofore, to-wit, on the 1st day of January, 1930, the said defendants were indebted to the said plaintiff in the sum of \$103,726.80 for the price and value of work then and there done by said plaintiff for said defendants at their request:

And in the sum of \$103,726.80 for materials then and there furnished by the plaintiff to the defendants at their request;

And in the sum of \$103,726.80 for money then and there paid by the plaintiff for the use of the defendants at their request:

And in the sum of \$103,726.80 for money found to be due from the defendants to the plaintiff on account then and there stated between them.

And the defendants afterwards, to-wit, on the day and year aforesaid, in consideration of the premises respectively, then and there promised to pay the said several sums of money respectively to the plaintiff on request.

Yet the defendants have disregarded the said promises, and have not paid any of the said several sums of money, or any or either of them, or any part thereof, but to pay the same have hitherto wholly failed and refused, and still refuse, to the plaintiff's damage \$103,726.80.

7. That by reason of the failure of said defendants to comply with their said several undertakings and promises aforesaid, the said plaintiff has suffered loss and damage to the amount of One hundred and three thousand seven hundred and twenty six and 80/100 dollars which is justly due and owing by said defendants to said plaintiff, as per account hereto annexed, duly verified by affidavit, and made a part hereof, and for which judgment will be asked as aforesaid.

8. That said indebtedness of the defendants to the plaintiff has not become and is not taxable under the laws of page 7 } Virginia.

Respectfully,

SOUTHERN FACTORIES AND STORES  
CORPORATION,

By SMITH & GORDON, its attorneys.

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Expenses Paid by Southern Factories & Stores Corporation for Virginia Table Co., in connection with inventories, etc.

(Itemized statement of expenses paid after February 1, 1929)

1929

Feb. 6	E. H. Hillis, W. E. Kimbrell, and Hoke Murray expense to Baltimore reference taking inventories and listing accounts receivable various stores		
2/ 4	Hotel at Baltimore	\$12.60	
	Supper	1.55	
	Railroad fare Richmond to Baltimore	20.17	
	Taxi	.50	
	Incidentals	2.22	
2/ 5	Breakfast	1.50	
	Supper	1.95	
	Railroad fare Baltimore to Richmond	20.17	
	Taxi	.75	
	Incidentals	2.16	\$63.57

Feb. 12	E. H. Hillis, expense Columbia In. & A/c. Rec		
2/ 7	Hotel at Columbia	\$ 7.00	
	Supper for 2	1.75	
	Auto expense	2.06	
	Gas	1.30	
	Storage	.75	
	Incidentals	1.78	
2/ 8	Hotel at Columbia	2.50	
	Breakfast for 2	2.75	
	Lunch for 2	1.75	
	Supper for 3	2.70	
	Pressing	.75	
	Incidentals	1.23	
2/ 9	Hotel at Columbia	2.50	
	Breakfast	.75	
	Lunch	.75	
	Supper	.75	
	Four extra meals	3.00	
	Incidentals	1.23	35.30

Feb. 18 E. H. Hillis, expenses inventory and

a/c receivable, Columbia, inventory  
Jacksonville

2/10	Hotel at Columbia	2.50	
	Breakfast	.75	
	Lunch	.75	
	Supper	.72	
	Three Extra meals	2.25	
	Telephone call to Atlanta	2.65	
	Incidentals	2.00	
2/11	Hotel at Columbia	2.50	
	Breakfast	.75	
	Lunch	.75	
	Supper	.75	
	Three extra meals	2.25	
	Telegrams	1.99	
	Telegrams	.48	
	Pressing	.75	
	Carbon paper	.35	
	Incidentals	1.00	
	Forward	23.19	98.87

page 9 } Expenses paid for Va. Table Co.

Feb. 18	E. H. Hillis	Forward	\$23.19	98.87
2/12	Hotel at Columbia		2.50	
	Breakfast		.75	
	Lunch		.75	
	Supper		.75	
	Four extra meals		3.00	
	Telephone		1.60	
	Incidentals		2.00	
2/13	Hotel at Columbia		2.50	
	Breakfast		.75	
	Lunch		.75	
	Supper		.75	
	Three extra meals		2.25	
	Phone calls		.48	
	Laundry		2.74	
	Incidentals		1.00	
2/14	Hotel at Columbia		2.50	
	Breakfast		.75	
	Lunch		.75	
	Supper		.75	
	Four extra meals		3.00	
	Telephone		.60	

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	Incidentals	2.00	
2/15	Breakfast	.75	
	Lunch	.75	
	Supper	.75	
	R. R. fare Columbia to Jacksonville.	17.83	
	Taxi	.50	
	Telephone	.60	
	Incidentals	1.70	
	Two extra meals	1.50	
	Cleaning and Pressing	1.50	
2/16	Hotel at Jacksonville	3.00	
	Breakfast	.75	
	Lunch	.75	
	Supper	.75	
	Two extra meals	1.50	
	Taxi	.75	
	Telephone	2.72	
	Incidentals	1.85	94.06

## Feb. 21 J. L. Anderson, Expenses inventory

	Atlanta		
2/10	Breakfast	1.10	
	Lunch for two	1.35	
	Supper for two	2.65	
2/11	Breakfast	.70	
	Lunch for two	1.90	
	Supper for two	1.75	
2/12	Breakfast	.75	
	Lunch	1.60	
	Supper	1.55	
	Stamps	.40	
	Taxi	.50	
2/13	Breakfast	.65	
	Lunch for two	1.85	
	Supper	1.80	
	Two extra meals	1.40	
2/14	Breakfast	.80	
	Lunch for two	2.15	
	Supper	1.05	
	Expense, J. L. Zackery	5.00	
2/15	Breakfast	.77	
	Lunch	2.70	
	Forward	32.42	192.93

page 10 } Expenses paid for Va. Table Co.

Feb. 21	J. L. Anderson	Forward	\$32.42	192.93
	2/15	Supper	1.05	
		Porter	.25	
		Baggage	.40	
	2/16	R. R. fare Atlanta to Danville, Va.	14.48	
		Pullman	4.13	
		Baggage	.25	
		Taxi	.25	
		Breakfast	.90	
		Lunch	1.00	
		Supper	1.00	56.13
Feb. 24	R. Fleming			
		Expense to Fredericksburg		7.05
Feb. 24	E. H. Hillis	Expenses, inventory, and accounts recrivable at Jacksonville, Fla.		
	2/17	Hotel at Jacksonville	3.00	
		Breakfast	.75	
		Lunch	.75	
		Supper	1.25	
		Telephone	1.50	
		Incidentals	.85	
	2/18	Hotel at Jacksonville	3.00	
		Breakfast	.75	
		Lunch	.75	
		Supper	1.25	
		Three extra meals	2.25	
		Telephone	1.35	
		Supplies	.75	
		Registered packages	.63	
		Incidentals	.85	
	2/19	Hotel at Jacksonville	3.00	
		Breakfast	.75	
		Lunch	.75	
		Supper	1.25	
		Four extra meals	3.00	
		Pressing	.75	
		Incidentals	.85	
	2/20	Hotel at Jacksonville	3.00	
		Breakfast	.75	
		Lunch	.75	
		Supper	1.25	



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	Two extra meals	1.50	
	Telephone	.64	
	Incidentals	.85	
2/21	Hotel at Jacksonville	3.00	
	Breakfast	.75	
	Lunch	.75	
	Supper	1.25	
	Three extra meals	2.25	
	Laundry	2.33	
	Incidentals	.85	
2/22	Hotel at Jacksonville	3.00	
	Breakfast	.75	
	Lunch	.75	
	Supper	1.25	
	Two extra meals	1.50	
	Pressing	.75	
	Incidentals	.85	
2/23	Hotel at Jacksonville	3.00	
	Breakfast	.75	
	Lunch	.75	
	Supper	1.25	
	Forward	64.55	256.11
page 11 }	Expenses paid for Va. Table Co.		
Feb. 24	E. H. Hillis	Forward	64.55
	Three extra meals	2.25	256.11
	Incidentals	.85	67.65
Feb. 26	C. D. Phillips, expenses, accounts receivable Atlanta		
2/11	Supper	.75	
	R. R. Columbia to Atlanta	8.96	
	Pullman	3.75	
	Taxi	.50	
2/12	Hotel at Atlanta	2.50	
	Breakfast	.60	
	Lunch	.85	
	Supper	1.10	
	Taxi	.50	
	Telephone	1.10	
	Pencils	.30	
	Carbon paper	.40	
2/13	Hotel at Atlanta	2.50	
	Breakfast	.55	
	Lunch	.80	

	Supper for two	2.10	
	Postage	.20	
2/14	Hotel at Atlanta	2.50	
	Breakfast	.45	
	Lunch	.85	
	Supper for two	1.80	
	Telephone	1.25	
2/15	Hotel at Atlanta	2.50	
	Breakfast	.40	
	Lunch	.70	
	Supper	.75	
	R. R. fare Atlanta to Danville	14.48	
	Pullman	4.15	
	Telephone	.48	
2/16	Breakfast	.60	
	Lunch	.55	
	Supper	.85	
	Taxi	.25	
	Telephone	1.10	
	Carbon paper	.60	
	Pencils	.30	
2/17	Hotel at Danville	2.50	
	Breakfast	.35	
	Lunch	.50	
	Supper	1.10	
2/18	Hotel at Danville	2.50	
	Breakfast	.55	
	Lunch	.85	
	Supper	1.10	
	Telephone	.90	
2/19	Hotel at Danville	2.50	
	Breakfast	.50	
	Lunch	.85	
	Supper	1.10	
2/20	Hotel at Danville	2.50	
	Breakfast	.50	
	Lunch	.85	
	Supper	1.10	
	R. R. fare Danville to Richmond, Va.	5.07	
	Pullman	3.00	
	Taxi	.25	
	Telephone	.48	
	Forward	91.07	323.76

page 12 } Expenses paid for Va. Table Co.

Feb. 26	C. D. Phillips	Forward	91.07	323.76
2/21	Breakfast		.40	
	Lunch		.30	
	Supper		1.25	
	R. R. fare Richmond to Columbia, S. C.		12.96	
	Pullman		2.70	
	Taxi		.60	109.28
Feb. 27	J. L. Zackry, Expenses, inventory to Jacksonville			
2/17	Lunch		1.00	
	Supper		1.20	
	R. R. fare Atlanta to Macon		2.00	
	Taxi		1.00	
2/18	Hotel at Macon		3.50	
	Breakfast		.75	
	Lunch		.75	
	Supper		1.25	
	R. R. fare Macon to Jacksonville		12.80	
	Taxi		.50	
2/19	Hotel at Jacksonville		3.50	
	Breakfast		.75	
	Lunch		.85	
	Supper		1.40	
2/20	Hotel at Jacksonville		3.50	
	Breakfast		.75	
	Lunch		.75	
	Supper		1.25	
2/21	Hotel at Jacksonville		3.50	
	Breakfast		.75	
	Lunch		.70	
	Supper		1.30	
	Two extra meals		1.80	
2/22	Hotel at Jacksonville		3.50	
	Breakfast		.75	
	Lunch		.80	
	Supper		1.40	
2/23	Hotel at Jacksonville		3.50	
	Breakfast		.75	
	Lunch		.75	
	Supper		1.25	58.25
Feb. 27	W. E. Kimbrell, Expense, inventory Atlanta and Macon			

2/ 6	Supper	1.80	
	R. R. fare Richmond, Va., to Atlanta, Georgia, for W. E. Kimbrell and J. L. Anderson	51.86	
	Taxi	.60	
	Telegrams	.96	
2/ 7	Breakfast	.70	
	Lunch	.85	
	Supper	1.00	
	Taxi	.50	
	Telegrams	1.20	
	Supplies	.70	
2/ 8	Breakfast	.65	
	Lunch	.80	
	Supper	1.10	
	Taxi	.50	
	Forward	63.22	491.29
page 13 } Expenses paid for Va. Table Co.			
Feb. 27	W. E. Kimbrell	Forward	63.22 491.29
	Telegrams	.95	
2/ 9	Breakfast	1.10	
	Lunch	.80	
	Supper for Three	3.40	
	Taxi	.60	
	Telegrams	.96	
2/10	Breakfast	.85	
	Lunch	1.00	
	Supper for four	4.50	
	Phone and telegrams	2.10	
2/11	Breakfast	.65	
	Lunch	.80	
	Supper	1.10	
	Taxi	.50	
	Telegrams	2.02	
	Entertainment	2.00	
2/12	Breakfast	.60	
	Lunch for two	1.10	
	Supper	.90	
	Telegrams	.48	
2/13	Breakfast	.70	
	Lunch	.75	
	Supper	1.10	
	Telephone	.48	

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	Cleaning and pressing	1.75	
2/14	Breakfast	.80	
	Lunch for two	1.50	
	Supper	1.10	
	Taxi	.40	
2/15	Breakfast	.45	
	Lunch	.90	
	Supper for four	4.60	
	Taxi	.65	
	Telephone	.96	
	Incidentals	1.60	
2/16	Hotel	29.76	
	Breakfast	1.60	
	Lunch	1.00	
	Incidentals	.40	
	Taxi	.65	
	Telegrams	1.80	
	Entertainment for six people	8.40	
2/17	Hotel at Atlanta	59.32	
	Breakfast	.90	
	Lunch	1.00	
	Supper	.85	
	R. R. fare Atlanta to Macon	2.00	
	Baggage	1.50	
	Taxi	.65	
	Telegrams	1.56	
	Telephone	2.60	
2/18	Hotel at Macon	4.75	
	Breakfast	.75	
	Lunch	.75	
	Supper for two	2.00	
	R. R. Macon to Jacksonville	12.85	
	Taxi	.65	
	Telephone	3.48	
	Forward	246.59	491.29

page 14 } Expenses paid for Va. Table Co.

Feb. 27	W. E. Kimbrell	Forward	246.59	491.29
2/19	Breakfast		.85	
	Lunch		.70	
	Supper		1.10	
	Taxi		.45	
	Telephone		1.68	
2/20	Breakfast		.85	

	Lunch	1.00	
	Supper	1.25	
	Telephone	1.35	
	Entertainment	14.00	
2/21	Breakfast	.75	
	Lunch	.90	
	Supper	1.10	
	Taxi	.60	
	Telephone	.60	
2/22	Breakfast	.75	
	Lunch	.80	
	Supper	1.25	
	Telephone	.60	
	Two extra meals	2.00	
2/23	Hotel at Jacksonville	37.28	
	Breakfast	.85	
	Lunch	.75	
	Supper	1.10	
	R. R. fare Jacksonville to Columbia	15.50	
	Taxi	.60	
	Three extra meals	2.85	
	Incidentals	.50	
2/24	Breakfast	.75	
	Lunch	.75	
	Supper	1.00	
	Taxi	.60	
	Telephone	.48	
2/25	Hotel at Columbia	3.00	
	Breakfast	.75	
	Lunch	.75	
	Supper	1.25	
	R. R. fare Columbia to Richmond, Va.	17.42	
	Taxi	.50	
	Telephone	1.20	
	Incidentals	.85	
	Stamps	1.82	369.72
<hr/>			
Mar. 4	E. H. Hillis, Expenses, inventories and accounts receivable Jacksonville and Savannah		
2/24	Hotel at Jacksonville	3.50	
	Breakfast	.75	
	Supper—extras	4.15	

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	R. R. fare Jacksonville to Savannah for E. H. H. and J. L.		
	Zachry	13.84	
	Taxi	1.90	
	Valet	1.00	
	Incidentals	2.05	
2/25	Hotel at Savannah	3.50	
	Breakfast	.75	
	Lunch	.75	
	Supper	1.00	
	Extra meals	1.50	
	Telegrams	2.37	
	Incidentals	1.15	
2/26	Hotel at Savannah	3.50	
	Forward	41.71	861.01
page 15 } Expenses paid for Va. Table Co.			
Mar. 4	E. H. Hillis	Forward	41.71 861.01
	Breakfast	.75	
	Lunch	.75	
	Supper	1.00	
	Extra meals	2.25	
	Telephone	6.00	
	Pressing	.75	
	Incidentals	1.15	
2/27	Hotel at Savannah	3.50	
	Breakfast	.75	
	Lunch	.75	
	Supper	1.00	
	Three extra meals	3.00	
	Incidentals	1.15	
2/28	Hotel at Savannah	3.50	
	Breakfast	.75	
	Lunch	.75	
	Supper	1.00	
	Extra meals	1.50	
	R. R. fare Savannah to Jacksonville	6.92	
	Baggage	.75	
	Taxi for two	1.42	
	Telephone	1.12	
	Laundry	2.71	
	Incidentals	1.15	
3/ 1	Breakfast	.75	

	Lunch	1.85	
	Supper	1.25	
	R. R. fare Jacksonville to Columbia	15.00	
	Taxi	.80	
	Telephone	1.50	
	Incidentals	1.15	
3/ 2	Hotel at Columbia	5.50	
	Breakfast for two	1.50	
	Lunch for three	2.25	
	Supper for four	3.00	
	R. R. fare to Spartanburg	3.40	
	R. R. fare to Greenville	1.15	
	Taxi for two	1.25	
	Registered mail	1.38	
	Incidentals	1.15	128.99
<hr/>			
Mar. 6	H. W. Kimbrell, Expense, accounts receivable at Asheville		
2/24	Breakfast	.90	
	Lunch	1.00	
	Supper	1.25	
	R. R. fare Durham to Spartanburg	8.90	
2/25	Hotel at Spartanburg	3.50	
	Breakfast	.85	
	Lunch	1.10	
	Supper	1.25	
	R. R. fare Spartanburg to Asheville	3.36	
	Taxi for two	1.00	
	Telephone	1.32	
	Carbon paper	.50	
2/26	Hotel at Asheville	4.00	
	Breakfast	.85	
	Lunch for two	2.10	
	Supper	1.20	
	Taxi	.40	
	Telephone	.75	
	Laundry	1.07	990.00
<hr/>			
	Forward	35.35	
page 16 } Expenses paid for Va. Table Co.			
Mar. 6	H. W. Kimbrell Forward	35.35	990.00
	2/27 Hotel at Asheville	4.00	



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	Breakfast	.85	
	Lunch	.90	
	Supper for two	2.05	
	Taxi	.40	
	Postage	.10	
	Pressing	.75	
2/28	Hotel at Asheville	4.00	
	Breakfast	.90	
	Lunch for two	1.80	
	Supper	1.25	
	Taxi	.40	
	Telephone	.36	
3/ 1	Hotel at Asheville	4.00	
	Breakfast	.85	
	Lunch	1.90	
	Supper	1.25	
	Telephone	1.90	
3/ 2	Hotel at Asheville	4.00	
	Breakfast	.85	
	Lunch for two	1.60	
	Supper	1.00	
	R. R. fare Asheville to Green- ville	4.81	
	R. R. fare Greenville to Spar- tanburg	1.45	
	Taxi	.50	
	Telegrams	.90	
	Envelopes	.25	
	Incidentals	2.82	81.19
Mar. 7	J. L. Anderson, Expense, inventory at Danville		
2/ 5	Lunch	.65	
	Supper	1.05	
	Telephone	.25	
	Auto expense	2.93	
2/ 6	Hotel at Richmond, Va.	2.50	
	Breakfast	.55	
	Lunch	.40	
	Supper	1.15	
	Baggage	.25	
2/ 7	Breakfast on train	1.10	
	Lunch	.65	
	Supper	.90	
	Pencils and stamps	.55	

	Baggage	.25	
2/ 8	Breakfast	.85	
	Lunch	.90	
	Supper	1.35	
	E. S. pencils	1.00	
2/ 9	Breakfast	.95	
	Lunch for two	1.50	
	Supper	.80	
	Taxi	.75	
2/17	Hotel at Danville—two days	5.00	
	Breakfast	.80	
	Lunch	1.05	
	Supper	1.25	
2/18	Hotel at Danville	2.50	
	Breakfast	.95	
	Lunch	.85	
	Supper	1.20	
	Pencils and crayons	.45	
	Telegrams	.40	
2/19	Hotel at Danville	2.50	
	Forward	38.23	1,071.19

page 17 } Expenses paid for Va. Table Co.

Mar. 7	J. L. Anderson	Forward	38.23	1,071.19
	Breakfast		.90	
	Lunch		1.00	
	Supper		1.25	
	Telephone		5.55	
2/20	Breakfast		.95	
	Lunch		1.00	
	Supper		1.50	
	R. R. fare Danville to Richmond		5.07	
	Pullman		3.00	
	Baggage		.50	
	Telegram		.40	
	Messenger boy		.40	
2/21	Breakfast		.60	
	Lunch		.50	
	Supper		1.35	
	Baggage		.25	
	Taxi		.75	
	Repairing tires		2.25	
	Gas		1.68	
	5 qts. oil		1.50	

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	Storage	.50	
	1 set chains and adjusters complete	6.50	
2/22	Breakfast	.50	
	Lunch	.75	
	Supper for four	2.15	
	Gas	2.34	
	Oil	.35	
	1 tire and one tube	12.75	
2/23	Lunch for four	2.10	
	Supper for four	2.65	
	12 gal. gas	2.76	
	1 qt. oil	.35	
2/25	Hotel at Greenville	2.50	
	Breakfast	.97	
	Supper for two	1.85	
	Auto expense	2.15	
2/26	Breakfast for two	.94	
	Lunch for two	1.85	
	Supper for two	1.60	
	Auto expense	2.65	
2/27	Breakfast for two	1.45	
	Lunch for two	1.50	
	Supper for two	1.85	
	Auto storage and exp.	2.50	
2/28	Hotel at Greenville	3.85	
	Breakfast	.65	
	Lunch	.72	
	Supper	1.05	
	Auto expense	1.15	
3/ 1	Lunch for four	2.97	
	Supper for four	2.60	
	Express on goods from Wilson	9.41	146.54
Mar. 11	J. L. Zachry, Expense, inventory at Savannah.		
3/ 4	R. R. fare Atlanta to Columbia	12.72	
	Taxi	1.00	
	Telephone, etc.	2.75	
3/ 5	Breakfast	.80	
	Lunch	.75	
	Supper	1.40	
	Taxi	.50	
	Forward	19.92	1,217.73

page 18 } Expenses paid for Va. Table Co.

Mar. 11	J. L. Zachry	Forward	19.92	1,217.73
3/ 6	Hotel at Columbia		3.50	
	Breakfast		.50	
	Lunch		.75	
	Supper		2.65	
	R. R. fare Columbia to Augusta		2.99	
	Taxi		.50	
	Telephone		1.68	
3/ 7	Hotel at Augusta		3.00	
	Breakfast		.60	
	Lunch		.75	
	Supper		1.25	
	Telephone		1.85	
3/ 8	Hotel at Augusta		3.00	
	Breakfast		.50	
	Lunch		.60	
	Supper		1.40	
	R. R. fare Augusta to Columbia		2.99	
	R. R. fare Columbia to Greenville		4.00	
	Taxi		1.00	
	Telephone		1.85	
3/ 9	Hotel at Greenville		3.00	
	Breakfast		.60	
	Lunch		.80	
	Supper		1.35	
	R. R. fare Greenville to Atlanta		7.92	
	Taxi		1.50	
	Telephone		.90	71.35
Mar. 11	J. L. Zachry, Expense, inventory Savannah and Jacksonville			
2/24	Hotel at Jacksonville		3.50	
	Breakfast		.65	
	Lunch		.85	
	Supper		1.40	
	R. R. fare Jacksonville to Savannah		6.75	
2/25	Hotel at Savannah		3.50	
	Breakfast		.50	
	Lunch		.75	
	Supper		1.35	
	Taxi		.50	
	Telephone		1.85	

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2/26	Hotel at Savannah	3.50	
	Breakfast	.60	
	Lunch	.80	
	Supper	1.55	
2/27	Hotel at Savannah	3.50	
	Breakfast	.55	
	Lunch	.75	
	Dinner	1.10	
2/28	Hotel at Savannah	3.50	
	Breakfast	.60	
	Lunch	.65	
	Supper	1.40	
	R. R. fare Savannah to Augusta	8.60	
	Taxi	.50	
3/ 1	Hotel at Augusta	2.00	
	Breakfast	.70	
	Lunch	.75	
	Supper	1.25	
Forward		53.90	1,289.08

page 19 } Expenses paid for Va. Table Co.

Mar. 11	J. L. Zachry	Forward	53.90	1,289.08
		R. R. fare Augusta to Atlanta	9.16	
		Taxi	1.00	
		Telephone	1.50	
3/ 2	Taxi		1.00	
	Telephone		1.00	67.56
Mar. 13	H. W. Kimbrell, Expense, inventory			
	at Asheville			
3/ 3	Supper for three		2.25	
3/ 4	Breakfast		.75	
	Lunch		.85	
	Supper		1.25	
	R. R. fare Spartanburg to Asheville		3.26	
	Taxi		.80	
3/ 5	Hotel at Asheville		4.00	
	Breakfast		.75	
	Lunch		.90	
	Supper		1.25	
	R. R. fare Asheville to Spartanburg		3.26	
	R. R. fare Spartanburg to Durham		8.90	

	Taxi	.65	
3/ 6	Lunch for two	1.80	
	Supper	.75	
	R. R. fare Durham to Danville	2.00	
	R. R. fare return	2.00	
	R. R. fare Durham to Charlotte, N. C.	5.74	
	Telephone	.85	
3/ 7	Hotel at Charlotte	4.00	
	Breakfast	.75	
	Lunch	.90	
	Supper	1.25	
	Telephone	.60	
3/ 8	Hotel at Charlotte	4.00	
	Breakfast	.75	
	Lunch for two	1.90	
	Supper	1.25	
	Telephone	.20	
3/ 9	Hotel at Charlotte	4.00	
	Breakfast	.75	
	Lunch	2.85	
	Supper	.90	
	Laundry	1.07	67.18
<hr/>			
Mar. 14	E. H. Hillis, Expense, inventory at New Orleans		
3/ 3	Hotel at Charlotte	3.00	
	Breakfast	.90	
	Supper	1.75	
	R. R. fare Greenville to Charlotte	3.84	
	Taxi for two	1.35	
	Telephone	2.65	
	Incidentals	1.00	
3/ 4	Breakfast	.75	
	Lunch	2.10	
	Supper	4.55	
	R. R. fare Charlotte, to New Orleans	38.02	
	Taxi	.75	
	Incidentals	2.25	
3/ 5	Hotel at New Orleans	3.50	
	Meals	4.00	
	Taxi	.75	
	Incidentals	1.51	

3/ 6 Hotel at New Orleans		3.50	
Forward		76.17	1,423.82
page 20 } Expenses paid for Va. Table Co.			
Mar. 14	E. H. Hillis	Forward	76.17 1,423.82
	Meals	4.00	
	Taxi	.75	
	Incidentals	1.51	
3/ 7	Hotel at New Orleans	3.50	
	Meals	4.00	
	Taxi	.75	
	Incidentals	1.51	
3/ 8	Hotel at New Orleans	3.50	
	Meals	4.00	
	Taxi	.75	
	Laundry	3.00	
	Incidentals	1.51	
3/ 9	Hotel at New Orleans	3.50	
	Meals	4.00	
	Taxi	.75	
	Incidentals	1.50	114.70
Mar. 18	E. H. Hillis, Expenses, inventory		
	New O.		
3/10	Hotel at New Orleans	3.50	
	Meals	3.40	
	Auto hire	.75	
	Incidentals	1.50	
3/11	Hotel at New Orleans	3.50	
	Meals	3.40	
	Auto hire	.75	
	Incidentals	1.60	
3/12	Hotel at New Orleans	3.50	
	Meals	3.40	
	Telegrams, etc.	12.38	
	Auto hire	.75	
	Laundry	1.74	
	Pressing	1.50	
	Incidentals	1.60	
3/13	Hotel at New Orleans	3.50	
	Meals	3.40	
	Auto hire	.75	
	Incidentals	1.60	
3/14	Hotel at New Orleans	3.50	
	Meals	3.40	

	Telegrams	.60	
	Auto hire	.75	
	Incidentals	1.60	
3/15	Meals	3.40	
	R. R. fare New Orleans to Richmond	50.95	
	Pullman Roanoke to Richmond	3.75	
	Telegrams	2.28	
	Auto hire	.75	
	Valet	.50	
	Incidentals	1.60	
3/16	Meals	3.60	
	Incidentals	6.10	135.30
Mar. 20	J. L. Zachry, Expense, inventory Greenville and Charlotte		
3/10	R. R. fare Atlanta to Greenville	8.54	
	Taxi	1.00	
3/11	Breakfast	.75	
	Lunch	1.00	
	Supper	1.60	
	Taxi	.75	
	Telephone	.90	
	Telephone	2.45	
	Forward	16.99	1,673.82
page 21	{ Expenses paid for Va. Table Co.		
Mar. 20	J. L. Zachry Forward	16.99	1,673.82
3/12	Breakfast	.70	
	Lunch	1.00	
	Supper for two	2.65	
	Hotel at Greenville	3.50	
	Telephone	.90	
3/13	Breakfast	.60	
	Lunch	.90	
	Supper	1.35	
	Hotel at Greenville	3.50	
	Telephone	2.10	
3/14	Breakfast	.65	
	Lunch	1.00	
	Supper	1.40	
	Hotel at Greenville	3.50	
	R. R. fare Greenville to Charlotte	4.65	
	Taxi	1.00	



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3/15	Breakfast	.50	
	Lunch	.90	
	Supper	1.55	
	Hotel at Charlotte	3.50	
3/16	Breakfast	.60	
	Lunch	.90	
	Supper	1.25	
	Hotel at Charlotte	3.50	59.09
<hr/>			
Mar. 20	H. W. Kimbrell, Expense, accounts		
	receivable at Charlotte		
3/10	Hotel at Charlotte	4.00	
	Breakfast	.75	
	Lunch	1.00	
	Supper	1.25	
	Telephone	.25	
3/11	Hotel at Charlotte	4.00	
	Breakfast	.80	
	Lunch for three	2.25	
	Supper	.90	
	Telegraph	.87	
3/12	Hotel at Charlotte	4.00	
	Breakfast	.85	
	Lunch	.90	
	Supper	1.25	
	Telegram	.68	
3/13	Hotel at Charlotte	4.00	
	Breakfast	.90	
	Lunch for two	1.85	
	Supper	1.25	
	Postage	.12	
	Laundry	.77	
3/14	Hotel at Charlotte	4.00	
	Breakfast	.85	
	Lunch	1.10	
	Supper	1.25	
	Taxi	.40	
	Hat cleaned	.75	
3/15	Hotel at Charlotte	4.00	
	Breakfast	.80	
	Lunch	.60	
	Supper	.95	
	Pressing and cleaning	1.50	
3/16	Hotel at Charlotte	4.00	
	Breakfast	.75	

	Supper for two	2.50	
	Forward	56.09	1,732.91
page 22	} Expenses paid for Va. Table Co.		
Mar. 20	H. W. Kimbrell Forward	56.09	1,732.91
	Postage	.20	
	Telegram	.75	57.04
Mar. 26	W. E. Kimbrell, Expense, inventory—		
	New Orleans, Atlanta, Macon,		
	Jacksonville		
2/27	Breakfast	.75	
	Lunch	.75	
	Supper	1.25	
	R. R. fare Richmond to Charlotte	13.96	
	R. R. fare Charlotte, to Statesville	1.75	
	Telegram	.94	
3/ 1	Hotel at Statesville	3.00	
	Breakfast	.60	
	Lunch	.85	
	Supper	1.05	
	R. R. fare Statesville to Columbia	5.75	
	Taxi	.50	
	Telegram	.60	
	Telephone	.60	
3/ 2	Hotel at Columbia	3.00	
	Breakfast	.75	
	Lunch for three	2.05	
	Supper	.85	
	R. R. fare Columbia to Greenville	4.00	
	R. R. fare Greenville to Atlanta	9.84	
	Telegrams	1.50	
	Telephone	.83	
3/ 3	Hotel at Atlanta	2.00	
	Breakfast	.75	
	Lunch	1.10	
	Supper	1.25	
	R. R. fare Atlanta to Columbia	12.96	
	Baggage	.40	
	Taxi	1.20	
	Telephone	7.75	

## Supreme Court of Appeals of Virginia.

3/ 4	Hotel at Columbia	3.00	
	Breakfast	.70	
	Lunch	1.00	
	Supper	1.90	
	R. R. fare Columbia to Spar-		
	tanburg	3.40	
	R. R. fare Spartanburg to		
	New O.	34.81	
	Taxi	.60	
	Telephones	2.61	
3/ 5	Breakfast for two	2.20	
	Lunch	.75	
	Supper	1.25	
	Taxi	1.10	
	Telephone	.60	
	Entertaining	3.50	
3/ 6	Breakfast	.70	
	Lunch	.90	
	Supper	2.05	
	Taxi	.60	
	Telephone	.60	
3/ 7	Breakfast	.75	
	Lunch	.70	
	Supper	1.50	
	Taxi	.55	
	Telegrams	1.20	
3/ 8	Breakfast	.70	
	Lunch	.75	
	Telegrams	1.60	
3/ 9	Breakfast	.90	
	Forward	152.70	1,789.95

page 23 } Expenses paid for Va. Table Co.

Mar. 26	W. E. Kimbrell	Forward	152.70	1,789.95
3/ 9	Breakfast		.90	
	Lunch		1.00	
	Supper		1.50	
	Taxi		.65	
	Phones		.60	
3/10	Breakfast		.85	
	Lunch		1.50	
	Supper		1.25	
	Taxi		.65	
	Telephone		1.20	

3/11	Breakfast	.70
	Supper	1.50
	Taxi	.75
	Telephone	1.80
	Extra entertaining	3.00
3/12	Breakfast	.80
	Lunch	1.25
	Supper	1.10
	Taxi	.75
	Telephone	1.80
3/13	Breakfast	.75
	Supper	1.50
	Taxi	.70
	Telephone	.60
3/14	Hotel at New Orleans	59.23
	Breakfast	.75
	Lunch	.70
	Supper—four extras	6.50
	Taxi	1.90
	Telegrams	2.40
	R. R. fare New Orleans to Charlotte	38.74
3/15	Breakfast	1.40
	Lunch	1.45
	Supper	2.25
3/16	Taxi	.65
	R. R. fare to Columbia—Jones	3.40
	Breakfast	.70
	Lunch	.90
	Lunch—three extras	1.80
	Supper	1.00
	Telegram	1.76
3/17	Hotel	3.50
	Breakfast	.65
	Lunch	1.25
	Supper	1.70
	Telegrams	2.16
	Taxi	.65
	Bus fare—Greenville	4.00
3/18	Hotel	3.00
	Breakfast	.80
	Telegrams	1.20
	Bus fare to Augusta	3.00
	Lunch for two	1.40

## Supreme Court of Appeals of Virginia.

	Bus fare for two—C. D. Peavey		
	Columbia and return	6.00	
	Supper	1.80	
3/19	Hotel	3.00	
	Breakfast	.80	
	Forward	340.24	1,789.95
page 24	Expenses paid for Va. Table Co.		
Mar. 26	W. E. Kimbrell	Forward	340.24 1,789.95
	Telephone	.85	
	Telegrams	.72	
	Lunch	1.00	
	Supplies	.80	
	Supper	.95	
3/20	Hotel	3.00	
	Breakfast	.70	
	Bus fare to Columbia	3.00	
	Taxi	.50	
	Lunch	.60	
	Supper for four	4.50	
	Telegrams	.60	
	Telegrams	.72	
	Telegram	.30	
3/21	Telegram	.48	
	Breakfast for two	1.40	
	Lunch	1.70	
	Supper	1.10	
	Hotel and phone	6.15	
	Bus fare	3.00	
	Telegrams	.60	
3/22	Hotel	3.00	
	Breakfast	.65	
	Lunch	1.10	
	Supper	.85	
	R. R. fare to Richmond	17.46	
	Taxi	.50	
	Telegram	.48	
	Telephone	.85	
3/23	Breakfast	1.85	
	Telegram	.48	
	R. R. fare—C. D. Peavy—		
	Macon to Augusta and return	8.40	
	Hotel	3.00	
	Eats	4.70	416.23

Mar. 26	Rives Fleming, Expense to Fred- ericksburg		7.80
Mar. 26	C. D. Phillips, Expense, accounts re- ceivable at Greenville		
3/11	Breakfast	.60	
	Bus fare to Greenville	4.00	
	Taxi	.25	
	Supper for six	7.50	
3/12	Breakfast	.55	
	Telephone	.90	
	Telegram	.67	
	Telephone	.85	
	Hotel at Greenville	3.50	
	Gas and oil	4.51	
	Supper	1.00	24.33
Mar. 27	J. L. Zachry, Expense Charlotte, and Augusta		
3/17	Breakfast	.50	
	Lunch	.75	
	Supper	1.50	
	Hotel at Charlotte	3.50	
	Telegrams	2.20	
3/18	Breakfast	.60	
	Lunch	.70	
	Supper	1.45	
	Hotel at Charlotte	3.50	
	Forward	14.70	2,238.31
page 25	{ Expenses paid for Va. Table Co.		
Mar. 27	J. L. Zachry Forward	14.70	2,238.31
3/19	Breakfast	.50	
	Lunch	.75	
	Supper	1.50	
	Hotel	3.50	
	R. R. fare Charlotte, to Danville	5.50	
	R. R. fare Danville to Augusta	15.01	
	Taxi	1.00	
3/20	Breakfast	1.20	
	Lunch	.60	
	Supper	1.25	
	Taxi	.50	
3/21	Breakfast	.50	
	Lunch	.70	
	Supper	1.30	

## Supreme Court of Appeals of Virginia.

	Hotel at Augusta	3.00	
	R. R. fare Augusta to Macon	7.50	
	Taxi	.50	
	Telephone	2.25	
3/22	Breakfast	.60	
	Lunch	.75	
	Supper	1.10	
	Hotel at Macon	3.00	
	Taxi	.50	
3/23	Breakfast	.60	
	Lunch	.75	
	Supper—four extras	4.05	
	Hotel at Macon	3.00	76.11

## Mar. 27 H. W. Kimbrell, Expense, Inventory

	Macon	
3/17	Breakfast	.90
	Lunch	1.10
	Supper for two	2.50
	R. R. fare to Charlotte	3.45
	R. R. fare to Spartanburg	4.00
	Telephone	.60
3/18	Breakfast	.75
	Lunch	.75
	Supper	.75
	Hotel at Spartanburg	3.00
	Postage	.25
	Laundry	1.15
	Pressing	.75
3/19	Breakfast	.85
	Lunch	.90
	Supper	1.00
	Hotel at Spartanburg	3.00
	Telephone	.60
3/20	Breakfast	.75
	Lunch	1.50
	Supper	1.25
	Hotel at Spartanburg	3.00
	R. R. fare Spartanburg to Macon	12.78
	Taxi	.50
	Telephone	1.45
3/21	Breakfast	.85
	Lunch for two	2.50
	Supper	1.25
	Hotel at Macon	3.50

	Postage		.20	
	Telephone		.60	
		Forward	56.43	2,314.42
page 26	} Expenses paid for Va. Table Co.			
Mar. 27	H. W. Kimbrell	Forward	56.43	2,314.42
	3/22 Breakfast		.80	
	Lunch		1.10	
	Supper		1.25	
	Hotel at Macon		3.50	
	Telephone		.60	
	Pressing		.75	
	3/23 Breakfast		.85	
	Lunch		.90	
	Supper		1.25	
	Hotel at Macon		3.50	
	Laundry		.75	71.68
Mar. 28	H. W. Kimbrell, Expense, inventory			
	Macon			
	3/24 Breakfast		.75	
	Lunch		1.10	
	Supper		1.25	
	Hotel at Macon		3.50	
	R. R. fare Macon to Atlanta		2.00	
	Taxi		.50	
	Telephone		.70	
	1 Columnar pad		.60	
	3/25 Breakfast		.75	
	Lunch		1.50	
	Supper		1.25	
	Hotel at Atlanta		4.00	
	R. R. fare Atlanta to Spartan-			
	burg		10.71	
	Taxi		.40	
	Telephone		1.20	
	2/26 Supper		1.50	
	R. R. fare Spartanburg to Rich-			
	mond		17.52	
	Postage		.84	50.07
Apr. 16	E. H. Hillis, Expense Baltimore ad-			
	vertising			
	4/ 7 Hotel at Baltimore		4.00	
	Supper		.45	



## Supreme Court of Appeals of Virginia.

	R. R. fare Richmond to Baltimore	6.77	
	Taxi	.65	
	Incidentals	1.00	
4/ 8	Hotel at Baltimore	4.00	
	Breakfast	.75	
	Lunch for two	2.10	
	Supper for four	3.10	
	Telephone	.36	
	Incidentals	1.00	
4/ 9	Breakfast	.75	
	Lunch	1.20	
	R. R. fare Baltimore to Richmond	6.77	
	Taxi	.85	
	Telephone	.36	
	Incidentals	1.00	35.11
Apr. 20	W. E. Kimbrell and J. L. Zachry reference stores Tenn. and Ala.		
3/25	R. R. fare Baltimore to Washington	2.85	
	Supper	1.15	
	Hotel at Baltimore	4.40	
3/26	Taxi	.85	
	Three meals	3.40	
	Forward	12.65	2,471.28
page 27	{ Expenses paid for Va. Table Co.		
Apr. 20	W. E. Kimbrell and J. L. Zachry		
	Forward	12.65	2,471.28
	Telephone	1.80	
3/27	Hotel	8.60	
	Breakfast	.85	
	Taxi	.85	
	R. R. fare Baltimore to Washington	1.45	
	R. R. fare to Fredericksburg	1.75	
	Lunch	.70	
	Bus fare to Richmond	2.00	
	Baggage ck.	.40	
	Taxi	.45	
3/28	R. R. fare to Spartanburg	16.76	
3/29	Breakfast	1.45	
	Lunch	.80	

	Supper	1.25
	R. R. fare Atlanta	12.85
	Telegrams	1.08
3/30	Breakfast	.75
	Lunch	.80
	Supper	1.65
3/31	Breakfast	.75
	Lunch for three	3.25
	Hotel	13.60
	Telephone	1.48
	R. R. fare to Knoxville	16.78
	Supper	1.85
4/ 1	Breakfast	.95
	Taxi	.50
	Bus	1.75
	Lunch	.80
	Supper	.85
4/ 2	Hotel	3.00
	Telegrams	1.38
	Breakfast	.90
	Bus	5.00
	Lunch	.75
	Bus	3.75
	Supper	1.10
4/ 3	Breakfast	.75
	Hotel	3.00
	Lunch	.85
	R. R. fare Knoxville to Memphis	20.80
	Taxi	1.75
	Telegrams	1.20
	Supper	1.75
4/ 4	Taxi	.60
	Telegram	2.40
	Breakfast	.85
	Hotel	3.00
	Taxi	.75
	R. R. fare to Birmingham	14.87
	Lunch	.85
	Supper	1.50
	Baggage ck.	.40
	Telegrams	1.20
4/ 5	Hotel	2.45
	Taxi	1.23
	Telegrams	1.80

Forward	189.33	2,471.28
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page 28 } Expenses paid for Va. Table Co.

Apr. 20 W. E. Kimbrell and

	J. L. Zachry	Forward	189.33	2,471.28
	Breakfast		.90	
	Lunch		1.10	
	Supper		1.25	
	R. R. fare Atlanta		10.75	
	Taxi		.65	
4/ 6	Taxi		.70	
	Breakfast		.70	
	Telegram		.48	
	Telephone		1.50	
	Lunch for three		2.85	
	Taxi		.55	
	R. R. fare to Columbia		12.76	
	Hotel		3.00	
	Telephone calls		4.70	
4/ 7	Breakfast		1.10	
	Taxi		.60	
	Telephone		2.35	
	Lunch		.80	
	Supper		1.10	
4/ 8	Hotel		3.00	
	Taxi		.50	
	Breakfast		1.10	
	R. R. fare to Spartanburg		3.40	
	R. R. fare to Johnson City		7.90	
	R. R. fare to Bristol		.90	
	R. R. fare to Marion		1.61	
	Lunch		1.50	
4/ 9	Breakfast		.85	
4/10	Telephone		.96	
	Breakfast		.85	
	Lunch		.90	
	Supper		1.50	
	Hotel at Marion		6.50	
	R. R. fare Bristol to Knoxville		3.75	
	Taxi		.70	
	Telephone		1.68	
	Laundry		2.35	
4/11	Hotel		3.00	
	Phone		3.50	
	Telephone		.60	
	Breakfast		.80	

	Lunch	.90	
	Taxi	.70	
	R. R. fare to Memphis	20.55	
	Supper	2.10	
4/12	Taxi	.85	
	Breakfast	.90	
	Telegram	1.80	
	Lunch	1.10	
	R. R. fare to Birmingham	12.87	
	Taxi	.60	
	Supper	1.75	
	Hotel	3.00	
4/13	Breakfast	.85	
	Lunch	.75	
	Forward	333.74	2,471.28

page 29 } Expenses paid for Va. Table Co.

Apr. 20	W. E. Kimbrell and		
	J. L. Zachry	Forward	333.74 2,471.28
	Taxi	.60	
	Hotel	2.00	
	R. R. fare to Atlanta	7.13	
	Supper	1.75	
	Taxi	.50	
4/14	Breakfast	.75	
	Telephone	1.68	
	Lunch	1.50	
	Supper	1.10	
	R. R. fare to Greenville	8.74	
4/15	Taxi	.50	
	Taxi	.50	
	Telegram	1.38	
	Breakfast	.75	
	Lunch for three	2.45	
	Bus to Columbia	4.00	
	Parcel post	.20	
	Hotel	7.85	
4/16	R. R. fare to Charlotte	3.40	
	Hotel	2.50	
	Taxi for two	1.00	
	Breakfast	.60	
	Lunch	.85	
	Supper	.95	
	R. R. fare to Richmond	13.85	

## Supreme Court of Appeals of Virginia.

	Phone	1.70	
	Telegram	.60	
	J. L. Zachry, Expense		
3/24	Hotel at Macon	3.50	
	Meals	2.85	
	R. R. fare Macon to Atlanta	2.00	
	Taxi	.50	
3/31	R. R. fare Atlanta to Charlotte	13.22	
4/ 1	Meals	3.25	
4/ 2	Hotel at Marion, Va.	2.75	
	Meals	2.00	
	Telegrams	1.92	
	R. R. fare Bristol to Knoxville	3.75	
4/ 3	Hotel at Knoxville	2.50	
	Meals	3.25	
	Taxi	.50	
	R. R. fare Knoxville to Memphis	20.55	
4/ 4	Hotel at Memphis	2.50	
	Meals	2.55	
	Taxi	.50	
	R. R. fare Memphis to Birmingham	12.87	
4/ 5	Meals	2.30	
	R. R. fare Birmingham to Atlanta	10.00	
	Taxi	.50	
4/22	R. R. fare Atlanta to Knoxville	8.78	
	Meals	1.50	
	Taxi	1.00	
4/23	Hotel at Knoxville	3.00	
	Meals	3.40	
	R. R. fare Knoxville to Memphis	20.55	
	Taxi	.75	
4/24	Meals	3.00	
	R. R. fare Memphis to Birmingham	12.87	
	Forward	551.18	2,471.28

page 30 } Expenses paid for Va. Table Co.

Apr. 20	J. L. Zachry	Forward	551.18	2,471.28
4/25	Meals		3.20	
	Taxi		.50	
	R. R. fare Birmingham to Atlanta		7.13	52.016

Apr. 29	H. Murray, Lynchburg and Danville analyzing cash disbursements		
4/25	R. R. fare Richmond to Lynch- burg	5.26	
	Pullman	3.00	
4/26	Hotel at Danville	3.00	
	Breakfast	.75	
	Lunch	.90	
	Supper	1.25	
	R. R. fare Lynchburg to Dan- ville	2.28	
	Taxi	.85	
	Telephone	.60	
	Baggage ck.	.30	
	Tips and miscellaneous	.50	
4/27	Breakfast	.60	
	Lunch	1.00	
	R. R. fare Danville to Richmond	5.07	
	Taxi	.25	
	Telephone	.30	
	Tips and miscel	.75	26.66
May 11	Telegrams		12.95
May 20	W. E. Kimbrell, Tenn. and Ala. stores		
4/21	Breakfast	1.90	
	Lunch	.90	
	Supper	1.10	
	R. R. fare Washington to Knox- ville	24.10	
	Taxi	.60	
	Telephone	3.20	
4/22	Hotel	9.70	
	Breakfast	.80	
	Lunch for two	1.90	
	Supper	2.00	
	R. R. fare Knoxville to Memphis	20.55	
	Baggage ck.	.20	
	Taxi	.70	
	Telephone	2.05	
	Incidentals	1.90	
4/23	Hotel at Memphis	5.25	
	Breakfast	.85	
	Lunch for four	4.50	
	Supper	1.25	
	R. R. fare Memphis to Nashville	12.87	

## Supreme Court of Appeals of Virginia.

	Baggage	.20	
	Taxi	.50	
	Telephone	1.67	
	Tips	.95	
4/24	Hotel	2.00	
	Breakfast	1.10	
	Lunch	.90	
	R. R. fare Nashville to Knoxville	12.07	
	Taxi	.50	
	Telegram	1.80	
	Telephone to Nashville	1.20	
	Telephone to Newark	8.85	
	Telephone to Memphis	2.45	
4/25	Breakfast	1.20	
	Forward	131.71	3,072.90

page 31 } Expenses paid for Va. Table Co.

May 20	W. E. Kimbrell	Forward	131.71	3,072.90
	Lunch		.75	
	Supper		1.25	
	Taxi		.50	
	Tips		1.00	
4/26	Hotel at Knoxville		3.95	
	Breakfast		.75	
	Lunch for three		2.40	
	Supper		1.10	
	R. R. fare Knoxville to Asheville		5.85	
	Taxi		.40	
	Telephone		2.80	
4/27	Breakfast		.75	
	Lunch		.85	
	Supper		1.10	
	R. R. fare Statesville to Charlotte		1.75	
	R. R. fare Charlotte to Columbia		4.00	
	Taxi		.50	
	Telegrams		.96	
4/28	Hotel at Columbia		3.00	
	Breakfast		.65	
	Lunch		.75	
	Supper		1.05	
4/29	Hotel at Columbia		3.00	
	Breakfast		.65	

	Lunch	.90	
	Supper	1.15	
	Telephone	1.20	
4/30	Hotel at Charlotte	3.00	
	Breakfast	.65	
	Lunch	.75	
	Supper	1.25	
	R. R. fare Columbia to Charlotte	4.00	
	Telephone	1.56	
4/31	Hotel at Charlotte	3.00	
	Breakfast	.80	
	Lunch	.95	
	Laundry	2.34	
5/ 6	Breakfast	.65	
	Supper	1.95	
	Telegrams	.96	
	Tips	.40	
	Gas and oil Richmond to Raleigh	2.90	
5/ 7	Hotel at Raleigh	3.96	
	Breakfast	.65	
	Lunch	.90	
	Supper	1.25	
	Three extra meals	2.70	
	Gas and auto equipment to Durham	6.88	
5/ 8	Hotel at Durham	2.50	
	Lunch	.75	
	Supper	1.00	
	Telegram	.48	
	Telephone	.85	
	Pressing	.75	
	Ferry	.50	
5/ 9	Hotel at Raleigh	3.00	
	Auto expense	2.08	
	Breakfast	.65	
	Lunch	.70	
	Supper	.95	
	Telephone	1.65	
	Auto expense to Raleigh	2.34	
	Forward	234.42	3,072.90

page 32 } Expenses paid for Va. Table Co.

May 20 W. E. Kimbrell Forward 234.42 3,072.90



5/10	Hotel at Raleigh	4.55	
	Breakfast	.65	239.62
June 28	W. E. Kimbrell, Expense Atlanta and		
	Macon	1.89	
6/ 5	Gas—Atlantic to Macon	1.89	
	Gas and oil	1.78	
	Hotel	2.50	
	Breakfast	.65	
	Lunch	.80	
	Supper	.95	
	Tire and tube	11.05	
	Telegram	.60	
	Telegram	.48	
6/ 6	Hotel at Macon	2.50	
	Breakfast	.65	
	Lunch	.50	
	Supper	1.10	
	Telegrams	.96	
	Incidentals	.95	
6/ 7	Atlanta dnd Macon		
	Telephone	1.60	
	Telegram	.60	
	Hotel	3.00	
	Breakfast	.50	
	Lunch	.80	
	Supper for two	2.40	
	Telegram	.48	
	Tips	.40	
6/ 8	Hotel	3.00	
	Breakfast	.60	
	Telegram	.60	
	Lunch	1.10	
	Gas and oil	2.88	
	Storage	3.00	
	Laundry	1.40	
	Oil	.25	
	Supper	1.10	
6/ 9	Hotel	3.00	
	Breakfast	.70	
	Lunch	.65	
	Supper	1.50	
	Telegram	.60	
6/10	Hotel	3.00	
	Breakfast for two	1.05	

	Lunch	.90	
	Telegram	1.08	
	Storage for car	1.50	
	Telephone	9.65	
	Phoning reports	.60	
	Gas and oil	2.64	
	Gas and oil	1.84	
	Supper for two	1.70	
6/11	Hotel	2.50	
	Breakfast	.65	
	Gas and oil changed	3.50	
	Lunch	.75	
	Supper	1.15	
	Puncture	.25	
	Gas	2.16	92.44
	Forward		3,404.96

page 33 } Expenses paid for Va. Table Co.

July 24	R. Fleming, Expense to Marion	RForward	3,404.96
6/20	R. R. fare to Marion	14.76	
	Tips	.25	
	Breakfast	1.35	
	Tip	.25	
	Tip	.25	
	Lunch	1.15	
	Tip	.75	
	Taxi	1.20	
	R. R. fare Marion to Richmond	14.76	
	Incidentals	1.28	36.00
Aug. 9	H. Murray and W. E. Kimbrell, Expense to Baltimore, regarding inventories Expense to Baltimore and return July 31, and August 1	20.88	
	Servicing car	5.90	26.78
Aug. 14	E. H. Hillis, Expense, accounts receivable, and inventory—Macon		
8/ 7	Lunch	.80	
	R. R. fare Richmond to Atlanta	27.93	
8/ 8	Hotel at Atlanta	3.50	
	Breakfast	1.60	
	Lunch	.85	
	Supper	1.65	
	R. R. fare Atlanta to Macon	3.00	
	Taxi	.50	

## Supreme Court of Appeals of Virginia.

	Incidentals	.79	
8/ 9	Hotel at Macon	3.50	
	Breakfast	.85	
	Lunch	1.65	
	Supper	2.20	
	Telephone	.60	
	Incidentals	.96	
8/10	Hotel at Macon	3.50	
	Breakfast	.85	
	Lunch for three	2.40	
	Supper for two	1.20	
	Telephone	.60	
	Pressing	.75	
	Incidentals	.96	60.64
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Aug. 16	E. H. Hillis, Expense, accounts re-		
	ceivable, and inventory at Macon		
8/11	Hotel at Macon	3.50	
	Breakfast	.75	
	Lunch	1.10	
	Supper	1.35	
	Telephone	.60	
	Incidentals	.85	
	Supplies	1.45	
8/12	Hotel at Macon	3.50	
	Breakfast	.85	
	Lunch for two	1.95	
	Supper for two	2.45	
	Telephone	1.20	
	Carbon paper	.25	
	Incidentals	1.80	
8/13	Breakfast	.85	
	Lunch	1.75	
	Supper	1.35	
	R. R. fare Macon to Atlanta	2.00	
	R. R. fare Atlanta to Greenville	9.29	
	Taxi	.50	
		<hr/>	
	Forward	37.34	3,528.38
<hr/>			
page 34	} Expenses paid for Va. Table Co.		
Aug. 16	E. H. Hillis	Forward	37.34 3,528.38
	Laundry	1.84	
	Pressing	1.50	
	Sealing wax and registered mail	1.90	
	Incidentals	.85	
8/14	Hotel at Spartanburg	3.00	
	Breakfast	.80	
	Lunch for three	2.05	

	R. R. fare Greenville to Spartanburg	1.14	
	R. R. fare Spartanburg to Greensboro	9.46	
	Taxi	1.14	
	Telephone	1.80	
	Incidentals	1.10	
8/15	Breakfast	.80	
	Lunch	1.75	
	Supper	1.90	
	R. R. fare Greensboro to Raleigh	2.93	
	R. R. fare Raleigh to Durham	1.00	
	R. R. fare Durham to Greensboro	2.00	
	R. R. fare Greensboro to Richmond	10.56	
	Taxis	1.35	
	Telephone	.60	
	Incidentals	1.80	88.61
<hr/>			
Aug. 16	W. E. Kimbrell, Expense, inventory at New Orleans		
8/ 1	Hotel—Baltimore	4.00	
	Supper	2.00	
	Breakfast	1.50	
	Lunch	1.85	
	Telephone	1.20	
8/ 2	R. R. fare Richmond to Charlotte	13.86	
8/ 3	R. R. fare	4.00	
	Breakfast	.65	
	Lunch	.80	
	Supper	1.10	
8/ 4	R. R. fare	3.50	
	R. R. fare New Orleans	34.82	
	Hotel at New Orleans	3.00	
	Breakfast	.65	
	Taxi	.50	
	Telegram	.60	
	Lunch	1.50	
	Supper	1.75	
8/ 5	Breakfast	1.50	
	Taxi	.65	
	Lunch	.65	
	Dinner	1.50	
	Telegram	1.20	
8/ 6	Breakfast	.85	
	Lunch	.70	
	Supper	1.10	

## Supreme Court of Appeals of Virginia.

	Sandwich	.40	
8/ 7	Tips	.80	
	Breakfast	.75	
	Lunch	.90	
	Taxi	.50	
8/ 8	Telegram	.60	
	Lunch	1.00	
8/ 9	Telegram	.60	
	Supper for four	6.00	
	Forward	96.98	3,616.99

page 35 } Expenses paid for Va. Table Co.

Aug. 16	W. E. Kimbrell	Forward	96.98	3,616.99
8/10	Lunch		1.25	
	Lunch—extras		1.40	
	Taxi		.65	
	Supper for two		2.25	
8/11	Taxi		.60	
	Lunch		1.00	
	Telegram		1.20	
	Tips		.80	
	Hotel bill at New Orleans		40.62	
	Telegram		1.90	
	Telegram		.60	
8/12	Lunch		.85	
	Supper		1.50	
8/13	Supper		1.50	
	Telegram		.60	
	Taxi		1.00	
	Tips		.70	
	Lunch		.90	
	Hotel		10.04	
	R. R. fare New Orleans to Charlotte		34.82	
8/14	Breakfast		1.95	
	Lunch		1.75	
	Supper for four		3.75	
	R. R. fare—Columbia		4.15	
	Taxi		.50	
	Telephone		.85	
8/15	Hotel		2.50	
	Breakfast for two		.75	
	Lunch for two		1.70	
	R. R. fare to Richmond		12.94	
	Supper		2.25	
	Pullman		3.75	
	Telegram		.60	238.60

Aug. 31	W. E. Kimbrell, Expense—New Orleans and Atlanta		
8/16	R. R. fare Richmond to Charlotte	13.96	
8/17	Breakfast	.80	
	Telegram	.48	
	Lunch	.75	
	R. R. fare	4.00	
	Supper	1.10	
	R. R. fare to Atlanta	12.96	
8/18	Breakfast	.65	
	Lunch	1.00	
	Supper	1.10	
	Telegram	1.60	
	Telephone	.85	
	Taxi	.60	
	Baggage check	.20	
8/19	Breakfast	.75	
	Lunch	.80	
	Telegrams	.60	
	Telegrams	1.56	
	Supper	1.20	
	Incidentals	1.20	
8/20	Breakfast	.75	
	Lunch	.70	
	Supper for two	2.20	
	Forward	49.81	3,855.59
page 36 }	Expenses paid for Va. Table Co.		
Aug. 31	W. E. Kimbrell	Forward	49.81 3,855.59
	Taxi	.40	
8/21	Breakfast	.75	
	Lunch	.85	
	Supper	1.20	
	Telegram	1.20	
8/22	Breakfast	.75	
	Stationery	.65	
	Lunch for two	1.50	
	Supper for two	2.20	
	Taxi	.30	
8/23	Breakfast	.75	
	Lunch	.85	
	Supper	1.10	
	Telegrams	1.20	
	Taxi	.30	
8/24	Breakfast	.75	
	Lunch	.75	
	Dinner for two	2.20	
	Taxi	.40	

## Supreme Court of Appeals of Virginia.

	Telephone	.95	
	Incidentals	1.20	
8/25	Breakfast	.75	
	Lunch	1.10	
	Supper for two	3.20	
	Telegrams	.48	
	Telegram	.60	
	Stationery	.70	
8/26	Breakfast	.75	
	Lunch	.75	
	Supper	1.10	
	Taxi	.20	
8/27	R. R. fare Atlanta to Columbia	12.96	
	Breakfast	.75	
	Lunch	.80	
	Dinner	.95	
	Telephone	.48	
	Hotel bill at Atlanta	42.48	
	Taxi	.50	
8/28	Hotel at Columbia	3.00	
	Taxi	.50	
	Postage	.42	
	R. R. fare Columbia to Raleigh	7.30	
	Breakfast	1.25	
	Lunch	.80	
	Supper for three	2.35	
	Telegram	.48	
	Telegram	.60	
	R. R. fare Raleigh to Richmond	5.50	
	Pullman	3.00	
	Midnight lunch	.40	164.21
Oct. 12	Rives Fleming, Expense at Fred-		
	ericksburg		
	Gas, oil and greasing car	3.25	
	Meals, etc.	3.75	7.00
	Forward		4,026.80
page 37	} Expenses paid for Va. Table Co.		
	Forward		4,026.80
Services of:			
W. E. Kimbrell	98 Days	\$100.00	9,800.00
E. H. Hillis	42 "	50.00	2,100.00
Hoke Murray	10 "	50.00	500.00
Rives Fleming	5 "	100.00	500.00
H. W. Kimbrell	12 "	25.00	300.00
J. L. Anderson	12 "	25.00	300.00
C. D. Phillips	8 "	25.00	200.00
	Total	\$17,726.80	

page 38 } Virginia Table Company, Incorporated  
and  
Virginia-Lincoln Furniture Corporation

To Southern Factories and Stores Corporation, Dr.

To amount due for securing eleven options	\$11,000.00
To amount due for expense and services in connection with taking inventories, etc., as per detailed schedule annexed to notice of motion for judgment	17,726.80
To loss and damage to business and expenses, as claimed in notice of motion for judgment, at least	75,000.00
	<hr/>
	\$103,726.80

State of Virginia,  
City of Richmond, to-wit:

Before me, Katharine Lyon Scott, a Notary Public for the City aforesaid in the State of Virginia, personally appeared Rives Fleming, who being first duly sworn made oath before me in my said City that he is President and agent of Southern Factories and Stores Corporation and duly authorized and qualified to make this proof; that the claim of said Southern Factories and Stores Corporation against Virginia Table Company, Incorporated, and Virginia-Lincoln Furniture Corporation amounts to the sum of One hundred and three thousand seven hundred and twenty-six and 80/100 dollars as shown by the above account; that said amount is justly due and owing; and that interest is due and claimed on the said sum from January 1st, 1930, until paid.

My commission as Notary Public expires on the 20th of February, 1933.

Given under my hand this 13th day of July, 1931.

KATHARINE LYON SCOTT,  
Notary Public.

page 39 } And at another day, to-wit: at a Law and Equity  
Court of the City of Richmond, Part Two, held  
the 11th day of August, 1931:



This day came the plaintiff, by counsel, and it appearing to the Court that the return day of this proceeding happened to be a day of the term on which the Court did not sit, it is now ordered that his case be placed upon the docket of this Court as prescribed by law.

And at the same day, to-wit: at a Law and Equity Court of the City of Richmond, Part Two, held the 11th day of August, 1931:

This day came the plaintiff, by its attorneys, and made a motion in open Court for judgment against the defendant in accordance with its notice of motion for judgment, with accompanying account and affidavit, herein, and the said defendants, being solemnly called, came not.

On consideration whereof, it appearing that said notice of motion for judgment, with the account and affidavit attached thereto, was duly served upon the defendants by the Sheriff of Smyth County on the 15th day of July, 1931, and filed in the Clerk's Office on the 16th day of July, 1931, and this cause having been duly docketed, and the defendants and each of them having failed to file any plea, counter-affidavit or other defense, and it being the opinion of the Court that the plaintiff is entitled to a present judgment for the items of liquidated damages stated in the account and affidavit filed with its said notice of motion for judgment:

Therefore it is considered and ordered by the Court that the plaintiff recover of the defendants the sum of Twenty-eight thousand seven hundred and twenty-six and 80/100 Dollars (\$28,726.80), with interest thereon, to be computed at the rate of six per centum per annum, from the 1st day of January, 1930, until paid, and its costs by it about its suit in that behalf expended.

And it is further ordered that his cause be continued and hereafter tried as to the item of \$75,000.00 of unliquidated damages claimed in the said amount.

page 40 } And at another day, to-wit: at a Law and Equity Court of the City of Richmond, Part Two, held the 21st day of August, 1931:

This day came the parties by their attorneys and the defendants moved the Court to set aside the judgment entered

herein on Aug. 11, 1931, and allow them to file pleas in abatement to the venue of the Court, which said pleas, it appears, were deposited in the mail at Marion, Virginia, on the 8th day of Aug., 1931, and in the ordinary course of delivery should have reached the Court on the return day of the motion, but which in fact failed to reach the Clerk until August 12, 1931, by reason of miscarriage by the postoffice employees. And the defendants introduced in support of said motion the correspondence between its attorney, J. P. Buchanan, and the Clerk of this Court under date July 16, 17, 18 and 20, 1931, and the letter of the Postmaster to said Buchanan dated Aug. 15, 1931, and the original envelope and letter transmitting said pleas to the Clerk. And the plaintiff opposed said motion and filed in opposition thereto the affidavits of Rives Fleming, W. E. Kimbrell and Hoke Murray, and moved the Court to require the defendants to plead to the merits as a prerequisite to the entertainment of said motion to set aside said judgment.

On consideration whereof, it being the opinion of the Court that the failure of the defendants to file said pleas before the entry of said judgment is excused by their having placed them in the mails in time for delivery in the usual course to the Clerk by Aug. 10, 1931, and the miscarriage in the mail by the postal authorities, and that the ends of justice will best be served if the said judgment be vacated and said pleas received, without at this time requiring any defense by the defendants on the merits;

Wherefore it is considered and ordered by the Court that the judgment entered herein on the 11th day of August, 1931, be set aside, and that the defendants have leave to file their said pleas in abatement without at this time making any other defense to the plaintiff's action and thereupon the  
 page 41 } defendants filed their said pleas in abatement; to  
 which actions of the Court in setting aside said judgment and allowing said pleas in abatement to be filed and in refusing to require the defendants to plead to the merits as set out above, the plaintiff, by Counsel, excepted on the grounds that Sec. 6046 of the Code gave the plaintiff the right to the said judgment in the absence of any defense filed by the defendants, or either of them, and that said section forbids the filing of said pleas after rendering a judgment for the plaintiff and that in no event should said judgment be set aside without requiring the defendants to plead to the merits as required by said section and by section 6135 of the Code, and as required by law.

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(Filed Aug. 21, 1931)

July 16, 1931

Southern Factories & Stores -vs-  
Virginia Table Co. Inc., et alClerk,  
Law & Equity No. 2  
City Hall,  
Richmond, Va.

Dear Sir:

A notice has been served on the Virginia Table Company returnable before the Judge of your *Court* on the 10th of *Augst* under the above style. Will you be kind enough to advise us the following?

1. When your present term began and when it will end, or if the Court is in vacation when the next term will begin?

2. If the state of your docket is such as that a notice of motion for judgment can be tried soon after the return day?

3. What is the practice of your Court in regard to these notices of motion for judgment; that is whether they are tried at the term to which they are returnable or whether after a plea is entered they are continued over until another term?

Very truly yours,

JPB:KS

(signed) J. P. BUCHANAN  
J. P. BUCHANAN

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(Filed Aug. 21, 1931.)

Richmond, Va., July 17, 1931.

Mr. J. P. Buchanan,  
% Buchanan & Buchanan,  
Marion, Va.

Dear Sir:

*Re.* Southern Factories & Stores  
Corp. vs. Va. Table Co. & als.

Your letter of the 16th inst. received.

The answers to your queries are as follows:

1. The present term of this court began on June 8th and will end sometime during the first week in August. The next

term will begin on the Third Monday in September, Sept. 21st.

2. Our docket at present is very light and this case should be tried early in the next term of this court.

3. This notice of motion will be docketed on the first day of the next term of this court, and unless a plea and counter-affidavit are filed on or before that date, the plaintiff will be entitled to a judgment on that day. If the plea and affidavit are filed on or before the date of the docketing of this case, then the plaintiff may have same set for hearing at the September Term upon application to the Court. The docket will be called on Sept. 21st, 1931, at 10:00 o'clock A. M.

Trusting that his fully answers your letter, we remain,

Yours very truly,

LUTHER LIBBY, Clerk.

By E. M. EDWARDS, D. C.

page 44 }

(Filed Aug. 21, 1931.)

July 18, 1931

Southern Factories & Stores Corp.  
vs. Va. Table Co. Inc, et al

E. M. Edwards, Esq.,  
Deputy Clerk for Luther Libbey, Clerk,  
Law & Equity Court of the City  
of Richmond, Part Two.  
Richmond, Va.

Dear Sir:

I thank you very much for your letter of July 17th answering in full the inquiries in my letter of the 16th.

I take it that if on or before the return day of the notice, to-wit the 10th day of August, appropriate *pleadings* are filed in the manner required by Statute, this case will go over *until* the September term and will at that time be set for hearing and that no prejudice can result of the defendant if *such* pleas are filed on or before the *retrn* day.

May I also ask if any deposit is required of the defendant by the Clerk in the filing of its plea and if so what amount?

Very truly yours,

(Signed) J. P. BUCHANAN  
S.

J. P. BUCHANAN

JPB:KS

page 45 }

(Filed Aug. 21, 1931.)

Richmond, Va., July 20, 1931.

Mr. J. P. Buchanan,  
% Buchanan & Buchanan,  
Marion, Va.

Re: Southern Factories & Stores  
Corp. vs. Va. Table Co. & al

Dear Sir:

Your letter of the 18th inst. received.

You are correct in your statement that if appropriate pleadings are filed on or before the return day of the notice, the case will go over until the September term and will be set for hearing (upon application of plaintiff's counsel), and that no prejudice can result to the defendant if such pleas are filed on or before the return day.

We do not require any deposit from the defendant in filing pleas, but we do look to the defendant's counsel to pay the clerk's fees chargeable to the defendant upon the completion of the suit. Ordinarily the clerk's fees of the defendant would not amount to more than Three or Four Dollars, but of course, this depends upon the number of pleas filed and subpoenas issued in the case.

Yours very truly,

LUTHER LIBBY, Clerk.

By E. M. ENWARDS, D. C.

page 46 }

(Filed Aug. 21, 1931.)

BW—p

August 15th, 1931

Messrs. Buchanan & Buchanan,  
Attorneys-at-Law,  
Marion, Virginia.

Gentlemen:

Referring to your letters of the 12th and 13th instants, regarding delayed delivery of Registered Letter #193, mailed

by you at Marion, Va., on August 8th, which was addressed as follows:

“To the Clerk of  
Law & Equity Court side of  
City of Richmond, Part Two,  
Richmond, Va.”

the entire responsibility for said delay is assumed by the Richmond Post Office and the employees who committed the error that caused the delay have been given the full penalty therefor as prescribed by the Department. The employees responsible for the error can give no adequate explanation or excuse for the misdistribution of the register, but it is assumed that they had in mind Hustings Court Part 2, which is much better known to everyone due to the fact that news articles of trials in this court are almost a daily occurrence. Another thing that may have contributed to the error is the word “side” as a part of the address. Hustings Court Part 2 is located on the Southside, to which the register was mis-sent, and much mail for that district is addressed to “South-side Station”. This is not offered as any excuse to justify the error, but merely as a possible explanation as to how it occurred.

I wish to assure you of my deepest regret for the trouble, inconvenience and embarrassment you have been caused by the incident. I am reasonably certain that the action taken by this office with the employees involved will prevent a recurrence of similar trouble.

Very truly yours,

BERKLEY WILLIAMS, Postmaster.

page 47 }

(Filed Aug. 21, 1931)

(Front of envelope)

After 5 days, return to

20c and 2c postage  
stamps affixed.

BUCHANAN & BUCHANAN,

Box T,

MARION, VA.

Registered Return  
Receipt—

REGISTERED  
NO. 193

## RETURN RECEIPT REQUESTED

To the Clerk of  
Law & Equity Court side of  
City of Richmond, Part Two. City Hall.  
Richmond, Va.

Main Office.

Received  
Aug. 12/31  
9:15 A. M.  
E. M. E.

(Reverse side of envelope)

## (POSTMARKS)

MARION, VA.  
AUG 8 1931  
REGISTERED

MARION, VA.  
AUG 8 1931  
REGISTERED

MARION, VA.  
AUG 8 1931  
REGISTERED

RICHMOND, VA.  
AUG 9 1931  
REGISTERED

RICHMOND (South Side Sta.) VA. AUG 10 1931 REGISTERED	RICHMOND, VA. AUG 10 1931 REGISTERED	RICHMOND (South Side Sta.) VA. AUG 10 1931 REGISTERED
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RICHMOND, VA.  
AUG 11 1931  
REGISTERED

RICHMOND (South  
Side Sta.) VA.  
AUG 11 1931  
REGISTERED

page 48 } (Filed Aug. 21, 1931.)

Virginia:

In the Law & Equity Court of the City of Richmond, Part  
Two.

Southern Factories &amp; Stores Corp., Plaintiff,

vs.

Virginia Table Company, Inc., et al., Defendants.

State of Virginia,  
City of Richmond, to-wit:

I, Rives Fleming, hereby certify that I am President of Southern Factories & Stores Corporation, the said plaintiff, which is a corporation existing under the laws of the State of Virginia, with its principal office in the said City of Richmond; that Virginia-Lincoln Furniture Corporation, one of said defendants, is a Virginia Corporation and that J. P. Buchanan is its Secretary and one of its directors; that Virginia Table Company, Incorporated, was before its dissolution and still is for the purpose of said suit a Virginia corporation and that J. P. Buchanan was and still is for said purpose its Secretary and one of its directors; that the contract alleged in the third numbered paragraph of the plaintiff's notice of motion for judgment in the above entitled cause was made at the William Byrd Hotel in the City of Richmond, Virginia, in a conference between W. E. Kimbrell, C. C. Lincoln, Jr., R. S. Wahab and this affiant, at which J. P. Buchanan was not present; that the contract alleged in the fourth numbered paragraph of said notice of motion for judgment was made as stated therein; that the items of expense and services claimed in said notice of motion were paid at and directed from the office of said plaintiff in the said City of Richmond; and that in a conference at Charlotte, North Carolina, several months ago about the claims of the plaintiff and defendants in said suit against each other, this affiant heard said J. P. Buchanan who page 49 } was then representing the said defendants admit to James B. Murphy who was then representing the said plaintiff that said Southern Factories & Stores Corporation could bring suit against said defendants in said City of Richmond, and this admission was made with reference to the jurisdiction of a Richmond Court to hear and determine a claim of the said plaintiff against said defendants. Given under my hand this 19th day of August, 1931.

RIVES FLEMING.

Subscribed and sworn to before me this 19th day of August, 1931.

(Notarial  
Seal)

M. K. ELLIOTT,  
Notary Public.

My Commission Expires June 8, 1934.



(Filed Aug. 21, 1931.)

Virginia:

In the Law & Equity Court of the City of Richmond, Part  
Two.

Southern Factories &amp; Stores Corp., Plaintiff,

vs.

Virginia Table Company, Inc., et al., Defendants.

State of North Carolina,

City of Charlotte, to-wit:

I, W. E. Kimbrell, hereby certify that I am General Manager of Southern Factories & Stores Corporation, the said plaintiff, which is a corporation existing under the laws of the State of Virginia, with its principal office in the said City of Richmond; that Virginia-Lincoln Furniture Corporation, one of said defendants, is a Virginia Corporation and that J. P. Buchanan is its Secretary and one of its directors; that Virginia Table Company, Incorporated, page 50 } was before its dissolution and still is for the purpose of said suit a Virginia corporation and that J. P. Buchanan was and still is for said purpose its Secretary and one of its directors; that the contract alleged in the third numbered paragraph of the plaintiff's notice of motion for judgment in the above-entitled cause was made at the William Byrd Hotel in the City of Richmond, Virginia, in a conference between Rives Fleming, C. C. Lincoln, Jr., R. S. Wahab and this affiant, at which J. P. Buchanan was not present; that the contract alleged in the fourth numbered paragraph of said notice of motion for judgment was made as stated therein; that the items of expense and services claimed in said notice of motion were paid at and directed from the office of said plaintiff in the said City of Richmond; that in a conference at Charlotte, North Carolina, several months ago about the claims of the plaintiff and defendants in said suit against each other, this affiant heard said J. P. Buchanan who was then representing the said defendants admit to James B. Murphy who was then representing the said plaintiff that said Southern Factories & Stores Corporation could bring suit against said defendants in said City of Richmond, and this admission was made with reference to the jurisdiction of a Richmond Court to hear and determine a claim of the said plaintiff against said defendants.

Given under my hand this 19th day of August, 1931.

W. E. KIMBRELL.

Subscribed and sworn to before me this 19th day of August, 1931.

(Notarial  
Seal)

V. F. ALEXANDER,  
Notary Public,  
State of North Carolina.

My Commission Expires Nov. 6, 1931.

page 51 } (Filed Aug. 21, 1931.)

State of North Carolina,  
County of Mecklenburg.

Personally appeared before me Hoke Murray who on oath says: That he definitely remembers having heard Mr. J. P. Buchanan make a statement, at a conference held between the auditor of Virginia-Lincoln Furniture Company and J. P. Buchanan, on the one hand and Rives Fleming, W. E. Kimbrell, Hoke Murray and James B. Murphy, on the other hand; said statement being made to the effect that while the Lincoln Company could sue the Southern Factories & Stores Corporation in Richmond, he knew that the Southern Factories and Stores Corporation could likewise sue the Lincoln people in Richmond, Virginia; that said statement was made in the course of a conversation between all the parties.

HOKE MURRAY.

Sworn to and subscribed before me this 18th day of August, 1931.

V. F. ALEXANDER, (L. S.)  
Notary Public for North Carolina.

My Commission expires Nov. 6, 1931.

(Notarial Seal)

page 52 } (Filed Aug. 21, 1931.)

In the Law and Equity Court of the City of Richmond,  
Part Two.

Southern Factories & Stores Corporation  
vs.

Virginia Table Company, Incorporated, & Virginia Lincoln  
Furniture Corporation.

## PLEA TO JURISDICTION.

Defendant, Virginia Table Company, Incorporated, appearing specially for this purpose and none other, by its attorney, comes and says that this Court ought not to have or take any further cognizance of the action aforesaid of the said plaintiff, because the said defendant says that the supposed causes of the said action did not, nor did any part thereof arise in the said City of Richmond, but that the supposed causes of the said action or parts thereof arose in the County of Smyth, State of Virginia, and that at the time of the service of the notice in this cause, the said defendant was not a corporation but had been dissolved by operation of law; that before it was dissolved it was not a resident of nor was its principal office located in the City of Richmond, but it was a resident of and its principal office was located in the County of Smyth and State of Virginia; that before its dissolution none of its officers, directors or agents upon whom process could be served were residents of the City of Richmond, but were then, have been ever since, and still are after their term of office expired at the date of the service of said notice residents of the County of Smyth and State of Virginia, and this the defendant is ready to verify.

Wherefore it prays judgment whether this Court  
page 53 } can or will take any further cognizance of the action aforesaid.

J. P. BUCHANAN, p. d.

State of Virginia,  
County of Smyth, to-wit:

This day, J. P. Buchanan, Agent and Attorney for Virginia Table Company, Incorporated, personally appeared before me, Katherine Scott, a Notary Public in and for the County and State aforesaid in my County aforesaid and made oath that the matters and things stated in the foregoing plea are true.

Given under my hand this the 8th day of August, 1931.  
My Commission expires Nov. 21, 1934.

KATHERINE SCOTT,  
Notary Public.

page 54 } (Filed Aug. 21, 1931.)

In the Law and Equity Court of the City of Richmond,  
Part Two.

Southern Factories & Stores Corporation

vs.

Virginia Table Company, Incorporated, & Virginia Lincoln  
Furniture Corporation.

### PLEA TO JURISDICTION.

Defendant, Virginia Lincoln Furniture Corporation, appearing specially for this purpose and none other, by its attorney, comes and says that this Court ought not to have or take any further cognizance of the action aforesaid of the said plaintiff, because the said defendant says that the supposed causes of the said action did not, nor did any part thereof arise in the said City of Richmond, but that the supposed causes of the said action or parts thereof arose in the County of Smyth, State of Virginia, and that at the time of the service of the notice in this case the said defendant was not a resident of, nor was its principal office located in the City of Richmond, but it was a resident of and its principal office was located in the County of Smyth, State of Virginia and its President, Directors, Officers and Agents upon whom process could be served were not residents of the City of Richmond, but all did then reside and have ever since resided and do now reside in the County of Smyth, and this the defendant is ready to verify.

Wherefore it prays judgment whether this Court can or will take any further cognizance of the action aforesaid.

J. P. BUCHANAN, p. d.

State of Virginia,  
County of Smyth, to-wit:

This day, J. P. Buchanan, Agent and Attorney for Virginia Lincoln Furniture Corporation personally appeared before me, Katherine Scott, a Notary Public in and  
page 55 } for the County and State aforesaid in my County  
aforesaid and made oath that the matters and  
things stated in the foregoing plea are true.

Given under my hand this the 8th day of August, 1931.

My Commission expires Nov. 21, 1934.

KATHERINE SCOTT,  
Notary Public.

page 56 } And at another day, to-wit: at a Law and Equity  
Court of the City of Richmond, Part Two, held the  
5th day of October, 1931:

This day came again the plaintiff and defendants, by counsel, and thereupon the plaintiff replied generally to the two pleas in abatement heretofore filed by the defendants in this case and issues being joined thereon; and neither party demanding a jury for the trial of the issues raised by the pleas but agreeing that all matters of law and fact might be heard and determined and judgment rendered by the Court; and the Court having heard the evidence and arguments of counsel is of opinion that this Court has jurisdiction over the subject-matter arising upon the plaintiff's Notice of Motion for Judgment; it is therefore considered by the Court that the two pleas in abatement be overruled; to which action of the Court the defendants, by counsel, excepted, and filed herein a memorandum in writing of the grounds of their exceptions.

And thereupon the defendants filed herein their separate demurrers in writing to the plaintiff's Notice of Motion for Judgment, to the filing of which demurrers the plaintiff, by counsel, objected.

(Note:—Memorandum of exceptions were never filed.)

page 57 } (Filed Oct. 5, 1931.)

Virginia:

In the Law & Equity Court of the City of Richmond,  
Part Two.

Southern Factories & Stores Corporation,

vs.

Virginia Table Company, Incorporated, and Virginia-Lin-  
coln Furniture Corporation.

DEMURRER OF VIRGINIA TABLE COMPANY, IN-  
CORPORATED.

The defendant, Virginia Table Company, Incorporated, comes and says that the special counts of the notice of motion or declaration in the above entitled cause is not sufficient in law, and for ground of its demurrer says:

That the special counts of the notice of motion or declara-

tion shows on its face that there is a misjoinder of causes of action against these defendants for the reasons given by the Court of Appeals in *Langhorne vs. Richmond Ry. Co., et al.*, 91 Va. 369, 22 S. E. 159 (1895).

JOHN P. BUCHANAN,  
KIRSH & BAZILE,  
p. d.

page 58 } (Filed Oct. 5, 1931.)

Virginia:

In the Law & Equity Court of the City of Richmond,  
Part Two.

Southern Factories & Stores Corporation,

vs.

Virginia Table Company, Incorporated, and Virginia-Lincoln Furniture Corporation.

DEMURRER OF VIRGINIA-LINCOLN FURNITURE  
CORPORATION.

The defendant, Virginia-Lincoln Furniture Corporation, comes and says that the special counts of the notice of motion or declaration in the above-entitled cause is not sufficient in law, and for ground of its demurrer says:

That the special counts of the notice of motion or declaration shows on its face that there is a misjoinder of causes of action against these defendants, for the reasons given by the Court of Appeals in *Langhorne vs. Richmond Ry. Co., et al.*, 91 Va. 369, 22 S. E. 159 (1895).

JOHN P. BUCHANAN,  
KIRSH & BAZILE,  
p. d.

page 59 } And at another day, to-wit: at a Law and Equity  
Court of the City of Richmond, Part Two, held the  
7th day of November, 1931:

This day came again the parties, by their attorneys, and the defendants having filed their demurrers to the plaintiff's notice of motion, the plaintiff moved the Court to transfer this cause to the equity side of the court; and then said demurrers and motion were argued by counsel.

On consideration whereof, the Court, for reasons stated in writing and now made a part of the record, doth overrule the said motion of the plaintiff, and doth overrule the said demurrers of the defendants; to which actions of the Court, respectively, the plaintiff and defendants, respectively, excepted.

And on motion of the plaintiff, it is ordered that the defendants, if they are so advised, do file their pleas to said notice of motion, with counter-affidavit, on or before the 23rd day of November, 1931.

And on motion of the plaintiff, it is further ordered that the defendant do file their grounds of defense herein on or before the 23rd day of November, 1931.

And on motion of the defendants, it is ordered that the plaintiff do file the particulars of its claim for unliquidated damages on or before the 23rd day of November, 1931.

And this order having been seen by counsel for all parties, no service of said rules to plead and file grounds of defense and to file particulars of claim shall be necessary.

page 60 }

(Filed Nov. 7, 1931.)

Virginia:

In the Law & Equity Court of the City of Richmond,  
Part II.

The Southern Factories & Stores Corporation, Plaintiff,  
vs.

The Virginia Table Company, Inc., and Virginia-Lincoln Furniture Corporation, Defendant.

#### MEMORANDUM BY THE COURT.

Upon, (1) a motion by the plaintiff to remove this action to equity side of the Court under authority of Code #6084.

(2) A demurrer by the defendants to the special count in the notice of motion.

The plaintiff in its notice of motion for judgment alleges (1) a contract with the Virginia Table Company, Incorporated (2) that the Virginia Table Company, Incorporated, transferred all of its assets to the Lincoln Furniture Manufacturing Company, Incorporated, (3) that the Lincoln Furniture Manufacturing Company, Incorporated, assumed all of the liabilities of the Virginia Table Company, Incorporated, (4) that thereafter the corporate name of said Lincoln Furniture Manufacturing Company, Incorporated, was changed by amendment of its charter to Virginia-Lincoln Furniture Cor-

poration, (5) that thereafter the Virginia Table Company, Incorporated, was dissolved with the consent of all of its stockholders, (6) that the contract with the plaintiff has been breached by the defendants, and (7) the damages claimed by the plaintiff for said breach are partly liquidated and partly unliquidated.

The case made by the plaintiffs' pleadings furnishes no occasions to go into equity. If the two defendants cannot be sued jointly it would be a vain thing to transfer this action to the equity side of the Court merely for the purpose of getting judgment against a dissolved corporation with no assets when the party that has assumed all the obligation of the defunct corporation is before the Court and  
 page 61 } has all of its assets and judgment can be rendered  
 in the Common Law action directly against the existing corporation.

The measure of the unliquidated damages should be passed on by a jury. Were this action transferred to the equity side of the Court it would still be necessary in order to give to the defendant that trial by jury preserved to him by constitutional guarantees, to either remand this cause to the law side of the Court or order an issue out of chancery. Why remove this cause to the equity side when it must come back either in form or in substance?

It is urged that to remove this cause to the equity side would avoid a multiplicity of suits. It would avoid the bringing of one additional common law action. In this connection the language of the Court in *French vs. Strange Mining Co.*, 133 Va., at page 630, is pertinent and persuasive, if not binding.

"It must be remembered, too, that while the particular number of actions which will support this ground of equity jurisdiction is not fixed, and depends upon the circumstances of each case (21 C. J. 75), the very foundation of the jurisdiction is the inadequacy of the legal remedy arising out of a multiplicity of actions. We have here a prospect of two simple actions at law by the complainants, one against B. T. Johnson, Jr., and the other against Strange and associates, to recover the value of the ore respectively removed by them for 86.8 acres of the original Byrnes land. We are aware of no authorities which would warrant us in declaring this to be the prospect of a multiplicity of suits."

In the case at bar the matter for trial is essentially of that nature for a trial by jury in a Court of Common Law.

The motion to remove will be denied.



## THE DEMURRER.

There are two cases in Virginia which have a bearing on this question. They are:

*Langhorne vs. Richmond Rwy., etc.*, 91 Va. 369.

*Ives vs. Williams*, 143 Va. 855.

Also Code #6102.

Under the above section of the Code a demurrer page 62 } will not lie for mere misjoinder of parties. Such defect can only be reached by motion to abate as to the parties misjoined. The determination of the demurrer depends upon whether in the case at bar there has been merely a misjoinder of parties, or there has been also a misjoinder of causes of action.

In *Langhorne vs. Richmond Rwy. etc., supra*, The Richmond City Railway Company was sued because of a personal injury inflicted by it. The action was for negligence. It was *ex delicto*. The plaintiff also joined as co-defendant, the Richmond Railway and Electric Company charging that the first named corporation had been consolidated with the last named and that by operation of law this later corporation was also liable to him. The liability of the last named corporation was not *ex delicto*. It arose out of a promise implied by law. The case then presented was against two defendants—the cause of action against one arising *ex delicto* and the cause of action arising against the other was *ex contractu*. Such a defect was and still is demurrable. On page 376 of that case the Court remarks:

“If an action at law be brought against two or more persons, it must appear from the declaration that the contract or tort upon which it is brought is a joint contract, or a joint tort.”

This language may have been broader than the facts of that case necessitated and its application, according to frequently stated principles, is to be limited to its application to the facts of that case, i. e., a joinder of action *ex delicto* and *ex contractu*.

I think this more limited application should be made in view of the recent case of *Ives vs. Williams, supra*. On page 863 the Court in that case said:

“\* \* \* It is insisted on behalf of the appellants that the notice of motion sets forth on its face two independent

causes of action. We cannot agree with this. The guaranty being absolute, the causes of action arose from the same circumstances and rested upon the same proof against both parties, \* \* \* we are satisfied that the objection that the causes of action are entirely distinct and therefore the two defendants could not be sued together, as that would require separate judgments on separate causes of action, *cannot be sustained*. (Italics supplied.) Section 6102 of the Code of 1919 was enacted for the purpose of speeding litigation in such cases as this, in which there is merely a misjoinder of parties defendant in an action *ex contractu*. Under that statute it has been held that the only proper remedy is to move for abatement of the suit as to move for abatement of the suit as to the party or parties improperly joined and that the misjoinder cannot be reached by demurrer."

In the case at bar the assumption of the promises of the Virginia Table Company was alleged as absolute. It would seem, therefore, that the causes of action arose from the same circumstances and rested upon the same proof against both parties.

The demurrer should be overruled.

FRANK T. SUTTON, JR.

Nov. 4th, 1931.

page 64 } And at another day, to-wit: at a Law and Equity Court of the City of Richmond, Part Two, held the 23rd day of November, 1931:

This day came again the plaintiff and defendants, by counsel, and thereupon the plaintiff filed herein a bill of additional particulars of its claim in this action. Thereupon the defendant Virginia-Lincoln Furniture Corporation filed herein its petition in writing praying that it be dismissed for misjoinder of parties, its motion in writing to abate this action as to it for misjoinder of parties, a statement in writing of the grounds of its defense, a counter-affidavit and plea of "non assumpsit" and put itself upon the Country and the plaintiff likewise. Then the defendant Virginia Table Company, Incorporated, filed herein its motion in writing to abate this action as to it for misjoinder of parties, a statement in writing of the grounds of its defense, a counter-affidavit and plea of "non assumpsit" and put itself upon the country and the plaintiff likewise.

page 65 }

(Filed Nov. 23, 1931.)

Virginia:

In Law &amp; Equity Court of the City of Richmond, Part Two.

Southern Factories &amp; Stores Corporation

vs.

Virginia Table Company, Inc., et al.

In compliance with the order entered herein on the 7th day of November, 1931, the plaintiff files the following additional particulars of its claim, viz:

Salaries of \$3,490.00 to T. C. McGahee and of \$1,828.00 to H. R. Martin who were retained in employment of plaintiff to meet the demands and agreements of defendants, and who otherwise would not have been employed.

Extra rental paid and contracted to be paid, to-wit: \$36,000.00, by plaintiff on lease of new store at Greenville, S. C., and improvements of \$9,089.86 on the property leased, which extra rental and expenses otherwise would not have been incurred.

Salary of \$500.00 per month to R. S. Wahab from, to-wit, March, 1930, made necessary by failure of defendants to comply with their agreements with plaintiff, plus his expense.

Expenses in regard to claims and judgments to Marion National Bank and Sugar Grove Lumber Co., Inc., against plaintiff, to-wit, \$1,000.00.

Disruption of plaintiff's business, impairment of credit, increase of inventories, loss of sales and profits, to great damage of plaintiff, and caused by *defendant's* failure to comply with their agreements.

The claims or loss and damage as stated in the notice of motion for judgment.

SMITH &amp; GORDON, p. q.

page 66 }

(Filed Nov. 23, 1931.)

Virginia:

In Law &amp; Equity Court of the City of Richmond, Part Two.

Southern Factories &amp; Stores Corporation

vs.

Virginia Table Company, Incorporated, and Virginia-Lincoln Furniture Corporation.

PETITION OF VIRGINIA-LINCOLN FURNITURE CORPORATION.

To the Honorable Frank T. Sutton, Judge:

Your petitioner, the Virginia-Lincoln Furniture Corporation, a Virginia corporation, one of the defendants in the above styled action now pending in your Honorable Court, sheweth unto your Honor the following facts:

First: That it is a Virginia corporation, incorporated on the      day of      , under the name of Lincoln Furniture Manufacturing Company, Incorporated; that on the day of      , 19      , by amendment its name was changed to Virginia-Lincoln Furniture Corporation; that it never entered into or had any contractual relationship with the plaintiff, and is in no manner liable for the defaults alleged in said notice of motion and/or declaration.

Second: That while it is true that this corporation bought from the Virginia Table Company all of its property and assets, it did not assume all of the liabilities of the said Virginia Table Company, Incorporated, and specifically did not assume the payment of the liabilities alleged in the plaintiff's notice of motion and/or declaration. In support of this, this defendant herewith tenders to the Court the deed and/or contract setting forth the agreement between the Virginia-Lincoln Furniture Corporation and the Virginia Table Company, Incorporated, together with extracts from the minutes of the corporation, showing what the contract between them was, and that no part of the liability alleged in the plaintiff's notice of motion and/or declaration was assumed by the Virginia-Lincoln Furniture Corporation.

page 67 } Third: This defendant respectfully shows unto the Court that there has never been any consolidation of this defendant with the Virginia Table Company, Incorporated. In support of this, the defendant tenders to the Court and offers to produce its corporate charter, the corporate charter of the Virginia Table Company, Incorporated, and a certified copy of the proceedings before the State Corporation Commission, showing that no such consolidation ever occurred.

Fourth: This defendant says that its purchase of the property and assets of the Virginia Table Company, Incorporated occurred on December — 1929; that the deed showing the consummation of the said transaction was put on record in the Clerk's office of Smyth County at Marion, Virginia, on the 8th day of December 1930; and that the plaintiff was aware of this sale and purchase.

Five: That by reason of the foregoing facts, which this defendant is ready to verify, this defendant is in no respect *responsibile* or the liability alleged in the plaintiff's notice of motion and/or declaration.

Wherefore, your petitioner says that it has been improperly joined as a co-defendant in this action with the said Virginia Table Company, Incorporated, and prays that it may be dismissed as a party to the within action.

VIRGINIA-LINCOLN FURNITURE  
CORPORATION,  
By J. P. BUCHANAN,  
Its duly authorized agent.

State of Virginia,  
City of Richmond, to-wit:

This day personally appeared before me Alfred J. Kirsh, a Notary Public for the City of Richmond in the State of Virginia, J. P. Buchanan, who having been first duly  
page 68 } sworn, made oath before me that he is the duly  
authorized agent of the Virginia Lincoln Furniture Corporation, a Virginia corporation, one of the defendants in the above styled action, and that the matters and things said in the foregoing petition are true.

J. P. BUCHANAN.

Subscribed to before me this 23rd day of November 1931.

ALFRED J. KIRSH,  
Notary Public.

My term of office expires on the 13th day of March, 1934.  
page 69 } (Filed Nov. 23/31.)

Virginia:

In Law & Equity Court of the City of Richmond, Part Two.

Southern Factories & Stores Corporation

vs.

Virginia Table Company, Incorporated, & Virginia Lincoln Furniture Corporation.

MOTION AND AFFIDAVIT UNDER SECTION 6102 OF  
THE CODE FOR MISJOINDER.

This day came the defendant, Virginia Lincoln Furniture Corporation by its Attorney and says that this action should abate and be dismissed as to it because of misjoinder for the following reasons:

The Court on a demurrer filed by this defendant has held that by virtue of the decision of the Supreme Court in the case of *Ives vs. Williams*, 143 Va. 855, a demurrer did not lie to the notice in this case for misjoinder; and it being held in the said case that the proper pleading in such case is a motion and affidavit under Section 6102 of the Code such motion and affidavit is herewith filed for the following reasons;

The Court having held that the notice in this case declares against the Virginia Table Company Incorporated as the principal debtor and against the Virginia Lincoln Furniture Corporation upon its unconditional and absolute agreement as guarantor of said debt, then there is a misjoinder in that under the decision in the case of *Ives vs. Williams*, 143 Va. 855, and in the case of *Shores vs. Lawrence*, 68 W. Va. 220; 69 S. E. 791, the two parties defendant to this action cannot be joined in one action.

Wherefore, this defendant says that there is a misjoinder and that this action should be abated as to it.

VIRGINIA LINCOLN FURNITURE  
CORPORATION,

By Counsel.

LEON BAZILE,  
J. P. BUCHANAN, Attys.

State of Virginia,  
County of Smyth, to-wit:

This day personally appeared before me, Katherine Scott, a Notary Public in and for the County and State aforesaid, J. P. Buchanan, agent and Attorney for the above named defendant, Virginia Lincoln Furniture Corporation and made affidavit that the matters and things in the foregoing affidavit and motion are true.

Given under my hand this the 9th day of November 1931.  
My Commission expires Nov. 21, 1934.

KATHERINE SCOTT,  
Notary Public.

page 70 } (Filed Nov. 23, 1931.)

Virginia:

In Law & Equity Court of the City of Richmond, Part Two.

Southern Factories & Stores Corporation

vs.

Virginia Table Company, Incorporated, and Virginia-Lincoln  
Furniture Corporation.

### GROUND OF DEFENSE.

For its grounds of defense the Virginia-Lincoln Furniture Corporation comes and states that it will rely upon the following:

1. All of the pleas and affidavits filed by it in this case and every matter set up therein.

2. Upon every matter that may be pleaded or relied upon under the general issue.

3. That the Virginia Table Company, Incorporated, and this defendant did not, as alleged in Section One of the notice of motion and/or declaration, have the same officers, directors and stockholders.

4. That this defendant did not assume and agree to pay all of the liabilities of the Virginia Table Company, Incorporated, when it purchased its assets, and especially did not assume and agree to pay the sums set forth in the notice of motion and/or declaration.

5. That it denies all liability on account of the fact that it did not have any contract with the plaintiff and did not assume or agree to pay any of the sums in the notice of motion and/or declaration set forth, but if for any reason it should be held that there was an assumption of such liability by this defendant, then it adopts as its own the grounds of defense filed by the Virginia Table Company, Incorporated, a copy of which is attached hereto and made a part  
page 71 } hereof as fully and completely as if herein incorporated in full.

J. P. BUCHANAN,  
KIRSH & BAZILE.

(Note: Grounds of defense of Virginia Table Company mentioned in the foregoing grounds of defense, is omitted here and copied at page 76.)

page 72 } (Filed Nov. 23, 1931.)

Virginia:

In the Law & Equity Court of the City of Richmond, Part Two.

Southern Factories & Stores Corporation

vs.

Virginia Table Company, Incorporated, and Virginia-Lincoln Furniture Corporation.

COUNTER-AFFIDAVIT.

State of Virginia,  
City of Richmond, to-wit:

I, Alfred J. Kirsh, a Notary Public in and for the City of Richmond, in the State of Virginia, do certify that this day personally appeared before me J. P. Buchanan, who being first duly sworn, made oath before me in my said City of Richmond, Virginia, that he is the agent of the Virginia-Lincoln Furniture Corporation, and that he verily believes that the plaintiff is not entitled to recover anything from the said defendant, Virginia-Lincoln Furniture Corporation, on its claim set up in its said notice of motion and/or declaration.

J. P. BUCHANAN.

Subscribed and sworn to before me this 23rd day of November, 1931. In testimony whereof, I have hereunto set my hand the day, month and year aforesaid.

ALFRED J. KIRSH,  
Notary Public.

My commission expires March 13, 1934.

page 73 } (Filed Nov. 23, 1931.)

Virginia:

In the Law & Equity Court of the City of Richmond, Part Two.

Southern Factories & Stores Corporation

vs.

Virginia Table Company, Incorporated, and Virginia-Lincoln Furniture Corporation.



## PLEA OF NON ASSUMPSIT.

The said defendant, Virginia-Lincoln Furniture Corporation, by its attorney, comes and says that it did not undertake or promise in any manner and form as the plaintiff hath in this action complained. And of this the said defendant puts itself upon the country.

KIRSH & BAZILE, p. d.  
J. P. BUCHANAN, p. d.

page 74 } (Filed Nov. 23, 1931.)

Virginia:

In the Law & Equity Court of the City of Richmond, Part Two.

Southern Factories & Stores Corporation

vs.

Virginia Table Company, Incorporated, & Virginia Lincoln Furniture Corporation.

MOTION AND AFFIDAVIT UNDER SECTION 6102 OF  
THE CODE FOR MISJOINDER.

This day came the defendant, Virginia Table Company Incorporated by its Attorney and says that this action should abate and be dismissed as to it because of misjoinder for the following reasons:

The Court on a demurrer filed by this defendant has held that by virtue of the decision of the Supreme Court in the case of *Ives vs. Williams*, 143 Va. 855, a demurrer did not lie to the notice in this case for misjoinder; and it being held in the said case that the proper pleading in such case is a motion and affidavit under Section 6102 of the Code such motion and affidavit is herewith filed for the following reasons:

The Court having held that the notice in this case declares against the Virginia Table Company Incorporated as the principal debtor and against the Virginia Lincoln Furniture Corporation upon its unconditional and absolute agreement as guarantor of said debt, then there is a misjoinder in that under the decision in the case of *Ives vs. Williams*, 143 Va. 855, and in the case of *Shores vs. Lawrence*, 68 W. Va. 220; 69 S. E. 791, the two parties defendant to this action cannot be joined in one action.

Wherefore this defendant says that there is a misjoinder and that this action should be abated as to it.

page 75 }

VIRGINIA TABLE COMPANY  
INCORPORATED,

By Counsel.

LEON BAZILE,  
J. P. BUCHANAN, Attys.

State of Virginia,  
County of Smyth, to-wit:

This day personally appeared before me, Katherine Scott, a Notary Public in and for the County and State aforesaid, J. P. Buchanan, agent and Attorney for the above named defendant, Virginia Table Company Incorporated and made affidavit that the matters and things in the foregoing affidavit and motion are true.

Given under my hand this the 9th day of November 1931.  
My Commission expires Nov. 21, 1934.

KATHERINE SCOTT,  
Notary Public.

page 76 }

(Filed Nov. 23, 1931.)

Virginia:

In the Law & Equity Court of the City of Richmond, Part Two.

Southern Factories & Stores Corporation

vs.

Virginia Table Company, Incorporated, and Virginia-Lincoln Furniture Corporation.

#### GROUND OF DEFENSE.

For its grounds of defense the Virginia Table Company, Incorporated, comes and states that it will rely upon the following:

1. All of the pleas and affidavits filed by it in this case and every matter set up therein.
2. Upon every matter that may be pleaded or relied upon under the general issue.
3. That this defendant did not promise the plaintiff to pay

it the sum of One Thousand (\$1,000.00) Dollars for each and every option secured by it for this defendant, as set forth in Section Three of the notice of motion and/or declaration.

4. That none of the options alleged to have been secured in the notice of motion and/or declaration by the plaintiff for this defendant measured up to the conditions or requirements imposed by the defendant.

5. That none of said options were to be paid for unless the same were exercised and the sale consummated.

6. That none of said options were to be paid for unless the contemplated merger was effected.

7. That none of said options were to be paid for unless the completed audit of all of the stores under option was satisfactory to the bankers of this defendant to the extent that they would finance the proposed merger, and the said merger was not consummated, and the bankers refused to fi-  
page 77 } nance the same.

8. That this defendant did not promise to pay any expenses of the plaintiff in connection with securing options.

9. That this defendant, until long after the work had been done, had no knowledge of the amount of expenses, labor and salaries charged it for taking inventories, as set forth in Section Four of the notice of motion and/or declaration; that the amounts charged in the account attached to the notice of motion and/or declaration are excessive; that the expenses charged are excessive; that the defendant is willing to pay a reasonable amount for the work done in connection with taking said inventories and a reasonable amount for expenses incurred in connection therewith; that it denies that a large part of the salary and expense account attached to the notice of motion and/or declaration was incurred on its behalf in taking said inventories; that it has never been supplied with proof of any expenditure, and the plaintiff has presented to it and to auditors conflicting statements of said expense and salary account, and that it denies that it owes the plaintiff any amount in excess of that admitted in its plea.

10. That it cannot answer specifically the allegation in Section Five of the notice of motion and/or declaration that it is due the plaintiff expenses in connection with the renewal and extension of options, because no such account is filed with the notice of motion and/or declaration, and no particular amount claimed; and it denies that it owes the plaintiff anything on this account or that it promises the plaintiff to pay it any amount of money by reason of such expenses.

11. That it did not promise the plaintiff that it would ex-

ercise the option given by the plaintiff to defendant, as set forth in Section Five of the notice of motion and/or declaration.

12. That it never promised the plaintiff that it would consummate the proposed merger.

13. That the failure to exercise said option and consummate said merger did not damage the plaintiff.

14. That the plaintiff suffered no expense, loss  
page 78 } or damage by reason of the failure of the defendant to exercise said option or consummate said merger.

J. P. BUCHANAN,  
KIRSH & BAZILE, P. D.

page 79 } (Filed Nov. 23, 1931.)

Virginia:

In the Law & Equity Court of the City of Richmond, Part Two.

Southern Factories & Stores Corporation

vs.

Virginia Table Company, Incorporated, and Virginia-Lincoln Furniture Corporation.

### COUNTER-AFFIDAVIT.

State of Virginia,

City of Richmond, to-wit:

I, Alfred J. Kirsh, a Notary Public in and for the City of Richmond, in the State of Virginia, do certify that this day personally appeared before me J. P. Buchanan, who being first duly sworn, made oath before me in my said City of Richmond, Virginia, that he is the agent of the Virginia Table Company, Incorporated, and that he verily believes that the plaintiff is not entitled to recover anything from the said defendant, Virginia Table Company, Incorporated, on its claim set up in its said notice of motion and/or declaration, except the sum of Thirty five hundred Dollars, which defendant owes the plaintiff by virtue of the cause of action set forth in Paragraph Four (4) of its said notice of motion and/or declaration; that defendant owes plaintiff nothing further and that plaintiff is not entitled to recover any other or further sum.

J. P. BUCHANAN.

Subscribed and sworn to before me this 23rd day of November, 1931. In testimony whereof, I have hereunto set my hand the day, month and year aforesaid.

ALFRED J. KIRSH,  
Notary Public.

My Commission expires March 13, 1934.

page 80 } (Filed Nov. 23, 1931.)

Virginia:

In the Law & Equity Court of the City of Richmond, Part Two.

Southern Factories & Stores Corporation

vs.

Virginia Table Company, Incorporated, & Virginia Lincoln Furniture Corporation.

### PLEA OF NON ASSUMPSIT.

The said defendant, Virginia Table Company, Incorporated, by its attorney, comes and says that it did not undertake or promise in any manner and form as the plaintiff hath in this action complained. And of this the said defendant puts itself upon the country.

KIRSH & BAZILE, p. d.  
J. P. BUCHANAN, p. d.

page 81 } And at another day, to-wit: at a Law and Equity Court of the City of Richmond, Part Two, held the 1st day of February, 1932:

This day came again the parties, by their attorneys, and the plaintiff moved the Court for leave to amend its notice of motion for judgment by inserting therein after the first numbered paragraph two paragraphs numbered respectively, 1-A and 1-B, which motion was resisted by the defendants, and on consideration whereof the Court doth sustain said motion and permit said amendment as of this date, and said paragraphs 1-A and 1-B are thereupon filed as a part of said notice of motion; to which action of the Court the defendants, by counsel, excepted.

And on motion of the plaintiff it is ordered that the defendants do take and file on or before March 1, 1932, such depositions as they may be advised to take.

page 82 } (Filed Feb. 1, 1933.)

1-A. Prior to December 26, 1929 you were two separate corporations created and existing under the laws of the State of Virginia, under practically the same management, and thereafter, to-wit, on the 31st day of December, 1929 the said Virginia Table Company, Incorporated transferred all of its assets, which exceeded its liabilities by a large amount, to-wit, \$1,500,000.00, unto the said Virginia Lincoln Furniture Corporation, and the entire business of said Virginia Table Company, Incorporated was taken over by said Virginia Lincoln Furniture Corporation, and the said Virginia Table Company, Incorporated was dissolved, and there was thereby effected a merger or consolidation of said two corporations.

1-B. That in the resolution of the stockholders and/or boards of directors of said Virginia Table Company, Incorporated and Virginia Lincoln Furniture Corporation under which the said assets of the former were transferred to the latter, the said two corporations, then and there well knowing that said Virginia Table Company, Incorporated, was largely indebted to the plaintiff, and with intent to hinder, delay and defraud the plaintiff, attempted to exclude from the liabilities of said Virginia Table Company, Incorporated, which were assumed by said Virginia Lincoln Furniture Corporation upon the transfer to it of said assets, the just claims and demands of the plaintiff against said Virginia Table Company, Incorporated, which are hereinafter asserted; that the transfer of said assets was made by said Virginia Table Company, Incorporated and accepted by said Virginia Lincoln Furniture Corporation with intent on the part of both of them to hinder, delay and defraud the plaintiff in the assertion of its said claims and demands; that the said assets were a trust fund for the benefit of the plaintiff and other creditors of said Virginia Table Company, Incorporated, and were transferred by it to said Virginia Lincoln Furniture Corporation for a grossly inadequate consideration, and that said transfer, as to the net assets of said Virginia Table Company, Incorporated, to-wit, one million five hundred thousand dollars, was voluntary, fraudulent and void as to the plaintiff and its claims and demands.

page 83 } And at another day, to-wit: at a Law and  
Equity Court of the City of Richmond, Part Two,  
held the 6th day of February, 1932:

This day came again the plaintiff and defendants, by coun-

sel, and thereupon the defendant Virginia-Lincoln Furniture Corporation, by counsel, filed herein its motion in writing for a continuance. Then the defendants filed herein their demurrer in writing to the plaintiff's notice of motion for judgment and the plaintiff joined therein; and the said demurrer is continued for argument to be heard thereon.

page 84 } (Feb. 6, 1932.)

Virginia:

In the Law and Equity Court of the City of Richmond, Part Two.

Southern Factories & Stores Corporation

vs.

Virginia Table Company, Incorporated, and Virginia-Lincoln Furniture Corporation.

#### MOTION FOR CONTINUANCE.

The Virginia-Lincoln Furniture Corporation, by its counsel, comes and moves the court to continue the trial of the above action from the 16th day of February, 1932 until such time as the court shall fix after the adjournment of the General Assembly of Virginia now in session, and as grounds for its said motion assigns that one of its counsel, B. F. Buchanan (who is also individual counsel for the preferred stockholders of the Virginia-Lincoln Furniture Corporation) is a member of the General Assembly of Virginia as Senator from the district composed of the counties of Smyth and Washington and the city of Bristol, and that the said General Assembly will be in session on the 16th day of February, 1932.

VIRGINIA-LINCOLN FURNITURE CORPORATION AND ITS PREFERRED STOCKHOLDERS,

LEON M. BAZILE,

B. F. BUCHANAN,

By J. P. BUCHANAN,

Counsel for defendants.

B. F. BUCHANAN,

Counsel for Preferred Stockholders Va. Lincoln Furniture Corp.

B. F. BUCHANAN,

Counsel for defendant &  
Preferred Stockholders.

page 85 } (Filed Feb. 6, 1932.)

Virginia:

In the Law and Equity Court of the City of Richmond, Part Two.

Southern Factories and Stores Corporation

vs.

Virginia Table Company, Incorporated, and Virginia-Lincoln Furniture Corporation.

DEMURRER.

Defendants, by counsel, demur to the notice and each count thereof, and for grounds assign the following:

1. In the special count actual and consequential damages are claimed for breach of a contract of sale of personal property by the alleged buyer.

The contract breached is not set out, nor the price or value agreed to be paid alleged.

2. Performance or tender by the plaintiff is not alleged.

3. The circumstances out of which the consequential damages arose, and the defendants' breach therefore are not set out.

Wherefore these defendants say the notice is not sufficient in law, etc.

LEON M. BAZILE,  
B. F. BUCHANAN,  
J. P. BUCHANAN,

Attys. for dfts.

page 86 } And at another day, to-wit: at a Law and Equity Court of the City of Richmond, Part Two, held the 17th day of February, 1932:

This day came the Virginia Table Company, by attorney, and offered its demurrer and plea to the amended notice; and

The Virginia Lincoln Furniture Corporation, by its attorney, came and offered its demurrer to the amended notice of the plaintiff and its plea to the amended notice and its affidavit of misjoinder, all of which are ordered to be filed and this is accordingly done.



page 87 } (Filed Feb. 17, 1932.)

Virginia:

In the Law & Equity Court of the City of Richmond,  
Part Two.

Southern Factories & Stores Corporation

vs.

Virginia Table Company, Incorporated, et al.

DEMURRER VIRGINIA TABLE COMPANY.

The defendant, Virginia Table Company, Incorporated, by its attorney, comes and says that it demurs to the notice and amended notice and each count thereof and says that the same is not sufficient in law.

For grounds of demurrer it relies upon grounds previously assigned in writing to the original notice and the grounds set forth in the demurrer this day filed to the original and amended notice by Virginia Lincoln Furniture Corporation.

Wherefore this defendant says that the said notice should be dismissed.

VIRGINIA TABLE CO., INC.,  
By Counsel.

KIRSH & BAZILE,  
BUCHANAN & BUCHANAN,  
Attys.

page 88 } (Filed Feb. 17, 1932.)

Virginia:

In the Law & Equity Court of the City of Richmond,  
Part Two.

Southern Factories & Stores Corporation

vs.

Virginia Table Company, Incorporated, et al.

PLEA AND ANSWER OF VIRGINIA TABLE COMPANY,  
INCORPORATED, TO AMENDED NOTICE.

This day came Virginia Table Company, Incorporated, by counsel, and says that it is not guilty of any fraud in the manner and form set up in the amended notice.

Wherefore etc.

VIRGINIA TABLE COMPANY, INCORPORATED.

By J. D. LINCOLN, Vice-Pres.

KIRSH & BAZILE,  
BUCHANAN & BUCHANAN,  
Attys.

Sworn to before me Feb. 17, 1932, by J. D. Lincoln, E. M. Edwards, Deputy Clerk of the Law and Equity Court of the City of Richmond, Part Two.

E. M. EDWARDS,  
Deputy Clerk, Law and Equity Court  
of the City of Richmond, Part Two.

page 89 } (Filed Feb. 17, 1932.)

Virginia:

In the Law & Equity Court of the City of Richmond,  
Part Two.

Southern Factories & Stores Corporation

vs.

Virginia Table Company, Incorporated, et al.

#### DEMURRER TO AMENDED NOTICE.

The defendant, Virginia Lincoln Furniture Corporation, by its attorney, comes and says that it demurs to the original notice and each count thereof and to the amended notice and each count thereof and says the same is not sufficient in law.

This defendant here further assigns the grounds of demurrer heretofore relied upon by written demurrers filed in this cause.

As additional grounds of demurrer to the amended notice this defendant comes and says:

#### 1.

The plaintiff seeks to recover a personal judgment against this defendant on a debt due from another on account of its alleged knowledge of or participation in an alleged fraudulent conveyance, by the said debtor.

The plaintiff has no right of action at law against this defendant by reason of any of the allegations of fraud in the notice contained. A grantee in an alleged fraudulent conveyance cannot be properly made a defendant in a personal action at law by a general creditor of the alleged fraudulent grantor declaring on a debt against the alleged fraudulent grantor. If all of the statements of fraud in the notice are true they do not of themselves make this defendant personally liable in a legal action to the plaintiff, for said debt,

or for damages for breach of a contract by the alleged fraudulent grantor.

## 2.

The allegations of fraud in the notice are insufficient at law. The ground upon which the conveyance is alleged to be fraudulent in the notice is inadequacy of consideration. Mere inadequacy of consideration is not sufficient of itself to constitute fraud.

## 3.

The elements of fraud are not set forth *forth* with that particularity and definiteness which the law required. The amount of consideration paid which is alleged to be inadequate and the value of the property bought is not alleged, nor are any other circumstances alleged such as insolvency, etc., which constitute sufficient proof of fraud.

## 4.

There is a misjoinder of causes of action in the notice. The following causes of action are set forth:

(1) That the Virginia Table Company, Incorporated, employed the plaintiff to secure certain options on certain furniture stores and agreed to pay therefor the sum of \$1,000 for each, which it has not paid.

(2) That the Virginia Table Company employed the defendant to work for it in taking certain inventories in certain furniture stores for which it agreed to pay the plaintiff and failed to do so.

(3) That the Virginia Table Company breached a contract whereby it agreed to purchase plaintiff's property for which a large amount of unliquidated damages is claimed.

(4) The Virginia-Lincoln Furniture Corporation assumed the payment of the debts set forth in the declaration.

(5) That the sale of assets by Virginia Table Company to this defendant was fraudulent.

(6) By reason thereof this defendant is liable and a personal judgment is sought against it.

All of these causes of action are separate and distinct, aris-

ing out of entirely separate transactions and contracts and the said causes of action are misjoined.

5.

page 91 } In this motion at law for a judgment (which is a purely legal proceeding) the allegations are contradictory and the pleadings inconsistent. The notice, which takes the place of a declaration at law, first alleges that this defendant assumed the payment of the debts set forth in the notice, and secondly that this defendant did not assume the said debts but that there was a sale of assets to this defendant by the alleged debtor which was fraudulent, and therefore this defendant is personally liable therefor.

Pleadings at law must be consistent and not contradictory.

6.

The notice is not divided into counts; there is only one count in the notice in which all of the causes of action are combined, which causes of action are separate and the allegations in regard thereto contradictory.

6½.

There is a misjoinder of causes of action in the amended notice as an original debtor corporation & a corporation with which it is alleged it consolidated or merged cannot be joined.

7.

The amended declaration declares against the defendant upon the ground of fraud. It is therefore a tort action joined with an action in contract and the two cannot be joined in the same notice.

Wherefore this defendant prays that the said notice be dismissed.

VIRGINIA-LINCOLN FURNITURE CORPORATION.  
By Counsel.

KIRSH & BAZILE,  
BUCHANAN & BUCHANAN,  
Attys.

page 92 }

(Filed Feb. 17, 1932.)

Virginia:

In the Law & Equity Court of the City of Richmond,  
Part Two.

Southern Factories &amp; Stores Corporation

vs.

Virginia Table Company, Incorporated, et al.

PLEA AND ANSWER OF VIRGINIA-LINCOLN FURNI-  
TURE CORPORATION TO AMENDED NOTICE.

This day came Virginia-Lincoln Furniture Corporation, by its attorney, and in addition to pleas filed says that it is not guilty of any fraud as set forth in the amended notice and that it does not owe the amounts in the said notice set forth or any part thereof.

VIRGINIA-LINCOLN FURNITURE CORPORATION.

By J. D. LINCOLN, Vice-Pres.

KIRSH & BAZILE,  
BUCHANAN & BUCHANAN,  
Attys.

Sworn to before me Feb. 17, 1932, by J. D. Lincoln, E. M. Edwards, Deputy Clerk of the Law and Equity Court of the City of Richmond, Part Two.

E. M. EDWARDS,  
Deputy Clerk, Law and Equity Court of  
the City of Richmond, Part Two.

page 93 }

(Filed Feb. 17, 1932.)

Virginia:

In the Law & Equity Court of the City of Richmond,  
Part Two.

Southern Factories &amp; Stores Corporation

vs.

Virginia Table Company, Incorporated, et al.

**AFFIDAVIT AND MOTION FOR MISJOINDER.**

This day came the defendant, Virginia-Lincoln Furniture Corporation under the provisions of the Statute in such cases made and provided and says there is a misjoinder of parties in the notice and amended notice in this case and moved that an order may be entered dismissing it as a party from this proceeding.

For grounds of its motion in addition to the affidavit and motion heretofore filed in this case this defendant comes and says that under the amended notice it is sought to join it as a party defendant in a law action with the Virginia Table Company, Incorporated; that the grounds upon which it is joined in such legal action is that it is an alleged fraudulent grantee of the Virginia Table Company an alleged fraudulent grantor; that the said Virginia Table Company, Incorporated, has transferred its property to this defendant with intent to defraud the plaintiff and prevent the plaintiff from collecting its just debt.

The object of the amended notice is to recover a personal judgment at law and the amount of damages claimed in the notice solely because it is an alleged fraudulent grantee of a fraudulent debtor, who was primarily liable therefor.

This defendant cannot therefore legally be made a defendant at law nor can a personal judgment be secured against it in a legal action. Its alleged participation in the fraud does not impose upon it by reason thereof and personal liability on account of the alleged debt of the plaintiff in an action at law where it is joined with the principal debtor.

There is neither joint nor joint and several liability  
page 94 } for the alleged debt upon the defendant under the  
circumstances alleged in the notice.

**VIRGINIA-LINCOLN FURNITURE CORPORATION.**

By Counsel.

**KIRSH & BAZILE,  
BUCHANAN & BUCHANAN,**  
Attys.

State of Virginia,  
County of Smyth, to-wit:

This day personally appeared before me, Katherine Scott, a Notary Public in and for the County and State aforesaid, J. P. Buchanan, Agent and Attorney for the Virginia-Lin-

coln Furniture Corporation and made affidavit that the matters and things in the foregoing affidavit and motion are true to the best of his knowledge and belief.

J. P. BUCHANAN.

Subscribed and sworn to before me on the 15th day of Feb., 1932.

KATHERINE SCOTT,  
Notary Public.

Commission expires Nov. 21, 1934.

page 95 } And at another day, to-wit: at a Law and Equity  
Court of the City of Richmond, Part Two, held the  
7th day of March, 1932:

This day came the plaintiff, by counsel, and filed herein its "Amended Additional Particulars of Claim" to this action.

page 96 } (Filed March 7, 1932.)

Virginia:

In Law & Equity Court of the City of Richmond,  
Part Two.

Southern Factories & Stores Corporation

vs.

Virginia Table Company, Inc., et al.

In compliance with the order entered herein on the 7th day of November, 1931, the plaintiff files the following amended additional particulars of its claim, viz:

Salaries of \$3,490.00 to T. C. McGahee and of \$1,929.00 to H. R. Martin who were retained in employment of plaintiff to meet the demands and agreements of defendants, and who otherwise would not have been employed.

Extra rental paid and contracted to be paid, to-wit: \$36,000.00 by plaintiff on lease of new store at Greenville, S. C., and improvements of \$9,089.86 on the property leased, which extra rental and expenses otherwise would not have been incurred, as per copy of lease and statement furnished counsel for defendants.

Salary of \$500.00 per month to R. S. Wahab from, to-wit,

March, 1930, made necessary by failure of defendants to comply with their agreements with plaintiff, plus his expenses.

Expenses in regard to claims and judgments of Marion National Bank and Sugar Grove Lumber Company, Incorporated, against plaintiff, to-wit, \$2,360.75, as per statement furnished counsel for defendants.

Interest, to-wit, \$3,266.12, paid on additional money borrowed, to-wit, \$42,000.00, in order to comply with demands and requests of defendant, and because of its agreements with plaintiff in excess of what would otherwise have been necessary, as per statement hereto attached.

Interest, to-wit, \$6,637.64, paid to trade credit-page 97 } tors of plaintiff, the payment of which would not have been necessary but for the effort of the plaintiff to comply with the demands and requests of the defendant, and/or of the failure of the defendant to comply with its agreements with the plaintiff, as per statement hereto attached.

Disruption of plaintiff's business, impairment of credit, increase of inventories, loss of sales and profits, to great damage of plaintiff, and caused by defendant's failure to comply with their agreements.

The claims for loss and damage as stated in the notice of motion for judgment.

SMITH & GORDON, p. q.

page 98 } INTEREST PAID BY SOUTHERN  
FACTORIES & STORES  
CORPORATION ON \$25,000.00 BORROWED  
APRIL 1st, 1930.

<i>Date Paid</i>	<i>Amount of Interest Paid</i>
State-Planters Bank & Trust Co. (\$15,625.00)	
4-1- 1930	\$ 239.58
7-1	239.58
10-1	242.19
1-1- 1931	231.77
4-1	236.98
7-1	239.58
10-1	247.40
1-1- 1932    Accrued to 3-1-32	156.25

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Total—Paid to State-Planters Bank & Trust Co. \$1,833.33



## North Carolina Bank &amp; Trust Co. (\$6,250.00)

4-1- 1930	95.85
7-1	95.85
10-1	95.85
1-1- 1931	93.75
4-1	94.79
7-1	32.29
8-1	32.29
9-1	31.25
10-1	33.33
11-1	31.25
12-1	33.33
1-1- 1932	32.29
2-1 to 3-1-32	31.25

---

Total—Paid to North Carolina Bank & Trust Co. \$ 733.37

## Independence Trust Company (\$3,125.00)

4-1- 1930	47.42
7-1	47.91
10-1	47.91
1-1- 1931	46.87
4-1	47.39
7-1	47.39
10-1	48.43
1-1- 1932 Accrued to 3-1-32	31.25

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Total—Paid to Independence Trust Company \$ 364.57

Total Interest Paid on \$25,000.00 Loan \$2,931.27

page 99 } INTEREST PAID BY SOUTHERN  
FACTORIES & STORES  
CORPORATION ON \$17,000.00 BORROWED  
OCTOBER 29th, 1931.

10-29-31	State-Planters Bank & Trust Co. (\$10,625.00)	<i>Interest</i>
12-31	to 12-31	\$ 99.46
1-1-32	accrued to 3-1-32	106.25
Total		<hr/> \$205.71

10-29-31	North Carolina Bank & Trust Co. (\$4,250.00)	
11-28	to 11-30	\$ 23.38
12-30	to 12-31	21.33
1-30-32	to 1-31	21.96
2-1	Accrued to 3-1-32	20.47
Total		\$ 87.14

10-29-31	Independence Trust Company (\$2,125.00)	
12-30	to 12-31	\$ 20.75
1-1-32	Accrued to 3-1-32	21.25
Total		\$ 42.00

Total interest paid on \$17,000.00 Loan \$334.85

page 100 } INTEREST PAID BY SOUTHERN  
 FACTORIES & STORES  
 CORPORATION TO TRADE CREDITORS  
 FROM MAY, 1929, to FEBRUARY 29, 1932, INCLUSIVE

	<i>Month Paid</i>	<i>Amount Paid</i>
1929	May	\$
	June	44.50
	July	196.58
	August	339.71
	September	194.05
	October	288.87
	November	340.63
	December	383.17
1930	January	99.81
	February	151.40
	March	277.95
	April	134.26
	May	169.30
	June	214.56
	July	62.88
	August	161.33
	September	172.96
	October	396.92
	November	205.51
	December	231.43

1931	January	224.04
	February	288.36
	March	202.43
	April	307.11
	May	176.42
	June	169.78
	July	115.88
	August	134.39
	September	131.61
	October	148.74
	November	141.64
	December	157.57
1932	January	195.40
	February	178.45
Total		<hr/> \$6,637.64

page 101 } And at another day, to-wit: at a Law and  
Equity Court of the City of Richmond, Part Two,  
held the 14th day of March, 1932:

This day came again the parties, by their attorneys, and the demurrers of the defendants to the plaintiff's amended notice of motion for judgment being argued by counsel, the Court, for reasons stated in writing and hereby made a part of the record, doth sustain the said demurrers, with leave to the plaintiff to amend its said notice of motion; and thereupon the plaintiff excepted to the action of the Court in sustaining said demurrers, and by leave of Court amended its said amended notice of motion by striking therefrom the paragraph numbered "1-B", which was added thereto under the order entered herein on the 1st day of February, 1932, and by substituting for said paragraph another paragraph numbered "1-B, amended", in the following words, viz:

"1-B, amended. That when the said assets were transferred by said Virginia Table Company, Incorporated, to said Virginia-Lincoln Furniture Corporation, both of said corporations knew that the said Virginia Table Company, Incorporated, was largely indebted to the said plaintiff; that said assets exceeded by a large amount, to-wit, one million five hundred thousand dollars, any consideration paid therefor by said Virginia-Lincoln Furniture Corporation; and that

said assets constituted a trust fund for the benefit of the plaintiff as a creditor of said Virginia Table Company, Incorporated."

And the Court doth overrule the motions of the defendants respectively that this cause do abate as to the other defendant, and that the plaintiff be required to elect as against which of the two defendants it will proceed; with leave to the defendants to hereafter renew the said motions if they shall be so advised; to which action of the Court in overruling the said motions and permitting said new amendment the defendants excepted.

page 102 } (Filed Mar. 14, 1932.)

Virginia:

In the Law & Equity Court of the City of Richmond, Part II.

Southern Factories and Stores Corporation, Plaintiff,  
vs.

Virginia Table Company, Incorporated, and Virginia-Lincoln Furniture Corporation, Defendants.

#### MEMORANDUM BY THE COURT.

Previous to the amendments 1-A, and 1-B, to the notice of motion for judgment the Court overruled a demurrer based on the ground that there had been a misjoinder of causes of action. The Court was of the opinion that the basic reason for the rule in *Langhorne vs. Richmond Rwy., etc.*, 91 Va. 369, was that in that case there was clearly a joinder of an action *ex contractu* with one *ex delicto*. Following the rule laid down in *Ives vs. Williams*, 13 Va. 855, this Court was of the opinion, however, that a demurrer would not lie when both causes of action were *ex contractu* and arose out of the same circumstances and rested upon the same proof against both parties, e. g. the promise of one defendant, the assumption of that promise (or obligation) by the other defendant and the breach by both.

There being no motion before the Court at that time, to abate for misjoinder of parties, the Court expressed no opinion on that phase of the case.

Since the announcement of that ruling the plaintiff applied for and obtained leave (over the objection of the defendants) to amend its notice of motion by inserting on page , paragraphs 1-A and 1-B. The defendants have now de-

murred to the amended notice of motion on the ground that there is now by reason of the amendment a mis-  
 page 103 } joinder of causes of action. The Court is of the  
 opinion this demurrer should be sustained on  
 ground, but with leave to the plaintiff to amend, or the notice of motion will be dismissed. The original notice of motion seems to have been based on the theory of a promise by the defendants, either express, or arising by implication of law and the Court has treated it solely as an action *ex contractu*. Since the amendment in addition to the promises previously alleged, there appears now in the notice of motion in paragraph 1-B, the charge that the transfer of the property was made "with intent to hinder, delay and defraud and plaintiff" and "was voluntary fraudulent and void". The addition of these charges constitutes a cause of action *ex delicto* and the amended notice now contains causes of action *ex contractu* and *ex delicto*. This is clearly a misjoinder of causes of action and affords ground for sustaining the demurrer.

Anticipating that the notice will be amended, and proceeding now to consider the motion of the defendants to abate for misjoinder of parties as provided by Section 6102 of the Code, the Court thinks at this stage of the proceeding that it has not been made sufficiently clear that there has been a misjoinder of parties and that the ends of justice do not require the Court now to direct that the suit abate as to the party misjoinder. The Court is of the opinion the case should proceed and at any stage of the proceedings before a verdict, the motion to abate may be renewed and will be considered by the Court and acted upon at that time as the ends of justice may require.

In the arguments of counsel heretofore upon the demurrers and motions to abate there has been drawn into the case a question of whether the liability of the Virginia-Lincoln Furniture Corporation, if any, does not sound solely in tort. Many authorities from other states have been cited but the Court is of the opinion that this is no longer an open question in Virginia. In *American Railway Express Company vs. Downing*, 132 Va. 139, and in *American Railway Express Company vs. Royster*, 141 Va. 602, it was held that under such a state of facts as alleged in the plaintiff's notice of motion, a promise arose by implication of law.  
 page 104 }

FRANK T. SUTTON, JR.,

March 9th, 1932.

page 105 } And at another day, to-wit: at a Law and  
Equity Court of the City of Richmond, Part Two,  
held the 16th day of March, 1932:

On the motion of the plaintiff, by counsel, it is ordered that a writ of *venire facias* be issued, directed to the Sheriff of the City of Richmond, commanding him to summon the following named persons, designated by the Court, to-wit: T. L. Anderson, Thos. S. Winn, H. N. Phillips, Thos. P. Deitrick, A. K. Muhleman, W. Meade Addison, Waller Holladay, Geo. S. Kemp, Walker C. Cottrell, C. Braxton Valentine, T. Croxton Gordon, Ralph P. Neale, Clarence Gray, R. McLane Whittet, Robt. B. Forrest, Luke D. Drury, Geo. H. Keesee, Edw. Waller, Jr., E. Lorraine Ruffin, H. B. Rufty, W. C. Carrick, Meade T. Spicer, Sr., Robt. S. Montgomery, Preston B. Watt, J. Page Ramos, Clyde H. Ratcliffe, W. Chester Evans, B. O. Andrews, Otis S. Allfriend, and T. Garnett Tabb, residents of the City of Richmond, to attend this Court on Monday, the 21st day of March, 1932, at ten o'clock A. M., from whom a special jury shall be chosen for the trial of this case.

page 106 } And at another day, to-wit: at a Law and  
Equity Court of the City of Richmond, Part Two,  
held the 14th day of April, 1932:

This day came the defendant, Virginia Table Company, Incorporated, by counsel, and filed herein its plea of Off-Set and Counter-claim to the plaintiff's notice of motion for judgment.

In the Supreme Court of Appeals of Virginia.

Virginia-Lincoln Furniture Corporation, Plaintiff in Error,  
vs.  
Southern Factories and Stores Corporation, Defendant in Error.

#### STIPULATION OF COUNSEL.

It is hereby stipulated and agreed between counsel for the plaintiff in error and counsel for the defendant in error that the following parts of the manuscript record shall not be printed, unless required by the Court to be printed:

The plea of set-off and counter-claim of the Virginia Table Company, pages 107-109 of the manuscript record, both inclusive.

The order of April 22, 1932, requiring the Virginia Table Company to file the particulars of its set-off and counter-claim, found on page 110 of the manuscript record.

The memorandum of filing of the particulars of the claim set out on page 111 of the manuscript record.

The particulars of the Virginia Table Company's claim of set-off and counter-claim found on page 112 of the manuscript record.

The memorandum of May 19, 1932, found on page 113 of the manuscript record.

The amendment to the plea of set-off and counter-claim found on page 114 of the manuscript record.

The particulars of said amended claim found on pages 115-116, both inclusive, of the manuscript record.

The order of May 24, 1932, requiring the Virginia Table Company to file additional particulars of its amended plea of set-off and counter-claim found on page 117 of the manuscript record.

The supplemental particulars of the Virginia Table Company's plea of set-off and counter-claim found on pages 118-127, both inclusive, of the manuscript record.

it being the purpose of this stipulation to omit from the printed record pages 107-127, both inclusive, of the manuscript record, which pages relate exclusively to the pleas of set-off and counter-claim filed by the Virginia Table Company.

Witness our hands this 24th day of November, 1933.

LEON M. BAZILE,  
JNO. P. BUCHANAN,  
Counsel for Virginia-Lincoln Furniture  
Corporation.

SMITH & GORDON,  
Counsel for Southern Factories and  
Stores Corporation.

page 128 } And at another day, to-wit: at a Law and  
Equity Court of the City of Richmond, Part Two,  
held the 15th day of July, 1932:

On the motion of the plaintiff, by counsel, it is ordered that a writ of *venire facias* be issued, directed to the Sheriff of the City of Richmond, commanding him to summon the following named persons, designated by the Court, to-wit: Robert Lecky, Thomas L. Anderson, Thomas S. Winn, H. N. Phillips, A. K. Muhleman, W. Meade Addison, Waller Hol-

laday, Walker C. Cottrell, C. Braxton Valentine, T. Croxton Gordon, Ralph P. Neale, Clarence Gray, R. McLane Whittet, Robert B. Forrest, Luke D. Drury, George H. Keesee, Edward Waller, Jr., E. Lorraine Ruffin, H. B. Rufty, W. C. Carrick, Meade T. Spicer, Sr., Robert S. Montgomery J. Page Ramos, Clyde H. Ratcliffe, W. Chester Evans, B. O. Andrews, Otis S. Alfriend, T. Garnett Tabb, Louis Hankins and John H. Gary, residents of the City of Richmond, to attend this Court on Tuesday, the 19th day of July, 1932, at ten o'clock A. M., from whom a special jury shall be chosen for the trial of this case; to which action of the Court in allowing a special jury for the trial of this case the defendants, by counsel, excepted on the grounds that a special jury is unnecessary in this case.

page 129 } And at another day, to-wit: at a Law and  
Equity Court of the City of Richmond, Part Two,  
held the 18th day of July, 1932:

It appearing to the court that by reason of exemption, and otherwise for lawful reasons, the special jury selected and summoned for this case has been reduced to less than twenty, it is ordered that a writ of *venire facias* be issued, directed to the Sheriff of the City Richmond, commanding him to summon the following named persons, designated by the Court, to-wit: Harper W. Shelton, Edward W. Henning, O. H. Funsten, Irving Straus, R. A. Ricks, John Sloan and William E. Barrett, residents of the City of Richmond, to attend this court on Tuesday, the 19th day of July, 1932, at ten o'clock A. M., to complete the panel from which a special jury shall be chosen for the trial of this case.

page 130 } And at another day, to-wit: at a Law and  
Equity Court of the City of Richmond, Part Two,  
held the 19th day of July, 1932:

This day came the plaintiff and defendants, by counsel, and thereupon the defendants, by counsel, moved the Court to quash the *venire facias* issued in this case and to dismiss the special jury summoned thereunder, for reasons stated in writing and now made a part of the record, and said motion being argued, the Court doth overrule the same; to which action of the Court the defendants, by counsel, excepted.

And the special jury summoned for the trial of this case appeared in Court and thereupon sixteen jurors were chosen by lot and the parties, beginning with the plaintiff, by counsel, alternately struck off one until the number was reduced to twelve, who are as follows, to-wit: Thomas L. Anderson,



A. K. Muhleman, Walter Holladay, C. Braxton Valentine, W. C. Carrick, Meade T. Spicer, Sr., J. Page Ramos, B. O. Andrews, Otis S. Alfriend, Edward W. Hening, R. A. Ricks and John Sloan. And they were thereupon sworn well and truly to try the issues joined in this case and having partly heard the evidence were adjourned until tomorrow morning at ten o'clock.

page 131 }

(Filed July 19, 1932.)

Virginia:

In the Law and Equity Court of the City of Richmond, Part  
Two.

Southern Factories and Stores Corporation

vs.

Virginia Table Company and Virginia-Lincoln Furniture Corporation.

### MOTION TO QUASH *VENIRE FACIAS*.

The defendants, Virginia Table Company and Virginia-Lincoln Furniture Corporation, come and craveoyer of the jury list and of the writ of *venire facias* issued for the special jury summoned in the case at bar, and on the production of the jury list and of the writ of *venire facias*, moved the Court to quash the *venire facias* for the following reasons:

1. Because it does not appear that any of the members of the special jury selected were selected from the jury list, and because only one member of the special jury summoned is on the jury list, namely, R. McLean Whittet.

2. Because Section 5988 of the Code requires the jury list to be prepared by the jury commissioners and Section 5989 of the Code requires this list to be delivered to the clerk, who is required to safely keep the same, and section 5990 of the Code requires the names of jurors to be written on special ballots folded and deposited in a secure box which is required to be locked and opened only at the direction of the judge; and because section 5991 of the Code provides, "all jurors required for the trial of civil cases in any circuit court or city court shall be selected by drawing ballots from the said box in the manner prescribed in this chapter \* \* \*"; and further because Section 5992 of the Code requires the jurors to be drawn by lot from the ballots deposited in said

page 132 }

box and permits them to be drawn only by the clerk in the presence of the judge or of the Com-

wealth's attorney or of a jury commissioner, and before said ballots may be drawn the law requires the clerk to shake and mix the ballots together and the total number to be drawn must be withdrawn without inspecting the names thereon until the proper number has been withdrawn.

Section 6005 of the Code, authorizing special juries, is contained in the same chapter of the Code, namely, chapter 249; and while that section authorizes the court to designate the persons to be summoned on a special jury, it is a statute in *pari materia* with the other sections of this chapter, and clearly contemplates and requires the Court to draw the persons to be summoned for a special jury from the jury box of the court in the manner prescribed by law for the drawing of other juries.

To give to Section 6005 of the Code the interpretation placed on it here by permitting the judge to select persons for service on a special jury regardless of whether they are on the jury list or not, and to select them other than by lot, would enable a judge actuated by motives less high than those which actuate the distinguished judge who presides over this Court, to pack a jury so as to place a litigant completely at the mercy of an unscrupulous judge.

It is submitted that the whole history of constitutional law and legislation in this State negatives the idea that the General Assembly ever intended Section 6005 of the Code to be open to the construction which the Court has placed upon it by the manner in which the special jury was summoned in this case. The right to a jury trial is guaranteed to a litigant by Section eleven of the Constitution of Virginia, and the General Assembly has declared that in all civil cases the jurors shall be selected by drawing ballots from the jury box in the manner prescribed by chapter 249 of the Code.

JOHN P. BUCHANAN,  
KIRSH & BAZILE,  
P. D.

page 133 } And at another day, to-wit: at a Law and  
Equity Court of the City of Richmond, Part Two,  
held the 20th day of July, 1932:

This day came again the plaintiff and defendants, by counsel, and the jury sworn in this case on yesterday appeared in court in accordance with their adjournment and having further heard the evidence were adjourned until tomorrow morning at ten o'clock.

And at another day, to-wit: at a Law and Equity Court of the City of Richmond, Part Two, held the 21st day of July, 1932:

This day came again the plaintiff and defendants, by counsel, and the jury sworn in this case appeared in court in accordance with their adjournment on yesterday and having further heard the evidence were adjourned until Monday morning next at ten o'clock.

And at another day, to-wit: at a Law and Equity Court of the City of Richmond, Part Two, held the 22nd day of July, 1932:

This day came again the plaintiff and defendants, by counsel, and the jury sworn in this case appeared in court in accordance with their adjournment on yesterday and having further heard the evidence were adjourned until Monday morning next at ten o'clock.

page 134 } And at another day, to-wit: at a Law and Equity Court of the City of Richmond, Part Two, held the 25th day of July, 1932:

This day came again the plaintiff and defendants, by counsel, and the jury sworn in this case appeared in court in accordance with their adjournment on yesterday and having further heard the evidence were adjourned until tomorrow morning at ten o'clock.

And at another day, to-wit: at a Law and Equity Court of the City of Richmond, Part Two, held the 26th day of July, 1932:

This day came again the plaintiff and defendants, by counsel, and the jury sworn in this case appeared in court in accordance with their adjournment on yesterday and having further heard the evidence were adjourned until tomorrow morning at ten o'clock.

And at another day, to-wit: at a Law and Equity Court of the City of Richmond, Part Two, held the 27th day of July, 1932.

This day came again the plaintiff and defendants, by counsel, and the jury sworn in this case appeared in court in accordance with their adjournment on yesterday and having further heard the evidence were adjourned until tomorrow morning at ten o'clock.

page 135 } And at another day, to-wit: at a Law and Equity Court of the City of Richmond, Part Two, held the 28th day of July, 1932:

This day came again the plaintiff and defendants, by counsel, and the jury sworn in this case appeared in court in accordance with their adjournment on yesterday and having further heard the evidence was adjourned until tomorrow morning at ten o'clock.

And at another day, to-wit: at a Law and Equity Court of the City of Richmond, Part Two, held the 29th day of July, 1932:

This day came against the plaintiff and defendants, by counsel, and the jury sworn in this case appeared in court in accordance with their adjournment on yesterday and having fully heard the evidence were adjourned until Monday morning next at ten o'clock.

And at another day, to-wit: at a Law and Equity Court of the City of Richmond, Part Two, held the 1st day of August, 1932:

This day came again the plaintiff and defendants, by counsel, and the jury sworn in this case appeared in court in accordance with their adjournment on Friday last and the defendant Virginia Table Company, Incorporated, by counsel, moved the Court to abate this action as to said defendant for misjoinder of causes of action, and the plaintiff being required to elect as to which defendant it would proceed against, elected to proceed against the Virginia-Lincoln Furniture Corporation, and the Court having granted the said motion, it is ordered that this suit be abated as to the page 136 } said defendant Virginia Table Company, Incorporated, and it is further directed that this suit proceed only as to the defendant Virginia-Lincoln Furniture Corporation, to which action of the Court the plaintiff, by counsel, excepted.

And the jury having heard the arguments of counsel were sent out of court to consult of a verdict and after some time returned into court with a verdict in the words and figures following, to-wit: "We, the Jury, on the issue joined find for the plaintiff and assess its damages at \$20,500.00, plus interest from Jan. 1, 1930."

Thereupon the defendant, by counsel, moved the Court to set aside the said verdict as contrary to the law and the evidence, and for other reasons set forth in writing and now made a part of the record, which motion the Court continued for argument to be heard thereon.

Virginia:

In the Law and Equity Court, Part Two, of the City of  
Richmond.

Southern Factories and Stores Corporation, Complainant,

vs.

Virginia-Lincoln Furniture Corporation, Defendant.

MOTION TO SET ASIDE VERDICT AND GROUNDS  
THEREFOR.

The defendant, Virginia-Lincoln Furniture Corporation, comes and moves the Court to set aside the verdict of the jury rendered in this cause on August 1, 1932, and pursuant to leave granted it by the Court, files in writing the following grounds as the basis for its motion to set aside the verdict of the jury returned in the above-entitled cause:

1. Because the verdict of the jury is contrary to the law and the evidence.

2. Because of errors committed by the trial court in the admission and in the conclusion of evidence.

3. Because of errors committed by the trial court in the granting of the plaintiff's several instructions.

4. Because of the action of the trial court in refusing the instructions offered by the defendant which were refused by the court.

5. Because of the action of the trial court in amending certain of the instructions offered by the defendant except in those particulars in which the defendant consented to the amendment.

6. Because of errors committed by the trial  
page 138 } court in drawing, selecting and impanelling of the  
special jury that tried the case, for the reasons  
set out in the defendant's motion to quash the *venire facias*.

7. Because of the action of the trial court in holding that personal and confidential communications passing between the defendant, its agents and representatives, on the one part, and James B. Murphy, its attorney, on the other part, were not privileged and confidential.

8. Because the court erred in not holding that under the evidence in the case the plaintiff's recovery on the claim for taking inventories and appraising accounts was limited to

the amount of the bill first rendered by it to the defendant, Virginia Table Company.

9. Because of the action of the trial court in holding that under the first section of count five of the declaration damages could be recovered by the plaintiff, when as a matter of law no damages would lie for the breaches of the contracts alleged in that part of count five.

10. Because of the action of the trial court in its instructions in drawing a distinction between original options and extensions and options sought after the eleven options mentioned in count three had been obtained.

11. Because of the action of the trial court in admitting in evidence testimony of witnesses, correspondence and documents relating to the alleged verbal contract of July 19, 1929, subsequently stricken from the record, it being the theory of the defendant that the admission of this testimony, although subsequently excluded, led the jury to believe that the plaintiff had sustained large damages as the result of this alleged verbal agreement and that the effect of such evidence is reflected in the verdict of the jury.

12. Because of the action of the trial court in permitting the plaintiff to amend its declaration so as to substitute an entirely new party as the party plaintiff in the place and stead of the original plaintiff.

13. Because of the action of the trial court in refusing to sustain the motion to strike out all of the evidence, because it appeared during the trial of the case that the cause of action of the plaintiff had been absolutely assigned to a trustee for the State Planters Bank and Trust Company, by which assignment the plaintiff had been completely divested of its title to maintain said suit.

14. Because of the action of the trial court in holding that the plaintiff was not bound by the testimony of its officials, members of its executive committee and other officers.

15. Because of all of the objections made by counsel for the defendant during the course of the trial to which exception was taken, all of which will appear from the transcript of the testimony when reduced to typewriting by the stenographer.

In the giving of specific reasons for setting aside the verdict of the jury, it is not intended to waive any of the general reasons assigned therefor, but the general reasons assigned as grounds for having the verdict of the jury set aside are expressly relied on in addition to the special reasons hereinabove assigned.

Respectfully submitted this 2nd day of August,  
page 140 } 1932, at 1:35 o'clock P. M. and this day filed pur-  
suant to the leave granted the defendant by the  
court on August 1, 1932.

VIRGINIA-LINCOLN FURNITURE CORPORATION.

By JOHN P. BUCHANAN, Counsel. B.  
KIRSH & BAZILE, Counsel.

page 141 } And at another day, to-wit: at a Law and  
Equity Court of the City of Richmond, Part Two,  
held the 10th day of February, 1933:

This day came again the parties, by their attorneys, and the Court having maturely considered the motion of the defendant to set aside the verdict of the jury, and the arguments of counsel thereon, and for reasons stated in the written opinion of the Court, which is hereby made a part of the record, doth overrule the said motion.

Wherefore it is considered and ordered by the Court that the plaintiff recover of the defendant, Virginia-Lincoln Furniture Corporation, for the benefit of Hoke Murray, Trustee, the sum of Twenty thousand five hundred dollars (\$20,500.00), with interest thereon to be computed at the rate of six per centum per annum from the 1st day of January, 1930, until paid, and its costs by it about its suit in that behalf expended, the plaintiff, in accordance with the ruling of the Court, having endorsed on its notice of motion that any recovery should be for the benefit of said Hoke Murray, Trustee.

And the said defendant, Virginia-Lincoln Furniture Corporation, excepted to the action of the Court in overruling said motion to set aside the verdict of the jury and in rendering judgment against said defendant, and leave is granted it to file its bills or certificates of exception as provided by law.

And said defendant having indicated a purpose to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to said judgment, it is ordered that said judgment be suspended for sixty days from this date on condition that said defendant, within fifteen days from the date hereof, shall execute before the Clerk of this Court a suspending bond in the penalty of Twenty-five thousand dollars (\$25,000.00), with security to be approved by said Clerk, and conditioned according to law.

page 142 } (Filed Feb. 10, 1933.)

Virginia:

In the Law and Equity Court of the City of Richmond,  
Part II.

Southern Factories and Stores Corporation, Plaintiff,

vs.

Virginia Table Company, Inc., et al., Defendant.

### MEMORANDUM BY THE COURT.

Upon a motion by the defendant to set aside the verdict of the jury in favor of the plaintiff as contrary to law and evidence, etc., the defendant assigns seven separate grounds for setting aside the verdict. Briefly stated, they are:

1. The admission of the testimony of James B. Murphy, who acted as attorney in some matters for the defendant.

2. Because the jury were allowed to find damages for breach of implied *assumpsit*.

3. Because the jury were allowed to find damages for breach of implied contract as set up in the fifth count in the Notice of Motion.

4. Because the court allowed evidence of an oral contract of July 19th, 1929, to be heard by the jury and afterwards, by instructions struck out all evidence relating thereto.

5. Because there was error in the instructions as to damages.

6. Because the defendant's objections to the jurisdiction of the court and venue should have been sustained.

7. The substitution of a new plaintiff for the plaintiff who originally brought this action.

These grounds will be taken up and disposed of in the order named.

### EVIDENCE OF JAMES B. MURPHY.

It is necessary to recall the attendant circumstances in passing on this objection. Prior to any employment of the witness by the defendant, the witness had been and was at the time, the general attorney for the plaintiff corporation which fact was known to the defendant.

The witness was the owner of a large block of the plaintiff's stock. The brief for the defendant corpora-



tion states that he was the owner of a majority of the plaintiff's stock. At this time both the plaintiff and the defendant were interested in a merger of furniture stores in the Eastern and Southern portions of the United States. Had this merger been effected both parties then thought it would be considerably to their interest, and in their separate ways were working towards this end with constant communications being sent back and forth between the representatives of the plaintiff and the representatives of the defendant, as to the progress being made and as to the ways and means of carrying out the projected venture. There may be many instances of communications between counsel and client which are not privileged. The rule in Virginia is stated in *Lyle vs. Higginbotham*, 10 Leigh 63. To have excluded all the testimony of Murphy under general objections would have seriously prejudiced the plaintiff's case and suppressed evidence of facts not affected by any rule of privileged communications. Because of its tendency to suppress truth the rule should always receive a strict construction. 28 R. C. L., page 550, §140. No secrets were involved. Lincoln, president of the defendant corporation, could have been called to the stand and required to disclose the same facts.

There are two, possibly three, outstanding cases in Virginia, dealing with this subject-matter. They are:

*Lyle vs. Higginbotham*, 10 Leigh, page 63.

*Chahoon vs. Commonwealth*, 21 Grat., page 822.

*Stein vs. Morris*, 120 Va., at page 396.

The Chahoon case involved the disclosure to counsel by one accused of crime. As the accused was exempt from going on the witness stand, he could not have been required to testify as to the matter communicated to counsel. This distinguishes this case from a civil case. It must have been recognized by Judge Moncure that there was such a distinction, for the case of *Lyle vs. Higginbotham*, *supra*, had been decided thirty years before, yet in the Chahoon case, Judge

Moncure intimates that the question there in-  
 page 144 } volved was a matter of first impression in Virginia. That being so, he did not intend to overrule anything said in the *Lyle vs. Higginbotham* case, but must have considered the point in the Chahoon case a different one. *Lyle vs. Higginbotham* has never been overruled and must be said to still express the law in Virginia. In the course of that opinion, Judge Tucker said:

"But several things must concur to bring a case within the rule. The matter must have been one of professional confidence; it must have been at the time a secret, for if known to all the world, there was no reason for further concealment. The disclosure must be *in invitum*, as it respects the client; and lastly, if it might be forced from the client by the rules of the court, *pari ratione*, it may be drawn from the attorney."

The testimony of Murphy shows that these several things did not concur and the objection to the testimony was properly overruled.

In *Stein vs. Morris*, 120 Va., at page 396, it is said:

"No communication to a lawyer for the express purpose of having it brought to the attention of the public or communicated to another is privileged."

In 28 Ruling Case Law, pp. 533, 561, 562, 563, 566, & 571, will be found a statement of the law as to when an attorney will or will not be permitted to disclose communications from his client. No rule is found there which would debar James B. Murphy from giving the testimony heard in this case.

#### DAMAGES FOR BREACH OF IMPLIED ASSUMPSIT.

This objection is technical. Technicalities should be disregarded in the interests of justice, unless to do so would sacrifice just and sound principles. *Clark vs. Hugo*, 130 Va. 99. The point is a new one in Virginia. Precedents are not many and are from other States. At most they are merely persuasive. It is deemed unnecessary to make a review of them in this memorandum. In passing judgment on this point, the court should be controlled by the settled policy of this State in the application of general principles. Implied promises resulting in contracts, when breached afford ground for the recovery of damages. A consideration for a promise may be furnished by refraining from a certain line of  
page 145 } conduct. The primary object of allowing damages is to put the injured party in as good a position as he would have been if there had been no breach. This objection is aimed at the correctness of instruction Number seven (7) and its relation to the allegations in the Notice of Motion in the first part of paragraph five (5).

In substance the allegation is that the defendant called upon

the plaintiff to secure (1) extensions of options, (2) to keep separate and distinct sets of books after January 31, 1929, (3) to change its method of business, and (4) vary its method of sales, (5) to purchase large supplies and increase its inventories, and (6) to operate its business for the benefit of said defendant, or as directed by said defendant. And in consideration therefor the defendant promised the plaintiff (1) to reimburse it for all expenses, loss and damage sustained by it on account of its compliance. There was evidence that the defendant requested of the plaintiff the above and that the plaintiff complied with such requests. The promise was not express. The plaintiff relied upon the implied promise, that is to say, a promise that the law raises by implication from the conduct of the alleged promisor. It has its foundation and very existence in the justice of the occasion.

It is natural equity. In *Rinehart vs. Pirkey*, 126 page 146 { Va. 351, the court quoting, says:

“The acts of the parties may bring about an obligation *quasi ex contractu* \* \* \*. Where one person confers benefits upon another for which the *later* ought to pay \* \* \* the obligation rests, as said by Professor Keener, ‘upon the doctrine that a man shall not be allowed to enrich himself unjustly at the expense of another’.”

Such is the foundation for the existence of implied contracts and no good reason is seen why in their scope they should not cover as broad a field as express contracts. Parties may expressly agree that he will not run it at all (within certain limits) and that the other will pay such party therefor, he may recover the consideration promised. If this can be done expressly, it can be done impliedly. Loss of profits, if the business was stopped could reasonably be within the contemplation of the parties.

In *Payne vs. Grant*, 81 Va., at page 170, the court, quoting from an author of distinction, says:

“The proposal or acceptance of an agreement may be communicated by conduct as well as by words; and proposals and acceptances so communicated are governed, as near as may be, by the same rule as if made in express words.”

This objection should not prevent a practical consideration of the real damage, if any suffered by the plaintiff.

## THE ORAL CONTRACT OF JULY 19TH, 1929.

The evidence as to the oral contract above, presented one of those situations during the trial difficult to handle until the court had heard all of the evidence in support thereof. Such instances are not infrequent and the danger of working a prejudice is greater when the evidence is excluded without a full comprehension of its scope, than by allowing it to come in and afterwards directing the jury to disregard it. It presented one of those situations where the trial court must pursue that course most consonant with justice and yet conduct the business of the court in a practical way. In the instance referred to there was nothing in the evidence tending to inflame the passions of the jury, nothing to prejudice them for or against either party, and upon the page 147 } conclusion of the evidence on this phase of the case, the court promptly instructed the jury to disregard all evidence touching such a contract, and afterwards by written instruction directed them to disregard such evidence. It is not every irrelevant statement the jury hears that results in prejudice and justifies a mistrial or the setting aside of the verdict. To justify such action there must be something in the nature of the evidence likely to inflame the passion or instill a prejudice in the minds of the jury. The jury in this case was composed of men of unusual qualifications and the court thinks no prejudice resulted to the defendant.

## THE INSTRUCTIONS AS TO DAMAGES.

The jury were guided over this feature of the case by instructions numbers 2, 4, 5 and 7 given at the request of the plaintiff and by instructions lettered A, B, D, E, F, I, O, P, T and U, given at the request of the defendants (slight modifications excepted). No prejudicial error has been pointed out in the matter of these instructions. *Newbern vs. Baker*, 147 Va., at page 1002, and cases cited.

## JURISDICTION AND VENUE.

This question was disposed of at a hearing on the plea in abatement to the jurisdiction. The burden of proof was upon the defendant. Upon the case then presented, the court was of the opinion that the plea should be overruled. The court adheres to that ruling.

## ESTOPPEL AND ELECTION.

The matters discussed under this heading were questions to go to the jury under proper instructions for such weight as the jury thought proper to give them. As presented, they were not questions of law for the court. Instructions P and U, given at the request of the defendant protected it upon this phase of the case.

## THE SUBSTITUTION OF A NEW PLAINTIFF, ETC.

The view that the court permitted the substitution of a new plaintiff for the plaintiff who originally brought this suit, is not sustained by the record. See pages 1469, 1470, 1471 of the stenographic transcript of the evidence.

The court in its ruling was careful to draw the page 148 } distinction between the substitution of a new plaintiff and merely an amendment continuing the action in the name of Southern Factories & Stores, etc.; for the benefit of Hoke Murray, Trustee.

This action of the court is fully sustained by the cases of:

*Bardach vs. Tenebaum*, 136 Va. 163, 173.

*Kain vs. Angle*, 111 Va. 415.

The court is of the opinion that the motion to set aside the verdict should be overruled and judgment entered in accordance with the verdict of the jury.

FRANK T. SUTTON, JR.

Feb. 8th, 1933.

page 149 } And at another day, to-wit: at a Law and Equity Court of the City of Richmond, Part Two, held the 23rd day of February, 1933:

This day came again the plaintiff and defendant Virginia-Lincoln Furniture Corporation, by counsel, and on the motion of the said defendant, by counsel, it is ordered, for reasons appearing to the Court, that the time for giving the suspending bond in this case, as provided by the order entered herein on the 10th day of February, 1933, be extended for a further period of ten days from this date.

page 150 } And now at this day, to-wit: at a Law and Equity Court of the City of Richmond, Part Two, held the 24th day of March, 1933:

On motion of the Virginia-Lincoln Furniture Corporation, by counsel, and after due written notice to the plaintiff, the stenographic transcripts of the testimony and other incidents of the trials in this case of the plea in abatement and the issues on the merits were authenticated pursuant to Rule 24 of the Supreme Court of Appeals by the Judge of this Court and are ordered to be made parts of the record in this case.

page 151 } Virginia:

In the Law and Equity Court of the City of Richmond, Part Two.

Southern Factories and Stores Corporation, Plaintiff,  
vs.

Virginia Table Company, Incorporated, and Virginia-Lincoln Furniture Corporation, Defendants.

AUTHENTICATION OF THE STENOGRAPHIC REPORT OF THE TESTIMONY AND OTHER INCIDENTS OF THE TRIAL UNDER RULE XXIV OF THE SUPREME COURT OF APPEALS OF VIRGINIA.

I, Frank T. Sutton, Jr., Judge of the Law and Equity Court of the City of Richmond, Part Two, do hereby certify that the following is an accurate and authentic stenographic report of the testimony and other incidents of the trial of the above styled cause and that it appears in writing that the attorneys for the plaintiff were given reasonable notice of the time and place when the said report would be tendered and presented to me for authentication.

FRANK T. SUTTON, JR.,  
Judge of the Law and Equity Court of the City of Richmond, Part Two.

March 24th, 1933.

page 152 } Mr. Bazile: If Your Honor please, so as not to delay the hearing of the case I would like to make a motion at this time to quash the venire. If Your Honor please, I would like for the record to show that it is a fact that the Court did not draw the special jury from the jury box.

The Court: That certainly is a fact.

Mr. Bazile: But the Court selected them personally.

The Court: Men that the Court personally knew; men of

intelligence and integrity. I have got the rich and poor, the mighty and the weak.

Mr. Bazile: With that fact before the Court, I want to move to quash the venire because the statute says that unless we point out the reasons for the motion specifically before the jury has been impaneled we shall not be permitted to take advantage of it. I have put the reasons for it in writing, which I will ask to file with the record.

Note: Assignment of reasons for quashing the venire filed with the record.

The Court: How did you get the fact MacLean page 153 } Whittet's name is on there?

Mr. Bazile: I checked the list.

The Court: How did you get it?

Mr. Bazile: The clerk told me his name was on the list. I asked the clerk to examine it, and in support of my motion I crave oyer of the jury list.

The Court: I just wondered how you got it, remembering that provision that you should see it only upon my order, because I hadn't ordered it.

Mr. Bazile: Now I understand Your Honor has given a great deal of consideration to this matter, but I wish to make the point so as to preserve our objections in the record and for that reason I put my motion in writing.

The Court: The motion is overruled. This jury was drawn under Section 6005 of the Code which says the Court shall order such persons to be summoned as it shall designate for the purpose.

Mr. Bazile: Now, if Your Honor please, for the reasons we have heretofore given we respectfully except to the ruling of Your Honor in refusing to quash the venire, and for the purposes of the record do I understand the Court page 154 } permits oyer of the jury list—the regular jury list prepared by the jury commissioners?

The Court: Oh, yes. I reckon it is no doubt about the fact McLean Whittet's name is on the list. Do you accept that, Mr. Gordon, or do you want it verified?

Mr. Gordon: I don't want to verify it.

Mr. Bazile: What I want to show affirmatively is that Mr. Whittet is on the jury list.

The Court: I did not take them from the jury list.

Mr. Bazile: I don't think that we have any objection to anybody on the jury list, but our objection is based purely upon the fact they were not taken from the jury list and not selected by lot.

Note: Thereupon, the jury was selected and sworn, the witnesses excluded, and the opening statements of counsel made to the jury.

page 155 } RIVES FLEMING,  
a witness introduced in behalf of the plaintiff,  
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Gordon:

Q. State your name, age, residence and occupation.

A. Rives Fleming; 55 years old; president of Southern Factories & Stores Corporation and president of Cameron Stove Company; Richmond, Va.

Q. How long have you been president of the plaintiff company?

A. Since its organization—May, 1928, I think it was.

Q. How did you first learn of the proposed merger of Mr. Lincoln's corporation with other enterprises?

A. Mr. Kimbrell, our manager, notified me they had approached him on coming with that company. He advised them he could not come unless the company came. So he brought me into the conference. I went to the William Bryd Hotel and we had a conference that lasted about twelve or thirteen hours, interrupted only by time to sleep and time to eat, and we discussed every detail of it. Do you want me to go into the details of it?

Q. You can tell what was said there and done.

A. They were starting to form a chain of furniture stores and we had already been through that very experience; we had just consolidated our factory with six stores or had them in contemplation; we had taken over options from six furniture stores. They realized we had had that experience and solicited our help in its organization. They say they wanted us to go in with them and put our stores and factory in this organization and we told them we didn't want to do that because we had just made arrangements to properly finance ourselves through Atlanta—

Q. I want the jury to hear that particularly—want the jury to hear what you told Mr. Lincoln in regard to your plans of financing for your company.

A. Well, we started in our Southern Factories & Stores Corporation—



Mr. Bazile: If Your Honor please, we submit that has got nothing in the world to do with it. The proposition was reduced to writing and we call for the production of the contract and when that contract is produced it will be seen that it was in writing and every term and condition of the agreement was put in writing in the contract, and, therefore, the negotiations that preceded the making of that contract have nothing in the world to do with this case.

Mr. Gordon: We are not trying to affect the page 157 } written contract in any manner, shape or form.

The complaint in this case doesn't set up any written contract; it sets up an oral contract and we are merely undertaking to show what were the negotiations leading up to that oral contract about the securing of the options and it has a very vital bearing on the question of damages in this case.

The Court: The objection is overruled.

Mr. Bazile: Exception.

A. (Continued) As I said, we were under-capitalized in our Southern Factories & Stores Corporation. We had contemplated selling our stock soon after we started and we had just made arrangements through a banking firm of Atlanta to sell \$600,000 preferred stock. Just at that time Mr. Lincoln approached us on going into his organization. We told him we didn't want to do it first because we had just prepared ourselves to go along alone.

Q. Right there. Did he in that initial conference understand that you had to have additional financing or not?

Mr. Bazile: We object to that as leading.

Q. Did you tell him so?

A. We told him so.

Mr. Bazile: We object to the question as being leading and we move the witness' answer be stricken out.  
page 158 } The Court: The question and answer are before the jury now and the motion to exclude would hardly be of any service, but I suggest to counsel to make their questions not leading.

Mr. Gordon: He had made a statement with regard to what their plans were and I merely asked him whether or not that was communicated to Mr. Lincoln. I don't think that is a leading question.

The Court: The Court has allowed it to stay in, but has

made the suggestion to counsel to avoid that objectionable feature.

Mr. Gordon: I will try to observe it.

By Mr. Gordon:

Q. All right, now.

A. We told Mr. Lincoln that we were just starting to finance properly and we didn't want to go into his organization unless we were assured absolutely first that it would go through and, second, that we would be acceptable to the organization. He outlined what kind of stores they wanted and before we added ours we had them go to our stores and make a superficial investigation of them to see if they complied with their requirements, which they did and assured page 159 } us our stores were O. K. to go in. Then we discussed the question of giving options.

Q. Now what, if anything, was done at that conference or the one the next day with regard to the plaintiff securing options for the Virginia Table Company, Inc.?

A. Mr. Lincoln told us we had experience in getting options and he wanted us to get the options in the South for him and after discussing various details of it we reminded him of the fact that it cost money to get options and asked what would be a fair price. He thought over the matter a few minutes and came back and said he would give us \$1,000.00 for each of the options we secured. He told us the stores he wanted should have about \$1,000,000.00 gross assets and show about 10% profit over a period of five years, this 10% applicable to the assets purchased. I asked this question—I said: “Mr. Lincoln, suppose we find a store with only \$78,000.00 assets?” He said: “We will leave that part entirely to you and Mr. Kimbrell.” However, in every option we secured we got their approval before going into it in order to be certain about it. We would find the assets and get their approval before going into it too deeply.

Q. The names of these eleven stores are stated in the notice of motion for judgment and Mr. Buchanan has just told the jury you did secure those eleven options. That is correct, isn't it?

page 160 } A. Yes, sir; our organization did.

Q. Now in that conversation was anything in the world said about the payment of this \$1,000.00 being contingent upon the exercise of the option?

Mr. Bazile: We object. That is clearly leading.  
The Court: Objection sustained.

By Mr. Gordon:

Q. Was the agreement that you have just stated all of the agreement that was made there?

Mr. Bazile: We object to that as leading.

The Court: Objection overruled. He has got to approach the subject in some way.

Mr. Bazile: Exception.

By Mr. Gordon:

Q. Was that that you have stated the oral agreement he made in regard to the payment of \$1,000.00 for each of these options?

A. Yes, that was made once and repeated at the Cameron Stove Company the next day. It was very clearly understood.

Q. Now, as a matter of fact, did your organization go out and work on the securing of these options?

A. Yes, we certainly did. We worked very hard on them. In fact, we neglected everything else in order to get these options as quickly and as cheaply as possible.

Q. Now, then, were all of those which you se-  
page 161 } cured—these eleven options, approved by Mr. Lin-  
coln?

A. Yes, sir.

Q. And his company?

A. All of them.

Q. Did you anticipate the securing of any options which he wouldn't approve and turn down?

A. We investigated a great many companies; in fact, we investigated pretty nearly every furniture store of any consequence in Virginia and the Carolinas—especially the Carolinas, a great many in Georgia, but we realized after going into the investigation they wouldn't pass and those we didn't recommend; some we went into and finally found they wouldn't pass.

Q. Can you give the names of some of those now that were approached, but which weren't acceptable to Mr. Lincoln?

A. I didn't handle a great many of them, but I can recall a few: Morrison & Neiss at Greensboro; one in Wilmington that I can't recall the name.

Q. I will put them in later.

A. Those stores will show for themselves. I don't recall them because we looked into so many.

Mr. Gordon: Now I want at this point, may it please Your Honor, to introduce some of the documents in the case. I

want to introduce some of the documents n the  
page 162 } case. I want to introduce the minutes of the  
board of directors of the Virginia Table Com-  
pany, Inc., held October 1st, 1928.

Note: Filed and marked Exhibit R. F. #1, which is as follows:

At a meeting of the Board of Directors of the Virginia Table Company, Inc., held at the Office of the Company, Marion, Virginia, on the first day of October, 1928, pursuant to call of the President there were present:

C. C. Lincoln, C. C. Lincoln, Jr., John D. Lincoln, John W. Horne and J. P. Buchanan, being all of the directors of the Corporation.

C. C. Lincoln, Jr., Vice-President, presided and John W. Horne performed the duties of Secretary.

On motion of C. C. Lincoln, Jr., introduced and moved the adoption of the following resolution which was seconded by J. P. Buchanan, and the same was unanimously passed, each director voting in the affirmative:

"Be it resolved by the Board of Directors of Virginia Table Company, Inc., that C. C. Lincoln, Jr., R. S. Wahab, and Harry Coplan or any or either of them be and they are hereby authorized and empowered for and in the name of the Virginia Table Company, Inc., to execute on its be-  
page 163 } half all option contracts entered into in the  
United States for the purchase by the Virginia Table Company, its assigns, etc., of the personal property of mercantile establishments engaged in the furniture business; the said parties or either of them to have full power and authority to sign the name of the Virginia Table Company, Inc. by them and when the said options shall have been so executed they shall be valid and binding upon the Corporation; and the actions of the said parties or any or either of them in and about the execution of any and all of said option contracts are hereby ratified, approved and confirmed."

C. C. LINCOLN, JR.,  
Vice-President.

J. W. HORNE, Secretary.  
Corporate Seal.

By Mr. Gordon:

Q. Now after the making of this agreement about the options what was done, if anything, with regard to taking inventories in these stores?

A. We allowed our store managers and even the head manager, Mr. Kimbrell, to go to these various store and appraise the inventories and accounts and take them over—take the inventories.

page 164 } Q. At whose instance was that done?

A. At Mr. Lincoln's or his associates.

Q. Then were you present in New York at any time in regard to the set-up which was presented to Haystone Corporation or Hayden, Stone & Company about this merger?

A. I was in Baltimore when this set-up was presented to—was worked out by Haskins & Sells that was going to Hayden & Stone, the bankers. Haskins & Sells were the auditors in Baltimore and we went up there and discussed the different units and were advised all our units were passed, and very creditably; very acceptable.

Q. That is, these eleven?

A. Yes, sir.

Q. And your own?

A. Yes, sir; Cameron Stove Company included.

Q. Do you remember about when that was?

A. Well, I wouldn't like to say the date positively because I am not real sure. I don't remember the date, no.

Q. Now during the negotiations that Mr. Lincoln was having with regard to forming this merger state whether or not there were any renewals of these options which had been gotten?

A. Yes, they were renewed several times—three or four times, I think. I know I got one or two renewed three or four times; I have forgotten whether three or  
page 165 } four.

Q. At whose instance was that done?

A. Mr. Lincoln and his associates.

Q. Who was the general counsel for the Lincoln Corporation?

A. Mr. Buchanan.

Q. Mr. J. P. Buchanan here?

A. Yes, sir. We held our correspondence with Mr. Buchanan, Mr. Lincoln or Mr. Wahab, his agent.

Q. Do you remember whether or not that visit to Baltimore was in the spring of 1929 when the first audits had been made?

A. Yes, sir, it was sometime in the spring of 1929.

Q. Was it based on the first audits Haskins & Sells made?

A. I think so.

Q. Now do you know anything about the circumstances connected with the abandonment of this plan of merger by Hayden, Stone & Company or Haystone Finance Corporation?

A. All I know is what Mr. Lincoln and Mr. Buchanan and Mr. Wahab told us from time to time.

Q. What was that?

A. Mr. Sherwood, who was a senior partner of Hayden & Stone, had all the papers ready and expected, we were told, four and a half million dollars would be put in bank the following Wednesday or Thursday, but Mr. Sherwood, the senior partner, dropped dead on Sunday night or Monday page 166 } day and we were told that would delay it about sixty days and for that reason they changed bankers and gave up the merger temporarily.

Q. Now was anything said to you by either of those gentlemen with regard to the charges that were being made by the New York bankers?

A. I have heard it said several times—

Q. You really couldn't say unless you heard them say it.

A. The bankers said nothing to me; I had no conference with the bankers.

Q. Now, Mr. Fleming, did anything happen with regard to this proposed merger in July, 1929?

A. Yes. They asked us to renew our options then the second time. I think about July we were called to New York—I think in July—to renew those options or to discuss the matter.

Q. Did you attend any meeting of the parties interested at Marion?

A. Yes, sir.

Q. What transpired at that conference?

Mr. Bazile: If Your Honor please, Mr. Fleming is going to make a statement which would be extremely damaging to us and which is clearly inadmissible, in my judgment, and I ask that the jury be excluded and Your Honor hear the statement he proposes to make and permit us to page 167 } argue the matter at this time.

Note: The jury retires from the courtroom.

The Court: You had better let the answer go in the record and then follow up the objection.

By Mr. Gordon:

Q. Just answer what Mr. Lincoln undertook to say.

A. We went up to that meeting fully decided among ourselves that we wouldn't renew our option because continuing as we had it was very damaging to our business. When we were there a great many other store managers attended. Mr. Lincoln came to the meeting and assured us that if for any reason—

By the Court:

Q. Which Lincoln?

A. Mr. C. C. Lincoln, Jr., assured us that if for any reason the bankers wouldn't finance our merger that he would throw his assets in with the stores on the same basis as they threw their assets in and form an individual merger and finance it later. It was only on that consideration that we would think of renewing our option. I never heard a more sacred promise and we relied on Mr. Lincoln's word to do it.

Mr. Bazile: Now may I ask a few questions establishing the circumstances?

page 168 } Jury out.

The Court: Yes.

By Mr. Bazile:

Q. Now, Mr. Fleming, that conversation with Mr. Lincoln occurred on the 19th day of July, 1929, did it not?

A. What conversation do you mean?

Q. That you have just repeated.

A. I wouldn't call it a conversation.

Q. Well, that promise.

A. Mr. Lincoln addressed the meeting.

Q. Well, that meeting occurred on the 19th day of July, 1929, didn't it?

A. Approximately.

Q. And you so testified at the hearing on the plea in abatement, didn't you?

A. If I was asked I did, yes.

Q. Then you further after that conference came back here to Richmond and signed a renewal of the option agreement dated the 20th day of July, 1929, didn't you?

A. I think so. The option will show.

Q. Now let me ask you if that isn't the agreement which you signed on the 20th day of July, 1929?

Mr. Gordon: See whether it was executed that day. It was dated that day anyhow.

A. Yes, sir, this agreement dated the 20th was signed by us. The date is blank as to when it was signed.

page 169 } Jury out.

The Court: Let the reporter identify that paper.

By Mr. Bazile:

Q. This is the agreement you signed, dated the 20th day of July, 1929, renewing or extending your option?

A. Yes.

Mr. Bazile: I offer this in evidence.

Note: Filed and marked Exhibit R. F. #2, which is as follows:

THIS AGREEMENT, made this 20th day of July, A. D. 1929.

BY AND BETWEEN THE SOUTHERN FACTORIES AND STORES CORPORATION, a corporation existing under the laws of the State of Virginia, party of the first part  
AND

THE VIRGINIA TABLE COMPANY, INCORPORATED, a corporation existing under the laws of the State of Virginia, party of the second part.

WHEREAS, The Southern Factories and Stores Corporation, now owns and operates a retail furniture business with its principal office located at Twenty-first and Decatur Street, in the City of Richmond, State of Virginia; and owns and operates six retail furniture stores located as follows:

page 170 } Southern Stores Co., 1718 Main St., Columbia, S. C.

Southern Stores Co., 175 N. Church St., Spartanburg, S. C.  
Martin-Hawkins Furn. Co. Laurens & Coffee St. Greenville, S. C.

Farris Bros. Furn. Co. 10-14 N. College St. Charlotte, N. C.  
Goodwin-Smith Furn. Co. 124 E. Martin St. Raleigh, N. C.  
Shepherd Furn. Co. 202-4 N. Corcoran St. Durham, N. C.

AND WHEREAS, the party of the second part is now engaged in the manufacture of furniture with its principal place of business at Marion, Virginia, and, also, owns and controls all of the stock of the Lincoln Furniture Manufacturing Company, Inc. a corporation existing under the laws



of the State of Virginia; which said corporation is also engaged in the manufacture of furniture;

AND WHEREAS, the said parties hereto are interested in forming a consolidation between the said manufacturing plants and a number of retail furniture stores in various cities in the United States, and to this end contemplate the organization of the two companies, to be known as "The Virginia-Lincoln Furniture Corporation" and "The Lincoln Furniture Stores, Inc.", or by other appropriate names, the first of which is to be a holding company, and is to hold all of the Common Stock of the said Virginia Table Company, Inc. the party of the second part hereto, and all of the stock of the Lincoln Furniture Stores, Inc. or the Corporation to be formed by some other appropriate name, which is to purchase, take over, own and operate the retail stores aforesaid.

NOW THIS INDENTURE, WITNESSETH:

# I.

page 171 } That the Party of the first part for and in consideration of the sum of \$1.00 paid, cash in hand, by the party of the second part, the receipt whereof before the Execution and delivery of these presents is hereby acknowledged, hereby jointly and severally grant, and give unto the party of the second part, its successors and assigns, the sole and exclusive right and option for the period up to and including October 18, 1929, to purchase of and from them the following described property upon the following terms and conditions and subject to the following stipulations, to-wit:

a. All of the stock of goods, wares and merchandise of every kind, character and description belonging to the party of the first part used or owned by them in their business as retail furniture stores, wherever owned, or stored, held, or exposed for sale, or whether in transit, and whether located at the premises at Twenty-first and Decatur Streets, in the City of Richmond, State of Virginia, or on the premises of the six stores located in the cities aforesaid, in warehouses or elsewhere.

b. All bills and Accounts Receivable belonging to the Southern Factories & Stores Corporation, in connection with its said business, except as hereinafter provided.

c. All furniture and fixtures of every kind, character and description used or owned by the party of the  
page 172 } first part in connection with its said business, including all office supplies and equipment, elec-

trical fixtures, and electrical or advertising signs, whether attached to the free hold or not.

d. All delivery equipment, trucks, wagons, motive power of any kind and other equipment of similar character, owned or used by the parties of the first part in connection with its said business.

e. All choses in action as may be agreed on and all rights in law or equity belonging to the party of the first part and arising as a result of the operation of its said business.

f. The name, good will and trade mark, copy rights and all property of similar character belonging to the party of the first part or used by it in connection with its said business.

g. All other personal property of every kind, character and description, tangible or intangible, including notes, accounts, lease contracts, conditional sales contracts, etc., not included in the foregoing paragraphs, whether of like character and nature as those herein specifically described or not, belonging to the said party of the first part or in which it has an interest, or used or owned by it in connection with its own business.

## II.

page 173 } The party of the first part will, by October 18, 1929, appoint one or more representatives and the party of the second part will appoint one or more representatives and the two so appointed shall forthwith proceed to take if necessary a full and complete additional inventory of all goods, wares and merchandise, furniture and fixtures, delivery equipment (the property described in sub-sections a, c and d of Section I hereof and other similar property used in said business of the Southern Factories and Stores Corporation, but not included in said section); said inventory shall correctly show the number and character of such property by items and its cost to the party of the first part, (including carriage); and present market value, if different from cost.

The bill's and accounts receivable, property described in sub-section b of Section I of this agreement, belonging to the Southern Factories and Stores Corporation) shall also be listed by said representatives so chosen and a complete and accurate itemized statement made thereof. The said representatives shall also list all other properties described herein and shall make up statements showing the interest of the party of the first part therein if less than complete own-

ership and the nature and character thereof, and if any of the choses in action, etc., are in litigation, the character of said action and the rights asserted thereunder, page 174 } together with the names and addresses of counsel, and the Court in which same are pending.

If the representatives chosen to take the additional inventory and determine the cost, shall disagree as to the correct value of any item or as to any other matter, then the two representatives chosen shall choose a third and the decision of the three representatives so chosen as to such disputed appraisal or matter shall be conclusive and binding upon the parties.

The party of the first part covenants that it will make a full and complete disclosure of all its property, tangible and intangible, owned by it in connection with or arising out of the operation of its business and will allow to the party of the second part, its assigns and duly authorized agents and servants, full and complete access to all its books and accounts, balance sheets and other papers, including tax returns used or executed by them in connection with their business and also cost sheets, records of carriage charges, bills for merchandise bought and market reports (if the last are available) for the purpose of the inspection and audit of all of said items by the party of the second part and the party of the first part further covenants that its said books and accounts have been fully audited by its accountants at regular intervals, and to the best of their knowledge

page 175 } and belief are accurate, and the party of the second part shall have the right to verify the same in any manner that it shall desire by certified public accountants regularly licensed and of high standing. In making such audit, the party of the first part will render any assistance in its power.

### III.

It is hereby covenanted and agreed between the parties hereto that the purchase price of all the property described in this agreement, in the event of the exercise of this option within the said period herein stipulated, or within any additional period hereafter agreed upon between the parties in writing and attached hereto, shall be ascertained as follows:

For all goods, wares and merchandise, furniture and fixtures delivery equipment, etc., owned by the Southern Factories and Stores Corporation (property described in sub-section

a, c and d of said Section I hereof, and other similar property used in said business but not included in said section), the party of the second part will pay to the party of the first part, the value thereof at cost as carried on the books of the Southern Factories and Stores Corporation on the day that the option is exercised as shown by the inventories made of such property as herein provided with such addition to, or amendments of, said inventory as may be necessary to  
 page 176 } bring the same correctly to that date from the time it was originally made.

All bills and accounts receivable owned by the Southern Factories and Stores Corporation shall be paid for by the party of the second part to the party of the first part at 7% of their total face value.

It is agreed that the party of the second part will pay to the party of the first part in cash, an amount, which, will be sufficient to pay all liabilities of the party of the first part.

#### IV.

The party of the first part further covenants and agrees that if during the life of this option, or within the period of any additional time hereinafter agreed upon between the parties hereto in writing, and attached hereto, the party of the second part shall pay to the party of the first part a sufficient amount of the total purchase price of the property of the Southern Factories and Stores Corporation described herein, ascertained as set forth above, in current lawful money of the United States, to pay all the current liabilities of the Southern Factories and Stores Corporation which shall consist of Trade Accounts Payable, Notes Payable, Accrued Taxes and Interest, and other unforeseen contingent liabilities as shown by the records of the Company, and shall execute an agreement to delivery to the party of the first part  
 page 177 } part within sixty days after the consummation of a sale under this option, the balance of said purchase price of the property of the Southern Factories and Stores Corporation and the total purchase price of all the property described herein, ascertained as set forth above, known as The Virginia-Lincoln Furniture Corporation (or by some other appropriate name), in the following manner:

That the total purchase price of the property of the Southern Factories and Stores Corporation remaining after the payment of sufficient cash to liquidate all current liabilities as described herein, shall be paid by the issuance and delivery

to the party of the first part of 50% in 7% Cumulative First Preferred Stock of the corporation to be formed, known as The Virginia-Lincoln Furniture Corporation (or by some other appropriate name) in shares of \$100.00 par value, (each share to be valued at par) and the balance of the purchase price by the issuance and delivery to the party of the first part of the no par value common stock of the corporation to be formed, known as The Virginia-Lincoln Furniture Corporation (or by some other appropriate name); the value of said no par value common stock to be determined as of its market value when initially placed upon the first Stock Market on which the same is listed.

The agreement hereinabove referred to for the delivery of the stock of the said corporation to be formed, shall be executed in writing and delivered to the party of the page 178 } first part upon the consummation of the sale under this option, and in the event of the failure or inability of the party of the second part to deliver the said stock in accordance with this agreement, then, in that event, the party of the first part shall have the right to retain a lien upon the property transferred, until the said stock shall have been so delivered and the deed, bill of sale and other paper or papers, which shall be executed, transferring said property, shall so provide. Upon the delivery, however, of the said stock, the party of the first part agrees to execute a release of such lien in such form as may be necessary and legal for that purpose under the laws of the States or Virginia.

The Southern Factories and Stores Corporation agrees to immediately use the cash to be paid hereunder for the purpose of liquidating all its current liabilities.

## V.

The Party of the first part further covenants and agrees that, in the event this option is exercised, they will do all things necessary to comply with the bulk sales law, or any other laws affecting the transfer of the said property in the state where the property is located.

## VI.

The party of the first part covenants and agrees that if this option is exercised, and the terms hereof are complied with by the party of the second part, that it, the party page 179 } of the first part, will transfer and deliver there herein described property to the party of the

second part free from all liabilities and encumbrances whatsoever of any kind, character and description, and covenants that it will invest the party of the second part with the full and absolute ownership thereof; and further covenants that all accounts and bills payable and all other liabilities of every kind and character, owned or assumed by them in the operation of its business or in connection with the property described herein, will be assumed and paid by it, and that it, the party of the first part, will guarantee and warrant to the party of the second part absolute title to such property, free from all the claims of all persons whatsoever, and further covenants that there are no liens or reservations of title against any of the property described herein; and further agrees and covenants that in the event, the party of the second part shall be compelled to pay any amounts, or suffer any damage, on account of any bills and accounts payable, taxes accrued, or hereafter determined to be due, or other liabilities of the party of the first part or on its property herein described, that it will forthwith pay to the party of the second part any sums which it may be compelled to pay on that account and any damages which it might suffer by reason thereof; and the party of the first part further agrees and cove-  
 page 180 } nants that if it shall be determined that sny such liabilities, taxes, etc., exist, or are hereafter found to be due or that any such bills or accounts payable are due and unpaid, the party of the second part shall have the right to pay the same, in which event, the party of the first part covenants and agrees to forthwith and immediately repay to the party of the second part any amount it may so have paid, together with damages it may have sustained on that account; and the party of the first part further agrees in case the party of the second part shall be involved in litigation as a result of any of the causes aforesaid, or on account of any of the accounts or transactions of the party of the first part, exercised, or done before the delivery of the property herein described, that it will pay to the party of the second part, in addition to any amount that it may be compelled to pay by reason thereof, all costs and damages, attorney's fees, and other expenses whatsoever incident thereto which it, the said party of the second part, may be compelled to pay or assume by reason thereof, and in case it shall become the duty of the party of the first part to pay the party of the second part any amounts under this section, it covenants and agrees to pay interest at the rate of six percentum (6%) per annum thereon from the date such sums become due. And the same shall be construed as being due upon the

payment or assumption of the sale by the party  
page 181 } of the second part.

## VII.

The party of the first part, who holds leases on the retail furniture stores property, located as aforesaid, covenants and agrees that it will assign said leases and/or sublet the stores' property covered by such leases to the party of the second part for the same term and at the same price said leases were made to the party of the first part. And when this option is exercised and the conditions as to payments complied with (whether the purchase price or any part thereof is held in escrow or not) the party of the first part covenants and agrees that the party of the second part shall have the right to immediately enter the said premises and take over the said leases.

## VIII.

The party of the second part covenants and agrees that if this option is exercised and the sale consummated under its terms, it will cause to be incorporated the two companies hereinbefore mentioned to be known as The Virginia-Lincoln Furniture Company and the Lincoln Furniture Stores, Incorporated (or two companies with appropriate names) or such other affiliated companies as the party of the second part may desire and that the Virginia-Lincoln Furniture Corporation (or company appropriately named) shall hold all of the common stock of the Virginia Table Company, Incorporated, and all the stock of the Lincoln Furniture Stores, Incorporated (except three shares of common stock in each company, if necessary to issue the same for the purpose of having directors).

## IX.

It is covenanted and agreed by and between the parties hereto that the deed and bill of sale provided for in this option to be executed by the party of the first part to the party of the second part when the terms hereof are complied with, shall not be delivered, nor any rights accrued thereunder, to the party of the second part, until options are the property or not less than six other retail furniture stores shall have been exercised and consummated by the party of the second part. However, upon the terms of this option being complied

with and the payment of cash made as required hereunder and the agreement to deliver the stock for the balance of the purchase price shall have been executed, the deed and bill of sale, cash and agreement to deliver stock, shall be placed in escrow with the State-Planters Bank and Trust Company, Richmond, Virginia, to be held until satisfactory evidence is adduced to it by the party of the second part, that it has consummated options on at least six other retail furniture stores aforesaid and taken over the property thereof under such options and that satisfactory evidence is adduced that all current liabilities of the Southern Factories and

Stores Corporation have been paid from the cash  
 page 183 } which is to be held in escrow as above stipulated  
 for the purpose of said bank to use for the sole purpose of paying any and all of the current liabilities of the Southern Factories and Stores Corporation herein referred to. Party of the second party agrees, that if its organization is affected generally as outlined or similarly thereto, and the party of the first part properties come up to requirements as agreed to; then and in that event, the party of the second part agrees that this option *will* be exercised. When satisfactory evidence is produced that the terms of the escrow agreement have been complied with, the holder in escrow shall then deliver to the party of the second part the deed and bill of sale and shall deliver to the party of the first part the stock if same has been issued.

## X.

It is further covenanted and agreed by and between the parties hereto that if this option is exercised, all cash on hand and in the bank at the time of the transfer and sale of the property shall be retained by the party of the first part.

## XI.

It is further understood and agreed that all the covenants made in this option by the party of the first part are binding on the Southern Factories and Stores Corporation, their assigns, or successors, and that the entire agree-  
 page 184 } ment in regard to the subject matter of this contract, is in writing and included herein, and that there are no verbal agreements or understandings of any kind or character in addition to, or in conflict with the provisions of this contract and that no agreement hereafter made as addition to, or amendment of, this agreement shall be valid unless incorporated in writing.



## XII.

It is further understood and agreed that this agreement is accepted at Marion, in the County of Smyth and State of Virginia, the principal office of the party of the second part, and that it is to be construed according to the laws of the State of Virginia.

## XIII.

It is further *covenants* and agreed by and between the parties hereto that the granting and acceptance of this option has been regularly approved by the Boards of Directors of the two corporations and that the said Boards of Directors have the authority to authorize the execution of these presents under the by-laws of the corporation, and that if this option is exercised, and the sale hereunder consummated, the Stockholders and Directors of the respective corporations will authorize and direct the fulfillment and performance of all of the terms and conditions thereof, by the respective corporations or by the stockholders thereof, to whom distribution may have been made in reorganization.

page 185 } IN TESTIMONY WHEREOF witness the corporate name of the party of the first part, by its President and Seal attached attested by its Secretary and the name of the Virginia Table Company, incorporated, by its duly authorized attorney in fact, this        day of        , 1929.

THE SOUTHERN FACTORIES AND STORES  
CORPORATION

By (signed) RIVES FLEMING        (Seal)  
President,

Attest:

(signed) HOKE MURRAY  
Acting Secretary

THE VIRGINIA TABLE COMPANY, INC.,

By \_\_\_\_\_ (Seal)  
Vice-President.

Attest:

\_\_\_\_\_  
Secretary.

page 186 } By Mr. Bazile:

Q. You testified, as I recall, on the plea in abatement that you didn't sign that contract at Marion, but that you brought it back to Richmond with you and executed it the next day after you returned to Richmond. That is correct, isn't it?

A. I think so. I don't recall that.

Mr. Bazile: Now, if Your Honor please, this agreement is in writing; it is dated the day after the alleged oral negotiations that took place between these gentlemen; it is an agreement that is under seal; it is signed and the corporate seal of the Southern Factories & Stores Corporation attached to it. It contemplated our seal being attached to it and I assume our seal is attached to the copy he had. This is our copy. This contract—if Your Honor will permit me, I will read it because I think it is necessary for the understanding of this issue. (Counsel reads Exhibit R. F. #2.)

Now, if Your Honor please, the facts as developed by this witness show that subsequent to the verbal transaction which he attempts to introduce in evidence here on behalf of his corporation he executed this contract in writing which I have just read to Your Honor. It expressly stipulates page 187 } that any transaction which occurred prior to the execution of that contract, unless included therein, is not a part of the agreement between the partes. Now further I call Your Honor's attention to the fact that the contract is under seal. \* \* \* Now there is another objection to this evidence. In the first place, there is a variance between the allegation of his declaration and the proof which he offers; it is offered for the purpose of showing that this option agreement was not an option agreement, but an absolutely binding contract to buy. Now Mr. Gordon will probably say that he is merely attempting to show what was the consideration for this option agreement and that by proving the consideration by parol he has a right to show that in fact it was not an option agreement, but that it was an absolutely binding contract to buy, which is what his declaration alleges, but the law is well settled in this State that while you may prove the true consideration by parol, notwithstanding the terms of a written instrument, there is an exception to that rule, and it is equally well settled in this State, that the parol evidence to prove the consideration is not admissible when the effect of it is to change the import of page 188 } contract itself. \* \* \* Now the third point is this, if the Court please, and I contend that it is in-

admissible on this ground: In order to introduce this testimony it must set up what would amount in law to a binding contract. If it is not, then, of course, it is not admissible. In order to be binding a contract must be certain as to price, as to terms, as to what will occur in the future.

Note: The objection was argued at length.

The Court: I think the argument as to the indefiniteness of the parol contract is premature at this stage. The witness has not been allowed to go ahead and state whether there were any details agreed upon at that time. Upon his answering the first or second question counseled for the defendant then asked permission to cross-examine and this argument followed. The parol evidence rule has been invoked. As I understand that rule, when a party makes a parol contract and afterwards commits that contract to writing, he is bound by the writing and they can't alter or change or add to it, but if it is apparent that the writing afterwards  
page 189 } executed by the parties refers to only one item of the parol contract I don't think the rule is applicable, and I think that is the situation here. The parol contract refers to the option, but that was only one item of the parol contract; there were other features of the parol contract which apparently were not intended to be covered by this writing. So I don't think the rule is applicable and the objection will be overruled.

Note: The objection was further argued.

The Court: Objection overruled.

Mr. Bazile: For the reasons given we respectfully except.

By Mr. Bazile:

Q. Mr. Fleming, this option contract between the Southern Factories & Stores Corporation and the Virginia Table Company, dated July 20th, 1929, expired on October 18th, 1929, did it not?

A. Yes; October 18th, 1929.

Q. Now, then, on the 12th day of October, 1929, you again extended that option by a written instrument under seal, did you not?

Q. I ask you to file that.

A. Yes.

page 190 } Note: Filed and marked Exhibit R. F. #3,  
which is as follows:

THIS AGREEMENT, made this the 12 day of October, 1929, between THE SOUTHERN FACTORIES & STORES CORPORATION of the first part and VIRGINIA TABLE COMPANY, INCORPORATED, of the second part.

WITNESSETH

WHEREAS: The first party has heretofore granted to the second party an option to purchase the property therein named upon the terms therein stated, reference being made to said option for a full and complete description of its terms; and

WHEREAS: It is desired to extend the term wherein the option may be executed until December 1, 1929, until 12:00 o'clock noon on that day;

NOW THEREFORE IN consideration of the sum of \$1.00 in hand paid and acknowledged, the first party hereby grants unto the second party the exclusive right and option to purchase the property in said option named upon the terms therein stated (except as herein altered) up to and including December 1, 1929, and specifically covenants and agrees that if the second party shall on its part do and perform all matters and things in said option to be by it done and performed that the first party will on its part execute the bill of sale named in said option and also carry into  
page 191 } effect all of the covenants and promises in said option to be by the first party done and performed.

It is also understood and agreed between the parties as follows:

First: It is understood and agreed that the Corporation to be formed shall be named "Lincoln Chain Stores Corporation"; that there shall be an issue of convertible debentures to run not less than five or more than twenty years obligations of the Corporation and to bear a rate of interest not exceeding 7%.

Second: It is also agreed that these debentures may be financed through Messrs. Schluter & Company, Bankers of New York or other banking firm of as high character and standing.

Third: It is further understood that if the party of the second part shall desire to make other adequate arrangements for financing the purchase of the property named in

the option, it shall have the right to do so provided the corporate structure of the proposed corporation remains practically the same.

Fourth: In case debentures are issued instead of convertible preferred stock, the preferred stock which is to be taken by the seller in part payment will be a first preferred.

Fifth: The property to be purchased shall be taken over as of the date of the audit made by Messrs. Has-  
page 192 { kins & Sells, to-wit: July 31, 1929, and paid for  
as the purchase price is established as of that  
date.

Sixth: All of the remaining terms and conditions of the said option and all of its terms except as herein specifically altered or amended remain unchanged and binding upon both parties until twelve o'clock noon, December 1, 1929.

In Testimony whereof witness the corporate name of the party of the first part by its President and its corporate seal attached, attested by its Secretary and the corporate name of the second party by its duly authorized attorney in fact.

THE SOUTHERN FACTORIES & STORES  
CORPORATION,

(Signed) RIVES FLEMING,  
President.

Attest:

(Signed) E. H. HILLIS,  
Secretary.

(Seal)

VIRGINIA TABLE COMPANY, INCORPORATED.

.....,  
Attorney in Fact.

page 193 { Jury out.

Mr. Bazile: Now, if Your Honor please, the evidence shows that on October 12th, 1929, the Southern Factories & Stores entered into a new option agreement or extension of the agreement of the 20th of July, 1929, in which no men-

tion is made of any binding obligation on the part of the defendant to purchase the property of the plaintiff and I contend this evidence is also inadmissible for the reason that if such agreement existed the option of October 12th, 1929, as well as the option of July 20th, 1929, operated as a waiver of any such agreement.

The Court: I understood from the reading of that it was merely a continuation of what had been done, with one or two changes of a minor nature. For the same reason the objection is overruled.

Mr. Bazile: Exception for the reasons given.

Note: The jury returns into the court room.

page 194 } By Mr. Gordon:

Q. Mr. Fleming, when the jury were sent out of the court I was asking you what transpired at that meeting on July 19th, 1929, at Marion. As a preliminary to that let me ask you this question. Were representatives of your company alone there or were there other representatives?

A. Many others.

Q. Others that had been included in this merger proposition?

A. Yes, sir.

Q. Now what transpired at that meeting with regard to the proposed merger of these corporations and the exercise of the options which had been given?

Mr. Bazile: We object to that.

The Court: Objection overruled.

Mr. Bazile: Exception.

Mr. Buchanan: We object also because Southern Factories & Stores Corporation had nothing to do with the merger; they were only interested in the sale of their property. When that was done they were through.

By Mr. Gordon:

Q. Go ahead.

A. When we were notified to come to Marion we discussed the question of renewing the option again and we decided we wouldn't renew it because we had seen how it was wrecking our business already. When we got up there  
page 195 } it was other representatives from other units there. Mr. Lincoln came into the meeting and made a most sacred promise to those men that if the bankers wouldn't finance it that he individually would throw his

assets in with the other units on the same basis and finance it later. He stated in that meeting, I remember, that he had just been in communication with the Foreman National Bank in Chicago and he had assurances they would finance it even on better terms than the previous banks, but even if that failed he individually would throw his assets in on the same basis as the other units and merge individually and finance when and as we could.

Q. Now I ask you what, if anything, were you and the other people to do with regard to that transaction?

A. We were to renew our option and to secure other renewals or extensions.

Mr. Bazile: Mr. Gordon, I want to come within the rule laid down by the Court in objecting to your question and I didn't object to the previous question at your request to wait until you asked that question. If Your Honor please, we object to that question and that answer and move to strike them out on the ground that it is a material variance between the allegations of the fifth count of the page 196 } declaration, which charges on the 19th day of July, 1929, the said defendant requested said plaintiff to again renew its said option and to secure renewals of other of said options, which the said plaintiff did and in consideration thereof and of the compliance by said plaintiff with the said requests and directions of said defendant, said defendant then and there undertook and faithfully promised said plaintiff that it would exercise the said option given to it by the plaintiff and consummate the said proposed merger.

The Court: Objection overruled.

Mr. Bazile: Exception for the reasons given.

By Mr. Gordon:

Q. Now, as a matter of fact, did you renew your option in pursuance of that undertaking had there?

A. Yes, sir.

Mr. Bazile: If Your Honor please, will it be understood we object to this whole line of examination and except to it?

The Court: Anything that bears on the question that we discussed out of the hearing of the jury may be considered as objected to, but if there be other matters brought out

I shall expect you to make your specific objection at the time.

Mr. Bazile: Yes, sir.

By Mr. Gordon:

Q. Was that agreement of Mr. Lincoln's made in the presence of representatives of a number of the other stores?

A. Yes.

Q. In pursuance of that did your company get renewals of other options?

A. Yes.

Mr. Buchanan: We object unless the options are presented.

Mr. Gordon: We have called upon you to produce them and you haven't done it.

Mr. Buchanan: You had copies of them.

By Mr. Gordon:

Q. Which ones do you recall?

A. Well, we renewed, I remember, Bell in Fredericksburg, Bledsoe in Danville, Mason in Atlanta, and others.

By the Court:

Q. Have you those options?

A. No, but we sent the renewals on to them—extensions on.

Q. To the defendants?

A. Yes, sir. When we got these—they were wiring for them pretty hot and when we would get them we shot them in pretty fast.

page 198 } Mr. Bazile: Haven't you got copies of them?

Mr. Gordon: No, sir. I called by regular legal process upon the defendant to produce all of these options and all of the renewals, and Mr. Buchanan has made a reply here in which he says they have been lost or misplaced in some way, but upon examination of the papers which have been produced I find that there is an option contract with Bell of Fredericksburg and four renewals of that, but as to the others I haven't been able to find them.

Mr. Buchanan: I will say for your benefit, Mr. Gordon and also Mr. Fleming, that after it was ascertained by the audit of Haskins & Sells that eight of these stores couldn't be of any possible use it was no use asking for any renewals and never were any given, and there were only three given, and one was Bell, one was Mason and the other Wood-Peavy.

The Court: The question is whether the options are available. You called for the production of the papers referred to. If they are available I want you to have them; if they are not available—



Mr. Buchanan: Bell is the only one I want page 199 } and that was filed here.

The Court: You don't want the others?

Mr. Buchanan: There weren't any others.

The Witness: I recall one that is not named among those three that they authorized me to pay \$500.00 to extend and I saved the \$500.00 and got them to extend it for nothing. That was Bledsoe in Danville. I had him wire you from my office.

The Court: There is no use going into things the lawyers haven't questioned you about.

By Mr. Gordon:

Q. Mr. Fleming, after that meeting in October, 1928, at which you were requested by Mr. Lincoln to get these options did you make up a contract or was there one prepared between your company and the Virginia Table Co.?

A. There was first a tentative contract outlining the basis upon which we would go in and later we signed a final contract.

Q. I show you here now an option agreement between Cameron Stove Company and Southern Factories & Stores Corporation, parties of the first part, and the Virginia Table Company, Inc., party of the second part, which has the date the 26th day of October, 1928, on it, which is not executed, and then the executed contract of the same character, page 200 } dated the 13th day of December. I merely want to ask you whether or not during the period between the time Mr. Lincoln made the agreement about securing the options and your giving him your option and the date of this executed contract you all had been negotiating about the option and the terms of the option?

A. Yes, sir.

Mr. Gordon: Now I want to introduce that one of December 13th.

Note: Filed and marked Exhibit R. F. #4, which is as follows:

THIS AGREEMENT, made this 13th day of December, A. D. 1928.

BY AND BETWEEN THE CAMERON STOVE COMPANY, INC., a corporation existing under the laws of the State of Virginia; and

THE SOUTHERN FACTORIES & STORES CORPORATION, a corporation existing under the laws of the State of Virginia; parties of the first part,

—A N D—

THE VIRGINIA TABLE COMPANY, INCORPORATED, a corporation existing under the laws of the State of Virginia, party of the second part.

page 201 } WHEREAS, one of the said parties of the first part which is the Cameron Stove Company, Inc., now owns and operates a stove manufacturing business with its principal plant and general office located at Twenty-first and Decatur Streets in the City of Richmond, State of Virginia; and the other party of the first part, The Southern Factories and Stores Corporation, now owns and operates a retail furniture business with its principal office located at Twenty-first and Decatur Streets in the City of Richmond, State of Virginia; and owns and operates six retail furniture stores located as follows:

Southern Stores Co., 1718 Main St., Columbia, S. C.

Southern Stores Co., 175 N. Church St., Spartanburg, S. C.

Martin-Hawkins Furn. Co., Laurens & Coffee Streets, Greenville, S. C.

Farris Bros. Furn. Co., 10-14 N. College St., Charlotte, N. C.

Goodwin-Smith Furn. Co., 124 E. Martin St., Raleigh, N. C.

Shepherd Furn. Co., 202-4 N. Corcoran St., Durham, N. C.

AND, WHEREAS, the party of the second part is now engaged in the manufacture of furniture with its principal place of business at Marion, Virginia, and, also, owns and controls all of the stock of the Lincoln Furniture Manufacturing Company, Inc., a corporation existing under the laws of the State of Virginia; which said corporation is also engaged in the manufacture of furniture;

AND WHEREAS, the said parties hereto are interested in forming a consolidation between the said manufacturing plants and a number of retail furniture stores in various cities in the United States, and to this end contemplate the organization of two companies, to be known as  
page 202 } "The Virginia-Lincoln Furniture Corporation"  
and "The Lincoln Furniture Stores, Inc.", or by

other appropriate names, the first of which is to be a holding Company, and is to hold all of the Common stock of the said Virginia Table Company, Inc., the party of the second part hereto, and all of the stock of the Lincoln Furniture Stores, Inc., or the Corporation to be formed by some other appropriate name, which is to purchase, take over, own and operate the retail stores aforesaid.

NOW THIS INDENTURE, WITNESSETH:

I.

That the parties of the first part for and in consideration of the sum of \$10.00 paid each of them, cash in hand, by the party of the second part, the receipt whereof before the execution and delivery of these presents is hereby acknowledged, hereby jointly and severally grant, and give unto the party of the second part, its successors and assigns, the sole and exclusive right and option for the period of one hundred and twenty (120) days from the date hereof to purchase of and from them the following described property upon the following terms and conditions and subject to the following stipulations, to-wit:

a. All of the stock of goods, wares and merchandise of every kind, character and description belonging to the parties of the first part used or owned by them in their page 203 } business as retail furniture stores and/or stove factories as aforesaid, wherever owned, or stored, held or exposed for sale, or whether in transit, and whether located on the premises at Twenty-first and Decatur Streets, in the City of Richmond, State of Virginia, or on the premises of the six stores located in the cities aforesaid, in warehouses or elsewhere.

b. All bills and Accounts Receivable belonging to the Southern Factories and Stores Corporation, one of the parties of the first part, in connection with its said business, except as hereinafter provided. All bills and Accounts Receivable belonging to the Cameron Stove Company are to be retained by the Cameron Stove Company and not to be included in the purchase of its other Assets.

c. All furniture and fixtures of every kind, character and description used or owned by the parties of the first part in connection with their said business including all office supplies and equipment, electrical fixtures and electrical or advertising signs, whether attached to the free hold or not.

d. All delivery equipment, truck, wagons, motive power of any kind and other equipment of similar character, owned or used by the parties of the first part in connection with their said business.

e. All lands, buildings, equipment, machinery, patterns and all other fixed assets, owned and used by the page 204 } Cameron Stove Company in connection with its stove manufacturing plant in the City of Richmond, State of Virginia, said land consisting of real estate upon which plant, etc., is located at Twenty-first and Decatur Streets, Richmond, Virginia. Any and all real estate which may be owned by the Southern Factories and Stores Corporation, is not to be included in the Assets to be purchased.

f. All choses in action as may be agreed on and all rights in law or equity belonging to the parties of the first part and arising as a result of the operations of their said business.

g. The name, good will, and trade mark, copyrights, and all property of similar character belonging to the parties of the first part or used by them in connection with their said business.

h. All other personal property of every kind, character and description, tangible or intangible, including notes, accounts, lease contracts, conditional sales contracts, etc., not included in the foregoing paragraphs, whether of like character and nature as those herein specifically described or not, belonging to the said parties of the first part or in which they have an interest or used or owned by them in connection with their own business, except the customers accounts receivable and notes receivable owned by the Cam- page 205 } eron Stove Company which are to be retained by the parties of the first part.

i. The entire Common Capital Stock of the Carolina Parlor Furniture Company of Statesville, North Carolina, which is owned by the Southern Factories and Stores Corporation. The price to be paid for said stock, in case this option is exercised, shall be its total par value, which shall not exceed \$65,000.00.

## II.

The parties of the first part will, within one hundred and twenty (120) days from the execution of this option appoint one or more representatives and the party of the second part will appoint one or more representatives and the two so ap-

pointed shall forthwith proceed to take a full and complete inventory of all goods, wares and merchandise, furniture and fixtures, delivery equipment (the property described in sub-section a, c and d of Section I hereof and other similar property used in said business of the Southern Factories and Stores Corporation but not included in said section); said inventory shall correctly show the number and character of such property by items and its cost to the parties of the first part, (including carriage); and present market value, if different from cost.

The bills and accounts receivable, (property described in sub-section b of Section I of this agreement, belonging to the Southern Factories and Stores Corporation) shall page 206 } also be listed by said representatives so chosen and a complete and accurate itemized statement made thereof. The said representatives shall also list all other properties described herein and shall make up statements showing the interest of the parties of the first part therein if less than complete ownership and the nature and character thereof, and if any of the choses in action, etc., are in litigation, the character of said action and the rights asserted thereunder, together with the names and addresses of counsel, and the Court in which same are pending.

If the representatives chosen to take the inventory and determine the cost, shall disagree as to the correct value of any item or as to any other matter, then the two representatives chosen shall choose a third and the decision of the three representatives so chosen as to such disputed appraisal or matter shall be conclusive and binding upon the parties.

The parties of the first part covenant that they will make a full and complete disclosure of all their property, tangible and intangible, owned by them in connection with or arising out of the operation of their business and will allow to the party of the second part, its assigns and duly authorized agents and servants, full and complete access to all their books and accounts, balance sheets and other papers, including tax returns used or executed by them in page 207 } connection with their business and also cost sheets, records of carriage charges, bills for merchandise bought and market reports (if the last are available) for the purpose of the inspection and audit of all of said items by the party of the second part, and the parties of the first part further covenant that their said books and accounts have been duly audited by their accountants at regular intervals, and to the best of their knowledge and belief are accurate,

and the party of the second part shall have the right to verify the same in any manner that it shall desire by certified public accountants regularly licensed and of high standing. In making such audit, the parties of the first part will render any assistance in their power.

The parties of the first part covenant that they will have a complete appraisal made of the fixed assets, owned and used by the Cameron Stove Company in the operation of its business; said appraisal to be made by the American Appraisal Company, which shall appraise all land, buildings, machinery, equipment, patterns, furniture and fixtures, automobiles, trucks and all other property owned and used by the Cameron Stove Company in the operation of its business, except bills and accounts receivable; said appraisal to show the replacement cost of all such property and also to show the present sound values of all such property so appraised. The appraisal requirement, as mentioned hereunder, page 208 } shall apply only to the property of the Cameron Stove Company as specifically described and not to any property owned by The Southern Factories and Stores Corporation.

### III.

It is hereby covenanted and agreed between the parties hereto that the purchase price of all the property described in this agreement, in the event of the exercise of this option within the said period herein stipulated, or within any additional period hereafter agreed upon between the parties in writing and attached hereto, shall be ascertained as follows:

For all goods, wares and merchandise, furniture and fixtures, delivery equipment, etc., owned by the Southern Factories and Stores Corporation (property described in subsection a, c and d of Section I hereof, and other similar property used in said business but not included in said section), the party of the second part will pay to the parties of the first part, the value thereof at cost as carried on the books of the Southern Factories and Stores Corporation on the day that the option is exercised as shown by the inventories made of such property as herein provided with such additions to, or amendments of, said inventory as may be necessary to bring the same correctly to that date from the time it was originally made.

For all goods, wares and merchandise, including page 209 } raw material, inventory in process, and finished products belonging to and used by the Cameron

Stove Company in the operation of its business, the party of the second part will pay to the parties of the first part the value thereof at cost or market value whichever is lower on the day that the option is exercised as shown by the inventories made of such property as herein provided with such additions to, or amendments of, said appraisal as may be necessary to bring the same correctly to that date from the time it was originally made.

All bills and accounts receivable owned by the Southern Factories and Stores Corporation shall be paid for by the party of the second part to the parties of the first part at 75% of their total face value. The bills and accounts receivable belonging to the Cameron Stove Company are not to be purchased by the party of the second part but to be retained and liquidated by the parties of the first part and the proceeds applied by the Cameron Stove Company in the liquidation of its current liabilities, at the time of the consummation of this option, and the said Stove Company agrees, in such case to so apply the proceeds.

It is agreed that parties of 2nd part will pay to parties of 1st part in cash an amount, which, with the proceeds from the collections of Cameron Stove Co.'s accounts and notes receivable, will be sufficient to retire all First  
 page 210 } Preferred Stocks and pay all liabilities of parties of 1st part. The amount in cash not to exceed 50% of So. Factory & Store Co.'s net worth and 40% of Cameron Stove Co.'s net worth.

All land, buildings, machinery, patterns, equipment, furniture and fixtures, automobiles and trucks, owned by the Cameron Stove Company are to be appraised by the American Appraisal Company as aforesaid, and shall be paid for by the party of the second part to the parties of the first part at 100% the total present sound value as shown and certified by said appraisal company.

#### IV.

The parties of the first part further covenant and agree that if during the life of this option and within the period of one hundred and twenty (120) days from this date, or within the period of any additional time hereinafter agreed upon between the parties hereto in writing, and attached hereto, the party of the second part shall pay to the parties of the first part a sufficient amount of the total purchase price of the property of the Southern Factories and Stores described herein, ascertained as set forth above, in current lawful

money of the United States, to pay all the current liabilities of the Southern Factories and Stores Corporation which shall consist of Trade Accounts Payable, Notes Payable, Accrued Taxes and Interest, and other unforeseen  
 page 211 } contingent liabilities not exceeding 50% of net worth, as shown by the records of the company, provided said amount of cash does not amount to more than one-half of the total purchase price, and shall execute an agreement to deliver to the parties of the first part within sixty (60) days after the consummation of a sale under this option, the balance of said purchase price of the property of the Southern Factories and Stores Corporation and the total purchase price of all the property described herein, ascertained as set forth above, owned by the Cameron Stove Company in the Capital Stock of the corporation to be formed, known as The Virginia-Lincoln Furniture Corporation (or by some other appropriate name) in the following manner:

The total amount of the purchase price of the property of the Cameron Stove Company to be paid by the issuance and delivery to the parties of the first part of 50% of said total purchase price in 7% Cumulative Preferred Class A stock of the corporation to be formed, known as The Virginia-Lincoln Furniture Corporation (or by some other appropriate name) in shares of \$100.00 par value, (each share to be valued at par) and the balance of the purchase price of the Cameron Stove Company to be paid by the issuance and delivery to the parties of the first part of the no par value common stock of the corporation to be formed, known as The Virginia-Lincoln Furniture Corporation (or by some other appropriate name). For this purpose, the  
 page 212 } value of the said common stock is fixed as of its market value when initially placed upon the first stock market on which the same is listed. That portion of the total purchase price of the property of the Southern Factories and Stores Corporation remaining after the payment of sufficient cash to liquidate all current liabilities as described herein, shall be paid by the issuance and delivery to the parties of the first part of 50% in 7% Cumulative Preferred Class A stock of the corporation to be formed, known as The Virginia-Lincoln Furniture Corporation (or by some other appropriate name) in shares of \$100.00 par value, (each share to be valued at par) and the balance of the purchase price by the issuance and delivery to the parties of the first part of the no par value common stock of the corporation to be formed, known as the Virginia-Lincoln Fur-



niture Corporation (or by some other appropriate name); the value of said no par value common stock to be determined as hereinbefore stated with regards to the issuance of common stock to the Cameron Stove Company, Inc.

THEN upon the delivery of such cash payment aforesaid, and the delivery of such agreement to deliver stock as aforesaid the parties of the first part covenant and agree that the Cameron Stove Company, Incorporated, will execute and deliver to the party of the second part, or as it may  
 page 213 } direct, a good and sufficient deed, with covenants of general warranty of title and freedom of possession, and also the English covenants of title, for all real and personal property of said Cameron Stove Company, Incorporated, described herein, and the Southern Factories and Stores Corporation will execute and deliver to the party of the second part a good and sufficient bill of sale for all of its properties described in Section I hereof, in such form as may be proper and lawful for that purpose under the laws of the states in which the property purchased under this option is located, and such other paper and papers as may be necessary and proper for the absolute and unconditional delivery of such property to the party of the second part, free from all encumbrances whatsoever, and the parties of the first part will also, upon the consummation of such sale, deliver and turn over to the party of the second part all books of accounts, statements, stationery, etc., on hand, necessary and useful for the continuance of said business.

The agreement hereinbefore referred to for the delivery of the stock of the said corporation to be formed, shall be executed in writing and delivered to the parties of the first part upon the consummation of the sale under this option, and in the event of the failure or inability of the party of the  
 second part to deliver the said stock in accord-  
 page 214 } ance with this agreement, then in that event, the parties of the first part shall have the right to retain a lien upon the property transferred, until the said stock shall have been so delivered and the deed, bill of sale and any other paper, or papers, which shall be executed, transferring said property, shall so provide. Upon the delivery, however, of the said stock, the parties of the first part agree to execute a release of such lien in such form as may be necessary and legal for that purpose under the laws of the State of Virginia.

The Southern Factories and Stores Corporation agrees to immediately use the cash to be paid hereunder for the purpose of liquidating all its current liabilities.

## V.

The parties of the first part further covenant and agree that, in the event, this option is exercised, they will do all things necessary to comply with the bulk sale law, or any other laws affecting the transfer of the said property in the state where the property is located.

## VI.

The parties of the first part covenant and agree that if this option is exercised, and the terms hereof are complied with by the party of the second part, that they, the parties of the first part, will transfer and deliver the herein described property to the party of the second part free  
 page 215 } from all liabilities and encumbrances whatsoever of any kind, character and description, and covenant that they will invest the party of the second part with the full and absolute ownership thereof; and further covenant that all accounts and bills payable and all other liabilities of every kind and character, owed or assumed by them in the operation of their business or in connection with the property described herein, will be assumed and paid by them, and that they, the parties of the first part, will guarantee and warrant to the party of the second part absolute title to such property, free from all the claims of all persons whatsoever and further covenants that there are no liens or reservations of title against any of the property described herein; and further agree and covenant that in the event, the party of the second part shall be compelled to pay any amounts, or suffer any damage, on account of any bills and accounts payable, taxes accrued, or hereafter determined to be due, or other liabilities of the parties of the first part or on their property herein described, that they will forthwith pay to the party of the second part any sums which it may be compelled to pay on that account and any damages which it might suffer by reason thereof; and the parties of the first part further agree and covenant that if it shall be determined that any such liabilities, taxes, etc., exist, or are hereafter found to be due or that any such bills or accounts payable are due and unpaid, the party of the  
 page 216 } second part shall have the right to pay the same, in which event, the parties of the first part covenant and agree to forthwith and immediately repay to the party of the second part any amount it may so have paid, together with any damages it may have sustained on that

account; and the parties of the first part further agree in case the party of the second part shall be involved in litigation as a result of any of the causes aforesaid, or on account of any of the accounts or transactions of the parties of the first part, exercised, or done before the delivery of the property herein described, that they will pay to the party of the second part; in addition to any amount that it may be compelled to pay by reason thereof, all costs and damages, reasonable attorney's fees, and other expenses whatsoever incident thereto which it, the said party of the second part, may be compelled to pay or assume by reason thereof, and in case it shall become the duty of the parties of the first part to pay the party of the second part any amounts under this section, they covenant and agree to pay interest at the rate of six per centum (6%) per annum thereon from the date such sums become due. And the same shall be construed as being due upon the payment or assumption of the same by the party of the second part.

#### VII.

The parties of the first part, who hold leases on the retail furniture stores property, located as afore-  
page 217 } said, covenant and agree that they will assign said leases and/or sublet the stores' property covered by such leases to the party of the second part for the same term and at the same price said leases were made to the parties of the first part. And when this option is exercised and the conditions as to payments complied with (whether the purchase price or any part thereof is held in escrow or not) the parties of the first part covenant that the parties of the second part shall have the right to immediately enter the said premises and take over the said leases.

#### VIII.

The party of the second part covenants and agrees that if this option is exercised and the sale consummated under its terms, it will cause to be incorporated the two companies hereinbefore mentioned to be known as the Virginia-Lincoln Furniture Company and the Lincoln Furniture Stores, Incorporated (or two companies with appropriate names) or such other affiliated companies as the party of the second part may desire and that the Virginia-Lincoln Furniture Corporation (or company appropriately named) shall hold all of the common stock of the Virginia Table Company, Incor-

porated, and all the stock of the Lincoln Furniture Stores, Incorporated (except three shares of common stock in each company, if necessary to issue the same for the purpose of having directors), provided, however, that the  
 page 218 } Virginia Table Company, Incorporated, shall have the right to issue in an amount not exceeding \$750,000.00, 7% cumulative preferred stock, preferred to the common stock as to dividends and also as to surplus and assets in distribution or liquidation which said stock shall be the only outstanding stock of the Virginia Table Company, Incorporated, having priority to its common stock.

### IX.

It is covenanted and agreed by and between the parties hereto that the deed and bill of sale provided for in this option to be executed by the parties of the first part to the party of the second part when the terms hereof are complied with, shall not be delivered, nor any rights accrue thereunder, to the party of the second part, until options on the property of not less than six other retail furniture stores shall have been exercised and consummated by the party of the second part. However, upon the terms of this option being complied with and the payment of cash made as required hereunder and the agreement to deliver the stock for the balance of the purchase price shall have been executed, the deed and bill of sale, cash and agreement to deliver stock, shall be placed in escrow with the State-Planters Bank & Trust Co., Richmond, Virginia, to be held until satisfactory evidence is adduced to it by the party of the  
 page 219 } second part that it has consummated options on at least six other retail furniture stores aforesaid and taken over the property thereof under such options and that satisfactory evidence is adduced that all current liabilities of the Southern Factories and Stores Corporation have been paid from the cash which is to be held in escrow as above stipulated for the purpose of said bank to use for the sole purpose of paying any and all of the current liabilities of the Southern Factories and Stores Corporation herein referred to. Party of the 2nd part agrees that if its organization is effected generally as outlined or similarly thereto and the parties of the 1st part properties come up to requirements as agreed to; then and in that event, the party of the 2nd part agrees that this option will be exercised. When satisfactory evidence is produced that the terms of the escrow agreement have been complied with, the holder in escrow

shall then deliver to the party of the second part the deed and bill of sale and shall deliver to the parties of the first part the stock if same has been issued.

X.

It is further covenanted and agreed by and between the parties hereto that if this option is exercised, all cash on hand and in the bank at the time of the transfer and sale of the property shall be retained by the parties of the first part.

page 220 {

XI.

It is further covenanted and agreed that if the party of the second part shall at least ten days prior to the expiration of this option notify the parties of the first part of its intention so to do in writing, it shall have the right upon the payment of (\$1,000.00) One Thousand Dollars to the parties of the first part, to have this option extended upon the same terms and conditions as herein set forth for an additional period of sixty days (60) from the expiration from that time, and the payment of the said One Thousand Dollars (\$1,000) shall be sufficient to continue this option and all of the terms and conditions thereof in force for such additional period and if such payment is made and such extension obtained the parties hereto *respectively* covenant and agree that all rights hereunder and all duties and obligations imposed by this agreement shall continue and be in force for the said period of sixty (60) days from the expiration hereof. If during such period of sixty (60) days, the option is consummated and the property purchased by the party of the second part, the said One Thousand Dollars (\$1,000) so paid for said renewal, shall be credited on the purchase price; otherwise, said sum of One Thousand Dollars (\$1,000) shall be retained by the parties of the first part.

XII.

It is further understood and agreed that all the covenants made in this option by the parties of the first  
page 221 { part are binding on both the Cameron Stove Company and the Southern Factories and Stores Corporation and/or either of them, and their assigns, or successors, and that the entire agreement in regard to the subject matter of this contract, is in writing and included herein,

and that there are no verbal agreements or understandings of any kind or character, in addition to, or in conflict with the provisions of this contract and that no agreement hereafter made as addition to, or amendment of, this agreement shall be valid unless incorporated in writing.

### XIII.

It is further understood and agreed that this agreement is accepted at Marion, in the County of Smyth and State of Virginia, the principal office of the party of the second part and that it is to be construed according to the laws of the State of Virginia.

### XIV.

It is further covenanted and agreed by and between the parties hereto that the granting and acceptance of this option has been regularly approved by the Boards of Directors of the three corporations and that the said Boards of Directors have the authority to authorize the execution of these presents under the by-laws of the corporation, and that if this option is exercised, and the sale hereunder consummated, page 222 } the Stockholders and Directors of the respective corporations, will authorize and direct the fulfillment and performance of all of the terms and conditions there.

IN TESTIMONY WHEREOF witness the corporate names of the parties of the first part, by their President and seals attached attested by their secretaries and the name of the Virginia Table Company, Incorporated, by its duly authorized attorney in fact this 13th day of December, 1928.

CAMERON STOVE COMPANY,  
By (signed) RIVES FLEMING, (Seal)  
President, (Seal)

Attest:

(signed) R. B. CARDOZO,  
Secretary.

THE SOUTHERN FACTORIES & STORES  
CORPORATION,  
By (signed) RIVES FLEMING, (Seal)  
President, (Seal)

Attest:

(signed) E. H. HILLIS,  
Secretary.

THE VIRGINIA TABLE COMPANY, INCORPORATED,

By (signed) C. C. LINCOLN, JR., (Seal)  
Vice-President.

Signed, sealed and delivered in the presence of

(signed) JAMES B. MURPHY.

page 223 } By Mr. Gordon:

Q. You say the meeting at Marion was held on the 19th day of July, 1929. I show you an agreement made the 20th of July, 1929, between your company and Virginia Table Company and ask you whether or not this paper of July 20th, 1929, was executed in pursuance of the agreement reached on the 19th?

A. Yes.

Q. Mr. Fleming, under the terms of this original option and the extension option of July 20th, 1929, was provision made there for the financial needs of the Southern Factories & Stores Corporation?

A. Yes, sir.

Q. In what way were those provisions made?

Mr. Bazile: We call for the contract as to that.

Q. Did it or not provide for sufficient cash to pay all of your indebtedness?

A. Yes, sir.

Mr. Gordon: Can we admit during the year 1929 Mr. C. C. Lincoln, Jr., was the president and treasurer of these companies and that Mr. Buchanan was the secretary?

Mr. Buchanan: Yes, sir.

The Court: That stipulation goes into the record as part of the evidence by consent of counsel.

page 224 } By Mr. Gordon:

Q. Now, Mr. Fleming, did you have some correspondence with Mr. Wahab and Mr. Buchanan and Mr. Lincoln with regard to these transactions about which you have testified this morning?

A. Yes, sir.

Mr. Gordon: I am now going to read this correspondence to the jury.

Mr. Bazile: If Your Honor please, this first letter is not objectionable except for the reason that it is going to cumber the record with something that is unnecessary. It is dated November 1st, 1928, long before any of these alleged breaches occurred and I don't see that it has any relevancy to the issues being tried before the Court and for the reason that it adds to the record and takes up unnecessary time.

Mr. Gordon: It is a reference to the options that were being prepared at that time. I want to show it was in process of being prepared.

The Court: It will be admitted subject to its being connected up.

Note: Letter filed and marked Exhibit R. F. #5, which is as follows:

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November 1, 1928.

Mr. Rives Fleming,  
Cameron Stove Co.,  
21st & Decatur Sts.,  
Richmond, Va.

Dear Mr. Fleming:

Absence from the office for several days accounts for our apparent delay in preparing the form of option which we promised to send to you for your consideration.

We are working on this form of option at our office today and expect to finish it tomorrow or the next day and will forward it to you as soon as completed.

We have had so many demands for our time in connection with this merger that it necessarily involves some delay. However, we are making a special effort to expedite all transactions with view of consummating a consolidation at the earliest date possible.

Thanking you for the courtesies extended us while in your good city and hoping to see you again at an early date, I am,

Cordially yours,

(signed) R. S. WAHAB,  
President.

RETAIL STORES SERVICE, INC.

RSW/G.



page 226 } By Mr. Gordon:

Q. There was introduced in evidence this morning the authority of Mr. Wahab to represent the Virginia Table Company with regard to securing options and executing options?

A. Yes, sir.

Q. Now where was Mr. Wahab located?

A. In Baltimore.

Q. Was he or not the representative of the Virginia Table Company in these transactions throughout?

A. He was.

Q. One of the representatives?

A. Yes, sir.

Mr. Gordon: This is a letter dated January 25th, 1929, from Mr. Fleming to Mr. Lincoln.

Note: Filed and marked Exhibit R. F. #6, which is as follows:

January 25, 1929.

Mr. C. C. Lincoln, Jr.,  
c/o Virginia Table Co.,  
Marion, Va.

Dear Sir:

It is a little premature, but when our organization is effected the question of a banking connection here will no  
page 227 } doubt arise, and I hope you will not consider it presumptuous on my part to ask that you confer with us before making any commitments here.

The company's best interest is our only motive.

The State Planters Bank & Trust Company, one of the largest and most progressive institutions in the South, has fully cooperated with us in the organization and operation of our Southern Factories & Stores Corporation and has willingly granted every request made by The Cameron Stove Company. We sincerely hope therefore that, all things being equal, we may continue our long and very pleasant association with them.

Mr. Kimbrell has again gone South to option more stores and I believe he will get several in the next ten days. With the four recently optioned, we now have fifteen.

Wish you would run down to Richmond for a day or two.

In addition to discussing several business matters, would like to show you how fast Richmond is growing.

With kindest regards and best wishes.

Yours very truly,

RIVES FLEMING,  
Pres. Cameron Stove Co.

RF/T

By Mr. Gordon:

Q. Now, as I understand, the first option that was given included the Cameron Stove Company and afterwards the Cameron Stove Company was eliminated?  
page 228 } A. Yes, sir.

Mr. Gordon: This letter is dated January 31, 1929, from Mr. Wahab to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #7, which is as follows:

January 31, 1929.

Mr. Rives Fleming,  
Cameron Stove Co.,  
Richmond, Va.

Dear Mr. Fleming:—

Copy of the option with the J. W. Bledsoe Furniture Co., Danville, Va., was received this morning.

In looking over this option I do not find where any provision has been made therein to cover lease on the store property. Perhaps there was some reason for eliminating this. It is highly important that all options have a provision for the lease, otherwise we may not be interested in acquiring the property, unless the lease on the building was made a part thereof. Furthermore by eliminating the lease clause from the option the seller might use this as a means of evading the option.

You no doubt had some understanding regarding this matter; will you please advise?

Yours very truly,

(signed) R. S. WAHAB.

RSW/G

page 229 } Mr. Gordon: This letter is dated February 1, 1929, from Mr. Fleming to Mr. Wahab.

Note: Filed and marked Exhibit R. F. #8, which is as follows:

February 1, 1929.

Mr. R. S. Wahab,  
c/o Retail Stores Service, Inc.,  
Keyser Building,  
Baltimore, Md.

Dear Mr. Wahab:

The option I used with J. W. Bledsoe Furniture Company, Danville, Va., was copied from the Fox Option drawn up by Mr. Murphy, their attorney.

The "leases" mentioned in paragraph four and six have reference to and cover property leases and other similar contracts.

Mr. Bledsoe advises me that he has two and one-half years lease from July 30th, 1929, at \$475.00 per month, and he thinks he can secure the second and third floors of two adjoining and similar buildings for \$50.00 per month, which would make his rental \$525.00 for the second and third floors of five stores and the first floor of the central store.

Have an appointment to meet at the Lord Baltimore Hotel on February 6th a man who owns and operates two stores.

If I get in a tight place, I may call on you for assistance, and in any event I hope that I can have you to  
page 230 } dinner with me.

With kindest regards, I am,

Yours very truly,

RIVES FLEMING,  
Pres. Cameron Stove Co.

RF/T

Mr. Bazile: This next letter is objected to for the reason it relates to the inventorying of the Cameron Stove Company, which is not involved in the issues in this suit; just takes up time and has nothing to do with it and has no relevancy to the subject of litigation.

Mr. Gordon: I think it has because it deals with both companies. They were joined in the original option. Cameron Stove Company and Southern Factories & Stores Corporation united as parties of the first part in the first option.

Mr. Bazile: But it was eliminated in the second option.

Mr. Gordon: This has reference to the first option.

The Court: Objection overruled.

Mr. Bazile: Exception.

Mr. Gordon: This letter is dated February 13, 1929, from Mr. Dykes to Mr. Fleming.

page 231 } Note: Filed and marked Exhibit R. F. #9,  
which is as follows:

Marion, Virginia,  
February 13, 1929.

Mr. Rives Fleming, President,  
Cameron Stove Company, Inc.,  
Richmond, Virginia.

*Virginia Table Company, Inc., Et. Al.*

Dear Sir:

Reference is made to your letter of February 9, 1929, addressed to our Baltimore office, with respect to the inventory of the Cameron Stove Company, Inc.

It is noted that the option given by your company to the Virginia Table Company, Inc. provides that one or more representatives will be appointed by your company and the prospective purchasers to take a full and complete inventory of all goods, wares and merchandise, furniture and fixtures and delivery equipment, and it, therefore, seems that arrangements for this work should be made with Mr. R. S. Wahab, representing the Virginia Table Company, Inc. It appears, however, from the terms of the option that a physical inventory should be taken at the earliest practical date and provision made for adjusting this inventory to January 31, 1929.

I presume that you have been in communication with Mr. Wahab with respect to this matter since writing  
page 232 } our Baltimore office.

Yours truly,

HAD-MLB

H. A. DYKES,  
Accountant in Charge  
Haskins & Sells, C. P. A.

Copy to  
Baltimore  
Mr. Wahab.

By Mr. Gordon:

Q. Who were Haskins & Sells?

A. They were the auditors for the Virginia Table Company in this merger.

Mr. Gordon: This letter is dated February 19, 1929, from Mr. Buchanan to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #10, which is as follows:

Bledsoe Furniture Co.

Feb. 19, 1929

Rives Fleming, Esq.,  
Cameron Stove Co.,  
Richmond, Va.

Dear Mr. Fleming:

On the above option, I will be glad if you will forward and have executed the enclosed agreement.

We will also desire abstract and a form of lease. I enclose you also form of lease which will be satisfactory.

In case you do not have counsel at Fredericks-  
page 233 } burg, I would suggest Hon. C. O'Connor Goolrick,  
who is a personal friend of mine and a splendid  
attorney.

We are forwarding at once an auditor to this store and will be glad if you will notify them to expect him. The reports are so very favorable that we are anxious to verify them and grab this store as early as possible.

You are to be congratulated upon securing it.

Very truly yours,

JPB:KS

(signed) J. P. BUCHANAN.

Mr. Gordon: That evidently refers to Bell instead of Bledsoe.

Mr. Bazile: We object to this next letter because it relates entirely to the Cameron Stove Company which is not involved in this litigation; it is perfectly irrelevant and just seeks to confuse the issues.

Mr. Gordon: No, it refers to both. It refers to the Southern company.

Mr. Bazile: All right.

Note: Filed and marked Exhibit R. F. #11, which is as follows.

page 234 }

Feb. 19, 1929.

Rives Fleming, Esq.,  
Cameron Stove Co.,  
Richmond, Va.

Dear Mr. Fleming:

I have wired you today that we will require the following:

1. An abstract of title to the real estate of the Cameron Stove Co. completed to such an extent that reputable local counsel will approve and certify thereto that in their judgment the title to the property is good and merchantable and free from encumbrance and that all taxes and current charges have been paid; also that there is no litigation pending affecting the land and none contemplated so far as he knows.

2. I enclose you form for minutes for stockholders and directors of Cameron Stove Co. and Southern Co. to be executed when we finally notify you that the transaction will be completed. This latter cannot be finished or executed until later.

3. I have also advised that it will be required that the title to all of the real estate occupied and leased by all of the stores will have to be abstracted and a like certificate of title and pending litigation attached thereto and forwarded. This will have to be done by local counsel in each town and I have also written Murphy to this effect.

4. Copies of all existing leases and agreement  
page 235 } to their assignment, if such is required therein.

5. If new leases are necessary a statement in regard thereto and the tentative form of the proposed lease.

I realize that this will cause you considerable trouble and I would not request it if it were not absolutely required by the Bankers counsel, and before we can finally present our completed picture as a basis for credit we must have the foregoing.

It seems that in another similar transaction in which they were interested trouble afterwards developed in regard to the lease and they are determining to forestall trouble in the present instance. I am not prepared to say they are not entirely right.

I sincerely hope therefore that you and Mr. Murphy, to

whom I am sending a copy of this letter, will take immediate steps to comply with these requirements.

With kind regards, I am

Sincerely yours,

JPB:KS

(signed) J. P. BUCHANAN.

Cy Mr. Murphy

P. S. I find I have forwarded you minutes for the Cameron Stove Co. and you can use these for a basis when the proper time comes for minutes for the Southern Store.

JPB

P. S. A certificate from reputable counsel in regard to the title to leased property and encumbrances will be page 236 } enough without an abstract of title.

JPB.

By Mr. Gordon:

Q. Mr. Fleming, what was the reference there to the Southern Company?

A. Intended for the Southern Factories & Stores Corporation.

Q. What Murphy is referred to?

A. Mr. James B. Murphy, our counsel.

Mr. Gordon: This is a telegram dated March 6th, 1929, from Mr. Wahab to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #12, which is as follows:

March 6, 1929.

RIVES FLEMING

CAMERON STOVE RICHMOND VIR

USE DATE YOU START INVENTORY PLANT MACHINERY ETC AS JANUARY THIRTY FIRST

R S WAHAB

By Mr. Gordon:

Q. Did you all comply with that request?

A. Yes, sir.

page 237 } Mr. Gordon: This is a letter dated March 18, 1929, from Mr. Lincoln to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #13, which is as follows:

March 18, 1929.

Cameron Stove Company,  
Richmond, Virginia.

Attention: Mr. Fleming.

Dear Mr. Fleming:

Difficulties which we could neither foresee nor prevent have occasioned delay in the completion of the audit of the various units of the new LINCOLN FURNITURE CORPORATION. The auditors are doing everything possible to expedite this work but they have met with considerable difficulty in the records of many stores and this has greatly delayed the work. This, quite naturally, has been a source of disappointment to us and we know also a matter of some inconvenience to you, but we can assure you that everything possible is being done and you will receive complete information within a very short time.

It is a pleasure to be able to tell you that the preliminary reports are most gratifying and I now see the possibility of a company with even greater prospects than we dared hope. It has been a pleasure to consider your business as a part of this great organization and I can further assure you that the other units are all excellent institutions with page 238 } records and reputations of the very best.

There is one thing you can do which will be of inestimable value to the new organization and that is by earnestly pushing sales during the present month to the limit. Your cooperation in doing this will make it possible for this new organization to start functioning in a most progressive manner and I earnestly appeal for your aid and assistance in doing this.

During this period of several weeks delay while we were doing still further work in the field, we were able to sign up a number of additional stores; all being institutions of a very high order. When the picture is finally completed there will be listed from forty to fifty high grade stores; undoubtedly, the largest chain furniture organization in the industry.



With your cooperation, advice and counsel, I feel confident of our ability to carry on, and only by united effort can we hope to build this organization to the position it should ultimately achieve; and that is to be the outstanding unit in the entire furniture industry.

It has not been my pleasure to meet all of you personally, as yet; but this is an opportunity to which I now look forward with great pleasure. In the meantime, be assured of our every cooperation and in return I beg of you the same. It will be most gratifying to me when we can have all of the members of our new organization welded together into one big, happy family—working and pulling to achieve one thing—bigger and better things for all of us.

Yours most respectfully,

(signed) C. C. LINCOLN, JR.,  
President.

CCLJr:MLB

Virginia Table Company, Inc.

Mr. Bazile: We want to object to all of this correspondence which occurred prior to the 20th day of July, 1929. Nearly all of this correspondence—all which Mr. Gordon has offered so far is dated back in the early part of 1929 and latter part of 1928 and has to do with matters about which there is no controversy and are not involved in this litigation and, therefore, we think they are irrelevant and immaterial and merely seek to confuse the issues here and cumber the record.

Mr. Gordon: May it please Your Honor, paragraph number four of the complaint distinctly sets out that after these various options were gotten that these gentlemen requested us to go ahead and do a great many things involving the leases and various ways in which we transacted the business and all that sort of thing. It has a definite bearing page 240 } on that paragraph of the complaint and also upon the contention made here that they were not bound by the agreement which they made to pay \$1,000.00 for these options. \* \* \* It is a part of the proof, may it please Your Honor, of the expense to which we were subjected and for which we are specifically suing and which they admitted this morning by the mouth of Mr. Buchanan they were willing to pay for.

The Court: Gentlemen, the matter at this stage may be very clear to the counsel who, no doubt, have had months of study over this paper, but it is very difficult for the Court with only a partial view of the evidence at this stage to say what is relevant and what is not until I see whether it is connected up. It is therefore the safest plan, I think, for the Court to admit such letters as do not distinctly prejudice your case.

Mr. Bazile: We except.

By Mr. Gordon:

Q. I read you this letter from Mr. Lincoln. Up to that time had anything ever been said or intimated to you about the stores not coming up to specifications?  
page 241 } A. No, sir, it hadn't.

Mr. Gordon: This letter is dated March 21, 1929, from Mr. Buchanan to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #14, which is as follows:

March 21, 1929.

Rives Fleming, President,  
Cameron Stove Company, Inc.,  
Southern Factories & Stores Company, Inc.,  
Richmond, Va.

My dear Mr. Fleming:

We sincerely regret that circumstances over which we had no control, and for which we are not responsible, have compelled us to request from you an extension of your option. You understand, of course, that we must at all times have a *live* option: our financial arrangements in regard to any store or factory at once ceases upon the expiration of our options.

This unfortunate delay is regretted most sincerely by us, and is affecting us more than it can possibly affect any of the constituent units in our organization. We have expended over one hundred thousand dollars in perfecting this merger, and naturally every days delay compels us to advance additional sums. This, however, we are bearing, for the reason that understand that the delay, unfortunate as it is, is inevitable on account of conditions we could neither  
page 242 } foresee nor prevent, and while of course the additional burden is very considerable, we realize

that we cannot always expect matters in an organization of this character to be free from unexpected contingencies, and that we must be prepared for the good as well as the bad.

Our organization was turned over exclusively to Mr. Sherwood, one of the senior partners in Messrs. Hayden Stone & Company. He had grown so interested in its possibilities that he had undertaken single-handedly, to work out all of the many details that necessarily attend a transaction of this magnitude. He was a financial genius—supreme, we believe, in his line—and that was the financial organization of a merger of the character we presented to him. He was also a man who was peculiar in that he took a great pride in working out these transactions alone, and when he had the final picture, present it completed. On Friday before he died, he and myself had a conference, in which he advised that all details had been completed except some matters of minor importance: that his advertisement was in his mind, and his letter formed, and it was arranged that the following Monday we should meet to complete the final Bankers contract. Mr. Lincoln was not here, but knowing his views, I knew that our troubles were at an end, and the deal closed. With this I was satisfied to leave New York for the South, which I did, leaving Mr. Sherwood to take his figures over  
page 243 } the week end for a final presentation Monday.

This occurred you will remember after the contract between ourselves and our Bankers had been signed, and their counsel and myself were instructed to have the corporations formed and the stock printed, which was done, except that the charter of the holding company was held in Wilmington by the Corporation Trust Company in abeyance pending the information as to the final figures worked out by Mr. Sherwood upon the *proportions* agreed upon in the relations of earnings to assets, etc. as shown by the completed figures of Messrs. Haskins & Sells.

Had he lived, the transaction would have been now completed.

However, on the Sunday after the Friday and before the Monday I have mentioned, he died, suddenly, of heart disease, at Inglewood. This I saw in the morning paper Monday, and we at once communicated with Messrs. Hayden Stone & Co.

The matter having been exclusively in his hands, and he alone having worked out the final details (the importance of which can be known only to those in direct touch with a transaction of this character) it became necessary for these Bankers to assign the matter to some other partner who

would take it up where Mr. Sherwood had begun to exclusively handle it. This demonstrated the unfortunate situation arising when a partner in a Banking House under-  
 page 244 } takes to handle a deal of this magnitude alone, which, I am aware if not often done, but, as I have said, Mr. Sherwood was particularly proud of this merger and especially interested in predicting its expansion: he desired, I think, to be known as its promoter, so far as Banking interests were concerned, and the result was very harmful to us—harmful, I believe, in the same degree as his excessive interest would have been advantageous had he lived.

The situation thus developing placed us in a *quandry*. The Bankers were asking for time to bring the negotiations through another partner up to the point where Sherwood left off. In this I cannot honestly censure them, for reasons that are apparent. They were investing several million dollars in a deal which had been under the control—and exclusive control—of a partner who was dead. We, on the other hand, were faced with expiring options, and were met with the question as to whether we would undertake to go immediately ahead under our agreement, or grant the delay, or make other connections.

We could not afford, even though we had a legal right, to enforce any agreement we had. It would have been suicidal to have our issue brought out under compulsion. We could not hope to have it supported, and the best asset we could have is a spirit of complete co-operation. We knew that we have a picture that is financible. We knew we had an organization which it had been agreed would be  
 page 245 } financed: but, as I have said, we were in a quandry.

At this juncture, we took into our complete confidence certain interests allied with ours, and upon their advice, after we had received assurances from other interests that they would be glad to finance us provided we could substantiate our presentations, we temporarily withdrew our proposition from all consideration by any Bankers, and subsequently presented the same to those whose proposition to us we considered most favorable to all interests involved.

Our negotiations with these gentlemen are such as to warrant my stating that in my judgment, it is only a matter of a very short time until we will be in position to take you over. We have been in the favorable position of being able to choose our connections, and we think we have chosen the best. They have now placed their entire organization in the investigation of our proposition, and I can say to you as confi-

dently as anyone could without absolute certainty, that we will be able to close as soon as they are finished. Naturally they desired to examine the plants and a number of the stores, and this was pleasing to us, for we know that in practically every case, the assets and earnings have been understated where there was any doubt.

We ourselves are contracting with the auditors to furnish such information as may be desired: our legal arrangements are being completed: our corporations are page 246 { being formed and our stock printed, which expenditures we would not of course undertake (and they are very considerable) unless we had confidence in their carrying out their agreements.

We are aligned with reputable financial interests, in whom we have complete confidence; we are renewing our options, and bearing every expense.

It is our confident belief that our organization will be the largest in the country in its particular line, and will at once take a commanding position.

We are especially anxious for you to go along with us, not only on account of your assets, but because we want your personnel.

We have made up our minds that this merger will be completed, and that very soon: we know that our proposition is one of the best that has been presented, for our Bankers tell us so, and outside of an actual closing, I can personally say to you that I am as confident as anyone can be who knows the facts, that in a short time you will be taken over.

Awaiting your reply, I am

Sincerely,

(signed) J. P. BUCHANAN.

page 247 { By Mr. Gordon:

Q. Prior to the receipt of that letter was anything said to you or intimated in any way about any option to any of these stores that had been taken?

A. No, sir.

Q. Had you been told by Mr. Wahab or Mr. Buchanan or Mr. Lincoln as to what would be done with these eleven stores on which you had secured options for them?

A. As to what would be done with them?

Q. Yes.

A. Well, a merger was to be formed.

Q. Were they to be in it?

A. Oh, yes. These eleven stores and such others as they approved would be in the merger and they all had been accepted and approved.

Q. Now this letter says the picture had been presented to the bankers and they had approved it at that time and you had heard nothing to the contrary in regard to any of these stores?

A. No, sir. In fact, we were asked to send photographs of the stores to appear in the advertisement.

Mr. Bazile: We object to that last question as to the approval of these options. They weren't approved and before they were approved the man died. Before they page 248 } could be approved the man went out and died of heart trouble.

Mr. Gordon: I don't so understand it. I will let the jury read the letter over if they have any doubt about it.

A Juror: Why don't you bring that out clearly so the jury might understand it clearly while it is fresh in their minds.

Mr. Bazile: May it be understood we are objecting for the reasons given to the admissibility of all these letters prior to July 19th?

The Court: That they are irrelevant and cumber the record?

Mr. Bazile: Yes, sir, and seek to confuse the issues.

By Mr. Gordon:

Q. He says: "Mr. Lincoln was not here, but knowing his views I knew that our troubles were at an end and the deal closed."

Mr. Bazile: Read the whole letter, not just one sentence.

Mr. Gordon: I will read the whole letter over again and glad to do it. (Counsel reads Exhibit R. F. #14.)

A Juror: May I ask a question? I would like to know if there is any dispute here to that point, as to page 249 } eleven branches being considered?

By Mr. Gordon:

Q. Was there any dispute about that point?

A. No, sir, no question or dispute about that at all. They were all accepted. On their approval we would go to a store and investigate tentatively; if we saw that the assets came up to about what they required and the profits, we would phone Mr. Wahab or Mr. Lincoln or Mr. Buchanan and get their approval. If they said get the option on this

store, then we would have them have a directors meeting, get them sold on the idea and take the option. As far as I know there was never any complaint; in fact, we were praised at every angle; told on many occasions what a pretty picture it was; how much better it was than usually go to New York for underwriting.

By a Juror:

Q. How much later than that was the audits of this company made?

A. I don't recall the time, but they were finishing the audits.

Mr. Gordon: The audits were finished.

Mr. Bazile: No, sir, the audits hadn't been.

The Witness: One set of audits was. This was a re-audit. Time after time they had to be re-audited. The first lot of bankers—

page 250 } By a Juror:

Q. Had any audits been made of those eleven stores up to this time?

A. What is the date of that letter?

Mr. Gordon: This date is March 21st. I show you here in the letter where they answer the question. Mr. Buchanan says: "final figures worked out by Mr. Sherwood upon the proportions agreed upon in the relations of earnings to assets, etc., as shown by the completed figures of Messrs. Haskins & Sells."

A. This was the first audit completed. Then they were audited later for other bankers.

Mr. Gordon: This letter is dated March 22, 1929, from Mr. Buchanan to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #15, which is as follows:

March 22, 1929.

Rives Fleming, Esquire,  
Cameron Stove Company,  
Richmond, Virginia.

Dear Mr. Fleming:

I am sure that you are aware of the situation which has

arisen by reason of the failure of the auditors to complete the audit within the time contemplated, and the page 251 } necessarily consequent delay which has caused us to await their report. This was not due to any negligence on their part, I think. If the books of the different stores, etc., had been in proper shape, they could have completed their work, but they found so many stores in which the records, for one reason or another, had been so badly and incompletely kept as to render it almost impossible for them to arrive at the correct financial status, or determine the past earnings. This necessitated a digging out of items and the consumption of time which otherwise would not have been necessary.

The delay is not our fault, and we are ready to go whenever we are presented with this report. Your option will shortly expire, and it will of course be necessary for us to have a renewal sufficiently long so that it will be in force *after* the Bankers hold their final conference with us. I enclose you a renewal for 30 days, and we will appreciate it very much if you will have the same executed and returned to me at the earliest possible moment as counsel for the Bankers are already asking about it.

I understand that under the option we are required to pay to you \$500 for the renewal, but as in any event it would be but swapping dollars, and we have as you know been at tremendous expense, I hope you can waive this: if you cannot advise me by wire at once, and in any event let me have your decision before the time when we would page 252 } have to give you formal notice. This I am sure I can rely on your doing.

With kind regards,

Sincerely,

(signed) J. P. BUCHANAN.

VIRGINIA TABLE COMPANY, INCORPORATED:

For a good and valuable consideration, the receipt of which is hereby acknowledged, the CAMERON STOVE COMPANY, Inc. and the SOUTHERN FACTORIES AND STORES CORPORATION, both corporations existing under the laws of Virginia, do hereby give and grant unto the Virginia Table Company, Inc., an extension of thirty days from the expiration of an option dated Dec. 13, 1928, from them to said Virginia Table Co. Inc., within which to exercise the



same, on the same terms and stipulations and subject to the same conditions as in said option set forth, and reference is specifically made to said option for the purpose of a description of said terms and conditions. If the said Virginia Table Company, Inc., its assigns, etc. shall carry out the terms of the said option within the said thirty days after its present expiration, then the undersigned agrees and bind themselves to carry out on their part all agreements therein made by them, and when said terms are fully complied with by the Virginia Table Company, Inc., its assigns, etc.,  
 page 253 } to convey to it the property therein described in the manner and to the extent for the consideration in the said option set forth.

Witness the corporate names of the said parties, by their duly authorized representatives, whose action in executing this extension has been ratified and approved by their respective Boards of Directors, this                      day of                      , 1929.

CAMERON STOVE COMPANY, INC.

By (signed) RIVES FLEMING,  
 President & Treas.

Attest:

(signed) H. M. PATTERSON,  
 asst. Secretary.

SOUTHERN FACTORIES & STORES CORPORATION

By (signed) RIVES FLEMING,  
 President

Attest:

(signed) HOKE MURRAY, Treas.

VIRGINIA TABLE COMPANY, INC.

By (signed) J. P. BUCHANAN,  
 Its attorney in fact and Secretary authorized to execute these presents.

Mr. Gordon: The option contract required \$1,000.00. Then here is a renewal of the option for thirty days, sent to the Virginia Table Company by Cameron Stove Company and Southern Factories & Stores Corporation.

page 254 } A Juror: What is the date of that letter?

Mr. Gordon: March 22nd. This other one was dated March 21st.

A Juror: Would you read the first paragraph of that letter.

Note: Mr. Gordon reads first paragraph of the letter of March 22nd.

Mr. Bazile: That is written on March 22nd?

Mr. Gordon: Yes. In the other letter of March 21st he says the report of the auditors had been submitted to the bankers.

A Juror: May I ask another question? On March 21st the letter indicates that the eleven stores—the final check-up was satisfactory. Then the next day he writes a letter stating they haven't been completed—

Mr. Gordon: No, it didn't say it hadn't been completed; said there had been a delay in completing it.

Mr. Bazile: He says it hadn't been completed. Read this letter on the 25th and see what that says.

Mr. Gordon: I am perfectly willing to let you have everything that is here.

Mr. Buchanan: I think it is a letter already page 255 } in.

Mr. Gordon: I can't tell you when Haskins & Sells completed those audits. Mr. Buchanan has got Mr. Dykes, of Haskins & Sells, down here and he is going to put him on the stand and I suppose you can find out exactly from him. We have got Mr. Wahab who presented the picture to Hayden, Stone & Company.

A Juror: Didn't you read a letter from Haskins & Sells' representative a minute ago?

Mr. Gordon: Yes, sir. I will show you what that is. That was on February 13th. (Reads Exhibit R. F. #9.) Now here is March 25th, written on the letterhead of Bell Furniture Company, and Bell was one of the later ones to sign the option.

Mr. Bazile: One of the eleven.

Mr. Gordon: Yes, and one of the later ones.

Note: Filed and marked Exhibit R. F. #16, which is as follows:

March 25, 1929.

Rives Fleming, Esq.,  
Cameron Stove Co.,  
Richmond, Va.

Dear Mr. Fleming:

Mr. Lincoln advises me that the final figures page 256 } will not be available from the auditors so as to make possible a consummation of the merger for

some two weeks yet. I am sure you understand the situation which has resulted in the delay and it is not necessary to re-iterate.

It is sufficient to say that we are without fault and that everything has been done that could be done to expedite matters.

The Bell option expires on the 28th of this month. I think it extremely advisable for you at once to go to Fredericksburg and ascertain the situation. If possible secure from them an extension of 30 days. If you cannot do this give them the enclosed statement that we will exercise the option and ascertain if with this definite commitment they will not arrange for a 30 day renewal.

If this cannot be done wire me. I presume that you will go to Fredericksburg tomorrow which is the 26th and I am sure that you can make a satisfactory arrangement.

With kind regards, I am

Sincerely yours,

J. P. B.

J. P. BUCHANAN.

JPB:KS

Cy

Mr. Lincoln

By Mr. Gordon:

Q. Do you know whether or not that later was received after Hayden & Stone had laid down on the mat-page 257 } ter or not?

A. I can't recall that, Mr. Gordon. I remember the request to get that option extended and remember going up and getting it extended. I don't remember the exact date.

Q. The letter from Mr. Buchanan that I read you a while ago, as I understand, on the 21st of March, stated that owing to Mr. Sherwood's death they had taken up the matter with other interests. Is that correct?

A. Yes, sir.

Q. And, of course, any other interests would have to have another audit, I suppose?

A. Yes.

Mr. Gordon: Now enclosed with that was a letter to Bell Furniture Company, written by Virginia Table Company, by J. P. Buchanan.

Note: Filed and marked Exhibit R. F. #17, which is as follows:

March 25, 1929.

Bell Furniture Co.,  
Fredericksburg, Va.

Gentlemen:

This is to advise you that we expect to exercise the option granted us by you and to purchase and take over the property described therein on the terms mentioned.

Respectfully,

VIRGINIA TABLE COMPANY, INC.

By (signed) J. P. BUCHANAN,  
Secretary and General Counsel.

page 258 } By Mr. Gordon:

Q. That was one of the stores that you got the option on for the defendant?

A. Yes, sir.

Mr. Gordon: This letter is dated March 26, 1929, from Mr. Fleming to Mr. Buchanan.

Note: Filed and marked Exhibit R. F. #18, which is as follows:

March 26, 1929.

Mr. James P. Buchanan,  
c/o Buchanan & Buchanan,  
Marion, Va.

Dear Mr. Buchanan:

Your letter of the 25th received this morning, after having talked with Messrs. Bell in Fredericksburg last night.

Have forwarded the extension agreement and feel certain that it will be signed and returned immediately. I will follow it up and mail to you promptly upon its receipt.

After superficially examining some of Bell's accounts which were classified by Mr. H. H. Hopkins of the Retail Stores Service, Inc., we agreed on a price of 75% for his good accounts and 5% for all other Accounts Receivables.

Mr. Kimbrell went to Baltimore last night and carried with him Bell's agreement to sell his accounts on that page 259 } basis. While the price agreed upon is equitable, I think we should realize a profit on these accounts of at least five to ten thousand dollars.

Knowing that you and Mr. Lincoln are having to fight hard and fast, I certainly hope that you will call no me if in any way I can assist you,

With kindest regards, I am

RIVES FLEMING, Pres.  
Cameron Stove Co.

Yours very truly,

Mr. Gordon: Here is a telegram of April 4, 1929, from Mr. Buchanan to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #19, which is as follows:

1929 APR 4

RIVES FLEMING  
CAMERON STOVE CO RICHMOND VIR

BEST NEWS FOLLOWING BY LETTER

J P BUCHANAN

Mr. Gordon: Then a telegram dated April 5, 1929, from Mr. Lincoln to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #20, which is as follows:

page 260 {

1929 APR 5

RIVES FLEMING  
CARE CAMERON STOVE CO RICHMOND VIR

NEGOTIATIONS HERE ABOUT COMPLETED  
VERY SATISFACTORY BASIS STOP ADVISE KIM-  
BRELL IMMEDIATELY THAT WE ARE INTER-  
ESTED RHODES CARROLL STORES AND I WILL BE

IN MARION SUNDAY AND AVAILABLE FOR CONFERENCE ANY PLACE HE SUGGESTS WILL HAVE BE HERE LATTER PART NEXT WEEK SO PREFER SEEING HIM EARLY IN WEEK REGARDS

C C LINCOLN JR.

Mr. Gordon: Then a letter dated April 8, 1929, from Mr. Buchanan to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #21, which is as follows:

April 8, 1929.

Address all further correspondence to  
J. P. BUCHANAN, ATTORNEY, HOTEL PRESIDENT  
OR HOLTON RICHARDS & CO. 30 BROAD ST.,  
NEW YORK.

Mr. Rives Fleming,  
Cameron Stove Co.,  
Richmond, Va.

Dear Mr. Fleming:

I will write you fully from the above address, where all communication should be addressed to me until we finally close.

page 261 } We have the very best news for you that I could possibly impart; our arrangements with the Bankers have been definitely and finally completed awaiting the receipt of final audit upon terms as favorable as we could possibly expect and the situation is indeed bright from our view point.

Instead of a preliminary listing of the curb we are assured that so far as is possible of a favorable reply from a list on the *Big Board*.

This is gratifying and not only a saving of expense, but adds materially to our standing in the market.

In regard to the transfer of your assets I have not gone over the new option but will do so and write you from New York.

With kind regards,

Sincerely yours,

JPB:KS

(signed) J. P. BUCHANAN.

Mr. Gordon: This is dated April 9, 1929, from Mr. Lincoln to Cameron Stove Company.

Note: Filed and marked Exhibit R. F. #22, which is as follows:

April 9, 1929.

Cameron Stove Company,  
Richmond, Virginia.

Gentlemen:

After having spent two weeks in New York, I  
page 262 } am very happy to report very satisfactory progress. We were able to make a deal with the bankers which was even more favorable than I had dared hope. This contract was made subject, of course, to final figures from our auditors which we expect to receive within a few days. From preliminary reports of the auditor's work, we anticipate a very favorable set up and one which will more than duplicate the picture as outlined to the bankers.

I want to again impress upon you the importance of our having two banking firms of the caliber of Hayden, Stone & Company and E. H. Rollins & Sons. I am more than ever convinced that these two firms represent the best in the banking profession and their methods of doing business will add much dignity to our securities. They seem to be very enthusiastic over the prospects of this organization and assure us again of their willingness to back us in the future on a substantial expansion program.

In addition to other unforeseen delays, we have spent several days in arranging for the listing of our stock. It was at first our plan to list the stock on the New York Curb Market and their requirements had been met accordingly. Due to the increased size of the company and the prospects for further growth, it was suggested that we investigate the possibility  
page 263 } of listing on the New York Stock Exchange, which is generally known as the "Big Board". It gives me pleasure to be able to tell you that so far we have met with all of their requirements and there now seems to be little doubt but that our issue will be admitted to trading on the premier stock exchange of the country.

It seems that only a few minor details stand in the way of our final closing and in this period of waiting you may well realize that we are just as anxious as you are to get something done. The auditors are now working on final settlement

papers and we think we can definitely promise you some action within the next ten days or two weeks at the most.

I want to thank all of you for your hearty response to my former letter and your expressions of cooperation are indeed helpful. It is vitally important that all of us stay on our tiptoes constantly if we expect to make an attractive showing during the spring months. I realize that all of you fellows in the stores are doing your bit and I cannot help but mention here the excellent progress being made by the factories. Virginia and Lincoln are making a wonderful showing. 1928 was a banner year for our plants and the first three months of 1929 produced an increase in shipments of 35% over 1927. 1929 is running a bit better than 10% ahead of 1928 and the boys in the factory tell me that they are going to increase this month by month. The other two factories  
page 264 } turning in similarly encouraging reports.

Everything possible is being done to expedite the closing of this first situation and we will advise you very shortly when everything is in readiness for final action. In the meantime, let all of us keep pushing ahead and work together for a great 1929.

With very best wishes, I am

Cordially yours,

(signed) C. C. LINCOLN, JR.,  
President Virginia Table Company, Inc.

CCLJr:MLB

By Mr. Gordon:

Q. What was Virginia and Lincoln?

A. Virginia Table Company and Lincoln Furniture Manufacturing Company.

Mr. Gordon: Here is, I find, a copy of a letter from Mr. Buchanan to Mr. Murphy of April 13th, 1929, the original of which I suppose is in the Murphy file which I am going to produce, but I can read this at this point if you don't object.

Mr. Bazile: Now, if Your Honor please, Mr. Murphy at that time was counsel for the Virginia Table Company, had been employed to represent them in this matter, and we think any correspondence between Virginia Table Company and Mr.

Murphy are confidential and not subject to be produced in this suit. Moreover, this thing is not  
page 265 } signed by Mr. Buchanan or anything to authenti-



cate it other than a typewritten signature on the typewriter that anybody could put there.

The Court: The complete answer to that is that is a copy.

Mr. Gordon: I will withdraw it. Here is April 16, 1929, from Mr. Buchanan to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #23, which is as follows:

W. A. Bell & Co.

April 16, 1929.

Rives Fleming, Esq.,  
Richmond, Va.

Dear Mr. Fleming:

Please obtain and have ready for delivery all insurance policies of every kind on the above premises which we are leasing and also on the stock, including all plate glass liability or other insurance that might be carried so that the same will be available on the day we take over the property. This is very important as we will have a representative present to take care of the insurance needs so that there will be no possible hiatus.

Very truly yours,

(signed) J. P. BUCHANAN.

JPB:KS

Cy

W. A. Bell & Co.

page 266 } P. S. I doubt if these parties are required to  
carry "Workmens Compensation".

Mr. Bazile: If Your Honor please, we object to this next letter because it purports to have been written by the plaintiff to parties other than the defendant. We know nothing about that. It would be hearsay so far as we are concerned.

Mr. Gordon: Mr. Murphy says that was his letter, so I won't read it. Here is a letter dated April 23, 1929, from Mr. Lincoln to Cameron Stove Works.

Note: Filed and marked Exhibit R. F. #24, which is as follows:

April 23, 1929

Cameron Stove Works,  
Richmond, Virginia.

Gentlemen:

It now seems that within a very short time our stock will be offered for sale by the bankers. It is useless to tell you that countless details have had to be handled and settled before this could be brought about. As a matter of fact, it was impossible for us to anticipate how many things had to be done before this deal could be completed.

From the number of inquiries that are being received by our bankers, it seems reasonable to believe that page 267 } the stock issue might possibly be over-subscribed.

If this is true, it will only mean that the stock purchased later will have to be bid on and, no doubt, a premium paid. If you or any of your friends, are interested in purchasing any stock, I would suggest that a letter be written at once direct to either one of the following bankers, requesting information and an allotment on this stock:

Hayden, Stone & Company, 25 Broadway, New York, N. Y.  
E. H. Rollins & Sons, Bank of America Bldg., New York, N. Y.

There will be two classes of stock offered, one a 7% Convertible Preferred Stock which will be convertible into common on very satisfactory terms at the option of the consumer. The other class is a No Par Value Common and will be sold somewhere between twenty and twenty-five dollars per share. Those of us connected with this organization have reason to feel that if we can get the thorough and hearty cooperation of all of the members of our new and large family, that this stock should have a very rosy future. The prospects for future growth and profit have never been brighter and it seems now that within a very few months we will control the largest distribution of furniture in America. This information is passed on to you because a number of inquiries have been received here and I hope your requests for stock will be received in time.

With very best wishes and hoping to have the  
 page 268 } pleasure of seeing you personally in the very near  
 future, I am

Sincerely yours,

(signed) C. C. LINCOLN, JR.,  
 B.

President Virginia Table Company, Inc.

CCLJr:MLB

Mr. Gordon: Here is a telegram dated April 24, 1929, from  
 Mr. Buchanan to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #25, which is as follows:

1929 APR 24

RIVES FLEMING

CAMERON STOVE CO RICHMOND VIR

ARRANGE WITHOUT FAIL GET EXTENSION BELL  
 BLED SOE TO MAY TWENTIETH LETTER FOLLOWS  
 IMPORTANT WIRE WHEN OBTAINED HOTEL PRESI-  
 DENT GET IN WRITING

J. P. BUCHANAN

By Mr. Gordon:

Q. What was the reference here to Bell—arrange without  
 fail get extension Bell?

A. Get an extension of his option.

Q. And Bledsoe was Bledsoe Furniture Company?

A. Yes; get an extension of his option also.

page 269 } Mr. Gordon: This letter is dated April 25, 1929,  
 from Mr. Buchanan to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #26, which is as follows:

April 25, 1929

Rives Fleming, Esq.,  
 Cameron Stove Company,  
 Richmond, Virginia.

My dear Fleming:

I am depending on you to get the following extensions:

Bell  
Bledsoe  
all Southern Stores )  
Cameron and )  
Carolina Parlor )  
to 5/20

Very truly yours,

J. P. BUCHANAN  
(signed) J. P. B.

JPB:DB

Cameron, So Stores & Carolina Parlor according to my records now ends May 12th.

Bell expires 4/29

Bledsoe expires 5/10

Be sure *wire* me here so I will know. *This is essential.*

By Mr. Gordon:

Q. To 5/20—that means to May 20th?

A. Yes, sir.

page 270 } A Juror: I would like to know if the other six options were in proper form at that time. There is no reference made in this request as to the other six. I understand there were eleven in all.

Mr. Gordon: We will prove that when Mr. Murphy goes on the stand.

The Witness: Those were all Southern stores.

Mr. Bazile: As a matter of fact, Mr. Ricks (the juror), there are only two of the eleven that are mentioned in this letter—Bell and Bledsoe. The others are not involved in that particular claim. They were the Southern stores.

Mr. Gordon: They were the ones Mr. Fleming was dealing with.

Mr. Bazile: Bell and Bledsoe are the only two among the eleven for which they are asking \$11,000.00. The stores of the Southern Factories & Stores Corporation were not among the eleven stores for which they are asking \$1,000.00 a piece for securing options. They weren't to get paid for giving options on their own stores; it is on the eleven other stores

they claim compensation, and Bell and Bledsoe are the only two of those which are mentioned in that letter.

Mr. Gordon: This letter is dated April 25, 1929, page 271 } from Mr. Buchanan to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #27, which is as follows:

April 25, 1929.

Rives Fleming, Esq.,  
Cameron Stove Company,  
Richmond, Virginia.

My dear Fleming:

I enclose your letter which I am writing.

I wish I could see you in person and explain to you the trouble that I am having, but I believe that you can understand it.

Our deal is finished. It is only the details we have now to contend with.

Will you have Cameron, Southern Stores and Carolina Parlor execute the enclosed renewals?

With kind regards, I am

Sincerely yours,

(signed) J. P. BUCHANAN.

JPB:DB

Encl.

Copy to Jas. B. Murphy

By Mr. Gordon:

Q. Did you get those renewals?

A. We did.

Q. From April 25th?

A. Yes, sir.

page 272 } Q. Who was handling the question of renewals on the other stores outside of Virginia?

A. Mr. Murphy, I think, did most of it. Mr. Kimbrell probably assisted him, but those two worked on it more than anyone else, I believe.

Mr. Gordon: This is dated April 25, 1929, from Mr. Buchanan.

Note: Filed and marked Exhibit R. F. #28, which is as follows:

April 25, 1929.

Dear Sir:

The enclosed letter from the attorneys for our bankers, Messrs. Chadbourne, Stanchfield & Levy, of 120 Broadway, New York City, explains itself.

There is no question but that the deal is closed; it is only the details that are now to be worked out; these details include the formation of a parent company, a stores company, and the different corporate structures to take over the various properties.

We have maintained an organization in New York for the past month, endeavoring to the very best of our ability to push to as rapid a conclusion as possible. We have found, and we frankly advise you that a transaction, involving as it does, such a large amount of money with the inclusion page 273 } of so many various properties, necessitates a tremendous amount of detail work, which is absolutely requisite to a final consummation.

In addition, we have been disappointed time after time by the accountants who were chosen by the bankers and whose report will not be in until Thursday, April 25th.

We know that that report carries out to the fullest extent the figures we have submitted. We say this because we have seen the final draft, which was prepared on yesterday, copies of which are going in the banker's hands tomorrow.

Neither the bankers nor ourselves are willing to consummate this transaction by the formation of this consolidation unless we know without question that every legal requirement has been complied with. This has taken a great deal more time than we ever anticipated, in view of the many properties we are taking over.

Personally, I hesitate to write to you again for the reason that I have advised you before of the difficulties we have encountered and you have so courteously acquiesced with my wishes. Mr. Lincoln and myself have been working both night and day with our staff; counsel for the bankers have been devoting all of their time; and the accountants have put on extra men in an endeavor to facilitate a final closing.

This we hoped would be May the first. We find page 274 } today that although everything but the details are settled, these legal details, including in many instances the necessary approval of the various state commissions to the issuance of stock, advertising, and so forth,

will take until May 20th. I put this date as the very last upon which we would ask a renewal.

I enclose a renewal of your option until that time with positive assurance on the part of all of us that we honestly *believe* matters will be concluded by that time. We cannot take over your property until the bankers are satisfied of the legality of our various transfers.

If you require it, we will pay you \$500 on account, for this extension. We hope that you will not demand this because our expenses have been very great, but we are willing to pay it if you prefer.

You understand that your options are the basis for our credit and that we are compelled to have an option in full force at all times.

During all of the negotiations attending this transaction you have been most courteous to all of us and I will appreciate if you will without fail wire me, at my expense, care of the Hotel President, on receipt of this letter, whether or not you will grant the extension.

I assure you that this is not asked for the purpose of determining whether we will exercise the option or  
page 275 } not. It is our intention to do so, but we cannot  
do so until all of these legal details are completed.

It is extremely important that you wire at my expense, immediately upon receipt of this letter, whether or not you will execute the enclosed extension.

I assure you that anything that you may do in this connection will be appreciated by both Mr. Lincoln and myself and the entire organization.

With kind regards, I am

Sincerely yours,

(signed) J. P. BUCHANAN.

JPB:DB

Encl.—Ext.

By Mr. Gordon:

Q. Did you grant an extension every time they asked it?

A. Every time they asked it.

Q. Did you make any charge for it?

A. No, sir.

Q. What did the option provide with regard to payment for an extension?

A. They agreed to pay \$1,000.00 for the extension.

Mr. Gordon: This letter is dated April 26, 1929, from Mr. Fleming to Mr. Buchanan.

Note: Filed and marked Exhibit R. F. #29, which is as follows:

April 26, 1929.

page 276 } Mr. J. P. Buchanan, Counsel,  
Lincoln Furniture Corporation,  
Hotel President,  
New York City.

Dear Mr. Buchanan:

Your communications of the 25th received and in your masterful efforts you have my deepest sympathy and greatest admiration.

I am inclosing herewith extension of Cameron Stove Company, Southern Factories and Stores Corporation, and W. A. Bell & Brother, just received since sending telegram.

Bledsoes option is in the mail and the Post-Master has personally promised that it would be delivered to me as soon as received at the Post-Office. I hope to inclose that herewith also.

On account of my records varying as to the dates of the Bell and Bledsoe options, I left them blank to be filled out by you.

You will need no extension on the Carolina Parlor Furniture Company because you will recall that the Southern Factories and Stores Corporation owns all of their Common Stock and their option takes care of it.

If I can be of further service, please do not hesitate to call on me.

With kindest regards, I am

page 277 } Yours very truly,

RIVES FLEMING, Pres.  
Cameron Stove Co.

Air Mail Special  
Delivery  
RF/T

Mr. Gordon: Here is a telegram dated April 26, 1929, from Buchanan to Mr. Fleming.



Note: Filed and marked Exhibit R. F. #30, which is as follows:

1929 APR 26

RIVES FLEMING

CAMERON STOVE CO RICHMOND VIR

SEE LATTER MAILED YESTERDAY *RE* EXTENSION STOP FINAL FIGURES NOW AVAILABLE STOP CONFERENCE BANKERS TODAY RESULTS IN FINAL CLOSING NEXT WEEK SOON AS FINAL CONTRACT PREPARED WILL BE NO FURTHER DELAY STOP ABSENCE FROM TOWN OF ONE OF BANKERS PREVENTS SIGNING UNTIL HIS RETURN NEXT WEEK STOP NOTICES WILL BE MAILED FOR MEETING TO CLOSE WITH YOU STOP EVERYTHING POSSIBLE HAS BEEN DONE TO EXPEDITE STOP ON THIS ACCOUNT VITALLY IMPORTANT AND ABSOLUTELY NECESSARY TO RETAIN OUR POSITION WITH BANKERS ACCOUNT THEIR POSITIVE REQUIREMENTS THAT YOU SEND US RENEWAL AS REQUESTED ON RECEIPT OF MY LETTER STOP PLEASE DO NOT DELAY ANSWERING BY WIRE WHEN YOU RECEIVE IT WHAT WILL BE DONE AS CANNOT INCLUDE WITH BANKERS OPTION WHICH WILL EXPIRE

J P BUCHANAN

page 278 { Mr. Gordon: Here is a confirmation of that telegram with a note on the bottom of its signed by J. P. B.: "Dear Mr. Fleming: It is unnecessary for me to comment further. What I want is the renewal until the 20th of May for everything including Bell and Bledsoc."

Note: Filed and marked Exhibit R. F. #31.

By Mr. Gordon:

Q. Up to that time had you heard of any question about any of these eleven options?

A. No, sir; there had been no question about them. You mean their acceptability?

Q. Yes.

A. There had been no question raised about it at all.

Mr. Gordon: Here is a telegram dated April 26, 1929, from Mr. Buchanan to Mr. Fleming:

Note: Filed and marked Exhibit R. F. #32, which is as follows:

1929 APR 26

RIVES FLEMING

CAMERON STOVE CO RICHMOND VIR

THANKS FOR WIRE BE SURE WIRE WHEN EXTENSIONS ASSURED

J P BUCHANAN

page 279 } Mr. Gordon: This is a telegram dated April 26, 1929, from Mr. Fleming to Mr. Buchanan.

Note: Filed and marked Exhibit R. F. #33, which is as follows:

Richmond, Va., April 26, 1929.

Mr. J. P. Buchanan,  
c/o Hotel President,  
New York, N. Y.

Will have Bell B'edsoe extensions tonight. Will wire when received.

RIVES FLEMING.

By a Juror:

Q. What was the duration of those options each time?

A. I think the first option ran for ninety days. It is right long ago.

By Mr. Gordon:

Q. Your first one was for 120 days, wasn't it?

A. 120 days and I think they then asked for 30 days extension. I won't be positive about that. I remember we granted every request, whatever they were, as to the extensions.

Mr. Gordon: This letter is dated May 2, 1929, from Mr. Buchanan to Mr. Fleming.

page 280 } Note: Filed and marked Exhibit R. F. #34, which is as follows:

May 2, 1929.

Rives Fleming, Esq.,  
Cameron Stove Company,  
Richmond, Virginia.

Dear Mr. Fleming:

I have received the extensions which you very kindly sent to me for which I thank you very much.

We have been engaged all of this week and all last week, working out the details of the merger, and I have never in my life seen as many demands as have been made upon us by the bankers.

I am writing to you entirely *confidentially*, not even for information to your closest associates, and I am sure that you will so regard it.

I am sorry to advise that the Jones chain, upon an audit, has shown no profits for the year 1928. This is a very serious matter, and while it doesn't affect the picture as a whole, it does affect the inclusion of these particular stores. It is this which has caused the delay. We are straining every point to have them included, but I cannot tell you whether we will be successful or not.

For some reason, unknown to me, the bankers are not enthusiastic about these stores and it is this situation with which we have now to contend.

As I have said, this is confidential, and I am passing it on to you for your individual information, only. It does not affect our general picture, and if we were able to take over one or two of this chain without the balance, it could possibly be done, but I took this up with Murphy when Kimbrell was present and it is our information that it will not be satisfactory unless the entire chain were also taken.

With kind personal regards, I am

Sincerely yours,

(signed) J. P. BUCHANAN.

JPB:DB

By Mr. Bazile:

Q. Mr. Fleming, the Jones chain consisted of Jones Brothers and Geo. W. Kennedy & Company of Jacksonville; M. K. Jones of Savannah, and Jones-Kennedy, did it not?

A. I think those were the names.

Q. And those are four of the eleven stores on which you are asking \$1,000.00 a piece in your declaration?

A. I am not sure about those names. Mr. Kimbrell over there handled that. I had nothing to do with the soliciting of that option. He can verify those names and find it on our list of names. I had nothing to do with the Jones options.

page 282 } By Mr. Gordon:

Q. When you made your original agreement with Mr. Lincoln in October, 1928, did you have anything in

the world to do under that agreement with his negotiations with his bankers?

A. No, sir.

Q. Had he approved these options which you got from the stores or not?

Mr. Bazile: We object to that as being leading.

Q. I ask you whether or not Mr. Lincoln or Mr. Wahab or Mr. Buchanan had approved those four stores in the Jones chain?

A. I had nothing to do with the Jones chain, but I was told they did approve them. I know they approved every one I had anything to do with.

By Mr. Bazile:

Q. Who told you they approved them?

A. I heard that on many occasions.

Q. Who told you that?

A. Do you want me to tell you?

Q. I want to know who told you as a basis for objecting to it.

A. Mr. Kimbrell told me.

Mr. Bazile: Now, if Your Honor please, I move to strike that out as being hearsay because what Mr. Kimbrell told Mr.

Fleming couldn't be admissible in evidence page 283 } against us.

The Court: Mr. Kimbrell wasn't your agent?

Mr. Bazile: No, sir; he was Mr. Fleming's agent.

By the Court:

Q. Who else was present?

A. The reason I referred to Mr. Kimbrell was because he solicited those stores.

Q. Wait a minute. Who was present when that happened—that statement was made to you by Mr. Kimbrell?

A. He told me on several occasions, but in Baltimore we all discussed it—

Q. That doesn't answer the question. Who was present?

By Mr. Gordon:

Q. Was Mr. Wahab present at the Baltimore conference?

Mr. Bazile: I object to that as being leading.

A. I will try to tell who was present in Baltimore. Mr. Murray—

Q. Who was Mr. Murray?

A. Our treasurer; Mr. Wahab; Mr. Kimbrell.

Q. Who was Mr. Wahab?

A. Mr. Wahab was the representative negotiating with Haskins & Sells for the Lincoln organization. He was the man we looked to on figures from their organization. He handled the collections and the audit for them. I don't recall others, but I know six or seven of us were there in a page 284 } meeting at Haskins & Sells' office in Baltimore which discussed these options.

The Court: Do you insist on your objection if Mr. Wahab was there?

Mr. Bazile: Yes, sir, because Mr. Wahab wasn't our agent for that purpose.

The Court: We would have to go into Mr. Wahab's connection with your company.

Mr. Gordon: Your Honor recalls I introduced the resolution of the Board of Directors appointing Mr. Wahab to do all acts necessary.

The Court: Was he embraced in that resolution?

Mr. Gordon: Yes, sir; Mr. Wahab was one of the parties appointed to do this work.

The Court: Objection overruled.

Mr. Bazile: Exception. May I ask one additional question?

The Court: Yes.

By Mr. Bazile:

Q. Mr. Fleming, when was that statement made in Baltimore? What was the date of it?

A. I can't recall the date, but I remember the circumstances attending on that meeting very well.

Q. You can't even recall the month?

A. It was in the spring of 1929. I don't recall the date, but the dates will show the days we were in Baltimore page 285 } in Haskins & Sells' office. We have a record of it in our records. I don't recall dates; my memory is very poor as to dates. It was only one time I was ever in Haskins & Sells office.

Mr. Gordon: Here is a telegram dated May 10, 1929, from Mr. Lincoln to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #35, which is as follows:

1929 MAY 10

RIVES FLEMING  
CAMERON STOVE COMPANY RICHMOND VIR

VERY IMPORTANT MEETING TO BE HELD HERE  
HOLTON RICHARDS AND COMPANY THIRTY BROAD  
STREET NEW YORK WEDNESDAY MAY FIFTEENTH  
IT IS NECESSARY THAT YOU KIMBRELL AND MUR-  
PHY BE PRESENT ACCOUNT IMPORTANT DEVEL-  
OPMENTS STOP REPRESENTATIVES OF THE OTHER  
STORES WILL BE HERE STOP WIRE ME WITHOUT  
FAIL CARE HOTEL PRESIDENT THAT YOU WILL BE  
HERE AT THAT TIME

C C LINCOLN JR

By Mr. Gordon:

Q. Did you and Mr. Murphy and Mr. Kimbrell go to New York about that time?

A. Yes, sir.

Q. Do you recall anything about the negotia-  
page 286 } tions there?

A. My train was wrecked on the way up there and I was late, but Mr. Kimbrell and Mr. Murphy were there to the meeting. I didn't get there until ten or eleven o'clock in the day; the train was hung up in Baltimore four or five hours.

Mr. Gordon: This letter is dated May 18, 1929, from Mr. Fleming to Mr. Buchanan.

Note: Filed and marked Exhibit R. F. #36, which is as follows:

May 18, 1929

Mr. J. P. Buchanan,  
Marion, Va.  
Hotel President, N. Y.

Dear Mr. Buchanan:

Your letter received and I have forwarded today the options for signatures and return.

I spoke to Mr. Lincoln about writing us a letter about his late interview with the Bankers. He preferred not writing it and I understood his position.

If agreeable with him I wish you would write me a letter asking us to extend our option and bring out in that letter the conditions that have delayed us, and as convincingly as possible that you can and will get it financed.

Confidentially. Our bank has become skeptical of our ability to finance it, so in writing us for a extension it would be a good opportunity to outline our good prospects page 287 } so we could show them the letter.

It may be necessary for us to change our bank account. In that event it would be very difficult to do so under existing conditions unless we did have such a letter.

Now, Mr. Buchanan, this is *VERY IMPORTANT*, so please write me this letter by first mail if possible.

We are inclosing the extension herewith.

Yours very truly,

RIVES FLEMING, Pres.  
Cameron Stove Co.

RF/T

By Mr. Gordon:

Q. Mr. Fleming, you stated on the stand this morning that you had explained to Mr. Lincoln in the initial conversation at the William Byrd Hotel in October, 1928, about the necessity of your company doing some refinancing?

A. Yes, sir.

Q. Did you or not intend this letter of May 18th as being in confirmation that situation?

Mr. Bazile: We object to that question. It is clearly leading and suggests the answer to the witness.

Mr. Gordon: I put it in the alternative. I covered it as I could under the rules applicable to the examination.

The Court: I don't know how you could approach that subject without making the question somewhat leading, unless avoiding all reference to it whatever and wandering around aimlessly. Under those circumstances the objection is overruled.

Mr. Bazile: We want to except. It seems to me that the proper thing for him to do would be to ask the witness why he wrote the letter. The witness ought to know why he wrote the letter without Mr. Gordon telling him why he wrote it.

The Court: It may be quite a number of reasons for writing a letter. We are just taking up a great deal of unnecessary time in requiring questions to be answered that are irrelevant or useless for the time-being. Unless there is some particular prejudice to your case, I think we had better indulge counsel a little in leading questions.

Mr. Gordon: If those gentlemen object to the form of the question I will withdraw the question and ask it in a different form.

Mr. Bazile: No; I think the mischief has been done now. You told him what you wanted him to say and asked him if that is what he meant.

By Mr. Gordon:

Q. Go ahead.

A. Why I wrote this letter?

page 289 } Q. Yes.

A. Well, we owed the bank pretty heavily and we felt the bank was due any information that we had on this big deal. I was tired of telling the bank what was going on because we promised one thing one month and something else the next month and I wanted the bank to hear first-hand what was going on and I asked Mr. Buchanan to write me a letter to take to them without having to tell them what was going on.

Q. Up to that time had you done anything towards refinancing along the lines that you had proposed before you had the initial conference with Mr. Lincoln?

A. We were contemplating a refinancing at the time we were approached on this merger and then we depended on the Virginia Table Company carrying this thing through and did nothing to improve our financial condition, which left us in a rather extended condition at that time—the time of that letter.

Q. Here is a letter without any date, in typewriting. Is this your handwriting, Mr. Fleming—"about May 19th"?

A. Yes, sir.

Q. Is that about the time you received that letter?

A. I think so. It was just a blank space and I filled in the time received.

page 290 } Note: Filed and marked Exhibit R. F. #37,  
which is as follows:

(In pencil) About May 1929.



My dear Fleming:

I enclose copies of various letters which please send to Kimbrell.

I also enclose original letter to Bledsoe and will ask you to take up with them.

Please also get from Bell a written extension to July 20 and mail me.

It is a pleasure not to have to explain matters to you, and your compliance with all my requests has made it a very real pleasure to deal with you.

Hurriedly,

JPB

By Mr. Gordon:

Q. Who was JPB?

A. J. P. Buchanan.

Q. This gentleman here?

A. Yes, sir.

Mr. Gordon: This letter is dated May 21, 1929, from Mr. Fleming to Mr. Buchanan.

Note: Filed and marked Exhibit R. F. #38, which is as follows:

page 291 }

May 21, 1992.

Mr. J. P. Buchanan,  
c/o Hotel President,  
New York, N. Y.

Dear Mr. Buchanan:

Mr. Bledsoe was to see me today and showed me a copy of his letter written to you.

He is with us 100%, but their letter was the Boards decision.

Do not send them the \$2,500.00, but let me know in time and Mr. Bledsoe and I can get the store all right. With no chain competition in Danville and with his store well located, I feel certain that we can develop it very quickly and profitably.

With kindest regards, I am

Yours very truly,

RIVES FLEMING, Pres.  
Cameron Stove Company.

By Mr. Gordon:

Q. Now what did that \$2,500.00 refer to?

A. That was the demand, I think, from Bledsoe to extend the option. He came into my office mad with his attorney and said he had written this letter and I persuaded him to withdraw this letter and extend his option without any cost to the company.

Q. So they didn't have to pay that \$2,500.00

A. They didn't pay anything for it.

page 292 } Q. Was that a clear saving to them of that amount if they wanted that option?

A. It was a clear saving because they didn't pay it.

Mr. Bazile: That doesn't follow. We might not have paid him at all.

Mr. Gordon: Here is a telegram dated June 4, 1929, from Mr. Buchanan to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #39, which is as follows:

1929 JUN 4

RIVES FLEMING

CAMRON STONE CO RICHMOND VIR

RE MASON ATLANTA BEFORE ACTING WAIT MY LETTER

J P BUCHANAN

Mr. Gordon: This letter is dated June 4, 1929, from Mr. Buchanan to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #40, which is as follows:

June 4, 1929

Rives Fleming, Esq.,  
Richmond, Va.

Dear Mr. Fleming:

On Jan. 4, 1929, Mr. Mason, of Atlanta, granted  
page 293 } us an option to purchase his business, to be exercised within 120 days.

This option expired May 4th. A clause was included that if we should pay Mr. Mason \$500 before the option expired, he agreed and promised to renew for an additional 60 days, on the payment of \$500.

As provided, I notified Mr. Mason ten days before the option expired that we wished to renew under the terms of the option, but I did not have the option before me, and I was

of the impression it provided for only 30 days instead of 60.

I therefore talked to Mr. Mason over the phone—asked him if he would renew—he said he would, under the terms of the option, and I sent him the \$500. I also signed a renewal agreement with him for 30 days instead of sixty days as was provided by the option.

This was an error on my part, and in derogation of our plain rights under the option, and of course a mistake.

I also saw Mr. Mason in New York, and also talked to him in Atlanta over the phone. From his statements to me, I was certain that he intended to go along with us and that he understood the enormous expense we had shouldered and the efforts we had made. I have never talked with the owner of

a store in whom I had greater confidence, and in  
page 294 } fact, from what he said to me, I told Lincoln and

Wahab that I was sure Mr. Mason would not take advantage of the unfortunate circumstances that we had to contend with to hold us up. I believed that if there was one man in the South upon whom we could rely, it was Mason of Atlanta. He hesitated about accepting the \$500, but finally said that it would be better to send it on, and that matters could be arranged later.

I explained the circumstances to him of Mr. Sherwood's death—and the consequences to us—and the other matters with which you are familiar, and which were fully discussed at the meeting we attended here, and he gave me every reason to believe that he understood, and would permit us to exercise his option along with the others.

From my impression of the man—for this reason—I did not urge a renewal. My time was fully taken up, as you know, and I wrote him one or two letters without reply, telling him the situation, until like a bolt out of the blue came his wire today that he would not renew.

Please understand that relying on him, I did not insist on the strict terms of his option, which were that the \$500 payment automatically renewed until July 4th. At first I overlooked it. When I did notice it, I paid no particular attention to it, for I had confidence in him, and believed what he said—that there would be no trouble.

We have completed our picture. We have pre-  
page 295 } sented it finally to our Bankers. So far as it is possible to be certain, we are certain that our deal is now completed, awaiting only the approval of their counsel, and I am working night and day with them. Our position is better than it was under the former picture and I have every

reason to state to you that we have succeeded in our financial plan.

This plan includes Mason's store. The accountants have made their certificate including him. The price of our stock is based on the picture including him. To have that store now taken out would mean an entire re-arrangement and another delay. I am sure that you understand this—price is based on earnings, and the proportion of earnings to assets. His assets, and his earnings are included, and upon the consequent figures, as finally certified, our deal has been approved. Therefore to eliminate him now would disarrange the entire plan—force us to get a new certificate from the accountants—necessitate a new set up by the Bankers, and renew negotiations that have been completed.

We were very happy today until I received this wire. He knows how much money we have spent and what efforts we have put forth to consummate this transaction, for he told me so himself, and I cannot believe that he would deliberately jeopardize our standing. We have attempted to comply with his every request, and now all that we ask is that he stand by his original agreement.

page 296 } He granted an option for 120 days. He agreed that if we would pay him \$500 he would extend 60 days longer. By a pure error I made this 30 days. Now all that we ask is that he stand by his agreement contained in his option, keep the \$500 and give us until July 4th to exercise it.

I do not feel that this is asking too much, for it is all that which he agreed to, and it was only my mistake that enabled him to take advantage of the 30 day provision—and that was an error. I cannot believe Mr. Mason is that kind of a man.

I feel very strongly about this, for the reason that our entire future is wrapped up in it. I have sacrificed a great deal to put this through. I think it is now done. And I cannot contemplate the fact that a man of Mr. Mason's calibre would take advantage of us in this way—although a mistake in regard to the terms of the option was made by me.

I am leaving to you the matter of going to Atlanta. You see Mr. Kimbrell, and do what you both think best. I know you understand our situation, and would be very glad if you can go, for it is important and take him with you (Kimbrell) at our expense. But for this one thing, I am certain I could advise you of the consummation of the transaction.

With kind regards,

Sincerely

(signed) J. P. BUCHANAN.

page 297 } By Mr. Gordon:

Q. Was Mason one of the people you had gotten for them?

A. Yes, sir.

Mr. Gordon: Then there is appended to that a memorandum signed JPB: "Dear Fleming: Pay him \$1,000 if necessary to be credited on purchase price." and then there is a memorandum here: "I think both you and Kimbrell should go as we are ready to close. JPB."

Q. Now did you go to Atlanta?

A. Yes, sir. In this case, like all others, we suspended our own business, closed my desk immediately, sent three or four telegrams to get in touch with Mr. Kimbrell and got him there the next morning and worked on Mr. Mason until eleven-thirty that night and all day. He had just given away on a recorded contract one-fourth of his business to his brother. We worked on him and finally persuaded him to go in with us and extend his option, but it was an awful fight and took two days for me and I think Mr. Kimbrell stayed three or four days longer; had to call on Mr. Murphy to assist him.

Q. Did you have to pay him this \$1,000.00?

A. Mr. Kimbrell, I think, handled that. I had nothing to do with that.

page 298 } By Mr. Bazile:

Q. What was the date of that visit to Atlanta?

A. As I said, my memory is bad on dates, but the record will show. I know about what time it was. It was the day after that letter.

Q. The letter is dated June 4th.

A. I left the night of June 4th or the morning of June 5th, one of those two days; just as soon as I could catch a train to Atlanta.

Q. That was 1929?

A. Yes, sir.

Mr. Gordon: The next letter is dated June 5, 1929, from Mr. Buchanan to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #41, which is as follows:

June 5, 1929.

Rives Fleming, Esq.,  
Cameron Stove Company,  
Richmond, Va.

Dear Mr. Fleming:

Counsel for Bankers are examining the title papers to the various properties and make the following requirements:

1. That you certify that the real estate named in the title guarantee policy is all the real estate owned by Cameron Stove Company.

page 299 } 2. Have your counsel execute the enclosed certificate.

Please let me have these as soon as possible, as any delay will hold us up.

Sincerely,

JPB

J. P. BUCHANAN.

Mr. Gordon: This letter is dated June 10, 1929, from Mr. Fleming to Mr. Buchanan.

Note: Filed and marked Exhibit R. F. #42, which is as follows:

June 10, 1929.

Mr. James P. Buchanan,  
Marion, Va.

Dear Mr. Buchanan:

We received your letter enclosing Certificate of Title, which will be executed and returned to you promptly.

Realizing the importance of getting Mason's extension both Mr. Kimbrell and I went to Atlanta. We found there at once what seemed to be a hopeless condition, namely, that Mr. Carlos Mason, the owner of the business, had recently given to his brother, and legally recorded it, one-fourth interest in the business. Mr. Carlos Mason was willing to sell, but Mr.

Hugh Mason his brother would be sacrificing  
page 300 } about \$25,000.00 or \$30,000.00 to accept a salary  
and no interest in the business.

After conferring with them nearly all day Thursday painting the independent store's prospect as blue as possible and trying to prove to him his greater possibilities in a consolidated operation, Mr. Hugh Mason began to take interest. He promised to think over the matter until morning and then advised us they would grant the extension on a condition that he be given an employment contract at \$600.00 a

month and 5% of the net profits, which Mr. Kimbrell agreed to give him.

Mr. Carlos Mason also insisted that the corporation assuming his lease should have some responsibility, which he, of course, has a right to expect. This we agreed to.

We immediately phoned Mr. Murphy, who agreed to come to Atlanta Saturday, but I have just received a letter from Mr. Kimbrell stating that Mr. Mason's attorney would not be available until Monday, the 10th.

While the salary concession may seem a little liberal on our part, I think it is a very fortunate solution of a bad situation that might have cost us great delay and possible failure.

With kindest regards, we are

Yours very truly,

CAMERON STOVE CO.

RIVES FLEMING, Pres.

Note: Court adjourned to July 20th, 1932, at ten o'clock A. M.

page 301 }

July 20th, 1932.

The Court convened pursuant to adjournment.

RIVES FLEMING,  
resuming the witness stand, testified as follows:

DIRECT EXAMINATION (continued).

By Mr. Gordon:

Q. Mr. Fleming, you stated yesterday that Haskins & Sells were the accountants for the defendant company; that is true?

A. Yes, sir.

Mr. Gordon: Have you gentlemen any objection to introducing that audit?

Mr. Buchanan: What is this the audit of?

Mr. Gordon: Of Southern Factories & Stores Corporation of April 30th.

Mr. Bazile: What is the relevancy of it?

Mr. Gordon: To show there was set up on the books of the Southern Factories & Stores Corporation prior to that these charges.

Mr. Buchanan: That is all right.

Note: Audit as of April 30, 1929, filed and marked Exhibit R. F. #43.

page 302 } Mr. Gordon: This was an audit made for the Southern Factories & Stores Corporation by Haskins & Sells, the auditors of the defendant company.

Mr. Buchanan: Not at that time. They were not auditors for the defendant company at that time.

Mr. Gordon: I understood they were the auditors. This is April 30, 1929. Among the assets is shown: "Other—\$18,222.55. The other accounts receivable comprise the following: Virginia Table Company, Inc., Marion, Virginia,—\$17,509.95" and the legend under that is: "The amount shown as due from the Virginia Table Company, Inc., represents charges of \$11,000.00 for services rendered and expenses incurred by officers and employees in securing, for the former company, options to purchase the assets of various retail furniture stores, plus charges aggregating \$6,509.95 for services rendered and expenses incurred in inventorying and valuing certain assets of retail furniture stores. The basis or amount of the liability of the Virginia Table Company, Inc., to the Southern Factories & Stores Corporation covering the services and expenses named, had not been  
page 303 } definitely determined at April 30, 1929. The charges recorded are based, we are informed, on a verbal agreement between the officers of the Virginia Table Company, Inc., and the officers of the Southern Factories & Stores Corporation."

By Mr. Gordon:

Q. Who was Vance Huggins?

A. He was the auditor for Haskins & Sells that audited our books.

Q. I show you now a copy of a letter from Mr. Buchanan to Haskins & Sells of June 12th, 1929, to which is appended a memorandum to you: "Read and pass on to Huggins. JPB." and ask you whether or not you received that?

A. Yes.

Note: Filed and marked Exhibit R. F. #44, which is as follows:

Memo: Mr. Fleming:

Read and pass on to Huggins.

JPB.



New York, N. Y., June 12, 1929.

Messrs. Haskins & Sells,  
c/o Southern Factories & Stores Corp.,  
Richmond, Virginia.

Attention: Vance Huggins,  
Accountant in charge.

page 304 } Gentlemen:

Replying to your letter of the 10th inst., I have just today returned from the South, and have not seen Mr. Lincoln in regard to the compensation for options secured by Mr. Kimbrell and Mr. Fleming.

I note that Mr. Fleming advise that Mr. Lincoln verbally agreed to pay for all options "that Messrs. Fleming and Kimbrell approved for acceptance". If you have a list of such options, I would be glad if you will send it to me, so we may get this matter straightened out. I have no idea there will be any controversy whatsoever, and do not mean to so intimate, but I have consulted so far neither Mr. Lincoln nor Messrs. Kimbrell and Fleming in regard thereto, and am totally ignorant of their agreement. In view of the above statement, however, it seems to me pertinent that such options as were "approved for acceptance" should be indicated, and in this connection I presume that such approval contemplates the financial condition and earnings record of such stores as proved unacceptable, based upon the audit made by your company. I believe that all consideration of options was based upon such record, as was the case with all stores under option, wherever located. I merely suggest this, as I cannot see how Messrs. Fleming & Kimbrell could pass upon the acceptability of a store until after the audit was completed; their prior knowledge being based upon the then information before them, which was, of course, subject to such corrections as an accurate audit might develop.

The confidence that I myself, as well as our entire organization, has in both these gentlemen, which is the result of our experience with and knowledge of them, negatives in my mind the possibility of disagreement.

Yours truly,

J. P. BUCHANAN.

Mr. Gordon: Now in connection with that, here is a copy

of a letter which was sent by Mr. Huggins in response to that request, dated June 13, 1929.

Note: Filed and marked Exhibit R. F. #45, which is as follows:

June 13, 1929.

Hon. J. P. Buchanan,  
Hotel President,  
New York, N. Y.

Dear Sir:

Replying to your letter of the 12th, will advise that the options secured and turned over to the Virginia Table Company, Inc., by Messrs. Fleming and Kimbrell are page 305 } as follows:

Jones Brothers, Jacksonville, Fla.  
Geo. W. Kennedy Co., Jacksonville, Fla.  
M. K. Jones Company, Savannah, Ga.  
Jones-Kennedy Co., Atlanta, Ga.  
Cochran Furniture Co., Atlanta, Ga.  
Mason Bros., Atlanta, Ga.  
Woods-Peavy Co., Macon, Ga.  
Ven Metre, Columbia, S. C.  
Sam P. Burton & Son, Asheville, N. C.  
Bledsoe Furn. Co., Danville, Va.  
W. A. Bell & Bro., Fredericksburg, Va.

Mr. Fleming advises me that the agreement of \$1,000.00 per option was not in payment of the option but to reimburse the Southern Factories & Stores Corp. for traveling and other expenses and compensation of its officers and other employes. The expenses incurred and compensation of the employes of the corporation in securing the above options approximated \$1,000.00 each; some of the options costing more and some less than this amount.

The above options were approved by Messrs. Fleming and Kimbrell as being desirable as far as they were able to ascertain without audit. Audits were made only of the stores on which options had been obtained.

Confirmation of this agreement is requested by us only that we may present a balance sheet of this corporation without qualification of this item, and Mr. Fleming assures me he only desires to do the fair and proper thing. Please reply to me at Charlotte, N. C., as I am leaving here today.

Very truly yours,

VANCE HUGGINS,  
Accountant in charge.

page 306 } Mr. Gordon: This is a letter dated August 26,  
1929, from Mr. Buchanan to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #46, which is as follows:

Aug. 26, 1929.

Mr. Rives Fleming,  
Cameron Stove Co.,  
Richmond, Va.

Dear Mr. Fleming:

Mr. Dykes, manager for Haskins & Sells, in the absence of Mr. Lincoln has conferred with me with regard to the bill submitted by Southern Factories & Stores for options and has shown me the account.

I am not prepared at all to pass upon this claim in the absence of Mr. Lincoln but as I advised you heretofore I feel sure we will have no trouble adjusting it when we can have an amicable understanding. I have told him however in order to make the picture as attractive as possible in his report, which of course binds no one, to limit the payments for options to \$3,000 for Bell, Mason and Peavy.

I thought I would write you this explanation confidential so that you would understand the attitude of Messrs. Haskins & Sells in cutting down the figures from \$11,000. to \$3,000.

I have approved all the expense items except page 307 } the salary of Mr. Kimbrell. I do not question this, but had no personal knowledge of the arrangement. I believe however that the salary item will be included.

With kind regards,

Very truly yours,

JPB.KS

(signed) J. P. BUCHANAN.

Cy

S

Mr. Murphy

By Mr. Gordon:

Q. Now, as a matter of fact, when Haskins & Sells set up a subsequent audit do you know whether they did reduce the amount at Mr. Buchanan's suggestion from \$11,000 down to \$3,000?

A. I don't know, sir.

Mr. Gordon: This is a letter dated July 12, 1929, from Mr. Fleming to Mr. Wahab.

Note: Filed and marked Exhibit R. F. #47, which is as follows:

July 12, 1929.

Mr. R. S. Wahab,  
c/o Retail Stores Service Inc.,  
Keyser Building,  
Baltimore, Md.

Dear Mr. Wahab:

I was rather shocked at your message today even though you said that the report emanated from Atlanta.  
page 308 } If you can reach Mr. Lincoln before he leaves Chicago, we would like very much for him to ascertain the responsible origin of such a report.

The worst that anyone could say about us is that we are not taking all discounts now and in a few instances, we have closed a portion of the accounts with notes all of which have been and shall be paid as agreed.

On several occasions we have told you that in the beginning we were just temporarily financed and in October when Mr. Lincoln approached us we had made arrangements to sell \$600,000 Preferred Stock and buy four more stores.

On the assurance that definite commitments had been made in New York and believing like you, and all the other interested parties, that every week for the last six months that the deal would soon be consummated, we postponed permanent financing.

On Tuesday the 9th we had our Annual Stockholder's Meeting in which our Stockholders subscribed about \$40,000 of our Common Stock at par and authorized the sale, on a definite written commitment from a local broker, to sell \$200,000 of our Preferred Stock. It is understood with our Broker that we expect to merge with the Virginia Table Company and its associates and that the time that he may offer this stock for sale and the conditions under which it is sold will depend on your success in New York and the  
page 309 } certainty with which it can be done within reasonable time.

While Mr. Kimbrell and his assistants were taking inventories, getting options, etc., our managers without his restraint bought more than they should have bought, so for

the last two months we have been reducing liabilities rather than trying to show profits.

I would like very much to have a talk with you and Mr. Lincoln Friday before the meeting if possible so we can explain our position more fully.

With kindest regards and best wishes, I am

Sincerely yours,

RIVES FLEMING, Pres.  
Southern Factories & Stores Corp.

Copy to

C. C. Lincoln

J. B. Murphy

By Mr. Gordon:

Q. Now when you in this letter said to him: "I would like very much to have a talk with you and Mr. Lincoln Friday before the meeting if possible" to what meeting were you referring? This letter was written on July 12th.

A. I don't recall what meeting was in contemplation then, Mr. Gordon.

Q. You met in Marion on the 19th, a week after this?

A. That was the meeting, evidently, that I referred to.

Q. Now, as a matter of fact, did you have any talk or conference with Mr. Lincoln at that meeting or prior  
page 310 } to that meeting and explain to him the situation?

A. Yes, sir; we told him our financial position was rather extended and we must do something at once, that we had bought heavily on their assurance they would take over the matter and all obligations would be paid. We had increased our liabilities very much more than we would have done if we hadn't been assured we were going into this larger merger.

Q. Now were you informed by Mr. Wahab or Mr. Buchanan or Mr. Lincoln or any of his associates in January or the spring of 1929 as to what time you were to be taken over?

A. We were told almost from the beginning it would have to take effect as of January 31st.

Q. 1929?

A. Yes. They had to set a date. In fact, we took three inventories in order to have them ready; we took an inventory December 31st; that is, Cameron Stove Company, and took another one to bring it up to the 31st and took another one on the 31st, and we were advised to keep our cash separate after that date and we were supposed to be operating under their direction after January 31st, 1929.

Q. When you discussed this matter with Mr. Lincoln at Marion in July, 1929, did he say anything to you with regard to this proposition about floating \$200,000 of pre-page 311 } ferred stock?

A. No, I don't think anything was discussed about that.

Q. You don't recall particularly about that?

A. No, I don't recall that at all.

Mr. Gordon: Here is a letter dated July 13, 1929, from Mr. Buchanan to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #48, which is as follows:

July 13, 1929.

Rives Fleming, Esq.,  
Cameron Stove Co.,  
Richmond, Va.

Dear Mr. Fleming:

As I wired you from New York arrangements are being made to send auditors to your store to check up and make out settlement sheets.

We have practically completed our negotiations and I am glad to advise that to all intents and purposes in our judgment the deal has been closed.

Mr. Lincoln was compelled to go to Chicago on account of the market but will be back in New York this week.

It is his urgent request that you be in Marion on Friday morning July 19th for a final meeting. The result of the former meeting in New York when all the stores and factories interested were present was so favorable page 312 } that we all thought it extremely advisable to have this conference at Marion. We also thought that you would be interested in seeing the factory here and at Bristol and having an opportunity to definitely understand the organization which is being perfected.

The expenses of your trip will of course be borne by us.

If you have not already advised me, please wire me at Marion that you will be present so that the necessary reservation and arrangements can be made.

We are looking forward very much to seeing you at this time and we feel sure that the meeting will be both instructive and profitable.

You will of course notify Mr. Kimbrell and you can use your own judgment about bringing Mr. Murphy along.

As you know the best way for you to come to Marion is by the 9:45 P. M. train from the Coast Line Station changing into the Marion and Bristol sleeper at Petersburg, arriving here the next morning at 9:00.

Very truly yours,

(signed) J. P. BUCHANAN.

By Mr. Gordon:

Q. Were those expenses ever paid?

A. No, sir.

page 313 } Q. Have the defendants here ever paid a single cent on any of the obligations about which you have been testifying?

A. Not one dollar.

Mr. Gordon: Here is a letter dated July 23, 1929, from Mr. Buchanan to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #49, which is as follows:

July 23, 1929.

Rives Fleming, Esq.,  
Cameron Stove Co.,  
Richmond, Va.

Dear Mr. Fleming:

I overlooked in the rush at Marion talking with you in regard to Bell Brothers at Fredericksburg. I had received a letter from them that they were entrusting their affairs to your good judgment, as I knew they would.

It is of course necessary that we have in hand an executed extension from them and I am enclosing you such an agreement which I trust you will have signed at the earliest possible moment and return to me.

I have not heard from Mr. Lincoln since he left but expect to have some news from him tomorrow.

With kind personal regards,

Very truly yours,

(signed) J. P. BUCHANAN.

page 314 } P. S. I am signing as attorney in fact as both  
of the Lincolns are absent, under my authority  
granted me by the Board.

J. P. B.

Mr. Gordon: I find I have gotten a little ahead of my  
schedule. Here is a telegram dated June 13, 1929, from Mr.  
Buchanan to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #50, which is as fol-  
lows:

1929 JUN 13

RIVES FLEMING

CAMERON STOVE CO RICHMOND VIR

HAVE COUNSEL PREPARE EXECUTE AND MAIL  
NEW OPTION ON TERMS OLD COVERING STORES  
ALONE BANKERS REQUESTING

J P BUCHANAN

Mr. Gordon: This is a letter dated June 27, 1929, from Mr.  
Fleming to Mr. Buchanan.

Note: Filed and marked Exhibit R. F. #51, which is as  
follows:

June 27, 1929.

c/o Hotel President,  
New York, N. Y.

page 315 } Dear Mr. Buchanan:

I have just received the following telegram from  
Atlanta, Ga.

"TIME IS DRAWING NEAR WHEN YOU EXERCISE  
OPTION. KIND REGARDS. (SIGNED) MASON BROTHERS."

Suppose I should answer this by wire, but with no definite  
information, I am respectfully referring it to you.

Mr. Mason was most emphatic in his statement that no  
renewal of option would be given and it would be useless for  
us to ask it. This position, I think, he will maintain.



Under the circumstances I think it would be best for you or Mr. Lincoln to communicate with him direct, and you might advise me immediately so I can answer his wire.

Mr. Cameron left for New York a few days ago on other business, and I gave him your address and that of Mr. Lincoln. Hope he had the pleasure of seeing you gentlemen.

As soon as you get any definite information—good or bad—please let us hear from you.

With kind regards, I am

Yours very truly,

RIVES FLEMING, Pres.  
Cameron Stove Company.

Inclosed copy of letter to Mason.

Mr. Gordon: This is a telegram dated July 11, 1929, from Mr. Buchanan to Cameron Stove Co.

page 316 } Note: Filed and marked Exhibit R. F. #52,  
which is as follows:

1929 JUL 11

CAMERON STOVE CO  
ATT FLEMING RICHMOND VIR

AT EARLIEST POSSIBLE DATE AUDITORS WILL  
ARRIVE YOUR STORE TO MAKE SETTLEMENT  
SHEETS BRINGING INVENTORY ETCETERA UP TO  
DATE STOP ALL EXECUTIVES OF STORES AND FAC-  
TORIES REQUESTED MEET OFFICERS OF CORPORA-  
TION MARION VIRGINIA FRIDAY MORNING JULY  
NINETEENTH WRITE ME MARION YOU WILL COME  
FULL LETTER FOLLOWS

J P BUCHANAN.

Mr. Gordon: Then a letter dated July 13, 1929, from Mr. Buchanan to Bell Brothers Furniture Co.

Note: Filed and marked Exhibit R. F. #53, which is as follows:

July 13, 1929

Bell Brothers Furniture Co.,  
Fredericksburg, Va.

Gentlemen:

We have arranged to have a conference of all the owners of all the stores and factories at Marion to devise ways and means for a final settlement, and would be very  
page 317 } glad indeed to have you gentlemen present at this time and believe that your visit would be both pleasant and instructive.

We have written Mr Fleming and send him a copy of this letter and if you decide to come to Marion for this final conference it will be very gratifying to us.

Very truly yours,

Cy  
Mr. Fleming

J. P. BUCHANAN.

Mr. Bazile: If Your Honor please, with reference to the next letter which Mr. Gordon wishes to read, it is a letter written by Mr. Buchanan to the Virginia Table Company's attorney at that time, Mr. James B. Murphy, and we object to the reading of that letter for that reason.

Mr. Gordon: Mr. Murphy at that time was in the regularly retained employment of the Southern Factories & Stores Corporation and these gentlemen knew it and it was no confidential communication at all; it was with regard to this whole set-up. It wasn't business particularly pertaining to the Virginia-Lincoln Company, but to all the whole proposition.

The Court: Is there any question about Mr. Murphy representing the other party?

Mr. Buchanan: Not at all.

page 318 } Mr. Bazile: But he was employed to represent us in this particular matter.

Mr. Gordon: You merely paid him for some of his expenses.

Mr. Bazile: He admits we paid him \$3,000.00.

Mr. Gordon: We paid him a whole bunch of money, too, for doing the very work for which you refuse to pay.

The Court: If he was the lawyer for both parties, the objection is overruled.

Mr. Bazile: Exception.

Mr. Gordon: This letter is dated August 1, 1929, from Mr. Buchanan to Mr. Murphy.

Note: Filed and marked Exhibit R. F. #54, which is as follows:

August 1st, 1929

Mr. James B. Murphy, Atty.  
Palmetto Bldg.,  
Columbia, S. C.

My dear Murphy:

I am sure you will be glad to know that we have completed the draft of the final contract, and it should be executed tomorrow.

As soon as it is signed, I will wire you.

With kind regards,

Sincerely yours,

JPB

page 319 } Mr. Buchanan: What contract does that refer to?

Mr. Gordon: I suppose you will introduce evidence to show.

By Mr. Gordon:

Q. Does that refer to the contract for this merger?

A. I don't know. Mr. Murphy can tell you.

Q. Mr. Fleming, do you know how many different bankers and how many different places the Virginia Table Company was dealing with regard to this merger?

A. I don't know that I could tell you all. I probably know a few of them.

Q. State what they were.

A. I think the first were Hayden & Stone and Holton, Richards & Company entered on it and probably Rollins & Company. I think then they went to Schluter & Company. I am not sure whether any other in the meantime or not before they went to the Foreman National Bank in Chicago and that was the most promising and I think the best arrangement they had so far as financing was concerned. I might say we weren't in on any of the conference with the banks.

Q. You stated yesterday you had nothing to do with the banking arrangements.

A. No, sir.

Mr. Bazile: If Your Honor please, we are going to object to this next letter for the reason it was written to page 320 } the Cameron Stove Company, dated August 12, 1929, and at that time the Virginia Table Company had no contract with the Cameron Stove Company and the Cameron Stove Company is not a party to this litigation here.

Mr. Gordon: It refers to the general set-up.

The Court: Is it your contention, Mr. Bazile, this refers to matters foreign to this controversy?

Mr. Bazile: No, sir, that isn't our contention at all. It is our contention it was written to somebody who wasn't a party to this controversy.

The Court: But by the defendant?

Mr. Gordon: Yes.

The Court: Objection overruled.

Mr. Bazile: Exception.

Mr. Gordon: This letter is dated August 12, 1929, from Mr. Lincoln to Cameron Stove Company.

Note: Filed and marked Exhibit R. F. #55, which is as follows:

August 12, 1929

Cameron Stove Company,  
Richmond, Virginia.

Dear Mr. Fleming:

I feel sure you have been advised through Mr. page 321 } Wahab and possibly through Mr. Buchanan that our bankers contract was signed in Chicago last week. I am very happy to be able to say to you that I really feel this is the best proposition we have ever discussed with bankers, and although we have all been inconvenienced by the delay, I believe this will work to the future benefit of our company.

The auditors and the inventory crews have no doubt been in your store already and if not you may expect them in a very few days. It seems that it is going to take about four weeks to complete this work and get the auditors reports in the hands of the bankers. In the meantime, there does not

seem to be much for me to do and I am planning to take advantage of this time to steal away for a little rest. Mr. Wahab has all of his plans made to expedite this work as much as possible and I will be back on the job just as soon as his inventory reports and the auditors reports are completed.

Mrs. Lincoln and I are planning to sail for a couple of weeks in Europe on Thursday night of this week. My time is so short that we will not have an opportunity to spend much time over there but at least we feel that the trip over and back will be well worth while. While I am away I can assure you most heartily that my thoughts will certainly be with you and with our future organization. I have never been more enthusiastic over prospects for our company and

I think we can all look forward to a great organization and one which will soon attain a premier position in the furniture industry.

I sincerely hope that this letter reaches you at a time when business is good, and with best wishes I am

Very sincerely yours,

(signed) C. C. LINCOLN, JR.

By Mr. Gordon:

Q. Did Cameron Stove Company itself own any stores?

A. No, sir.

Q. Then this had reference entirely to the Southern Factories stores?

A. Yes.

Mr. Bazile: We are going to object to this telegram of August 26, 1929, on the ground it is merely a self-serving declaration on the part of Mr. Fleming.

Mr. Gordon: I have already read the reply to it. So I think it ought to come in. I would have put that in ahead of the reply, but it was overlooked.

The Court: I don't think this comes within that rule of evidence, Mr. Bazile. You may show any reply you made to this. This is a statement direct to an officer  
page 323 } of the defendant corporation.

Mr. Bazile: We except.

Mr. Gordon: This is a telegram dated Aug. 26, 1929, from Mr. Fleming to Mr. Buchanan.

Note: Filed and marked Exhibit R. F. #56, which is as follows:

Richmond, Va., Aug. 26, 1929.

Mr. John P. Buchanan,  
Marion, Va.

Auditors report your allowing only for three options (Stop) Our distinct agreement with Mr. Lincoln was he would pay one thousand each for all options secured and approved by Kimbrell and me. (Stop) After payment of eleven thousand we are heavy losers. (Stop) Upon Lincolns request we worked Greensboro and other cities at considerable expense and loss of time, without any remuneration (Stop) Extensions secured and fees saved alone exceed the three thousand dollars (Stop) We secured options on stores of certain character and tentative earnings as outlined to us and that they were finally rejected is not our fault and should not be our loss. (Stop) Knowing you to be absolutely fair, we shall depend on your promptly correcting with auditors (Stop) Auditors here awaiting reply. (Stop) Kind regards.

RIVES FLEMING.

page 324 } By Mr. Gordon:

Q. Did you send that telegram?

A. Yes.

Q. Are the statements contained in that telegram true?

A. Absolutely.

Mr. Bazile: We object to that question as being leading and move to strike it out.

The Court: Objection overruled.

Mr. Bazile: Exception.

Mr. Buchanan: We object to the telegram also on the ground it is not the original.

Mr. Gordon: Then we ask you to produce the original.

Mr. Buchanan: We haven't it.

Mr. Gordon: Do you deny you received it?

Mr. Buchanan: I don't know whether we received it or not.

By Mr. Gordon:

Q. Did you send that telegram?

A. That is an actual copy of a telegram sent.

The Court: Objection overruled.

Mr. Buchanan: Exception.

Mr. Bazile: Now we object to this next telegram because we don't know what it relates to and it has a memorandum on it that is obviously inadmissible.

page 325 } Mr. Gordon: We can do away with that reply.

Q. I will ask you to look at this and see whether you received this telegram from Mr. Wahab—the telegram of which this is a copy?

A. Yes.

Q. Did you make a reply to that telegram?

Mr. Buchanan: We make the same objection to that.

The Court: What is the ground of the objection?

Mr. Buchanan: It is a copy of a telegram purporting to be received by Rives Fleming. It is on the blank, but it is in typewriting.

By Mr. Gordon:

Q. Explain how you got it.

The Court: I understand it is a telegram from Mr. Wahab to Mr. Fleming?

Mr. Buchanan: Supposed to be, but it is in typewriting and it has none of the symbols usually on telegrams. Anybody could just typewrite that on any blank.

By the Court:

Q. Can you explain how you got that?

A. We get most of our telegrams over the telephone and if it is immediately answered we answer then and make a copy of it. It is usually verified in the mail. The

page 326 } chances are that might have been in our mail.

By Mr. Bazile:

Q. You made that copy?

A. I had it made in the office by somebody who writes on a typewriter and here is my reply at the bottom of it.

By the Court:

Q. Do you know whether that is a true copy of a telegram received by you?

A. I know this telegram was taken down by someone in our office as written here and I know that my reply was sent out as indicated on the bottom of it.

By Mr. Gordon:

Q. Is this inscription at the bottom in your handwriting?

A. Yes. I just turned it over to one of the girls in the office to wire it off. Sometimes I would do it myself.

The Court: Objection overruled.

Mr. Bazile: Exception.

Mr. Gordon: This telegram is dated Sept. 7, 1929, from Mr. Wahab to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #57, which is as follows:

Baltimore, Md.,  
Sept. 7, 1929.

Rives Fleming.

Please have Mr. Kimbrell meet Sanderson Porter man at Raleigh.

page 327 }

R. S. WAHAB.

(Written in ink on bottom.)

Wahab wants you personally meet Campbell Raleigh tomorrow Sunday Important.

RIVES FLEMING.

Mr. Buchanan: Does the Court allow the answer in also?

The Court: I haven't passed on that.

Mr. Buchanan: I object to that on the ground it is a memorandum on the bottom of a copy of a telegram that is supposed to have been received by Mr. Fleming and no one knows whether it was sent or not sent.

Mr. Gordon: Mr. Fleming said he made a reply in the form in which that is stated there.

The Witness: I don't know how long the Western Union keep their records, but that could be verified if they keep their records that long.

The Court: The objection to this manuscript memorandum is sustained. The witness might state what he did in response to that telegram.

By Mr. Gordon:

Q. What did you do in response to that telegram?

A. I immediately wired in reply—



page 328 } Mr. Buchanan: We object upon the ground  
that the reply is the best evidence.

By the Court:

Q. Have you the reply?

A. I have a copy here.

The Court: Objection overruled.

Mr. Buchanan: Exception.

By Mr. Bazile:

Q. Did you write the original telegram out in longhand?

A. Here is my reply on it, yes.

Q. How do you know that is a copy of the telegram you sent?

A. Well, you generally send what you write. Unless I made a mistake there is no reason to suppose but that it went off.

Q. You sent the telegram off by telephone?

A. Yes.

By Mr. Buchanan:

Q. Yourself?

A. Either myself or someone in the office competent to send it.

Mr. Buchanan: We object, if Your Honor please.

The Court: Objection overruled.

Mr. Buchanan: Exception.

A. I immediately wired in reply as follows: "Wahab  
wants you personally meet Campbell Raleigh to-  
page 329 } morrow Sunday. Important."

By Mr. Buchanan:

Q. Who was that telegram to, that reply?

A. To Kimbrell.

Mr. Buchanan: It wasn't in answer to that message because the message is signed by R. S. Wahab.

Mr. Gordon: I didn't have any idea a little telegram like that would raise all this delay. I will just waive any reply to the telegram; just withdraw it all. Now here is a letter of October 8, 1929, from Mr. Buchanan to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #58, which is as follows:

Oct. 8, 1929.

Mr. Rives Fleming,  
Cameron Stove Co.,  
Richmond, Va.

Dear Sir:

We had confidently expected to advise you definitely before now and but for the reason of unfavorable reaction in the stock market would have done so. All of our plans were made, but as you have seen from the papers there has been what almost amounted to a panic on the exchanges and with leading issues dropping 25 and 30 points and page 330 } more, it was quite evident that this is not a favorable week to introduce new issues.

We have secured the cooperation of Messrs. Schluter & Company, Bankers of 111 Broadway, New York, and they have executed a most favorable contract with us agreeing to underwrite the entire issue themselves. They are entirely responsible and we have every confidence in their assurance that the matter will be carried through.

You will doubtful hear from Mr. Lincoln more fully in the course of the next few days. He would have written you before but was unavoidably detained in conference with the Bankers.

In the meantime we sincerely hope that you will push sales as rapidly as you can. It would at this time be indeed ruinous to us if sales and profits should materially fall off from last year.

We have closed with the Bankers upon the basis of July 31st and the audit of that date, the understanding being that we will pay you as of that date.

I will be glad to answer any further questions.

With kind regards, I am,

Sincerely yours,

(signed) J. P. BUCHANAN.

Cy  
Mr. Murphy.

page 331 } By Mr. Gordon:

Q. Did they pay you as of that date or any other date?

A. No, sir.

Q. Has he ever exercised the option as agreed in Marion or has he ever formed this merger?

A. No, sir.

Q. Did you receive any printed instructions from the defendant corporation or its representatives as to how you were to conduct your business after January 31st, 1929?

A. Yes, they gave us general instructions about pushing sales and extending ourselves and expanding and doing all the business we could and showing all the profit we could, which, of course, stretched our capital to almost the breaking point.

By a Juror:

Q. The interest of the Virginia Table Company in your concern up to that time—would they have been interested in the profits of the concern in any way?

A. No.

Q. Was the idea to increase sales and make a good showing for the auditor's report?

A. You mean up to the time they approached us?

Q. No; up to this time, July 31st.

A. I don't quite get that.

Q. It has been intimated certain control was exercised over your concern by the defendant company.  
page 332 } Was that control for profits or was it to make a showing as of a certain time to take over the business?

A. We all contemplated being together as of January 31st and, of course, they encouraged us to do all the business we could and make all the money we could. As one banker would drop us we would go to another banker and we were further requested to make as good a showing as we could to be acceptable to that banker and we kept going, pumping sales hard to show all the profit we could so the next banker would get the picture.

By Mr. Gordon:

Q. If they had taken you over who would the profit from January 31st belong to?

A. To them; to the organization.

The Juror: That is the question I wanted answered.

Mr. Gordon: This letter is dated October 7, 1929, from Mr. Wahab to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #59, which is as follows:

October 7, 1929.

Mr. Rives Fleming,  
Southern Factories & Stores Corp.,  
21st & Decatur Sts.,  
Richmond, Virginia.

page 333 } Dear Mr. Fleming:

Mr. Lincoln will, no doubt, write you today or tomorrow regarding the present status of the merger and our agreement with Foreman National Corporation and Caldwell & Co.

You will, no doubt, recall there was a clause in this agreement giving the bankers a right to relinquish their obligation, in the event of adverse market conditions, provided, they paid the expenses incidental to the audit, legal fees and taking inventory. A few days ago I received a telegram from Mr. Buchanan who was in Chicago advising that the bankers had availed of this market clause and that owing to the market conditions in their territory they could not at this time carry out the agreement to purchase the securities of the Lincoln Chain Stores Corporation. They admitted their liability to pay the expenses as agreed. This decision left us in a very indefinite position.

Naturally, our first consideration was to comply with the suggestion made by some of the store owners that we effect a merger of your unit and some of the others which are most profitable without having an underwriting as this seemed to be the only alternative since the market has been in such a deplorable condition in the past week or so. While we were considering this move, Mr. W. Russell Carr, attorney for the Cohen Furniture Company, Uniontown, Penn. suggested to us that he refer the matter of underwriting to  
page 334 } Schluter and Company, Investment Bankers, New York City. We have spent the past ten days in negotiating with Schluter and Company and succeeded last Saturday morning in getting a contract signed.

The general stipulations of this agreement are practically the same as we had with Foreman National Corporation. The outlook at present is for a better market condition which was in a most deplorable state all last week but reacted favorably on last Saturday. It is the consensus of opinion in banking circles that the liquidation period in the market is over.

I regret that circumstances have developed which necessitate the writing of this kind of letter but wish to assure

you nothing has been left undone in order to put this matter over in a profitable way. Both the Foreman National Corporation and Caldwell & Company were very reluctant to avail of their market clause but their Selling Department would not assume the obligation of selling this issue to the public claiming that investment trusts in Chicago had consumed so much of the money of their clientele that the issue could not be sold at this time. They, therefore, relinquished entirely on the market clause. The report of Sanderson and Porter and the report of the Auditors was most satisfactory.

Mr. Lincoln or I expect to call on you at your store within the next few days for the purpose of explaining all details.

Cordially yours,

(signed) R. S. WAHAB.

By Mr. Gordon:

Q. Let me ask you this: There was a letter here or telegram which I read just now from Mr. Buchanan in which he requested— No, here it is; dated September 30, 1929, to Rives Fleming from J. P. Buchanan: "Please mail me today itemized statement account Southern Factories against us accruing since July thirty-first including salaries and expenses shown and all cost of second inventories."

Note: Filed and marked Exhibit R. F. #60.

Q. I will ask you right there did you send them an account as of that time?

A. Yes.

Mr. Gordon: We would like to ask you to produce it.

Mr. Buchanan: Messrs. Haskins & Sells have it; \$6,600 and some cents is my recollection.

By Mr. Gordon:

Q. Now this letter of October 7th from Mr. Wahab says that "they; that is, the bankers; admitted their liability to pay the expenses as agreed. This left us in a very indefinite position". Now have the defendant companies here paid to the plaintiff any amount whatsoever with regard to these expenses about which Mr. Buchanan was telegraphing you?

A. No, sir, they haven't.

Mr. Bazile: We will admit they have not and it is your own fault you haven't been paid.

Mr. Gordon: You say it is our fault?

Mr. Bazile: Yes.

Mr. Gordon: The jury will have to determine whose fault it is. I don't think either one of us is competent to testify on that point.

Q. Did you ever see any of the contracts between the defendant Virginia Table Company and any of these bankers?

A. No, we never did. We were right anxious to see them, but we decided among ourselves we could trust Mr. Lincoln and it wasn't necessary to see the contract. We were advised it was an iron clad contract and the only thing necessary was to get stores of a certain character with certain profits and the thing was certain to go through.

Q. This letter to Mr. Wahab says: "Naturally, our first consideration was to comply with the suggestion made by some of the store owners that we effect a merger of your unit and some of the others which are most profitable without having an underwriting as this seemed to be the only alternative since the market has been in such a page 337 } deplorable condition in the past week or so." Do you know whether that had reference to what transpired in Marion on July 19th after Mr. Lincoln—

Mr. Bazile: We object to that as being leading.

The Court: Objection sustained.

Q. To what did it refer?

A. To what did what refer?

Q. When he said: "Naturally, our first consideration was to comply with the suggestion made by some of the store owners that we effect a merger of your unit and some of the others which are most profitable without having an underwriting."

A. He referred to what we had discussed at Marion and what Mr. Lincoln had agreed to do at Marion; that is, if we couldn't finance adequately and satisfactorily through New York and Chicago bankers then he would throw his assets in on the same basis as our stores and form an individual merger and finance later.

Mr. Bazile: For the same reasons which we gave when he first introduced this statement in the record we object to this statement and move to strike it out.

The Court: Same ruling; objection overruled.

Mr. Bazile: Exception.

Mr. Gordon: Now this is a letter dated October 338 } ber 22, 1929, from Mr. Wahab to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #61, which is as follows:

October 22, 1929.

Mr. Rives Fleming,  
Southern Factories & Stores Corp.,  
21st & Decatur Sts.,  
Richmond, Va.

Dear Mr. Fleming:

I am pleased to advise you that Schluter & Co. are now preparing the circular which they propose to issue in connection with their agreement to underwrite an issue of debenture notes and common stock of the LINCOLN CHAIN STORES CORPORATION.

I believe that Schluter & Co. will act definitely on their agreement within the next ten days or two weeks. Mr. W. Russell Carr told me over the long distance telephone yesterday that he had just returned from New York where he had a conference with Schluter & Co., who told him that they expect to be ready at a very early date.

I do not know what influence the present market conditions will bring to bear. You are aware, of course, that the agreement with Schluter & Co. is predicated upon market conditions which will enable them to sell these securities.

We have done everything possible to expedite page 339 } this transaction through an underwriting which would be to the mutual benefit of all concerned. If it happens that Schluter & Co. should be unable to carry out their agreement on account of adverse market conditions than we expect to call a meeting of the various interests represented and present a plan which we have already formulated to some extent, whereby we can affect a merger of some of the units without an underwriting at this time but in anticipation of an underwriting at some future date when the market is in a more favorable position.

I shall be pleased to advise you as to further developments.

With kindest regards, I am,

Yours very truly,

(signed) R. S. WAHAB.

Mr. Buchanan: Just for the purpose of making the objection—I don't think it is material—Mr. Wahab was not in any way connected with the defendant except for the securing of options. His authority was limited to the authority granted him in that power of attorney and if that letter could be construed in any way as a contract, which I don't think it possibly could be so construed, nevertheless he had no authority and could have had no page 340 } authority at that time to bind the Virginia Table Company in any way.

The Court: Your objection might properly come up if the Court undertook to construe that paper and I will hear you further on it then.

Mr. Gordon: Here is a letter dated October 31, 1929, from Mr. Lincoln to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #62, which is as follows:

October 31, 1929.

Rives Fleming, Esq., President,  
Cameron Stove Company,  
Richmond, Virginia.

Dear Rives:

Answering your letter of October 28, I can assure you that we are not asleep in working on this proposition. It is needless for me to say that due to the recent collapse of the security market that we will practically have to abandon any idea of doing public financing at this time. We are working on a proposition to get this done by private financing or in other words in effecting a merger without underwriting.

I hope to have something interesting to report on this within the next week or ten days and you may rest page 341 } assured that we will pass this information on to you.

Yours very truly,

(signed) C. C. LINCOLN, JR.

Mr. Gordon: Is there any dispute about Mr. Lincoln's authority?

Mr. Buchanan: Not the slightest.

By Mr. Gordon:

Q. I want to ask you, Mr. Fleming, this: Were any repre-



sentations made to you by Mr. Lincoln or his associates at or prior to the meeting of July 19th, 1929, at Marion as to the ability of Mr. Lincoln's corporations to do what you say they agreed to do at that time?

Mr. Buchanan: If Your Honor please, that is objected to because the allegation of the notice is that this contract was made in 1929 on July 19th and nothing that happened previous to that time has any bearing upon the subject-matter before the Court and the jury. All of the matters before that time were presumed to have been merged in the agreement which Mr. Fleming has stated upon the stand and which the notice itself states. Under that notice the Court could not under any conceivable circumstances, in my humble judgment, permit any damages for anything that occurred page 342 } curred prior to that date because that is the date of the contract to be complied with in the future and for that reason we think anything that occurred prior to that time has no bearing on this subject.

Mr. Gordon: May it please Your Honor, paragraph five of the notice of motion sets out two contracts; one an implied contract and the other an express contract. The first part of the paragraph sets out an implied contract; the second part, dealing with what transpired on July 19th, sets out the express contract, and I am asking him now in view of what occurred—what he has testified Mr. Lincoln told them and agreed on July 19th whether or not prior to that time or at that time Mr. Lincoln made any representations to them as to his ability to do what he said he would do.

The Court: I think that is relevant to this matter and may come in. Objection overruled.

Mr. Buchanan: Exception.

A. Mr. Lincoln showed us a statement of his business showing a profit of about \$325,000 a year for five years; he took us over his plants and showed what wonderful organization he had, and assured us in every way he was page 343 } perfectly competent to carry on what he had promised to do.

By Mr. Bazile:

Q. Will you specify what you mean by every way?

A. Every way? I mean he could carry out what he promised to do; that is, form his merger and throw his assets in on the basis of other people and his assets were what he

represented them to be and hoping we would form a very fine organization.

Mr. Bazile: I object to that as being a conclusion of Mr. Fleming and not evidence; that in every way he could carry it out.

The Court: He explained what he said.

Mr. Bazile: He shows by that it is merely his conclusion and not what Mr. Lincoln said or did. He followed it up by saying he showed them in every way it was possible to carry the merger through.

The Court: I allowed you to question him as to what he referred to and then he outlined the facts.

Mr. Bazile: Which shows his statement is itself entirely based upon a conclusion formed by him.

The Court: But the facts he stated there are admitted as evidence. The general conclusion or expression "in every way" is excluded as a conclusion, but the facts page 344 } he outlined are before the jury.

Mr. Bazile: That is all right; I am not objecting to the facts.

Mr. Gordon: Here is a letter dated December 19, 1929, from Mr. Lincoln to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #63, which is as follows:

December 19, 1929.

Mr. Rives Fleming,  
c/o Southern Factories and Stores Corp.,  
Richmond, Virginia.

My dear Rives:

I suppose you have heard from Earl by this time regarding our conversation while in Columbia last week. I have only reached this decision after very careful thought and after conferences with a number of people. It seems that just at this time of the year most of the banking interests seem to feel some skepticism about business for the coming year and consequently they are not so anxious to finance a new concern.

I think this is pretty well borne out by the answer Earl received from the banks in South Carolina. I think it would be a very bad idea to continue shopping around to a number of different banks in endeavoring to get this line as this

can only eventually work to cheapen your credit  
page 345 } in the eyes of the general banking fraternity.

It is my thought that the best thing we can do is for all of us to try to work out our own problems for the next month or so and in doing this I mean to get all liabilities cleared up as possible so that they wont show up so heavy on a consolidated balance sheet. I feel we will have no trouble in holding McGehee in line and the only chance we will stand of losing a store may be in Fredericksburg and if we do lose this outfit we will just simply have to try to replace it at some other point. I dislike very much to drop this matter now but I really see no other recourse. As I told Earl, I am going to keep working on this and when I am in Chicago and New York I will do everything possible to try to work out some plan to get a capitalistic loan made which will not have to be amortized over any period of time.

We are anxious to get our books straightened up before the end of the year and I will appreciate it if you will forward me settlement for the balance of Southern Stores account less the bill you rendered for organization expense. It seems that this bill is in order, but rather stiff for us to have to pay along with the other expenses we have met. However, there is no other way out of it and the only thing we can do is to pay it now and try to work something out of it later.

I appreciate very much the co-operation you and  
page 346 } Earl have shown and I feel quite certain that we  
can work out something of mutual interest within the very near future.

With best wishes and hoping to have the pleasure of seeing you soon, I am:

Yours very sincerely,

(signed) C. C. LINCOLN, JR.,  
President Virginia Table Company, Inc.

By Mr. Gordon:

Q. Who is Earl?

A. Mr. Kimbrell.

Q. Now he refers in the last part of this letter to the balance of the Southern Stores account less the bill you rendered. What was he referring to about the Stores account?

A. That was for merchandise our stores owed his firm for the purchase of his furniture.

Q. When had those purchases been made?

A. From the time we discussed the merger.

Q. Now what did he do about those two accounts that he had against you?

A. He got a judgment against us for them.

Q. What companies did Mr. Lincoln have? What were the names of Mr. Lincoln's companies?

A. Virginia Table Company and Virginia Lincoln Furniture Co.

page 347 } Q. The corporate name, as they admit, of the Virginia Lincoln Furniture Corporation was formerly Lincoln Furniture Manufacturing Company, Inc.?

A. Yes.

Q. Had your corporation purchased from both of those companies merchandise?

A. I don't know that definitely. Someone can tell you that.

Mr. Buchanan: We object to that, may it please the Court. I don't see what in the world that has to do with this controversy; simply cumbering up the record. There is nothing about it in the declaration; not a word.

The Court: I fail to see the relevancy of that.

Mr. Gordon: The relevancy is this: my friend asked me to furnish him with an itemized account of our damages in this case and I furnished him, among other items, with this: a statement of our loss and damage connected with these two suits which would not have been incurred had the contract been complied with and he has had it in hand for several months. He asked for the particulars of the claim and it is contained here in the particulars of the claim.

The Court: You are offering the evidence of the fact they had obtained a judgment as damage to you by page 348 } reason of the failure of the merger?

Mr. Gordon: Certainly, I do. They assigned these two accounts to individuals out in Marion and they brought suit on them against us and secured judgments because we had no defense we could make to the merchandise claim and involved in those was about \$1,900 of interest and a whole lot of other expense that we had to pay because we had not received the financing which had been promised by the Lincoln Corporation, and that is contained in these particulars of the claim.

Mr. Bazile: But it is not contained in his declaration.

Mr. Gordon: If they had paid us the \$18,000 at that time that they owed us we would have had the money to pay it, but they wouldn't do that either.

The Court: I think that is too remote. Objection sustained.  
Mr. Gordon: Exception.

Now this is a letter dated December 20, 1929, from Mr. Fleming to Mr. Lincoln.

Note: Filed and marked Exhibit R. F. #64, which is as follows:

page 349 }

DéceMBER 20, 1929.

Mr. C. C. Lincoln, Jr.,  
c/o Virginia Table Co.,  
Marion, Va.

Dear C. C.:

We appreciate your favor of the 18th and although we are sorry to abandon the merger for the present, we hope your decision to defer it for a month or two will prove to be best. We really think that to start with a small nucleus of ten or twelve stores is by far the easiest, the most economical, the quickest, and the most effective way to organize a larger one.

We note your request to send check for the difference between your account and the expense account rendered, but you will find upon adding to that expense account, the \$11,000. for options secured, that your company owes us a balance of \$4,447.78. Statement for the \$11,000 inclosed herewith. We did not include this in the statement recently sent you because you requested a statement of our *expenses* since February first, and because this charge was discussed at length with Haskins & Sells, whose representative discussed it with Mr. Buchanan, and so far as we knew this item had been set up on your books as due us.

You will doubtless recall telling Mr. Kimbrell and me that for each option secured and approved by us, you would pay us \$1,000.

page 350 } Considering the time and expense devoted to these options, to say nothing of the tremendous loss to our business, it amounts to considerably more than we are to receive for them. Reference to our records shows that during January and February, the months in which we were taking options and inventories, we incurred a loss of \$17,000 from operations, which hitherto had been continuously successful.

Upon placing yourself in our position, we feel confident

that you will realize the justice of our charge and place to our credit the \$19,826.80 as per statement.

Hope you and yours will have a very Happy Christmas and that 1930 will exceed in profit your banner year of 1929.

With kindest regards, we are

Yours very truly,

RIVES FLEMING,  
Pres. Southern Factories & Stores Corp.

Mr. Gordon: Next is a letter dated December 23, 1929, from Mr. Lincoln to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #65, which is as follows:

December 23, 1929.

Rives Fleming,  
c/o Southern Factories and Stores Corporation,  
Richmond, Virginia.

My dear Rives:

I was really very much surprised to get your page 351 } letter of December 20 in which you mention an additional charge for option. I had never discussed this matter with you and since you had not mentioned it to me I had assumed that under the circumstances you had dropped it.

It really seems to me that due to the expense we have already gone to in this situation that it would really be out of order for you to ask us to pay this amount. It seems that we all entered into a proposition which would have resulted in mutual benefit to everyone concerned and if we have lost out on this certainly all of us have contributed something to the attempt. As far as we are concerned we have been to tremendous expense and I see no reason why we should be asked to go to any more undue expense. We are perfectly willing to pay expenses which you have gone to in this situation and I thought that the bill you rendered me was very fair. You will also remember that on this bill the major portion of it contains charges for Mr. Kimbrell's time as well as other members of your organization. For your information I can tell you that no one else in the entire organization received any money for their time. You well know

the honest and conscientious effort which Mr. Wahab and Mr. Coplan expended in the attempted organization of this company. They have never received one cent for their salary during this time and all we have contributed to  
page 352 } them was the actual expense involved in travelling while they were doing this work.

Others of us have done the same thing and it seems to me in your case it would be perfectly fair for you to allow us to reimburse you for expenses and even willing to include additional compensation for Mr. Kimbrell's time. I feel sure when you reconsider this matter you will let it go at this and I really feel that it should amply take care of the situation. We have not dropped the matter yet and we are going to do everything we can to work it out but certainly if we are going to have to go to all this expense it would be foolish for us to consider doing anything in the future. I still have hopes, however, that we can work something out which will be of mutual attraction and I can assure you of my best efforts in this behalf.

Under the circumstances I would appreciate your writing me that this will be satisfactory so that we can get this account closed up. There has been no such amount set up on our books as due you and this is the first I have heard of it. We still have some few bills to pay in organization expense and it has been of course quite a hardship on us to take care of all of these new items. I feel sure you are going to be reasonable and assist us in this way.

With best wishes, I am.

Yours very truly,

(signed) C. C. LINCOLN, JR.,  
President Virginia Table Company, Inc.

page 353 } By Mr. Gordon:

Q. Was that any additional charge you were making or what had been agreed upon?

A. I thought everybody in the organization knew about it and thought it was on their books; it should have been.

Q. Did you ever drop it?

A. No, sir.

Q. Had you ever given Mr. Lincoln any reason to believe that you had dropped that charge?

A. None in the world. Every person in our organization knew that was a legitimate charge; on there all the time;

and we, of course, thought they knew it and I still think they did.

Mr. Bazile: Have you got the statement accompanying the letter of December 20th?

Mr. Gordon: I asked for the statement.

Mr. Bazile: No, you asked for the Haskins & Sells statement.

Mr. Buchanan: You asked for the additional statement between July 31st and that date.

Mr. Gordon: If you will show me the statement I will be perfectly willing to put it in.

Mr. Bazile: You read the letter and not the statement.

page 354 } By Mr. Gordon:

Q. See if that statement was sent with a copy of the letter of December 20th?

A. Yes, sir, this statement was sent.

Note: Filed and marked Exhibit R. F. #66, which is as follows:

December 20, 1929.

VIRGINIA TABLE COMPANY, MARION, VA.

TO SOUTHERN FACTORIES & STORES  
CORPORATION,

Dr.

RICHMOND, VA.

To securing the following options as per agreement,  
at \$1,000 per option \$11,000.00

Jones Bros., Jacksonville, Fla.

George W. Kennedy Co., Jacksonville, Fla.

M. K. Jones, Savannah, Ga.

Jones-Kennedy, Atlanta, Ga.

Cochran Furniture Company, Atlanta, Ga.

Mason Furniture Company, Atlanta, Ga.

Wood-Peavy Furniture Company, Macon, Ga.

Van Meter, Columbia, S. C.

Sam Burton Furniture Company, Asheville,  
N. C.

Bledsoe Furniture Company, Danville, Va.

W. A. Bell & Bro., Fredericksburg, Va.



Add expenses in connection with inventories as per statement	8,826.80
Total	<u>\$19,826.80</u>

Mr. Gordon: Here is a telegram dated Dec. 13, 1929, from Mr. Lincoln to Mr. Fleming.

Note: Filed and marked Exhibit R. F. #67, which is as follows:

page 355 }                      Pinehurst, N. C., Dec. 13, 1930.

Mr. Rives Fleming,  
c/o Cameron Stove Co.,  
Richmond, Va.

Please have Murray mail me today sure care Murphy Columbia copy statement expenses your organization taking inventory after February. Regards.

C. C. LINCOLN, JR.

By Mr. Gordon:

Q. Who was Mr. Murray?

A. Mr. Murray is our auditor and treasurer.

Q. Mr. Fleming, what effect did the failure of Mr. Lincoln to comply with this agreement you have stated he made have upon your business—the business of the Southern Factories & Stores Corporation?

A. It was very disastrous.

Mr. Bazile: We object to that. That is not a proper element of damage for the breach of a contract.

The Court: Why not?

Mr. Bazile: Unless it immediately connects itself with some tangible pecuniary loss, it is too remote and is not properly an element of damage.

page 356 }      The Court: The courts have gotten away from that old doctrine and wherever the damage can be proven with any reasonable degree of certainty they let in the evidence. The old doctrine was very strict, but the tendency of the modern cases is to relax that doctrine and if a party breaks a contract, the damages that would naturally flow from it are permitted to be related to the jury.

Mr. Buchanan: If the Court please, in order that we may

get this absolutely straight, the declaration or notice by which the plaintiff, I take it, is bound in this case, sets forth first a failure to pay for options; that is the money damage; \$11,000 is claimed for that and I take it that it makes no difference whether his business was disrupted and ruined, it can't add any more to that item. I think it is agreed if the jury should see fit to give him \$11,000 and in their judgment they thought he would be entitled to it, he wouldn't be entitled to anything more. The next allegation is taking inventories. If the jury sees fit to allow him the expenses and salaries claimed for taking inventories, that is the end of that, I take it. Now, if the Court please, we come page 357 } to the crux of the matter and let us see what the allegation is and what the declaration says that the defendant agreed to do and what the situation would have been if it had complied with its contract as set forth in the declaration and by Mr. Fleming. The allegation is as follows: (Counsel reads fifth paragraph of notice.)

Note: The object was argued at length.

The Court: I am going to permit the evidence to come in, subject to being sufficiently definite to go to the jury finally and sufficiently definite to show that it flows from the breach of the contract. It is admitted subject to those restrictions. It may be excluded afterwards if it does not come within that limit.

Mr. Bazile: Exception.

Mr. Gordon: Some of the details of this damage will have to be supplied by other witnesses who may speak more definitely, but as long as Mr. Fleming was on the stand I wanted him to complete his testimony.

The Court: I think that is consistent with the ruling of the Court, that you are given opportunity to connect this with other testimony which would make it definite; if not, it will be excluded.

Mr. Bazile: May it be understood our exception runs to the whole line of Mr. Fleming's testimony about the damages for the reasons we have heretofore given?

The Court: Yes, sir, so far as those questions are on that subject.

By Mr. Gordon:

Q. Mr. Fleming, what effect did the failure of Mr. Lincoln to comply with this agreement you have stated he made have

upon your business—the business of the Southern Factories & Stores Corporation?

A. The result was very disastrous, indeed, from a great many different angles. To start with, we were taking general orders from other people; our men were demoralized, the management was demoralized, not knowing who the manager was; our manager was taken from the stores and sent out taking inventories, representing the most important man in the concern to conduct our operations and not there to conduct it. We kept on, I think, four men at pretty good salaries, contemplating their use in the new stores when we went into the merger: I remember Mr. McGehee, Mr. Zachary, Mr. Farris and one or two others—Mr. Kimbrell's brother.

We have kept those men, believing we needed them  
 page 359 } in the larger organization. We were told to increase our sales and show all the profit we could for these succeeding bankers who were going to take the matter up and naturally we pumped sales hard and pushed our profits for all we could. That in the furniture business, especially with a company with a limited capital, is very disastrous because you can easily get too much extended, and that is what we did. We found our liabilities mounting very fast and they got out of proportion; our current position became questionable; our banks didn't like the position we were in; we found it difficult to borrow the money necessary to go on and run the business as we wanted to run it, and there were numerous angles that caused us lots of trouble and loss.

Mr. Bazile: Now, if Your Honor please, as to his statement that his management was demoralized by his managers being out taking these inventories, we move to strike that from the record for the reason he is seeking to recover \$17,000 for his managers going out and taking these inventories in another count of his declaration and it is certainly not provable as double damages under the fifth count of the declaration.

The Court: You may argue that when you come to it.

That is a question for the jury to weigh.

page 360 } Mr. Bazile: Exception.

A. (continued) Those actions we carried out after this contract was drawn.

Q. In the fifth count or fifth paragraph of the notice of motion it is claimed that after these options were secured you were assured from time to time that the merger would be effected. Is that correct?

A. Yes.

Q. It is also stated that you had to change your methods of business at the request of the Lincoln Company. Did you do that?

A. Yes, sir.

Q. And it is also stated that at his request you had to busy yourselves in securing extensions of options—

Mr. Buchanan: We don't like to object on the ground of his leading, but I think that is extremely leading.

The Court: I think he is going over something already in.

Mr. Gordon: I will waive any further questions along that line.

A. It has been the experience of most every store that has this experience that they have been demoralized in such interim; that is, between the option and the time you are taken over. It is always a very disastrous period.

page 361 } Q. As a result of these negotiations with the defendant corporation and the agreement that they made did you or not abandon the plan about the \$600,000 financing which you spoke to Mr. Lincoln about?

A. Yes, sir. We figured to go into this larger merger which we were ultimately aiming to go into with our \$600,000 financing we were providing to go immediately into with what we hoped ultimately to go into it with our \$600,000 merger; we figured on having twelve stores to start with, but they had the picture figured up to twenty-five or thirty stores and we figured it would probably be better to go along with them and then we abandoned our \$600,000 and after they lost under their proposition we were in no position to go back and finance it.

Mr. Gordon: I desire to introduce the minutes of the directors of the Lincoln Furniture Manufacturing Company of the 2nd of February, 1929.

Note: Filed and marked Exhibit R. F. #68, which is as follows:

At a meeting of the Board of Directors of the Lincoln Furniture Mfg. Company, Inc., held at the office of the Company, Marion, Va., on the 2nd day of January, page 362 } 1929, there were present C. C. Lincoln, Jr., Jno.

D. Lincoln, J. P. Buchanan, Jno. W. Horne and S. C. Sprinkle, being all the Directors of the Corporation.

C. C. Lincoln presided and J. P. Buchanan performed the duties of Secretary.

The President announced that the election of officers for the ensuing year was in order and Jon. D. Lincoln assumed the chair.

On motion duly made, seconded and unanimously carried the following officers were elected to serve for the ensuing year and until their successors are elected and qualified: C. C. Lincoln, Jr., President and Treasurer, Jno. D. Lincoln, first Vice-President, Jno. W. Horne, second Vice-President, J. P. Buchanan, Secretary, Leon Beville assistant Treasurer; and Jno. W. Horne, assistant Secretary.

C. C. Lincoln, Jr., resumed the chair.

On motion duly made, second and unanimously carried the following resolution was adopted:

“Be it resolved by the Board of Directors of The Lincoln Furniture Mfg. Co. Inc., that the President and Treasurer be and he is hereby authorized and directed to manage and control the affairs of the Corporation during the ensuing year and to execute on behalf of the Corporation and in its name all agreements, contracts and paper writings and sign all checks on deposit of the Corporation in any page 363 } Bank which may be necessary or advisable for carrying on its business and the Secretary is authorized and directed to sign all necessary paper writings of the Corporation and to attach the seal thereto, and the acts of the said officers in and about the said Corporation are hereby ratified, approved and confirmed.”

On motion made, seconded and unanimously carried, the following resolution was also adopted:

“Be it resolved by the Board of Directors of the Lincoln Furniture Mfg. Co. Inc., that the President be and he is hereby authorized and directed, if in his judgment the same shall be advisable, to effect a merger with the Virginia Table Company, Inc., upon such terms and in such manner as he shall deem proper and any actions of said President in this behalf are ratified, approved and confirmed.”

On motion duly made, seconded and unanimously carried the following resolution was passed:

“RESOLVED, that the President and Directors of the Manhattan Company, New York (hereinafter designated as

the Bank), be designated as a depository of this corporation and that funds of this corporation deposited in said Bank be subject to withdrawal upon checks, notes, drafts, bills of exchange, acceptances, undertakings or other order for the payment of money when made, signed, drawn, accepted or endorsed on behalf of this corporation by the following officers and persons, to-wit:

page 364 } C. C. Lincoln, Jr., President.  
C. C. Lincoln, Jr., Treasurer.

RESOLVED, that the Bank is hereby authorized to pay any such instruments and also to receive the same from the payee or any other holder without inquiry as to the circumstances of issue or the disposition of the proceeds even if drawn to the individual order of any signing officer or person, or tendered in payment of his individual obligation.

RESOLVED, that the following officers of the corporation and persons, to-wit:

C. C. Lincoln, Jr., President,  
C. C. Lincoln, Jr., Treasurer,

and may sign in either capacity are hereby authorized on behalf of this corporation to borrow money and to obtain credit for this corporation from the Bank, on such terms as may seem to them advisable, and to make and deliver notes, drafts, acceptances, agreements and any other obligations of this corporation therefor in form satisfactory to the Bank, and as security to pledge or assign and deliver stocks, bonds, bills receivable and other negotiable paper, bills of lading, warehouse receipts, insurance policies, and certificates, and any other property held by or belonging to this corporation, with full authority to endorse, assign or guarantee the same in name of this corporation, to execute and deliver all instruments and affix the corporate seal; and also to dis-  
page 365 } count any bills receivable or other negotiable  
paper held by this corporation, with full authority to endorse the same in the name of this corporation.

RESOLVED, that J. P. Buchanan Secretary of this corporation, be and he hereby is authorized to certify to the Bank the names of the present officers of the Company, and other persons authorized to sign for it and the offices respectively held by them, together with specimens of their

signatures, and in case of any change of any holder or holders of such offices, the fact of such change and the names of any new officers and the office respectively held by them, together with specimens of their signatures; and

BE IT FURTHER RESOLVED, that the Bank be promptly notified in writing of any change of any holder or holders of such offices, and until so notified and receipt acknowledged by the Bank in writing, that the Bank shall be indemnified and saved harmless from any loss suffered or liability incurred by it in continuing to act in pursuance of these resolutions after such change without such notice.

RESOLVED, that these resolutions be communicated to the Bank, and remain in full force until notice in writing of their *recission* or modification has been received by the Bank and receipt thereof acknowledged in writing by the Bank, and that J. P. Buchanan, Secretary of this corporation, be and he hereby is authorized to certify to the Bank the foregoing resolutions, and that the provisions page 366 } thereof are in conformity with the character and by-laws of the corporation.

On motion meeting adjourned.

C. C. LINCOLN, JR.,  
President.

Corporate Seal.

J. D. BUCHANAN,  
Secretary.

Mr. Gordon: Now I desire to introduce these two copies which Mr. Buchanan said need not be certified.

Mr. Bazile: Mr. Gordon, unless you prove the matter about which this letter was written actually went through, we are going to object to this. Our understanding is that relates to a matter which was never consummated.

Mr. Gordon: If this is incorrect, you can prove it. It is your own statement.

Mr. Bazile: As a matter of fact, if Your Honor please, the defendant was considering a plan which was subsequently abandoned and Mr. Gordon wants to introduce statements made about the plan which was subsequently abandoned.

Mr. Gordon: I am going to show it wasn't abandoned.

Mr. Bazile: We object to their admission until he proves

they relate to a plan that was actually consummated. page 367 }

Mr. Gordon: If I don't couple up these communications written by the general counsel and the secretary of these corporations to the clerk of the Corporation Commission and the State Tax Commission with what transpired afterwards, then His Honor can rule it out.

Mr. Bazile: But the mischief is already done.

Mr. Gordon: I can't introduce all my evidence at one time; I have to take it as it comes.

The Court: You have a paper you are familiar with, but I have no idea what it is.

Mr. Gordon: I will say this: it is a communication written by Mr. Buchanan to Mr. Wilson, the clerk of the State Corporation Commission, concerning the union of these two defendant corporations and what was proposed to be done and the dissolution of the Virginia Table Company, Inc., and it was submitted to the State authorities as the basis of their action with regard to that matter.

The Court: That, I think, has a proper place in the evidence under the pleadings in this case. Objection overruled.

Mr. Bazile: We except.

page 368 } Mr. Gordon: It was understood between Mr. Buchanan and myself that these copies of letters could be introduced without having them duly certified by the State authorities over in the State Office Building.

Note: Filed and marked Exhibit R. F. #69, which is as follows:

Virginia Table Co. Inc.,-Lincoln Furniture Manufacturing Company, Inc.

B. F. Buchanan

J. P. Buchanan

BUCHANAN & BUCHANAN

Attorneys at Law

Marion, Va

Dec. 12, 1929

(STATE CORPORATION  
COMMISSION

VA.

Dec. 13, 1929)

Mr. R. T. Wilson,  
Clerk,  
State Corporation Commission,  
Richmond, Va.



Dear Mr. Wilson:

I enclose you the following papers:

First: Unanimous consent of all of the stockholders of the Virginia Table Company, Incorporated, to its dissolution.

This is under the provisions of Chapter 171 of page 369 } the Acts of 1928, page 600, amending section 3810 of the Code and providing that when all of the stockholders shall consent in writing to the dissolution no meeting of the stockholders or directors shall be necessary.

Appended to this is a copy of the resolution of the directors and a certificate of the President, Secretary and Treasurer as to the names of the officers and directors. I do not know that this latter is necessary but we include it.

Second: Certificate of the President and Secretary of the Lincoln Furniture Manufacturing Company Incorporated attached to resolution of directors and stockholders amending the charter of the Corporation so as to change its name from Lincoln Furniture Manufacturing Company Incorporated to Virginia-Lincoln Furniture Corporation, and also changing the capital stock from a maximum of \$500,000 preferred to a maximum of \$300,000 preferred stock and from a maximum of 3,000 shares common stock to 10,000 shares common stock.

According to the charter we have paid the tax upon a maximum issue of \$500,000 preferred and 3,000 shares of common. As I calculate it we are due the State the difference between an authorized capital in full of \$1,300,000 and an authorized capital of \$800,000. heretofore paid and I enclosed certified check for \$100.00 representing the balance. Also certified check for \$5.00 to the Commission and \$4.50 each page 370 } to the Secretary of the Commonwealth and the Clerk of the Circuit Court of Smyth County.

Third: I understand that the State Tax Commission is required to issue a certified as to the payment of taxes before a certificate of dissolution to the Virginia Table Company can be issued. I enclose you copy of my letter to Mr. Morrisette which explains itself.

I sincerely trust that these matters may be passed upon before the first of the year as we are arranging all of our books accordingly and wish to start out the new year with the changes made.

In order that the commision may thoroughly *under* the corporate changes we are making, the following is the explanation.

The ownership of the two above corporations is the same and the common stock of both is held in the same proportion.

They are both engaged in manufacturing furniture and have the same officers and directors. It is properly considered that there is a duplication of effort, especially when all of the business is being conducted under the same executives and with the same bookkeeping and labor force, it is therefore resolved to consolidate and it was considered by the board of directors that the simplest way would be to relinquish the charter of one corporation after it had conveyed its assets to the other. Therefore the Virginia Table

Company Incorporated has wound up its affairs  
page 371 } and conveys its property to the Lincoln Furniture  
Manufacturing Company Incorporated whose  
name it is desired to change and whose capital stock will be  
increased to take care of the additional assets.

You will note that the seal of the Lincoln Company was erroneously placed on the certificate for the Virginia Table Company. We were unable to have this reexecuted, for the reason that the President had left and we could not secure his signature again. I have scratched out the seal however and placed the seal of the Virginia Table Company thereon.

Very truly yours,

(signed) J. P. BUCHANAN.  
J. P. BUCHANAN.

JPB:KS

#### CONSENT OF STOCKHOLDERS TO DISSOLUTION

We, the undersigned being all of the stockholders of Virginia Table Company, Incorporated, a corporation organized under the laws of the State of Virginia and owning 10,000 shares of its capital stock being all of the capital stock issued and outstanding, do hereby consent to the dissolution of the Corporation and to that end we do execute this certificate to be filed in the office of the Clerk of the State Corporation Commission of Virginia, to the end that under  
the provisions of law the said corporation may  
page 372 } be dissolved.

Given under our hands this the 9 day of December 1929.

C. C. LINCOLN, JR.  
LAURA D. LINCOLN,  
By C. C. LINCOLN, JR.,  
Attorney in Fact.

J. D. LINCOLN  
J. W. HORNE  
S. C. SPRINKLE  
J. P. BUCHANAN.

Virginia Table Co. Inc.,-Lincoln Furniture Mfg. Co. Inc.  
Dec. 12, 1929

(State Corporation  
Commission  
Virginia  
Dec. 13, 1929)

State Tax Commission,  
State Office Bldg.,  
Richmond, Va.

Attention Mr. Morrisette:

Dear Mr. Morrisette:

The two above Virginia Corporations which are owned in their entirety in the same proportion by the same stockholders and have the same officers and directors and are now jointly operated with the same general office and bookkeeping and labor force, have determined to continue page 373 } their business under the charter of the Lincoln Furniture Manufacturing Company Incorporated (to be amended), The Virginia Table Company Incorporated has transferred its assets to the Lincoln Company and it is desired to dissolve.

I have forwarded to the Clerk of the Corporation Commission the unanimous consent of all of the stockholders of the Virginia Table Company to its dissolution and the surrender of its charter and it is earnestly desired that the certificate of dissolution may be issued by the Commission before the first of the year as our books have been changed, stationery purchased and we are now in fact operating under the new arrangement pending the approval of the Commission.

In order to issue the certificate of dissolution it is necessary that the State Tax Commission certify to the Corporation Commission that the proper income returns, etc., of the Corporation desiring to dissolve have been made and I will appreciate it very highly if you will see that the proper certificate is drawn and sent over to Mr. Wilson.

I know that it is *presumptuous* in me to ask you to do this for me, and would not ask you to do so but for the necessity of saving time. I know that all of the returns have been made and there has never been any trouble in any way or controversy between the above corporations represented by myself and your department, which has not been or will be entirely and satisfactorily adjusted.

page 374 } With kind personal regards,

Sincerely yours,

JPB:KS

J. P. BUCHANAN.

Cy

Mr. R. T. Wilson.

By Mr. Gordon:

Q. I show you a letter of January 8th, 1930, from Virginia-Lincoln Furniture Corporation to Southern Factories & Stores Corporation. Please state whether or not you received that letter and, if so, did it contain the paster which is now pasted to it?

A. I can identify the letter. I am not familiar with the paster because I don't remember that definitely.

Q. I want to know whether this paster was on there.

A. I don't recall that, sir.

Mr. Gordon: Do you gentlemen admit that was sent out?

Mr. Buchanan: I don't know anything about that. I just don't know. I am not in the office.

Mr. Gordon: Mr. Lincoln, was it sent out?

Mr. Lincoln: I don't know.

The Court: If objection is made to it, it can't be introduced until properly identified.

By Mr. Gordon:

Q. Who received this letter?

page 375 } A. It was received in the usual way. I don't remember the thing coming in. I have every reason to believe it came in because it is in our possession, but I don't remember receiving the letter. Somebody else could probably identify it.

Mr. Gordon: It is signed by S. C. Sprinkle, Traffic Manager, Virginia-Lincoln Furniture Corporation. Was he the traffic manager?

Mr. Buchanan: Yes, sir.

Mr. Gordon: Do you deny the authenticity of this letter?

Mr. Buchanan: Not at all. I don't know anything at all about the paster.

Mr. Gordon: Mr. Fleming, step aside for a minute. Mr. Murray, take the stand.

Note: Mr. Fleming stood aside.

page 376 }

HOKE MURRAY,

a witness introduced in behalf of the plaintiff,  
being first duly sworn, testified as follows:

## DIRECT EXAMINATION.

By Mr. Gordon:

Q. What is your position with the plaintiff corporation?

A. Treasurer and general auditor.

Q. I show you here a letter from the Virginia-Lincoln Furniture Corporation to which is attached a paster. Please state whether or not that paster was received from the Virginia Lincoln Furniture Corporation?

A. It was.

Witness stood aside.

page 377 }

RIVES FLEMING,

resuming the witness stand, testified as follows:

Mr. Gordon: The letter hasn't anything to do with this controversy, but it is the paster I am after.

Note: Filed and marked Exhibit R. F. #70, which is as follows:

January 8, 1930.

Southern Factories & Stores Corp.,  
Twenty-five & Decatur Sts.,  
Richmond, Virginia.

Gentlemen:

In reference to your letter of January 6, we respectfully ask that you kindly return our credit memorandum of \$18.50 as this is a duplication of our credit #590.

We find upon checking our ledgers that credit memorandum #590 and #483 were issued in duplicate.

Under date of November 18 we instructed the Southern Stores Company at Clumbia, S. C., that the #25 china closet which was short and mentioned in their letter of November 15, was placed on our order #66319 in accordance with their instructions of September 4.

We will check over the invoice mentioned in  
page 378 } the second paragraph of your letter and make  
such credit as is necessary in this instance.

Thanking you very much for your kindness in this matter,  
we are

Yours very truly,

VIRGINIA-LINCOLN FURNITURE CORP.  
(signed) S. C. SPRINKLE,  
Traffic Manager.

(paster attached as follows)

### NOTICE

Effective January 1st, 1930.

In order to simplify our records our two companies, namely—THE VIRGINIA TABLE COMPANY, INC., and THE LINCOLN FURNITURE MANUFACTURING COMPANY, INC., will transact their business under the style of—

Virginia-Lincoln Furniture Corporation

Please, after the first of the year address all correspondence and make all checks in payment of accounts due either of the above companies to the

Virginia-Lincoln Furniture Corporation  
Marion, Virginia.

Mr. Gordon: Here are the interrogatories under our statute propounded by the plaintiff to the defendant:

“In pursuance of section 6236 of the Code of page 379 } Virginia, 1930, the plaintiff files the following interrogatories to the defendants, and to each of them, viz:

1. Did the Virginia Table Company, Incorporated, transfer all of its assets to Virginia-Lincoln Furniture Corporation, and if not, what part of its assets were transferred, and when was the transfer made? It is understood that in referring to the Virginia-Lincoln Furniture Corporation in these interrogatories, the plaintiff means the same corporation that was formerly named Lincoln-Furniture Manufacturing Company, Incorporated.”

Mr. Gordon: You gentlemen I suppose admit that an or-

der of the Virginia Corporation Commission did change the name and that the Virginia-Lincoln Furniture Corporation was dissolved, as stated in the notice of motion?

Mr. Buchanan: Virginia Table Company, you mean.

Mr. Gordon: Yes, the Virginia Table Company was dissolved. Now the answer: The Virginia Table Company, Inc., answered this way:

"The answer to the first interrogatory is that the deed whereby the Virginia Table Company Incorporated sold assets to the Virginia Lincoln Furniture Corporation is in writing signed by both parties and is the formal documentary evidence of the transaction. A copy thereof is herewith filed in answer to this interrogatory."

The second interrogatory was this:

"If such transfer was made, was it for the purpose of effecting a merger of the said two corporations?"

The answer to that is this:

"In answer to the second interrogatory the deed herewith filed shows the transaction between the parties. The transfer was not for the purpose of effecting a merger."

Third interrogatory: "If such transfer was made, was it for the purpose of effecting a consolidation of said two corporations?"

The answer to that is this: "The answer to the third interrogatory the deed herewith filed shows the transaction between the parties. The transfer was not for the purpose of effecting a consolidation."

The fifth interrogatory was: "Has the Virginia Table Company, Incorporated, been merged into Virginia-Lincoln Furniture Corporation?"

"In answer to the fifth interrogatory, the Virginia Table Company Incorporated has not been  
page 381 } The sixth is this: "Bradstreet's mercantile report shows that under date of January 7, 1930, Virginia-Lincoln Furniture Corporation by N. L. Dickinson, wrote Bradstreet's as follows, viz: 'We have your request for financial report of Virginia-Lincoln Furniture Corporation dated January 6th. Effective January 1st, we have merged our two companies, the Virginia Table Company and Lincoln Furniture Mfg. Company, and our auditor reports that he is getting up a statement now, and copy will be mailed to all of the mercantile agencies just as soon as possible. Just as soon this report is completed you will receive a copy.' Did you write this letter, and if so, did it correctly state the facts? Who was your auditor at that time, and who

is now your auditor? What was N. L. Dickenson's connection with you at that time, and what is now his connection with you? Did you send Bradstreet's and/or other mercantile agencies copies of the statement referred to in said letter of January 7th, 1930, and if so, file a copy of the statement with your answer."

And their reply to that is this:

"Interrogatory 6. In answer to the Sixth In-  
page 382 } terrogatory, we are advised by N. L. Dickenson  
that he did write the letter of Jan. 7th to Brad-  
streets. Mr. Dickenson is a layman without the knowledge  
of technical legal phrases. The transaction between the two  
corporations is evidenced by the deed aforesaid. The two  
companies were not merged. Mr. Dickenson was at the date  
of said letter employed in the office of the Virginia Lincoln  
Furniture Corporation to pass upon credits of customers and  
recommend to the executives whether orders should or should  
not be shipped. He occupies that position today. A state-  
ment was sent to Bradstreet and a copy is attached hereto.  
Mr. Dickenson had no authority to make this statement or  
to bind this corporation." and the statement that is attached  
I will have to find that afterwards.

The seventh interrogatory is this: "What was the con-  
sideration given or promised to Virginia Table Company,  
Incorporated, and/or to its stockholders by Virginia-Lincoln  
Furniture Corporation for the transfer of the assets of the  
former to the latter?" and the answer to that is: "In answer  
to interrogatory seven the consideration given  
page 383 } or promised to the Virginia Table Company, In-  
corporated, by the Virginia Lincoln Furniture  
Corporation for the sale of the assets from the former to the  
latter was as follows: The Virginia Table Company had  
become indebted in a very large amount, to-wit the sum of  
\$119,525.60 to the Lincoln Furniture Manufacturing Com-  
pany, the payment of which was desired, and the Virginia  
Table Company was unable to make the same in cash at the  
time. The Virginia Table Company through its directors and  
stockholders thereupon offered to sell its assets to the Lin-  
coln Furniture Manufacturing Company in consideration of  
the cancellation of the said debt and the payment by the  
purchaser of all of the liabilities of the Virginia Table Com-  
pany as the same then appeared upon its books and were  
taken into consideration in a statement of said liabilities fur-  
nished said Lincoln Furniture Manufacturing Corporation by  
Virginia Table Company. The Lincoln Furniture Manufac-  
turing Company cancelled the said debt of the Virginia Table



Company and assumed and paid the said liabilities, in amount \$211,665.50."

The next interrogatory 8: "In the letter of page 384 } December 13, 1929, written on behalf of both of you by your attorney, J. P. Buchanan, to R. T. Wilson, Clerk of the State Corporation Commission of Virginia, he said: 'In order that the commission may thoroughly *under* the corporate changes we are making, the following is the explanation. The ownership of the two above corporations is the same and the common stock of both is held in the same proportion. They are both engaged in manufacturing furniture and have the same officers and directors. It is properly considered that there is a duplication of effort, especially when all of the business is being conducted under the same executives and with the same bookkeeping and labor force, it is therefore resolved to consolidate and it was considered by the board of directors that the simplest way would be to relinquish the charter of one corporation after it had conveyed its assets to the other. Therefore the Virginia Table Company, Incorporated, has wound up its affairs and *conveyes* its property to the Lincoln Furniture Manufacturing Company Incorporated whose name it is desired to change and whose capital stock will be page 385 } increased to take care of the additional assets.'

What official relation did said J. P. Buchanan hold to you at that time? Did said letter correctly state the facts? If not, in what respect was it erroneous? To what extent was the capital stock of Virginia-Lincoln Furniture Corporation increased to take care of the additional assets transferred to it by Virginia Table Company, Incorporated?"

The answer to that interrogatory is this:

"In answer to interrogatory eight, this Corporation had no knowledge except such knowledge as they had by its attorney of the letter of Dec. 13, 1929. In writing said letter the attorney, J. P. Buchanan, was in error in regard to the ownership of the stock of the two corporations. The stock of the Lincoln Furniture Manufacturing Company had been issued years before to many different persons living in many different parts of the country. The stock in the Virginia Table Company was owned locally. The official relation of J. P. Buchanan to the Virginia Table Company at that time was that he was employed as its attorney. The two corporations were not consolidated. The capital stock of the Lincoln Furniture Manufacturing Company (or Virginia Lincoln Furniture Corporation) before the page 386 } sale was 3,000 shares of preferred and 2,000

shares of common (par value \$100) and after the sale was 3,000 shares of preferred and 10,000 shares of common, no par."

It was admitted on the record yesterday Mr. Buchanan was secretary of the corporation.

Interrogatory No. 9: "Give the names of all of the officers, directors and stockholders of each of said two corporations at the date when the said letter of December 13, 1929, was written, with the number and amount of the shares of the capital stock of each corporation held by each stockholder."

"In answer to interrogatory nine, a list is hereto appended showing the names of the officers, directors and stockholders of the Virginia Table Company Incorporated and Lincoln Furniture Manufacturing Company Incorporated of Dec. 13, 1929."—and there is a list there:

"10. What amount of net assets were transferred by Virginia Table Company, Incorporated, to Virginia-Lincoln Furniture Corporation at the time the former ceased to do business?"

page 387 } "In answer to interrogatory ten, all of the property and assets of the Virginia Table Company Incorporated were sold to the Virginia Lincoln Furniture Corporation."

"11. Did you make a contract or contracts with any brokers, bankers, or financial institutions in the years 1928 and/or 1929 to finance the proposed merger of yourselves, or either of you, with various furniture stores, including those of the plaintiff, and if so, with what brokers, bankers, and/or financial institutions were they made, and the dates when made?"

"Interrogatory 11. In answer to interrogatory eleven, contracts were made with Haystone Securities Corporation and E. H. Rollins & Sons and Foreman National Corporation. The contract with Haystone Securities Corporation will be filed with the deposition of Clarkson Potter. We do not have copy of the Foreman National contract. We have requested a copy but are informed that the files have been mislaid as the said corporation has failed. We will endeavor to secure a copy and forward to you.

"12. Have you been paid any money on account of expenses incurred by the plaintiff in services to  
page 388 } you or on your behalf in connection with the proposed merger stated in the plaintiff's motion for judgment herein, and if so, give the amounts of all payments made to you on that account, and state when and by whom they were made."

"In answer to interrogatory twelve, there was an agreement in the contract with Foreman National Corporation that certain amounts would be returned to Virginia Table Company if the contemplated deal did not go through. These expenses related only to the taking of the second inventory, not the first. A controversy arose as to the amount to be paid which was finally settled on the basis of Foreman National Company and Caldwell & Company, its associate, paying the amount due the Auditors for making the audit of the various stores, the amount due the engineers Sanderson & Porter and one-half of the amount expended for taking inventories and paid to the Corporation Trust Company. The amount paid to the Corporation Trust Company was \$2,425.00, the total amount paid for taking inventories was \$3,617.05

representing inventories in 26 stores and fac-  
 page 389 } tories. It would be impossible to state how much, if any amount was paid on account of expenses incurred by the plaintiff on behalf of the Virginia Table Company. The amount was paid by Caldwell & Company and Foreman National Corporation on the 26th day of December and the 21st day of November, 1929, respectively."

"13. Did you receive any money from the Foreman National Bank or any of its affiliated corporations on account of the expenses stated in the next preceding interrogatory, and if so, give the amount and date of payment to you, and by whom paid?"

"In answer to interrogatory thirteen, the amount was approximately Three Hundred Seventy-Nine Dollars and Seventy-nine cents (379.79)."

"14. In the counter-affidavit filed by Virginia Table Company, Incorporated, in this cause on November 23, 1931, it admitted an indebtedness of \$3,500.00 to the plaintiff. State the items constituting this admitted indebtedness?"

"In answer to interrogatory fourteen, the items making up the amount of \$3,500.00 are represented by re-  
 page 390 } muneration for services and expense incurred in taking inventories at the request of the Virginia Table Company, Incorporated."

No. 15—I will not read that unless you want it read.

"16. Did you or either of you set up any credit to the plaintiff on your books on account of any of the expenses and/or services claimed in the plaintiff's notice of motion for judgment, and if so, what amount was so set up, and when, and file a copy of the entries showing the same?"

"In answer to interrogatory sixteen, no credit was ever set up on the books of this corporation in favor of the plain-

tiff. This corporation had no means whatever of knowing the amount claimed by the plaintiff until it received a bill from Mr. Rives Fleming, President, and this amount nor any other amount was ever set up on its books as a credit."

Upon the coming in of these answers this order was entered by the Court: "This day came the parties, by their attorneys, and on motion of the plaintiff it is ordered that the defendant do forthwith make full and satisfactory answers to the first, eighth and tenth interrogatories filed by the plaintiff herein on November 30th, 1931, it appearing to the Court that the answers heretofore filed thereto do not give the plaintiff the information to which it is entitled."

The first interrogatory was: "Did the Virginia Table Company, Incorporated, transfer all of its assets to Virginia Lincoln Furniture Corporation, and if not, what part of its assets were transferred, and when was the transfer made?" and in reply to that they say this:

"Interrogatory 1. All of the assets of the Virginia Table Company, Incorporated, were sold and conveyed to the Virginia-Lincoln Furniture Corporation."

The next is No. 8: "The change in the capital stock structure of the Virginia-Lincoln Furniture Corporation was not made to take care of any additional assets purchased from the Virginia Table Company, Incorporated. The preferred stock was not changed. It was decided to change the common stock from a par value stock to a no par value stock and this was done."

"Interrogatory No. 10: What amount of net assets were transferred by Virginia Table Company, Incorporated, to Virginia-Lincoln Furniture Corporation at the time the former ceased to do business?"

This is the amended answer to that: "We can only give an opinion as to the value of the assets transferred and sold. No appraisal was ever made thereof. These assets consisted of real and personal property, including intangible property and accounts receivable. It also included goods in process, the value of which was entirely problematical. By goods in process is meant unfinished furniture. We submit in answer to this interrogatory a balance sheet showing the book value of these assets as carried by the Virginia Table Company, Incorporated, before the sale. This may or may not be market value. So far as goods in process are concerned it is not market value. Were we to give our opinion as to the value of goods in process on the market, we would estimate their

value at about twenty-five per cent. of the book value. The accounts receivable were, of course, not worth on the market face value. No appraisal was ever made of the page 393 } assets which were bought as a whole. A description thereof is contained in the balance sheet furnished. This is the best information we can give as to that."

Now this is the balance sheet of the Virginia Table Company, Incorporated, at time of sale of assets showing amount of assets transferred and the book value as shown by Virginia Table Company, Incorporated: Cash, \$20,278.82; Notes, \$6,566.97; Accounts, \$402,802.25; Goods ready for shipment, \$79,117.60; Goods being manufactured, \$82,705.53; Materials and supplies at cost, \$171,817.53; Land, \$100,000.00; Buildings at original cost, \$328,595.30; Tenements, \$7,560.00; Machinery and equipment at cost, \$236,417.55; Furniture and Fixtures, \$18,266.57; Delivery equipment, \$1,600.00; Railroad siding (estimated value of contract), \$4,206.00; Stationery and supplies, \$2,500.00; Miscellaneous, \$8,008.07, making a total, as I add it up, of \$1,479,422.19. "No depreciation has been taken off the original cost of the above items. The Virginia Table Company, Incorporated, reserves for depreciation on property and plant the sum of \$152,- page 394 } 682.66. It carried a reserve for accounts about \$12,500.00, but the actual experience in the collection of these accounts showed some thirty thousand dollars uncollected. It also owned common stock in the Lincoln Furniture Manufacturing Company valued at \$1.00. It owned miscellaneous stocks of various companies of \$1,206.00. In order to arrive at the correct valuation or market value of the above, proper depreciation would have to be taken, the accounts aged and valued, the market value of inventories ascertained, and the value of the goods in process. This is the very best information it is possible for us to give, and while it does not represent actual or market value, it discloses all of the information which we have on the subject."

Appended to that is the financial condition on February 10th, 1931, apparently sent to Bradstreet, signed by Virginia-Lincoln Furniture Corporation, by Chas. M. Hendry, Comptroller. It shows *preferred* stock, \$166,000.00; common capital, \$1,000,000.00; surplus, \$510,809.61; liabilities, \$259,036.68; capital and surplus being \$1,676,809.61.

page 395 } CROSS EXAMINATION.

By Mr. Buchanan:

Q. Mr. Fleming, in order that we may distinctly under-

stand exactly what is claimed in this case, as I understand you, you claim the sum of \$11,000 for securing eleven options on the stores of Jones Bros., Geo. W. Kennedy, M. K. Jones, Jones-Kennedy, Cochran Furniture Co., Mason Bros., Woods-Peavy, Van Metres, Sam Burton, Bledsoe, and Bell. Is that correct?

A. Yes, sir.

Q. I understand that it is also understood, from letters that were read yesterday, that the four Jones stores were optioned with the understanding that they all had to be taken or none taken. That is correct, isn't it?

A. Well, I don't know about that. I didn't option the Jones stores.

Q. Didn't you hear the letter that was read yesterday during your testimony?

A. I remember something said about the Jones stores.

Q. The total amount that is claimed by you under that account is \$11,000?

A. Yes, sir.

Q. The next allegation made as the basis for recovery is in connection with the taking of inventories. That includes salaries and expenses of various employees of page 396 } Southern Factories & Stores Corporation, including yourself, aggregating the sum of \$17,726.80. Is that correct?

A. Yes, sir.

Q. Now the third allegation as the basis of recovery is, as I understand it, for the breach of a contract made by Mr. C. C. Lincoln with you at Marion, Virginia, on the 19th day of July, 1929, at which time he agreed, in consideration of your extending the option of Southern Factories & Stores Corporation, and of securing other options, that he would, if the merger were not effected, combine the assets of his company with your assets and others and finance later, for which you are asking a damage of—

Mr. Gordon: Are you attempting to quote the notice of motion?

Mr. Buchanan: No, sir.

Mr. Gordon: Because you haven't stated the whole of the contract set out in that fifth paragraph.

Q. (Continued)—approximately, according to the notice of motion, \$73,000.00?

A. Yes, sir.

Mr. Buchanan: The Court will understand in cross-examining the witness upon this third item that we page 397 } do not waive the objections which have heretofore been made to the admissibility of any testimony on that subject.

Q. Now in addition to the options, the inventories and the breach of the contract of the 19th of July, 1929, are there any other claims that you are making against this company?

A. No.

Q. Taking this up in reverse order, as to the claim of the breach of the contract of the 19th of July was there any agreement on the part of Mr. Lincoln to exercise this option or purchase your property at the time the first option was given?

A. Repeat that question, please.

(Question read.)

Q. In December, 1928.

A. Nothing except what was stated in the option.

Q. But, according to your contention, he did, on the 19th of July, in consideration of the extension by you, agree that he would throw in his assets if he didn't do so?

A. Yes, sir.

Q. I want to ask you if on the 19th of July Mr. Lincoln agreed to exercise the option which you had given him?

A. He didn't use those words: exercise the option. As stated a while ago, he told us—stated before that page 398 } meeting very emphatically so nobody misunderstood in such an impressive way we all trusted him about it that he would, if he couldn't finance it through the bankers, throw in his assets on the same basis as the stores and finance individually.

Q. Then, as I understand you, Mr. Lincoln did not agree in any event to exercise the option, but did agree that if the options weren't exercised under the plan with the bankers that he in that event would merge his assets with yours and the other stores and finance later or individually?

A. He said if he didn't finance through the banks in New York or other places that he would throw in his assets on the same basis as ours and form the merger individually.

Q. Did he state what stores would be included in that second set-up?

A. No, sir, but I think it was understood by everybody anybody who wanted to come in on that basis would come.

Mr. Bazile: Now, if Your Honor please, we move to strike out that last statement of his as not being responsive.

The Court: His understanding?

Mr. Bazile: Yes, sir.

The Court: You may disregard that, gentlemen of the jury.

page 399 } By Mr. Buchanan:

Q. Was there any agreement as to the price—definite agreement on that day as to the price at which the various stores would put their assets in?

A. No, but he said on the same basis as his, which was equivalent to a price. We were willing to go in on any basis he went in.

Q. Did he state upon what basis he would come in?

A. On the same basis as we did, yes.

Q. Was there any way at that time fixed of measuring how either of you would go in?

A. No; but nobody was concerned about that; we didn't care; we were willing to go in on the same basis he did, whatever that might be.

Q. Was there any time fixed within which this contract would be completed?

A. No, sir.

Q. Were any of the terms discussed?

A. No, nothing except that on the same basis as his.

Q. Was the question of the formation of any corporation to take care of this additional merger?

A. The question arose as to—not exactly how definitely, but it was understood and agreed that we should form some sort of corporation and finance later.

Q. Was that corporation to issue common  
page 400 } stock, preferred stock, debentures or what class  
of securities?

A. That wasn't discussed and we weren't interested in that at all.

Q. Then you don't know whether you would have received cash debentures, stock, bonds or securities for your assets?

A. No, sir, and we didn't care so long as the others accepted the same thing.

Q. In other words, at that time you were willing to agree to any plan that Mr. Lincoln might in the future present to you at such time as he might present it?

A. On the basis he promised, yes, sir.

Q. Mr. Fleming, the first option was in writing, was it not?

A. We had a tentative agreement which was drawn up and then later a regular written option was signed.



Q. The option of July 20th is in writing, is it not?

A. The extension was in writing, yes.

Q. What was the approximate value of the assets that Southern Factories & Stores Corporation were transferring under that option of July 20th?

A. I don't recall definitely, but our statement will show.

Q. I mean do you remember approximately? I am not trying to get it exact; just asking approximately.

A. Between \$400,000 and \$650,000.

Q. And you say that you made on behalf of your stockholders an agreement with Mr. Lincoln to dis-  
page 401 } pose of those assets or include them in the mer-  
ger verbally without requiring it to be put in  
writing?

A. Yes.

Q. You were willing to do that on account of your confidence in him? Is that correct?

A. Yes, sir.

Q. Was there any other collateral agreement to that contract of July 20th?

A. Well, one thing was discussed what would be done with our subsidiary company, Southern Factories & Stores Corporation—I beg your pardon; Carolina Parlor Furniture Company. That is a subsidiary of ours which is a little furniture manufacturing company in Statesville, N. C.; we own all the common stock. Provision was made for the taking over of that along with us.

Q. Mr. Lincoln agreed to do that, did he not?

A. He said he would do that personally, if necessary.

Q. And you required it, didn't you?

A. It was understood, yes.

Q. And you required it to be put in writing, didn't you?

A. No, not in that.

Q. You didn't?

A. We required writing as to the option, but nothing was said in writing about the individual merger.

Q. I am asking you if you didn't require the  
page 402 } agreement as to the Carolina Parlor Furniture  
Company to be put in writing?

A. As to the option, yes.

Q. Why did you have that put in writing and not the other?

A. Because one would be bound by the writing and going by the writing of the different contracts and options which amounted to leaving out a very important part of our business which he explained couldn't be put in because of the

nature of things, but he said he personally would and did give us later a separate contract on the Carolina Parlor Furniture Company.

Q. That contract was required by your counsel to be in writing?

A. Yes, because of the very peculiar situation and it couldn't be left out unless we had that contract.

Q. Why didn't you take Mr. Lincoln's word for the Carolina Parlor Furniture situation?

A. Because it was a continuance of another contract made several months before.

Note: At this point the Court recessed until 3:00 o'clock P. M., at which time the taking of testimony was resumed.

By a Juror:

Q. This oral contract you are trying to prove that was made I haven't heard any testimony so far to the effect that you have called on the Lincoln people to complete the page 403 } oral contract. Was that done?

A. You mean the exercise of the option or the making of the merger?

Q. I am eliminating the merger. As I understand it, you are trying to prove an oral contract that in event the options weren't taken up that your company would in some shape or form be merged with the Marion people and I haven't heard any testimony to the effect that you have tried to get them to merge with you.

A. You mean we haven't asked them to merge with us or insist that they merge with us?

Q. Yes.

A. Well, we have been working along with them. Perhaps that question hasn't been asked me, but we have been working along with them and we had been looking to the bankers for the financing of it. Now as to the account—you mean the account we have against them?

Q. No, I understand the accounts have been rendered, but what bothers me if this oral contract should be proved in the minds of the jury has there been any breach of the contract on which damages can be assessed?

A. Yes; we have worked with them ever since then, with them and right along with Mr. Lincoln, as late as the last part of 1929 trying to get the merger under way.

Q. Under the option or under this oral contract? page 404 }

A. Up to about October or November under the

options and about a month later on individuals. We have been pushing just as hard as we could, doing anything we could to urge our principals, Virginia Table Company, to go on with it and we have rendered them every assistance and begged them to go on with it, but we couldn't do anything because they were handling the bank financing.

Mr. Gordon: I think what the juror wants to know if they declined.

By Mr. Gordon:

Q. Has the Virginia Table Company declined to carry out the agreement which was made in July, 1929?

Mr. Bazile: That isn't what he asked him. He asked him if he ever demanded—

The Court: I think we can ask Mr. Ricks: Did you get the information you desired? Did he answer?

The Juror: I understood him to say after the options were temporarily impossible to be put through that he then asked the defendants to get together on the merger of his company and theirs and I understood him to say yes, which satisfied me.

By Mr. Buchanan:

Q. Along that line, Mr. Fleming, isn't it a fact that since the failure of the merger with the last bankers page 405 { you have neither written a letter, made a visit, addressed a communication or had a conference in which you requested the Virginia Table Company at any time to merge their assets with you?

A. We were working along with Mr. Lincoln, trying to help him out before he threw it down. We had nothing to do with it. We were offering every assistance and begging him to go along, but he dropped the matter because he didn't want to go in on the merger alone.

Q. I am asking you if after the last banker's contract failed and if at the time you sent in your bill if you had made any effort whatsoever or asked Mr. Lincoln to merge your business with his or in any conference had any communication on the subject?

A. No, sir, because we knew it was impossible; he stated so. He told us he had done everything he could and he wouldn't go on the individual basis at that time. I went to the State-Planters Bank with him and he was offered a good line and he went to Lynchburg and he was offered a

good line and he could have done it on an individual basis, but he considered this wasn't the time to go in on an individual basis. We couldn't do anything about it.

Q. When was that?

A. The last of 1929 or first of 1930.

page 406 } Mr. Gordon: As I understand the law and I am sure my friend over here does, that the bringing of a suit of this kind is a sufficient request.

The Court: That is a sufficient request as a matter of law to make out the case, but the juror wanted to know what was done. I think they are entitled to have all the information concerning it.

Mr. Bazile: Your suit was brought a year or eighteen months after the time for the alleged going together and I think the jury ought to know that.

Mr. Gordon: No time was alleged. He just said he wouldn't merge.

Mr. Bazile: All the negotiations had ended. When did you bring your suit?

Mr. Gordon: September, 1931.

The Court: What is the object of this colloquy? I think unless something is to be developed respecting that testimony we had better get along.

By Mr. Buchanan:

Q. Mr. Fleming, we were discussing at the time of the adjournment a written collateral agreement made in July, 1929, in connection with the Carolina Parlor Furniture Company, a subsidiary of Southern Factories & Stores Corporation.

page 407 } Southern Factories & Stores Corporation owns all of the capital stock of Carolina Parlor Furniture Company?

A. No, sir; only the common stock.

Q. It owns a controlling interest in it?

A. Yes, sir.

Q. And, as I understood you, the agreement as to the Carolina Parlor Furniture Company was on the same basis as the agreement with Southern Factories & Stores Corporation; that is, whether the merger was completed or not that Carolina Parlor Furniture Company would also be taken over?

A. Yes, sir; to be taken along with us.

Q. In order to get it absolutely clear: there was a verbal agreement with Mr. Lincoln at that time that whether the option was exercised or not that Carolina Parlor Furniture

would be taken over with Southern Factories & Stores Corporation? That is correct?

A. Yes, sir.

Q. I want to ask you this: if that is a fact and if Carolina Parlor Furniture was to be taken over whether the option was exercised or not why you signed this document in regard to Carolina Parlor Furniture which reads in part as follows: "Third—This obligation to purchase and to deliver Carolina Parlor Furniture Company being absolutely binding upon both parties; the only contingency page 408 } there being that the Virginia Table Company does not exercise its option to purchase Southern Factories & Stores Corporation and the above merger be not completed or effected"?

A. Yes, sir, we signed this as an extension of the agreement about Carolina Parlor Furniture Company. That was a peculiar situation. We owned all the common stock of that and some provision had to be made of that outside of our previous option or extension.

Q. I don't believe I asked you that.

A. I just want to explain why that was signed.

Q. I asked you why you signed an agreement that this obligation should not be binding if the option was not exercised when you had an agreement it was to be binding whether it was exercised or not, according to your statement? Why did you do that?

A. I don't know any special reason for it. It was just a continuation of our previous agreement on this Carolina Parlor Furniture Company. I don't know that I considered this particular of it very thoroughly because we knew Carolina Parlor Furniture Company could be taken care of some way and Mr. Lincoln told us time after time that he would previous to that and we had his assurance Carolina Parlor Furniture Company would be taken care of in any page 409 } event. It was an insignificant thing, outside of our regular business, a small subsidiary company of which we didn't own the assets or liabilities, but of which we owned all the common stock.

Q. Your counsel, Mr. Murphy, was fully aware of this verbal agreement and understanding, wasn't he?

A. Yes, he was, I think.

Q. Wasn't that prepared by Mr. Murphy and signed in the office of the Virginia Table Company with your signature on it?

A. I don't know whether Mr. Murphy prepared it or you did. I couldn't say offhand whether he prepared it or you.

Q. You didn't sign the option on the 19th of July?

A. No, sir; signed it a day or two later.

Mr. Gordon: I will show my friend who prepared it.

Mr. Buchanan: That isn't it. That is the copy Mr. Murphy sent me. That is a different paper.

Mr. Gordon: Identical copies, with your signature on it. This one was never signed by you.

Mr. Buchanan: No, that was signed by Mr. Fleming. That is our copy.

Q. Mr. Fleming, I hand you another agreement dated the 20th of July, which was signed by you, in regard to the Carolina Parlor Furniture Company, which reads as follows: "Whereas, the Southern Factories & Stores Corporation, a Virginia corporation, has executed an agreement page 410 } dated the 20th day of July, 1929, whereby upon the terms and conditions therein stated it has granted the Virginia Table Company, Incorporated, the right to purchase from it the property therein described, a copy of said option agreement being attached hereto and made a part hereof, and whereas the Southern Factories & Stores Corporation are the owners of the capital stock of the Carolina Parlor Furniture Company, but it was not contemplated that said stock should be included; now, therefore, this agreement made this 20th day of July, 1929,—

Mr. Gordon: What are you reading from?

Mr. Buchanan: A paper signed by Rives Fleming, President of Southern Factories & Stores Corporation.

Mr. Gordon: That is not the contract. That is not signed by your company. This is the one signed by both parties. You can't undertake to put in a one-sided contract, when we have the signed contract with both parties.

Mr. Buchanan: It is signed by Mr. Fleming and attested by the seal of the corporation on it.

Mr. Gordon: Here is the contract signed by both parties.

page 411 } Mr. Buchanan: I have no objection to this.  
Mr. Gordon: Read that because that is signed by both.

By Mr. Buchanan:

Q. Who made the changes in that contract? Whose handwriting is that?

A. I think Mr. Murphy made it in your presence. He can tell you about that.

Q. This is his handwriting?

A. Yes. I think by your agreement they were made because there was some contention about that contract when it was signed.

Q. "Whereas the Virginia Table Company now has an option to acquire either by merger, purchase or consolidation with the Southern Factories & Stores Corporation six of its various stores located in North and South Carolina; and where the Southern Factories & Stores Corporation own all of the capital stock of the Carolina Parlor Furniture Company of Statesville, North Carolina; and whereas in the above mentioned consolidation, merger or purchase it is not found feasible to take over the stock of the said Carolina Parlor Furniture Company; now therefore in consideration of the premises and the further consideration of \$1.00 in hand paid the receipt of which is acknowledged and other good and valuable consideration, the Virginia  
page 412 } Table Company agrees:

First: That upon the settlement of the consolidation and or merger and or purchase under the terms of the option above mentioned that it will within sixty days from the date of such settlement thereof pay over to the Southern Factories & Stores Corporation shares of stock in the merger above mentioned an amount equivalent to Sixty-five Thousand (\$65,000) Dollars, said stock to be based upon the same value as is paid the Southern Factories & Stores Corporation and shall be paid in the same denominations; that is to say, 50% common non-par and 50% on the same class of preferred as is delivered to said Southern Factories & Stores Corporation. Second: Upon the payment of the stock above mentioned in the amounts therein denominated Southern Factories & Stores Corporation covenants and agrees that it will deliver to Virginia Table Company its successors or assigns the \$65,000. stock in Carolina Parlor Furniture Company. Third: This obligation to purchase and to deliver being absolutely binding upon both parties; the only contingency being that the Virginia Table Company does not exercise its option to purchase Southern Factories & Stores Corporation and the above merger be not completed or effected." Now I understand you to say that although you signed that at that time you had a binding agreement with the Virginia

Table Company in any event to merge with South-  
page 413 } ern Factories & Stores?

A. You say we had a binding agreement?

Q. Yes; verbal agreement.

A. Yes.

Q. Then why did you say in this contract that it was not to be binding if the Virginia Table Company does not exercise its option?

A. I could only tell you my impression because I can't remember exactly that far back, but I know we looked upon that as a secondary consideration. We trusted Mr. Lincoln to do what was fair in connection with that small interest we had in the company. We had lots of papers to draw, hurrying as fast as we could. We might not have covered every point in there. We felt sure Mr. Lincoln would do what was right by this Carolina Parlor Furniture Company.

Mr. Buchanan: I offer this contract now in evidence.

Note: Filed and marked Exhibit R. F. #71, which is as follows:

page 414 } STATE OF VIRGINIA, COUNTY OF SMYTH  
VIRGINIA TABLE COMPANY INCORPORATED  
AND  
SOUTHERN FACTORIES AND STORES CORPORATION.

#### AGREEMENT:

This agreement entered into this the 20th day of July 1929 by and between the above mentioned parties.

#### WITNESSETH

THAT WHEREAS the Virginia Table Company now has an option to acquire either by merger, purchase or consolidation with the Southern Factories & Stores Corporation six of its various stores located in North and South Carolina; and

WHEREAS the Southern Factories & Stores Corporation own all of the capital stock of the Carolina Parlor Furniture Company of Statesville, North Carolina; and

NOW THEREFORE in consideration of the premises and the further consideration of \$1.00 in hand paid the receipt of which is acknowledged and other good and valuable consideration, the Virginia Table Company agrees;



FIRST: That upon the settlement of the consolidation, and/or merger and/or purchase under the terms of the option above mentioned that it will within sixty days from the date of such settlement thereof pay over to the page 415 } Southern Factories & Stores Corporation Shares of stock in the merger above mentioned an amount equivalent to Sixty-five Thousand (\$65,000.) Dollars; said stock to be based upon the same value as is paid the Southern Factories & Stores Corporation and shall be paid in the same denominations; that is to say 50% common non-par and 50% on the same class of preferred as is delivered to said Southern Factories & Stores Corporation.

Second: Upon the payment of the stock above mentioned in the amounts therein denominated Southern Factories & Stores Corporation covenants and agrees that it will deliver to Virginia Table Company its Successors or assigns the \$65,000. stock in Carolina Parlor Furniture Company.

Third: This obligation to purchase and to deliver being absolutely binding upon both parties; the only contingency there being that the Virginia Table Company does not exercise its option to purchase Southern Factories & Stores Corporation and the above merger be not completed or effected.

Fourth: This agreement is based upon the audit made of Carolina Parlor Furniture Company as of date January 31, 1929, and it is further covenanted and agreed that the Carolina Parlor Furniture Company has not since that date and will not until this agreement is carried into effect issue any bonded indebtedness or incurred any indebtedness or carry on any transactions except in the ordinary page 416 } and regular course of business, nor has it or will it until this agreement is carried into effect become contingently liable by reason of contracts of endorsement guaranty or otherwise than in the usual and ordinary course of business.

Fifth: It is further understood and agreed that the transfer of this stock shall be upon the same terms and conditions and with the same warranties and representations as are covered in an option of Southern Factories & Stores Corporation to Virginia Table Company dated July 20, 1929.

VIRGINIA TABLE COMPANY

By (signed) J. P. BUCHANAN,  
Attorney in Fact.

SOUTHERN FACTORIES & STORES CORPORATION

By (signed) RIVES FLEMING, President.

page 417 } Q. You had general counsel at that time—Mr. Murphy?

A. Yes.

Q. He had absolute knowledge of all the facts and circumstances which you did, didn't he?

A. Supposed to have.

Q. All of the papers and options and written agreements that were drawn up in connection with this entire transaction were most carefully scrutinized by him as an attorney and changes made according to his understanding of the agreements, the final drafts prepared and then signed?

Mr. Gordon: We object to that. Mr. Murphy is here to testify for himself as to whether he examined those things. How can Mr. Fleming say?

The Court: If Mr. Fleming knows, he can testify.

A. You mean all these with your company?

Q. Yes.

A. As far as I know Mr. Murphy saw all of these we did sign.

Q. That paper right there was examined by him—the last exhibit was examined by him and alterations made in his handwriting? That is correct?

A. I don't know that. It looks like Mr. Murphy's handwriting. He can tell you that.

Q. And yet you still say that a valid and binding agreement to purchase \$400,000 worth of property was entered into verbally without any writing and with the full knowledge of your counsel?

A. Not necessarily to buy it, but to merge it.

Q. In other words, you were to dispose of it for a valuable consideration in some way? That is correct?

A. Yes.

Q. Now, Mr. Fleming, this agreement of the 20th of July was executed as the result of the conference on the 19th of July at Marion, I believe?

A. Yes, sir.

Q. You knew what you were signing when you signed it?

A. Yes, sir, I think so.

Q. The option contemplated the property of the Southern Factories & Stores Corporation, did it not?

A. Yes.

Q. That was the subject-matter?

A. Yes.

Q. And the verbal agreement which you have alleged also contemplated the property of the Southern Factories & Stores Corporation?

A. Yes, and others.

Q. I want to quote you from this contract this clause, which was signed by you: "It is further understood and agreed that all the covenants made in this option by the page 419 } party of the first part"—that is, Southern Factories & Stores Corporation—"are binding on the Southern Factories & Stores Corporation, their assigns and successors, and that the entire agreement in regard to the subject-matter of this contract is in writing and included herein and that there are no verbal agreements or understandings of any kind or character in addition to or in conflict with the provisions of this contract and that no agreement hereafter made as addition to or amendment of this agreement shall be valid unless incorporated in writing". How did you happen to sign that stipulation when you say you had a verbal agreement in addition thereto?

A. Because we had a verbal agreement—

Mr. Gordon: I am rather surprised that my friend should ask this witness that question after the very point was argued an hour and a half yesterday afternoon and Your Honor held that he was precluded from showing the verbal contract there by virtue of that very provision of that contract.

The Court: Is that the provision in the option?

Mr. Buchanan: Yes.

The Court: I ruled on that.

Mr. Bazile: We have a right to test the veracity of this witness and the accuracy of his memory.

The Court: By referring to irrelevant testimony page 420 } money?

Mr. Bazile: We are cross examining him as to what he signed and why he signed it. Your Honor ruled that his verbal testimony that he had a separate contract was admissible, but by that we don't admit that he had such a contract; in fact, we deny it, and we have a right to show by cross examination that he is mistaken when he says that he had such a contract and the object of this cross examination is to show that Mr. Fleming is mistaken when he says he had such a contract. It certainly is not probable he would sign such a stipulation of this kind if, in fact, he had a verbal contract, and we have a right to test his accuracy for the benefit of the jury.

The Court: Objection overruled.

A. On the 19th we had an agreement with Mr. Lincoln which provided for our signing an option on condition he would merge the stores. He had agreed on the 19th he would do this and this is simply a repetition or extension of a previous condition agreed to because he promised to merge individually if he didn't exercise the options.

Q. I will also quote from this contract: "The party of the first part"—Southern Factories & Stores Corporation—"for and in consideration of the sum of \$1.00 paid, page 421 } cash in hand, by the party of the second part, the receipt whereof before the execution and delivery of these presents is hereby acknowledged, hereby jointly and severally grant, and give unto the party of the second part, its successors and assigns, the sole and exclusive right and option for the period up to and including October 18, 1929, to purchase of and from them the following described property." If the consideration was what you stated, why wasn't that put in there, instead of a dollar?

A. Because you usually put one dollar in there, I understand, and the consideration was discussed afterwards.

Q. Do you mean to say it is your understanding that the consideration of a contract of this kind, obligating a party to buy \$400,000 worth of property, it is usual to omit it and not place it in the contract?

A. The contract goes on here to show the conditions under which this property will be bought. One dollar is just a matter of form to start the contract.

Q. Can you give any reason why when all of these other papers, voluminous as they are, and all these conditions were placed in writing down to the very last stipulation, that the most important one of them all was not in any way reduced to writing?

A. Yes, because Mr. Lincoln, in whom we had page 422 } implicit confidence, told us on his word of honor as a man he would go through with it, and we trusted him.

Q. Then why were these other supplemental contracts reduced to writing? Why didn't you trust him about those?

A. Simply because they were extensions and repetitions.

Q. You were trusting him in a new matter, but wouldn't trust him on the extensions?

A. Yes, sir, and the further we went the less we felt like trusting him.

Q. Mr. Fleming, on the 12th day of October, several months after July, you executed another agreement in writing as follows: "This agreement, made this the 12th day of Oc-

tober, 1929, between the Southern Factories & Stores Corporation of the first part and Virginia Table Company, Incorporated, of the second part. Witnesseth, whereas the first party has heretofore granted to the second party an option to purchase the property therein named upon the terms therein stated, reference being made to said option for a full and complete description of its terms; and whereas it is desired to extend the term wherein the option may be executed until December 1, 1929, until 12:00 o'clock noon on that day; now therefore in consideration of the sum of \$1.00 in hand paid and acknowledged, the first party hereby grants unto the second party the exclusive right and option to purchase the property in said option named upon the terms therein stated (except as herein altered) up to and including December 1, 1929, and specifically covenants and agrees that if the second party shall on its part do and perform all matters and things in said option to be by it done and performed that the first party will on its part execute the bill of sale named in said option and also carry into effect all of the covenants and promises in said option to be by the first party done and performed." Now if you had a valid and binding agreement verbally, as you say, to take over your property, why would you execute a paper of that character?

A. That is simply an extension of the option that had been in effect ever since October, 1928; extended four or five times.

Q. Why extend the option when you had a valid agreement to buy or to merge?

A. I don't quite understand what you are getting at.

Q. If you had a valid agreement to take over your property, what is the use of extending an option?

A. Because you requested it and we gave you an option.

Q. Do you think we would request it if we had any idea it was any valid contract to purchase?

A. Carrying out your contract, whether you would carry it on as an individual merger or whether you would exercise the options.

Q. You also say in here that all of the remaining terms and conditions of the said option and all of its terms except as herein specifically altered or amended remain unchanged and binding upon both parties until twelve o'clock noon December 31st, 1929?

A. Yes.

Q. And one of those conditions was that there was no verbal agreement before or after or in addition to the option contract. Did you have that in contemplation when you signed this?

A. I have to repeat myself. Mr. Lincoln promised to take these different units and form an individual merger if he didn't exercise these options, which we extended from time to time. This is but an extension.

Q. Mr. Fleming, I think a member of the jury asked you this morning in regard to profits and you replied that the profits would belong to the Virginia Table Company—

A. Virginia Table Company organization.

Q. Aren't you mistaken about that?

A. No, sir.

Q. Doesn't the option provide that your property was to be taken over as of January 31st, 1929?

A. That is right.

page 425 } Q. And that thereafter that there would be an audit as to transactions occurring thereafter and that all the money would be retained by the Southern Factories & Stores organization?

A. No, sir. From January 31st it went into the mutually merged companies—Lincoln Chain Stores Corporation. Up to the 31st of January it was our profit or loss, I was advised on many occasions, and our inventory was taken as of January 31st.

Q. You never turned those profits over to anybody?

A. What profits?

Q. I mean the Virginia Table Company didn't receive any profits?

A. I don't know anything about that.

Q. Oh, yes, you do. You know the Southern Factories & Stores never turned them over.

A. I don't know offhand what profits you are talking about. I know nothing was turned over to anybody.

Q. What I am trying to get at is this—I am not sure you know: if this option was exercised you would be paid for your property as of the 31st day of January?

A. Yes, sir.

Q. That is correct?

A. Yes.

Q. Now as to transactions after that time was  
page 426 } the money in the bank the property belonging to the new organization?

A. Yes, sir, after January 31st it was to be the merged organization. We kept our cash separate so that could be done. After January 31st we felt we were working for the new organization.

Q. I am just asking that question because I know in several of your contracts that no cash was to be turned over in

any way, but I have forgotten whether it applied to your company or not. In case the option had been exercised those profits—what I am trying to get at—those profits wouldn't have gone to Virginia Table Company, would they?

A. They would have gone to the new organization.

Q. Of which you are a party?

A. Yes, sir.

Q. It would have redounded to your benefit as well as the benefit of the others?

A. Yes, in the same way. We were a small unit in the new organization.

Q. Now who was present at this meeting in Marion on July 19th?

A. Sixteen or eighteen people. I can recall some of them.

Q. Would you have any objection to stating who you recall there?

A. Mr. Murphy, Mr. Kimbrell and I, re-  
page 427 } senting Southern Factories & Stores Corporation,  
and I think Mr. Tom Gilliam; Dr. Max Barnett,  
from New Orleans; Mr. Miller, from Wilmington; Phelps &  
Armstead, from Roanoke; Mr. Wood or Peavy, of Wood-  
Peavy Company, and several others—Mr. McGehee, from  
Lynchburg, was another, I think.

Q. Did all of these gentlemen who were present at that time hear this verbal contract made by Mr. Lincoln? I believe you stated it was made to all of them.

A. I wouldn't say all. All in the room, I suppose.

Q. It was a general statement made to all of them as a consideration for the renewal of their option?

A. Yes, sir.

Q. It applied to each one equally?

A. Yes, sir.

Q. As well as to the others?

A. Yes, sir.

Q. There had been no retraction on the part of Mr. Lincoln in October of this verbal agreement, had there?

A. Not so far as I know.

Q. And in October you still had with Mr. C. C. Lincoln, Jr., a binding agreement that if the merger were not consummated that he would merge with your company and a few stores and finance later?

A. Yes, sir.

Q. You are certain about that?

page 428 } A. I don't know the definite date, but we kept  
a live option with him all the time.

Q. I mean in October that contract was alive?

A. 1929 or 1930?

Q. 1929.

A. Yes.

Q. And he and you both knew it?

A. I think it was still in force then.

Q. It hadn't been terminated then?

A. I don't know what time it expired. I don't know the definite date of expiration.

Q. You said there was no date of expiration.

A. The thing was extended for so many times.

Q. I am talking about the verbal agreement.

A. Oh, yes, that was in existence then.

Q. In October to take over your stores or merge your stores, and Mr. Lincoln knew about it?

A. Yes, sir.

Q. This letter reads: Mr. C. C. Lincoln, Jr.—October 28th: "There is one thought that forcibly impresses me that may not have occurred to you, which convinces me that it might be best to consolidate individually such units as are agreeable, and underwrite later." Now if you had a binding contract with Mr. Lincoln to consolidate individually and underwrite later why did you write that letter page 429 } telling it might not have occurred to him to do that?

A. We were writing him to go on and finance individually. We were in favor of this in preference to a big merger and we told Mr. Lincoln so all the while. Instead of going into a large merger I had suggested that soon after we started, that we ought to start with twelve or eighteen stores and go on as best we can, that with twelve or eighteen stores it wasn't necessary to finance in New York. I have suggested that right along with Mr. Lincoln. I simply reminded him of this while he was negotiating with the banks.

Q. Hadn't he already agreed to do that with you?

A. Yes, sir, to go on with that.

Q. If he had agreed to do that with you, why did you say that might not have occurred to him?

A. He agreed to do that, but he was still working on the bank financing and I wrote him and said rather than that to go on with the individual financing we had discussed.

Q. I am not asking you that. If you had this agreement and he knew it why would you say in this letter: "There is one thought that forcibly impresses me that may not have occurred to you"?

A. That is, the advantage of this. I was trying to impress



on him for sometime the advantage of having an individual merger instead of a big merger, but he never would see it.

Q. Is that your signature?

A. Yes, sir.

Mr. Buchanan: I offer that in evidence.

Note: Filed and marked Exhibit R. F. #72, which is as follows:

October 28, 1929.

Mr. C. C. Lincoln, Jr.,  
Marion, Va.

Dear C. C.:

How are you getting on in New York? When you have a minute to spare, please advise me of developments.

There is one thought that forcibly impresses me that may not have occurred to you, which convinces me that it might be best to consolidate individually such units as are agreeable, and underwrite later; that is some stores might consolidate individually with the prospects of a later underwriting whereas if the underwriting has been abandoned they might not consider it.

With kindest regards, I am

Yours very truly,

(signed) RIVES FLEMING, Ores.  
Cameron Stove Company.

page 431 } By Mr. Buchanan:

Q. Mr. Fleming, there were a number of letters introduced, but you didn't introduce all the correspondence, did you?

A. Yes, I think so.

Q. This letter is in evidence, which is the reply of Mr. Lincoln: "Dear Rives: Answering your letter of October 28 I can assure you that we are not asleep in working on this proposition. It is needless for me to say that due to the recent collapse of the security market that we will practically have to abandon any idea of doing public financing at this time. We are working on a proposition to get this done by private financing or in other words in effecting a merger without underwriting. I hope to have something interesting to report on this within the next week or ten days and you may rest assured that we will pass this information on to

you. Yours very truly, C. C. Lincoln, Jr." This letter was in reply to the letter we have just read. Can you give any reason why you didn't give both letters to Mr. Gordon?

A. I don't think either one has got any bearing on it. I got out the letters I thought important and gave to him.

Mr. Gordon: What did you ask him?

Mr. Buchanan: Why didn't he give that letter to you.

The Witness: I got the young man in the office page 432 } to go through the files, which are very voluminous.

I expect you will find other letters over there about things having no bearing on this case and I don't think this has any bearing on it.

Mr. Gordon: I think it has a lot of bearing.

The Witness: Well, I didn't. It was no intention to leave it out.

Mr. Gordon: I hope you won't express that opinion for me. I think it has a lot of bearing.

By Mr. Buchanan:

Q. Why were you suggesting to Mr. Lincoln something that he had already agreed to do?

A. Simply trying to impress on him the advantage of that kind of merger instead of the way he was working on this.

Q. You were trying to remind him of his obligation to you?

A. Trying to impress on him the advantage of going to work and merge individually instead of through the banks.

Q. Wasn't that what he promised to do?

A. Yes, sir, but he was still working on the banks.

Q. Why did you say: "It may not have occurred to you to merge individually"?

A. No.

Q. Yes, you did: "There is one thought that forcibly impresses me that may not have occurred to you, page 433 } which convinces me that it might be best to consolidate individually such units as are agreeable, and underwrite later": which is what you say he verbally agreed to do in July.

A. Yes.

Q. Now why did you say to him it may not have occurred to him in October?

A. I don't know why I used those words exactly. I know I was simply trying to urge Mr. Lincoln to go on with individual financing, as I have from the very time he missed his first bank agreement. After that we have urged all the time individual financing.

Q. Mr. Fleming, you say your company in the latter part of 1929 and in 1930 was not as profitable as it might have been and expenses were a little greater. Is that correct?

A. Certainly not so profitable.

Q. You also stated this morning that that damage was due to the failure of Mr. Lincoln to comply with his contract. Is that correct?

A. Yes, sir.

Q. Now do you think there were any other conditions in the country in the latter part of 1929 and 1930 that might have caused the business to be a little less profitable than it had been before that time?

page 434 } A. I wouldn't say every loss we had was due to this transaction, but I know of many that did cause loss.

Q. Were there any other matters that caused you a loss; any other conditions in the country generally to give you a less profitable business during that period?

A. I didn't have anything to do with the operation of the stores and I know very little of the operations of the stores. I wouldn't attempt to tell you why they lost and about what they lost.

Q. You are president of the company?

A. Yes, sir; not active, though.

Q. Do you think the industrial conditions of the country had anything in the world to do with the profits in the business?

A. You will have to ask some furniture man who knows better what the furniture business was doing in that year. I think we have men to tell you that.

Q. You don't know whether it was affected or not?

A. No, sir.

Mr. Gordon: Your own clients were doing a booming business in 1929.

Mr. Buchanan: It boomed until October.

Q. Your concern was not an established concern at the time this option was taken, was it?

A. Established about a six or eight months.

page 435 } Q. You had formed a merger yourselves, I believe, of certain stores at that time?

A. Yes.

Q. You hoped it would be a success?

A. It was a success; very successful.

Q. You could tell in eight months time?

A. Yes.

Q. Without any difficulty?

A. Our profits showed very large.

Q. Very large during that period?

A. Yes.

Q. With what company did you have a binding contract to underwrite your preferred stock?

A. A firm in Atlanta. I didn't handle it. Mr. Murphy and Mr. Kimbrell can tell you about that.

Q. Have you a contract here?

A. No, sir. We made an agreement with them. Mr. Murphy and Mr. Kimbrell handled it. I had nothing to do with it.

Q. Do you know whether that agreement was binding or not?

A. I imagine so, but they can tell you better than I can.

Q. You don't know yourself whether—

A. I said we had an agreement.

Q. Do you know that from your own knowledge or hearsay?

A. From talking with our attorney and our manager.

page 436 } Mr. Buchanan: I think that ought to be stricken out.

Mr. Gordon: He is the president of the corporation.

The Court: If he doesn't know that of his own knowledge it is hearsay.

Mr. Gordon: I reckon that is correct, although I should think that information that comes to the president of the corporation through the other officers and members of the organization wouldn't come strictly within the hearsay rule.

The Court: The rule is that data and memoranda kept in the usual course of business and acted on by the corporation is admissible.

Mr. Gordon: I don't object. Let it go out because we will prove it by these other gentlemen anyhow.

By Mr. Buchanan:

Q. Are there any other matters you have testified to on information here or have the other matters been of your own knowledge?

A. I beg your pardon?

Q. Have you testified to any other matters here on information or is everything you have stated of your own knowledge?

A. You mean hearsay evidence?

Q. Yes.

A. Why? I think I tried to state it in the beginning—

page 437 } Mr. Bazile: Do I understand Your Honor to  
rule his statement out?

The Court: It is withdrawn. I don't have to rule on it.

By Mr. Buchanan:

Q. You are complaining, as I understand, of Mr. Lincoln because he asked you to sell more goods and make more profits; is that correct?

A. Well, we didn't complain. We said he requested us to do that which resulted in a loss to us—rather, an extended position for us.

Q. In other words, you lost because you sold more goods than you should have sold?

A. I didn't say lost; I said put us in an extended position; increased our liabilities to the point where our credit was impaired.

Q. Because you sold more goods and made more profits than you ought to have made?

A. Bought more goods and sold more goods than we should have bought and sold.

Q. You made a profit on all you sold, didn't you?

A. Yes, supposed to have made a profit.

Q. And you lost money because you made more profits?

A. I didn't say lost more money.

Q. Did you make money because you made more profit?

A. Certainly, we did.

page 438 } Q. Have you given Mr. Lincoln credit for that?

A. It doesn't do us any good if we get in a position where we can't pay our bills.

Mr. Gordon: I will produce that statement which you requested.

Mr. Buchanan: I am trying to find out if he was damaged because he sold more goods.

The Witness: If you look around the country you will see thousands of them right now because they bought so much and couldn't meet their bills.

Q. You mean because they haven't collected?

A. Certainly; got it on the books and can't pay their debts. It doesn't matter how much profit you have got on your books if you can't pay your bills.

Q. You are not in any financial stringency?

A. We haven't been in a very easy condition. You know that.

Q. You have been like all other similar companies in this period of depression, have you not?

A. No, sir, we are probably a little worse off than some and better off than others, but right uncomfortable.

Q. Mr. Lincoln's breach of this so-called contract hasn't thrown you into bankruptcy?

A. No, sir, but if we do go I think he will be the cause of it because he has put us in an awful condition.  
page 439 } Q. You haven't had time to recover from it yet?

A. No, sir.

Q. I hand you a statement made by Southern Factories & Stores to Bradstreet, November 8th, 1930, which shows that you were in a right favorable position at that time.

Mr. Gordon: This is signed by Hoke Murray. We are going to put him on the stand.

Mr. Buchanan: I want to know whether he knows that is correct or not.

Q. Do you know whether this is correct or not?

A. No, sir, I don't; wouldn't vouch for any statement anybody made in the company except myself. I don't know about the figures.

Q. Do you mean to say you don't know anything about the financial affairs of your company?

A. I didn't say I didn't know anything about it. I said I wouldn't vouch for any figures.

Q. Except made by yourself?

A. Yes, sir.

Q. You will vouch for Mr. Murray's figures if he said it was correct?

A. He will have to vouch for his own figures. I have lots of confidence in him, but wouldn't vouch for his figures.

Q. How long has Mr. Murray worked for you?

A. Ever since we started. I think he came  
page 440 } with us when we started or very soon afterwards.

Q. You have known him intimately and well?

A. Very well.

Q. And have the highest regard for his integrity?

A. Every confidence in the world.

Q. Still you wouldn't trust his figures and trusted Mr. Lincoln on a verbal agreement to buy \$400,000 worth of property?

Mr. Gordon: I don't think that is a proper question. He is trying to compare his trust if Mr. Murray with his trust in Mr. Lincoln and I don't think that is a proper question.

The Court: The evidence was admitted because of your promising Mr. Murray was going on the stand. I admitted the testimony as far as it went because of your assurance Mr. Murray was going on the stand and allowed this witness to testify as to his general reputation, as you said he would be a witness, but to go into details and ask this witness' opinion as to how far he would believe him is improper.

Mr. Buchanan: All right, sir.

Mr. Gordon: I will say this to you gentlemen. You have requested the figures which I am now handing page 441 } you.

Mr. Buchanan: That is a profit and loss statement. It doesn't matter how much profit you have got on your statement. What we want is the financial statement. That isn't a financial statement.

Mr. Gordon: Maybe I can give you that.

By Mr. Buchanan:

Q. Do you know what your surplus is at the present time?

A. No, sir, I don't, definitely.

Q. Now, Mr. Fleming, have you written any letters to the Virginia Table Company or Mr. C. C. Lincoln suggesting a merger of interests within the last year?

A. I don't recall writing any. I don't know whether I have or not.

Q. After the deal with the bankers was finally and completely ended in December, 1929, did you write any letters offering any plan of a merger of interests to Mr. Lincoln?

A. I discussed it either in person or writing two or three times—at various times.

Q. Have you copies of those letters?

A. I don't know. If we wrote them we have copies.

Q. Will you look and see if you have those copies?

A. You mean among the records here?

Mr. Gordon: If you tell me the dates—

Mr. Buchanan: It would be in December, 1929, or January or any time after the closing of the bankers deal—  
page 442 } ings; any time after January 1st.

Mr. Gordon: I don't think we have got any such.

By Mr. Buchanan:

Q. Mr. Fleming, going into the question of inventories, did you send any bill or did your company send any bill to the Virginia Table Company before February, 1930?

A. I don't know the definite date. We sent it when it was suggested that one account be put against the other or applied against the other.

Q. I will repeat it this way: Did you send in any bill for the payment for services in taking inventories prior to the date Mr. Lincoln wrote you in connection with your bill?

A. I don't think so. I don't know anything about that. I wouldn't attempt to answer it.

Q. Is it not a fact, going back to this other matter, that the letter of October 31st, 1929, in reply to your letter in which you said that you hadn't previously called it to his attention, signed by C. C. Lincoln, Jr., isn't that letter the last letter you received from Mr. Lincoln before he wrote you in regard to the bill?

A. Without looking over the correspondence I can't remember all these things in my mind. What was the question?

Q. Isn't that the last letter you received before the bill was forwarded?

page 443 } A. I couldn't answer that because I don't know.

Q. On December 19th Mr. Lincoln wrote you, requesting settlement of the balance of your account. You received that letter, did you not?

A. I don't recall it, but I suppose we did. I think it is in the records there. If he did, we have got it in our records.

Q. And you sent Mr. Lincoln a statement of the expense of taking inventories with the amount of time consumed by each man, dated February 19th, 1930?

A. Yes, sir.

Mr. Buchanan: This letter is dated February 19th, 1930, from Mr. Fleming to Mr. Lincoln.

Note: Filed and marked Exhibit R. F. #73, which is as follows:

February 19th, 1930.

Mr. C. C. Lincoln, Jr.,  
c/o Virginia-Lincoln Furn. Corp.,  
Marion, Va.



Dear C. C.:

As requested we are enclosing, herewith, itemized statement of expenses paid by us applicable to securing of options.

As explained before we did not charge a great many of our petty expenses to the option account because we realized that we were to receive a flat option fee of  
page 444 } \$1,000.00 each, on those options approved by us.

With kindest regards, we are,

Yours very truly,

(signed) RIVES FLEMING,  
Pres. Southern Factories & Stores Corp.

By Mr. Buchanan:

Q. At the top of this is: Southern Factories & Stores Corporation—Expenses paid by Southern Factories & Stores Corporation for Virginia Table Company in connection with inventories, etc. I want to ask you if that is a correct statement?

A. I didn't make this statement; Mr. Murray did. Mr. Murray will be glad to give you the information.

Q. Didn't you send it to Mr. Lincoln as requested?

A. Yes, sir. I believe it is correct as made out by Mr. Murray.

Q. Didn't you examine it before you sent it to Mr. Lincoln as the basis for receiving a check?

A. I didn't scrutinize it because I believed Mr. Murray would make it out properly.

Q. What is the total amount of that?

A. \$8,826.80.

Q. If that had been paid would it have satisfied you for all expenses in connection with inventories?

page 445 } A. If you read the letters approaching this you will see why we sent this.

Q. If that amount had been paid—

A. As a compromise proposal it might have been. That is why that was sent.

Q. Does that include—

A. I am surprised you asked me that question.:

Q. Does that include in addition to it the time of every man in your organization with the dates they worked upon the inventories?

A. That includes our record of the time of the people that worked on inventories according to the definite time and amount.

Q. How do you arrive at the figures?

A. Actual salaries and expenses we paid on our books to the men working on your work.

Q. That represents the actual amount paid by your organization to your men for the work done for Virginia Table Company?

A. That is for inventories, yes.

Q. Where was the contract made under which this work was done?

A. It was made between Mr. Lincoln and Mr. Kimbrell in several different places. They can tell you about that.

Q. When it was made did the Southern Factories & Stores Corporation contemplate making any profit out of the deal?

A. We have been over that. You mean for the inventories?

page 446 } Q. Yes; not talking about the options.

A. In inventorying we sent our men out and charged you in this bill the actual time and salaries paid them.

Q. This represents what is on your books?

A. At that time, yes, sir.

Q. For that work?

A. Yes.

Q. And if we had paid what was on your books at that time so far as the inventories are concerned it would have been satisfactory, wouldn't it?

A. At that time it probably would. I can't answer that.

Q. Now you have increased it from \$8,000 to \$17,000 for the same work in your bill. Why have you done that?

A. Well, when we sell the services of our men we don't sell them at cost. If we pay a man \$29.00 a day we expect to make a profit out of his services, but going along with you, making every sacrifice—I found fifty odd dollars of telegrams that never have been charged to you—telegrams and telephone charges. We were going along with you at that time, taking our part of the sacrifice and working like Trojans with you. When you attempted to get judgment against us and make us pay an account and not pay this, then we added to our time what we thought just compensation for our men's work.

Q. You were paying Mr. Kimbrell \$750.00 a month at that time?

page 447 } A. I think it figures \$29.00 a day; \$750.00 a month.

Q. That is what you charged us on your books, didn't you, for his services?

A. At that time, yes.

Q. And you thought his services worth \$750.00?

A. Certainly, we did, or we wouldn't have paid that; worth more than that. We are supposed to make a profit on every man we keep. We paid him \$750.00. He ought to be worth more than that.

Q. Now you are charging us \$9,800.00—\$100.00 a day.

A. Yes, sir, I did and I think he is worth it and don't think you could get another man in the United States as good that isn't worth that money. I think Mr. Kimbrell earned every dollar we paid him.

Q. Don't you know we had men to do identically the same work in the most of the United States from Oklahoma to the New England States in the larger cities in the United States and never paid one of them over \$75.00 a week?

A. I don't think many men in the United States know as much about the furniture business as Mr. Kimbrell. When a man goes out and checks over a million dollars worth of assets and works sixteen or eighteen hours a day, including Sundays and saying you every dollar he can on every purchase and not let people get by with rotten ac-  
page 448 } counts, I say \$100.00 is cheap and I think it cost more than \$100.00 to us every day he was away from the stores.

Q. You thought it was worth a certain amount at one time and then because of the changed conditions you thought it was worth more?

A. No, sir, I didn't say that. We let you have him for what it cost us in the beginning; glad to do it.

Q. That is, when the contract was made?

A. To take these inventories at that time and you showed a disposition not to go along with us and then we figured Mr. Kimbrell—we ought to be paid exactly what Mr. Kimbrell's time was worth, and what you would have to pay a similar man, and I don't think we over-charged you a penny.

Q. Do you think we ought to pay Mr. Kimbrell any more than we paid a perfectly capable and efficient man for similar work in other stores in the United States?

A. It is a question of the man. You had Mr. Kimbrell's interest; he was saving you every dollar he possibly could. His days were sixteen or eighteen hours and the average man that goes out works seven hours a day. He worked Sundays, I am told. I know how he works. I think the \$100.00 we charged you was well earned.

Q. \$100.00 for Sundays also?

A. I don't know.

page 449 } Q. You know it was charged for Sundays, too?

A. I don't know that, but if we did I know he worked all day Sunday. If he charged you for Sunday, he worked Sunday.

Q. You think for the 98 days the work he did was worth \$9,800.00?

A. I would say so, yes, sir.

Q. You charged \$100.00 for your services, I believe?

A. I was out only a few times. I think I saved you \$500.00 in two hours to go up to a man's place and renew an option, having to sell him and sell him over again. I think it is pretty cheap at \$100.00.

Q. And the men you have employed in your organization—your clerks and men—you tripled the charge to us on them also, I believe?

A. I don't remember whether tripled or not. I think we charged \$30.00, \$40.00 and \$50.00 a day, but we charged what we conscientiously thought those men were worth to you and what they were worth to us to supply them.

Q. Do you think those men taking the inventories in the stores in the South are worth any more than men who did similar work equally as well in the West and North?

A. It depends on who you get. You can get men, simply checkers, that will charge \$25.00 a day and absolutely worth that, but to get a man thoroughly experienced in furniture and working hard for you all day and knows furniture and accounts, I think \$40.00 or \$50.00 a day is a very reasonable amount to pay him. I would rather pay that man \$50.00 than a checker \$10.00 because that man is just a checker and doesn't care what gets by. The man that goes out conscientiously and works hard all day and knows accounts and knows furniture he will save you ten or fifteen times that in a day.

Q. When did you first find out Mr. Lincoln wasn't going to comply with his verbal contract?

A. I think it was about January, 1930; I think it was.

Q. January, 1930?

A. I think that is the time. Some time about the first of the year, I remember.

Q. And the breach occurred then, according to you, for the first time?

A. It occurred when we found he wasn't going to do it.

Q. How did you happen to send this bill in February at the prices that you have here?

A. February.

Q. Yes; February 19th.

A. I guess that our correspondence will explain that. I don't know why sent on that particular date.

Q. As a matter of fact you never contemplated padding this account to four times what it originally was until this suit was brought, did you?

page 451 } A. We haven't padded it four times; we haven't padded it at all. We have got the men's salaries instead of charging what it cost us; charging what we think they ought to bring on the open market. If you employ men of that kind—if you employ experts you have got to pay for them. We didn't think it necessary to demoralize our stores at cost to ourselves.

Q. Then if we pay this amount you will be making a profit between the \$6,000.00 on your books and the \$27,000?

A. No, sir, it wouldn't cover the loss or expense by their absence, I don't think.

Q. You didn't employ men in their places?

A. No, sir, we didn't.

Q. During any of this time did Mr. Kimbrell attend to any purchasing?

A. I think he attended to very little. He can tell you very likely about that. I think he was pretty much on the road for you.

Q. I want to ask you if Mr. Kimbrell made any of the inventories of the stores that you all acquired?

A. I think Mr. Kimbrell can tell you better than I can.

Q. Just tell me whether you know or not.

A. Made inventories for what?

Q. Took any of the inventories and judged any of the accounts of the stores you acquired in the Southern Factories & Stores merger?

page 452 } A. I don't know that definitely.

Q. Do you have any inventories taken in any of your stores?

A. Yes, we take inventories regularly.

Q. And judge accounts?

A. The accounts are put on there and kept on and appraised at different times by the different men, but Mr. Kimbrell is in touch with the stores all the time and he can tell you about that. I have very little definite dealings with the stores or their operation. Mr. Kimbrell can tell you any of the details you want to know about that.

Q. You charged \$100.00 a day, I believe, also for the time you came to Marion?

A. I don't remember whether this was charged in there or not, but I gave in my expense account. I know the ex-

penses paid by Cameron Stove Company weren't charged and paid and not charged in there.

Q. What were the names of the men who took these inventories at these prices?

A. You can find that by the list there.

Q. Do you know?

A. I know some of them. I know about what we paid them.

Q. Mr. Kimbrell, 98 days at \$100.00, \$9,800.00. Mr. Hillis, \$50.00 a day. What do you pay Mr. Hillis?

A. I think drawing \$400.00.

Q. That is \$1,500.00 a month. What were you page 453 } paying Mr. Murray?

A. About \$400.00.

Q. He was charging \$50.00, yourself at \$100.00 a day; Mr. H. W. Kimbrell, \$25.00. What was Mr. Kimbrell doing then?

A. Mr. Kimbrell is a rather good auditor and very familiar with the furniture business—Mr. H. W. Kimbrell.

Q. Mr. Anderson?

A. Experienced furniture man.

Q. What are you paying him?

A. I don't know what. Mr. Kimbrell can tell you better than I can.

Q. Do you know what you were paying Mr. Phillips that you charged us \$25.00 a day for?

A. No, sir, I don't know.

Q. What do your books show today or do you know how much Virginia Table Company owes you?

A. I don't know that. I would rather Mr. Murray tell you that.

Q. You don't know whether these additional amounts have been added to the amount first put on your books or not?

A. No, sir, I don't.

Q. Your books have been audited also by various auditors, have they not, each year?

A. Yes, sir.

page 454 } Q. Have you told your auditors that the Virginia Table Company owed you this large amount?

A. I haven't had any dealings with the auditors since our office was separated from Richmond.

Q. You haven't paid these men any expenses, have you?

A. What men?

Q. You haven't paid *this* men the amount you charged us?

A. We paid them their salaries and expenses.

Q. What I want to get clear is, regardless of what occurred afterwards, at the time you had such confidence in Mr. Lin-

coln and at the time this contract was made for those men's services you only intended to charge what it cost you?

A. That was our intention.

Q. You have known Mr. Kimbrell a long time?

A. Yes.

Q. Have great confidence in him as a practical man?

A. Yes.

Q. You know Mr. Wahab?

A. Yes.

Q. And have great confidence in him as an experienced man?

A. Yes.

Q. Do you think Mr. Wahab would be worth as much for taking inventories and judging accounts as Mr. Kimbrell?

A. In some respects I think worth more and some respects less.

page 455 } Q. On the average about right.

A. I think Mr. Wahab's services worth \$100.00 a day; I certainly do.

Q. Now as to the options, as I understood you yesterday, you were to secure options on stores way out from Richmond and you were to secure options on stores in the South which were satisfactory to you and Mr. Kimbrell and acceptable to Mr. Lincoln and you said, I believe, that the requirements as explained to you were that those stores should show an average net profit of 10% adjusted to the purchase price over a period of five years. That is approximately correct?

A. On the assets purchased.

Q. Do you recall also, as I am sure you do, that there was an additional provision that 1928, which was the last year, should be better than the average?

A. No, sir, I didn't know that. I think that was changed afterwards by the bankers. It wasn't our original agreement.

Q. Now, in order to be perfectly clear, is it your contention that the Virginia Table Company should pay you \$1,000.00 a piece for these options whether they came up to the requirements or not?

A. We claim you should pay us \$1,000.00 for every option you authorized us and instructed us to take and  
page 456 } you did instruct us to take all eleven of these options.

Q. Even if you gave us information as to their earnings which proved incorrect?

A. One or two we told you might not measure up to those requirements, but they had fine possibilities, and you said: "Go and get those options." One you were very uncertain

about at first you were crazy to option later on; that is Mr. Bell. You were doubtful about that at first; the amount was too small, but the man had good possibilities and you said get him and although it had less than the required gross assets it proved to be a very desirable store.

Q. I am not talking about the gross assets because that wasn't so important. I am talking about the earnings. The information in regard to these stores was given to Virginia Table Company by you that is correct, isn't it?

A. One or two of them.

Q. What I am trying to get at is this: if the audit proved that information which you gave Virginia Table Company wasn't true, but, on the contrary, was grossly wrong, in that event do you think the Virginia Table Company should pay you?

A. Absolutely because you told us to go and get the options on the information we gave you, based on such information as we could get. I think you will find page 457 } these stores averaged well.

Q. Then, as I understand you, regardless of whether they came up to the requirements or not Virginia Table Company should pay you for these options whether they made a dollar or lost a million?

A. That is if we told you what was there and you told us to get it, yes. That is all we got, those you told us to get.

Q. Based upon information furnished by you?

A. Furnished by us or them or anybody else; any information we could get.

Q. I want to ask you if you sent this to Virginia Table Company as a financial statement or profit and loss sheet of Bledsoe Furniture Company of Danville?

A. I couldn't possibly say now. That is a blank statement with no signature on it.

Q. You don't know?

A. No, sir.

Q. Did you make any attempt to ascertain whether the earnings of these stores was sufficient to warrant their inclusion in this proposed merger?

A. Yes, sir.

Q. Did you verify those statements as far as you could?

A. All the information we could get we submitted either to Mr. Wahab or Mr. Lincoln or you to get them page 458 } verified; usually Mr. Wahab.

Q. I show you a letter of February 18th, 1929. Did you write that?

A. Yes.



Note: Filed and marked Exhibit R. F. #74, which is as follows:

February 18, 1929.

Mr. C. C. Lincoln, Jr.,  
c/o Virginia Table Co.,  
Marion, Va.

Dear Mr. Lincoln:

I am inclosing herewith option on W. A. Bell & Bro. of Fredericksburg, Va.

They own their building which they verbally agreed to rent us for five years upon a rental basis of \$350.00 a month for the store and \$50.00 a month for their warehouse.

Attached you will find their letter outlining their sales, purchases, cash receipts, etc., which I did not attempt to verify, but which, on account of their excellent reputation, we might accept as approximately correct.

I am inclosing a copy of my letter to Mr. Kimbrell mentioning the side lights on this store, because I do not like to recommend its purchase under existing conditions without your approval or his.

Glad to know that you are getting along nicely page 459 } and hope we will have the big wheels running smoothly before long.

If I can assist in any way, please don't hesitate to call on me.

With kindest regards, I am,

Yours very truly,

(signed) RIVES FLEMING,  
Pres. Cameron Stove Co.

A. We looked at it tentatively.

Q. But you enclosed the option. You had already gotten the option before you verified the account?

A. Because he had instructed us to get it. We talked to Mr. Wahab and Mr. Lincoln, told them the circumstances. The man was a very reliable man, had been in business for years and his books showed a profit of \$25,000.00 a year and his business hadn't been pushed; he could have made more than that if his business was pushed hard; and he said: "Get that business." We went up and negotiated with Mr. Bell and got an option. We afterwards found it was

very much better than we expected; he made more money than he claimed to have made.

Q. At the time of the July meeting in Marion didn't you know at that time that every store upon which you and Mr. Kimbrell had secured options had been thrown out as unworthy of financing except three?

A. No, sir, I didn't.

page 460 } Q. You didn't know that?

A. No, sir.

Q. Didn't you know every store upon which you and Mr. Kimbrell secured options based upon the requirements which they gave you upon the audit of Haskins & Sells failed to come up to those requirements?

A. No, sir, I didn't know that. I don't think it is so. We saw figures to the contrary.

By Mr. Gordon:

Q. You say you saw figures to the contrary?

A. We saw in Haskins & Sells office figures that showed 13.2% on all the stores and were told by them that ours came up well above the average.

By Mr. Buchanan:

Q. You seem hesitant to accept Mr. Dykes statement at the present time.

A. I don't want to take anybody's statement because I was in Mr. Dykes' office and Mr. Murray found one item of \$5,000.00 that they had as a loss instead of a profit. They were trying to show all the loss they could.

Q. Did you not know that every store which was taken under option, no matter by whom so taken, had to be audited by Haskins & Sells?

A. Yes, sir, I understood that.

page 461 } Q. There have been statements made by Mr. Gordon and you about Haskins & Sells being the auditors of Virginia Table Company. I don't think you intended to say that, did you?

A. Well, they were auditors for your organizations.

Q. They were auditors of the bankers who expected to finance the new organization.

A. I don't know who employed them.

Q. Chosen by the bankers and not by us.

A. I don't know. You were paying them and we naturally understood they were your auditors.

Q. If Mr. Gordon permits me I will hand you the audits for the eleven stores.

A. It was 12.2% on all the stores they had in that picture in Baltimore.

Q. I am not talking about that.

A. We were told ours ran above the average.

By Mr. Bazile:

Q. Who told you that?

A. The auditors in the office there.

By Mr. Buchanan:

Q. Can you name the auditors?

A. Mr. Wahab was the man we talked to particularly.

Q. Wahab wasn't with Haskins & Sells.

A. He was in Haskins & Sells office representing you.

Q. What did Mr. Wahab know about Haskins page 462 } & Sells' audit?

A. He had the figures right before him. We spent a whole morning in Haskins & Sells' office going over these accounts.

Q. Do you know anything about the Cochran Furniture Company?

A. No, sir; had nothing to do with it.

Q. And nothing to do with Van Metre?

A. No, sir.

Q. Nothing to do with the Jones chain?

A. No, sir.

Q. I am trying to get the ones you did. Yours were Bell, Van Metre—

A. Not Van Metre; Bell and Bledsoe, the only two options I took.

Q. Don't you know that upon the audit by Haskins & Sells and weren't you told Bell was showing a total loss in 1929 of \$4,495.00; 1928, \$3,600.00; 1924, \$2,030.00?

A. I certainly wasn't told so; never heard it before in my life.

Q. And Bledsoe, the other one which you secured—Bledsoe made an average during the four years, based upon the purchase price, as you said—didn't you have a copy of this report showing an average of only 6.39%?

A. No, sir.

Q. You are not prepared to say that isn't cor- page 463 } rect?

A. No, sir, I am not. I think the audit we had showed right much more than that. He was slightly under, as I recall, but they figured several ways on those profits.

Mr. Gordon: What is the date of that?

Mr. Buchanan: January 31st, 1929. That is the date the audit was taken as of. The audit was not available until May.

Q. You still think, as I understand you, that whether these stores came up to specifications and whether they made a dollar or lost a million, we ought to pay for them?

A. Yes, sir.

Q. And you are also making a profit on that, I believe?

A. No, I don't think so.

Q. Paying you \$1,000.00 for the Bell store that cost you \$100.00 to get?

A. I think our expenses show around \$8,000.00 or \$9,000.00 and we had nothing like all our expense in there. When we charge a man's time and take a manager and send him out at cost we have lost a lot of money. We have lost money on it at \$11,000.00; a considerable amount of money.

Q. Did anybody but you go up to Bell?

A. I went up and renewed his option three or four times. I took Mr. Kimbrell once to verify his accounts. We stayed up right late at night every time. I renewed so many times

I was ashamed of asking him again. I told Mr. Wahab—I said: "you will have to promise this man to take his business over because I won't do it any more. He has put confidence in me." Mr. Wahab went up and told him in my presence he would guarantee to take his business over—not only exercise the option, but take that business over and pay him cash for it.

Q. Do you know that an effort was made to take over that business and he got more money from another party and sold it out? Do you know that?

A. No, I don't know that is a fact.

Q. He doesn't own it today?

A. He does. He has a man running it for him.

Q. I have been informed by O'Connor Goolrick he sold it.

A. He has got a brother-in-law running it.

A Juror: Did the bankers see this statement of the auditors?

Mr. Buchanan: Yes, they were submitted to the bankers.

A Juror: They were still encouraging you to the effect they were going to help to finance this after seeing it?

Mr. Buchanan: Not those stores. They were eliminated immediately.

A Juror: Why were the options renewed or continued?

Mr. Buchanan: The options weren't renewed page 465 } on but three of these stores.

A Juror: Not renewed on these stores that showed these figures?

Mr. Buchanan: No.

A Juror: Did the auditors' report come up to the specifications of the bankers on all of the stores on which options were renewed?

Mr. Buchanan: No, sir.

A Juror: Why were they renewed?

Mr. Buchanan: Because some of the Southern Factories & Stores Corporation stores themselves didn't come up, but as a group they did.

Mr. Gordon: My friend Mr. Buchanan is not on the stand.

The Court: You had better wait until some other witness answers those questions.

Mr. Gordon: I will just say to the members of the jury when Mr. Murphy gets on the stand he will straighten out a lot of this.

A Juror: Can we have Mr. Buchanan on the stand if we want him?

The Court: Yes, he can testify to any facts he may know.

Mr. Bazile: You are not directing him not to continue on in the case?

page 466 } The Court: No, sir, not if he goes on involuntarily.

The Juror: The question and answer just now of Mr. Buchanan—I would like to clear that up in my mind if I can.

The Court: You may ask Mr. Fleming.

By a Juror:

Q. Didn't you say you renewed the options or the option in Fredericksburg two or three times?

A. Three or four times.

Q. When I asked that question Mr. Buchanan made the statement just now, as I understood it, none of the options on those three stores—

Mr. Buchanan: I said but three stores. Bell was one of the three.

The Witness: I think Mr. Buchanan must be mistaken about that because I can name several more I renewed—Bell, Bledsoe, Mason and we must have renewed others because I was in on those renewals myself.

Mr. Buchanan: May I can clear this up—

The Witness: Wood-Peavy was renewed, Max Barnett was

renewed—we didn't renew it, but it was renewed. I don't recall any more offhand, but I am sure others can tell you.

page 467 } By a Juror:

Q. The point was made here a few minutes ago there were repeated renewals on stores you controlled.

A. Yes.

Q. That at the same time renewals were gotten on other stores?

A. Yes.

Q. That was just a part of the whole thing?

A. Yes.

Q. Mr. Fleming, were renewals asked for on these stores like Fredericksburg after this information was available?

A. Yes, sir, they were continued several times. I just happened to remember Fredericksburg because it was close and I went up myself.

A Juror: These auditors' report was what date?

Mr. Buchanan: As of January 31st, 1929, but—

A Juror: When was it made?

Mr. Buchanan: In May, 1929.

A Juror: So you had that information in May, 1929? Still you had renewals until October?

Mr. Buchanan: We always included Bell in the picture to the last. That was one of the best stores we had.

A Juror: Didn't you read it out as a loss?

Mr. Buchanan: No, not Bell. That was one page 468 } of the best stores we had.

A Juror: I understood you to say Bell had a loss.

Mr. Buchanan: Bell was one of the best stores we had in the organization, showing a consistent profit.

Mr. Gordon: Read the audit.

By a Juror:

Q. Didn't you state, Mr. Fleming, that they didn't want to take Bell at first because he was too small and then afterwards they went to check Bell?

A. That was in the preliminary examination. I told them Bell was a right small store and his gross assets would not be a hundred thousand dollars.

Q. Who looked it over?

A. Mr. Wahab. I went up with Mr. Wahab. He had a very fine store with a good lease on it; figured on putting another story on it, and then they decided they wanted it.

Q. Did Mr. Wahab look over any of the other stores?

A. Oh, yes; he was the main field man.

Q. Did he approve the other stores?

A. He approved Bledsoe.

Q. Then after that the Lincoln group approved them, too?

A. Yes, sir.

Q. Did Mr. Wahab have authority to tell Bell that he would take them over regardless?

page 469 } A. Mr. Wahab had authority from Mr. Lincoln to do almost anything he wanted to, as I understand. He was the field man, well posted in furniture and an extremely good auditor. He was their field man. Mr. Wahab worked with Mr. Lincoln and Mr. Buchanan throughout the deal.

Q. Did they or did they not ask for renewals of these options on stores that didn't come up to the audits of this Haskins & Sells?

A. Yes, sir. The letters—the correspondence a while ago referred to renewing the Bledsoe option. You remember the letter came out. I told them not to pay him \$2,500.00; I could get it renewed for nothing. Mr. Buchanan had written me to renew that option and I got it renewed for nothing.

A Juror: Didn't counsel for defendant in the opening statement admit they owed this money?

The Court: I don't think he did in those term, Mr. Henning, but the opening statement of counsel is not evidence. It is merely an outline of what he expects to show by testimony. You are to regard the testimony and not the opening statement of counsel. That merely gives you a guide to follow the evidence more intelligently.

Mr. Bazile: What was said—

The Court: I think we had better pass that by page 470 } with that explanation: that it is not evidence.

By Mr. Buchanan:

Q. Mr. Fleming, I think we can clear this up a little bit. I don't know whether you remember or not—I think I can find it for you—and that is that the auditors took considerably more time in making this audit than we had anticipated?

A. What auditors?

Q. Haskins & Sells.

A. Which audit are you speaking of?

Q. The first one. Do you recall that?

A. I remember they were very slow in doing it.

Q. You remember they were very slow and you also recall

that a number of these options expired before they had made their complete audit? Do you recall that?

A. Yes, sir, I think I remember some of the options expired too soon.

Q. And the options expired too soon before Haskins & Sells had made their report and it was necessary to get renewals before it was known what the situation was?

A. I don't know whether due to Haskins & Sells' delay, or delay with the bankers, but it was a delay.

Q. This is March 22nd, 1929. "Dear Mr. Fleming: I am sure that you are aware of the situation which has arisen by reason of the failure of the auditors to complete page 471 } the audit within the time contemplated, and the necessarily consequent delay which has caused us to await their report. This was not due to any negligence on their part, I think. If the books of the different stores, etc., had been in proper shape, they could have completed their work, but they found so many stores in which the records, for one reason or another, had been so badly and incompletely kept as to render it almost impossible for them to arrive at the correct financial status, or determine the past earnings. This necessitated a digging out of items and the consumption of time which otherwise would not have been necessary. The delay is not our fault, and we are ready to go whenever we are presented with this report. Your option will shortly expire, and it will of course be necessary for us to have a renewal sufficiently long so that it will be in force after the bankers hold their final conference with us. I enclose you a renewal for thirty days and we will appreciate it very much if you will have the same executed and returned to me at the earliest possible moment as counsel for the bankers are already asking about it. I understand that under the option we are required to pay to you \$500 for the renewal, but as in any event it would be but swapping dollars and we have as you know been at tremendous expense, I hope you can waive this; if you cannot, advise me page 472 } by wire at once, and in any event let me have your decision before the time when we would have to give you formal notice. This I am sure I can rely on your doing." You very kindly in response to that forwarded the renewal?

A. Yes, sir.

Q. And secured a renewal, if my recollection is correct, on Bledsoe and on Bell?

A. Yes, sir.

Q. Did you attend all of the directors' meetings of the



Southern Factories & Stores Corporation during this period?

A. So far as I know, I did.

Q. And, in order that the matter may be entirely clear, was the acceptance or rejection of any option on the eleven stores by the bankers in any way connected with the amount to be paid you?

A. Was the acceptance or rejection by the bankers—

Q. Did it have anything to do with whether the Virginia Table Company should pay you \$1,000.00 or not?

A. We were told Mr. Kimbrell and I could decide as to the size of those stores. If we got them a certain character then you would pay us \$1,000.00 for them. We submitted in each case all the details before we got the option and we then got the options on all these eleven stores.

page 473 } Q. What I am asking you is this: that you were to be paid, according to your contention, \$1,000.00 for these stores whether they were accepted by the bankers or whether they weren't acceptable to the bankers?

A. Yes, sir.

Q. No matter what their condition might be?

A. Yes, sir, that is right.

A Juror: I understood Mr. Fleming to say this morning that \$1,000.00 was to cover the expenses of inventorying the stores.

By a Juror:

Q. Am I correct in that?

A. Traveling expenses and other expenses incident to taking of the options.

Q. What is this eighty some hundred dollars?

A. That was expenses of taking inventories and checking accounts of the stores. I will just use one illustration. We went to Danville, had to have them have a directors' meeting and get all papers signed, took it to a notary and took it back to Richmond. Then after that they would send people to check the accounts and inventory, etc. Up to January 31st it was taking of options; after that it was inventories, etc.

Note: The Court adjourned until tomorrow, July 21st, 1932, at ten o'clock A. M.

page 474 }

July 21st, 1932.

The Court convened pursuant to adjournment.

RIVES FLEMING,

resuming the witness stand, testified as follows:

CROSS EXAMINATION (Continued).

By Mr. Buchanan:

Q. Mr. Fleming, I would like to know if you personally took any of these inventories in any of these stores or have you judged any of the accounts; if so, what stores?

A. I took no inventories and I only helped to judge one lot of accounts and I went with Mr. Kimbrell and went over Mr. Bell's accounts with him; not finally, but in the beginning.

Q. Do you recall how long it took you to go over those accounts?

A. We were just going over them tentatively and spent one afternoon and part of a night there, just getting an idea of the value of the accounts and how much they were, etc.

Q. In this proposed consolidation or merger you were aware of the fact that the Virginia Table Company was putting in its assets without receiving any cash therefor?

That is correct, isn't it?

page 475 } A. You mean in the large merger?

Q. Yes, sir.

A. Well, I didn't understand that exactly. I didn't know. I imagined or rather I was led to believe he was making a great deal in the common stock. In other words, the assets taken in at eighty cents on the dollar would be put in at one dollar and he would make that profit, amounting to probably eight hundred thousand or a million dollars.

Q. Don't you know, as a matter of fact, the assets of the Virginia Table Company were taken in at the appraisal which was made by the appraisal company chosen by the bankers dollar for dollar?

A. That may be so, but I was speaking about the common stock.

Q. And that the common stock was to be issued at the exact value of those assets?

A. No, sir, I didn't understand that.

Q. And that while Southern Factories & Stores and other stores were receiving a very considerable amount of cash that the Virginia Table Company was receiving no cash?

A. Virginia Table Company was buying us and we were selling to them, but I understood those assets would be put in at value which would have meant an increase of about

10 to 20% on the eight or ten million dollars. I think that was a fact.

page 476 } Q. What eight or ten million?

A. The gross assets that would have been taken in, amounting to eight or ten million, would have been put in at nine million, which would give an increased value of a million which would have accrued to Mr. Lincoln's benefit.

Q. You mean in the common stock?

A. That was my understanding. I expect others can probably explain that better than I can.

Q. Then it was very much to Mr. Lincoln's interest to consummate this merger?

A. The large merger, yes.

Q. And you are complaining now, as I understand, because he didn't?

A. Not that he didn't complete the large merger, but that he didn't go on with the individual merger.

Q. Then there is no complaint on your part, as I understand, of his failure in any way to *consume* any of the transactions up until July 19th?

A. No, sir. As far as making the merger is concerned Mr. Lincoln did all he could.

Q. And it is no complaint on your part of his failure to *consume* or exercise any of the options themselves after July 19th?

A. Repeat that question, please.

Q. Is there any complaint on your part of his failure to exercise the options after July 19th?

page 477 } A. Yes. It is no complaint that he didn't exercise the options, but a complaint that he didn't go on with the individual merger. He couldn't have completed the options, I suppose, unless he financed them.

Q. Then what I am trying to arrive at is this: I understand you now to say that there is no complaint on your part of the failure of Mr. Lincoln at any time to exercise any option?

A. Unless you figure that verbal agreement of ours as an option. We do complain of that.

Q. I am leaving that entirely out. The verbal agreement was a separate and distinct contract?

A. Yes.

Q. Now, as I understand you, that your complaint is his failure to comply with the verbal agreement. That is correct, isn't it?

A. Yes, sir.

Q. And that his failure to exercise the options themselves, outside of the verbal agreement, there is no complaint?

A. So far as we know, Mr. Lincoln did his duty and tried to get the large merger through. That is all we know.

Q. I would like to know why, if that is a fact, you have introduced a voluminous amount of testimony here, consisting of hundreds of letters, all of which refer entirely to his failure to exercise those options.

page 478 } A. No, I don't think so. They don't apply to that.

Q. Don't apply to that?

A. No, sir.

Q. They were all written before July 19th, were they not?

A. Some of them were and some afterwards, but the ones written before didn't apply to the exercise of options.

Q. I want to ask you if there is a single letter or single document, telegram or anything in writing in this entire file which refers in any way to the verbal contract which you complain of?

A. I don't recall offhand. I think you will find some do apply to the verbal contract. I don't know. I know there were many discussions and I imagine it must have been some by mail.

Q. Isn't it a fact that you did not at any time, nor did any member of your organization, ever write any letter, send any telegram or put anything in writing whatsoever that even mentioned this verbal agreement?

A. We certainly did have letters.

Q. Will you file if you can—

A. I remember some correspondence about Christmas time as to where he would go and about having Mr. Kimbrell with him. I know it was agreed; I don't know whether by parol or letter, but it was discussed.

Q. Will you please point out or have your counsel point out for the benefit of the jury and the Court a page 479 } single written communication which mentions in any way a single item of the verbal contract which you have mentioned? Will you do that?

A. I will have to go to the correspondence to find that. I couldn't say offhand.

Q. I want to ask you if you will tell the Court and jury the purpose of the introduction of this large mass of testimony and letters and documents prior to July and at a time when you have just stated you make no complaint about Mr. Lincoln not exercising options or consummating the merger?

A. Well, after January 31st—I explained to the jury up to January 31st we were securing options for which we were to be paid \$1,000.00 each. After that we were out doing

other work, such as taking inventories and appraising accounts, etc., for which we rendered a separate bill. We put those letters in to show the damage and loss and expense we have had since January 31st, 1929, and that goes on through the year practically of 1929.

Q. And that is all shown, as I understand it, in that itemized statement you have exhibited here showing the expenses and the *per diem* of the men to do the work?

A. All expenses charged are shown in there.

Q. And the salaries?

A. Yes.

page 480 } Q. And that is included in your itemized statement which you have attached to your notice?

A. Yes.

Q. I want to ask you then what effect or what connection the letters which you have introduced here in connection with the bankers contracts and failure to exercise them have to do with the inventories which you took and the options which you secured?

Mr. Gordon: May it please the Court, I don't think that is a proper question.

The Court: I feel at his stage the Court should interrupt. This case is going to take a great deal of time and I think that question is entirely irrelevant. I think it is unfair to the witness to ask him why his lawyer has asked certain questions. I can't conceive of a witness who wouldn't be confused or embarrassed or unable to answer a question why his lawyer had introduced certain testimony. It would lead any witness into an argument. For those reasons I think this line of examination is improper and should be discontinued.

Mr. Buchanan: I am very sorry if I have confused the witness—

page 481 } The Court: I don't know that you have confused him, but I think it is an improper question.

Mr. Buchanan: The reason I did that we couldn't understand ourselves why it was done.

The Court: If Mr. Gordon can't explain it in his argument to the jury—

Mr. Gordon: I think I can explain it.

Mr. Buchanan: I will be glad if you will.

By Mr. Buchanan:

Q. Mr. Fleming, in connection with the verbal agreement,

coming back to that for a moment—I don't know whether I asked you this question or not; if I did, I am sorry—What stores were contemplated in that verbal agreement?

A. Such stores as were willing to go in that were acceptable.

Q. And the names and whereabouts or addresses unknown?

A. Any stores that we had on the big merger that wanted to go in on the little merger would be taken in.

Q. This account which has been attached to the declaration shows that you have charged up to the defendant company the sum of \$100.00 per day for five days.

Mr. Gordon: You asked him that yesterday.

Mr. Buchanan: I didn't ask where the five days were.

Q. I would like you to tell me where you were during those five days.

A. I think that account states.

Q. The account states you were four days at page 482 } some point, but doesn't state the fifth one.

A. I couldn't say definitely, but I know I was in Atlanta two days—that wasn't on the options—Let me see that, please. My expenses on the company's records show where I was. I remember going to Fredericksburg two or three times; I went to Danville; I went to Baltimore at the call of their company; I went to Atlanta; spent two days, I think, and probably all night. I know my actual time from the office only was charged and I put in one day—I remember one day we worked sixteen or eighteen hours that day.

Q. And one of those days was at Marion?

A. I don't think so. I am not sure. I think there were five days without Marion. I went to Fredericksburg three or four times, Baltimore once and Atlanta. I think that accounts for the five days.

Q. You went to Baltimore in regard to the accounts receivable?

A. I have forgotten, but we were called there.

Q. And at Marion?

A. Not Marion. I don't think Marion was included. I think it was Atlanta one or two days, Fredericksburg three or four days and Baltimore one day.

Q. And you secured, according to the record, at the request of Virginia Table Company renewals several times on the Bell option?

A. Yes.

page 483 } Q. And one, I believe, on the Bledsoe option?

A. Yes.

Q. Now were there any others you helped secure?

A. Mr. Mason, at Atlanta.

Q. Those three?

A. Yes, sir.

Q. Mason, Bledsoe and Bell?

A. Yes.

Q. I will ask you to look at the top of page 26 of your notice and ask you if you haven't charged your expenses to Marion and also \$100.00 for your trip?

A. I don't see the \$100.00 a day. I see the expense is charged here.

Q. Didn't I understand you to say a few minutes ago that the five days that you were claiming were shown on this?

A. No, I say shown on our records. Mr. Murray can tell you exactly where I was on those days and what was charged. I don't recall. I don't think we charged the Marion trip, but I can account for about five days without that. It was dozens of other days we didn't make any charge for at all.

Q. Mr. Fleming, did you consider in an effort to secure financial assistance Mr. Lincoln did all that he could to effect this consolidation?

A. Which consolidation?

page 484 } Q. The first one.

A. So far as we know, Mr. Lincoln did.

Mr. Gordon: Judge, he is asking for the opinion of this witness. I don't think that is proper. We are here to determine facts. If Mr. Lincoln wants to state what he did about this thing, he can go on the stand and do it; he is here. He is asking for a mere opinion of this witness on a question of what Mr. Lincoln did.

The Court: Objection sustained.

By Mr. Buchanan:

Q. I believe you have stated just a minute ago in answer to a question that there wasn't a consolidation proposed, so far as you understood it, but that the Virginia Table Company was buying Southern Factories & Stores Corporation. Is that correct?

A. It was forming a merger and we were to be one of the units that he optioned and were to be taken over under the option.

Q. I will just ask you if you didn't state a few minutes ago that it wasn't a consolidation, but that the Virginia Table Company was buying Southern Factories & Stores Corporation?

A. Technically I don't know what you call it, but we gave an option and he was to exercise it and form this page 485 } merger. He, in that sense, was buyer and we were, in a sense, seller.

Q. In the first agreement here, dated the 13th of December, it is stated: "Whereas, one of the said parties of the first part which is the Cameron Stove Company, Inc., now owns and operates a stove manufacturing business with its principal plant and general office located at Twenty-first and Decatur Streets in the City of Richmond, State of Virginia; and the other party of the first part, The Southern Factories and Stores Corporation, now owns and operates a retail furniture business with its principal office located at Twenty-first and Decatur Streets in the City of Richmond, State of Virginia, and owns and operates six retail furniture stores; and whereas the party of the second part is now engaged in the manufacture of furniture with its principal place of business at Marion, Virginia, and, also, owns and controls all of the stock of the Lincoln Furniture Manufacturing Company, Inc., a corporation existing under the laws of the State of Virginia, which said corporation is also engaged in the manufacture of furniture; and whereas the said parties hereto are interested in forming a consolidation between the said manufacturing plants and a number of retail furniture stores in various cities in the United, and to this end contemplate the organization of two companies, to page 486 } be known as The Virginia-Lincoln Furniture Corporation and The Lincoln Furniture Stores, Inc., or by other appropriate names, the first of which is to be a holding company and is to hold all of the common stock of the said Virginia Table Company, Inc., the party of the second part hereto, and all of the stock of the Lincoln Furniture Stores, Inc., or the corporation to be formed by some other appropriate name, which is to purchase, take over, own and operate the retail stores aforesaid." In view of that which is signed by you I want to ask you if the understanding and intention was not to enter into a mutual enterprise to form a merger or consolidation of your stores and factories with the stores and factories of the defendant here for mutual benefit?

A. To form an organization for the mutual benefit, but from an entirely different angle and entirely different basis. We were selling out to his organization and his organization was buying our organization out, as he would have done other units, the difference being he called on us as he called on no other units to help him form this merger as we had



experience doing the very thing he was undertaking; we had gone out and optioned stores and merged them. They didn't know anything about it and wanted us to help them. So that required us to spend much money and give our  
page 487 } managers' time to help them organize this organization of theirs.

Q. And they gave their services—Mr. Lincoln gave his services during this entire period without remuneration and also expended a very, very large sum of money in order to merge the thing for the benefit of both of you?

A. I don't know what you asked me about Mr. Lincoln's expenditures. I guess he can tell about that better than I can.

Q. I just wanted to know what you knew of it.

A. I don't know what he received, but I was told—

Mr. Gordon: Don't say what you were told.

Q. It is not your contention Mr. Lincoln made any profit out of the failure of this merger, is it?

A. Certainly not.

Mr. Gordon: What is that?

The Witness: He asked me whether we thought Mr. Lincoln made anything out of the failure of this merger.

By Mr. Buchanan:

Q. It was to his interest and your interest both to consummate it?

A. Yes, sir.

page 488 } RE-DIRECT EXAMINATION.

By Mr. Gordon:

Q. Mr. Fleming, who prepared this option contract here? Who prepared it and submitted it to you all?

A. I think Mr. Buchanan.

Q. Is there any question about that, that he was the one that prepared it?

A. That was my understanding of it. I didn't see it drawn.

Q. If Mr. Lincoln had complied with the agreement—with the alternative agreement he made at Marion on the 19th of July, 1929, and had thrown his business in along with your business and those other units that wanted to come in, would that have relieved your financial troubles?

A. Yes, sir.

Mr. Buchanan: He asked him that on chief.

Mr. Gordon: No, I didn't. I didn't put it in that form.

The Court: If I pressed that rule strictly I would stop both of you. The Court is allowing counsel indulgence to go back. It is different when one side has rested its case.

By Mr. Gordon:

Q. I called under the statute for the production of all of the options and renewals which had been gotten by you for the defendant and they are—these papers are page 489 } here and I don't find any extensions except from Bell and I wish to ask you whether they are four extensions from Bell.

A. Yes, four extensions from Bell Furniture Company.

Q. The first one is undated, but was evidently in March; the next one is April 26th, 1929; the next one is the 15th of May, 1929, and the next one is July 29th, 1929.

A. Yes.

Note: Filed and marked Exhibit R. F. #75, which is as follows:

To:

VIRGINIA TABLE COMPANY, INC.

We the undersigned in consideration of \$1.00 in hand paid, the receipt of which is acknowledged hereby grant you an extension of 30 days from the present expiration date thereof, within which to exercise an option heretofore granted you by us for the sale of the property therein named upon the terms therein stated and if the said option is exercised and its terms carried out by you within said extension of 30 days, we agree and bind ourselves on our part to carry out all its terms to be by us done and performed.

MYRTLE FRANKLIN Witness  
MYRTLE FRANKLIN, Witness

W. A. BELL  
E. C. BELL

Fredericksburg, Va.  
April 26, 1929.

For One Dollar received in hand and hereby acknowledged, and other valuable consideration, we hereby grant unto The Virginia Table Company, Incorporated, their assigns or

agents, an extension, to May 20th, 1929, of our  
 page 490 } Option given to the said Virginia Table Com-  
 pany, Incorporated, under date of .....  
 1929; the same conditions and provisions to prevail as set  
 out in the said Option.

MYRTLE FRANKLIN Attest  
 MYRTLE FRANKLIN Attest  
 MYRTLE FRANKLIN Attest

W. A. BELL & BRO.  
 W. A. BELL  
 E. C. BELL

This agreement made this the 15th of May, 1929, between  
 W. A. Bell & Bro., Fredericksburg, Va., of the first part and  
 Virginia Table Company, Inc., of the second part; WIT-  
 NESSETH:

Whereas, the first party has heretofore granted to the sec-  
 ond party an exclusive option to purchase certain personal  
 property in said option described, upon the terms and con-  
 ditions therein named; which said option is here referred  
 to for a full and complete description of its terms; and,

Whereas, it is desired to extend the time within which the  
 said option may be exercised;

Now therefore, it is covenanted and agreed between the  
 parties as follows:

# 1.

That the said party of the second part shall have the right  
 to pay the consideration in said option named, in the manner  
 therein described, for the property therein set forth up to  
 and including the 20th day of July, 1929.

# 2.

The party of the first part agrees and covenants that if  
 the said party of the second part shall pay the consideration  
 named for the property described in the manner set forth  
 in said option, and shall perform all other covenants and  
 agreements to be by it performed under said option on or  
 before the 20th day of July, 1929, then the said party of the  
 first part will execute the bill of sale for the said property  
 in the manner set forth in said option and will on its part  
 carry out and perform all the matters and things by said  
 first party to be done and performed under said option.

page 491 }

3.

It is further understood that the covenants and provisions in said option contained remain unchanged except as herein set forth as to the time within which the same may be exercised except also that it is agreed that in completing the arrangements necessary to adequate finance the merger of interests the party of the second part may negotiate with any banking firm of recognized financial standing and high character and reputation competent and adequate to properly finance the same.

4.

No rights accruing to either party heretofore by reason of the execution of said option and proceedings resulting therefrom shall be affected except as herein stated. The consideration for this renewal is \$1.00 in hand paid.

IN TESTIMONY WHEREOF, the parties hereto have caused their names and seals to be affixed this the..... day of May, 1929.

MYRTLE FRANKLIN Attest  
MYRTLE FRANKLIN Attest  
MYRTLE FRANKLIN Attest

W. A. BELL & BRO.  
W. A. BELL  
E. C. BELL

\* \* \* \* \*

# VIRGINIA TABLE COMPANY:

In consideration of the sum of \$1.00 cash in hand paid, the receipt of which is hereby acknowledged, we do hereby agree to extend the time within which the Virginia Table Company, Incorporated, may exercise an option heretofore granted it by us upon the terms and conditions therein stated for 90 days from the 20th day of July, 1929.

Reference is made to said option for a full and complete description of the terms thereof and we covenant and agree that if the Virginia Table Company, Incorporated, shall within 90 days from July 20, 1929, on its part carry out and perform all the matters and things to be by it under said option done and performed that we will on our part carry out and perform all things which we agree under said option to do and perform upon compliance with the terms thereof by

the Virginia Table Company, Incorporated, and its assigns,  
etc.

page 492 } It is agreed that all of the terms of the said  
option remain unchanged with the exception of  
the time within which it may be exercised and reference is  
made thereto for a full and complete description of terms  
the same as if included herein in full.

In testimony whereof witness the following signatures and  
seals this the 29 day of July, 1929.

W. A. BELL (Seal)

E. C. BELL (Seal)

By Mr. Gordon:

Q. Mr. Fleming, to whom were these options and renewals  
sent when they were gotten?

A. Either to Mr. Buchanan or Mr. Lincoln or Mr. Wahab;  
usually to Mr. Buchanan. I think they were sent to Mr.  
Buchanan.

Q. Who requested the getting of these extensions from  
time to time?

A. Either Mr. Lincoln, Buchanan or Wahab, but mostly I  
think they came from Mr. Buchanan.

Q. Who handled the option business and the extensions  
south of Virginia for you all?

A. Mr. Kimbrell and Mr. Murphy.

Q. There is a charge here in this complaint after the  
charge of \$11,000.00 for the options and the \$17,000.00 for the  
expenses about the inventories and the *per diem* of \$75,-  
000.00 for damages, a large part of which has been itemized  
in the particulars of claim. Yesterday when Mr.

page 493 } Buchanan was asking you about the \$75,000.00  
did you intend to claim that that \$75,000.00 arose  
all after July or not?

Mr. Bazile: If Your Honor please, that is objected to  
as being leading.

The Court: Objection sustained.

By Mr. Gordon:

Q. To what did that claim for \$75,000.00 refer?

A. It arose beginning after January 31st. Our work on  
options stopped on January 31st on which day and as of  
which day we were supposed to be taken over by the organi-  
zation. After that time our loss and our expense and our  
damage began. From that time we were working on inven-

tories and accounts and doing many other things for the other company and from that date on you will find from our records we had very heavy losses.

Mr. Bazile: Now, if Your Honor please, I move to strike out so much of that answer as relates to working on accounts because he is suing for \$17,000.00—on inventories because he is suing for \$17,000.00 on inventories and he is not entitled to charge that up twice against us in his bill for damages.

The Court: I don't understand that objection. An inventory in one form is an account, isn't it?  
page 494 } Mr. Bazile: No, sir; he says a part of his damage resulted from the taking of inventories. Now, then, he has sued us for three causes of action here. First, he sued us for—

The Court: Don't mention the two that do not affect the item.

Mr. Bazile: He has sued us in his third claim for \$73,000.00, I think—anyhow, it is above \$70,000.00, and in that answer to Mr. Gordon's question he is attempting to assert the damages which he sustained under that cause of action for which he is asking \$73,000.00 and one of the elements of the damage which he said he sustained was from the taking of these inventories. Now in his second cause of action against us he has sued us for \$17,000.00 for the taking of these same inventories and I say he is not entitled to charge us \$17,000.00 or try to charge us that amount under the second cause of action brought against us and then add the damage he sustained from the doing of the very same thing to make up the \$70,000.00 which he seeks to recover under the third item, and therefore I move that so much of his answer as shows that his damage under the \$70,-  
page 495 } 000.00 claim resulted from the taking of these inventories be stricken out.

The Court: I don't know whether he is charging twice for the same item. That you will have ample opportunity to point out to the jury and the jury will have ample opportunity not to allow him for an item which he is claiming damages for twice.

The Witness: I think he misunderstood my answer.

The Court: One minute, don't interrupt. That is a question to go before the jury. If the jury think he is charging twice it would be their duty to allow him for only one.

Mr. Bazile: With that instruction to the jury I am satisfied.

The Court: I don't construe it. I leave it to them.

The Witness: My answer was trying to differentiate between prior to January 31st and after January 31st. I mentioned after January 31st as the inventory taking time. I didn't mean to charge this as taking inventories, but distinguishing that as the time we were taking inventories and other work than taking options.

By Mr. Gordon:

Q. Now I just want to ask you this question: I show you Exhibit #71, which is the Carolina Parlor Furniture agreement, and ask you by whom that was prepared originally?

Mr. Bazile: You asked him that yesterday.

A. This was prepared by Mr. Buchanan.

By a Juror:

Q. Did I understand you that on January 31st, 1929, if this deal had been consummated under this transaction you would receive \$11,000.00 or \$1,000.00 for each one of the eleven options which you secured at that time?

A. Yes, sir.

Q. Subsequent to that date you were called upon to have these options renewed?

A. Yes, sir.

Q. Was that done at any expense to your company?

A. Considerable.

Q. Where was that charged against the defendant company?

A. It was charged on our company's books.

Q. Is that part of the \$11,000.00?

A. No, sir; that comes separate. You see, the \$11,000.00 was covering the taking of options which they agreed to pay us \$1,000.00 each for. After we secured the options they engaged our services on account of our managers and other men in the furniture business knowing that line of business to go out and take these inventories and appraise accounts, etc. They spent sometime ten days or two weeks at one store. For instance, in New Orleans I think that man had in the neighborhood of a million dollars of assets and it took a lot of time for those managers to go over every piece of furniture and appraise it.

Q. I don't think you understood me. I am not questioning the appraising of the property, but securing the options.

On January 31st if this deal had been consummated you would have been entitled, under your opinion, to \$11,000.00 for having secured eleven options?

A. That is right.

Q. Then you were called upon subsequent to that date to have them renewed, some of the same options?

A. Yes, sir.

Q. Now I asked you did it cost you any expense to do that?

A. Yes, sir.

Q. Just securing a renewal of the option?

A. Yes, sir.

Q. How is that charged on your books? Is that part of the \$11,000.00 or is that part of the other item?

A. No, it is in the later item. The option money of \$11,000.00 was charged up prior to January 31st.

Q. If I understand correctly, the amount of \$17,000.00 is not the cost of taking only the inventories, but the cost of taking the inventories plus the cost of securing options subsequent to January 31st?

A. We didn't get any options after then.

page 498 } Q. You renewed them?

A. Yes, sir.

Q. And those were an expense to you, to renew them?

A. Yes, sir.

Q. Is that part of the \$17,000.00 or part of the \$11,000.00?

A. It is part of the \$17,000.00.

By Mr. Bazile:

Q. Your declaration doesn't charge that?

A. I think so.

The Court: Are you asking a question, Mr. Bazile?

Mr. Bazile: If Your Honor please, his declaration doesn't charge anything of the kind. His declaration charges that all of the \$17,000.00 was expense incurred in the taking of the inventories and the appraising of the accounts and he only asked for \$11,000.00 on account of the options. He isn't suing for any expense in connection with the options. (Reads third, fourth and fifth paragraphs of the declaration.)

The Court: Let me ask you right there: Did you allege that you were to receive \$1,000.00 for options and expenses?

Mr. Gordon: No.

The Court: Then the \$1,000.00 option or price for the option was to include the expense that the plaintiff had been put to in getting that option?

page 499 }



Mr. Gordon: Of course.

A Juror: May I ask a question right there? That \$8,500.00—what is that for? Is that the cost of securing the original options plus all renewals or only the cost of them?

Mr. Gordon: Only the cost of securing the original options.

The Court: Now that is all merged in the \$11,000.00?

Mr. Gordon: Of course, it is. Now when they called for additional information from us we furnished them an itemized statement of this \$8,537.27 which they asked us to furnish. That had nothing in the world to do with the itemized account of the expense of taking the inventories which had originally been filed with the notice of motion for judgment.

Mr. Bazile: That is exactly what I said.

Mr. Gordon: No, you didn't. You told His Honor—

The Court: Let's get along with the argument.

Mr. Gordon: As I said, my friend Mr. Bazile—he said just now we had on their call furnished them an entirely different statement from the one we had filed with the notice of motion.

The Court: I think he did.

page 500 } Mr. Bazile: I beg your pardon. Will Your Honor permit me to explain what I did say?

The Court: Yes.

Mr. Bazile: I said the expenses incurred in securing these options couldn't possibly be the same as the expense items set up in the \$17,000.00 account for the reason that when we called for an itemized account of the expense incurred in securing the options he filed an entirely different account from the account relating to the \$17,000.00 item and it had entirely different items in it and the two were separate and different. The contention I made was that under his pleadings he is not entitled to recover for any expense for getting the options.

The Court: He admits that is merged in the \$11,000.00, the expense of getting the options originally, but for renewals he does claim the expense.

The Witness: I could clarify that. We rendered a statement to the Lincoln Company for \$11,000.00 for options. The correspondence we have read will explain to you Mr. Lincoln objected to the \$11,000.00; said it was a pretty steep price.

He was perfectly willing to pay whatever expense  
page 501 } we had and asked us to render him a bill of our actual expense in getting these inventories—

Mr. Gordon: Options, you mean.

The Witness: Yes, sir. I beg your pardon. He wanted

to know what it actually cost us to get these options for which we were wanting him to pay \$11,000.00. We rendered him this statement showing what we had actually spent in getting the eleven options for which he agreed to pay us \$11,000.00. That was an entirely separate and distinct statement from that coming after January 31st. In other words, we were perfectly willing to show him what it cost us in actual recorded items to get the eleven options for which we were asking him to pay \$11,000.00 and we have many items we didn't charge. I found \$50.00 of telephone and telegram charges we didn't charge at all. We figured we were working for them and one or two dollars didn't make any difference because on January 31st we would be merged into one company and were indifferent to those minor items, but these were the recorded items and they amounted to \$8,500.00.

page 502 } CROSS EXAMINATION.

By Mr. Buchanan:

Q. You have stated in answer to a question that you charged no items in connection with these options after January 31st.

A. I said in securing options.

Q. I want to hand you a copy of your ledger which was presented in response to interrogatories or summons by the defendant, which is headed: "Organization expense—Options for Virginia Table Company". The total amount is \$5,950.08 as the expense—

Mr. Gordon: No, sir. If you read the notice you will find the other amount is added to it.

Mr. Buchanan: "Organization expense—Options for Virginia Table Company." I don't know what is to be added to it. I am taking it from the books.

Mr. Gordon: You want to be fair about it—

Mr. Buchanan: I certainly do.

Mr. Gordon: The answer to your request sets out the thing in full and it shows that this other was to be added there.

By Mr. Buchanan:

Q. Did Mr. Zachary have anything to do with securing renewal options?

A. I had no dealings with Mr. Zachary. Mr. Kimbrell can tell you that.

page 503 } Q. I want to ask you if it doesn't show—if you didn't include in your expenses for securing op-

tions a fee to Mr. James B. Murphy of \$2,026.54 for legal services?

Mr. Gordon: Certainly, we did.

A. Yes, that is in there.

Q. I also want to ask you if there isn't included in there a salary for one month for Mr. Kimbrell of \$750.00?

A. Yes.

Q. Now, Mr. Fleming, I want to ask you—

Mr. Gordon: You are at perfect liberty—the account speaks for itself. We are going to have Mr. Murphy on the stand.

Mr. Buchanan: I will ask Mr. Fleming.

Q. You stated none of these items were charged after January 31st. I want to ask you if these expenses for securing these options on your ledger don't show that after December 4th you charged E. H. Hillis, \$112.05; W. E. Kimbrell, \$341.59; Rives Fleming, \$23.83; Rives Fleming, \$8.30; H. W. Kimbrell, \$82.58; H. W. Kimbrell, \$54.67; H. W. Kimbrell, \$250.00 in salaries and James B. Murphy \$2,026.54, all after February 4th?

A. February 4th?

Q. Yes.

A. It might have been a few days later being charged, but our options were supposed to be over with on page 504 } January 31st. Now Mr. Murray can explain if they came in two or three days later.

Q. Isn't the last item February 28th?

A. Yes, sir. Mr. Murray knows about this and can explain it. I can't. I know our optioning was over on January 31st.

Q. What I am trying to get at that included in the expense of getting the options you also included—I am not prepared to say it is wrong—that you have also included legal fees of over \$2,000.00 and salary of Mr. Kimbrell for one month of \$750.00 and salary of Mr. H. W. Kimbrell for one month of \$250.00 in addition to expenses.

A. For securing options?

Q. Yes.

A. Certainly, we did. We did that all the time.

Q. I just want to show it was salary and not expense.

A. We didn't say expense; we say cost. That don't necessarily mean traveling expenses.

Q. Mr. Gordon has asked you if Mr. Buchanan prepared

these various papers. They were all submitted to your counsel and examined by him carefully, very carefully, in detail before they were signed by you, were they not?

A. Yes, sir, I think so.

Witness stood aside.

page 505 } W. P. HAZELGROVE,  
a witness introduced in behalf of the plaintiff,  
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Gordon:

Q. Please state your name, age, residence and occupation.

A. W. P. Hazelgrove; 40 years old; practising attorney, and resident of Roanoke, Va.

Q. You practise law in Roanoke?

A. Yes, sir.

Q. In the year 1929 were you counsel for any of the persons or firms that were supposed to go into the merger that Mr. Lincoln was forming?

A. May I refresh your memory from the file as to the year?

The Court: Yes.

A. Yes, in 1929 I was counsel for the partnership of Phelps & Armstead.

Q. Where were they located?

A. At Roanoke, Va.

Q. Did Phelps & Armstead have any contract with the Virginia Table Company, Incorporated, in regard to this proposed merger?

A. Yes, sir, they did.

Q. What was the nature of that contract?

page 506 } Mr. Buchanan: May it please the Court, we  
object. I don't see what that has to do with this  
controversy.

The Court: I fail to see the relevancy.

Mr. Gordon: The relevancy is this: I am going to prove—

Mr. Buchanan: Wait a minute. If you want to state what you expect to prove it should be done in the absence of the jury.

Note: The jury retires from the court room.

Mr. Gordon: Mr. Buchanan has stated in the presence of

the jury they had made no binding contract of sale or purchase with any of these interested units. I am going to prove by Mr. Hazelgrove that the Virginia Table Company had entered into a contract of sale and purchase in which the Virginia Table Company was bound to purchase, and that is one of the circumstances to support—and a very pregnant circumstance to support the agreement which I am going to show by this witness was made at the Marion meeting in July, 1929, because if he was already bound up to accept certain units that was all the more incentive on him  
page 507 } that he should go ahead with this individual merger.

The Court: Is this one of the companies?

Mr. Gordon: One of the interested units in the set-up.

Mr. Buchanan: But not one you all got the option on.

Mr. Gordon: It went into the whole picture.

Mr. Buchanan: I don't think that on account of circumstances that were entirely separate and distinct from the Southern Factories & Stores that negotiations were entered into orally with Messrs. Phelps & Armstead in connection—this company did ask them to take over a store and did operate it or secured the stock in it. I have no recollection of making any statement—I may have made it, but if I did I was in error because there was an agreement with Boggs-Rice which was afterwards exercised, but there were peculiar circumstances which surrounded each of those; circumstances which made it peculiarly advantageous, as we thought, at that time to secure Phelps & Armstead. They have since sold their business to other parties. But what I am trying to get at, this contract was made when the inventory was taken in January, my recollection is.

page 508 } The Court: This contract was in existence at the meeting of July 19th?

Mr. Buchanan: Yes, sir.

The Court: It had already been entered into?

Mr. Gordon: It was in the picture presented to Hayden & Stone.

Mr. Buchanan: Not only that, but in the very last picture in which several of those stores weren't presented, and Phelps & Armstead was a very valuable store, had earned \$40,000.00 to \$60,000.00 a year over a long period of time, and we entered into an absolutely separate and distinct contract, which you can produce, that if at that time they desired it we would exercise the option and if we bought their store we would have made a profit of \$40,000.00 or \$50,000.00, but that contract was separate and distinct.

Mr. Gordon: If you want to go into that feature of it I think I can show Your Honor they wanted you to comply with your contract and you didn't do it.

Mr. Buchanan: It was various terms in connection with it that had to be threshed out.

Mr. Gordon: This contract was entered into in January.

The Court: My view of it is that the making of page 509 } that contract at a different time is too remote to be admitted in evidence in proof of the making of this verbal contract.

Mr. Gordon: It was in existence at the time of that verbal contract.

The Court: You are offering that to corroborate the fact of the making of a verbal contract on July 19th?

Mr. Gordon: Why he entered into the agreement of July 19th. That was one of the inducements for it.

The Court: I think it is too remote. You may put it in the record and save the point.

Note: The jury returns into the court room.

By Mr. Gordon:

Q. Was the firm of Phelps & Armstead in the merger proposition that was presented to the bankers in New York—Hayden, Stone & Company?

A. Yes, so I understood. I never heard any intimation to the contrary and we were called to New York in a conference on that supposition. As a matter of fact, I was told so.

Q. At the time you went to New York with re- page 510 } gard to this proposition was there any contract existing between Virginia Table Company and Phelps & Armstead for the purchase by the former of the business of the latter?

A. Yes, sir.

Q. Was it an absolute binding contract and agreement to purchase?

Mr. Bazile: We object to that.

The Court: You can put your objection in if you have any additional grounds.

Mr. Buchanan: The contract is the best evidence.

Note: The jury retires from the court room.

By Mr. Gordon:

Q. Have you got the contract with you?

A. Yes, sir.

Q. Are you ready to produce it?

A. Yes, sir. On that question, though, I take it it would be a question of law to show that the contract, which was in the form of an option, had been accepted. Certain subsequent papers would be necessary to show its conversion into an accepted binding contract from what it showed on its face, which is an option.

Q. Were you present at the meeting at Marion, Va., on July 19th, 1929, when Mr. Lincoln made certain statements and propositions to the people assembled there?

page 511 } A. Without my file in front of me I wouldn't say exactly as to the date, but some time in the summer—I think in July, 1929. I was in Marion at a meeting of the representatives of the various units which were supposed to go into this merger.

Q. At that time was there a binding contract between Virginia Table Company, Incorporated, and your clients with regard to a sale and purchase?

A. I so considered those instruments, yes, sir.

Mr. Gordon: That is what we want to introduce before we go into what occurred.

The Court: Do you gentlemen want to put your objection in the record?

Mr. Bazile: Yes, sir. We object to this testimony because it is too remote. We further object to it as being irrelevant, having no bearing upon the issue here, and we also object to the statement made by Mr. Hazelgrove as to the legal conclusions expressed by him which should be drawn only from an inspection of the contracts themselves.

The Court: The objection is sustained and the evidence excluded.

Mr. Gordon: To which action of the Court the plaintiff excepts because we expect to prove by this witness  
page 512 } that at the meeting held in July, 1929, at Marion the Virginia Table Company, Incorporated, stated it had definite commitments for the merger of these different units, but if for any reason those commitments weren't realized that he would form a smaller merger between his corporation and such of the units as desired to go into the merger, and the evidence now sought to be introduced is for the purpose of showing an additional incentive on the part of Mr. Lincoln to make that agreement. Now I am going to ask

him now what the agreement was at Marion and then I want to—

The Court: What agreement?

Mr. Gordon: That Mr. Lincoln made there at that meeting.

The Court: The one you are suing on? You can ask him that.

Mr. Gordon: Then we want to ask him whether or not at that time there was a binding agreement between his company and Mr. Lincoln's company.

The Court: Made theretofore?

Mr. Gordon: Made before that time and whether they extended the time for the exercise of that agreement page 513 } ment on the basis of what was done there at that meeting.

The Court: Suppose you get all of that in the record now and I will decide whether I will let it go to the jury.

Mr. Bazile: Of course, we are going to object to his testimony on that point for the same reasons which we gave with reference to the introduction of Mr. Fleming's testimony at the time it was originally introduced.

Mr. Gordon: I am going to tell you gentlemen right now in order to meet that technical objection I am going to ask the Court to allow me to amend the declaration so as to state the contract in that form.

By Mr. Gordon:

Q. Mr. Hazelgrove, in view of the statement which you have made as to what transpired at Marion in July, 1929, when you were present I will ask you whether or not at that time Phelps & Armstead had a binding contract with the Virginia Table Company, Incorporated, for the taking over by the latter of the business of the former?

Mr. Bazile: We object to that for the same reasons heretofore given.

Mr. Buchanan: And also because any such contract proven, if proven, must be based upon considerations page 514 } which are totally different from the considerations proven or shown in this case and may have been for an entirely different purpose. It may have been to purchase a single store without any connection whatsoever with any merger or consolidation. It was between the defendant and a partnership not a party to this case and a contract entered into some six or eight months before, under circumstances and for a consideration which do not and cannot



exist between the defendant and the plaintiff in this case and for reasons which were satisfactory to the defendant which do not exist and could not exist between this plaintiff and the defendant.

Mr. Gordon: Before replying to that I will ask one other question.

Q. Were the statements which were made by Mr. Lincoln with regard to the merger made to all of those who were present at the meeting?

Mr. Bazile: That is objected to as leading.

The Court: I think that objection should be sustained. The question is leading and it is too general. The witness has not testified yet as to what was said.

page 515 } Mr. Gordon: That we had better meet that when we come to it.

The Court: I think if you could put that other question in and then ask him these questions we might save having the jury to go out again, but if it is going to embarrass the conduct of your case I will let you proceed your own way.

Mr. Gordon: I would rather wait until we come to that point then.

Note: The jury returns into the court room.

By Mr. Gordon:

Q. State whether or not Phelps & Armstead were one of the units in the proposed merger that Mr. Lincoln was forming in the year 1929.

A. Yes, sir, it was.

Q. State whether or not during the early part of that year Messrs. Phelps & Armstead had given to Virginia Table Company, Incorporated, an option for the purchase of their business.

Mr. Bazile: We object to that, if Your Honor please.

The Court: Objection overruled.

Mr. Bazile: Exception.

A. Yes, sir, they did give to the Virginia Table Company an option.

page 516 } Q. Have you got a copy of it with you?

A. They gave them an option under date of January 15th, 1929.

Q. Did you and your clients attend any meeting in New York with regard to this merger business?

A. Yes, sir, we did.

Q. About when was that?

Mr. Bazile: We object to the meeting in New York. That has no bearing upon this case. It is immaterial and irrelevant whether his clients went to New York or not, his clients not being the plaintiffs here.

The Court: As I understand, that is just leading up to the instance on July 19th.

Mr. Bazile: But that was at Marion.

The Court: Unless you can show something very prejudicial to you I am going to let it come in.

A. Yes, sir, I attended a meeting up there some time between the 10th and 16th of May, 1929.

Q. Were Messrs. Phelps & Armstead up there with you?

A. Yes, sir, they were both there.

Q. Please state whether or not Phelps & Armstead were in the set-up which was presented to the bankers in New York and about which you went to New York.

A. I could only answer that by saying I so understood and given to understand that from all the parties  
page 517 } interested with Mr. Lincoln and never until this  
case have I had it intimated they weren't, but on  
the contrary positively they were.

Q. Did Mr. Lincoln make any statements during that visit to New York to you or in your presence to others as to why the financing by Hayden, Stone & Company or Haystone Corporation didn't proceed?

Mr. Buchanan: I don't like to object; I would like the jury to have the benefit of every material point, but this case is taking a long time and if we go into the reasons for Haystone & Company and all the bankers—that is the reason I asked Mr. Fleming this morning if he had any complaint to make because the bankers didn't underwrite this merger and he stated no, he had no complaint to make. If we go into the reasons for that it would be interminable.

Mr. Gordon: I am not going into the reasons of the bankers, but you have undertaken to present and you said you were going to prove that the bankers—that the reason this thing fell down was because the bankers wouldn't approve the thing. Now I am going to prove that the real reason was something different.

Mr. Buchanan: All I said that I expected to  
page 518 } prove was this, which I will substantiate and which  
is substantiated in the record today, that Mr.

Potter, the senior partner of the firm of Hayden, Stone & Company, has given his deposition as testimony in this case when Mr. Gordon was present in which he stated that the reason that the bankers contract wasn't complied with was because the picture presented by the auditors didn't come up to the representations made by the stores. That is the statement I made and that I will substantiate.

The Court: That was a deposition taken by the defendant?

Mr. Buchanan: Yes, sir. I, of course—I don't know why they wouldn't do it except what he says and that is in the record.

The Court: I think that relevant to this inquiry. Objection overruled.

A. Yes, he did.

Q. Please state what he said.

A. Well, I wouldn't, Your Honor, undertake to attempt to repeat about a two-hour speech that Mr. Lincoln made up there in New York that day or quite a long talk. The sum and substance of it, as I recall it, was to the effect that he had considerable and prolonged negotiations with page 519 } one or more of the partners in Hayden, Stone & Company, which was the investment banking house set out in the original contracts of option to finance the securities; that one or more of these partners had died and various and sundry other details had been gone into, but that they were entirely too slow; that they wanted too much money for their financing and that he thought he could get his financing done by one or more other financing concerns in New York at a much lower rate and much more expeditiously, and at that meeting he named one or more concerns through whom he expected to do business, among them being Richard Cardwell & Company of Nashville, about whom I made inquiry from the National City Bank of New York.

Q. Did he state whether or not the proposition had been withdrawn from the Hayden-Stone interests?

A. He stated that he had so withdrawn it, yes, sir.

Q. He had withdrawn it?

A. Yes, sir.

Q. At that conference did Mr. Lincoln make any statement that Hayden, Stone & Company or their corporation had turned down this proposition because of lack of profits?

A. I heard no such statement, sir.

Q. Did you ever hear any intimation of that kind before?

Mr. Bazile: If Your Honor please, we object to that. What

he heard from other people wouldn't be admis-  
page 520 } sible. What he heard from Mr. Lincoln is proper.  
The Court: Objection sustained.

By Mr. Gordon:

Q. You heard no intimation from Mr. Lincoln to that effect, did you?

Mr. Bazile: He answered that.

Q. I asked whether you heard any intimation from Mr. Lincoln to the effect the bankers were turning down the proposition for lack of profits.

A. No, sir, I didn't hear any such intimation. If I did, it didn't make sufficient impression on me to remember it at this date.

Q. Your company was in the picture?

A. My clients, which was a partnership.

Q. If such a statement had been made by Mr. Lincoln at that time do you think you would have forgotten it?

Mr. Bazile: If Your Honor please, we object to that.

The Court: The objection is sustained.

By Mr. Gordon:

Q. Now did you and your clients attend a meeting that was held in Marion on July 19th, 1929, at which there was a conference in regard to this proposed merger?

A. I am merely using this to refresh my mind as to dates.

Yes, sir; it was July 19th, 1929; I attended a conference at Marion.  
page 521 }

Q. Now can you recall some of those who were present at that conference?

A. Yes, sir.

Q. Will you state who they were?

A. Mr. Murphy was there—sat by me; there was a chap there from some place down in Louisiana—I have forgotten his name—from New Orleans; there was a fellow named Rice there from some furniture store at Bristol, Va., or Bristol, Tenn., I don't remember which, or may be he was from the Lynchburg store; anyway, it was a fellow there by the name of Rice; I think. I can't recall right now the names of the various people. Mr. Wahab was there; Mr. Buchanan was there; Mr. C. C. Lincoln, Jr., was there.

Q. Without going into detail, state whether or not that was

a conference between Mr. Lincoln and a number of these constituent units that were proposed to be merged.

A. Yes, sir, I would say in that conference there was something around twenty-odd people in there—men.

Q. Now did Mr. Lincoln at that conference make any statement with regard to this proposed merger and, if so, what?

Mr. Bazile: Now, if Your Honor please, before the witness answers this question we want to interpose an objection to any answer which would attempt to prove page 522 } by parol evidence a contract different from that set up in the option agreement between Southern Factories & Stores Corporation and Virginia Table Company of July 20th, 1929, and the other objections that we have heretofore made to the parol evidence which has been given by Mr. Fleming in this case. Your Honor will recall the various objections that were made to that testimony and we wish to make the further additional objection that Mr. Fleming hasn't proven any contract separate and apart—or the plaintiff hasn't proven any contract separate and apart from the written contract of July 20th, 1929, and for that reason and for that reason any declarations or statements made which are not contained in that written contract are not admissible here.

The Court: These are substantially the same objections you made when Mr. Fleming was testifying?

Mr. Bazile: Yes, sir.

The Court: For the reasons stated then the objection is overruled.

Mr. Bazile: Exception.

A. Mr. Lincoln made a lot of statements; made quite a long talk at that meeting. If you would suggest the page 523 } line—

Q. I wanted you to state what, if anything, he said he would do with regard to this proposed merger and what he was doing at that time.

Mr. Bazile: May it be understood that our objection runs to the whole examination on this point?

The Court: This point, yes, sir.

Mr. Bazile: We will make additional objections when new matter makes it necessary.

A. In substance Mr. Lincoln stated to the meeting these investment bankers or brokerage concerns with whom he

had been negotiating and dealing in New York had failed to accomplish the necessary financing, that some of the less attractive units originally proposed for the merger had been eliminated on account of their operating statements, that he had made definite contact with a concern in Chicago that had the word Foreman in the name. If there is no objection, I think I can refresh my recollection after these three years from something in here.

Q. I think Foreman National Corporation, wasn't it?

A. The Foreman National Bank had a subsidiary, I think, called the Foreman Trust & Savings Bank; anyway, it was an investment banking concern in Chicago that was in some ways connected with the Foreman Bank; that the man in charge of this institution—and he gave us their  
page 524 } names, which I don't now recall—didn't have the

New York bankers' attitude with respect to wholesale concerns that handle instalment selling paper or instalment selling merchandise; that these people were competent and able to consummate the financing, except that the financing would have to be done by certain debenture notes or debenture bonds bearing 6% interest, is my recollection, instead of in a convertible preference stock, as originally planned, which carried a higher rate of dividend; that the financing would be accomplished much easier; that on account of the condition of the market people were timid of stocks, but more gullible or better buyers of debenture bonds; that it would have the consolidated or merged corporation considerable funds, and that the matter was practically consummated from a financing standpoint; that he felt certain that it would be floated within a few days, but urged everyone there who had heretofore been sticking together, as he said, to grant a sixty or ninety day extension, although he said he didn't think he would need anything like that much time, but in that additional time he could drive a better bargain in the way of financing cost. Some gentleman at the meeting—I have forgotten who; I think the gentleman from New Orleans—got up and made a very nice little talk and  
page 525 } moved to express the sense of the members in the meeting that they extend the option either sixty or ninety days, whichever it was, longer than Mr. Lincoln had requested. The meeting was there that day—stayed in session a good part of the day and some time at the meeting Mr. Lincoln developed this thought, that his plant was sufficiently solvent or had sufficient assets or sufficient liquid assets which, together with the group of stores then left in the picture of a portion of the stores then left in the

picture, if the necessary financing couldn't be obtained through outside brokers that we would put together such of the units together with his factory as we felt proper and do our temporary financing ourselves until market conditions got better when it could be done by extraneous financing.

Q. Was that a definite proposition on his part?

Mr. Bazile: We object to that question as being leading.  
The Court: Objection sustained.

Q. Did he say what he would do in event the financing with the bankers fell through?

A. Mr. Gordon, I can't answer that question definitely in the way you have asked it for Mr. Lincoln was apparently so positive that the financing through the Foreman Trust and the Chicago concern was so certain and practically was consummated that the contingency of its not going through I don't think was very materially considered, but he certainly did make the statement that should the one-thousandth chance occur or should the financing not be done that then his concern had money and that he would divert his equity in the merged property by taking an inferior stock or an inferior security and thereby use the whole resources of his concern to secure the investment or advances made by other elements in the merger and that a part of this group or all of the group then left in the picture or such of them as were willing to do it would do their own merging and their own financing, which would be temporary and he would, so to speak, pledge his own resources to consummate it until outside financing could be negotiated, and made the statement in substance, if not in words, that after having gathered together such a fine group of stores who had shown such spirit of co-operation and having spent so much money himself that he was certainly not going to see this thing fall through.

Mr. Gordon: Judge, I now want to ask the question which we discussed with you and if Your Honor holds to that ruling then we would give the same reasons.

The Court: I will let the jury go out.

Mr. Gordon: After conferring with Mr. Murphy we will just withdraw that and won't touch that.

Q. Have you any interest in this case at all?

A. No, sir.

Mr. Buchanan: We don't want to ask him any questions.

Witness stood aside.

page 528 } D. L. ARMSTEAD,  
a witness introduced in behalf of the plaintiff,  
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Gordon:

Q. Please state your full name.

A. Drewry L. Armstead.

Q. Where do you live?

A. Roanoke, Va.

Q. What is your business?

A. Well, I was in the furniture business up until three or four months ago. I am not doing anything at present.

Q. What was your first?

A. Phelps & Armstead.

Q. In the year 1929 state whether or not your firm gave an option to the Virginia Table Company, Incorporated, for the sale of its property?

A. Yes, sir.

Q. For what purpose was that given?

A. For the purpose of forming a merger of the furniture business.

Q. Did you visit New York any time in May of 1929 with regard to this proposed merger?

A. Yes, sir.

page 529 } Q. Do you know whether your company was in the set-up that had been presented to the bankers there?

A. Yes, sir, it was.

Q. Did you have any conversation with Mr. Lincoln or hear him make any statements at that time in New York with regard to why the financing with Hayden, Stone & Company didn't go through?

A. I think the first trouble was the senior partner died and he said they would have to put it off sixty or ninety days before they could take any further action. Then after that I believe they raised the commission on it for forming the merger.

Q. Raised the commission on it?

A. Yes, sir.

Q. Did you hear him make that statement?



A. Yes, sir.

Q. Did he make any statement as to what he was going to do in regard to Hayden, Stone & Company about this proposition?

A. I think he pulled out from them.

Mr. Bazile: We object to what he thought.

The Court: State only what you know.

A. (continued) Well, he said he pulled out from them.

Q. Did he make any statement with regard to the charges they were making against him—I mean money page 530 } charges?

A. Yes; he said he could get it, I think, something like 2% less from some other concern.

Q. He said they were demanding 2% more than some other concern?

A. Yes, sir.

Q. Did he say whether or not he was willing to pay that?

A. No, he said he wasn't.

Q. Said he wasn't willing to pay it?

A. Yes, sir.

Q. Did Mr. Lincoln at that conference make any statement with regard to Hayden & Stone themselves turning this proposition down?

Mr. Bazile: If Your Honor please, that question is objected to as leading.

The Court: Objection overruled.

A. No, I don't remember him saying anything about it.

Q. He said he had withdrawn from the bankers—had withdrawn the proposition?

A. That is what I understood, yes, sir.

Q. Now were you present at the Marion conference held on July 19th, 1929?

A. Yes, sir.

Q. Did Mr. Lincoln at that conference make any statement with regard to what he was willing to do as to this proposed merger?

page 531 } Mr. Bazile: If Your Honor please, we make the same objections to the answer to this question which were made to Mr. Fleming's testimony on this point and Mr. Hazelgrove's testimony on this point.

The Court: Objection overruled for the same reasons.

Mr. Bazile: Exception for the same reasons.

A. He said he had practically made a contract with some Chicago and New York houses to put the merger through; that was a verbal contract and all he had to do was to take the papers up there and have it signed and expected to have it done in the next two or three days, but said if he didn't do that he could go ahead and form a merger of his own; thought he had available the resources of his own to form a merger and finance it himself.

Q. At that meeting what was said, if anything, about the extension of the options?

A. Well, he wanted the options extended, I think, sixty days he said and we agreed to give ninety days.

Q. Do you know whether or not the persons there assembled did agree to extend the options?

A. I think they did. I think most of them did.

Q. Did you agree to extend yours?

A. Yes, sir.

Q. You have no interest in this case at all?

A. No, sir.

page 532 } CROSS EXAMINATION.

By Mr. Buchanan:

Q. Mr. Armstead, in New York do you recall that Mr. Lincoln had a contract with Hayden, Stone & Company for this financing upon a certain basis?

A. That is what I understood.

Q. And at a certain price?

A. Yes, sir.

Q. And when the audit of Haskins & Sells didn't come up to representations Hayden, Stone wanted more money?

A. I understood they wanted more money, yes, sir; 2 or 3%.

Q. And he was unwilling to pay the additional money and for that reason Hayden, Stone having refused to finance it on the original basis he withdrew it and was going to give it to other bankers. That is correct?

A. Yes, sir.

Q. Now as to the conference in Marion—you know Dr. Barnett, of the Max Barnett Furniture Company of New Orleans, don't you?

A. Yes.

Q. Don't you recall that before Mr. Lincoln—or do you—before Mr. Lincoln made any statement as to any private

financing that Dr. Barnett made a motion that all present extend the option or do you recall that?

A. He got up and made a considerable talk page 533 } and advocated extending the option, yes.

Q. And the parties present agreed to extend it by vote?

A. I think they all did.

Witness stood aside.

page 534 }

B. M. PHELPS,

a witness introduced in behalf of the plaintiff, being first duly sworn, testified as follows:

### DIRECT EXAMINATION.

By Mr. Gordon:

Q. State your full name.

A. Benson Miller Phelps.

Q. Where do you live?

A. Roanoke, Virginia.

Q. Are you the late partner of Mr. Armstead, who has just testified?

A. Yes, sir.

Q. How long have you been in the furniture business with Mr. Armstead?

A. About twenty years.

Q. Were you present in New York in May, 1929, with regard to this merger of the Virginia Table Company with your company and others?

A. Yes, sir.

Q. Was anything said at that meeting in New York by Mr. Lincoln as to why the bankers weren't going on with the financing?

A. Mr. Lincoln stated that one of the officers of the bank he was dealing with had died and it would be de- page 535 } layed for some time and that he had withdrawn his papers and he found out he could make a deal with some other bankers and save quite a lot of money.

Q. That he had withdrawn the papers from the bank?

A. Yes, sir.

Q. Did he suggest in any way at that meeting that the bankers had turned down the proposition for any lack of profits?

A. Not to my knowledge, no, sir.

Q. Now were you present at the meeting that was held at Marion on July 19th, 1929?

A. Yes, sir.

Q. For what purpose was that meeting held?

A. I think that meeting was held for an extension of time to arrange for his financing.

Q. Were you present at the conference that was held there in Marion?

A. Yes, sir.

Q. Did you hear Mr. Lincoln make any statement as to what he would do with regard to this merger?

A. He stated at that time he thought he had practically arranged for the finances or would only take about fifteen or thirty days to complete his negotiations.

Q. Did he make any further statement with regard to what would be done if that fell through?

A. If I remember right, he said if that fell through that he had finances enough, getting together a small  
page 536 } bunch of that group, that he could finance it any-  
way until the market got so that he could market the bonds.

Q. Was that latter statement you have made—was that a proposition that he made with regard to what would be done or not?

Mr. Bazile: We object, if Your Honor please.

The Court: Objection sustained.

By Mr. Gordon:

Q. You say he said he had made arrangements to get the financing done?

A. Yes, sir.

Q. I am asking you now was any request made to persons there to extend the option?

A. Yes, sir.

Q. Did he make any alternative statement with regard to what would be done if the financing wasn't carried through in Chicago?

Mr. Buchanan: We object. He has answered that.

The Court: Objection overruled.

Mr. Bazile: Exception.

A. He said if it didn't go through in Chicago that with his finances and with getting together a few of the better stores that he thought he could finance it and with that group

of men he didn't want to give it up as much as he had spent on getting that group together.

page 537 } Q. You have no interest in this case at all?

A. No, sir.

### CROSS EXAMINATION.

By Mr. Buchanan:

Q. Mr. Phelps, at Marion the conference was in session for several years, wasn't it?

A. Yes, sir.

Q. And the members present at that time were discussing every phase of the situation before them? I mean they were discussing the merger and the possibility of financing, were they not?

A. Yes, sir.

Q. Do you remember Dr. Max Barnett, of New Orleans, of the Max Barnett Furniture Company?

A. I don't remember him distinctly, there were so many there.

Q. Do you know him personally?

A. No, sir.

Q. Do you remember whether Dr. Barnett was there that day or not?

A. Yes, sir.

Q. I don't know whether you remember or not, but do you recall that Dr. Barnett made a motion that all the members present extend their options or do you recall that?

A. I don't recall now.

page 538 } By a Juror:

Q. Was there any objection on the part of the different stores represented there to extending the options? Did any of them object to the extending of them when the motion was made that they be extended?

A. If I remember right, there was one party that wouldn't extend his option.

Q. Did he state why?

A. I don't remember.

Q. Do you remember who he was?

A. No, sir. It was some store in the West, but I can't recall the name of the party.

By Mr. Buchanan:

Q. Was it Harbour-Longmire Furniture Company?

A. I wouldn't know the name of the store if I heard it.

By a Juror:

Q. One point that I am not clear on is this: in this conference at Marion did Mr. Lincoln say that he could finance a merger with the help of these other companies or that he would?

A. I think he said he could.

Q. Was it in the form of a promise or a statement that he could?

A. As far as I remember, he said he could. I don't think he said he would.

page 539 } RE-DIRECT EXAMINATION.

By Mr. Gordon:

Q. Are you undertaking to repeat exactly what he said or just the impression you got from him?

A. Just as near as I could remember. I couldn't repeat exactly what was said because I didn't try to remember it exactly because I had my attorney there to take care of that and I probably would have followed it closer if I hadn't had him there.

Witness stood aside.

A Juror: Is it possible for Mr. Hazelgrove to come back?  
The Court: Yes.

page 540 } W. P. HAZELGROVE,  
being recalled to the stand, testified as follows:

By a Juror:

Q. Mr. Hazelgrove, I want to ask you the same question I asked the preceding witness. Did Mr. Lincoln say that he would form this merger in the form of a promise or did he say he could form it in case this other financial institution didn't take him up?

A. I can't answer that yes or no, but if His Honor will permit—and he can strike such part as he doesn't think admissible—I couldn't undertake three years after that to say whether Mr. Lincoln used the word “could” or used the word “would”. The distinct impression which I have from memory now from Mr. Lincoln's statement then was to the effect that the finances of his concern together with the financial ability of the then remaining group of prospective merging stores was such that in the event outside financing wasn't done that that group possessed the ability to do their own

financing and could do it, but that he—the Virginia Table Company had spent so much money and that the whole crowd had put so much into it that he wasn't going to see the merger fall through and that if the financing wasn't done outside that his concern together with such members  
 page 541 } of the group as might want to come into the picture would do their own merging, do their own temporary financing and leave their permanent financing until market conditions would enable it to be done outside. Now if that answers your question that is as accurate as I can make it.

Witness stood aside.

Mr. Buchanan: There is a matter I overlooked and I want to have Mr. Fleming back.

page 542 } RIVES FLEMING,  
 being recalled to the stand, testified as follows:

# RE-CROSS EXAMINATION (resumed).

By Mr. Buchanan:

Q. Mr. Fleming, we were discussing this morning the question of the cost of securing options which you stated to be around some \$8,000.00, I believe.

A. Yes, sir.

Q. Now in response to a request for an itemized statement of the cost of securing such options the plaintiff furnished a paper which is filed in this case marked Exhibit #4: Expenses in connection with options secured by the Southern Factories & Stores Corporation for Virginia Table Company. Is that the paper?

Mr. Gordon: I will admit that is the paper.

Q. The stores upon which you secured the options for the Virginia Table Company are the eleven stores which are set forth in the declaration, namely: Jones Bros., and Geo. W. Kennedy, of Jacksonville, Florida; M. K. Jones, of Savannah, Ga.; Jones-Kennedy and Cochran Furniture Company and Mason Bros., of Atlanta, Ga.; Woods-Peavy, of Macon, Ga.; Van Metre, of Columbia, S. C.; Sam Burton, of Asheville, N. C.; Bledsoe Furniture Company,  
 page 543 } Danville, and W. A. Bell, of Fredericksburg. That is correct, is it not?

A. Yes, sir.

Q. The first item upon this expense in connection with securing these options is an item dated December 13th, 1928: expense to Winston-Salem and return, Rives Fleming. Which one of those stores did that expense apply to?

A. We weren't asked for the expenses applying to these stores; we were asked for the expenses of getting options. That applied to Romiger.

Q. You haven't charged anything in regard to Romiger?

A. Of course, we didn't. You asked us for the list of expenses we had in getting these options. We rendered a bill for \$11,000.00 for eleven options. Mr. Lincoln said he didn't think he ought to pay that amount and he would be very glad if we would send him a list of our expenses or rather the expenses we had in getting options. We thereupon went to our records and gave you a list of our expenses in securing options. We went to Winston-Salem to see about Romiger Furniture Company, which option we didn't get. Mr. Lincoln was there also and tried to get it and several other stores. We were unable to get that option.

Q. Then you were charging expenses in here in trying to secure options which you didn't get? Is that correct?

A. Certainly.

page 544 } Q. The third allegation of your notice is that heretofore, to-wit: on the blank day of October, 1928, the said defendant, in the said City of Richmond, Virginia, and in pursuance of its said purpose, requested the said plaintiff to secure for it options for the purchase of said stores in various parts of the country, and then and there undertook and faithfully promised said plaintiff to pay it the sum of \$1,000.00 for each and every said option secured by it for said defendant, and said plaintiff thereafter gave to said defendant an option to purchase its own said stores, and said plaintiff, relying upon said request, promise and undertaking of said defendant, did at great expense to said plaintiff, to-wit: the sum of \$8,537.27, secure for and deliver to said defendant eleven options on the following furniture stores." You charge in here that you at the expense of \$8,537.27 delivered the eleven options named in here. Now when I come to the first item of that \$8,537.27 you say that it is not applicable to those options.

A. I say we didn't spend that money getting the options we ask you to pay us for, but we spent it in getting options—trying to get them.

Q. "And said plaintiff, relying upon said request, promise and undertaking of said defendant, did at great expense



to said plaintiff, to-wit: the sum of \$8,537.27, se-  
page 545 } cure for and deliver to said defendant eleven op-  
                  tions on the following furniture stores." Is that  
statement correct?

A. We did spend that money getting options.

Q. I asked you if you spent \$8,537.27 to get those eleven  
options?

A. We interviewed more than eleven. We got those eleven  
after having spent this much money.

Mr. Buchanan: I would like to have an answer to the  
question.

The Court: I think he answered you.

The Witness: I don't know how to answer it any other  
way. It is plain to me what it meant.

By Mr. Buchanan:

Q. Maybe I can put it plainer. You say in your notice  
that it cost you \$8,537.27 to secure eleven options as follows:  
Jones Bros., Geo. W. Kennedy, M. K. Jones, Jones-Kennedy,  
Cochran Furniture, Mason Bros., Sam Burton, Bledsoe and  
Bell?

A. Yes, sir.

Q. Now I want to ask you if it cost you \$8,537.27 to se-  
cure only those eleven options?

A. I will answer by saying in securing these eleven op-  
tions we spent that much money.

Q. You did?

A. Yes, sir. We interviewed numerous other  
page 546 } stores.

Q. The next item on the bill is expense to Salis-  
bury, N. C. Did you get an option there?

A. No, sir.

Q. The next item is Winston-Salem. Did you get an op-  
tion there?

A. I just told you we didn't.

Q. The next item Greensboro.

A. No, sir.

Q. Wilmington. Did you get an option there?

A. No.

Q. Next item Sanford. Did you get an option there?

A. No.

Q. Next item Charlotte. Did you get an option there?

A. We had a store already in Charlotte. We didn't get  
any other store except our own store.

Q. You have expense for one day.

A. That may have been going to see some other store.

Q. Gastonia?

A. No, sir.

Q. Durham?

A. No, sir.

Mr. Gordon: That is just giving him the items of expense these gentlemen were put to in attempting to get the options.

Mr. Buchanan: You have charged us in the bill page 547 } with \$8,000.00 in getting these options and the expense items show you weren't taking options in a single one of those places.

Mr. Gordon: We haven't charged you a single item of that money. We charged you \$11,000.00.

By Mr. Buchanan:

Q. Next Greensboro. None there?

A. We tried to get one there at the request of Mr. Lincoln.

Q. Asheville; did you get one there?

A. Yes; Burton.

Q. Next at Richmond. Did you get any there?

A. No, sir.

Q. Wilmington, Charlotte, Atlanta—get any at Charlotte?

A. No, sir.

Q. Wilmington?

A. No, sir. The eleven options have been repeated a dozen times. Those are the towns we got; no other towns.

Q. The total of this bill is \$8,537.27. I am just trying to understand the situation. If you had gotten these options you would have expected us to pay \$11,000.00—I mean \$1,000.00 a piece?

A. We did get them and do expect you to pay.

Q. Did you get them at Gastonia?

A. As I explained a while ago, we got them at the towns enumerated there.

Q. Then we are charged here with \$1,000.00 for page 548 } the options you did get, together with all the expense of those you didn't get?

A. No, sir. That is a statement sent you at the request of your Mr. Lincoln to tell him how much we spent in getting these eleven options. We simply made it up giving you an itemized account of it.

Q. What I am not able to understand is how you spent money in Winston-Salem, Durham, Wilmington in getting options in Jacksonville, Atlanta, Asheville and Danville.

A. I don't think anybody ever claimed that we spent money in Durham getting an option in some other town. We have never claimed that.

RE-DIRECT EXAMINATION.

By Mr. Gordon:

Q. Mr. Fleming, when Mr. Lincoln and Mr. Wahab and Mr. Buchanan asked you all to go out and get options for the Virginia Table Company, Incorporated, did they tell you that you would be limited in your investigation to these particular cities in which these eleven options were obtained?

A. No, sir.

Mr. Bazile: If Your Honor please, we object to that question and move to strike his answer out because the question is leading.

The Court: Objection overruled.

page 549 } Mr. Bazile: Exception.

By Mr. Gordon:

Q. Were you purporting to segregate your expenses in this statement with regard to the particular store on which any particular option was secured?

A. Certainly not.

Q. In other words, this represents the expense to which you were put—actual expenses in attempting to secure options for them which resulted in the securing of the eleven options you did secure?

A. Yes, sir.

Mr. Bazile: We object to that as being leading.

The Court: Objection overruled.

Mr. Bazile: Exception.

By Mr. Gordon:

Q. Every dollar of this money is included in the \$11,000.00, isn't it? Every dollar of your expense is included in your charge of \$11,000.00?

A. Yes, sir.

Witness stood aside.

page 550 }

JOHN L. ANDERSON,

a witness introduced in behalf of the plaintiff,  
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Gordon:

Q. Give you full name.

A. John L. Anderson.

Q. By whom are you now employed?

A. Carolina Parlor Furniture Company, Statesville, N. C.

Q. How long have you been in the furniture business and what has been your experience in it?

A. Continuously since 1918, with the exception of a few months in 1921.

Q. Have you had experience in the appraisal of furniture and that sort of work?

A. Yes, sir.

Q. Did you take part in the making of inventories for Southern Factories & Stores Corporation on behalf of the Virginia Table Company?

A. Yes, sir.

Q. Do you remember how many days you worked on them?

A. On actual inventorying I think twelve or fourteen.

Q. State to the jury the character of the work page 551 } you had to do and hours you had to spend in doing that work?

A. Well, the work that we were supposed to do was to go into the stores, take the inventory of the stock at the very best price we could get, which consisted of a committee of about three; myself and one member of the firm, which usually was the head of the house and someone else, mostly in his own employ, to do the calling on the merchandise. This inventory work was just about like inventorying in any other store. An item—a desk cost so much money when it was bought. When I went out on these crews I had instructions from Mr. Kimbrell to buy this merchandise as cheap as possible, with the view of making the purchase for Mr. Lincoln's outfit at the very best price possible. In other words, if an item was bought at a certain time and cost \$20.00, they wanted \$20.00 for it. If we thought it could be bought today at \$10.00, that is what we paid for it. We weren't there to spend the company's money, but to save the company's money as far as possible.

Q. On an average how many hours a day did you work on this work?

A. Usually from about seven o'clock in the morning, seven-thirty; just as quick as we could get the crowd down to the store; most of the time it was around eight o'clock before we got them actually working, stop fifteen to forty-five min-

utes for lunch and possibly an hour and a half  
page 552 } at night and as late as midnight. In fact, over  
half the time during that time we worked until  
ten or twelve and then sometimes I have sat up in the room  
until one-thirty or two extending figures.

Q. Did you have anything to do with the appraisal of the accounts?

A. No, sir.

Q. Now you say you were engaged on that work for twelve days. Under whose general direction were you doing this work?

A. Mr. Kimbrell.

Q. Did you work with Mr. Kimbrell sometimes or not?

A. Yes, sir.

Q. There is charged on this account for your services for twelve days at \$25.00 a day, \$300.00. Please state whether or not that was a fair and reasonable charge for your services as far as you are concerned?

A. Well, sir, I suppose you would say—I would think it would be worth more than that, considering our value to the company—to the firm we were serving. If I was buying an outfit and the man could buy merchandise for me like we were buying those, I would say his salary would be worth more than that.

#### CROSS EXAMINATION.

By Mr. Buchanan:

Q. You didn't have anything to do about buying the stores?

A. Only taking the inventory.

Q. And the options had already been taken when you went there?

A. I know nothing about the options.

Q. Do you think the value of your services is dependent upon the price to be paid for the stores or the services worth what they are worth?

A. Well, I would say this: I would say in buying a store and inventorying a store like that a man would certainly have somebody to do that that had sense and ability to know what he was doing.

Q. Certainly. Do you think the amount to be paid, therefore, is dependent upon the price of the store?

A. What is that question?

Q. You have just stated you were taking in consideration the price at which these stores were being bought and your

services were worth more than that. Do you think the price had anything to do with the value of your services?

A. What price? The price they were paying me?

Q. The price they were paying for the goods.

A. Had anything to do with my services?

Q. Yes.

A. Well, I don't know.

Q. Don't you think you ought to charge the same for your services whether they were being bought cheap page 554 } or not?

A. I might charge the same, but I wouldn't put a man in there regardless of the price I was paying if he wasn't capable of doing the job.

Q. What salary were you getting at that time?

A. \$60.00 a week and expenses.

Q. And charging \$25.00 a day?

A. I was getting \$60.00 a week and expenses.

Q. You are charging here \$25.00 a day and expenses?

A. Yes.

Q. How long had you been working for \$60.00 a week?

A. My compensation up until that time since I have been with this firm was on a commission basis.

Q. Up until this time?

A. Yes, sir.

Q. How old are you?

A. I will be 33 in September.

Q. In 1929 you were about 30 years old?

A. 29 or 30.

Q. How long had you been in the furniture business?

A. Since 1918.

Q. Where?

A. Four years—nearly five at Columbia; three years at Greensboro; since 1925 employed by Carolina Furniture, salesman on the road.

Q. Your duties consisted of going into a store, page 555 } counting the various articles, comparing them with the cost price and arrive at the value?

A. Yes, sir.

Q. I don't dispute your expense account at all, but I would just like to ask you something about it. On the 10th day of February you charged up for breakfast and two extra meals. How did that occur?

A. That was in paying for—inviting someone in the store that was serving us to a meal.

Q. On the 11th you charged for two extra meals. The same thing applies there?

A. What meal?

Q. At Atlanta, Ga., lunch for two and supper for two.

A. That was in an instance where we were going to work at night and we carried them out to dinner with us.

Q. On the next day you had lunch for two—extra for two and two extra meals for supper. Did you again treat them the next day?

A. On these instances when we were working at night.

Q. You were at Atlanta, I believe, from February 10th to February 15th and went from there to Danville?

A. Yes, that is right.

Q. You were also at Danville on the 5th, I believe, of February?

A. No, sir; I was in Norfolk.

page 556 } Q. I will hand you your account and see if you haven't charged up here February 5th at Danville.

Mr. Gordon: I am going to put Mr. Murray on the stand in regard to those items.

Mr. Buchanan: This is all the information we have about it.

Mr. Gordon: Oh, no, you haven't. Your own auditor has been down there and checked it up.

A. My impression is this should be Norfolk instead of Danville.

Q. What store did you inventory at Norfolk?

A. Neither one. That is when they called me and told me to leave and come up to be with Mr. Kimbrell. I put in my expenses from the time I left Norfolk.

Q. That was lunch, supper, telephone and auto. Did you go from Norfolk in an automobile?

A. Yes, sir.

Q. Next day at Richmond. Were you inventorying any stores at Richmond?

A. No, sir. I was getting my instructions here.

Q. On the 9th you were still at Richmond and had lunch for two. Why this extra meal? Do you remember that occasion?

A. Let me see that. This doesn't say on the 9th I was in Richmond.

Q. It says up here Richmond. Where were you on the 9th?

page 557 } A. On the 7th it shows breakfast on train. I was on my way to Atlanta.

Q. On the 18th you have hotel at Danville; on

the 20th you came from Danville to Richmond and on the 21st you have the company charged up with \$2.25 for repairing tires and \$1.68 for gas and \$1.50 for oil, a set of chains and adjusters, \$6.50.

A. Yes, sir.

Q. That was for your automobile?

A. They were paying the expenses of my automobile which had been left here that length of time. When I got here it was a terrific snowstorm and I wouldn't start out without those supplies.

Q. The next day you were still in Richmond and had supper for four.

A. No, I wasn't in Richmond.

Q. Where were you?

A. I was at home, taking my family to Greenville, which they were to pay my expenses, which I was still in the employ of this company, going on to Greenville.

Q. The next day you have a tire and tube for \$12.75.

A. Yes; had a blow-out.

Q. And the next day at Greenville you had breakfast for two and supper for two, and the next day, which was the 26th, you had breakfast for two and lunch for two and supper for two.

A. Yes.

page 558 } Q. And the next day on the 28th—there was no store at Greenville to inventory?

A. No. This was a store of the Southern Factories & Stores Corporation that I went down to superintend there.

Q. How did you happen to be charging this company for working for Southern Factories & Stores?

A. I was still on the expense account. They were to pay my expenses.

Q. We were to pay your expenses when you were working for yourself and also Virginia Table Company?

A. No, I wasn't working for myself.

Q. I mean when working for Southern Factories & Stores and for the Virginia Table Company?

A. I was still under Mr. Kimbrell's instructions. That is all I can tell you.

Q. Mr. Kimbrell instructed you to charge up expenses when working for his own stores to Lincoln?

A. No, sir, I have no instructions as to that.

Q. You did do that, didn't you?

A. That was my expense account. I didn't know who it was to go to.

Q. You didn't know. I am not criticizing at all. We have



this defendant charged with it and I just want to know whether you were doing work for this defendant.

A. My impression I was still doing work for the Lincoln Company.

page 559 } Q. But at Greenville working for the Southern Factories & Stores?

A. I understood that to be part of Lincoln Factories & Stores.

Q. That is all I want to know, whether your expenses were charged when you were working for Southern Factories & Stores to the Lincoln organization?

A. Yes.

Q. You took no inventories in your own stores for us?

A. I don't believe I did. Someone else was sent there to do that.

Q. On March 1st you were still at Greenville, still working for Southern Factories & Stores: lunch for four and supper for four and express on goods from Wilson \$9.41; still working for Southern Factories & Stores. Do you remember that express?

A. Yes, sir.

Q. What was it?

A. Household goods sent down; my expenses to be paid by this crowd.

Q. You were still at Greenville?

A. Yes.

#### RE-DIRECT EXAMINATION.

By Mr. Gordon:

Q. Do you remember where Harry Jones' page 560 } store was?

A. No, sir. There was a Jones store in Atlanta. I inventoried that store.

Q. Was there any Jones store in Greenville?

A. Yes.

Q. Did you go there?

A. I was in there, but I didn't take part in the inventory.

Witness stood aside.

page 561 }

T. D. GILLIAM,

a witness introduced in behalf of the plaintiff, being first duly sworn, testified as follows:

## DIRECT EXAMINATION.

By Mr. Gordon:

Q. State your full name.

A. T. D. Gilliam.

Q. Where do you live?

A. Statesville, N. C.

Q. How long have you been living in North Carolina?

A. About 25 years.

Q. Where were you born?

A. Virginia.

Q. Appomattox, weren't you?

A. Yes, sir.

Q. What is your business now?

A. In the furniture manufacturing business.

Q. With the Carolina Parlor Furniture Company?

A. Yes, sir.

Q. Were you present at Marion on July 19th, 1929, at a conference which was held between Mr. Lincoln and various furniture dealers?

A. Yes, sir.

page 562 } Q. Will you please state what, if anything, Mr.  
Lincoln said at that conference he proposed to  
do with regard to this merger?

Mr. Bazile: We desire to renew our objection to this question and any answer made thereto for the same reason which we gave in objecting to similar testimony by Mr. Fleming, Mr. Hazelgrove and others.

The Court: Objection overruled for the same reasons.

Mr. Bazile: Exception for the same reasons heretofore given.

A. Mr. Lincoln outlined to those of us that were present the negotiations with the banks and the status at that time. He stated that it wasn't any question in his mind but what the financing plan would be *consumated*. He stated, however, that on account of the delay these options—most of them—I don't know how many—probably all of them—would soon run out and he stated these options would soon expire and it would be necessary for them to be renewed and that he would like very much for all those present to extend these options, and he stated also that if they would extend these options in the event anything happened there with the banking—the financing plan didn't go through he would pool his assets with the assets of the others interested and we would

page 563 } form a merger of our own and operate until such time as market conditions justified going back to the banks.

## CROSS EXAMINATION.

By Mr. Buchanan:

Q. Mr. Gilliam, when was this to be done?

A. Why no definite time was specified, but we assumed as soon as he found out the bank wouldn't finance it.

Q. Who was to be included in it?

A. My impression was that all those who desired to go in.

Q. All those that desired to go in?

A. Yes, sir.

Q. What was the basis of the proposed merger?

A. Well, I don't know that I understand the question exactly.

Q. I mean at what price were the companies to be taken in?

A. He stated we would all go in on an equal basis.

Q. You understand to form a merger it takes a considerable time. What kind of an organization was to be formed?

A. I wasn't familiar enough with the previous negotiations to know the nature of the organization.

Q. Was anything said about the organization to be formed?

A. A merger.

Q. The nature of it was left in the indefinite future as to what would be done or how it would be done? It was to be done, but how it was to be done wasn't settled?

page 564 } A. So far as I know when I was present it wasn't. They didn't go into the details as to the set-up. He just stated he would pool his assets with the assets of the rest of us on an equal basis, form a merger and operate with our own finances until such time as the market conditions justified adequate financing by the banks.

Q. What position did you hold with the Southern Factories & Stores Corporation at that time?

A. I was a director and vice-president.

Q. Will you please tell the jury what effort, if any, was made by Southern Factories & Stores Corporation to consummate that proposition or pool their resources with Mr. Lincoln?

A. I couldn't tell you about that.

Q. Do you know whether any was or not?

A. You mean at that time.

Q. Or later. Any time.

A. Well, I think Mr. Kimbrell and Mr. Lincoln started some kind of negotiations later. I don't know the details.

Q. As a matter of fact, nothing was ever done?

A. No, sir.

Q. Do you remember Dr. Max Barnett, of the Barnett Furniture Company?

A. Yes, sir.

Q. Was he present at that meeting?

A. I don't remember whether he was present or not.

Q. Do you remember Messrs. Phelps & Arm-  
page 565 } stead were there?

A. Yes, sir.

Q. Do you recall or do you not that a gentleman from New Orleans, Mr. Barnett, got up on his feet in that meeting and moved that all present extend the options, not for the sixty or thirty days requested by Mr. Lincoln, but an additional thirty days?

A. I couldn't well recall that if I don't recall Mr. Barnett being there.

Q. I mean anyone.

A. No, I don't. I don't remember.

Witness stood aside.

page 566 } C. D. PHILLIPS,  
a witness introduced in behalf of the plaintiff,  
being first duly sworn, testified as follows:

#### DIRECT EXAMINATION.

By Mr. Gordon:

Q. State your full name.

A. Carlisle Dixon Phillips.

Q. Where do you live?

A. Greenville, S. C.

Q. Where are you now employed?

A. Manager of the Martin Furniture Company.

Q. Where?

A. In Greenville.

Q. Is that one of the subsidiaries of the Southern Fac-  
tories & Stores Corporation?

A. Yes, sir.

Q. Did you take part in the making of the inventories in  
1929 for the Southern Factories & Stores Corporation?

A. I did, for the accounts receivable only; checking the accounts receivable.

Q. What is your position down there with the corporation?

A. At the present time?

Q. Yes.

page 567 } A. Manager of the local store there in Greenville.

Q. At that time what were you?

A. I was in charge of the credit department in the Columbia store.

Q. What experience had you had in the credit department?

A. Well, at that time around between six and seven years.

Q. Now what number of days did you work on this appraisal?

A. To the best of my knowledge I left Columbia on the afternoon of February 11th, went to Atlanta, called there by Mr. Kimbrell; I worked in Atlanta the 11th, 12th, 13th and 14th, I believe; possibly the 15th. Then I was sent from Atlanta to Danville, Va. I was in Danville through the 20th, I believe. From there I went back to Columbia. Then on March 11th and 12th, I believe, I was in Greenville, S. C., checking the store there.

Q. The charge here is C. D. Phillips, eight days at \$25.00 a day.

A. Yes, sir.

Q. Is that a correct charge?

A. Yes, sir.

Q. What hours did you work over this thing?

A. Well, usually we got to work between eight and eight-thirty and didn't have any time to quit; anywhere from ten-thirty to twelve, sometimes later.

Q. At night?

page 568 } A. Yes, sir, with just enough time off to get a little lunch and dinner at night.

Q. State whether or not this was a job that you were told had to be done in a great hurry.

A. They asked us to rush it through as quick as possible, yes, sir, to keep down the expense.

Q. Now there is a charge here on this account of \$25.00 a day for services you rendered in making this appraisal of these accounts. Please state whether or not that is a fair and reasonable charge.

A. I think so. Ordinarily, if I was running my own business I wouldn't work for that; that is, to be away from my business for a length of time.

Q. In doing this appraisal work on these accounts did that

involve conditional sales contracts and things of that kind?

A. Well, I don't know.

Q. I am talking about you said you were working on the accounts.

A. Accounts receivable, yes, sir. I was only classifying the accounts receivable as to good, bad or not good.

Q. You had to segregate them into three classes?

A. Yes, sir; good, doubtful or no good.

Q. We call them conditional sales; you may call them chattel mortgages. Were you dealing with chattel mortgages there?

A. I just went through the ledgers.

page 569 } Q. I understand, but you had to segregate them into three different classes?

A. Yes, sir.

Q. Did that work require the exercise of experience and discretion?

A. Yes, sir.

Q. In doing this work did you do it alone or was there a representative of the store with you?

A. In each instance there was a representative of the store right there with us.

Q. And you all had a discussion as to the value of each individual item?

A. Occasionally there would come up a discussion. I would think it would go in this class and he would think it ought to go in the other class and we would go into quite a bit of discussion at times.

### CROSS EXAMINATION.

By Mr. Buchanan:

Q. Mr. Phillips, you were working at that time, I believe, for Southern Factories & Stores Corporation?

A. Yes, sir.

Q. What salary did you get?

A. I was drawing a salary of \$50.00 a week and commission.

Q. What would it amount to in round numbers?

A. You mean the commission?

page 570 } Q. Yes.

A. Well, it varied. I have gotten as high as \$70.00 or \$75.00 a week altogether.

Q. Where were you located at that time?

A. Columbia, S. C.

Q. Now, you didn't, of course, know personally the people who own these accounts that you judged?

A. No, sir.

Q. But you would go to the ledger and to the record of payments and from the record of payments and general state of the account you would judge whether that account was good, indifferent or bad?

A. Yes, sir.

Q. In other words, if a man hadn't paid for four or five months you would throw it out?

A. No, sir.

Q. Mark it indifferent?

A. No, sir. That is where possibly the man—the representative from that store—there would be some conditions he would explain to me and from my previous experience we would act accordingly.

Q. You charged \$25.00 a day or it has been charged for you. The difference between the \$25.00 a day and your salary goes to the Southern Factories & Stores, as I understand page 571 } stand; doesn't go to you?

A. No, sir, it doesn't come to me.

Q. You only got your salary?

A. Yes, sir.

Q. Now as to the store at Greenville, what store was at Greenville?

A. Jones Furniture Company.

Q. That was a store upon which no option was ever taken?

A. I couldn't tell you; couldn't answer that question.

Q. I mean it never was in the picture at all?

A. I don't know anything about that. That wasn't a part of my duty.

Q. You don't know whether any option was ever taken?

A. No, sir. I only had instructions to report there and check the store.

Q. Who gave you the instructions?

A. Mr. Kimbrell.

Q. That Jones store at Greenville, do you know whether an audit was made of that store or not by Haskins & Sells?

A. No, sir, I don't know. At that time my wife—on Tuesday afternoon I got a wire to come home, that my wife was seriously ill and was to be operated on the next morning. I was too late to catch a bus and I had to call Columbia and have my car sent up there and go back. So I didn't quite finish my work there.

Q. Nobody was there taking an inventory when page 571 } you were there?

A. Yes, sir.

Q. Who was there?

A. Mr. Zachary.

Q. At Greenville?

A. Yes, sir.

Q. Do you mean to say Mr. Zachary was working on inventories and not on options?

A. At that time he was taking the inventory of the Jones store.

Q. No charge has been made for his services is the reason I asked you. Now as to your expense account I don't want to be captious, but you have bus fare to Greenville. Did you got to Greenville by bus?

A. Yes, sir.

Q. Was your car there?

A. No, my car was in Columbia.

Q. The next day you have an item of gas and oil, \$4.51.

A. Well, I will explain that. My wife was taken seriously ill and no way to get out by train or bus and I had to have my car sent. It was about 110 miles.

Q. On the 11th I notice you had supper for six. How did that occur?

A. That is Mr. Zachary and myself and four of the employees helping us rush the work through.

Witness stood aside.

page 573 }

E. H. HILLIS,

a witness introduced in behalf of the plaintiff,  
being first duly sworn, testified as follows:

### DIRECT EXAMINATION.

By Mr. Gordon:

Q. Give your full name.

A. Edmund Harvie Hillis.

Q. Where do you live?

A. Charlotte, N. C.

Q. What is your business?

A. With the Southern Factories & Stores Corporation.

Q. What position do you hold with them?

A. Manager of the Charlotte store.

Q. What position did you hold with them in 1929?

A. I was with Mr. Kimbrell in the Richmond office, helping him with his merchandising and advertising.

Q. What is your age?



A. 34.

Q. How long have you been in the furniture business?

A. Approximately 12 years.

Q. Did you take part in this inventorying—taking of these inventories for Southern Factories & Stores Corporation on account of the Lincoln Furniture Corporation?

page 574 } A. I did.

Q. What experience had you had in such work as that?

A. Well, I had some experience in 1926—no, 1927, I think, with the National Manufacturers & Stores; then I took inventories and judged the accounts for the Southern Factories & Stores Corporation when they organized in 1928.

Q. Now do you recall how many days you worked on these inventories for the Virginia Table Company proposition?

A. No, I don't know exactly how many days it was. From January up through March.

Q. To whom did you make your report as to your part of this work and your expenses?

A. I reported my expense account to Mr. Murray, treasurer of the Southern Factories & Stores Corporation, and then I reported where I was working and what I was doing to Mr. Wahab. We reported to him in Baltimore what progress we were making on the accounts and inventories.

Q. What was the nature of the work which you had to do in making these inventories?

A. Well, I took inventory in the stores they were figuring on buying and I also judged the accounts—the accounts receivable of the stores.

Q. About what were your hours of labor on this work as a rule?

page 575 } A. Well, we didn't have any hours, just day and night work; we worked every day and every night. I remember in New Orleans I was at Dr. Barnett's ten or twelve days and it was one night out of that time we didn't work. That was one Sunday night. We always got to the store around eight or eight-fifteen, left there around eleven or eleven-thirty that night because we was told to push it through, day and night work.

Q. Who kept the account of the number of days you were employed on this work?

A. Mr. Murray, I imagine—I know so.

Q. He was the treasurer of the company?

A. Yes, sir.

Q. State whether or not you reported to him as to your expense account, showing the number of days you were employed.

A. Oh, yes, sir. I sent in my expense account to Mr. Murray and he reimbursed me.

Q. The charge that is made here on this account for you is 42 days and is charged here at \$50.00 a day. Was that a fair and reasonable charge for the character of work you were doing there on these inventories?

A. I consider that a very reasonable charge because it was day and night work; it was tedious work; it was work you should have some experience on to carry it through because we was making every effort to buy the stores as reasonable as we could.

### CROSS EXAMINATION.

By Mr. Buchanan:

Q. You don't think the price you were paying for the store had anything to do with your salary, do you?

A. No, but when I am working for a man and he is paying me I am going to render every service I can to him to strike as good a bargain for him as I can.

Q. Does it make any difference whether he is getting a bargain or not so far as your duties are concerned? Are you to be paid more because he is getting a bargain?

A. No, sir; I was being paid a certain amount each month. I was receiving so much a month and expenses.

Q. How much were you getting a month?

A. \$400.00.

Q. \$400.00 a month?

A. Yes, sir.

Q. Can you tell the jury any other concern that ever paid you \$50.00 a day?

A. No concern has ever paid me \$50.00 a day.

Q. Did you charge up Sunday, too?

A. I was getting paid by the month.

Q. Do you know whether your services have been charged on Sunday also for the Southern Factories & Stores?

A. How do you mean charged on Sunday?

Q. I mean there is a charge of \$50.00 a day against the defendant for your services. Do you know whether that includes Sundays or not?

A. I don't know, but it should have because I worked Sundays.

Q. Now on February 6th you were in Baltimore with Mr. Kimbrell and Mr. Murray, according to the statement here; February 4th you have charged up in your expense account hotel in Baltimore, \$12.60.

A. I can't say, sir.

Q. Do you know whether that is correct or not?

A. Not unless I could see it.

Q. Here is the item charged for E. H. Hillis, \$12.60.

A. That is right. That is for all three of us. I paid the bill.

Q. You took inventories, I believe?

A. Took inventories and judged the accounts.

Q. That contemplates the counting of the various articles in the store, ascertaining the cost price or market value, as the case may be, and judging the accounts as to good, indifferent and bad—those three classes?

A. I think we had the three classifications. Different merchants have different classifications.

Q. What store did you take inventory in and judge the accounts at Columbia?

A. Van Metre.

page 578 } Q. I notice that on the 7th in Columbia you charge for supper for two.

A. Yes, sir.

Q. And on the 8th you charged breakfast for two and lunch for two and supper for three.

A. Yes, sir.

Q. On the 9th breakfast, lunch and supper and five extra meals on that day; on the 4th you charged for incidentals \$2.22; 5th, incidentals \$2.16; 7th, incidentals, \$1.78; 8th, \$1.23; 9th, \$1.23. What was the occasion for those extra meals?

A. Well, now, in Columbia we was making two inventories there; Mr. Wahab or the Lincoln crowd had their representative there taking the Southern Factories & Stores inventory and I was down at Van Metre. We would meet and maybe I would pay the bill. Another thing they told us: "Don't spare any time." Well, now, in those stores the men that were working in the stores, employees of the stores, they would maybe at six o'clock say: "I am going to get off and run out home." That would take him an hour or an hour and a half. We would say: "Come on around here and have supper with us" and that shows on the expense account. We wanted to do everything we could to make those people get through. They weren't interested in this thing getting it through like we were. We would take them out  
page 579 } and buy a meal and we would pay for their meals.

We did everything possible to make that store be friendly towards us who was in there making the inventory and audit for them.

Q. On the next day, the 10th, you had three extra meals, incidentals \$2.00; on the 11th, four extra meals, incidentals \$1.00; 12th, four extra meals; 13th, three extra meals; 14th, four extra meals; 15th, three extra meals; 16th, two extra meals. That made thirty-five or forty extra meals in that week and that was the reason you charged those?

A. I don't know how many extra meals; you have it right there, but that is why I charged up extra meals because I paid for them.

Q. And incidentals, what were they?

A. Pressing, tips, taxis, sometimes miscellaneous items; just whatever I spent.

Q. Now weren't you in Jacksonville from the 17th to the 23rd? On the 17th you had incidentals 85c; 18th, 85c; 19th, 85c; 20th, 85c; 21st, 85c; 22nd, 85c; 23rd, 85c. That ran even every day during that week and the next week—on the 25th you were in Savannah, I believe?

A. I don't remember just exactly. It is all down there.

Q. And incidentals ran \$3.50 on the 24th, \$3.50 on the 25th, \$3.50 on the 26th, \$3.50 on the 27th, \$1.15 on the 28th, \$1.15 on the 29th, \$1.15 on the 1st and \$1.15 on the 2nd.

page 580 } A. Those were for telegrams and telephone.  
No, I don't think I ever put in \$3.50 for miscellaneous items.

Q. Haven't you incidentals on the 25th, \$3.50?

A. No, that is hotel at Savannah. Incidentals \$1.15.

Q. On the 26th, \$1.15; 27th, \$1.15; 28th, \$1.15; on the 1st, \$1.15; 2nd, \$1.15. They were for tips and things of that character, as I understand. What store did you take inventory in at Columbia?

A. I told you a while ago Van Metre.

Q. What store did you take at Charlotte?

A. At Charlotte? No, sir. I wasn't at Charlotte, I don't think, as far as taking inventories and accounts, except on the second go-around when we came back and re-checked it all. I think I did catch Charlotte.

Q. You have charged here March 3rd, hotel at Charlotte, \$3.00. Did you take any inventory at Charlotte?

A. I think that is when I was ordered to come on up to Charlotte and meet Mr. Kimbrell to go to New Orleans. I think that was the way of it and he didn't come to Charlotte and he got on the train at Spartanburg.

Q. Here you have incidentals \$6.10. Do you have an itemized statement of that? Incidentals start at 85c, then went to \$1.15, now on March 10th incidentals are \$1.50; 11th, \$1.50; 12th, \$1.60; 14th, \$1.60; 15th, \$1.60. They were all correct, were they not?

page 581 } A. If that is on that expense account I sent in to Mr. Murray. You take in New Orleans; our hotel was quite a distance from the store. We worked there all way; we would go on up to the hotel that night about six o'clock, wash up a little, go and get dinner and go back to the store.

Q. The reason I asked you that because the others didn't charge incidentals.

A. I could have listed it if I thought about it.

Q. The last incidentals were \$1.50 and on August 7th and August 8th incidentals were 79c and on the 9th, 96c; 10th, 96c; 11th, 85c; 12th, \$1.80; 13th, \$1.85; 14th, \$1.10; 15th, \$1.80, making a total of incidentals around over \$100.00 during that time. On the 16th of March you have incidentals charged \$6.10. Do you know what they are?

A. Have you got my book?

Q. No, sir, this is all I have. You don't recall what they were?

A. No, sir.

Witness stood aside.

Note: The Court recessed until 3:30 o'clock, P. M., at which time the taking of testimony was resumed.

page 582 } A Juror: Several of the jurymen, including myself, wonder if Mr. Buchanan will take the stand for a few minutes. There has been an accumulation of questions we have been wanting to ask for two and a half days and it may throw a light in our minds and we would appreciate very much if he would take the witness stand for a few minutes.

The Court: The plaintiff hasn't rested its case yet. When the plaintiff rests its case then I will entertain your request.

R. S. WAHAB,  
a witness introduced in behalf of the plaintiff, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION.

By Mr. Gordon:

Q. State your name, please, sir.

A. R. S. Wahab.

Q. And your residence and age.

A. Baltimore; 44.

Q. With what concern are you now connected?

A. Retail Stores Service, Inc., Baltimore; a Maryland corporation.

page 583 } Q. What is the character of your business?

A. An operating corporation for various chains and individual furniture stores located in the eastern section of the United States.

Q. How long have you been in that business?

A. This particular company was organized in August, 1927.

Q. What is your personal connection with the Southern Factories & Stores Corporation?

A. Chairman of the executive committee.

Q. Is that committee now operating these stores—that executive committee?

A. It is functioning in the capacity of an executive committee and cooperating with the board of directors.

Q. Did you have anything to do with the proposed formation of the merger of the Virginia Table Company, Incorporated, with various other units in the years 1928 and 1929?

A. Yes, sir.

Q. There has been read into the evidence here the resolution of the board of directors of the Virginia Table Company, Incorporated, adopted on the 1st day of October, 1928, appointing you and Mr. C. C. Lincoln, Jr., and Mr. Harry Coplan as agents of the corporation to secure and sign options. Is that correct?

A. That is correct.

Q. Were you present at the William Byrd Ho-  
page 584 } tel in a conference that was held there between

Mr. Lincoln and Mr. Fleming and Mr. Kimbrell in October, 1928, with regard to the Southern Factories & Stores Corporation securing options for the Virginia Table Company?

A. I was present at a conference—I can't state definitely about October, but I believe October. I was present at a conference at the William Byrd Hotel and I believe it was October; couldn't say definitely without my records.

Q. What was the object of that conference?

A. The object of that conference was to interview Mr. Kimbrell of the Southern Factories & Stores Corporation and to determine as to whether or not he would be interested in becoming—whether his company would be interested in becoming one of the units proposed for a certain merger.

Q. Was that conference continued at any other point?

A. The following day we were invited over to the Cameron

Stove Company where the general offices of the Southern Factories & Stores Corporation were located at that time—at the Cameron Stove Company of Richmond, Va. We were invited there primarily, I believe, for the purpose of looking over the Cameron Stove Company to determine whether or not we might also consider that as one of the units for merging with other stores. We went to the Cameron Stove Company

the next morning and there was various matters page 585 } of discussions and I would say a general conversation pertaining to the matters that we had already initiated the previous day at the William Byrd Hotel.

Q. Now over there at the Cameron Stove Company did Mr. Lincoln say anything to you with regard to the securing of options for his company by the Southern Factories & Stores Corporation and, if so, what did he say to you?

A. As we were leaving the office of the Southern Factories & Stores Corporation in the Cameron Stove Company building Mr. Lincoln remarked to me—he said “I have just made an arrangement with Mr. Kimbrell, who is very well connected in the South; he knows a lot of stores and can get us some options on some stores in the South that he knows about.” That is what Mr. Lincoln stated to me.

The Court Speak louder.

A. (Continued) As we were leaving the Cameron Stove Company Mr. Lincoln stated to me: “I have just made an arrangement with Mr. Kimbrell to go out and get options for us.” He said: “He is well connected and he can probably get us some options on stores in the South.”

Q. What arrangement did he say he had made with Mr. Kimbrell or Mr. Fleming, if any, with regard to compensation?

A. He told me at that time that he had agreed to pay Mr. Kimbrell \$1,000.00 for each option that he procured. I asked Mr. Lincoln at that time—I said: “Well, how about the expenses? Who are to pay the expenses?” He page 586 } said: He is to pay all the expenses. The Southern Factories & Stores Corporation will pay the expenses of procuring those options. It will be \$1,000.00 and they will pay the expenses for getting the options.

Q. Now did the Southern Factories & Stores Corporation secure a number of options?

A. They secured several options, yes, sir.

Q. It has been admitted here in the pleadings that they secured the eleven options which are set out in the notice of motion for judgment. Is that correct?

A. It was eleven or twelve. I believe eleven is correct; somewhere around that.

Q. Now after the securing of these options was anything done by you, representing the Virginia Table Company at that time, with regard to employing the Southern Factories & Stores Corporation to take the inventories, etc.?

A. There were certain requirements stated by the banking interests that these inventories should be taken in a certain way and also it was necessary to take inventories preliminary to having audits made by Haskins & Sells and I told Mr. Lincoln at that time it would be necessary to have considerable help in order to expedite the taking of those inventories—these merchandise inventories and also on placing a value

or inspecting the accounts receivable, which has page 587 } to be assured to get the right value of those. He

told me to go ahead and make arrangements to have that done and to select the personnel and I selected a number of men from different stores and different units, some out of my own organization, and selected Mr. Kimbrell to take the inventories of the southern stores, to supervise it; put Mr. Kimbrell in charge of the Southern territory—I would say south of Virginia and maybe in some places in Virginia, particularly in North and South Carolina and Georgia.

Q. At whose expense was that to be done?

A. My understanding was that that inventory was to be taken at the expense of the Virginia Table Company.

Q. Now what was the character of service that was required in the taking of such inventories and making of appraisals?

A. Well, it required a knowledge—someone that had the experience and knowledge, some people who were particularly skilled in that kind of work because the task involved determining as to whether the inventory was worth the amount claimed by the owners and as to the liquidity of the accounts receivable every account on the book had to be inspected and classified to determine as to whether that account was good, doubtful or negligible. Everything had to be done in detail and it required a personnel who were capable of doing that kind of work and we tried to select a personnel page 588 } who could accomplish that task.

Q. Please state whether or not Mr. Kimbrell and his associates from the organization of the Southern Factories & Stores Corporation were of that class of men, as you observed from their work?

A. Why, Mr. Kimbrell was at the head of the company and had considerable experience and my knowledge of Mr. Kim-



brell's previous connection, the length of time he had been engaged in that kind of work led me to believe he was thoroughly capable of doing that work and that is why I selected him, and after I selected him I found he performed the work very efficiently.

Q. As far as you observed their work, was that true of those who were associated with him from his organization in this work?

A. I think the work in the southern stores particularly was handled very commendably and very satisfactory; not only by Mr. Kimbrell, but by those he had associated with him and by his subordinates.

Q. Have you had experience in your organization and in the business in which you have been engaged in this character of work appraisal of stocks and of accounts from time to time?

A. Our executives have specialized in that character of work.

Q. I want to ask you is work of this character of just an ordinary nature or is it highly specialized work?  
page 589 } A. I would say it is highly specialized.

Q. During the first six months of 1929 what would have been a fair and reasonable sum to have paid to such a person as Mr. Kimbrell for such service as was rendered in the taking of these inventories and appraisal thereof and of the accounts?

A. That is rather a difficult question, to determine the fair but we have employed men and used our executives. That is all I would have to go by, the matter of procedure; what has been paid for similar work. We had some men—some juniors who worked for \$25.00 a day, some \$50.00, some \$75.00 and a few for \$100.00. That is, on work of that nature.

Q. Ordinarily on the figures which you have just named how long would the person who was engaged in the work be supposed to work a day? What would be considered a working day?

A. In our company when we send executives in the field or juniors for that kind of work we determine seven hours a day as a day and if during that twenty-four hours a day we should work ten or fourteen why it is on a *pro-rata* basis of seven hours a day. That is the way it is handled in our organization.

Q. Can you approximate the amount of money  
page 590 } that was involved in the options under which Mr. Kimbrell and his crew were taking these inventories and appraising these stocks and accounts?

A. The amount of money involved? You mean the gross assets?

Q. Yes, the gross assets.

A. Well, what I say would be an approximation; it would be just an opinion. I don't remember the figures, not having the reports of Haskins & Sells, which would speak for themselves on that—whatever is in Haskins & Sells' report. Haskins & Sells made the audit of those stores and they have the exact figures.

Q. I just want to get an approximation of it?

A. What I would say would be an approximation. I would say the gross assets would be perhaps between two and three-quarters and three million dollars in all the stores. That is merely an opinion.

Mr. Bazile: May I ask a question?

The Court: Yes.

By Mr. Bazile:

Q. Are you referring to all the stores in the options or only those inventoried by the Southern Factories & Stores Corporation?

A. I am referring to those stores that Mr. Kimbrell had under his jurisdiction and he was supervising the inventories in the south; not referring to any particular page 591 } group, but all the stores that came under Mr. Kimbrell's supervision.

By Mr. Gordon:

Q. Did Mr. Kimbrell have the Barnett store in New Orleans under his supervision?

A. Mr. Kimbrell and Mr. Hillis were sent to the Max Barnett Furniture Company of New Orleans to take the inventory, in charge of Mr. Kimbrell. He had some other assistants. We had the inventory about 75% completed when Mr. Coplan and I went to New Orleans from Oklahoma City and assisted Mr. Kimbrell and his other assistants in completing that inventory. I remember that distinctly.

Q. About what was the size of Barnett's store with regard to assets?

A. It was around a million dollars; I think maybe a few dollars over a million dollars. It required quite a long time to take that inventory, I remember. It was quite a voluminous task on account of the size of the store and he had a large warehouse.

Q. Now do you recall when the units of the proposed mor-

ger which Mr. Lincoln was trying to effectuate were presented to the bankers in New York?

A. Yes, sir.

Q. About when was that?

A. That was sometime in the fall of 1928 when it was first —when the first meeting was held with the Bank-  
page 592 } ers in New York. The units weren't presented at  
that time, however. The first meeting was in the  
fall of 1928.

Q. Now right at that point let me ask you: were you present at all of the conferences in New York with the bankers who were supposed to finance this merger?

A. I couldn't say I was present at all of the conferences. I was present at all I knew about. Perhaps there were some conferences held that I didn't know about, but I would say I was present at most of the conferences where matters of major importance were discussed.

Q. With whom did the Virginia Table Company make the first financial arrangements for this merger?

A. Hayden, Stone & Company, investment bankers of New York, who had associated with them at that time E. H. Rollins & Sons, of New York also.

Q. Now state whether or not you visited Hayden, Stone & Company or the Haystone Securities Corporation from time to time with regard to this matter?

A. I attended several conferences at the offices of Hayden, Stone & Company from time to time.

Q. With whom were those conferences held on behalf—as far as Hayden & Stone were concerned?

A. As far as Hayden, Stone & Company were concerned there were present Mr. Potter, one of the partners, and Mr. Sherwood; Mr. Pinkham was the statistician, and several other junior partners and statisticians that I  
page 583 } don't offhand recall their names.

Q. Was Mr. Potter at all of the conferences?

A. I don't believe Mr. Potter was at all of the conferences I attended. Mr. Sherwood was the partner who seemed to be handling the matter primarily.

Q. Do you know what office of Hayden, Stone & Company Mr. Potter had charge of as one of the partners—what branch office?

A. Potter—I am not answering this definitely, but merely as an opinion—it seems to me he had charge of the Boston office. He had something to do with an office in Boston; I don't know that he had charge of it, but he was in Boston part of his time. I can't say that definitely.

Q. Now who carried to New York and presented to Hayden, Stone & Company or its corporation the set-up of this proposed merger?

A. Who carried it to New York? I believe I had a copy of the figures that were presented and Mr. Lincoln had a copy; Haskins & Sells had a copy, and maybe one or two others. We all arrived in New York about the same time and called at the offices of Hayden, Stone & Company with those figures and the report which was compiled by Haskins & Sells.

Q. Now state whether or not that original report which you carried to New York for Hayden, Stone & Company contained these eleven stores on which the Southern Factories & Stores Corporation had secured options for Mr. Lincoln?

A. If you call the eleven stores I could say. I can call the number, but not able to call the eleven. I can call eight or ten.

Q. I will call them out to you. Before calling these out, can you recall about when this conference was held which we are talking about?

A. It was in the spring of 1929—I think the spring of 1929.

Q. Here are the stores: Jones Bros. and Geo. W. Kennedy Company, of Jacksonville, Fla.; M. K. Jones of Savannah, Ga.—is that right?

A. That is correct.

Q. Jones-Kennedy and Cochran Furniture Company and Mason Bros. of Atlanta, Ga.?

A. Correct.

Q. Woods-Peavy of Macon, Ga.?

A. Correct.

Q. Van Metre, of Columbia, S. C.?

A. Correct.

Q. Sam Burton, of Asheville, N. C.?

A. Correct.

Q. Bledsoe Furniture Company, of Danville, Va.?

A. Correct.

page 595 } Q. And W. A. Bell & Bro., of Fredericksburg Va.?

A. Correct.

Q. That is the eleven. Now as these options were secured by the plaintiff here for the Virginia Table Company, Incorporated, to whom were they sent?

A. The options were sent to the Virginia Table Company and copies were sent to my office.

Q. Now state whether or not from time to time options were proposed to be gotten by the Southern Factories & Stores Cor-

poration which were not acceptable to Mr. Lincoln and which they were told not to get?

A. I only knew of those that were gotten. I didn't come in contact with those that were discussed and proposed and not taken in. All that I know about were those that are on the list. If there were any other stores that were discussed—I believe there was one by the name of Cochran.

Q. That was one that was taken in. Do you know anything about—I can prove these three—do you know anything about the proposition to get Simmons Furniture Company which wasn't accepted?

A. Simmons?

Q. Yes.

A. You mean the Simmons Bed Company?

Q. No; the Simmons Furniture Company,  
page 596 } Greensboro, S. C.

A. No, we didn't get—

Q. Greenwood, S. C.?

A. No, I don't know about that.

Q. Jones Bros. of Augusta, Ga.?

A. Jones Bros. of Jacksonville. I don't know of Jones Bros. in Augusta.

Q. Now did you confer with Mr. Lincoln from time to time as to the options that were being sent in—signed options being sent in by the Southern Factories & Stores?

A. Yes, sir.

Q. State whether or not these eleven options which were secured by the Southern Factories & Stores Corporation were approved by Mr. Lincoln as to going into the picture?

A. The options were satisfactory to Mr. Lincoln, provided they would measure up to the requirements of the bankers as stated—the report of Haskins & Sells because in the last analysis the report of Haskins & Sells was the criterion. It wasn't what Mr. Lincoln said or what I said about them, but the bankers would rely only on a statement from a reputable firm of certified public accountants.

Q. Now, as a matter of fact, did these eleven stores—you said, I think, it is eleven stores—they went into the original proposition or set-up by Haskins & Sells?

A. Yes, sir.

Q. State whether or not they were submitted to  
page 597 } Hayden, Stone & Company?

A. Yes, sir.

By a Juror:

Q. Had these stores been approved by Haskins & Sells at this time as to their financial condition?

A. It wasn't up to Haskins & Sells to approve them; it was up to Haskins & Sells to submit the figures to the bankers as they found them and let the bankers decide. Haskins & Sells says: "Here are the figures and here is the set-up" and put it in the report and Haskins & Sells had been told that the stores must measure up to a certain requirement and before Haskins & Sells made the audits we had some of the men working under Mr. Kimbrell, who had some amount of experience, and some of the men working under my supervision, make tentative examinations of these stores as to their profits over a period of three to five years and unless those stores measured up to the requirements according to our tentative examination why we wouldn't have them audited, but if they measured up then we stated the requirements to Haskins & Sells and had these stores audited by Haskins & Sells.

Q. That was done subsequent to this time; not previous to this time, was it?

A. This temporary examination—tentative examination was made previous to Haskins & Sells audit.

page 598 } Q. The point I want to clear up in my mind is: as I understand now, this preliminary audit was made which was satisfactory to you and to Mr. Lincoln, but there was still another audit that would have to be made by Haskins & Sells before the bankers would accept. Is that it?

A. Correct.

Q. Now this audit hadn't been made at this particular time you are talking about. Had Haskins & Sells approved—been over these eleven and approved them at this time?

A. At this meeting, yes, Haskins & Sells had been over them.

Q. Therefore, then, do I understand those options were satisfactory to the bankers, to the auditors and your interests and Mr. Lincoln at this time?

A. They had been passed on satisfactory to my interests and satisfactory, I know, to Mr. Lincoln and Haskins & Sells made the examination and presented it to the bankers.

By Mr. Bazile:

Q. But the bankers hadn't approved it at that time, had they?

A. Well, it is very difficult to find out when a bankers approves anything and when he doesn't, an investment banker. You don't know when they approve anything; they have a poker face.

Q. At least he hadn't approved it the day you presented it to him?

A. He hadn't rejected it. It was never re-  
page 599 } jected by the bankers. As a matter of fact, the  
usual way is not to give the bankers a chance to  
reject it.

By Mr. Gordon:

Q. I want to clear up in the mind of Mr. Valentine now this point that at the time you are speaking of when you went to New York with this set-up Haskins & Sells had made these audits of these eleven stores along with others and they were in the picture that was then presented on the basis of Haskins & Sells audits to the bankers?

A. Tentatively, yes—positively that we had Haskins & Sells' audit with us at the first meeting we attended in New York—not the meeting where we negotiated with the bankers in the fall, but the meeting where we carried the figures and statements all contained in Haskins & Sells' report and included those eleven stores.

Q. Now when you and Mr. Lincoln went to New York with those figures and the report of Haskins & Sells did those figures and that report meet with your approval and Mr. Lincoln's approval as the basis of this merger?

A. The stores measured up to my approval because perhaps my approval—I was regarding some things as being paramount and perhaps the bankers would regard other things as being paramount and Mr. Lincoln would regard other things  
page 600 } as being paramount, but generally the stores  
measured up very well. They were very satisfactory to me. Some stores had more earnings than the others, but they were offset in many instances by a store having better possibilities and potentialities for the future than some store in the past, but the stores were generally satisfactory.

Q. Now I will ask you whether the set-up that was to be presented to the bankers and on which they were to act was to be based on an average earnings of the units that were to go into the picture?

A. It was based generally—I would say the average earnings was the primary basis, but the bankers also wanted the earnings to show the proper trend—trend upward instead of trend downward, and there was a great deal of discussion about the average earnings and earnings for the last two years and the last months for the first two years and it seemed to be a variation of opinion even among some of the bankers then as to what they considered paramount in the matter of earnings, whether it should be the average for the five years or the last two years, etc.

Q. Now on the statement you carried to New York, you and Mr. Lincoln, do you recall what it showed as to average earnings on the whole set-up?

A. I couldn't state definitely—so many figures—what they averaged at this time, but it seemed to me that at page 601 } that at that time around 10 or 11% was about our requirement.

Mr. Buchanan: If you will permit me to say it, those figures will be produced. I mean that report will be produced in its entirety.

Mr. Gordon: I will prove the figures by another witness in Baltimore. I have already done so by another witness.

Mr. Buchanan: I mean the actual report will be brought here.

By Mr. Gordon:

Q. Now do you know how Hayden, Stone & Company or their corporation happened to get out of this picture?

A. One of the senior partners died, a man by the name of Arthur Sherwood—died suddenly. I understood the issue was all ready to come out; everything had been arranged to put the issue on the market, all preliminaries had been taken care of and the legal work, and Mr. Arthur Sherwood died suddenly—I believe it was in April—and after he died why they called it off and they didn't give any definite reason. As a matter of fact, I don't think they called it off. We realized they were going to. They signified and told us they were going to cancel it and call it off. So we went in and withdrew it before they had time to cancel it because that is usually customary in taking a deal to New York in the street. page 602 } If given an opportunity to turn it down it is weakened for the next time. So we pulled the props from under before they had a chance to turn it down.

Q. After Mr. Sherwood's death were there any statements there by any of his surviving partners with regard to charges? Did you hear anything about that discussed by Mr. Lincoln—increasing the charges?

A. What do you mean?

Q. I mean brokerage they were going to charge for this service or compensation they were to receive.

A. Yes, they were to receive a certain amount. The issue was to be sold. We were to take an issue of preferred stock and float an issue of common—make a public offering of common stock and out of that Hayden & Stone was to get a certain commission.



Q. Now after Mr. Sherwood's death was that amount which they were to receive increased by the surviving partners or did they make increased demands on Mr. Lincoln. Do you recall that?

A. I believe there was some attempt to buy the issue at a lower price at that time.

Q. Buy the issue at a lower price. If they bought the issue at a lower price it would amount to their getting a larger compensation for their services, wouldn't it?

A. Yes, sir; provided, however, they would put page 603 } it on the market. The market condition would control it. The market might be different in that time and it would depend on whether they could market it.

Q. Up to the death of Mr. Sherwood, then, there had been no objection on the part of the Hayden-Stone interests to the set-up, had there?

A. If you go to an investment banking house it is all objections; never have anything but objections. I have had lots of dealings with lots of them; been to several of them in New York, Philadelphia, Boston, and it is all objections when you go in there.

Q. What I am talking about as far as the set-up that was presented to them as far as this merger was concerned?

A. They use objections as a medium for trading, Mr. Gordon; these investment bankers.

Q. You have just stated they were about to advertise the stock. Isn't that true?

A. Yes. The circular, I believe, had been prepared; they were going to advertise the stock at a price.

Q. So that the little differences had been ironed out then at the time Mr. Sherwood died. Is that correct?

Mr. Bazile: I object to that as leading.

Q. Had or not these differences that you say will arise with bankers—had they been ironed out generally about the time Mr. Sherwood died? Had they or not?

page 604 } A. All the differences had been ironed out as far as I know; there weren't any remaining. They told us they were going to take the issue.

Q. Do you recall any statement made by the bankers on Friday afternoon before Mr. Sherwood's death as to coming back to close?

A. It was generally understood. I was waiting in New York over the week-end. My wife was with me. I remember that distinctly. We were waiting over the week-end in

anticipation of closing on Monday or Tuesday and on Sunday Mr. Lincoln called me on the telephone at the hotel and told me we had run into hard luck again, that Mr. Sherwood had just died,

Q. Now what you have so far narrated in regard to the negotiations in New York occurred about the middle of April, didn't they, 1929?

A. It was April of 1929.

Q. I find here this letter of Mr. Buchanan's referring to Mr. Sherwood's death is dated on March 21st, 1929.

A. I said March or April. It was in the spring; somewhere around that time. I don't remember the dates.

Q. This is March 21st in which he refers to his death. Now do you know how long it was after the death of Mr. Sherwood that Mr. Lincoln withdrew the proposition from Hayden, Stone & Company?

page 605 } A. Within three or four days. Mr. Sherwood; I believe, died on Sunday and this was withdrawn either the following Tuesday or Wednesday; somewhere along the middle of the week.

Q. Now what was done then with regard to the proposition after it was withdrawn from Hayden, Stone & Company?

A. Why we sought other connections.

Q. Now did those other connections involve another audit?

A. The other connections involved another audit, and not only another audit, but the subsequent connection required that the units be appraised and examined by industrial engineers, and we had a new audit and there was an audit made on the grounds that they couldn't list the stock on the Stock Exchange with a balance sheet that was over four months old. So that necessitated another audit.

Q. Now were those new bankers you took up after Hayden, Stone & Company located in New York?

A. We negotiated with some in New York, but the next bankers after we left Hayden-Stone that gave us a contract were the Foreman National Company—I can give you the name of this securities company; they are connected with the Foreman National Bank of Chicago and I believe it is Foreman National Company; and a concern in Nashville, Tennessee—Caldwell & Company. They were the  
page 606 } two banking houses.

Q. Did they have the same auditors that Hayden-Stone & Company had or other auditors?

A. As far as the auditors were concerned we only had one firm of auditors—Haskins & Sells, but those bankers required to augment that audit an examination by a firm of in-

dustrial engineers besides the auditors. So they passed on the—they determined the validity of the set-up by Haskins & Sell's report augmented by the report from Sanderson & Porter, a firm of industrial engineers of New York City.

Q. As I understand it, this concern of industrial engineers were doing from a large organization the same character of work which had been originally done by Mr. Kimbrell and his associates in the taking of the inventories and appraisal, did they not?

A. Their work consisted primarily of appraising fixed assets and determining and getting the history of the organization, determining its potentialities; general appraisal work. That was primarily their work.

Q. I understood you to say a while ago that Mr. Kimbrell and his associates in doing that work originally throughout the southern States had to appraise the stocks and the bills receivable also?

A. Correct.

page 607 } Mr. Gordon: Now we have called here for the production of the contract with the Foreman National Corporation, but never have received it.

Mr. Buchanan: I just have gotten it.

Mr. Gordon: I just want to get the date of it.

Mr. Buchanan: I am not sure I have it here, but I finally got a photostatic copy of it. Here it is.

By Mr. Gordon:

Q. This appears to be dated on August 8th, 1929. Can you state whether or not negotiations had been in effect between the Virginia Table Company and the Foreman National Corporation prior to the meeting that was held at Marion on July 19th, 1929?

A. You mean as to whether or not we had had negotiations with the Foreman National Bank prior to the time we had the meeting in Marion on July 19th?

Q. Yes.

A. Yes, sir.

Q. Now please state whether or not from time to time after these original options were secured by the plaintiff for the Virginia Table Company there were requests to Southern Factories & Stores Corporation to get renewals of the options?

A. There were several renewals necessary and  
page 608 } requests were made, due to the fact we had to defer our negotiations and had to seek other

banking connections and in the meantime some of the options we had procured for sixty, thirty or ninety days had expired and it was necessary to have options renewed in order to keep the options in effect.

Q. By the way, on the original set-up that was proposed and the merger that was originally proposed as of what time were these units to be taken over—as of what date?

A. Either January or February of 1929; early in 1929. It is very difficult for me to remember all those dates because I have so many figures to handle and I rely on my records entirely. It is difficult for me to carry the dates.

Q. Were any instructions issued by you or your organization with regard to the running of these businesses after January 31st, 1929?

A. Due to the fact that change in ownership was contemplated and expected at that time and the change in ownership was simultaneous of the same date it was necessary to issue instructions to the stores as to the proper accounting procedure and how various matters should be handled effective as of the date that the ownership would change.

Q. And the ownership was supposed to change page 609 } as of January 31st?

A. January 31st or January 1st, I couldn't say; either one of the dates.

Q. I show you here two of these sheets issued by your company and signed by you. Were these instructions sent out to the stores?

A. Yes, that is on our stationery and my name is typed there. I know that emanated from our office without reading it all.

Mr. Gordon: This is just a typewritten instruction about the management of the business.

Note: Filed and marked Exhibit R. F. #76, which is as follows:

RETAIL STORES SERVICE, Inc.,  
Key Building, Baltimore, Md.

SUBJECT: STATEMENT OF CASH RECEIPTS AND  
DISBURSEMENTS FEBRUARY 1, 1929 TO APRIL  
15, 1929

Attention: Store Manager

BULLETIN NO. 3  
DATE April 10, 1929.

You will find attached hereto forms designated as Exhibit "A" and Exhibit "B". You will please fill in these forms to agree with your records and forward to this office promptly. An explanation follows:

#### EXHIBIT "A".

#### CASH BALANCE—AT CLOSE OF BUSINESS JANUARY 31, 1929.

page 610 } This amount should include the cash in bank and cash in office as at the close of business January 31, 1929, and should agree with the balance set up by Haskins & Sells.

#### CASH RECEIPTS—FEBRUARY 1, 1929 TO APRIL 15, 1929.

#### CASH SALES:

This should include the total cash received from February 1, 1929 to April 15, 1929, inclusive from merchandise sold for cash.

#### FIRST PAYMENTS AND COLLECTIONS:

This should include the total down payments and the collections paid at the store and to Collectors.

#### OTHER CASH RECEIPTS (details below):

Any cash receipts from any source other than the two above mentioned should be listed in detail on a separate schedule made of same.

#### TOTAL CASH RECEIPTS:

This should be the total of all cash received.

#### TOTAL CASH AVAILABLE:

This total is obtained by adding the balance at the beginning to the total cash receipts.

#### CASH DISBURSEMENTS.

#### FOR LIABILITIES AS OF JANUARY 31, 1929.

Haskins & Sells have made a set up of your liabilities existing as of January 31, 1929, which includes accounts payable

and notes payable. Any and all cash paid for the purpose of liquidating any liability included in Haskins & Sells' schedule whether notes payable or accounts payable should be listed under this caption.

### FOR MERCHANDISE LIABILITIES INCURRED SINCE JANUARY 31, 1929.

In paying your bills you have paid some of the liabilities which were shown as of January 31, 1929 and some liabilities which have been incurred since that date. You will therefore put on this list payments for *merchandise* bought and paid for since January 31, 1929.

page 611 } FOR EXPENSES SINCE JANUARY 31, 1929.

You will fill in the amounts paid for each expense account as shown in the schedule. In the event you should have expenses not included in this schedule you will list under the caption of "Other Expenses" and attach a schedule for these items.

### TOTAL PAID FOR EXPENSES.

This figure will represent items paid for expenses whether same were put through your accounts payable or paid direct, i. e., it is the usual custom when you make out your pay-roll check not to put it through your accounts payable. On the other hand if you have an invoice for repairs to automobiles it is quite probable that this has gone through your accounts payable. In any event whether the item has gone through accounts payable or not it should be listed under the proper expense account.

### FOR ITEMS OTHER THAN MERCHANDISE AND EXPENSES.

There may be some items paid which would not be in either the category of Merchandise or Expenses; you will include such items under this caption and attach a schedule for same.

### TOTAL CASH DISBURSEMENTS.

This represents total cash paid out for all purposes from February 1, 1929 to April 15, 1929, inclusive.

BALANCE ON HAND AT THE CLOSE OF BUSINESS  
APRIL 15, 1929.

This figure is obtained by deducting the total cash disbursements from the total cash available. This figure should tie in with your bank balance and cash in office as at the close of business April 15, 1929.

EXHIBIT "B".

*Notes Payable.*

The composition of this account should merely include the balance as of January 31, 1929, with subsequent debits and credits with the balance as of April 15th, 1929, brought down as a debit so as to make the debit and credit column equal.

page 612 }

*Accounts Payable:*

This is merely a composition of your accounts payable beginning with the balance January 31, 1929, showing totals of subsequent debits and credits resulting in the balance as of April 15, 1929.

Whenever an asterisk (\*) appears in the schedule an amount should be entered provided there has been a transaction to represent such an amount.

These two statements will no doubt be audited by our Accounting Department.

In the event you should receive these statements before April 15th it will enable you to line up the required data and have available to send the statements to this office as soon as possible after the close of business April 15, 1929.

Your prompt attention to this matter will be greatly appreciated and will tend to expedite final settlement. We wish you would therefore see to it that your Office Manager gives this matter special attention.

Yours very truly,

R. S. WAHAB.

By Mr. Gordon:

Q. Now about July, 1929, state whether or not some of these options were expiring.

A. They were expiring at various dates because the options were not all signed at the same time and naturally we were having expirations at various dates.

Q. In contemplation of the renewal of these negotiations for a merger through the Foreman National Corporation was any meeting between Mr. Lincoln and his corporation and some of these other units held?

A. Yes, sir.

page 613 } Q. Where was it held and when was it held?

A. There were two meetings held for the purpose of procuring options. The first one I believe was held in New York; the next one held in Marion, Va.

Q. Do you recall the date of the Marion meeting?

A. I am very poor on dates, but I believe somewhere about the middle of July, about the 15th to 20th of July.

Q. That was 1929?

A. Yes, sir.

Q. Were you present at that meeting?

A. Yes, sir.

Q. What, if anything, was then proposed by Mr. Lincoln with regard to carrying forward the merger of these furniture units?

Mr. Bazile: If Your Honor please, we make the same objection to this question and any answer thereto for the reasons which we gave at the time Mr. Fleming was permitted to testify about this matter and the other witnesses were permitted to testify. I don't think it necessary to repeat all of the reasons we gave at that time, but ask that those reasons be included in the objection to this witness' testimony.

The Court: Objection overruled.

Mr. Bazile: Exception for the reasons stated.

A. Mr. Lincoln proposed at that time—as a matter of fact, quite a number of stores proposed to the others that the options be extended. That was the purpose of the meeting, to have the options extended, and Mr. Lincoln proposed—stated that he had confidence in the present banking connection and urged the store representatives to renew their options or extend the options rather.

Q. Were the options extended?

A. At that meeting there were some extended; I got the signature on some; I had the extensions prepared, but there were some present who merely represented the corporations and didn't have the authority to extend those options. There were those representing as single proprietors or partnerships and they signed at the meeting, but some who indicated a willingness to sign had to have the extension approved by the directors. So they had to return home and call a meeting of



the board of directors in order to have the options extended.

Q. Did Mr. Lincoln state at that meeting—

Mr. Bazile: Don't lead.

Q. Did Mr. Lincoln make any statement at that time as to what he would do if these persons were willing to extend their options later?

page 614 } Mr. Bazile: We object to that question and any answer thereto for the same reasons as heretofore assign.

The Court: Objection overruled.

Mr. Bazile: Exception.

A. Mr. Lincoln stated at that time every body had worked hard on this and he had as much at stake or more than perhaps any other store, that he was putting in from two and a half to three million dollars of his assets in the merger and was willing to go along with it and he gave them various reasons he was optimistic; he told them he believed it would be more profitable to them to extend their options and he had confidence it would be only a matter of a short time when we would have a very fine company operating profitably.

Q. Was anything said at that meeting with regard to a smaller merger if the larger one didn't go through?

A. Mr. Lincoln stated at the directors table—

Mr. Bazile: May our objection to his answer to this question and all other questions relating to this matter be considered as having been put to each question and answer?

The Court: The objection because it relates to the parol evidence rule.

Mr. Bazile: Yes, sir, and the other reasons given.

The Court: I thought that was the reason given.

page 615 } Mr. Bazile: Yes, sir, and we have an additional reason: that Mr. Fleming had never established any complete contract under his evidence, which I say violates the parol evidence rule, and also because it was a variation between the allegation of the declaration and the proof. Those were the three reasons that have heretofore been given and I wish to make all of them applicable to Mr. Wahab's testimony and I understand Your Honor has overruled us.

The Court: The testimony on that point. Very well; you can have that understanding.

Mr. Bazile: And it will cover all of his examination on that point?

The Court: Yes.

A. Mr. Lincoln stated at the directors table that he was putting his assets in with the others and he says: "In the event that the bankers don't go along", he says, "we can get together and perhaps we can work out something that will be to our mutual benefit. I will throw in my assets with you". I can't quote that verbatim. Something to that effect.

Q. He said: "I will throw in my assets with you"?

A. Yes, sir. I can't quote that verbatim.

page 616 } By Juror:

Q. Was any definite arrangement made between the parties at the meeting in Marion to that effect?

A. Any definite arrangement made?

Q. Or agreement?

A. I didn't hear any definite arrangement, no, sir; nothing definite at that meeting. I don't know of any definite arrangement, except the options were extended and Mr. Lincoln urged them to sign and said what I repeated a while ago. I can't repeat it verbatim, but he said something to the effect: "If the bankers go back on us I will, if necessary, throw in my assets and we will all go along together"—something to that effect. I couldn't repeat it verbatim.

Q. Did Mr. Lincoln say he could or would do that?

A. I couldn't state definitely. It was something said about it, but I couldn't state it verbatim; wouldn't attempt to do it.

By Mr. Gordon:

Q. Were you at a meeting in New York City when there was a discussion about taking the proposition from Hayden, Stone & Company and securing extensions of the options?

A. Yes, sir.

Q. Was that done at that time? Do you know about what time that meeting was held in New York?

A. That meeting was previous to the Marion  
page 617 } meeting; sometime between the 1st of April and  
1st of July. I don't remember exactly the dates  
of meeting there for the options.

Q. Do you remember where that conference in New York was held?

A. It was held at the office of—what is the name of that concern on Broad Street?

Q. Holton, Richards & Company?

A. Yes; Holton, Richards & Company, I believe on Broad Street.

Q. Now who called that meeting up there?

A. Mr. Lincoln, Jr., called it or I called it at Mr. Lincoln's suggestion; one or the other.

Q. What was the purpose of that meeting?

A. The purpose of that meeting was to advise the stores to extend the options.

Q. To get extensions of the options?

A. Yes, sir. We realized at that time we had to seek new banking connections and we saw that the factor of time was very important.

By a Juror:

Q. Did you at that time at that meeting instruct Southern Factories & Stores to secure renewals of all eleven options?

A. Yes, sir.

page 618 } By Mr. Gordon:

Q. You can't locate very definitely the date of that meeting in New York to which you have just referred?

A. That meeting in New York was perhaps in April. I could take some of my correspondence and find it. Perhaps the first of May or last of April; somewhere along there.

### CROSS EXAMINATION.

By Mr. Buchanan:

Q. Mr. Wahab, I will take up that question first. You stated at that time renewals of all eleven options were requested. Do you remember that the first extension of options was requested because the auditors hadn't completed their audit and made their report and the options were running out and that is the first time any request was made to extend options on account of the failure of the auditors?

A. I believe it was. A few of these options were short term options which had to be renewed.

Q. I want to refresh your recollection as to the Cochran store in Atlanta which is one of the eleven. No extension was ever asked of that, was it?

A. I believe there was an extension gotten on that. I think it was an extension gotten on that.

Q. The same is true of the Jones stores, you think?

A. I think so.

page 619 } Q. Now taking up your testimony in regard to the contract for options which was made in Richmond with Mr. Kimbrell: as I understand it, you weren't present when that was made?

A. You refer now to the contract—

Q. Whereby Mr. Lincoln agreed to pay \$1,000.00.

A. I wasn't present. I didn't say I was. I said I wasn't present. I made that clear.

Q. That you weren't present and didn't know the terms?

A. Yes, sir.

Q. I want to ask you if also at that time the requirement that the bankers would absolutely insist upon was known to you and Mr. Lincoln in connection with this proposed merger as to earnings and record?

A. At that time?

Q. Yes.

A. You say that the requirements of the bank were absolutely known to us?

Q. If you knew what character of stores and earnings they would require to go into the merger?

A. We had a general idea; I did; very good idea.

Q. I think you will recall that the requirement was there should be a 10% earnings over a period of five years—

Mr. Gordon: Don't you testify.

Mr. Buchanan: He is on cross examination.

The Court: Counsel may ask if that wasn't a fact, but not make a statement.

page 620 } By Mr. Buchanan:

Q. I am asking you if it isn't a fact that the requirements were that there were to be an average earning over a period of five years of 10% and that 1928, the last year, should be better than the average? Is that your recollection?

A. I couldn't state that latter part was true, but somewhere around 10% was required for the average stores—all of the stores. We had some question with the bankers. I asked: "If one store doesn't measure up and another measures up will you take the whole picture?" and I figured around 10%, but at that time we hadn't—

Q. You also said something which you said had an important effect on the bankers; that is, the trend of earnings must be upward and not downward?

A. Some of the bankers—it was varied at different times. It was generally preferred in any underwriting set-up that the earnings trend be upward instead of downward. That is generally preferred.

Q. Now as to inventories: you were in charge of taking in-

ventories and judging accounts all over the country of the entire organization, were you not?

A. I was supervising the instructions emanating from my office and I was also in the field. I did some field work also.

Q. There were a large number of very important units in the west and north, as well as in the south?

A. Yes, we had some large stores in the north and west and one or two large ones in the south.

Q. With the exception of Max Barnett Furniture Company, the stores in the south were comparatively smaller than the stores in the east and west, weren't they?

A. They were smaller as to the size of the gross assets, but some in the south had better earnings than stores in the north.

Q. I am talking about gross assets.

A. That is naturally so with any enterprise.

Q. Do you recall Schwartz Bros., in Connecticut; also one store in Scranton, and in Uniontown—Cohen Company?

A. The stores in the north had larger gross assets.

Q. And Okmulgee, of Oklahoma, which is a very large store?

A. Yes.

Q. In connection with these stores it was just as important to ascertain their proper inventory as it was of the southern stores, wasn't it? Just as necessary to ascertain the proper amount of their inventory as the southern stores?

A. That is so.

Q. And you employed competent men for that purpose, didn't you?

page 622 } A. Yes, sir.

Q. I believe you employed Mr. Shriner as one of them, didn't you?

A. Mr. Shriner was employed by the Retail Stores Service, Inc.

Q. That is your concern?

A. Yes.

Q. And Mr. Wahab, your brother, was employed to do that work?

A. Yes.

Q. And I think Mr. Wren was also employed by you?

A. No; Mr. Wren had been working for me a long time. He had been employed some time previous to that. He was a member of our permanent organization.

Q. And Mr. Sam O. Wyatt was also employed to do this work?

A. Yes.

Q. And they were all competent men to do that work?

A. They were all employed in a junior capacity.

Q. They judged accounts, did they not?

A. Some of them did; some did clerical work.

Q. Some of them took inventories, did they not?

A. They assisted. None of those had the responsibility of taking an entire inventory; they were assistants.

Q. Who in the north and west had charge of taking the inventories—active charge of the men?

A. Mr. Harry Coplan was in charge of that. Mr. Harry Coplan was doing similar work in the north that  
page 623 } Mr. Kimbrell was doing in the south. Mr. Harry Coplan is vice-president of Retail Stores Service.

Q. I want to ask you how much you paid Mr. Shriner for this work.

A. We didn't make any charge to the Virginia Table Company on account of Mr. Shriner's service. We merely had the Virginia Table Company reimburse the Retail Stores Service for the amount the Retail Stores Service paid because of the fact that if the merger went through we were going to be paid in another way; we were getting our compensation in another way.

Q. You don't mean to say you didn't pay Mr. Shriner as much as his service was worth, do you?

A. I employed him as cheaply as I could.

By Mr. Gordon:

Q. Would you mind saying how much you would have gotten?

Mr. Bazile: We want him to say what he did get.

Mr. Gordon: He said he was to get his compensation in a different way. I want to find out.

A. I will clarify that. I want to be perfectly fair; want to give the statement as it is. Mr. Shriner was employed by us and we paid him and we didn't endeavor to make a profit on Mr. Shriner's services, as is usually customary with  
page 624 } accounting concerns and appraisal companies for the reason the Retail Stores Service was realizing its profit from this merger transaction by another method.

By Mr. Buchanan:

Q. Mr. Wren, wasn't a regular employee of yours, was he?

A. Mr. Wren is a certified public accountant; certified in Virginia and New York.

Q. Of high standing?

A. Yes.

Q. And perfectly capable to do this work?

A. Yes. He was doing accounting work; wasn't doing any appraisal work. He was solely doing accounting routine.

Q. Don't certified public accountants get a larger per diem than appraiser, in your experience?

A. I couldn't answer that categorically. They might or might not.

Q. Haven't you over the period of the last few years aided and assisted in paying out thousands of dollars to public accountants?

A. I think so.

Q. And you paid out a great deal of money to appraisers in taking inventories?

A. Yes, sir.

Q. Doesn't a certified public accountant get a very much larger per diem than those people who appraise inventories?

A. I find the fees of certified public accountants page 625 } vary as much as practising attorneys or any other profession.

Q. And the same is true of appraisers. Mr. Wahab, is there anything extraordinarily difficult in ascertaining the inventory of a store?

A. Not if you know him. It is a matter of skill and knowing how to proceed with an inventory and take an inventory and in this instance it was a question of making valuations. If you go into a store to take an inventory and the cost is all marked on the merchandise—in some of these stores the cost wasn't marked and you had to determine the value of that merchandise by an eye-appeal and knowing the merchandise; couldn't find the cost on a lot of it, particularly in the south.

Q. The Retail Stores Service had the same agreement in connection with the inventories in the north that the Southern Factories & Stores had in the south. Now isn't that correct?

A. Repeat that.

Q. The Retail Stores Service had the same understanding as to the taking of these inventories and paying for them that the Southern Factories & Stores did in the south?

A. Had the same understanding in taking inventories. The uniform information was issued all over. It was a meeting

in the offices of the Retail Stores Service at which  
 page 626 } Mr. Kimbrell was present and a number of others  
 called to Baltimore for the purpose of discussing  
 and formulating a plan and procedure for taking inventories.  
 A definite conclusion was arrived at there and proceeded  
 with accordingly along and under the instructions which  
 emanated from Mr. Kimbrell, Mr. Hillis and a few others.

Q. Have any of the men doing this work of taking these  
 inventories made any complaint about the amount of money  
 they received from it—Mr. Hendry, Mr. Shriner, Mr. Wren  
 or your brother?

A. They haven't made any definite complaint. I don't re-  
 member any definite complaint.

By a Juror:

Q. A little while ago you said you were charging in the  
 services of these men employed by your company just at  
 what you paid them?

A. That is right.

Q. You said you expected to get your profit in another way.  
 Just what did you mean by that?

A. I had a contract—The Retail Stores Service, my com-  
 pany, had a contract with Mr. Lincoln that they were to pay  
 my company \$50,000.00 in good will. We were the only com-  
 pany that was going to get money because ours was a per-  
 sonal service corporation with no merchandise to sell and  
 very few accounts receivable and they were pay-  
 page 627 } ing us \$50,000.00.

Q. That is in event the merger went through?

A. In the event the merger was consummated. We felt  
 \$50,000.00—

Q. What compensation if not; if the merger wasn't con-  
 summated?

A. Nothing.

Q. You were gambling? The way you were working, as I  
 see it, you were willing to charge these men at cost, gambling  
 on getting it back in that \$50,000.00?

A. I didn't consider it a gamble at that time; I was rather  
 confident it was going through. I wouldn't call it a gamble.  
 A gamble is when you don't see the cards, but I thought I  
 could look at the cards face up. Somebody had some up  
 their sleeve.

By Mr. Buchanan:

Q. Now I hand you these bills—



Mr. Gordon: May it please Your Honor, I think under the evidence that has been given by this witness with regard to how he expected to receive compensation and how he was charging that this isn't competent evidence of the reasonable value of such service as was rendered by the plaintiff in this case and I object to the introduction of these cost bills. A large batch of them are here. Except probably page 628 } as expense items, they don't reflect anything like the value of such service as was rendered by the plaintiff in this case and that is recognized by the witness here who said he expected to get his compensation in a different way.

\* \* \* \* \*

The Court: You want to introduce those to show the average?

Mr. Buchanan: Yes, the average salary paid during that period of time for people doing the same kind of work.

The Court: Why not ask the witness that question and then if counsel calls for specific instances you can put them in.

By Mr. Buchanan:

Q. Mr. Wahab, I hand you for your information a paper—Wait a minute. Do you know the salaries you paid these gentlemen?

A. I might not remember them all.

Q. Approximately how much did you pay them on an average per week for this character of work? I will give you these papers.

A. I find that the average of this is higher than the average paid the Southern Factories & Stores men. page 629 } Q. What is the average?

A. Higher than the amount paid the Southern Factories & Stores men.

Q. What is the average approximately?

A. Well, I will have to figure that up. The average on this statement, four men at \$74.00 a week.

Q. How much?

A. \$74.00 a week average per man on this one. The average on this one is \$75.00 a week.

The Court: Put those different ones down and average them.

A. (continued) I would say it would average between \$78.00 and \$82.00 a week. That is, the actual salary. That is as close as I can approximate it.

Q. Will you file these?

The Court: They are not in evidence. I allowed him to review them and refresh his memory.

A. These men were allowed a traveling expense in addition to their salaries.

Q. I want to ask you also there are submitted with these bills the expense accounts, aren't they?

A. I don't know about all of them, but the general plan was to submit an expense account.

Q. And you don't find any incidentals or extra meals in them, do you?  
page 630 } A. Yes; I had to charge for some incidentals and extra meals myself.

Q. I am talking about your employees. Look through there and see if you can find any.

Mr. Gordon: May it please Your Honor, I object to that. Some men might have to spend money for an extra meal and others not. I don't see how the fact some of these accounts don't show extra meals and incidentals affects the question of whether another man had to have extra meals and incidentals.

Mr. Buchanan: The only thing I have to say we are charged here, when you add it up, with a large amount of money for extra meals and incidentals which appear upon these expense accounts submitted to us when men doing precisely the same character of work got along with breakfast, dinner, supper and lodging, and for that reason I don't think it is necessary or usual or customary when you send a man out to pay for sixty or seventy extra meals every week or so.

The Court: I think you would be limited to the average per diem expense account; not to go into detail.

page 631 } By Mr. Buchanan:

Q. Will you kindly state the average per diem of expense if you can?

Mr. Buchanan: Would the Court permit him to submit that later?

The Court: Yes.

Q. You were present, you have stated, I believe, in Baltimore when the agreement was made that Mr. Kimbrell was told to see to the inventories and have them taken in the southern stores?

A. Yes, sir.

Q. These expense accounts and salaries of yourselves were sent in to Virginia Table Company weekly or semi-weekly?

A. The people in the field were furnished expense books—little blue expense books from my office—

Q. Is that it (exhibiting book)?

A. This is the idea. That happens to be my own expense account. These were sent in weekly to the Retail Stores Service by the men we had in the field and we would reimburse the employee from the funds of the Retail Stores Service, Inc., and the Retail Stores Service in turn would bill the salaries of those people and their expenses to the Virginia Table Company who would remit to us at the end of each week or directly thereafter. Sometimes we would  
page 632 } send them in two weeks at a time.

Q. And they were promptly paid?

A. Paid promptly, yes; paid regularly.

Q. And, Mr. Wahab, as the executive of the Virginia Table Company in charge of all of this outside work in this merger, it was your understanding that Southern Factories & Stores were sending in their accounts weekly, was it not?

A. I was leaving that to Mr. Kimbrell. I told him to make arrangements for handling his expense accounts and I didn't check up to find out just how he was handling it. I had confidence in his method of billing expense accounts.

Q. Have you any objection to stating what your salary and Mr. Coplan's were in 1929 from your concern?

Mr. Gordon: I object to that. What has that to do with it.

The Court: You haven't laid any foundation for asking that question.

By Mr. Buchanan:

Q. Were you in the same relative position as regards the stores in the north that Mr. Kimbrell was in the south?

A. No. Mr. Coplan was in perhaps the relative position.

Q. What was Mr. Coplan's salary at that time?

A. Mr. Coplan is a member of our firm, the vice-president of our company.

page 633 } Mr. Gordon: I don't see that is relevant. It is not a question what one man's salary was; it is what was the reasonable value of the service rendered.

By the Court:

Q. What section of the country is Mr. Coplan operating in?

A. Operating in the north, but perhaps I should clarify this salary situation without answering the question. The matter of salaries of Mr. Coplan and myself would be irrelevant because it is a close corporation and we don't depend on our salaries altogether for our means of livelihood; we depend on our stock earnings, and the matter of salary would be irrelevant. We depend upon our earnings. We might draw a big salary one year and the next year whatever we think—Mr. Buchanan: I withdraw it.

By Mr. Buchanan:

Q. As I understand you, you were charging the expenses as they were sent in and the salaries to Virginia Table and they were paying them?

A. Yes, sir.

Q. I want to ask you what agreement, if any, was made if this merger became effective as to Mr. Kimbrell's future connection with it? What official position was he to have if this finally were effected?

A. I believe it was discussed. It wasn't any page 634 } real definite arrangements made as to official positions because that would be up to the stockholders; we couldn't determine it, but we had a slate to the extent I was to be treasurer of the corporation—I was slated for treasurer—that was unsolicited; Mr. Kimbrell was to have a position in the south in some executive capacity; he was to supervise the stores in the south and do some work in the stores in the south.

Q. I want to ask you if it wasn't the understanding in Baltimore that the Southern Factories & Stores were to charge the Virginia Table Company the amount that it cost them to take these inventories?

A. I never heard any arrangement made. I didn't make that arrangement.

Q. I thought you made it.

A. I think that arrangement was made between Mr. Lincoln and Mr. Kimbrell, as far as I know.

Q. You don't know what it was?

A. What the arrangement was?

Q. You don't know how much Mr. Lincoln was to pay?

A. Yes, Mr. Kimbrell's organization was to take the inventories and Mr. Lincoln was to pay him for the expense of taking those inventories. That was my understanding—ex-

pense of taking the inventories, but just how they  
page 635 } would arrive at the amount I didn't go into details.

Q. What I am trying to arrive at is that you knew the expenses—the Virginia Table Company was not to pay—Here is what I am trying to get at: the agreement was the Virginia Table Company wasn't to pay any profit to Southern Factories & Stores over and above what it cost Southern Factories & Stores to take these inventories?

A. I never heard that discussed one way or the other.

By a Juror:

Q. I understood in your testimony a few minutes ago you to say these people got paid an average of \$78.00 to \$82.00 working seven hours a day. Is that right?

A. Yes, sir.

Q. I also understood you to say on account of the—

A. I beg your pardon. Not these people we paid \$72.00 in this merger because we employed these people at that time. I stated when we sent men out from our office on special survey work we worked on a basis of seven hours a day.

Q. Do I understand then these men made anywhere from ten to fifteen or sixteen hours at that compensation?

A. Whatever time they worked that is what they received, the amount stated in this statement.

Mr. Gordon: We object to anything being paid by Mr. Wahab about the hours of service rendered by  
page 636 } the gentlemen whose accounts he holds in his hand  
because that would be purely hearsay testimony unless he was with them when they worked.

The Court: Of course, he can't tell something he doesn't know anything about.

By Mr. Buchanan:

Q. Weren't you present several times at these stores when these men were taking these inventories?

A. I was in and out of the stores, but my work was more in the north at that time—in the northern stores.

Q. I am talking about your men in the northern stores.

A. I was in there to see how they were getting along; merely supervising. Mr. Coplan had *charged* of it directly. I would get my information from Mr. Coplan and he would take instructions from me and pass it on down.

Q. Did any of your men work very long during this time, to your knowledge, to complete this work?

A. They worked spasmodically and irregularly. It was necessary to do that. I don't know about much overtime; it wasn't any record kept. It wasn't any reason for keeping a record. We were paying them so much for working spasmodically and overtime. Some days they would work a few hours and the next day work right along and sometimes work nights. We didn't keep a record of it.

By a Juror:

Q. Wasn't this overtime work purely voluntary; nothing compulsory about it, was it?

A. Entirely voluntary. That is correct. We didn't compel them to work overtime.

Q. Perfectly voluntary?

A. Yes, sir.

Q. They didn't receive any extra remuneration for it?

A. Not the men in our organization.

By Mr. Gordon:

Q. These men, as I understand it, were on fixed compensation with your organization?

A. Yes, sir.

Q. And your organization was expecting to get a profit out of the contract you had with Mr. Lincoln?

A. We had no other way of getting that profit.

Mr. Bazile: Mr. Kimbrell and your men were on fixed compensation with your company.

Mr. Gordon: We didn't have anything at stake as a profit.

Mr. Bazile: Yes, you were to get a lot of common stock.

Mr. Gordon: Not a cent.

By a Juror:

Q. At this time we are trying to value the two units, the Baltimore unit and the Southern unit. I understand you to testify it was hard to inventory or value the furniture stores in the south on account of their records. Is that correct?

A. Yes, the records in the south weren't as good as the records in the north.

Q. I further understood you to say these men whose expense accounts you hold in your hand are junior men?

A. They were all doing junior work; they were subordinate to Mr. Coplan and myself.

Q. Would you consider these men—their services satisfactory to do the work they did perform for this other company?

A. Do I consider these men satisfactory to do the work?

Q. Yes.

A. Yes, they were satisfactory to do the work, working under the supervision of Mr. Coplan and myself. My salary nor Mr. Coplan's salary doesn't appear here at all. That shows you we were relying on getting our profit from another source. Mr. Coplan and I weren't working for a salary.

Q. You would have been satisfied to have one of these junior men to come down to one of those stores and send you the inventory?

A. We work juniors and seniors.

Q. That is the point I am trying to get in my mind. I understood the work that came through Mr. Kimbrell was passed. He was practically a senior man?

page 639 } A. Mr. Kimbrell is senior to anyone in taking inventories. Mr. Coplan was senior to anyone whose names appear in this group and also I suppose my services were considered senior.

Q. You wouldn't have been satisfied to accept these inventories except vised by a senior man?

A. Yes, sir. Each of these would require a senior to help him.

By Mr. Buchanan:

Q. How many seniors were in the south, so far as you know, that you call a senior man?

A. I would determine Mr. Kimbrell a senior man; I would determine Mr. Murray a senior man in his work, and I would say Mr. Hillis would be between the two—he would be a very good junior and not quite a senior. You can't draw the line exactly between junior and senior.

Q. What is the difference between a junior and senior?

A. Knowledge, skill, general ability and experience.

Q. I want to ask you something else. Would it make any difference if it were a week's job or a six months' job in the compensation?

A. Yes, it would make some difference.

Q. Weren't there several stores, if you recollect, that Mr. Coplan didn't visit in person?

page 640 } A. Yes, sir, there were some stores Mr. Coplan didn't visit; maybe one or two stores in the south. I don't believe he visited very many in the south. In the north either Mr. Coplan or myself were in attendance. All of the big jobs in the north Mr. Coplan or I were present.

Where we had assets of considerable size Mr. Coplan went there himself, appeared personally, and I did myself in a great many instances.

Q. Had all these men been with you prior to this time or did you employ some of them as new men?

A. A number of these men—I would say all the men with the exception of Mr. Wren were employed primarily for the purpose of assisting in the preliminary work, but also with the view if they measured up in this preliminary work they would be given a position.

Q. That is exactly the situation.

A. They were promised if they would work for us in taking these inventories they would be given a permanent position with the merged company when it was consummated.

Q. That is what I am trying to bring out; that is, these men weren't your regular employees, but were employed by you at this particular time to do this particular work at that particular wage? Am I correct in that, with the exception of Mr. Wren?

A. All with the exception of Mr. Wren.

page 641 } By a Juror:

Q. If you all had to take your men out of your store and put them on the road then what compensation would you have paid them as compared to these that you went out and got?

A. You mean if I had to take men out of my office and put them on the road without any other compensation?

Q. Yes, rather than the men you got on the open market.

A. It would be difficult to answer that. It would depend on circumstances: if I put him out for this same work that I was going to be reimbursed in another way myself or if I didn't have any other method of making a profit on my men. Which do you mean? Let me get that clear.

Q. I say if there was no other compensation coming in.

A. If no other compensation? Well, we have a settled rule we bill our men out on similar work. Every accountant and every accounting firm, the American Appraisal Company, National Appraisal Company—they have that system of employing a man at one price and billing him to the client at another price per diem. That is really the generally recognized system of operating.

Q. In what proportion is that done? Suppose you are hiring a man for, we will say, \$12.00 a day and he is going out to do this work; what is a reasonable profit on that man's services?



page 642 } A. I could only answer that by saying that I have employed men for \$40.00 a week that worked for Haskins & Sells and taken from Haskins & Sells, employed them for \$40.00 that Haskins & Sells billed at \$25.00 a day. I have employed them for \$40.00 a week from Haskins & Sells, the same men that Haskins & Sells had billed me at \$25.00 a day.

Q. Still the point I am trying to get at is if they are not auditors. I am talking about these men doing your inventories. I am not talking about what the auditors got. I am talking about this particular work of taking inventories in these stores. If you are paying a man—we will just take any figure; say if you are paying him \$10.00 a day; if he is that valuable a man to you and you are sending him out to these stores, would you charge them \$20.00 a day? What is a reasonable per cent?

A. If a furniture store would come to me and make arrangements to make a survey in their store, a large furniture store—I would say a store with considerable assets called us to make a survey, I would make that arrangement on a per diem basis on those stores. That is how we usually work, on a per diem basis, and if it became necessary to send a man out to make that survey, taking inventories and analyzing the accounts receivable my lowest rate would be  
page 643 } \$25.00 a day. I would pay one \$35.00, \$50.00, \$75.00 and \$100.00, depending upon the status and qualification of the man.

Q. That is a perfectly normal—just an ordinary thing that is done every day; it is not an abnormal thing to do?

A. The appraisals companies and the larger accounting concerns usually adopt that method of charging their clients on a per diem basis for the personnel.

Q. Most of the jury are familiar with certified public accountants, but we have never hired any people to appraise furniture stores and we are just trying to get in our minds what is fair.

A. You will find the American Appraisal Company and Sanderson & Porter charge for the services of their men about the same rate—\$25.00, \$35.00, \$50.00, \$75.00 and \$100.00, depending upon the status of the employees. They charge about the same. That was about the price back in 1929; maybe a little bit less today. That was the price in 1929. Do I make that clear to you?

Note: The Court adjourned until tomorrow, July 22nd, 1932, at ten o'clock A. M.

page 644 }

July 22nd, 1932.

The Court convened pursuant to adjournment.

R. S. WAHAB,  
resuming the witness stand, testified as follows:

CROSS EXAMINATION (resumed).

By Mr. Buchanan:

Q. Mr. Wahab, you were requested on yesterday to average the expense accounts handed you. Have you made that calculation?

A. Yes, sir.

Q. What is the average?

A. Around about between \$74.00 and \$76.00 a week. That is expenses; does not include salaries.

Q. You spoke yesterday of the amount paid to employees sent out by Sanderson & Porter and Haskins & Sells. Sanderson & Porter are business engineers of the very highest standing in this country. Am I correct?

A. They are business engineers of very high standing; I don't know about the highest in the country. They rank high.

Q. I will ask if examinations are made by them at the request of such persons as J. P. Morgan; Hayden, page 645 } Stone & Company; Rollins & Son, for the purpose of ascertaining whether it will be profitable in their judgment to largely finance such industries?

A. That is one of their functions, yes.

Q. And their reports are the basis of financing which runs into the millions; that is correct?

A. It is, sir.

Q. No was to Haskins & Sells: they are certified public accountants, are they not?

A. Yes, sir.

Q. What is their standing in this country and abroad, if you know?

A. They rank as among the largest and most reputable public accountants.

Q. And upon financial reports and audits made by Haskins & Sells the bankers also rely for financing which may run into the millions also. That is correct, isn't it?

A. Yes, sir, that is correct.

Q. I want to ask you in view of your testimony on yesterday if you class the store employees of the Southern Fac-

tories & Stores Corporation who made these audits in the same class as Sanderson & Porter and Haskins & Sells?

A. They are not in the same class. It is an entirely different field of work.

Q. It is an entirely different field of work, isn't it?

A. Yes, sir.

page 646 } Q. Mr. Wahab, in this organization you were associated by Mr. Lincoln as having full executive charge of the taking of these inventories and reports, were you not?

A. I was.

Q. And you and Mr. Lincoln requested Mr. Kimbrell to take charge of that work in the south?

A. Yes, sir.

Q. I want to ask you if you would have employed Mr. Kimbrell if you had had any idea that he was going to charge \$100.00 a day?

Mr. Gordon: We object to that. We are here asking for what is reasonable compensation and it doesn't seem to me that is a proper question.

Mr. Buchanan: I am trying to bring out the fact Mr. Wahab was in absolute charge of this work and it was his understanding that Mr. Kimbrell was not to receive any such amount and if he had he never would have employed him.

The Court: If he has any information or can testify as to any acts of this plaintiff in that connection, the evidence of those facts may come out.

By Mr. Buchanan:

Q. Was it your understanding in connection with Mr. Kimbrell and Mr. Murray and Mr. Fleming that these  
page 647 } inventories and this work was to be done at cost?

A. At cost, yes, sir.

Q. Mr. Wahab, in connection with the dealings with the bankers, a banker's contract such as was taken in this case is not a final commitment on their part, is it?

A. A banker's contract or the contracts which we procured—two, or perhaps three—it was always one clause that investment bankers insist on and that is what they call the market out clause or a calamity clause. That means in the event of an earthquake, cyclone, war or sudden collapse of the stock market the bankers elect the right to withdraw from the agreement they have that way out. I know we endeavored many times to eliminate that clause, but we have never been successful in getting that clause eliminated from

the contract for an underwriting with a large firm of investment bankers, such as Dillon & Reid; Morgan; Hayden-Stone or any of the larger concerns.

By a Juror:

Q. You stated, I believe, just a minute ago that it was your understanding that these inventories would be taken at cost. Well, now, what do you mean by "at cost"? Do you mean by that the actual cost of the salaries that these gentlemen were paid who took the inventory or the actual cost to the firm by virtue of the fact there was some loss page 648 } encountered by having these key men out of the stores? Is that a proper question?

The Court: I see no objection to that.

A. That was not specifically and definitely discussed at that time, to my knowledge. I never heard it gone into just in that detail, but it was my understanding that the Virginia Table Company was to reimburse Retail Stores Service for the amounts they paid towards taking inventories and doing the work and they were likewise to reimburse the Southern Factories & Stores Corporation for the amounts that the Southern Factories & Stores Corporation expended, but there was no attempt to define cost at that time—what constituted cost.

Q. I notice from your expense accounts that your expense accounts were rendered weekly. Why was it that the Southern Factories & Stores Corporation expense accounts were not rendered in accordance with your expense accounts?

A. In our organization I insisted on it being done that way for the reason, as I explained yesterday, that our company is a personal service corporation and our capital is very small, as it would naturally be in a personal service corporation, and we didn't have the funds to let it accumulate. We had at that time in order to meet our payrolls and other expenses—we had to send those expenses page 649 } in weekly as at least semi-monthly so as to replace our funds we had disbursed because they were running a considerable size at that time.

Q. Did you have any understanding as to how long to defer those expense accounts before they were sent in?

A. I didn't attempt to control that or make any recommendation about the expense accounts at all. My supervision was as to the procedure and mechanics of completing the inventories and the personnel. So far as the payment of cash was concerned I had nothing to do with that on the part of

Southern Factories & Stores. They paid them themselves and, as a matter of fact, I didn't know for perhaps several months subsequent to the time the merger matter was dropped as to whether or not the Southern Factories & Stores had been reimbursed.

By Mr. Buchanan:

Q. I believe you said your thought was, without knowing positively, that these accounts had gone in like yours at the time?

A. I said I would naturally assume that would be the logical way to handle it. It would be the reasonable way, but I didn't know their way. I didn't have knowledge how it was being handled, but my natural inference would be that would be the most methodical and satisfactory way to handle it.

Q. The reason for that was with the exception page 650 } of Mr. Kimbrell and his few stores in the south practically all of the expense of effecting this organization went through your office and received your O. K. That is correct, isn't it?

A. There was considerable expense—you had acquired some expense, Mr. Lincoln had some expense, Mr. Lincoln's brother had some and Mr. Murphy had some expense that didn't go through our office or Southern Factories & Stores Corporation.

Q. I mean outside of personal services all expenses went through you?

A. Largely for taking the inventories it went through my office and Southern Factories & Stores Corporation.

Q. And were promptly paid. You were speaking of the market clause. I hand you a paper to file—the first contract which was made with Haystone Securities Corporation. Do you recognize that contract?

A. Yes, this is the contract. I wish to correct my testimony. I said Hayden-Stone; it is Haystone Securities Corporation, a subsidiary of Hayden, Stone & Company.

Note: Filed and marked Exhibit R. S. H. #77, which is as follows:

page 651 }

April 5, 1929.

Haystone Securities Corporation,

E. H. Rollins & Sons,

New York, N. Y.

Gentlemen:

Confirming our oral understanding arrived at this day

with regard to the organization and financing of Lincoln Furniture Corporation, we beg to advise you as follows:

(1) The undersigned, Virginia Table Company, Inc., and C. C. Lincoln, Jr., will cause to be organized under the laws of the State of Delaware, a corporation known as Lincoln Furniture Corporation, or such other name as may be agreed upon, having an authorized capital stock consisting of 100,000 shares of 7% Convertible First Preferred Stock of the par value of which 35,000 shares are presently to be issued; 75,000 shares of Class A Preferred Stock of the par value of \$100 per share, of which not more than 17,000 shares are presently to be issued; and 1,000,000 shares of Common Stock without par value, not more than 490,000 shares of which are to be presently issued (40,000 shares of which shall be reserved for conversion of the 7% Convertible First Preferred Stock); the exact number of shares of the Class A Preferred and Common Stock to be issued shall be determined upon the completion of the audit which our accountants, page 652 } Messrs. Haskins & Sells, are preparing.

Said capital stock shall contain the preferences and limitations and the Certificate of Incorporation and By-Laws of the Company shall be in the form already agreed upon. The 7% Convertible First Preferred Stock shall be convertible at the rate of \$25 per share, or 4 shares for 1, with proper adjustments in the event of corporate changes. The Company shall, until March 1, 1931, apply annually a sum equal to 15% of its consolidated net earnings after interest, taxes, depreciation, dividends on the 7% Convertible First Preferred Stock and such reserves as are necessary for the proper conduct of the business to the purchase and retirement of the 7% Convertible First Preferred Stock and after such date a sum equal to 3% of the largest principal amount of such stock at any time outstanding, or 15% of such consolidated net earnings of the Company, whichever is greater, to such purchase annually until the retirement of all of the outstanding shares of such stock. The sums so determined shall, within three months after the close of the fiscal year of the company, be applied to the purchase and retirement of the 7% Convertible First Preferred Stock at the price of not more than \$110 per share. Upon the determination of the sum available for such purchase, the company shall notify you of such amount and you shall have the privilege of first offering such preferred stock for sale page 653 } and retirement before the company attempts to make such purchases in the open market or other-

wise. In the event that the amount to be applied to the purchase and retirement of said stock in any year is not fully exhausted by reason of the inability of the company to make such purchases at not more than \$110 per share, any excess shall after the expiration of three months from the close of the fiscal year be used by the company for its general corporate purposes.

(2) The undersigned, C. C. Lincoln, Jr., is the owner of one-third of the outstanding capital stock of Virginia Table Company, Inc., a Virginia corporation, which corporation owns all of the outstanding capital stock of Lincoln Furniture Manufacturing Company. Virginia Table Company, Inc., has acquired valid and binding options to purchase the assets of a certain number of retail furniture stores located in the States of Connecticut, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, Georgia, Florida, Oklahoma and Louisiana and also to purchase the stock of Cameron Stove Company of Richmond, Virginia, and Carolina Parlor Furniture Co. of Statesville, North Carolina. Said options provide that the purchase price of such assets and stock shall be paid partly in the Class A Preferred Stock and the Common Stock of Lincoln Furniture Corporation and partly in cash. In addition, the under-  
page 654 } signed, C. C. Lincoln, Jr., will cause to be transferred to Lincoln Furniture Corporation all of the outstanding capital stock of Virginia Table Company, Inc., and Lincoln Furniture Manufacturing Company in exchange for Common Stock of Lincoln Furniture Corporation.

(3) The consolidated net earnings as above defined of Lincoln Furniture Corporation, when formed, figured upon 400,000 shares of its Common Stock (after eliminating the 140,000 shares of reserved for conversion of the 7% Convertible First Preferred Stock) will be equal to \$886,000 per annum over a five-year 1928, however, will be in excess of this amount, and any obligation on your part as a result hereof shall be conditioned upon this fact. The consolidated net assets of Lincoln Furniture Corporation available upon the said 400,000 shares of Common Stock will aggregate \$4,924,000, or \$12.31 per share.

(4) Upon the organization of Lincoln Furniture Corporation and the acquisition of the assets referred to in (2) above, you shall purchase from said corporation 35,000 shares of said 7% Convertible First Preferred Stock at par of \$100 per share less a commission of 10%. The Class A Preferred Stock shall be issued to the persons or corporations

selling the assets referred to in (2) above, in part payment thereof, and the Common Stock shall be issued as follows:

page 655 } (a) To the sellers of certain of the stores to be acquired as set forth in (2) above; 29,268 shares taken at the rate of \$20.00 per share.

(b) To Virginia Table Company, Inc., and Lincoln Furniture Manufacturing Company and certain other sellers of the assets referred to in (2) above: 235,580 shares taken at the rate of \$12.31 per share.

In the event of the issuance of the Common Stock of the *company* upon the basis set forth in (a) and (b) above, you shall purchase 82,580 shares of such stock at \$17.68 per share, making the total number of shares of Common Stock to be outstanding 347,428 shares, so that there will remain unissued in addition to the shares reserved for conversion, 512,572 shares.

(5) Of the 235,580 shares of Common Stock to be issued as set forth in (b) of paragraph (4) above, 182,800 shares shall be deemed to be allocated to the purchase of the stock of Virginia Table Company, Inc., and Lincoln Furniture Manufacturing Company, and you agree to purchase 25%, or 45,700 shares, from the holders thereof at \$17.68 per share.

(6) The computations arrived at and set forth in paragraphs (3), (4) and (5) hereof shall be re-adjusted upon the receipt of complete financial statements from our accountants, Messrs. Haskins & Sells, and such other adjustments as may be agreed upon, but the ratios therein expressed shall in any event remain the same as those set forth page 656 } in said paragraphs.

(7) Upon the issuance of the shares of 7% Convertible First Preferred and Common Stock to you pursuant hereto, each of you shall have the privilege of designating one member of the Board of Directors of Lincoln Furniture Corporation and we shall cause such designees to be duly elected to said Board.

(8) The undersigned shall cause Lincoln Furniture Corporation to grant to you and to Mr. C. C. Lincoln, Jr., an option to purchase all or any part of an aggregate of 100,000 shares of its Common Stock from and after January 1, 1930, and up to January 1, 1933; said option may be exercised as follows:

34,000 shares at \$22.50 per share.

34,000 shares at \$25.00 per share.



32,000 shares at \$27.50 per share.

The other details of said option and the manner of exercising the same shall be set forth in the option agreement to be executed by the company pursuant hereto. The options thereby granted at your election may take the form of transferable stock purchase warrants.

(9) Our accountants will have completed their audit of the accounts of all of the companies whose assets or stock are to be acquired by Lincoln Furniture Corporation on or about April 14, 1929. At such time we agree to enter into a new contract, at your option, setting forth the substance of this agreement with such additions as may be page 657 } agreed upon between us. In any event, your obligation to take up and pay for the stock of Lincoln Furniture Corporation shall be terminated at any time prior to the actual purchase thereof, in case, after an investigation of the business and affairs of the companies whose stock and assets are to be acquired, you decide that it would be inadvisable to market the securities to be purchased by you hereunder, or in case you, in your discretion, decide that general market conditions are such that the marketing of such securities would be inadvisable.

The undersigned C. C. Lincoln, Jr., agrees that for a period of one year after the date of issuance thereof he will not dispose of any part of the Common Stock of Lincoln Furniture Corporation to be issued to him pursuant to this agreement without your consent, and at the expiration of such period he will not dispose of such stock for an additional period of one year without offering the same to you. The undersigned C. C. Lincoln, Jr., further agrees that he will use his best efforts to cause the persons, firms and corporations receiving Common Stock upon the transfer of the stock and assets referred to in paragraph (2) hereof to enter into a similar agreement for the same periods.

Your acceptance noted to the foot hereof will page 658 } constitute an agreement between us.

Very truly yours,

VIRGINIA TABLE COMPANY, INC.,  
By C. C. LINCOLN, JR.,  
President.

C. C. LINCOLN, JR.,

(L. S.)

Accepted:

HAYSTONE SECURITIES CORPORATION,  
By A. C. SHERWOOD,  
Secretary.  
E. H. ROLLINS & SONS,  
By GEO. B. GREENE,  
Vice-President.

By Mr. Buchanan:

Q. I want to ask you if the clause which I will read to you is the market out clause that you referred to: "In any event, your obligation"—that is, Haystone Securities' obligation—"to take up and pay for the stock of Lincoln Furniture Corporation shall be terminated at any time prior to the actual purchase thereof, in case, after an investigation of the business and affairs of the companies whose stock and assets are to be acquired, you"—that is, Haystone Securities—"decide that it would be inadvisable to market the securities to be purchased by you hereunder, or in case you, in your discretion, decide that general market conditions page 659 } are such that the marketing of such securities would be inadvisable."

A. That is the market out clause.

Q. And that clause was exercised by Hayden, Stone & Company—Haystone Securities Corporation?

A. Was that a question?

Q. Yes.

A. You say that was exercised by Haystone Securities Corporation?

A. Yes.

A. They got out. I don't know whether they exercised that. That is about the only thing they had to get out on. I suppose they withdrew on Mr. Sherwood's death.

By Mr. Gordon:

Q. What is that?

A. Mr. Sherwood died at that time and I was told they exercised it on account of Mr. Sherwood's death. That is what they told me.

By Mr. Buchanan:

Q. In order that the jury may understand the procedure in connection with these contracts, a contract was entered into upon representations made by your organization as to the financial picture which you would present. That is correct, isn't it?

page 660 } Mr. Gordon: May it please Your Honor, I think I ought to raise this question right now. So far there is no evidence whatever that we were involved in any way with the bankers in this case. As a matter of fact, we expect to show that we never saw this contract and had no connection with the bankers. We made an agreement with Mr. Lincoln whereby we were to get \$1,000.00 apiece for these options, they were approved by him and we had nothing to do with the bankers. Now what transpired subsequently—the set-up that he attempted—Mr. Lincoln attempted and Mr. Wahab attempted, I don't think has anything to do with this case.

The Court: What is the bearing of this testimony on the making of the contract?

Mr. Buchanan: I am perfectly frank to say to the Court that I think it has absolutely no bearing whatsoever. Now, if the Court please, these gentlemen have introduced, for what reason I don't know and we objected at the time, before this jury a voluminous, long series of correspondence and letters from counsel to Mr. Fleming and Mr. Murphy in regard to this very contract. Your Honor will  
page 661 } remember they read letter after letter about dealings with the bankers, what occurred in New York about these contracts, about the failure of the bankers to exercise it, about Mr. Sherwood's death. We objected to it at the time. I didn't think then it had anything to do with the case and I don't think so now, but since these gentlemen have attempted to show all those circumstances in New York, for some purpose known to them which I don't know, it is necessary that we must show what did transpire in that city. They have attempted to show it by all this correspondence which has been read here. \* \* \* Now if all those letters be withdrawn and that testimony be stricken out why we have not the slightest objection, but, on the contrary, would be delighted.

The Court: I thought that testimony was introduced, not for the purpose of getting the details in, but to show what was being done in furtherance of the contract that was alleged by the plaintiff; that the details weren't matters of importance, but they crept in or had to come in when they read the letters.

Mr. Gordon: I can show Your Honor the allegation here. We were kept on the tender-hooks for practically twelve months and this declaration shows it, waiting on  
page 662 } Mr. Lincoln, and this witness has himself testified that we were to be taken over as of the 31st

of January, 1929, and that is confirmed by the letters which have been introduced. Now if we were kept all that year in a state of suspense, as this declaration shows, then we were entitled to show that by all of this correspondence that took place.

Mr. Buchanan: The situation, as we see it, is this: These gentlemen have introduced every detail as to what occurred in the City of New York. They had given options; they were paid for those options a fair consideration, a nominal consideration. They weren't compelled to do any of these things. They didn't have to give these options if they didn't want to do it. They weren't compelled to do it, but, as Mr. Gordon says, they are attempting to show they were kept on tender-hooks during this entire period. The object of this testimony is to show the reason why we were compelled to ask for renewals of these options and that they acquiesced in it by giving such renewals at that time.

The Court: Is that the purpose of this testimony?

Mr. Buchanan: Yes, the reason for all of this.

The Court: I will let you go into that.

page 663 } By Mr. Buchanan:

Q. In order that the jury may understand the procedure in connection with these contracts, a contract was entered into upon representations made by your organization as to the financial picture which you would present. That is correct, isn't it?

A. Representations made by executives of the Retail Stores Service in conjunction with representations made by Mr. Lincoln I think were the dominating factors with the bankers in the negotiations.

A Juror: A little louder, please.

A. The representations made to the bankers by executives of the Retail Stores Service and by Mr. Lincoln were the dominant factors in interesting the bankers to go into this merger.

Q. Now after the contract was made on those representations and after the contract with the bankers had been signed the next thing was the taking of inventories. Is that correct?

A. Taking of inventories and appraising the accounts receivable and doing work in general preliminary to having the audit made.

Q. What I am trying to establish is that the audit couldn't

be made until the inventories were taken and the  
page 664 } accounts appraised in these stores. That is correct, isn't it?

A. That audit couldn't be completed until then.

Q. That is what I mean. Now after the inventories were made and the audit was completed those figures were then presented to the bankers. That is correct, isn't it?

A. The figures presented to the bankers contained the report made by Haskins & Sells.

Q. Where did you get the information as to the figures in the stores whose options had been secured by Mr. Kimbrell and Mr. Murphy? Who gave you that information as to those figures?

A. Who gave me the information?

Q. Yes.

A. Haskins & Sells' report.

Q. I am asking you now who gave you the preliminary figures before Haskins & Sells made the audit?

A. In those stores—the eleven stores referred to a preliminary examination was made by Mr. Kimbrell or some of the representatives of the Southern Factories & Stores for the purpose of determining whether or not the tentative examination would justify an audit.

Q. That is it. Mr. Kimbrell and Southern Factories & Stores made an examination of these eleven stores of the figures and those figures were carried on to you as a basis for the tentative figures which you submitted to  
page 665 } the bankers. Is that correct?

A. That is correct.

By a Juror:

Q. Did you let Mr. Kimbrell—give him a free lance to furnish you the information or did you lay down certain instructions he was to follow?

A. Well, there weren't any definite instructions. We would get preliminary information from various sources; we might get the first report from a mercantile agency, get a balance sheet or financial statement from Dun or Bradstreet or Lyons Furniture Mercantile Agency—get the last report the store filed, and Mr. Kimbrell would go into the stores and first find out approximately the assets of that store and approximately the receivables and the earnings as had been reported by the stores or according to the profit and loss account on the general ledger of the store. He would give me just sort of a general summary of the earnings as shown by the store, but that could hardly be final because for our

purposes we had what we call non-recurring expenses. A store might have a certain amount of profit, but for our purposes and for the bankers' purposes that profit might be entirely a different thing upon audit because we were eliminating from our expenses certain non-recurring items. For example, it might be a close corporation, a family affair and they might be taking extraordinarily large salaries in lieu of dividends. It wouldn't be fair to compare that with some store on another basis. So those things had to be adjusted. So on account of these non-recurring charges I couldn't determine altogether what Mr. Kimbrell told me as final. I had to find out about extraordinary conditions, whether the salaries had been larger than the salaries would be under the merger organization.

Q. So then you took the information furnished you and remade the statement to suit your policy?

A. To a very large extent, yes.

Q. Did Haskins & Sells use in their report the inventory taken by your company and your representatives?

A. Haskins & Sells set-up the merchandise inventory as taken by our representatives after they had tested the accuracy of that inventory, proved the arithmetic accuracy of the extensions.

Q. They didn't actually go through the stores?

A. Haskins & Sells didn't go through the stores and take the inventories. I think that is qualified in their report. I think they state that in their report of audit, that they had made certain tests as to the arithmetic computations, but did not go into the matter of taking the actual physical count as we did. They accepted our figures on it.

page 667 } By Mr. Buchanan:

Q. Mr. Wahab, in order to show exactly the kind of information that you received, I hand you two statements, one on Van Metre and one on Bledsoe, and ask you if they are the character of reports which were received by your organization—the general character of reports. I am not asking you about those particular figures.

Mr. Gordon: I would like for him to state whether that is an accurate summary of what the inventories and appraisals showed on certain cases.

A. These two statements seem to be two of the statements showing preliminary figures taken from the stores before Haskins & Sells made the audit; seem to show the figures

used to determine as to whether or not it was worth while to make an audit. I wish to say, however, that this was not always final because I had some preliminary statements that made a good showing and upon going into it with the auditor it didn't make a good showing, and *vice versa*: I had some that didn't make a good showing on the preliminary, but after taking into consideration non-recurring salaries and other non-recurring expenses they made a much better showing.

Note: Filed and marked Exhibit R. S. W. #78.

page 668 } By Mr. Gordon:

Q. Can you state from whom you received those and when you received them or did you receive them or Haskins & Sells?

A. I couldn't state definitely as to when I received these or whether they were received. There were lots of statements coming into my office at that time and I was looking them over daily, but I couldn't state whether I looked over these two statements, but this is in the general form that the information was tentatively submitted.

Q. Did that have reference to a first compilation by Haskins & Sells or to a subsequent one? Can you state anything about that?

A. It appears that these statements have nothing to do with Haskins & Sells; they were preliminary and before Haskins & Sells' audit was made. These statements were made before Haskins & Sells made the audit and submitted to us for the purpose of determining as to whether or not we wanted to make an audit or whether we were further interested in taking the option on the store.

By Mr. Buchanan:

Q. I believe those are two of the stores that were contacted by Southern Factories & Stores—Bledsoe and Van Metre?

A. Bledsoe of Danville and Van Metre of Columbia, S. C.

Q. Now after all of the figures from all of the page 669 } stores came in and the audit was made—the first audit I am speaking of now—those figures were taken to New York by Haskins & Sells and yourselves and presented to Haystone Securities Corporation, were they not?

A. Yes, sir.

Q. Now please tell the jury what occurred when those fig-

ures were first presented, whether they were accepted or rejected or whether they were re-arranged or whatever occurred at that time.

A. When the report was submitted at the office of Hayden & Stone there were present several of the partners of Hayden & Stone and Rollins—I remember Mr. Sherwood was present; he seemed to be handling the matter, in charge of it—and there were naturally a lot of questions asked and lots of discussion and a lot of discussion as to the stores. As a matter of fact, the questions and inquiries were rather numerous. They wanted to know a lot about the stores and there were some suggestions made.

Q. Now what I am trying to get at is: is it not a fact then that for some weeks these figures of these stores were arranged and re-arranged and Haskins & Sells were called upon to make different reports from time to time in order to get a set-up that would be satisfactory to the bankers?

page 670 } Mr. Gordon: Is there any written memorial of these things, and, if so, we ask for its production.

Mr. Buchanan: Written memorial?

Mr. Gordon: Of those figures you said were produced; the thing that was presented to Hayden & Stone originally.

Mr. Buchanan: You mean you want the original audit?

Mr. Gordon: I want the first one made.

Mr. Buchanan: Mr. Dykes has that audit. He has been here all the week and left yesterday when we couldn't get to him. If you want us to continue this line of examination until that audit can be had we have no objection. I have the second audit, but I am not asking about that.

Mr. Gordon: I don't think this is material evidence to the issues in this case, but at the same time if he wants to go into it I am not going to raise any objection.

The Court: Then let the testimony come in.

A. Haskins & Sells made only one major report containing the stores, but the bankers were naturally interested to know as to whether that report could be improved as regards earnings by certain additions and eliminations and certain revisions of Haskins & Sells' report, and  
page 671 } I know I made myself from the figures in Haskins & Sells' report, but always adhering to the figures submitted in Haskins & Sells' report—I made several set-ups for the bankers and they wanted to consider it by certain eliminations and changing around and we made several statements. I know there were perhaps a dozen or



more different statements made. I made several and some of the auditors in my office made several, at the suggestion of Mr. Lincoln and the bankers, for the purpose of determining how the picture would look by changing it different ways at that time.

Q. When Haystone Securities Corporation finally turned that proposition down I want you to tell the jury why Mr. Lincoln withdrew it, if you know, rather than have them deliberately turn it down?

A. We realized from certain developments that they were going to turn it down, the bankers were going to reject it---

By Mr. Gordon:

Q. Was that on account of Mr. Sherwood's death?

A. That was after Mr. Sherwood's death, and naturally having an important issue of this kind, one in which we had all invested a lot of money, we didn't want any bankers to turn it down. So we discussed the matter and Mr. Lincoln talked with Mr. Holton, of Holton, Richards & page 672 } Company, and went over to Hayden & Stone's office and withdrew it and didn't give the bankers an opportunity to really turn it down. They withdrew it before they had an opportunity to turn it down, and that is usually the custom. The bankers will usually give you an opportunity to withdraw it so that it wouldn't be said that the bankers turned it down because every time you have to shop an issue of this kind it weakens the potential sale of the securities.

By Mr. Buchanan:

Q. After that other bankers were approached and finally a new agreement was made with Foreman National Corporation, in Chicago, I believe. Is that correct?

A. That is correct.

Q. There were meetings in New York of all of these stores during this time, were there not, and the situation explained to them?

A. There were several meetings in New York.

Q. The situation was explained to them and some of them---

Mr. Gordon: Mr. Buchanan, you have undertaken to say that the situation was explained to all of these gentlemen there. The witness hasn't said so.

Mr. Buchanan: I asked him.

page 673 } Q. Was the situation explained to them?

A. What situation?

Q. The situation in regard to the issue having been turned down and the reasons therefor and the hope of future financing.

A. The stores were aware of the fact that it had been taken away from Hayden & Stone and they were also aware of the fact other connections were being sought.

Q. And they were asked to renew their options?

A. They were asked, but some renewed voluntarily. Others were asked.

Q. Some were paid for renewing the options. Is that correct?

A. Nominal amounts. I believe the sum of \$500.00 or \$1,000.00 was the highest that was paid, but a great many renewed without.

Q. I believe Southern Factories & Stores were kind enough to renew without paying them anything?

A. I couldn't say definitely which stores were paid and which weren't paid.

Q. Then the proposition was taken to Chicago and was rejected there also?

A. Yes, sir.

By a Juror:

Q. I understood from the testimony that the Chicago interests required a new inventory to be taken by the appraisal company. I am interested in getting a comparison of that value as shown by that inventory and the value as shown by the Southern Factories & Stores Corporation.

A. The engineers who made this inventory inspected and accepted the figures compiled by the employees of the Southern Factories & Stores and by our employees; they didn't go into that unless they perhaps found something—some minor adjustment, but there wasn't anything of major importance that was changed.

Q. Then do I take it that they were still up to the specifications required in the original option account; they were still satisfactory after the audits?

A. There was no material change on account of the inventories or the valuation of the accounts from the figures compiled by the employees of the Southern Factories & Stores and employees of the Retail Stores Service. There was no material change made. As a matter of fact, the auditors and neither did Sanderson & Porter, the engineers, take physical inventories; they reviewed them and verified them, but didn't take the inventories.

By Mr. Buchanan:

Q. In order to clear that up, is it not a fact that after a consultation and at your direction all of the stores under option from Mr. Kimbrell or Southern Factories & Stores were eliminated in the second audit but three?

A. I would rather refer you to that audit.

page 675 } Q. I will hand you the audit and ask you if all of them weren't eliminated but three.

A. All of the Southern Factories & Stores are retained in this.

Q. I didn't ask you that. I asked you if all of the eleven stores for which options had been secured weren't eliminated but three—by Mr. Kimbrell.

A. This has Bell, of Fredericksburg, which was one of the eleven; Mason Bros., one of the stores obtained by Mr. Kimbrell, and it ought to be another one in here—and Woods-Peavy, Macon, Ga.

Q. They are the only three of the eleven that were retained in this second audit?

By a Juror:

Q. If they came up to the specifications on that second go-around why were only three of them retained and the other eight rejected?

A. What measured up for one set of bankers wouldn't measure up for another set. The requirements proposed were varying and the market conditions weren't getting any better; they were getting worse—conditions for floating a new issue, and perhaps that had some effect.

Q. Then am I correct in my mind that the first set of bankers found the eleven satisfactory and the second set of bankers only found three out of the eleven satisfactory, largely due at the time, as you say, the market didn't look so good?

A. The last bankers in this report eliminated all but three but they weren't eliminated in the first. Haskins & Sells' report we took in to Hayden & Stone contained the eleven stores. It is very difficult to tell why a banker does a thing because there is a lot of trading going on and they will raise a lot of objections to a store and may turn it down and never tell you why; don't have to say why.

By Mr. Buchanan:

Q. Mr. Wahab, in order to make this clear, Haystone Securities Corporation turned the whole proposition down, didn't they? There weren't any stores satisfactory to them in the picture?

A. So did the Foreman National also turn it down. It wasn't any accepted; it was all turned down; not any accepted. This merger was never consummated by the bankers; never accepted by any bankers. It wasn't put through, but they dropped out gradually one at a time until they were all out of the picture.

By a Juror:

Q. Weren't they actually approved by Mr. Sherwood just before his death? At one time weren't they actually approved and the picture all ready to go through?  
page 677 }

A. It would be very difficult to say whether they were approved by Mr. Sherwood or not because Mr. Sherwood—I remember his characteristics; he was pessimistic at all times.

Q. But you testified yesterday, I think, that you were assured on Saturday that the papers would be executed Monday.

A. Yes, that is true.

Q. Sherwood died on Sunday and I understood from your testimony yesterday that the picture was satisfactory on Saturday and it was just a question of executing the papers on Monday.

A. That is true, but Mr. Sherwood never stated to me he approved them because he would argue and talk all about the objectionable points and say nothing about the good ones, but the issue was acceptable to my knowledge to Hayden & Stone and was supposed to come out the following week when Mr. Sherwood died. That is my understanding because they were doing things and had made certain arrangements and completing their legal requirements and certain things that they had had done indicated to me they were bringing the issue out, that they were getting ready to bring it out the following week. As a matter of fact, we had been instructed to do certain things in anticipation of the issue coming out the following week.

page 678 } Q. But for Mr. Sherwood's death you think the issue would have gone through at that time?

A. I believe so, yes, sir. I think Mr. Sherwood's death had a great deal to do with it.

By Mr. Buchanan:

Q. Mr. Wahab, to refresh your memory, Mr. Sherwood was one partner, was he not?

A. Yes, sir, he was one.

Q. Isn't it a fact that all of the partners meet on Monday

of each week in Haystone Securities Corporation to determine whether they will or will not accept a proposition?

A. I couldn't answer that. I don't know.

Q. I want to ask you if Mr. Potter or anyone in Haystone Securities Corporation told you that on the Monday after Mr. Sherwood's death that Mr. Hayden, the president and head of the entire firm, as they expressed it, boiled up and said he wouldn't under any circumstances underwrite this issue because, in the first place, Rollins had refused to do it?

A. That is correct. Rollins withdrew their support from the Haystone Company proposition before Mr. Sherwood died and the Haystone Securities Company were proceeding without the support of Rollins and Mr. Richards and Mr.

Lincoln went in and they told me that Rollins had page 679 } withdrawn their support prior to Sherwood's death, but Sherwood was proceeding without that support, but after Mr. Sherwood died Mr. Hayden, of Hayden & Stone—I believe he is the senior partner—he became aware of the fact for the first time that Rollins had withdrawn and he seemed to be rather peeved about that matter, didn't like it. So he said: "If they have withdrawn we will withdraw"—something said to that effect.

Q. Mr. Wahab, yesterday you spoke of securing \$50,000.00 if this merger were effected. You are the president of the Retail Stores Service in Baltimore, are you not?

A. Yes, sir.

Q. It is a corporation, is it not?

A. Yes, sir.

Q. And this \$50,000.00 wasn't a bonus, but was to buy your corporation. Isn't that correct?

A. \$50,000.00 for our corporation—for the stock.

Q. Just as they were buying Southern Factories & Stores they were buying you and it was worth every dollar of it, wasn't it?

A. They were buying tangible assets in Southern Factories & Stores, but in the Retail Stores Service they weren't buying it; they were buying good will, paying us \$50,000.00 for a plan or idea.

Q. And you had a stock issue and had paid dividends on your stock practically every year, hadn't you?

A. We paid dividends and still pay dividends.

Q. And the merger was acquiring a dividend-paying proposition at that time, was it not, regardless of what it consisted of?

A. Yes.

Q. And a very valuable organization, was it not?

A. It was a personal service corporation. It had nothing to sell. It is like an old established insurance agency. We don't carry a stock of merchandise, don't have accounts receivable, and they were paying us for our plant, for the good will.

Q. You have originated what is called the chainway plan of merchandising, have you not?

A. Together with some others.

Q. And in effecting this merger Mr. Lincoln was very anxious to secure your corporation and your plan. That is correct, isn't it?

A. Yes.

Q. And was paying you \$50,000.00 for it if the merger had been effected?

A. They were giving us \$50,000.00 if the merger had been effected.

Q. And that was in common stock, wasn't it, in the new corporation?

page 681 } A. Yes, but the common stock given to us—  
some stores were given at book value and some at market value.

Q. On the first picture?

A. Yes. We were getting our common stock at the—the number of shares we were to get was to be based on book value and naturally assumed the market value would be a great deal more than book value. We were getting \$50,000.00 at book value.

By Mr. Gordon:

Q. Do you remember what that proportion was between market and book?

A. The market value that we would turn this issue out at was considerably more than the book value. I don't remember the exact proportion now, but we couldn't bring an issue out at book value; we wouldn't sell it to the bankers for book value because the price they were paying us was predicated upon earnings.

By a Juror:

Q. You say you had no stock of trade. In paying you \$50,000.00 was it the intention of this new corporation or this merged corporation to use that system of merchandising? Is that what they were paying for?

A. Yes, sir.

Q. What were they going to get for the \$50,000.00?

A. The corporation was to get our company; page 682 } it was to be a unit in the corporation and was to function in the capacity as an executive office control for the stores in the merger and also function in the same capacity we are functioning now—operating stores not connected with the merger.

By Mr. Buchanan:

Q. In other words, he was buying a going concern and that going concern would supervise all the stores in the merger and in addition to that the merger would get the profits which your Retail Stores Service made from serving other furniture stores all over the United States?

A. That is it.

Q. So it was just as much a unit as Southern Factories & Stores, as Van Metre, as Bledsoe, and was so understood?

A. It was understood it would be a unit and that particular service would inure to the corporation.

Q. What was the issued capital stock of your corporation at that time?

A. The issued capital stock of our corporation at that time was—

Q. How much preferred and common?

A. \$12,000 preferred, 7% preferred, cumulative preferred, \$100.00 par value, and we had 1,000 shares of common without par.

Q. Now I want to ask you if your company in page 683 } your judgment wasn't worth every dollar that Mr. Lincoln was to pay for it in stock?

A. If my company wasn't worth it?

Q. Yes.

A. Certainly. I think it was worth more than that.

By a Juror:

Q. Mr. Wahab, what effect did this merger have on your company? I mean by that the operation of it. Did it have any effect at all on your business dealings during this period?

A. This merger had a very adverse effect on our company because during the time the merger was being handled the executives in our company, Retail Stores Service, devoted a great deal of their time towards the merger and naturally we had to neglect some things in Retail Stores Service.

Q. I mean other than that, if it had nothing to do with merchandising.

A. We don't carry merchandise in our company.

Q. The only effect it had then was to take your executives out in other work?

A. That is the only effect.

Q. Plus not getting this \$50,000.00. You did feel the effect of not getting this \$50,000.00?

A. We eventually got the \$50,000.00 in another page 684 } way. We didn't get that \$50.00, but we got another one.

By Mr. Buchanan:

Q. Mr. Wahab, is it not a fact that all of those connected with this merger at this time hoped and expected it would form what would be one of the largest and most profitable industries in the United States?

Mr. Gordon: How does he know what other people expected?

Mr. Buchanan: Because he heard them say so.

Q. Isn't that a fact?

A. We naturally were enthusiastic about it, the executives. We were interested in making it as large as possible. That was the cause of the delay; we were trying to make it too large. We would get some stores and the bankers would say in talking to you: "Ten million assets—make it fifteen." We kept on working and that delayed it. Had we been contented with a smaller company we could have gotten our figures in before the market collapsed and before conditions changed and perhaps it would have been better. We were trying to make it too large. It would have been one of the largest chains of its kind in the country had it been consummated in the form it was originally presented by Haskins & Sells' report.

Q. And there was also a plan made as to who would be the executives? A set-up of the officers and directors page 685 } was made which was satisfactory to the bankers if it had gone through?

A. I answered that yesterday.

Q. Now Mr. Fleming was to be a director, I believe, or vice-president—which?

A. I never heard Mr. Fleming's name mentioned on the slate.

Q. I will bring you the slate. Mr. Fleming was to have charge in an executive capacity of all the Southern Factories & Stores Corporation stores, I believe. That is correct?



A. He was at that time manager of the Cameron Stove Company. My idea was he was to retain that same position; in charge of the Cameron Stove Company.

Q. He was to retain his position. What I am trying to get at: the consummation of this merger wouldn't eliminate Mr. Fleming from this picture, but it was provided he should remain in charge of Cameron Stove Company and executive of the company. Isn't that a fact?

A. Yes, but there were no definite agreements or contracts made in that connection.

Q. I said it was contemplated in the slate?

The Court: Aren't you getting a little far off?

Mr. Buchanan: I think so.

Q. Mr. Wahab, I asked you yesterday, I believe, in regard to the trend of earnings and if 1928 wouldn't have to be better than the average. I want to ask you to read page 686 } paragraph three of this—I will read this part of paragraph three of the contract: "The consolidated net earnings as above defined of Lincoln Furniture Corporation, when formed, figured upon 400,000 shares of its common stock, after eliminating the 140,000 shares reserved for conversion of the 7% convertible first preferred stock, will be equal to \$886,000 per annum over a five-year period, or \$2.21 per share. The actual net earnings for the year 1928, however, will be in excess of this amount, and any obligation on your part as a result hereof shall be conditioned upon this fact." I want to ask you if one of the conditions was that 1928 should be better than the average?

A. I think that paragraph speaks for itself.

Mr. Gordon: Turn to the first page of that and read the date.

The Witness: April 5th, 1929.

The Court: What paper is that?

Mr. Buchanan: The contract with Haystone Securities Corporation, showing the bankers requirements.

Mr. Bazile: It is Exhibit #77.

By Mr. Buchanan:

Q. I want to ask you this question: When Haskins & Sells were making up their audit they consulted with you about various matters in connection therewith, did they page 687 } not?

A. Yes, sir.

Q. Now I want to ask you if on or about the 4th day of June, 1929, in the City of Baltimore, either in your office or in the office of Haskins & Sells, you told Mr. H. A. Dykes, accountant in charge for Haskins & Sells, that it was the agreement that the Southern Factories & Stores were to be paid only for options which were exercised by the Virginia Table Company and that at that time only three were expected to be exercised; to-wit: W. A. Bell & Bro., Mason Bros., and Woods-Peavy Company?

A. Yes, but that was for the purpose of the Chicago transaction. That was after Hayden & Stone. That was away along in June or July.

Q. That was in June?

A. In June or July. I told them only these three stores would be included in the Foreman National set-up.

Q. That is correct, and you told him that the understanding or agreement was that the Southern Factories & Stores was to be paid only for such options as were exercised by the Virginia Table Company?

A. No, I didn't tell him that. I didn't know it at that time. I said yesterday I didn't know anything about that until later. I told him about the three stores, that those three stores were to be included in the picture, but I didn't say Southern Factories & Stores were to be paid only page 688 } for three.

Q. You didn't tell Mr. Dykes that?

A. I have no recollection of it.

Q. Was it a fact or was it not at that time?

A. I never have told him. I didn't know it. I wasn't aware of it.

Q. You never have told him?

A. I wasn't aware of it.

Q. You never have said it?

A. If I wasn't aware of it I couldn't have told it.

By a Juror:

Q. Mr. Wahab, was it your understanding or did you know whether or not in the original agreement between Mr. Lincoln and Mr. Fleming's organization whether or not the eleven stores were to be paid for at the rate of \$1,000.00 per store or not?

A. I didn't hear that agreement made, but Mr. Lincoln told me later he had made an arrangement with Mr. Kimbrell to pay him \$1,000.00 for getting options on the stores—each store.

Q. The eleven stores?

A. Well, at that time we didn't know how many. He said he was going to get as many as he could. Mr. Lincoln told me that. That was after the options were acquired.

Q. Do you think at any time during these negotiations Mr. Lincoln recognized an obligation to pay for eleven stores at \$1,000.00 per option?

A. I couldn't state that definitely.

Q. Do you personally feel they are entitled to be paid \$11,000.00 for these eleven stores?

The Court: Mr. Ricks, I am afraid that calls for the conclusion of the witness. You may ask him questions of fact and the jury will draw their conclusions.

By Mr. Buchanan:

A. As I understood you, you didn't hear the agreement and didn't know its terms?

A. I wasn't present when that agreement was made. I heard it talked about. It was discussed, but I wasn't present when that agreement was made. I was told the agreement was made, but I wasn't there and didn't hear the agreement. I don't believe there was a written agreement.

The Court: Don't state your belief. Gentlemen of the jury, disregard that.

By a Juror:

Q. Mr. Wahab, was anything said—was there any condition on the payment of this \$1,000.00 for options expressed by Mr. Lincoln to you? Did he just say that he was going to pay \$1,000.00 for each option or did he say he would pay \$1,000.00 for each option that was finally accepted by the bankers?

A. Mr. Lincoln didn't go into the details. He said he was going to pay \$1,000.00 for options; didn't qualify it by saying whether he was going to pay for options exercised or not exercised. He didn't state.

By Mr. Gordon:

Q. You stated yesterday he told you he was going to pay \$1,000.00 for each option they secured for him. Is that correct?

A. He told me he had made an arrangement with Mr. Kimbrell to get options for which he was going to pay him \$1,000.00 an option and Mr. Kimbrell pay his own expenses.

By Mr. Buchanan:

Q. In addition to the question I have asked you about Mr. Dykes—do you know the name of the accountant who was in charge of the Southern Factories & Stores audit?

A. I met the man. He is in charge of the Charlotte office; can't call his name. If you call his name—

By Mr. Gordon:

Q. Vance Huggins?

A. No, Huggins is the field man. Huggins isn't in charge. The resident accountant in the Charlotte office is in charge.

By Mr. Buchanan:

Q. I want to ask you if you received a copy of page 691 } a letter written from Baltimore on June 4th by Haskins & Sells to Mr. Vance Huggins in which this statement is made—

Mr. Gordon: We object to that as hearsay testimony.

Mr. Buchanan: I asked if he got a copy of that letter.

Mr. Gordon: That doesn't make any difference.

Mr. Buchanan: I am not going to ask him anything about it if he didn't get a copy. It is not my intention to read that to the jury if he didn't get the copy; that isn't my intention.

Mr. Gordon: All right; ask him if he got a copy.

By Mr. Buchanan:

Q. Have you got a copy of that letter?

A. I couldn't state definitely whether I did or not; it was so much correspondence. I couldn't say whether I got a copy of that or not.

The Court: In order that the record may identify that letter just state what the question refers to.

Mr. Buchanan: The *questions* refers to a letter dated Baltimore, June 4th, 1929, addressed to Mr. Vance Huggins, 21st & Decatur Streets, Richmond, Virginia, and signed by Haskins & Sells.

page 692 } Q. You can't state whether you did or not?

A. I couldn't say.

Q. I want to ask if in the City of Baltimore about a year ago in your office in the presence of Mr. John D. Lincoln and Mr. C. M. Hendry, you stated to them that according to your understanding the agreement was that Mr. Lincoln was to pay only for such options as were exercised and that you had so advised Haskins & Sells? Do you recall that?

A. No, sir. I told them at that time—you were present and know what was said—I told them that Mr. Lincoln told me it was his intention to pay only for options that were exercised, but Mr. Lincoln told me that a year or more later when litigation was pending. That is what I told you.

Q. I will also ask you if in Mr. Lincoln's room in the Hotel John Marshall at the time this case was first called on the question of the plea in abatement and when you testified before if in the presence of Mr. C. C. Lincoln, Mr. Charles M. Henry, Mr. W. T. Mitchell, Mr. James Todd and Mr. James Walsh you made the statement that it was your distinct understanding at the time that the contract between Mr. Lincoln and Mr. Kimbrell was that Mr. Lincoln was to pay only for such options as were exercised?

A. No, sir.

page 693 } Q. You were present at the conference at Marion on the 19th of July, I believe?

A. 19th of July? I was present at a conference sometime in July. I don't remember the exact date.

Q. Will you please state who was there at that time, as well as you can remember?

A. I couldn't name them all. I could name some of them. Mr. Lincoln was present; Mr. C. C. Lincoln; Mr. John D. Lincoln; Mr. J. P. Buchanan; Mr. Fleming; I believe Mr. Murphy was present; Mr. Nathan Miller, of Wilmington, Delaware; Dr. Barnett, representing the Max Barnett Furniture Company of New Orleans; Mr. Phelps, of Phelps & Armstead, and Mr. Armstead of that concern; I believe Mr. Hazelgrove was present at that meeting; Mr. Kimbrell was present; perhaps there were some more; I was present.

Q. Were you present in New York at the first preliminary conference with the bankers before any options whatsoever were taken, at the time Mr. C. C. Lincoln, Sr., was there—before his death?

A. I was never present at any meeting when Mr. C. C. Lincoln, Sr., was present in New York.

Q. I also want to refresh your memory there—I think you have simply forgotten—that you stated yesterday that Mr.

page 694 } Potter, you thought, was the Boston partner of Haystone Securities Corporation. Now is it not a fact that the Boston partner was Mr. Prescott Bigelow and the Baltimore partner was Mr. Potter?

A. Mr. Bigelow it seems had charge of the Boston office, but it seemed, too, Mr. Potter also had something to do with the Boston office. I didn't state that positively yesterday; I said it occurred to me.

Q. Were you in the office of Hayden, Stone & Company the Monday after the death of Mr. Sherwood at a conference with Mr. Potter?

A. I didn't go in the office Monday. I went back Tuesday, I think, just to drop in to pay my respects.

Q. Do you recall Mr. Pinkham also?

A. Very, very well; yes, sir.

Q. He was employed by Haystone in a subordinate position?

A. He was chief statistician, I understand.

### RE-DIRECT EXAMINATION.

By Mr. Gordon:

Q. When Mr. Lincoln told you in October, 1928, at the office of the Cameron Stove Company that he had agreed to pay the plaintiff here \$1,000.00 for each of the options secured did he tie any strings to it at that time?

Mr. Bazile: I object to his being led.

Mr. Gordon: They have just gone over it and I am asking whether he tied any strings to it.  
page 695 } The Court: I think you brought it out on examination which wasn't strictly cross examination.

Mr. Bazile: I just object to the form of the question as being leading.

The Court: I don't think it suggests the answer. Objection overruled.

Mr. Bazile: Exception.

A. Mr. Lincoln stated to me as we were leaving—he said: “Mr. Wahab, I have just made a very good arrangement with Mr. Kimbrell who is going to be able to get us some good stores in the south.” I said, “What arrangement did you make?” He said: “He will get the stores and we are going to pay him \$1,000.00 for an option.” I said: “Have you got that agreement in writing? Have you a written agreement of that?” He said: “No. I have been knowing Mr. Kimbrell—been knowing that boy a long time and my father knew him,” and he said, “That will be all right, I am sure.” That is all that was said at that time.

Q. What amount did he say he was going to pay him?

A. \$1,000.00 and Mr. Kimbrell was to pay his own expenses out of the \$1,000.00. I asked particularly about that.

Q. Now did Mr. Lincoln ever say anything to you with

regard to that compensation being contingent upon his exercising the options until a question of litigation  
page 696 } between these parties arose?

A. It was several months later that Mr. Lincoln said it was his purpose to pay only on the options that were exercised.

Q. It was his purpose only to pay—

A. Only on the options that were exercised.

Q. And at that time he knew none would be exercised, didn't he?

A. No options were exercised; those that Mr. Kimbrell took or others took. There weren't any options exercised.

Q. I mean at the time he made that additional statement with regard to his understanding or what he proposed to do the whole matter had fallen down, hadn't it?

A. Oh, yes. That was some months later.

Q. Now our friends on the other side have introduced a copy of their agreement with Haystone Securities Corporation which is dated April 5th, 1929. As a matter of fact, had there not been a number of renewals of these options before April 5th, 1929?

Mr. Bazile: That question is objected to as being leading.

Mr. Gordon: You brought this in. I have a right to ask about that.

The Court: It is impossible to approach that fact without making the question somewhat leading. The facts  
page 697 } surrounding the matter ought to be shown by the question; otherwise, I think it would necessitate asking half a dozen more and prolonging this case. Some latitude must be allowed and I am going to overrule the objection.

Mr. Bazile: Exception.

A. There were some renewals made on some contracts before that time that had expired, that we had secured for thirty or sixty days.

Q. I mean renewals among these eleven options which had been secured.

A. Yes, sir.

Q. Now I want to read this from this paper which has just been introduced. This is addressed to Haystone Securities Corporation and E. H. Rollins & Sons, New York, N. Y., and is signed Virginia Table Company, Incorporated, by C. C. Lincoln, Jr., President, and it is accepted by Haystone Se-

curities Corporation, by A. C. Sherwood, Secretary. This proposition emanating from Mr. Lincoln says: "The undersigned, C. C. Lincoln, Jr., is the owner of one-third of the outstanding capital stock of Virginia Table Company, Inc., a Virginia corporation, which corporation owns all of the outstanding capital stock of Lincoln Furniture Man-  
 page 698 } ufacturing Company." Now in a letter addressed to Mr. Fleming, as president of the Southern

Factories & Stores Corporation, and written by Mr. Buchanan, which is dated March 21st, 1929,—whether or not that was a mistake in the date I can't tell, but it is dated that way—he says this: "We sincerely regret that circumstances over which we had no control, and for which we are not responsible, have compelled us to request from you an extension of your option. You understand, of course, that we must at all times have a *live* option: our financial arrangements in regard to any store or factory at once ceases upon the expiration of our options. This unfortunate delay is regretted most sincerely by us, and is affecting us more than it can possibly affect any of the constituent units in our organization. We have expended over one hundred thousand dollars in perfecting this merger, and naturally every day's delay compels us to advance additional sums. This, however, we are bearing, for the reason that understand that the delay, unfortunate as it is, is inevitable on account of conditions we could neither foresee nor prevent, and while of course the additional burden is very considerable, we realize that we cannot always expect matters in an organization of this character to be free from unexpected contingencies, and that we must be prepared for the good as well as the bad.

page 699 } Our organization was turned over exclusively to Mr. Sherwood, one of the senior partners in Messrs. Hayden, Stone & Company. He had grown so interested in its possibilities that he had undertaken single-handedly, to work out all of the many details that necessarily attend a transaction of this magnitude. He was a financial genius—supreme, we believe, in his line—and that was the financial organization of a merger of the character we presented to him. He was also a man who was peculiar in that he took a great pride in working out these transactions alone, and when he had the final picture, present it completed. On Friday before he died, he and myself had a conference, in which he advised that all details had been completed except some matters of minor importance; that his advertisement was in his mind, and his letter formed, and it was arranged that the following Monday we should meet to complete the



final bankers contract. Mr. Lincoln was not here, but knowing his views, I knew that our troubles were at an end, and the deal closed. With this I was satisfied to leave New York for the South, which I did, leaving Mr. Sherwood to take his figures over the week-end for a final presentation Monday. This occurred, you will remember, after the contract between ourselves and our bankers had been signed, and  
page 700 } their counsel and myself were instructed to have the corporations formed and the stock printed, which was done, except that the charter of the holding company was held in Wilmington by the Corporation Trust Company in abeyance pending the information as to the final figures worked out by Mr. Sherwood upon the proportions agreed upon in the relations of earnings to assets, etc., as shown by the completed figures of Messrs. Haskins & Sells. Had he lived, the transaction would have been now completed. I ask you in your judgment, as you remember the circumstances, does that letter correctly state the facts: "Had he lived, the transaction would have been now completed"?

A. Who wrote that letter?

Q. Mr. Buchanan.

A. That is generally the facts as I understood at that time.

Q. Now I can't account—I am stating this—for the statement made in this letter that they had already—the Virginia Table Company had already entered into a binding contract with the Haystone Securities Corporation or Hayden, Stone & Company, and I can't reconcile that with the date on this paper which has just been introduced. Can you reconcile it?

A. Are you asking me the question?

Q. Yes.

A. I can't reconcile it, except in my opinion it  
page 701 } is an error in Mr. Buchanan's date.

Mr. Bazile: Mr. Potter in his deposition says a few days after Mr. Sherwood's death—

Mr. Gordon: Are you introducing Mr. Potter's deposition?

Mr. Bazile: No; just the probable explanation of the thing, that a few days after Mr. Sherwood's death he notified the Lincolns the bankers wouldn't go through with it and he fixed the date of notification as May 7th, 1929. So Mr. Sherwood must have died a few days before May 7th, 1929, which would evidently make that date on that letter incorrect.

Mr. Gordon: He also says in that deposition that Mr. Sherwood's death had absolutely nothing to do with this thing.

The Court: Gentlemen, I don't think we are getting anywhere with this colloquy between counsel.

Mr. Buchanan: I think it is due me to state I dictated that letter—

The Court: Aren't you making a statement explaining your letter?

Mr. Buchanan: I am not going to explain the letter, except as to the date. I just think the date is wrong. page 702 } I think the stenographer made a mistake.

The Court: If there is any controversy about the date I think it should go to the jury in the proper way.

Mr. Buchanan: I don't know. I am just saying that in aid of Mr. Gordon. He said he didn't know whether the date was right or not and I don't know, either, because I didn't write it.

By Mr. Gordon:

Q. What was the general condition of the retail furniture business and the furniture business in general in this country in the year 1929?

Mr. Buchanan: I think that is a question in chief, but I understand the Court relaxes the rule.

The Court: What rule?

Mr. Buchanan: As to the introduction of testimony.

Mr. Gordon: I am recalling him to ask that question.

The Court: I thought I had stated to counsel that that rule was relaxed considerably in the production of evidence. The rule is enforced more strictly when both sides have rested and the plaintiff calls for rebuttal testimony, but not when counsel has temporarily told the witness to stand page 703 } aside or turned him over for cross examination.

If I enforced that rule strictly it would inflict great hardship on counsel on both sides.

A. The year 1929 was a very good year. It was perhaps the best year for a five-year period; the top year.

Q. The top year?

A. Yes, sir.

Q. In the furniture business?

A. Yes, sir.

The Court: Of course, any new matter, Mr. Buchanan, I will allow you to come back and cross examine him on.

Q. Is there any analogy really between the amounts you

were paying your employees for the work about which Mr. Buchanan examined you yesterday and the character of work and responsibility that was placed on these gentlemen in taking those inventories and making those appraisals?

A. No.

Q. As I understand you, you had certain men there and you were trying to get a service rendered at a minimum of cost. Is that true?

A. Yes, sir.

Q. Was your organization a close corporation?

A. The vice-president, Mr. Coplan, and I at the time owned about 80% of the common stock.

Q. My friend has asked you about your capital  
page 704 } set-up and you said you had \$12,000.00 of preferred stock and 1,000 shares of no par common.

A. Yes, sir.

Q. How much actual money was invested in the concern—only the preferred stock?

A. How much money was actually invested?

Q. Yes.

A. The only cash paid in was in the preferred stock. The common stock was issued on good will.

Q. If this merger had gone through you said your corporation would have been taken in on this \$50,000.00 basis. Would you have had a position with this larger corporation?

The Court: Mr. Gordon, what is the relevancy of that?

Mr. Gordon: I am only undertaking to show that when he sent these subordinate employees out to do the work about which Mr. Buchanan examined him that there were considerations to him which did not apply to these other gentlemen who were sent out—taken from their business for months to do this work on the charges which we have made.

The Court: Proceed.

A. It was discussed with the bankers that I was slated for  
page 705 } treasurer of the larger corporation.

Q. Do you know whether or not your associate would also have been in the picture?

A. He was slated for a position as one of the vice-presidents.

Q. Now you said you understood when Mr. Kimbrell and his crew were sent out that the work which was to be done was to be done at cost?

Mr. Bazile: We ask that Mr. Gordon put that question in a form that is not leading.

Mr. Gordon: I should think as long as you have been practising law you wouldn't raise that objection.

The Court: Let's get along without colloquy between counsel and without making your questions leading, Mr. Gordon.

Mr. Gordon: I didn't ask him specifically in the examination in chief on that point and they were the ones that brought it out and I thought I had a right to frame this question so as to bring out what the witness really did mean.

The Court: I haven't heard the question. You were interrupted before you finished. Very often the harm is done when the question is asked. Although the answer is excluded, the harm is done.

page 706 } By Mr. Gordon:

Q. What elements did you understand would go into the question of cost?

A. As regards the Southern Factories & Stores?

Q. Yes.

A. Traveling expenses, railroad fare, meals and salaries of the employees for the time they were devoting to the taking of the inventories, and taxi fare and telephone calls and general incidentals.

Q. Now did Mr. Kimbrell ever say to you or Mr. Murray or any of them that they were going to limit their charge for their actual services—I mean for the men that were on the work to the amount of salaries which they were then receiving?

Mr. Buchanan: We object, sir. It doesn't make any difference what he did say to Mr. Murray. We are not bound by anything Mr. Kimbrell said to Mr. Murray.

Mr. Gordon: And we are not bound by what Mr. Wahab thought.

Mr. Buchanan: You can't bring in what Mr. Kimbrell said to Mr. Murray.

Mr. Gordon: I will limit it to Mr. Kimbrell.

A. It wasn't discussed.

Mr. Bazile: We further object to that question—

Mr. Buchanan: I understood him to say it  
page 707 } wasn't discussed.

By Mr. Gordon:

Q. Some reference was made by these gentlemen to Sanderson & Porter as appraisal engineers. I will ask you how

did the service which was rendered by Mr. Kimbrell and his associates in the making of these inventories and appraisals compare with such service as you could have secured from Sanderson & Porter?

A. Well, the service—Sanderson & Porter are appraisal engineers; they go in and place a valuation on machinery and industrial plants. That is principally their work, and making valuations of public utilities and mining projects, but in the other instance Kimbrell and his crowd were adhering strictly to the furniture business. They had knowledge particularly and were specializing in the furniture business. That is the difference.

Q. I am not talking about the subject-matter of the investigations, but the character of the investigations that were made. I meant to say how did the service that was rendered by Mr. Kimbrell and his associates in the taking of these inventories and making these appraisals compare in character and in responsibility with such appraisals as are ordinarily made by Sanderson & Porter?

page 708 } A. Well, the responsibility—the bankers and auditors were depending upon those that took these inventories and criticized the accounts receivable for about a twelve million dollar investment; they were depending on the ability and knowledge of the people who were taking those inventories in the same manner as they would depend upon Sanderson & Porter to appraise an item.

Q. I will ask you whether or not the services that were rendered by Mr. Kimbrell and his associates were satisfactory to you and to Mr. Lincoln?

A. It was satisfactory to me and I never heard any complaint from Mr. Lincoln.

Note: At this point the Court recessed until 3 o'clock P. M., at which time the taking of testimony was resumed.

By Mr. Gordon:

Q. Mr. Wahab, a number of questions have been asked you in regard to the negotiations with the bankers. Please state whether or not the negotiations between you and Mr. Lincoln and the bankers in New York—Hayden, Stone & Company—was or not a matter of trading?

A. It was entirely a matter of trading with Hayden, Stone & Company; not only trading with Arthur Sherwood, but trading with their statisticians in various ways, trying to purchase this issue at the lowest possible price. We had

our ideas as to what we thought—considered the  
 page 709 } issue worth and they tried to buy it at a lower  
 price naturally and in doing that they would some-  
 times seem to criticize some of the units in order to get a low  
 price.

Q. Explain the question of how profits entered into that trading proposition.

A. At that time it was recognized that the fair price to bring a new issue of common stock out was ten times earnings. We knew that. We had some knowledge of other issues that had been floated about that time—some other furniture chains that had floated an issue of stock just previous to our attempted merger, and we were trying to get the bankers to pay us around eight times earnings. They contended they had to bring it out—bring the issue out and sell the issue to the public at about ten times earnings and that two points wouldn't give them enough profit. It was a lot of discussion and trading as to the price they would pay us for the common stock.

Q. Then is it or not a matter of fact that it was to the interest of the bankers to depreciate the earnings all they could to get the issue as cheap as they could?

A. In one sense, but in another sense it was to the interest of the bankers to have as large earnings as possible because  
 it would enhance the selling potentiality of the  
 page 710 } stock by putting out an issue that had large earnings. On the other hand, so far as we were concerned, dealing with us, it was to the interest of the bankers to minimize those earnings.

Q. Now you stated, as I recollect, yesterday that Southern Factories & Stores were told they were taken over as of January 31st, 1929. Is that correct?

A. It was understood all the stores would be taken over as of January 31st; not only Southern Factories & Stores, but all the units would be taken over simultaneously on January 31st or January 1st—I believe it was January 31st. I am not positive about the date there, but it was either January 1st or January 31st.

Q. Was that the occasion of the issuing by you of the typewritten program which I introduced yesterday by you?

A. Yes, sir.

Q. I want to ask you, as an expert in the furniture line, which I think you are qualified in, what would be the natural, probable, direct result or the effect on a business such as the Southern Factories & Stores Corporation of having its executive officers like Mr. Kimbrell and others engaged for a

large part of the year 1929 in the negotiations and compliance with the requests that were being made of  
 page 711 } it by the Lincoln interests?

A. It would be detrimental.

Mr. Buchanan: That is a pure opinion, I think. He doesn't know all the circumstances that surrounded these facts. I don't see how—he doesn't know whether they employed men equally capable or not or what they paid them. There is no objection to the witness answering the question if he could answer it individually knowing all the circumstances. Mr. Wahab couldn't unless he knew all the circumstances of every character affecting the situation, the particular stores, the several stores. He couldn't state it, I don't believe. I may be wrong. He couldn't state in any possible way whether it would cost \$1.00 or \$10.00 or \$50.00 or \$100.00 or what it would cost. I submit he hasn't qualified himself as an expert and that there are so many elements which enter into that which these gentlemen might prove if they want to, but I don't think Mr. Wahab could possibly tell what the effect would be unless he knew all those circumstances. It calls for an opinion in any event.

The Court: Objection sustained.

Mr. Gordon: May I say this—

page 712 } The Court: I thought you didn't want to say anything. I waited for you. I want to state this: after the Court has ruled on a matter counsel then arising appear to be arguing against the ruling of the Court. If I cut you off I will hear from you, but I thought I waited ample time for you to say anything.

Mr. Gordon: If Your Honor adheres to the ruling, of course I except.

The Court: The Court ought to say the Court waited for Mr. Gordon to make any reply and none being made the Court then ruled and Mr. Gordon then desired to reopen the question.

Mr. Gordon: Will Your Honor then allow me to repeat in somewhat different form the question and then tell Your Honor why it should be answered?

The Court: Go ahead, sir.

By Mr. Gordon:

Q. What experience have you had with regard to the conduct of furniture stores generally in this country in the Southern States or in the United States?

A. I have been directly connected with the retail furniture

industry for about fifteen years and during the past six years we have been specializing in retail furniture stores, making investigations and surveys for financial interests, banking interests, and for the operating of these particular stores. We have made several large surveys—surveys of large furniture stores and chains of stores. We make a survey of the Southern Factories & Stores Corporation.

Q. Beginning early in the year 1929 were you acquainted with the business that was being done by the Southern Factories & Stores Corporation, its methods of merchandising, etc.?

A. Not in 1929. My company made a survey of the Southern Factories & Stores Corporation, I believe, early in 1930.

Q. In 1930?

A. Yes, sir.

Q. During these negotiations between the Southern Factories & Stores Corporation and you and Mr. Lincoln did you have an opportunity to become acquainted with their business in a general way?

A. In a general way, but not in detail.

Q. Now you stated, I believe, that 1929 was the peak year in the furniture business?

A. Generally recognized as such.

Q. Can you state what would be the natural, reasonable, probable and direct result of such activities as were required of the Southern Factories & Stores Corporation during the year 1929 by Mr. Lincoln and his associates on such retail business as was being conducted by the Southern Factories & Stores Corporation?

Mr. Buchanan: Same objection. Does the Court desire me to add to it?

Mr. Gordon: Now, may it please Your Honor, the witness has testified that this was the peak year in the business. We have introduced a mass of testimony here with regard to the way in which we were being tolled along during this year on this proposition. He has stated that they were to be taken over as of January 31st, 1929. Now I am asking him—and I think it is proper and within the rule of law—what would have been the natural, reasonable and direct result, if any, of withdrawing all these gentlemen from their activities in order to comply with these various requests that were being made by the defendant corporation. I have just asked him what the reasonable and direct effect, if any, would have been and it is exactly responsive to the allegations of the bill.



Mr. Bazile: Now, if Your Honor please, we move in addition to the reasons given by Mr. Buchanan to exclude the question for the same reasons which were given when Mr.

Fleming was put on the stand and attempted to  
page 715 } testify to this alleged parol agreement that he  
had with the Lincoln company, for that and all of  
the several reasons that were given at that time and when  
subsequent witnesses testified, namely: that it violates the  
parol evidence rule; secondly, because Mr. Fleming didn't  
testify to such a state of facts as would constitute a complete and independent contract for the breach of which damages could be allowed, but he testified only to a fragmentary statement that in law does not amount to a contract, and also because under the pleadings in this case no such proof is admissible.

Mr. Gordon: Now, may it please Your Honor, my friend has overlooked the fact that the fifth paragraph contains two contracts, one implied contract and one express contract, and it is distinctly alleged in there that by reason of the directions and requests with which we complied we suffered this loss and damage.

The Court: I don't think the last reasons given were good ones, but I do think this is a matter in which the answer involves a conclusion and that the jury from the facts related to them can draw their own conclusion intelligently, and the objection is sustained to the witness answering that  
page 716 } question.

Mr. Gordon: Exception.

By Mr. Gordon:

Q. Mr. Wahab, to what extent, if any, did the negotiations between you and Mr. Lincoln on one side and the plaintiff on the other after these options were taken affect the work that these gentlemen had to do? Do you know that?

Mr. Buchanan: That is exactly the same question in another way.

Mr. Gordon: The other question was for a conclusion. This is for the work; what did it involve in the way of activities on their part.

Mr. Buchanan: He has asked that.

The Court: Was this witness asked that or another witness.

Mr. Buchanan: I thought this witness.

The Court: I am not sure this witness testified to it or some other witness.

Mr. Gordon: Mr. Fleming has testified to it without objection.

Mr. Buchanan: What Mr. Kimbrell's duties were, and he testified he was in charge of the entire southern territory. He went into detail as to what Mr. Kimbrell was supposed to do and he mentioned the names of the others. Now my recollection is returning. He said he was in charge of all the southern stores; he said he was in charge of the inventories, that he occupied the same position in the south he, in his organization, did in the north, and I think he has gone over it, sir.

The Court: I am going to allow him to answer that question. Answer of your own knowledge and not your opinion.

A. I don't quite understand the question. The effect of the work you had to do? I don't quite understand the question.

Q. To what extent did it require, do you know—

Mr. Bazile: Don't lead the witness. I will object to a leading question.

Mr. Gordon: I haven't asked it yet.

Mr. Bazile: I am asking the Court to caution Mr. Gordon.

The Court: I have cautioned him.

By Mr. Gordon:

Q. To what extent, if any, did it affect their necessary activities in their own private business, if you know that?

Mr. Bazile: This man was up at Baltimore.

The Court: This witness has been instructed already to answer only as to matters he had personal knowledge of.

page 718} A. I have personal knowledge that the duties took them away from the business the major portion of the time.

By a Juror:

Q. Didn't you have a similar contract if this merger went through and it didn't go through? Didn't you have the same ground to bring suit on as much so as the plaintiff?

The Court: I don't think that is a proper question.

By Mr. Gordon:

Q. As far as you know was this Haystone Securities contract ever shown to the plaintiff here?

A. I couldn't state whether it was or was not shown.

Q. Did they take part in any of the representations or negotiations or trading that was done in New York with Mr. Sherwood or other members of his organization?

A. Mr. Lincoln and I did the trading. They had nothing to do with the banking end of it at all.

Q. We had no opportunity up there—

Mr. Bazile: That is leading.

Q. Did we or not have any opportunity up there from our standpoint to present any figures?

Mr. Bazile: That calls for a conclusion.

The Court: Objection overruled.

Mr. Bazile: Exception.

A. I could only state that no person—none of the representatives of the Southern Factories & Stores Corporation were present at any conference when I was present  
page 719 } with the bankers and Mr. Lincoln, and the trading  
and negotiations with the Bankers was something  
at that time that the Southern Factories & Stores representatives didn't participate in.

Q. Did you yourself ever communicate any of these trading negotiations to the Southern Factories & Stores Corporation?

A. Why nothing definite. I might have mentioned it casually we were doing some pretty hard trading with them or something like that, but nothing in detail because it was confidential and was only known by Mr. Lincoln and his associates. Mr. Lincoln's father while he was living and Mr. Buchanan knew something about those. It wasn't generally known—the conditions of the exact agreement wasn't generally known by the stores.

Q. Mr. Lincoln's father died in December, 1928, didn't he?

A. It was around Christmas, 1928.

Q. When you went to New York with Mr. Lincoln who controlled the question of what stores should be presented to the bankers?

A. I would say that control was vested in Mr. Lincoln and myself and submitted by Haskins & Sells' report.

Mr. Gordon: Then we want to ask that these gentlemen will furnish us by Monday in this connection with the original report of Haskins & Sells which was taken to New York by

Mr. Wahab and Mr. Lincoln, showing the original page 720 } figures presented to the bankers.

Mr. Buchanan: We will do so.

The Court: Without any formal order?

Mr. Buchanan: We will do so with pleasure. We will furnish the first set of information Haskins & Sells took up there. That is the only thing we have. I want to say in explanation of that no report was ever made.

Mr. Gordon: We want the original set-up by Haskins & Sells.

Mr. Buchanan: We will give you the original figures of Haskins & Sells. That is all we have; all that are in existence because no report was ever made.

By Mr. Gordon:

Q. Now you have referred to the fact that when you took the matter up with Foreman National Corporation there was an elimination of some of these stores—all but three, you said. Had some of the stores embraced in this bunch of options refused to extend their options or renew them?

A. I believe all the options were renewed, is my recollection; that all the options were renewed or extended.

Q. I will ask you particularly with reference to the Jones chain in Florida. Did they consent to keep on with it?

A. It was one store, the Jones stores in Jacksonville and Savannah—I believe they decided not to go in.

Q. That chain was four stores, wasn't it?

A. Jones of Savannah and Jacksonville and Atlanta.

Q. Two in Jacksonville?

A. Yes. They were in Florida and Georgia; four stores in Florida and Georgia.

Q. If they had refused to renew their options, of course they couldn't be put in the picture. That is true, isn't it?

A. The bankers wouldn't accept it unless it was an option. That was *prima facie* evidence of the store's intention to come in.

Q. Now I want to get you to explain a little more fully than you did yesterday as to the increased percentage that these bankers wanted up there at the time you withdrew—Mr. Lincoln withdrew from Hayden, Stone & Company.

Mr. Bazile: He went over that yesterday.

Mr. Gordon: I want to find out exactly the figures now if I can.

A. Well, it was discussed in various directions on the basis of times earnings, which was one method of discussing it, and the same effect could be realized by taking a flat per cent on the gross assets—gross per cent on the net assets. It was various standards of determining the earnings, but the bankers had some average earnings requirements  
page 722 } which amounted generally to about 10% of the gross assets. That was one way of computing it; 10 or 11%.

Q. As I understand, they were making there in the form of a set-up of one way or the other or readjustment of figures a demand for more than Mr. Lincoln was willing to pay. Is that correct?

A. They were making a demand which was more than Mr. Lincoln was willing to pay.

Q. In other words, in the form of compensation or commission?

A. It wasn't just exactly in that term. It wasn't discussed that way. The trading was done on the basis of what price they should pay us for the common stock. They wouldn't tell us what they were going to bring the common stock out at—offer it to the public at, but we were discussing at that time they should pay us around eight times the average earnings, eight times average earnings, and they offered seven at one time, claiming they couldn't bring it out for over ten times, but we had knowledge other chains had been brought out for ten times and more and the discussion was the difference between what he would pay us and what they could bring it out on the market at, but they didn't tell us what they would bring it out on the market and we were sticking out for as large a price—a price we thought was fair because it wasn't only to the interest of Mr. Lincoln's concern,  
but to the interest of mine and the interest of  
page 723 } the stores that the stock was brought out at our price.

Q. If Mr. Lincoln had agreed to the seven times proposition, as the bankers desired, then the whole matter would have gone through, wouldn't it?

Mr. Bazile: The witness hasn't said anything of the kind. We object to that question because it is leading and puts the answer in the witness' mouth.

The Court: Isn't that already in evidence in the form of a letter?

Mr. Gordon: I read a letter in which he said the matter except for Mr. Sherwood's death would have been already closed.

The Court: That is my recollection, but the evidence is already in and if the witness knows anything about it he can tell it, but not draw his conclusion.

By the Court:

Q. Have you any knowledge of that?

A. That is a very difficult question for me to answer. I couldn't say whether it would or not. They have various ways of trading with you; they could come back the next day and say the market isn't ready and want to change. I couldn't answer that accurately.

page 724 } By Mr. Gordon:

Q. At the time you went to New York—I don't know whether I have asked you this specific question or not—at the time you went to New York with the proposition and submitted it to Hayden, Stone & Company had you and Mr. Lincoln accepted the eleven options which had been gotten by the plaintiff corporation in the picture?

A. We had taken those options and had instructed Haskins & Sells to make an audit of them, but it wasn't up to Mr. Lincoln and I to accept them. Mr. Lincoln and I had accepted them so far as we were concerned, but they had to be submitted to the banks.

Q. I mean to say as far as you and Mr. Lincoln were concerned they were accepted?

A. I had accepted them at that time.

Q. This contract here of April 5th says: "The consolidated net earnings as above defined of Lincoln Furniture Corporation, when formed, figured upon 400,000 shares of its common stock." You were dealing on averages, weren't you? I mean on a consolidated statement always?

A. A consolidated statement, yes, sir.

## RE-CROSS EXAMINATION.

By Mr. Buchanan:

Q. Mr. Wahab, when you say that the options were accepted by you and Mr. Lincoln it was on the basis of the information which you had at that time?

page 725 } A. We had no other method except by the figures, and the results were satisfactory to me.

Q. And those figures were subject to verification or otherwise by Haskins & Sells?

Mr. Gordon: They had already been accepted by them.

A. The figures as submitted by the tentative report were accepted by us and then when the figures were submitted by Haskins & Sells why we didn't have very much control over it then. It wasn't Mr. Lincoln and I; we didn't have much control over the situation after the figures were compiled by Haskins & Sells because in the last analysis the bankers would regard Haskins & Sells' figures as paramount to the tentative figures or to our figures. They would ask us some questions about the potentialities of the stores for future operations.

Q. One other question I want to ask you to clear up. Mr. Gordon has asked you if Southern Factories & Stores were to be taken over as of January 31st. You replied they were. The second option, which superceded the first option and which is now in evidence here, is dated July 20th and that is the option—the last option which was given in anticipation of the Foreman National Bank deal. I want to ask you if in that situation, which was the one that controlled, if the stores weren't to be taken over as of July 31st and not January 31st?

page 726 } A. I would say the option would speak for itself. I don't remember.

Q. I hand you—which is in evidence—the contract of the Foreman National Bank and will ask you to examine clause fourteen thereof, which reads in part as follows:—which says that the audit of Haskins & Sells was taken as of July 31st, and ask you if that is correct? I will ask you if the audits weren't taken as of July 31st and not January 31st?

A. I don't see that.

Q. Audit of Haskins & Sells as of July 31st, 1929; if that wasn't the date of the audit.

A. This was dealing with the Foreman National Corporation.

Q. That is what I am talking about.

A. Yes. That had nothing to do with the Hayden, Stone picture.

Q. Not a thing, but that was the last one.

A. Yes.

Witness stood aside.

page 727 }

H. W. KIMBRELL,

a witness introduced in behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Gordon:

Q. Where do you live?

A. Durham, North Carolina.

Q. What kin are you to Mr. W. E. Kimbrell?

A. Brother.

Q. Did you take part in the taking of the inventories that were secured by the Southern Factories & Stores Corporation for the Virginia Table Company?

A. Yes, sir.

Q. How long have you been in the furniture business?

A. Thirteen years.

Q. What experience have you had in the furniture business? I mean with regard to the taking of inventories, etc.

A. My first experience in the buying and selling business was with Fox Manufacturing Company in 1925 or 1926; somewhere along there. That was my first real inventory work, buying and selling.

Q. With whom was that?

A. Fox Manufacturing Company, known as the National Manufacturers & Stores Corporation; Atlanta, Ga.

Q. Do you recall how many days you worked page 728 } on these inventories for the Southern Factories & Stores Corporation and Mr. Lincoln's companies?

A. No, sir.

Q. To whom did you report your work?

A. Mr. Kimbrell.

Q. Where did you work on these inventories?

A. Columbia, S. C.; Greenville, Spartanburg, Durham—I am not sure about Raleigh; wouldn't say about Raleigh—Asheville and Macon, Ga.

Q. The account here that is rendered is for twelve days of your services. Can you state whether or not you were engaged in this work that number of days?

A. At least that long, yes, sir.

Q. What was the character of the work that you had to do in taking these inventories?

A. I did some inventory work and some book work both.

Q. Was it a question of appraisal of the furniture?

A. That is right.

Q. Did you have anything to do with the appraisal of the accounts, too?

A. Some, yes, sir.



Q. What hours on an average did you spend per day in the doing of this work?

A. Fourteen to fifteen; day and night.

Q. There is a charge here on this account for page 729 } your services in doing that work of \$25.00 a day.

Please state whether or not that was a fair and reasonable charge for the work that you did?

A. Very reasonable, I think.

### CROSS EXAMINATION.

By Mr. Buchanan:

Q. What stores did you inventory at Durham?

A. That was the company store; Shepherd Furniture Company. I believe I was working for my own organization at that time.

Q. Working for your own organization and got us charged \$25.00 a day and expenses?

A. I don't think so.

Mr. Gordon: No, we haven't included that.

Q. You have here on the 24th day of February that you were at Durham; breakfast, lunch, supper and I ask you if you haven't charged us for the day at Durham \$25.00 and expenses?

A. It seems I was moving from Durham to Spartanburg at that time.

Q. And you were representing Southern Factories & Stores and you went to Spartanburg. What store did you work at Spartanburg?

A. That is the same company.

Q. The company store and you have got us charged \$25.00 a day and expenses at Spartanburg.

page 730 } Mr. Gordon: No, we haven't.

Q. I will ask you to look at 2/25; Hotel at Spartanburg, breakfast, lunch, supper, railroad fare from Spartanburg to Asheville, taxi for two and telephone.

A. This work taken more than twelve days from the time of its beginning until the time I came off of it.

Q. I am asking if you haven't this defendant charged for work done at Spartanburg when you didn't do a lick of work for them?

A. Whether that is charged to them I couldn't say.

Q. It is in your account there.

A. I see it on there.

Q. What store did you inventory at Greenville?

A. Same company.

Q. And you have got us charged with one—two—three days at Greenville and railroad fare from Asheville to Greenville, hotel, breakfast, lunch for two, supper, taxi, telegrams, envelopes and incidentals \$2.82. I will ask you to examine that and see if that isn't correct and if that work wasn't done for your own company and not for us?

A. This up here says Asheville.

Q. Right here.

A. This railroad fare Asheville to Greenville. This top part says Asheville and says down here railroad fare from Asheville to Greenville and Greenville to Spartanburg. }  
page 731 }

Q. What store did you inventory at Charlotte?

A. Jones-Lewis.

Q. No option was ever taken on that store, was it?

A. I couldn't answer that.

Q. You don't know anything about that?

A. No.

Q. I will ask you if your bill here of March 7th, 8th and 9th at Charlotte was in connection with the Jones-Lewis store? Is that correct?

A. I checked two stores there; checked one for Southern Factories & Stores Corporation and one for Jones-Lewis. I don't know which bill that is.

Q. Do you know how many days you spent checking your own store there; that is, Jones-Lewis? No option taken for that?

A. I couldn't say for sure.

Q. Whatever time you were there outside of Jones-Lewis you spent for your own company?

A. To the best of my memory.

Q. And charged \$25.00 a day to this company for it. Now in March on the 17th, 18th, 19th and 20th you were again at Spartanburg. Were you working for your own store—Southern Factories & Stores?

A. Yes, sir.

Q. And you have us charged up with all those four days, with railroad fare, hotel, etc., on this bill?

page 732 } Mr. Gordon: What date?

Mr. Buchanan: March 17th, railroad fare to Charlotte, March 18th at Spartanburg, 19th at Spartanburg,

20th at Spartanburg; went to Macon the next day and the total charge is about \$56.00.

Q. Now on March 24th you went to Atlanta. What store did you check at Atlanta?

A. I didn't check a store in Atlanta.

Q. I didn't think so, but you have us charged with railroad fare from Atlanta to Spartanburg, \$10.71, and Spartanburg was your own store?

A. No, sir, that was transportation between the two towns of Spartanburg and Macon.

Q. I believe you are right. Excuse me on that. You were going from Macon to Spartanburg. Now you have charged us the next day from Spartanburg to Richmond?

A. Going back to headquarters, yes.

Q. You didn't come straight from Macon; you stopped a day in Spartanburg?

A. Yes.

Q. You have us charged for a day in Spartanburg for the time you laid over, is that right?

A. I couldn't say about the amounts. I don't know about that.

Q. What salary were you getting?

A. You mean what salary the company was paying me?

Q. Yes.

page 733 } A. About \$250.00 a month.

Q. Who had you worked for previous to that time?

A. Before I went to Southern Factories & Stores Corporation?

Q. Yes.

A. Kimbrell Furniture Company.

Q. That is, your brother in Columbia?

A. Yes.

Q. What were your services in Columbia? Clerk in the store?

A. No, sir; at the time I made the change I was operating a store in Spartanburg.

Q. That was the time you went into the Southern Factories & Stores chain to start it before this merger was projected?

A. Yes, sir.

Q. For whom have you ever worked for \$25.00 a day? Give the names of the various employers who employed you at that price and the dates.

A. I haven't had very many jobs; just had about one job

since leaving school and just the same line and I haven't worked for any employer except my brother.

Q. And he paid you \$250.00 a month?

A. Yes.

page 734 } RE-DIRECT EXAMINATION.

By Mr. Gordon:

Q. Are these the expense books you turned in that were handed me by Mr. Murray, the auditor and treasurer?

A. Yes, sir.

Q. Look at all of them and see if those are your expense accounts?

A. Yes, sir, that is right.

Mr. Bazile: You will put them in evidence?

Mr. Gordon: I am going to put them in evidence.

By a Juror:

Q. Were you paid any overtime by your company for the extra long hours you were spending on this work?

A. No, sir.

Q. You just made the trip on your salary of \$250.00?

A. Yes, sir; regular salary.

By Mr. Gordon:

Q. In the employment that you had with your brother in the furniture business how many hours were you supposed to work there?

A. Didn't have any special hours; just worked until we got through, but the customary day was to close at six o'clock in the afternoon.

Mr. Gordon: I offer these expense books.

Note: Filed and marked Exhibit H. W. K. #79.

page 735 } Q. Did you do night work on these inventories?

A. Yes, sir.

Q. You stated a while ago you worked more than twelve days altogether. Is that correct?

Mr. Buchanan: We object to that. We have no way in the world of checking that. He is charging twelve days and they are the ones we are supposed to pay. If he worked any more than twelve days that is *immaterial*. If you want

to amend your notice and strike this out and put more in, that is a different proposition, but we are not prepared to meet anything we don't know anything about.

Mr. Gordon: I was informed this was the correct account. If it is a wrong account we are going to strike it out.

Mr. Buchanan: I am not blaming you in the least, Mr. Gordon. We understand errors will occur.

By Mr. Gordon:

Q. Under whose direction were you operating?

A. Mr. Kimbrell.

Q. Your brother?

A. Yes, sir.

page 736 } RE-CROSS EXAMINATION.

By Mr. Buchanan:

Q. During this time your brother Mr. W. E. Kimbrell was not only supervising on behalf of Virginia Table Company's inventories, but was also supervising his own inventories and you were acting under his instructions? Is that correct?

A. I don't know about that, sir.

Q. Was he supervising you at the time?

A. He was supervising me at the time.

Q. At the time you were taking inventories for your own company?

A. Yes, sir.

Witness stood aside.

page 737 } A Juror: Certain members of the jury would like to have a copy of the balance sheet of Virginia Table Company as of the end of business at the date of dissolving, as well as a copy of the balance sheet of the other company.

Mr. Buchanan: Both will be produced Monday.

A Juror: And in addition a copy of the balance sheet of the two merged companies as of the morning after they merged.

Mr. Buchanan: We will give you the whole three.

A Juror: Some of the members of the jury would like to have the date of Mr. Sherwood's death.

Mr. Buchanan: May I state that, Judge?

The Court: If you know it.

Mr. Buchanan: May 5th, 1929.

Mr. Bazile: We had Mr. Hopkins examine the New York Times Index to ascertain that information and he returned with it about an hour ago.

The Court: That goes in by stipulation of counsel.

Mr. Gordon: Subject to any correction. I know nothing to the contrary.

Mr. Bazile: All we know is what the New York Times shows.

Mr. Buchanan: If the jury desires it I can wire Mr. Potter.

Mr. Gordon: No, we won't put you to that expense.

A Juror: That satisfies me.

page 738 } Mr. Gordon: Mr. Murphy tells me he thinks he has something which will establish that date.

A Juror: May I ask a question? Mr. Wahab stated this morning, I think, Mr. Lincoln, Sr., died December, 1928. Did he mean 1928 or 1929?

Mr. Buchanan: 1928.

A Juror: So he passed out of the original picture very quickly?

Mr. Buchanan: Yes, sir.

Note: The Court adjourned to Monday, July 25th, 1932, at ten o'clock A. M.

page 739 } JULIEN H. HILL,  
a witness introduced in behalf of the plaintiff,  
being first duly sworn, testified as follows:

#### DIRECT EXAMINATION.

By Mr. Gordon:

Q. Mr. Hill, what is your connection with the State-Planters Trust Company?

A. President of it.

Q. During the years from 1928 up to this time has your bank had any business relations with the Southern Factories & Stores Corporation?

A. Yes.

Q. Did you know anything about the proposed merger between the Southern Factories & Stores Corporation and Virginia Table Company, Incorporated?

A. Yes.

Q. Did you have occasion to visit New York in the summer of 1929?

A. Yes.

Q. At what time was that?

A. June 12th and 13th.

Q. At that time did you have any talks with Mr. Lincoln about this matter?

A. Yes.

Q. Please state about what was said in regard page 740 } to effecting this merger.

A. My recollection is that there was only going to be a short lapse of time before the merger would be completed.

Q. You gathered that from Mr. Lincoln?

A. Yes.

Q. Now do you know at whose requirement Mr. R. S. Wahab was employed by the Southern Factories & Stores Corporation?

A. I think it was at our bank's insistence and the approval of both the Lincoln interests and the Southern Factories & Stores Corporation.

Mr. Bazile: Now, if Your Honor please, we object to that and move to strike that out as being immaterial.

Mr. Gordon: We are claiming it as one of the elements of damage.

Mr. Bazile: It is certainly too remote to prove as an element of damage because Mr. Wahab was employed in March, 1930, according to his recollection, and Your Honor the other day ruled out another piece of evidence as being too remote and that was an alleged damage that occurred prior to the employment of Mr. Wahab.

The Court: I think it is admissible on this ground that Mr. Wahab has been a witness on the stand and all the circumstances attending the employment of him in page 741 } this matter are proper matters to go before the jury.

Mr. Buchanan: The employment he is referring to now is not the employment for Lincoln Furniture Manufacturing Company, but employment for Southern Factories & Stores Company in 1930, several months after, in order to rejuvenate that company. It wasn't during the merger that he is testifying about, but the employment of Mr. Wahab in 1930 long after the matters here in controversy.

The Court: Mr. Wahab has testified as to a great many incidents covering probably his entire connection with this matter and I think the facts concerning his employment are proper matters to go before the jury, whatever weight they may give it.

\* \* \* \* \*

Mr. Gordon: I will give Your Honor exactly the purpose of it. We are claiming we were put to a great deal of expense and loss and damage by reason of the failure of Virginia Table Company to comply with its contracts and they have asked us to specify—give them the particulars of our claim. Amongst those particulars we stated if Mr. Lincoln had complied with his agreement that then we  
 page 742 } wouldn't have had to employ Mr. Wahab and that the cost to us was a direct loss occasioned by Mr. Lincoln's failure to comply with his contract. It has already been stated in evidence that a result of this failure of the defendants to comply with their contracts was a great loss of credit and we were practically compelled to employ Mr. Wahab by our own creditors.

Mr. Buchanan: If the Court please, I didn't understand that was the object of Mr. Gordon's question. I desire to add also this objection, if the Court please. The Court will recall that when the bill of particulars in this case was introduced by Mr. Gordon that we objected upon the ground that there was no connection between the allegations of the notice and the damage claimed, and at that time the Court stated the proper time to make the objection, if it were a proper objection, was when the evidence was sought to be introduced. We, therefore, make that objection to the introduction of this testimony as a basis for payment upon the ground that undoubtedly it is special damage. It is no question about that. It is not damage that could be considered naturally flowed from any breach. The allegation on  
 page 743 } that is this: "Said defendant then and there undertook and faithfully promised said plaintiff that it would exercise the said option given to it by the plaintiff and consummate the said proposed merger, yet the said defendant, well knowing that their failure to exercise said option and consummate said merger would entail great loss and damage to said plaintiff, and although often requested to comply with said agreement, failed and refused and still refuses to exercise said option and/or consummate said merger or to reimburse said plaintiff for the expense, loss and damage sustain by it on account of its compliance with said requests and directions of said defendant, and the plaintiff says that by reason of the premises aforesaid its said business was disorganized, and its inventories unduly increased, and its credit impaired, and its sales and profits reduced, all to the great loss and damage of said plaintiff." Now, as the Court has said, the bill of particulars is not a pleading—



The Court: What is the bill of particulars?

Mr. Buchanan: Objection was made at the time the bill of particulars was produced upon the ground page 744 } there was no connection. The bill of particulars doesn't take the place of the notice—the Court knows that—and every allegation necessary to sustain this case must be contained in the notice and it is our contention there is no connection whatever between the allegations of the notice and the employment of Mr. Wahab several months later which may have been caused by the depression, which may have been caused by hundreds of different things, especially as Mr. Wahab has testified that he acted in a like capacity for some fifty or sixty retail stores all over the country.

Mr. Gordon: It seems to me any objection our friends have to this evidence would better be made after the evidence is in and we come to the instructions to the jury. That whole question will come up when we come to the instructions. I am obliged to put on my evidence from time to time and if I can't couple it up according to the rules of law then I admit we can't prevail on this evidence, but if we do couple it up under the rules of law then we are entitled to this as an element of the damage.

Mr. Buchanan: The bill of particulars which page 745 } was introduced at the time and to which we objected says: "In compliance with the order entered herein on the 7th day of November, 1931, the plaintiff files the following additional particulars of its claim, viz: Salaries of \$3,490.00 to T. C. McGahee and of \$1,929.00 to H. R. Martin who were retained in employment of plaintiff to meet the demands and agreements of defendants, and who otherwise would not have been employed. Extra rental paid and contracted to be paid, to-wit: \$36,000.00, by plaintiff on lease of new store at Greenville, S. C., and improvements of \$9,089.86 on the property leased, which extra rental and expenses otherwise would not have been incurred. Salary of \$500.00 per month to R. S. Wahab from, to-wit, March, 1930, made necessary by failure of defendants to comply with their agreements with plaintiff, plus his expenses. Expenses in regard to claims and judgments of Marion National Bank and Sugar Grove Lumber Co., Inc., against plaintiff, to-wit, \$1,000.00. Disruption of plaintiff's business, impairment of credit, increase of inventories, loss of sales and profits, to great damage of plaintiff, and caused by de- page 746 } fendant's failure to comply with their agreements. The claims for loss and damage as stated

in the notice of motion for judgment''. Now we respectfully submit that that element of damages is not connected in any way with the notice; it is too remote. In the second place, we further believe there is no connection whatsoever between this allegation and that slight clause. It doesn't say why he was employed, doesn't say what he was to do, doesn't give us any information upon which to base a defense in any way, and we contend it is long after this matter and no connection between the allegation of the notice and the particulars.

Mr. Bazile: If Your Honor please, I merely suggest this additional reason. When Mr. Gordon undertook to prove the next item of his alleged expense set out in his bill of particulars, namely: the expense he incurred in defending these suits, Your Honor ruled that out and held it was improper and I submit that this—

The Court: I did what?

Mr. Bazile: Mr. Gordon undertook to prove when he had Mr. Fleming on the stand that he had incurred some expense in defending two suits which the Virginia Table Company or its assignees brought against Southern Fac-  
page 747 } tories & Stores and when he offered that evidence

I objected to it and assigned as one of the reasons for my objection that it was not a proper element of damage and it was too remote and Your Honor sustained the objection.

The Court: That is, the evidence relating to the judgments of the Virginia Table Company?

Mr. Gordon: You excluded it on the ground the interest followed the principal.

Mr. Bazile: You excluded it as too remote. This alleged item which they attempt to bring in by Mr. Hill is alleged to have occurred in March, 1930, which was months after the thing had entirely fallen through. The stock market crash came, as I recall, in the month of October, 1929, and nobody ever had any real basis for believing that any kind of stock issue could be floated after the stock market crash had come. Now we have from October, 1929, until March, 1930, when they say that they incurred an item of expense by employing somebody to help run their business. I submit that stands on the same basis as the evidence which Your Honor ruled out and that it is too remote and not a proper element of damage which could be allowed in this suit.

page 748 } Mr. Gordon: I will say to Your Honor that I anticipated in the progress of this evidence asking Your Honor to reconsider the question about the suits brought in Marion. The question is here the witness knew

this merger was pending and they were a large creditor of the Southern Factories & Stores. We allege that if Mr. Lincoln had complied with his agreement about the private merger as we have introduced a number of witnesses to prove that we wouldn't have been subjected to all of this financial stress and strain and that it was a reasonable and natural consequence if his failure to comply with that agreement that we should be embarrassed financially and that we should have to make arrangements with our creditors. This creditor himself was relying upon Mr. Lincoln's promise—his agreement.

The Court: Gentlemen, I think in order to rule properly on that question I will have to hear more than this answer to this one question. I would like for you gentlemen to examine Mr. Hill out of the presence of the jury.

Note: The jury retires from the courtroom.

page 749 } Jury out.

By Mr. Gordon:

Q. You have stated that you knew that this proposed merger was being formed. Did that have any influence with your bank in the extension or continuance of credit to the Southern Factories & Stores Corporation?

A. Yes.

Q. Now have you correspondence with the representatives of the Southern Factories & Stores Corporation up to December, 1929, and later than that with regard to this proposed merger? I mean not with the Southern Factories & Stores, but with the representatives of the Virginia Table Company.

A. We have it with Mr. J. P. Buchanan, who was, as I understood, the attorney for them, and Mr. C. C. Lincoln, both of the Virginia Table Company and one of them is on the letterhead of Virginia Lincoln Furniture Corporation.

Mr. Gordon: Your Honor remembers Mr. Fleming has testified if Mr. Lincoln had complied with the agreement their financial difficulties would have been over. Here is a letter I will read to Your Honor, written on June 7th by Mr. Buchanan to the State-Planters and his visit to New York was a few days later: "I have your letter in reply to letter addressed you by me, containing application of  
page 750 } the above gentlemen for line of credit"—that is,

C. C. and J. D. Lincoln. The next paragraph has nothing to do with this. "In addition, as soon as the merger is completed, there will be ample funds in hand to take over

the loan, and we could not secure an agreement to permit us to anticipate payment of the bonds except at a very considerable bonus." Then he goes on with reference to the merger: "The Virginia Table Company, which owns the Lincoln Furniture Manufacturing Co., has been phenomenally successful, and is now enjoying a trade which ensures a continuation of the handsome profits made in the past. I am securing for your financial and operating statements of these corporations, as requested for your confidential file. They both have a line of credit more than sufficient for their needs, and their commercial paper has been extensively traded in and has always been promptly taken care of. The proposed merger consists of the consolidation of some thirty stores and several factories together with a managing service which has been successfully operating a chain of stores in the north and south for many years. Counsel for the bankers are now checking my

work in the formation of the various corpor-  
 page 751 } ations, securing options and leases, and advises  
 us that they are ready to close when the legal work  
 has been approved. This will take some two weeks yet, as I  
 have formed some thirty different corporations, as well as the  
 holding company, and the very voluminous files require considerable  
 time to accurately check. I think I can say with practical  
 certainty that within a month the merger will be accomplished.  
 The theatre cost more than we had contemplated and we were  
 so anxious to pay all the indebtedness prior to the merger, that  
 we used up our funds for this purpose, which left us right at  
 this time short of ready cash. We cannot take it from the  
 operating corporations we own for the reason that the merger  
 will be operative as of March first this year—

The Court: What year is this?

Mr. Gordon: 1929. "—and our picture is based upon the  
 financial condition at that time, after which the consolidation  
 is entitled to the profits. Our source of cash heretofore, therefore,  
 is not available, until the merger is completed, and even after  
 that time we do not wish to dispose of any of our com-

mon stock if we can possibly avoid it, as we are  
 page 752 } satisfied it is a most attractive investment." Then

I will read this letter of December 18, 1929, from  
 Mr. Lincoln himself. This is December 18th, 1929, bringing  
 the matter up to within several months of the time Mr. Wahab  
 was employed: "My dear Mr. Hill:—Since my conference  
 with you in Richmond a week or so ago I have spent a lot of  
 time in discussing this matter with various bankers and parties  
 interested in the situation. As an outcome of these conferences,  
 we have come to the conclusion that the best course

for us to pursue would be to wait until after the first of the year to re-open this matter. I say this from no feeling of pessimism over 1930 business, but on the other hand I do think it would be good business and in line with the general policy of conservatism to await developments before proceeding further. We have no idea of dropping the matter and fully expect to carry it through to some conclusion within the next few months. I have communicated this thought to the Southern Factories & Stores Corporation and have told them that we would work very closely with them in the future. For your information, I have visited several of their stores in the Carolinas and was very agreeably surprised with the work they are doing. I find that Mr. Kimbrell has been very diligent in working out his merchandising plan and was particularly well pleased with the low expense under which he is able to operate. It strikes me that in any sound chain store picture that it is much better to have small stores with low operating expense than it would be to have a number of large stores whose overhead is prohibitive during any period of business recession. I feel sure that they are making wonderful progress and we would consider their unit a very desirable acquisition to any chain we would attempt to form. I want to express to you and to Mr. Dew my appreciation of the interest you have both shown and we will look forward with much pleasure to discussing this matter with you again in the future."

Q. Did you rely on these representations of Mr. Lincoln and what he told you in New York as to your dealings with the Southern Factories & Stores Corporation?

Mr. Bazile: We would object to that as being leading.

Mr. Buchanan: Not only that, it wouldn't show damage, but would show a favor granted to them instead of any damage.  
 page 754 } The Court: Let your objection go in the record.

A. Yes. If we had not believed it was going through we would have certainly not indulged them as long as we did; more than likely would have pressed our claim vigorously for the collection of the debt.

Mr. Gordon: We respectfully submit this evidence ought to be admitted as a direct and proximate damage from the breach of this contract.

Mr. Bazile: What he is offering to prove is entirely different matter from what he stated he expected to prove by the witness and I suppose the objection we made wouldn't be applicable to what he has offered here.

The Court: Do you want to make an additional objection?

Mr. Buchanan: We have only one additional objection. That is, the letter which has been read into the record by Mr. Gordon was a letter addressed by counsel for Mr. Lincoln personally to the State-Planters Bank for the purpose of securing personal credit for Mr. Lincoln and is private and the statements therein contained couldn't possibly bear upon any issue in this case, but have reference entirely to the personal and private property of Messrs. C. C. Lincoln and J. D. Lincoln and are in no way connected with any matter page 755 } in issue in this case.

Mr. Gordon: I will read this additional letter I overlooked. Here is one on June 7th, 1930: "I appreciate very much your letter of June 4 and I can assure you that we have not forgotten our conversation with you of last fall. We have been awaiting some change in the general business conditions before taking any steps in effecting a merger of manufacturing and retail units. We are very much in hope that conditions will be such that we can continue with this work in the very near future and it will be a pleasure indeed to discuss the matter with you at that time." That is June 7th, 1930, bringing the matter right up beyond the point at which we had to employ Mr. Wahab.

The Court: Some of the correspondence in evidence is bearing on other issues in this case and might be introduced for that purpose by appropriate questions, but the general trend of this evidence, the object being to show damages, is such that the Court thinks it is too remote and the objection is sustained.

Mr. Gordon: To which we except for the reasons stated.

Note: The jury returns into the courtroom.

page 756 } By Mr. Gordon:

Q. Mr. Hill, did you ever enter into correspondence with the representative of the Virginia Table Company in regard to this proposed merger?

A. Yes.

Mr. Gordon: Now I will introduce these letters. I don't want to introduce them except on that point. Here is a let-

ter from Mr. Buchanan to the State-Planters Bank & Trust Company, dated May 21st, 1929.

Note: Filed and marked Exhibit J. H. H. #80, which is as follows:

May 21, 1929.

Thos. B. McAdams, Esq.,  
Executive Manager,  
State Planters Bank & Trust Co.,  
Richmond, Va.

Dear Sir:

Accept my thanks for your letter of the 18th inst. enclosing letter of Mr. Leake, in regard to deposit of Lincoln Furniture Stores.

I regret to state that the unexpected sudden death of Mr. Sherwood, one of the senior partners of Messrs. Hayden, Stone & Company, who had exclusive charge of the financial arrangements contemplated, will somewhat delay the closing. Mr. Sherwood had taken particular interest in the consolidation—considered it as the result of his own effort—page 757 } forts, and had therefore handled the matter personally. His death is a great loss to us, but matters have been now so arranged that we hope the delay will not be considerable.

I had hoped to be in Richmond this week to discuss also with the officials of your bank the question of a deposit and line of credit for Lincoln Investment Corporation, which has taken over all the property of the late C. C. Lincoln, Sr., of Marion, Va. The indebtedness of the estate, except contingent liabilities, have been practically liquidated, and the estate is being handled as a corporation. The interests involved are considerable, and I believe the connection would be a profitable one. As to this I will advise you further.

Again thanking you, and with kind regards to Mr. Leake, I am

Very truly,

(signed) J. P. BUCHANAN.

Mr. Gordon: Then on June 7th, 1929, there was a letter from Mr. Buchanan to State-Planters.

Note: Filed and marked Exhibit J. H. H. #81, which is as follows:

page 758 }

Re: C. C. & J. D. Lincoln

June 7, 1929.

State Planters Bank & Trust Co.,  
Richmond, Va.

Gentlemen:

I have your letter in reply to letter addressed you by me, containing application of the above gentlemen for line of credit.

The real estate owned by the Hotel Corporation in Marion has already been approved by a Trust Company for a loan of \$65,000, payable over a period of ten years, but the interest rate (calculating discount on bonds) will average 7.3% which we feel we should not pay when the real estate security is unquestioned and in addition the payment of the bond will be guaranteed personally by Messrs. C. C. and J. D. Lincoln, whose personal statement you have, and who are unquestionably worth a million or more each.

In addition, as soon as the merger is completed, there will be ample funds in hand to take over the loan, and we could not secure an agreement to permit us to anticipate payment of the bonds except at a very considerable bonus.

We are perfectly willing to give a mortgage on the hotel property, and if necessary on the theatre property also, endorsed by these gentlemen personally, if we can secure it on approximately a 6% basis over a period of ten years, we to pay all legal expenses and title insurance, if we be given the privilege of redeeming at 101 at the end of any  
page 759 } year.

The hotel is now under an attractive lease, and is unencumbered. It is the finest and best equipped hotel between Roanoke and Bristol, and equipped cost over \$130,000. The theatre is just completed, and has also been leased on an attractive basis, more than sufficient to take care of the loan desired.

As I wrote you, these gentlemen also own some fifty or sixty other houses and lots in Marion, including a large restaurant property on Main Street, and also some of the most attractive frontage on that street in the business part of town.

The Virginia Table Company, which owns the Lincoln Furniture Manufacturing Co., has been phenomenally successful, and is now enjoying a trade which ensures a continuation of the handsome profits made in the past. I am securing for you financial and operating statements of these corporations,



as requested for your confidential file. They both have a line of credit more than sufficient for their needs, and their commercial paper has been extensively traded in and has always been promptly taken care of.

The proposed merger consists of the consolidation of some thirty stores and several factories together with a managing service which has been successfully operating a chain of stores in the north and south for many years.

page 760 } Counsel for the bankers are now checking my work in the formation of the various corporations, securing options and leases, and advises us that they are ready to close when the legal work has been approved. This will take some weeks yet, as I have formed some thirty different corporations, as well as the holding company, and the very voluminous files require considerable time to accurately check. I think I can say with practical certainty that within a month the merger will be accomplished.

The theatre cost more than we had contemplated, and we were so anxious to pay all the indebtedness prior to the merger that we used up our funds for this purpose, which left us right at this time short of ready cash. We cannot take it from the operating corporations we own for the reason that the merger will be operative as of March first this year, and our picture is based upon the financial condition at that time, after which the consolidation is entitled to the profits. Our source of cash heretofore, therefore, is not available, until the merger is completed, and even after that time we do not wish to dispose of any of our common stock if we can possibly avoid it, as we are satisfied it is a most attractive investment.

I shall be pleased to hear from you as early as practicable. You understand that our firm will take care of all our commissions in case of a loan.

Very truly,

(signed) J. P. BUCHANAN.

page 761 } Mr. Gordon: Then on August 12th, 1929, from Mr. Buchanan to Mr. Hill, of the State-Planters.

Note: Filed and marked Exhibit J. H. H. #82, which is as follows:

August 12, 1929.

Julien Hill, Esq.,  
State Planters Bank & Trust Co.,  
Richmond, Va.

Dear Mr. Hill:

For your information, we have executed on behalf of the proposed Lincoln Stores Corporation a contract with the Foreman Securities Corporation and Caldwell & Company, Bankers, whereby they agree to adequately finance the proposed merger upon the preliminary audit which has been submitted by us, being confirmed by the final audit of Messrs. Haskins & Sells.

From all the information which I can obtain the consolidated condition of the constituent units which will form the proposed consolidation will be better than the audit taken as of January 31st of this year. January and February are usually the lean months in the furniture business and we knew that the factories have done very much better business this year than the corresponding period last year; in fact our trial balance shows that our profits for the first seven months of this year are as much as for the entire year of 1928. We have had a most satisfactory business and we feel sure that if there  
page 762 } that if there should be a falling off in any of the stores (which we do not contemplate) it will be more than compensated by the favorable conditions of the factories.

I assure you that if I can give you any further detailed information I shall be more than pleased to do so.

Very truly yours,

J. P. BUCHANAN.

Mr. Gordon: This is dated December 18th, 1929, from Mr. Lincoln to Mr. Hill.

Note: Filed and marked Exhibit J. H. H. #83, which is as follows:

Dec. 18, 1929.

Mr. Julien Hill, President,  
State & Planters National Bank,  
Richmond, Va.

My dear Mr. Hill:—

Since my conference with you in Richmond a week or so ago I have spent a lot of time in discussing this matter with various bankers and parties interested in the situation. As an outcome of these conferences, we have come to the conclusion that the best course for us to pursue would be to wait

until after the first of the year to reopen this matter. I say this from no feeling of pessimism over 1930 business, but on the other hand I do think it would be good business and in line with the general policy of conservatism to await page 763 } developments before proceeding further.

We have no idea of dropping the matter and fully expect to carry it through to some conclusion within the next few months. I have communicated this thought to the Southern Factories & Stores Corporation and have told them that we would work very closely with them in the future.

For your information, I have visited several of their stores in the Carolinas and was very agreeably surprised with the work they are doing. I find that Mr. Kimbrel has been very diligent in working out his merchandising plan and was particularly well pleased with the low expense under which he is able to operate. It strikes me that in any sound chain store picture that it is much better to have small stores with low operating expense than it would be to have a number of large stores whose overhead is prohibitive during any period of business recession. I feel sure that they are making wonderful progress and we would consider their unit a very desirable acquisition to any chain we would attempt to form.

I want to express to you and to Mr. Dew my appreciation of the interest you have both shown and we will look forward with much pleasure to discussing this matter with you again in the future.

With best wishes, I am

Very truly yours,

page 764 }

(signed) C. C. LINCOLN, JR., Pres.  
Virginia Table Co. Inc.

Mr. Gordon: This is June 7th, 1930, from Mr. Lincoln to State-Planters Bank & Trust Company.

Note: Filed and marked Exhibit J. H. H. #84, which is as follows:

June 7, 1930.

State-Planters Bank & Trust Company,  
Richmond, Virginia.

*Attention: Mr. B. F. Dew, Vice President.*

Dear Mr. Dew:

I appreciate very much your letter of June 4 and I can assure you that we have not forgotten our conversation with

you of last fall. We have been awaiting some change in the general business conditions before taking any steps in effecting a merger of manufacturing and retail units.

We are very much in hopes that conditions will be such that we can continue with this work in the very near future and it will be a pleasure indeed to discuss the matter with you at that time.

Thanking you very much for writing and with best wishes, we are

Very truly yours,

(signed) C. C. LINCOLN, JR.,  
President.

Virginia-Lincoln Furniture Corp.

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