

2211
190-505

Record No. 3502

In the
Supreme Court of Appeals of Virginia
at Richmond

W. H. WREN, ET ALS.

v.

FLORENCE LEE TATE, ET ALS.

FROM THE CIRCUIT COURT OF SMYTH COUNTY

RULE 14.

15. NUMBER OF COPIES TO BE FILED AND DELIVERED TO OPPOSING COUNSEL. Twenty copies of each brief shall be filed with the clerk of the court, and at least two copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

16. SIZE AND TYPE. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and names of counsel shall be printed on the front cover of all briefs.

M. B. WATTS, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

190 VA 505

RULE 14—BRIEFS

1. **Form and contents of appellant's brief.** The opening brief of the appellant (or the petition for appeal when adopted as the opening brief) shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned, and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the record where there is any possibility that the other side may question the statement. Where the facts are controverted it should be so stated.

(d) Argument in support of the position of appellant.

The brief shall be signed by at least one attorney practicing in this court, giving his address.

The appellant may adopt the petition for appeal as his opening brief by so stating in the petition, or by giving to opposing counsel written notice of such intention within five days of the receipt by appellant of the printed record, and by filing a copy of such notice with the clerk of the court. No alleged error not specified in the opening brief or petition for appeal shall be admitted as a ground for argument by appellant on the hearing of the cause.

2. **Form and contents of appellee's brief.** The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate reference to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this court, giving his address.

3. **Reply brief.** The reply brief (if any) of the appellant shall contain all the authorities relied on by him, not referred to in his petition or opening brief. In other respects it shall conform to the requirements for appellee's brief.

4. **Time of filing.** (a) *Civil cases.* The opening brief of the appellant (if there be one in addition to the petition for appeal) shall be filed in the clerk's office within fifteen days after the receipt by counsel for appellant of the printed record, but in no event less than thirty days before the first day of the session at which the case is to be heard. The brief of the appellee shall be filed in the clerk's office not later than fifteen days, and the reply brief of the appellant not later than one day, before the first day of the session at which the case is to be heard.

(b) *Criminal Cases.* In criminal cases briefs must be filed within the time specified in civil cases; provided, however, that in those cases in which the records have not been printed and delivered to counsel at least twenty-five days before the beginning of the next session of the court, such cases shall be placed at the foot of the docket for that session of the court, and the Commonwealth's brief shall be filed at least ten days prior to the calling of the case, and the reply brief for the plaintiff in error not later than the day before the case is called.

(c) *Stipulation of counsel as to filing.* Counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

5. **Number of copies to be filed and delivered to opposing counsel.** Twenty copies of each brief shall be filed with the clerk of the court, and at least two copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

6. **Size and Type.** Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and names of counsel shall be printed on the front cover of all briefs.

7. **Non-compliance, effect of.** The clerk of this court is directed not to receive or file a brief which fails to comply with the requirements of this rule. If neither side has filed a proper brief the cause will not be heard. If one of the parties fails to file a proper brief he cannot be heard, but the case will be heard *ex parte* upon the argument of the party by whom the brief has been filed.

CLERK

SUPREME COURT OF APPEAL

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IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 3502

W. H. WREN, J. ROBERT WREN, BEVERLY T. WREN,
J. HAROLD WREN, AND EDITH WREN
WHITNEY, Appellants,

versus

FLORENCE LEE TATE, WILLIAM T. GRAHAM, AND
THE MARION NATIONAL BANK, A CORPORA-
TION, ADMINISTRATORS OF THE ESTATE OF
JAMES D. TATE, DECEASED, AND FLORENCE
LEE TATE, WILLIAM T. GRAHAM, AND THE
MARION NATIONAL BANK, A CORPORATION, IN-
DIVIDUALLY, Appellees.

PETITION FOR APPEAL.

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

Your Petitioners, whose names are set out in the above caption as Appellants, respectfully show that they are aggrieved by a final decree entered in the Circuit Court of Smyth County on the 17th day of May, 1948, in a certain chancery cause pending in said Court, wherein W. H. Wren, et al., the above named Appellants, were Complainants, and Florence Lee Tate, et al., the above named Appellees, were the Respondents.

Your Petitioners file herewith a transcript of the record in said cause, and pray that the same may be read with this petition.

PRELIMINARY STATEMENT.

It is believed that a brief and clear-cut statement of the case, and the main issue involved, stated in the very beginning of this Petition, will the better enable this Honorable Court to understand the matter, and follow the presentation of the facts with ease.

This is a suit in equity, brought by said Petitioners in the Circuit Court of Smyth County, to set up and establish an express parol trust agreement, known as the August 29 or 30, 1912, Parol Trust Agreement, hereinafter referred to as the August, 1912, agreement.

4* *From an adverse decision in the court below, the said Wren Petitioners apply for an appeal.

The learned judge of the court below, the Honorable Walter H. Robertson, correctly states the case, on the first page of his opinion, saying:

“The gravamen or burden of complainants’ case is to show that by virtue of an express trust growing out of a parol conference between James D. Tate and complainants on August 29 or 30, 1912, almost immediately following the death of Mrs. Amelia Tate, James D. Tate became a trustee holding the legal title to the Mitchell B. Tate estate for the benefit of complainants and that upon his death on December 21, 1941, without having conveyed or devised said estate or any part thereof to complainants he committed a breach of trust thereby rendering his estate liable to complainants for many thousands of dollars.

“In a brief to clarify the issues in the case, counsel for complainants say that the only issues in the case are whether or not complainants are entitled to the Residuary Lands of the M. B. Tate will, and whether or not they are entitled to M. B. Tate’s interest in the mercantile firm of Robinson, Tate & Co., of Lynchburg, Va.”

To further clarify and arrive at the real issue in the case, it may be further observed that said August, 1912, parol trust agreement is made up of five elements (*in re Leverich’s Will*, 238 N. Y. S. 533), namely:

1. A settlor,
2. A Trustee,
3. Beneficiaries,
4. The Trust res. and

5* *5. The terms of the disposition of the trust res.

Taking up these elements in order and eliminating the ones about which there is no uncertainty from present considera-

fion, we find that James D. Tate is the settlor, no doubt about that; also, James D. Tate is the Trustee, no room for uncertainty here, that is to say, James D. Tate is both the settlor and the trustee in the above parol trust.

As to element No. 3, the Wren Petitioners are, of course, the beneficiaries, no uncertainty here.

Concerning element No. 4, the trust res. The trust res. as stated by the Court below is the residuary lands of the M. B. Tate will, and the M. B. Tate interest in the mercantile firm of Robinson, Tate & Co.

The amount the Wren Petitioners claim from the sale of said residuary lands is \$100,000.00 derived from the sale
6* *of the manganese acreage during the first World War, referred to in the pleadings as the "Rye Valley" or residuary lands, together with 6% interest thereon from the time of said sale, August 19, 1918, until paid, and since Robinson, Tate & Co., has been liquidated and Col. Tate has been paid \$53,150.00 in ordinary and liquidating dividends, the Wren Petitioners claim this amount of \$53,150.00, together with 6% interest on said dividends from the time they were paid to Col. Tate until payment is made to said Wrens. These amounts are arrived at with certainty, to the very penny, and amount the Wrens are entitled to, if anything. The position it is not believed that there is any controversy as to the of the defendants appears to be that the Wrens are not entitled to anything. That is to say, the Wren Petitioners are entitled to \$100,000.00 and \$53,150.00 (\$153,150.00) together with interest on said respective amounts, according to defendants' views as we understand them, or they are not entitled to anything whatever.

As to said elements 1, 2, 3 and 4, there does not appear to be any uncertainty or controversy, but on element No. 5, which is the battle-line of the case, as to whether a parol trust was created in said August meeting, the issue is sharply drawn. Or as the court below, in its opinion, states the issue in the case:

"My opinion is that the verbal conference of August 29th, or 30th, 1912, did not constitute a contract or create a trust, and that if by *any possibility it did so, it was rescinded
7* and annulled, superseded by the merged in, the written contract under the hand and seal of all parties entered into on November 25, 1912."

So the court below states the real issue in the case.

The said November 25, 1912, agreement will be fully discussed hereinafter, under assignments of error, suffice it to

say here that the view of said Wren Petitioners is, as to said November agreement, that it is merely a part of said August parol conference, does not embody all the terms of the August agreement, and is mostly a clarification of certain terms of the August agreement, giving effect in a practical and business-like way to take care of situations existing at that time.

It is true that the said November 25, 1912, agreement is very deceptive on its face, but when interpreted by the methods set forth in an address by Prof. Charles A. Graves before the Virginia Bar Association (14 Va. Law Reg. 913) which applies to contracts as well as wills (*Stace v. Baumgardner*, 89 Va. 421), and which has been cited so many times with profound admiration and approval by this court, the said November agreement when read in connection with said August agreement, and the many other circumstances of the same time and place, the meaning of said November agreement becomes clear as light of day.

Taking a thought from Prof. Graves' address, "as *to 8* the state of his family" it may be helpful in the beginning to observe that the Wrens are the only blood relatives of the said James D. Tate, who, from their earliest infancy, both their father and mother dying early, stood in the position of a father to the Wrens, never a harsh word between any of them, while, on the other hand, Mrs. Florence Lee Tate was jealous of the fatherless and motherless Wren children from their earliest infancy as to the Wrens getting any part of the estate, was determined to swing the estate to her side of the house, although the evidence indicates that she is between 79 and 80 years of age, and her nearest relative is a niece.

The case will be presented under the following heads:

PART I Proceedings in the Circuit Court.

PART II Assignment of Errors.

PART III Statement of Facts:

A—1892-1912.

B—Events leading up to the August, 1912, Parol Trust Agreement.

C—As matters stood immediately before Parol Trust Agreement.

D—August, 1912, Parol Trust Agreement.

E—All assets not discovered, inventoried and appraised.

PART IV Argument and Authorities.

PART V Statement of funds sued for.

PART VI Conclusion.

9*

*PART I.

PROCEEDINGS IN THE CIRCUIT COURT.

On May 11, 1944, said Wren Petitioners, complainants in the court below, filed the Original Bill to set up (Tr., p. 10) "an implied, resulting, constructive or express trust", in said residuary lands.

A short time after the Original Bill was filed an Amended Bill was prepared, which was filed August 5, 1944. This Amended Bill seeks to establish a trust, among other things, in said M. B. Tate-Wren interest in Robinson, Tate & Co.

It is also alleged in the Amended Bill that the administrators of James D. Tate, deceased, had made large disbursements to Florence Lee Tate, with sufficient information to put them on notice of the trusts asserted, and in violation of the express provisions of Chapter 221 of the Code, hence, Florence Lee Tate, William Tate Graham and the Marion National Bank were made individual defendants.

Another allegation in the Amended Bill brought forth from the Marion National Bank probably one of the most amazing and damaging implied admission or confession that ever turned up in a case in the history of law. Wren Petitioners had information that the November, 1933, will, which contained a trust in favor of the Wrens after the death of Col. Tate, was executed in said bank, witnessed by two of said bank *officials, and much other information unknown to 10* said bank, especially as to the May, 1939, alleged holographic will, so the following allegation was put in the Amended Bill:

"Complainants further show that Florence Lee Tate, William Tate Graham and The Marion National Bank, both as administrators of the estate of James D. Tate, and individually, knew that James D. Tate had executed his will of November, 1933, with employees of said bank as the witnesses thereto, and they knew from the provisions of said will that James D. Tate recognized said duty and obligations to complainants" (Tr., p. 40).

Then the Bill continues with allegations concerning knowledge by said administrators and as individuals of the 1839 alleged holographic will.

The Marion National Bank, having a key to Col. Tate's lock box at the time he died, and knowing that Col. Tate said to his last conscious moment that his will was in his lock box in the Marion National Bank, is now caught in a dilemma.

In reply to the allegations of the Amended Bill, if the bank admits knowledge of a will, then it knows that it must produce it or account for it. So the bank decides on the wilful and deliberate falsehood route as to the best way out, and files the following Answer (Tr., pp. 69-70):

"These respondents (The Marion National Bank and William T. Graham) have never had any knowledge that James D. Tate ever executed the alleged will of November, 1933; and deny, if such will was ever executed, that the said James D. Tate recognized therein any duty or obligation of his to said complainants as alleged in their Amended Bill."

*"These respondents further deny that they ever had
11* any knowledge of the alleged will of James D. Tate, claimed by said complainants to have been executed in May, 1939."*

When the evidence was taken it developed that there was an agreement between Col. Tate and the Marion National Bank whereby the bank would pay Attorney B. L. Dickenson's fee for writing the will in consideration of Col. Tate making said bank the sole executor of his estate, in the November, 1933, will; that said will was executed in said bank, in the private office of the chief executive officer, witnessed by employees of the bank; that the bank paid Mr. Dickenson's fee for the preparation of the will, which the bank charged to the bank's expense account.

This matter is further dealt with under Assignment of Error No. VIII.

The defendants filed demurrers and pleas of the statute of limitations to the Bill and Amended Bill, which were overruled, and Answers alleging that the estate of M. B. Tate was insolvent, that James D. Tate had made advances from his private funds to pay the debts of M. B. Tate, denying that James D. Tate was indebted to complainants in any amount, and exhibiting the paper of November 25, 1912, as a release and settlement in full of complainants' claim with respect to the trust in the residuary lands or the proceeds from the sale thereof, and alleging that James D. Tate had recovered judgment in the sum of \$34,924.61, with interest,
against the estate of M. B. Tate, and denying that de-
12* fendants had sufficient information to put them on notice of the trusts asserted, and denying the provisions of Chapter 221 of the Code had not been complied with, and denying generally all the allegations of the Bill and Amended Bill, and relying on the doctrine of laches.

In view of the former litigation concerning the settling up of the November, 1933, will, or the May, 1939, holographic will, the court may well wonder, it seems to us, that connection there is between this Trust case and said Will case, even though there is no plea of *res adjudicata* in the Trust case. The answer is that the former litigation was an attempt to set up a will of Col. Tate; the present litigation to establish a trust in the M. B. Tate estate. The evidence in the two cases is along different lines and with different objectives.

Mr. Chief Justice Hudgins, in the case of *Cohen v. Power*, 183 Va. 258, 32 S. E. (2d) 64, states the doctrine of *res adjudicata* and clarifies a somewhat confused state of the law on this point, saying:

“The test generally applied in the application of the doctrine of *res adjudicata* is to determine whether the facts essential to the maintenance of the two actions are the same. If the same facts or evidence would sustain both actions, then the two actions are considered the same and a judgment in one bars any subsequent action based upon the same facts. If different proof is required to sustain different actions, a judgment in one is no bar to the maintenance of the others.”

13* *In trying to set up the 1939 unwitnessed holographic will it was anticipated that great difficulty would be encountered in proving the contents of said will, so the present Trust suit was brought soon after the Will suit was entered, and over a year before the trial of the Will suit in the Circuit Court.

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*PART II.

Assignment of Errors.

The fundamental error complained of is the action of the Court in dismissing Complainants' Bill and Amended Bill. This error will be considered and presented under the following specific assignments:

1. The Court erred in holding that “the verbal conference of August 29 or 30, 1912, did not constitute a contract”, or “create a trust”.

2. As to the November 25, 1912, written contract, the Court erred in holding that “the verbal conference of August 29 or 30, 1912, did not constitute a contract or create a trust, and that if by any possibility it did so, it was rescinded

and annulled, superseded by and merged in, the written contract under the hand and seal of all the parties entered into on November 25, 1912" (Tr., p. 523).

3. The Court erred in holding that (Tr., p. 545):

"The expressions that 'eventually the Wrens would get everything that was coming to them' and that 'if you boys go along with me, eventually it will be yours anyway' * * * The expressions seem to belong to that class of gratuitous and loose statements which the courts often declare have no probative value" (Tr., p. 546).

4. The Court erred in holding that (Tr., p. 552):

"The interest of M. B. Tate in Robinson, Tate & Co., was transferred to James D. Tate before the death of M. B. Tate."

5. The Court erred in holding that the claims of *Com-
15* plainants were barred by laches and the statute of limitations.

6. The Court erred in holding (Tr., p. 554) that the wills of James D. Tate were not evidence that he intended to comply with his agreement.

7. The Court erred in failing to take into consideration the false statement in the Answer of the Marion National Bank that they "never had any knowledge that said James D. Tate ever executed the alleged will of November, 1933" (Tr., p. 69).

8. The Court erred in refusing to strike the Answers of defendants, or to have those parts of the Amended Bill not answered taken for confessed, particularly Sections V and VI thereof, relating to the M. B. Tate interest in Robinson, Tate & Co. (Tr., p. 80).

9. The Court erred in not holding the administrators individually liable for the funds sued for.

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*PART III.

"A" Statement of Facts

1892-1912.

Major Mitchell B. Tate, a Confederate Veteran, had the following family; Mrs. Amelia Tate, his wife; Mrs. Rosa Tate Wren, mother of the said five Wren Petitioners, a daughter; James D. Tate, a son; and Mrs. Mittie B. Shuff, a daughter.

He was the owner, at the time of his death, of 2,400 acres

of fine farming lands in Smyth and Washington counties, Virginia. His home was upon this large tract of land, where about a dozen tenant families were employed, with a small store to supply their wants.

He was engaged in the manufacture of iron, was the part owner of a number of small iron furnaces. At these furnace properties, where many men were employed, there were commissaries or stores to supply the wants of the workmen. He was the part owner of a wholesale grocery firm in Lynchburg, Virginia, known as Robinson, Tate & Co., that supplied these various stores or commissaries with goods, as well as served the general public. From this large farm house, butter, eggs, and such products of the farm, were shipped to said wholesale grocery, which was a very prosperous concern. The Major Tate interest in Robinson, Tate & Co., is part of the trust *res* of this suit, Major Tate being interested in the manufacture *of iron at a number of locations, it was but

17* natural that he would be interested in iron ore and manganese acreage. So at the time of his death he was the owner of a large boundary of mineral acreage, known as the Rye Valley property, which was residuary lands. That is to say, the said mineral acreage is designated in the residuary clause of the M. B. Tate will as "Rye Valley property" which is part of the trust *res* of this suit.

In 1893, soon after the marriage of his daughter, Rosa Tate, to W. H. Wren, and before any of said five Wren Petitioners were born, Major Tate made his will, devising his property, as the matter stands today, to the Wrens and James D. Tate. The pertinent provisions of said will are as follows: The Wrens were devised 600 acres of said farming lands, and the Major Tate interest in the wholesale grocery firm of Robinson, Tate & Co.

James D. Tate was devised 1,800 acres of said farming land (subject to a life estate in 1,000 acres thereof to Amelia Tate, his widow) and all of his residuary property charged with the payment of his debts, and provided that said Rye Valley property be first sold to pay the M. B. Tate indebtedness. (See Complainant's Exhibit No. 1, p. 76, for copy of said M. B. Tate will.)

After said marriage the parents of said Wrens lived in Lynchburg, where W. H. Wren was employed, and became a part owner of Robinson, Tate & Co.

The late 80's and early 90's, it appears, was a boom 18 period throughout Virginia and the country generally, and there was much wild speculation in land and business enterprises. Major Tate, for example, a short time be-

fore he died in 1892, bought a tract of land in Norfolk for \$100,000, paying \$25,000 in cash, balance of \$75,000 on time. W. H. Wren, father of the said Wrens, was also a wild speculator in land and business enterprises, especially the Mt. Athos deal, in which Major Tate endorsed notes for W. H. Wren amounting to \$20,000.

About this time Rosa Tate Wren died leaving said five Wren Petitioners, the youngest a baby, the oldest seven years of age, and the children were taken into the home of the Heffernans in Lynchburg to live, Mrs. Heffernan being a sister of the father.

When the fury of the storm of the Panic struck both Major Tate and W. H. Wren became involved in serious financial difficulties, W. H. Wren, who was a good man at heart, in trying to weather the financial storm, committed certain business irregularities, such as the misuse of the partnership funds of Robinson, Tate & Co. He committed no forgeries, was never indicted for any offense. In this dilemma the grief-stricken W. H. Wren conveyed all his property to Major Tate, at least with the implied understanding that Major Tate would pay his indebtedness, and went South to gain surcease from sorrow and chagrin, hoping that Major Tate could settle his affairs.

19* *But the fury of the financial storm of the early 90's increased in intensity, and Major Tate, being ill and in declining health, deemed it advisable to make a deed of assignment for the benefit of his creditors, so on January 11, 1892, Major Tate conveyed all his personal property of every kind and description in his *possession* or to which he was entitled to *possession* to James D. Tate and John H. Shuff, Trustees, to sell and pay his indebtedness.

Within a few months after Major Tate makes said deed assignment he dies, and Col. Tate qualifies as sole executor under his will, which is duly probated, executor's bond \$20,000.

Within a few months after Major Tate dies Mr. Shuff, one of the trustees under said deed of assignment, drops out as trustee, and Col. Tate proceeds to handle the matter as sole trustee. Col. Tate now being sole trustee under the deed of assignment, and sole executor under the will, now has the M. B. Tate estate matters under his control. Amelia Tate secures the custody and control of said five Wren children, as more fully set forth hereafter, and qualifies as their guardian, Col. Tate being the real or *de facto* guardian, W. H. Wren, the father, dies soon thereafter, and \$17,585.00 life insurance money comes into the hands of James D. Tate

(see Tr., pp. 84, 170, and exhibits for Complainants No. 4 as to status of same). So, Col. Tate is now in complete control of the entire situation.

20* *Note: Now, what is to be Col. Tate's plan of action in handling this matter? There are two courses open to him, namely: (1) He can proceed to settle up the estate and give the Wrens what they are entitled to, which is the legal way (and the youngsters probably waste it when they become of age, and probably be without a home), or (2) Col. Tate can get the M. B. Tate indebtedness in his own hands by buying up claims against the estate and holding the claims as any other creditor, conserve the estate, keep it intact, putting it beyond the reach of the Wrens to waste or fritter away, and when they become 21 years of age enter into a life-long agreement with them, whereby he will manage their financial affairs, and finally leave the entire M. B. Tate estate to them. The evidence indicates that Col. Tate, and his mother, had talked over the matter. The result was that Col. Tate made a binding promise to his mother. Col. Tate decides on Plan No. 2, or as the Original Bill states the matter:

"After this vast estate came into the hands of James D. Tate it soon became apparent that he meant to get the entire estate under his own exclusive control, including the property willed to them (The Wrens) as aforesaid, for the purpose, as the said James D. Tate said often, of preventing your immature and inexperienced complainants from wasting their means, and, he having no children or other blood relatives, of returning it to them when he was through with it."

If this Honorable Court will "stand in the shoes" of Col. Tate, consider his motive and his plan, his obligations 21* to his mother and the Wrens, the situation of the parties, the property, it will not have any difficulty in understanding the case.

It should be borne in mind that Col. Tate was not exactly proceeding in the "legal" way, or under Plan No. 1; that he sometimes takes the short-cut to his objectives, whether legal or illegal, but he is acting through innocent and worthy motives and had no thought of cheating or defrauding the Wrens.

As an example of some of the "illegal" acts, Col. Tate, at least in one instance, bought up a claim for less than its face value, but charged it up in his settlement under the

said deed of assignment at full face value (Tr., p. 431). (For his method of handling such matters see Tr., pp. 468-469.)

Col. Tate sold timber off of the Wrens' 600 acres of land during their minority amounting to \$8,371.36. (His motive being to get the property of the Wrens under his own control to prevent them from wasting their means.)

M. B. Tate devised or bequeathed to the Wrens his interest in Robinson, Tate & Company. Col. Tate converts the partnership into a corporation, takes the stock certificate in his own individual name, all of which he does for what he thinks is the best interests of the Wrens.

22*

“B” STATEMENT OF FACTS.

Events Leading Up to the August, 1912, Parol Trust Agreement.

As before stated, upon the death of their mother, the five Wren children were taken into the home of the Heffernans in Lynchburg to live. They became very much attached to these likeable children and wanted to keep them. It further appears from the evidence that the mother, on her death bed, had requested the Heffernans to take the children to raise—probably on account of the Lynchburg schools as compared with the rural schools in Smyth County at that time—and the father was inclined to comply with the request of his deceased wife.

But the truly good and devoted Amelia Tate, their grandmother, with a love for these motherless children that probably has never been excelled in human experience, had her heart set on bringing the Wren children to her home near Chilhowie to raise. There was a considerable controversy as to whether the Heffernans or the Tates would get the custody of the children.

As before stated, W. H. Wren is in the South at this time. Amelia Tate writes numerous letters to W. H. Wren begging for the custody of the children. The burden of these letters is that she and Major Tate will give the Wrens all their property if he will give them the custody and
23* control of the children.

(Note:) The Wren Petitioners do not claim that these property promises of Amelia and Major Tate to W. H. Wren constitute a term of the August, 1912, parol trust agreement, but they do show, since Major Tate died soon thereafter before giving effect to these promises, and since Mrs. Amelia Tate got a promise from James D. Tate to carry out these

promises, that there was a reason, with a background, for James D. Tate promising the Wrens, in the August, 1912, parol trust conference hereinafter set forth, all of the M. B. Tate estate.

To give a few brief extracts from these Amelia Tate letters, Amelia Tate in a letter to W. H. Wren, dated March 23, 1892, said (Tr., p. 324):

"Now do, oh do write to Mr. Heffernan to give us the control that he has from you of the dear darlings and give them to us instead, to train as you suggest and care for and control *as our own and give them with you our home and our property.*"

In a similar letter to W. H. Wren a few days later she said (Tr., p. 329):

"He (Major Tate) *says all his property is for me and those precious little darlings and you if you will do your duty.*"

After Amelia Tate was awarded the custody of the children, after they came to live with the Tates, she writes a letter to W. H. Wren that apparently could have been probated as a holographic will, in which she says (Tr., p. 277):

"You may rest assured that your dear little *ones 24* will be provided for and protected at all times here as long as I live and after *they shall have all I leave first and above all others.*"

It may be here observed that Mrs. Florence Lee Tate, the defendant, knows of the intention of Amelia and Major Tate to leave the Wrens all their property, for Amelia Tate says in this very holographic will letter (Tr., p. 278):

"I think Florence is jealous. She says she will come and stay only a few days. I am determined on my course though. Nothing will change me toward my dearest ones that I have with me."

It may be further observed at this point, like future events casting their shadow before them, that the jealousy of Mrs. Florence Lee Tate of the Wren children, almost as innocent and helpless at this time as birds of the same name, is to

increase in fury, as hereinafter set forth, until the last conscious breath of Col. Tate—as to whether the estate of Major Tate would go to her side of the house or to that of Col. Tate's.

Death, as it must to everyone, came to Major Tate, the battle-line Confederate Veteran, in August, 1892. He died without conveying or devising "all his property" to the Wrens and Amelia Tate. In view of the situation existing at that time, the indebtedness and unstable business judgment of W. H. Wren, the chaotic financial condition of his own estate, made it inadvisable for Major Tate to undertake

it. So, it appeared best to leave the said 1883 will as 25* it was, the bulk *of the estate being devised to James

D. Tate and no judgments against him. For Major Tate to have devised all his property to the Wrens, leaving James D. Tate out altogether, would have resulted in the loss of the entire Major Tate estate, as the evidence clearly indicates. In this dilemma it appeared very sensibly advisable for Amelia Tate, who was conducting all the negotiations, to talk the matter over with James D. Tate. The result of this conference was, as the evidence shows, that Amelia Tate got a promise from James D. Tate that he would manage the Major Tate estate, conserve it, prevent the immature Wren children from wasting it or wrecking the estate as their father had come near doing, and at the proper time leave the entire Major Tate estate to the said Wren children.

Note: This promise of Col. Tate to his mother was like the Star of Bethlehem to him, for Col. Tate was a good man at heart, believed in the Great Chancellor of the Universe, expected to see his mother again, when life's fitful fever was over, and he so much wanted to tell her that he had left a will, in his own handwriting, complying with his promise to her—a will to be administered under the supervision of the Chancery Court of Smyth County, in which he had so much confidence. But Florence Lee Tate and the Marion National Bank, each of which had a key to Col. Tate's lock box therein, in which he left his holographic will, had contrary ideas as to the administration of Col. Tate's estate, which was 26* mainly the Major Tate *estate, and as to who would get the bulk of the estate.

Bearing in mind that Major Tate had devised to the Wrens 600 acres of his rich agricultural lands, and his interest in Robinson, Tate & Co., the rest of the estate being devised to

Col. Tate, which was out of the reach of the anticipated spendthrift Wren children, so, for Col. Tate to comply with the promise of his mother it was necessary for him to look forward to the day when the Wren children would become 21 years of age and possibly sell their 600 acres of land and their interest in Robinson, Tate & Co., and waste the proceeds therefrom. Col. Tate's difficult problem to solve was, therefore, how to get the 600 acres and the Robinson, Tate & Co., interest under his own control. Most of the difficulties of this case grow out of this very problem, but if one will bear in mind the doctrine of Prof. Graves' said article, "stand in the shoes," of Col. Tate, and look at the situation through his eyes, everything becomes as plain as the light of day. So, soon after the death of his father, he devised a plan to tie up the 600 acres of land, so that the Wrens cannot sell an acre of it without his consent, and, it may be observed here, that there was never a minute in the lives of the said Wrens in which they could sell an acre of their land without Col. Tate's consent.

What was Col. Tate's plan? The answer is, to get the biggest judgment lien against the Wrens' 600 acres of 27* land *that he could get the Circuit Court of Smyth County to grant.

Bearing in mind that the net amount of the indebtedness against the estate of Major Tate was around \$20,000 and that Col. Tate to get said Residuary Lands was required to pay the Major Tate indebtedness, but for Col. Tate to pay this indebtedness would clear the 600 acres of land from liens, and each Wren, as he became 21 years of age, could sell his interest in said land and waste the money. So, Col. Tate, instead of paying the Major Tate said net indebtedness, bought up claims against the estate of Major Tate, mostly the very indebtedness created by W. H. Wren in the said Mt. Athos land deal, in which Major Tate endorsed notes for W. H. Wren in the sum of \$20,000, and by leaving the estate open (as to settling with the court) for about twelve long years, and by charging, in effect, interest on his said bought-up claims which the Commissioner of Accounts allowed to the extent of \$14,526.27, the Circuit Court of Smyth County by decree entered on April 30, 1904, confirming said Commissioner's report, entered a judgment in favor of James D. Tate against the M. B. Tate estate (Major Tate) in the sum of \$34,635.10, which of course became a lien on the Wrens' 600 acres of land—all the Wrens being before the court by guardian *ad litem*.

It may be here observed that the defendants and the court below in its opinion continually make the erroneous state-

ment that Col. Tate paid the indebtedness against the
28* *Major Tate estate. If he had done this the Wrens' 600 acres of land would have been free of the lien of the judgment of over \$34,000. Certainly for Col. Tate to buy up claims against the Major Tate estate and take judgment against the Major Tate estate was not paying the debts against the Major Tate estate.

It is interesting to observe how Col. Tate got the Major Tate interest in Robinson, Tate & Co., which was willed to the Wrens, Robinson, Tate & Co., was a partnership at the time Major Tate died, and was for *either* years thereafter. When Major Tate died in 1892 Col. Tate qualified as executor and gave a \$20,000 bond.

Col. Tate was not authorized by the will to continue the partnership as executor, the Wrens were babies and it could not be continued in their name, hence he continued it in his own name, obviously with the consent of the other parties.

Bearing in mind that M. B. Tate devised his interest in Robinson, Tate & Co., to the Wrens, and since Col. Tate had no children of his own, he stood in the position of a father to the Wren children, and since Col. Tate had promised his mother that he would always look after the Wrens and their interest in the M. B. Tate estate, it became necessary for him to look forward to the time when the Wren boys would become 21 years of age, possibly sell, among other things, their interest in Robinson, Tate & Co., and cause a liquidation of this prosperous wholesale mercantile firm, it be-

29* ing a *partnership, so Col. Tate in 1900, devised a plan to get the control of this Wren interest in Robinson, Tate & Co., and get the legal title in his own name, and put it beyond the reach of the Wrens.

What was his plan? The answer is to convert the partnership of Robinson, Tate & Co., into a corporation and take the stock certificate, for the Wren interest, in his own individual name, that is, in the name of James D. Tate. As hereinafter set forth, the legal title to this Wren interest, as now represented by said stock certificate, being in Col. Tate, and the beneficial interest in the Wrens created a perfect set-up for the creation of an express trust as set forth in said August, 1912, parol trust meeting.

Note: As hereinbefore mentioned, the M. B. Tate interest in Robinson, Tate & Co., is part of the trust res of this suit, which the court below said, in its opinion, was transferred by M. B. Tate in his lifetime to Col. Tate, which is Assignment of Error No. 5, as hereinafter set forth, where the question of the ownership of said interest is discussed in detail.

30*

*“C”—STATEMENT OF FACTS.

*As Matters Stood Immediately Before Said August, 1912,
Parol Trust Agreement.*

The youngest of the Wrens had become 21 years of age on January 2, 1892. Mrs. Amelia Tate had just died—in August, 1912.

Col. Tate had settled his accounts as trustee under the M. B. Tate deed of assignment of his personal property, and had taken a judgment against the M. B. Tate estate, in his favor individually, for the sum of \$34,635.10 as aforesaid, which became a lien on the Wrens' 600 acres of land.

The duties of Col. Tate as trustee under the said deed of assignment differed from his duties as executor under the will of M. B. Tate in the following important respect: M. B. Tate devised to James D. Tate said Rye Valley property subject to the requirement that James D. Tate pay the M. B. Tate indebtedness. The deed of assignment related solely to personal property. It was the duty of Col. Tate as executor of the M. B. Tate will to sell said Rye Valley property and pay the M. B. Tate debts.

At the very time of the August, 1912, parol conference, discussed immediately hereafter, there was a suit pending in Judge Hutton's court (Circuit Court of Smyth County) instituted when all the Wrens were minors, by a creditor of

M. B. Tate, to collect a debt, Commissioner Sexton's report having been *filed saying that said residuary lands should be sold first (Exhibit for Complainants No. 1, pp. 100-101), and the case had progressed to the point where a decree could be entered confirming said report and ordering a sale of said residuary lands. A decree shows on its face that Col. Tate was trying to avoid a sale of these lands, but Judge Hutton had this part of the decree stricken out and ordered that the case be proceeded with. And that was the status of the residuary lands at the time of said August, 1912 parol conference. That is to say, *the time for a settlement under the M. B. Tate will had arrived or a new agreement must be made.*

It should be here observed that Col. Tate qualified as executor in 1892, and that in August, 1912—20 years later—there is a suit pending in said court to compel him to settle his executorship of the M. B. Tate residuary estate. Col. Tate went so far as to buy the claim of said creditors, but since infants were involved and he had a debt against the M. B. Tate estate, which was a lien on the Wrens' land, and the will

of M. B. Tate required James D. Tate as executor to sell said residuary lands and pay his debts, he apparently could not get the case dismissed. The said November 25, 1912, agreement, executed pursuant to said August parol conference, was intended to take care of this suit in Judge Hutton's court, to meet that situation, and was not intended to be a settlement between the Wrens and Col. Tate, which is 32* more fully discussed in *assignment of error No. 3 hereafter.

Col. Tate knew that a settlement with the Wrens at that time would result in a tremendous amount of money being released to them, which he also anticipated, from experience with the immature youngsters, would be immediately wasted, the very thing that his now deceased mother would want to avoid—a settlement would upset all their plans for the care and protection of the Wrens.

Col. Tate had on hand \$8,371.36, the money paid to him by Cole & Fry for timber sold off of the Wrens' land; also \$7,152.89 for the first land sale to Frazier, money he held as Receiver of the Court, in another case pending in Judge Hutton's court, in a suit brought to sell part of the Wrens' 600 acres of land.

Col. Tate also had offers from Frazier, and Allison and Craig, amounting to \$9,832.12, at the time of said August, 1912, parol meeting, for other parts of the Wren 600 acres of land. If the Wrens demanded a settlement Col. Tate would lose this sale and money, or lose altogether in cash \$25,356.39. That is to say, if the Wrens demanded a settlement they could walk away from that conference with practically \$25,356.39, every penny of which was derived from sales of their land or timber off of it.

Also, if the Wrens demanded a settlement, instead of entering into the parol trust agreement that Col. Tate 33* suggested, there would have to be administration of Amelia Tate's estate. She lived 20 years after the death of Major Tate, had a life estate in 1,000 acres of fine farm land, was an industrious woman, sold immense quantities of produce—hams, eggs, butter, produce of all kinds, shipped to Robinson, Tate & Co., in Lynchburg, all of which funds went into the hands of Col. Tate, whom she said was "saving her money for her" as she never had on hand any money except a few dollars at a time, not needing much money on that "place of plenty". She never had a bank account. The Wrens had in their possession the holographic will letter of Amelia Tate, wherein she said "they (the five Wrens) shall have all I leave first and above all others."

Under any view of the matter the Wrens would have been entitled to part of her estate.

Also, if the Wrens demanded a settlement, instead of entering into the parol trust agreement suggested by Col. Tate, Col. Tate knew that he would have to account for the dividends from Robinson, Tate & Co., that had been paid to him; also, account for the residuary lands sold by him and not accounted for, which amounted to \$3,750.00; also the accounts of Col. Tate show that from 1892, the death of Major Tate, to 1912 he had made \$45,911.11 in profits from said farm (Exhibit for Complainants No. 5, J. H. Wren Exhibit, pp. 3, 5, 6). Evidently a large part of this belonged to the estate of Amelia Tate.

In brief, Col. Tate knows that if the Wrens demand a settlement of the M. B. Tate estate, now that they are 34* all *21 years of age, and the Amelia Tate estate, that a large sum of money and property will be released to the youngsters, which they will probably waste, and upset all his plans and those of his mother for their welfare, so Col. Tate has in mind, before he goes into said parol conference, of entering into a new agreement with the Wrens whereby he will keep all the monies he has on hand, manage the Wrens financial affairs as he had always done, conserve the M. B. Tate estate, add to it, and finally leave the said Wrens the entire M. B. Tate estate, in accordance to the promise he made to his mother, as the Wrens were his only blood kin.

One of the important things that Col. Tate had in mind was that in the case of *W. A. Wren, Adm'r., v. James D. Tate, Executor*, a decree was entered April 30, 1904, confirming Commissioner Copenhaver's report that the estate of M. B. Tate owed James D. Tate two debts amounting to \$34,924.61, a marked out paragraph in which decree showed that Col. Tate desired to stop the proceeding at that point (Exhibits for Complainant No. 1, page 103), but the Court added a paragraph directing Commissioner Sexton to report to the Court "an account of what lands M. B. Tate died seized and the order in which lands are liable for the indebtedness herein reported, the rental value of said lands." Commissioner Sexton reported February 10, 1906, among other things, that the lands first liable for the payment of the debts reported in the cause were the residu- 35* ary lands in *the will of M. B. Tate, and described them and mentioned that three of the tracts had been sold and conveyed by James D. Tate (See Exhibits for Complainants, pp. 100-101).

So this is the way matters stood immediately before Col. Tate calls the Wrens into a conference, and we will now see what transpires there.

36*

“D”—STATEMENT OF FACTS.

August, 1912 Parol Trust Agreement

When their grandmother, Mrs. Amelia Tate, became sick unto death, in August, 1912, the Wrens who were in various parts of the country hurried to her bed-side. On August 29, 1912, when death came, there was grief, there was sadness in the hearts of the Wrens and Col. Tate.

During this grief-stricken period, either on the day of the funeral or the day thereafter, Col. Tate called a meeting of the Wrens at his Terrace Hall home in Chilhowie. His promise to his mother had now become deeply engraved on the table of his memory, and as the evidence shows he was determined to comply with it. To cheat and defraud these grief-stricken youngsters was a thought that never entered his mind. The evidence indicates that he entered the conference with some uneasiness as to an agreeable outcome. However, his mother had taught the Wren children from their youth up to treat their Uncle Jim as a father, never ask him any questions, let him handle their affairs because he was the smartest man in the world; to always rely on his judgment in the management of their affairs, never to question anything that he suggested, that whatever he did was for their best interest. Col. Tate knew that the Wrens had little information as to the status of the M. B. Tate estate, or of the amount of money that is in his hands, hence he

does not deem it advisable to mention amounts except
37* - *the \$34,000 judgment that he has against the estate, which he uses effectively to show the Wrens, in effect, that they should accept his offer or they might lose everything.

Col. Tate says to the Wrens, in effect, as the evidence shows: “Now that you all are here and Ma has passed on I want to tell you something of your affairs. Your grandfather’s estate is involved to the extent of some \$34,000, which is a lien against the estate and a lien against your land. I now have this lien in my hands. I have sold some standing timber off your land to Cole and Fry, and a tract of your land to Frazier. I think if you boys agree to it, I will just accept what monies I got and release your land from any lien of any sort.”

At this point Will Wren spoke up and said: "According to our grandfather's will, that Rye Valley property (residuary lands) was to be sold first to pay debts."

Col. Tate turned on him, not furiously, but authoritatively, and said, "That property, it is not expedient to sell at this time. It is worth very little, probably not worth near enough to cover this indebtedness, and it is no time to sell it. You boys don't know anything about such affairs. You are spendthrifts. You are more or less incapable of handling funds and business. You have just finished up a chicken-raising venture in which you lost \$3,500."

Turning to J. Robert Wren, Col. Tate said: "You're 38* *just through with a trouble I bailed you out of at the Virginia Polytechnic Institute."

Having silenced any opposition, Col Tate proceeds in a leisurely manner: "It is true that the will provides for the sale of the Rye Valley property first to pay the debts, but this is no time to sell it. If it is ever sold an adjustment with you will be made, you will eventually get anything that is coming to you."

Col. Tate continues: "I have attended to all your affairs from your earliest infancy and will continue to do so right on. I promised your grandmother that I would do such a thing and take care of you and your interests. I have managed this estate very well. I know how to manage it. If you boys go along with me it will be continued to your advantage, because you are going to get the whole thing anyway."

Col. Tate continues without interruption: "You all ought to trust me to continue the management of your financial affairs. If you boys go along with me, eventually it will be yours anyway, and your future, your financial welfare, will be far better served than if you try to manage it yourself or fail to let me go ahead with it. In case you need money I will come to your assistance, but young folks should make their own way, and I don't want to be bothered with demands unless they are very necessary, and I recommend that whatever help I give anyone that they pay it back, so as to keep the estate intact."

39* *At this point Beverly T. Wren, the oldest of the Wrens, makes a little speech: "I think Uncle Jim's right. He should continue to manage this affair, particularly as it is Grandma's wish and since he has already always done it."

Col. Tate replies to Beverly's speech by asking: "Very well, is it agreed?"

To which all the Wrens said, "Oh, yes; yes, sir."

Immediately after Col. Tate's foregoing offer was accepted by the Wrens, and a binding contract and trust being thereby created which neither side could alter or change a term thereof, Col. Tate, the practical business man that he was, now climbs into the driver's seat and commences to give orders to the immature and obedient Wrens, as to what has to be done to carry out the foregoing trust agreement.

Note: By standing in the shoes of Col. Tate and looking at the situation existing at that very hour, as reflected by the evidence, one can anticipate what he is going to say. There are two cases pending in Judge Hutton's court, in which the Wrens are parties as infants, and Col. Tate well knows by former encounters that infants entering Judge Hutton's court "enter under the protection of the place"—one case, as before mentioned, involves the sale of the residuary property to pay the debts against the Major Tate estate; and the other case (sale of part of 600 acres to Frazier), Judge Hut-

ton knows that Col. Tate as Receiver of the Court has 40* in his hands a *considerable sum of money belonging to the Wrens (\$7,152.89 is the exact amount) and even though all the Wrens are now 21 years of age Col. Tate well knows that in law he occupies a fiduciary relation to the Wrens and courts do not look with favor on such settlements, with cases pending in court, made without approval of a court of equity. If the above parol meeting had adjourned without more Col. Tate could not have gotten the two cases in court dismissed. The famous November 25, 1912 paper, which the defendants and the court below says, in effect, was a complete settlement and release between Col. Tate and the five Wrens, but when read in connection with the case in Judge Hutton's court, to sell the residuary lands, its meaning becomes clear as light of day.

As before mentioned, Col. Tate climbs into the driver's seat and closes the parol meeting by saying:

"There will be numerous papers to sign, which I want you to sign as soon as I send them to you. Now I want that fully understood, and I want you to sign these things, I don't want any dissention or delay. I want it understood that I don't want any correspondence on any requests I make of you. There is something I must get in order with the Commissioner, you boys must—you children must sign. I'm going to make an exchange there with an equal acreage for some of yours. There will be another place where we must straighten a line fence to keep things straight. (Transcript

references as to *above parol trust agreement: 347,
41* 348, 349, 350, 354, 380, 253, 254, 255, 256, 257, 258, 407,
408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 244.)

SALE OF MINERAL ACREAGE OR RYE VALLEY RESIDUARY LANDS: The evidence shows that the said Rye Valley property, which was practically worthless in 1912, but due to the first World War and the urgent demand for manganese, about 95% of our domestic demands of manganese being imported during normal times, and due to the fact that not a gun or pound of steel could be made without manganese to mix with the iron, and due further to the German submarine sinkings of our ships imperiling imports of manganese, the said Rye Valley mineral acreage became very valuable and Col. Tate sold it for \$100,000 and received cash for it, which he mingled with his funds. The above sale of said Rye Valley property was made by James D. Tate to John D. Peery August 19, 1918 during the said first World War as aforesaid (Tr. p. 54).

The said \$53,150.00, ordinary and liquidating dividends of Robinson, Tate & Co., were paid to James D. Tate from 1900 until his death and \$3,333.33 thereof was paid to his administrators after he died. (See Exhibits for Complainants No. 1, pp. 129, 130.)

This logically brings us, while said parol trust agreement is fresh in mind, to the first assignment of error.

42*

“E”—STATMENT OF FACTS.

All assets not discovered, inventoried and appraised.

Col. Tate's financial statements to The Marion National Bank in 1933, 1936 and 1938, introduced by defendants, (Exhibits for Defendants No. 12), show an increase in the value of money, stocks, bonds, notes, etc., from \$427,100.00 in 1933, to \$600,000.00 in 1938. Also, the 1933 statement shows an income in 1932 of \$32,769.50. It is fair to assume that such a large income, together with a general increase in value of stocks, bonds, etc., between 1938 and December 21, 1941, when Col. Tate died, resulted in another large increase in the value of such assets at the time of his death.

The Inventory and Appraisal of Col. Tate's estate, filed by his administrators, after revisions made by the taxing authorities, show money, stocks, bonds, notes, etc., valued at only \$510,014.45. (Exhibits for Complainants No. 1, pp. 134, 137.)

The foregoing proves the allegation of Section VIII of the Amended Bill, which was not responded to in any way by the Answers of Defendants. (See motions to strike Defendants' Answers or to take same for confessed, Tr. pp. 73-75.)

43* ARGUMENT AND AUTHORITIES.

Assignment of Error No. I

The Court erred, in its opinion, in holding that the "verbal conference of August 29, or 30, 1912, did not constitute a contract or create a trust."

Note: Since the cause under consideration is of such tremendous importance to said Wren Petitioners, the truth of their contention will be demonstrated in a scientific, mathematical and analytical way, wherever possible, and not by dangerous and deceptive analogous reasoning. Since the human mind can think of but one thing at a time, think of only one element of a case at a time, it is desirable to determine the elements of said August 1912 parol trust agreement, and deal with one element thereof at a time, and not confusingly try to think of all five elements at once.

44* *Fortunately for said Wren Petitioners there is a New York judge (Judge Wingate) with an analytical type of mind, who states the elements of a trust (In re Leverich's Will, 238 N. Y. S. 533, 548). This learned jurist says:

"The elements necessary for a trust are

- (1) a settlor;
- (2) a trustee;
- (3) a beneficiary;
- (4) a trust res. and
- (5) a declaration of the terms of the disposition of the trust res."

The facts of said August parol trust agreement will now be examined in an effort to determine to what extent these five essential elements are here present.

- (1) As to the Settlor: Col. Tate answers the description.
 - (2) As to the Trustee: Col. Tate is of course the Trustee.
- As to whether settlor and trustee may be one and the same person, Bogert on Trusts and Trustees, Vol. 1, page 5, states

what appears to be the doctrine throughout the United States on this point.

"It is customary to think of three persons as connected with every trust, namely, the settlor, the trustee, and the cestui que trust. But since, where the settlor and trustee are one and the same person, a trust may exist with only 45* *two parties." *Riggan's Admr. v. Riggan*, 93 Va. 78, 88.

To the same effect is Scott on Trusts, Vol. 1, Section 100; Perry on Trusts and Trustees (7th Ed.) Sec. 997.

(3) As to the beneficiaries, there is no doubt of course that the five Wrens are the beneficiaries.

(4) As to the trust res, this is the M. B. Tate estate, particularly that part of it designated herein as the Residuary Lands, and the M. B. Tate interest in Robinson, Tate & Co. It may be here observed that the remainder of the Wrens' 600 acres of land was sold in 1915, settled for by Col. Tate for the most part, and is not involved in this litigation. As to the 1,800 acres of agricultural land which Major M. B. Tate devised to Col. James D. Tate, which was of course a part of the Major Tate estate, the greater part of this was intact at the time of Col. Tate's death. The Wrens, soon after the death of Col. Tate bought the supposed life estate therein, which Mrs. Florence Lee Tate had sold to others, and then, being the owners of both the life estate and the vested remainder, sold said 1,800 acres, or the remainder thereof, so this part of the M. B. Tate estate is not involved in this litigation. As before stated, the said Residuary Lands and the M. B. Tate interest in Robinson, Tate & Co., are the trust res of this litigation.

Further as to the trust res, it should be borne in mind, according to the doctrine of Prof. Graves' article, that 46* *said parol trust conference occurred in 1912. Up to that time Col. Tate had been busy, for the most part, as the evidence indicates, in extricating the M. B. Tate estate from its financial difficulties, and, other than what he got under the M. B. Tate will, and the profits of \$45,911.11 from the farm up to 1912, had accumulated no appreciable amount of property, and one, therefore, should not confuse the James D. Tate estate in 1941, the time he died, with that of M. B. Tate in 1912. When Amelia Tate and M. B. Tate promised the Wrens all their property, there is not the shadow of a doubt as to whose or what property was meant. The promise that Amelia Tate got from James D. Tate related to the

property of the M. B. Tate estate. (Tr. pp. 253, 348.) Col. Tate told Mrs. T. M. Jones in Alexandria, Virginia, shortly before he died, in effect, that the M. B. Tate Estate belonged to the Wrens. (Tr. p. 220.) Mrs. Jones said:

“He (Col Tate) told Mr. Jones and I one night, he said, ‘you know I am a very wealthy man, and I have always used sound judgment in my investments,’ and said, ‘of course when I made my money the money I made I made it off of what belonged to the Wren children.’”

Col. Tate also told Mrs. Jones (Tr. p. 219):

“I promised my mother I would always take care of them and look after them.”

In December, 1924 (about 9 years after the last of 47* the Wrens’ 600 acre tract of land had been sold. Ralph

Vuono, a business associate of J. Robert Wren, testifies that Col. Tate said to him (Tr. p. 82):

“Mr. Tate told me that the Wrens’ parents had died early, and of how he and his mother had raised them from infancy. He told me he was holding the Wrens’ estate together for them, and they eventually would get all that he had, because it was partly theirs anyway, ‘and also because of a promise I made Ma before she died.’”

Mr. Vuono continues: “I am of Albanian descent and we always call our mother ‘Mama’ and had never heard anyone use the word ‘Ma’. That impressed the statement on my mind.”

Note: To understand the full significance of the Vuono statement one should consider the status of matters as they stood in December, 1924. At this time all of the Wrens’ 600 acres of land had been sold about 9 years previously thereto, so Col. Tate could not have had the 600 acres of land in mind. Six years previous thereto Col. Tate had sold the Rye Valley or manganese acreage for \$100,000 and mingled the funds with those of his estate. Hence, it is significant that Col. Tate said that “they (the Wrens) would eventually get all that he had, because it was partly theirs anyway”—meaning of course derived from the M. B. Tate Estate. Col. Tate also refers to the promise he made to his mother, which could not have been other, as the evidence shows, than that the Wrens are entitled to the whole M. B. Tate Estate.

When Col Tate in said August parol conference 48* spoke *of keeping the estate "intact" he was of course referring to the M. B. Tate estate. J. Robert Wren was asked on cross examination (Tr. p. 380):

"Q. Whose estate was to be kept intact?

A. The estate of M. B. Tate.

Q. M. B. Tate?

A. Yes, sir."

ELEMENT NO. 5—A declaration of the terms of the disposition of the trust res. This is of course the main point in the entire case. The said Wren Petitioners have in mind that a very high degree of proof is required to establish this element. The leading case on this point is *Russell's Ex'rs., v. Passmore*, 127 Va. 475; 103 S. E. 672, wherein Mr. Justice Sims says that such proof must be "unequivocal, explicit, clear, and convincing."

Note: It may be observed here that Mr. Justice Sims while at the University of Virginia majored in Greek, Latin and English, as well as mathematics and that the words he uses have a very precise and definite meaning, hence the care of said Wren Petitioners in the preparation and presentation of this case.

It may be observed here that the doctrine of the *Russell v. Passmore* case, supra, is exemplified by the eminent, learned, and John B. Minor—just-thinking Judge Dobie, in the case of *Darden v. Darden*, (1945) 152 F. (2d) 208, 49* which *was a parol trust case, and decided according to Virginia Law. Judge Dobie says:

"Whether a trust has been perfectly created is largely a question of fact in each case, and the court, in determining the fact, will give effect to the situation and relation of the parties, the nature and situation of the property, and the purposes or objects which the settlor had in view."

Speaking of corroborating evidence Judge Dobie says:

"The same degree of proof should be required to prove an express trust as to establish a resulting trust, and the naked oath of one witness, without other corroborating circumstances, proved, ought never be held as sufficient.

"In this connection it is particularly to be noted that the requirement beyond the testimony of one witness is that

there be merely corroborating circumstances, rather than any necessary requirement of specific corroborating testimony.

"The requirements to be satisfied here are that the declaration of trust must be unequivocal and explicit and established by clear and convincing testimony and that, if this testimony is of one witness only, there be corroborating circumstances. We find that these requirements have been fully established in this case."

It may be here observed that in said Darden case, supra, that the oath of one witness, supported by corroborating circumstances, overcame the testimony of two adverse witnesses. Whereas as to the said August, 1912 parol trust agreement, between Col. Tate and the Wrens, four witnesses present at said meeting testify as to said August agreement, and in addition there is overwhelming wealth of circumstances to establish the truth of said agreement.

50* *It will be observed that the testimony of the witnesses, as to what was said in said August meeting, occurs, here and there, throughout many pages of the voluminous record, and that it is brought together, in one place, as set forth above, so as to "hold a mirror" up to the agreement and see it as it is.

As to a legal precedent for this method of stating, presenting and interpreting said August parol trust agreement, this Honorable Court, of conscience, truth and justice, is referred to Greenleaf's (on evidence) TESTIMONY OF THE EVANGELISTS, especially, as examples, pages 537 to 539, and note at the bottom of page 470.

In this treatise Greenleaf, probably the greatest authority on the law of evidence that the world has ever produced, gives a practical demonstration of his philosophy relating to the law of evidence. This philosophy is briefly stated in the preface thereto, wherein Greenleaf, in dedicating this "Unknown God" (Testimony of the Evangelists) to the legal profession, says:

"Our profession leads us to explore the mazes of falsehood, to detect its artifices, to pierce its thickest veils, to follow and expose its sophistries, to compare the statements of different witnesses with severity, *to discover truth and separate it from error.*"

That is to say, as we understand Greenleaf's thought, in reporting what was said in a meeting, where several are

present, consideration should be given to everything
51* that was *said, that one thing said may impress itself upon one witness, something else said be recorded upon the table of the memory of another witness, and so on, but in arriving at the sum total of all that was said one would naturally take the testimony of all the witnesses, more especially since there is no conflict as to what was said.

The defendants do not deny one word that was said at said August meeting. They offer no evidence to disprove what was said. Truth never conflicts with itself. No one knows enough to disprove that which is true.

The main defense, in this respect, is that the Wrens were spendthrifts, spendthrifts, spendthrifts. In saying the Wrens were spendthrifts, the defendants, at one fell swoop, condemned about 99.99% of the entire human race.

Upon the truth of the Wren testimony, as to said August conference, rests, for the most part, the entire case of said Wren Petitioners. In this connection, Greenleaf, in his Testimony of the Evangelists, at page 28, says:

“The credit due to the testimony of the witnesses depends upon, firstly, their honesty; secondly, their ability; thirdly, their number and the consistency of their testimony; fourthly, the conformity of their testimony with experience; and fifthly, the coincidence of their testimony with collateral circumstances.”

Let us note briefly these five elements of testimony:

1. The very honesty of the Wrens is reflected in the mirror of their testimony. No two of them give exactly *the
52* same account of the said August meeting, yet there is perfect harmony when it is all combined. According to Greenleaf's philosophy this is a real badge of truth.

The Wrens are such upright people, as a family, with a history extending over many hundreds of years, and have so many fine qualities and characteristics, especially in the higher realms of life, some of it the admiration of the art and architectural world, and said Wren Petitioners having lived such struggling, innocent, and blameless lives to this very day, whom, the defendants, like Pilate, could find no fault in, sought to brand all the generations of Wrens as trifling and worthless by trying to leave the impression on the Court that W. H. Wren, their dead father, was a criminal—not by offering court records that their father had ever in his entire life been convicted or even charged with a crime, but by offering

17 pages of newspaper reports to the effect that their father had committed crimes. It may be here observed that the Wrens as a family have certain fine and admirable characteristics that anyone should feel proud to possess.

The said Wren testimony bears upon its face the truth, and reflects their honesty in every word thereof.

2. AS TO THEIR ABILITY: It requires no special ability to tell the truth, most anyone can do that.

Or, as Greenleaf states the matter, page 31, (Tes. Ev. supra): ,

53* *“The ability of a witness to speak the truth, depends on the opportunities which he has had for observing the fact, the accuracy of his powers of discerning, and the faithfulness of his memory in retaining the facts, once observed and known.”

All three of these elements, as to ability, are abundantly shown without detailed comment here.

3. As to the number of the witnesses and the consistency of their testimony, this has been shown, supra, and needs no further comment here.

4. The conformity of their testimony with experience. Blood being thicker than water, the history of the human race has been for property to go to the blood kin. The laws promulgated by God Himself are to the same effect. (Israel) Laws and Legal Precedents by Kent (Yale Prof.) page 72.) The Wrens were the only blood kin of Col. Tate. The property of the Wrens and Col. Tate for the most part, was derived from the same common source. Col. Tate had acted as de facto guardian of the Wrens from their earliest infancy. The most cordial relation existed between them. There was never a harsh word between Col. Tate and the Wrens. Never in a single instance did any of the Wrens ask Col. Tate for money that they did not get it, some requests amounting to thousands of dollars. It often happens that a man of means, who has an agreeable companion and happy home life, leaves his entire estate to his wife, but this was not the case here. When Mrs. *Tate finally caught up

54* with the old Colonel at Savannah, Georgia, to “settle their differences that had been existing through the years,” (Tr. p. 476), and trying to get the cornered Colonel to write a new will, at the time he was stricken, giving her substantially all his property, those words “settle their differences that had been existing through the years,” do not need tongues to tell their own cruel and deadly story.

What was their "differences that had been existing through the years?" It started when Amelia and M. B. Tate promised to give the Wrens all their property, soon after the Wren children came to the M. B. Tate home to live (Tr. p. 278). Mrs. Amelia Tate says, "Florence is jealous," jealous of the Wren children, almost as helpless at this time as birds of the same name. Truly as King Solomon said, "jealousy is cruel as the grave."

During the first World War, J. Robert Wren, true to the blood that was in him, like his grandfather Major Tate, volunteered for service. On a leave from camp he visited his Uncle Jim and Aunt Florence. As he was leaving to catch an evening train to go back to camp, Mrs. Tate said to him:

"Now, Rob, I don't intend you Wren boys shall have any of Jim Tate's money."

In reply to this cruel stroke, J. Robert Wren, sorrowfully, but courteously, replied:

"Aunt Florence, I am awfully sorry you said such a thing, and now I have something to say to you which I didn't intend to tell anyone, I have volunteered for spy service behind the
*German lines, which is dangerous. I don't think I have
55* much chance of coming back so you can speak to the others about that" (Tr., pp. 179, 180).

In 1939 Col. Tate was visiting his nephew, the said William H. Wren, in his apartment in Richmond, Virginia. Col. Tate came in one day with a letter in his hand, very much perturbed and worried, and his nephew asked him what was the matter. Col. Tate replied:

"I have a letter here from Mamie Jeffrey (Mrs. Tate's sister, now deceased) and she tells me to send Florence what she wants (Mrs. Tate being in Asheville, N. C., at that time) and not what she needs." * * * And then he said: "They can't wait until this old grey head gets cold" (to get his property) and then he said, "they will see" (Tr., p. 216).

Again Col. Tate, on his fatal trip, on his way South, to regain his health, in October, 1941, in his flight from his wife, as the evidence indicates, stopped at a hotel in Richmond, but let Will Wren take up the story here (Tr., p. 203):

"He had just finished talking on the telephone he said to Aunt Florence, who was then at Chilhowie. He seemed very much agitated and perturbed. I didn't know why but he began telling me he was going to spend his money as he pleased, that he was going to get well if he could, and that in no one year of his life had he ever spent as much as he made that year."

Finally, his wife and death overtook the old Colonel at the DeSoto Hotel in Savannah, Georgia, Mrs. Tate having come for a show-down:

"To settle their differences that had *been existing 56* through the years."

Was Col. Tate leaving the well beaten paths of thousands of years of experience, and leaving his property to Mrs. Tate's side of the house?

5. In the fifth place, *as to the coincidence of the Wrens' testimony with collateral and contemporaneous facts and circumstances. This raises by far the most important point in all the law of evidence.* Witnesses may lie, but no man knows enough to make "collateral facts and circumstances" lie. Or, as Greenleaf expresses the thought:

"It is not possible for the wit of man to invent a story, which, if closely compared with the actual occurrences of the same time and place, may not be shown to be false."

That is to say, it is not possible for the Wrens to invent a story, that they are entitled to the M. B. Tate estate, the evidence extending over a long period of years, that may not be shown to be false, if such were the case.

The late Professor Graves compared these "collateral facts and circumstances, not to links in a chain, but to the strands of a steel cable, strong according to the number of strands. There are enough of these strong steel strands of evidence in support of the Wrens' case to build a Brooklyn bridge of evidence, but only a few will be mentioned, which are numbered as follows:

1. Amelia and M. B. Tate promised the Wrens all their property. These promises are evidenced by letters in 57* the handwriting of Amelia Tate. At this time the youngest Wren was a babe, not old enough to talk, the oldest about 7. Surely the Wrens could not invent this strand of evidence.

2. Col. Tate promised his mother, in effect, that he would carry out these promises.

3. Col. Tate told Mrs. Jones in Alexandria, Va., of this promise.

4. He told Vuono in New York of the promise.

5. He told the Wrens of his promise to his mother in said August, 1912, meeting.

6. Col. Tate executed a will in November, 1933,—the will the Marion National Bank made the false answer about—leaving the Wrens 70% of his estate, showing that he meant to comply with his promise to the Wrens.

7. Col. Tate told Fred C. Buck, his banking associate, at a banker's meeting in Bermuda in 1939 that he had executed a will in his own handwriting, leaving the Wrens the "bulk of his estate".

8. Col. Tate told Mr. Buck immediately before he left on his fatal trip South practically the same thing, leaving the Wrens the bulk of his estate, and that his will was in his lock box in the Marion National Bank.

9. As Col. Tate passes through Richmond, Griffin A. Rigney said, among other things, that he had taken care of the Wrens in his will.

58* *10. Almost the last conscious words of Col. Tate in Savannah, to Mrs. Tate, were that he had made his will, amply providing for her, and that the will was in his lock box in The Marion National Bank, a bank official having the key thereof.

11. The parents of the Wren children had died, the father a bankrupt, with some cloud upon his name, no one ever mentioning their father's name to them, silent, sad, and disconsolate, they wondered what had happened and what the future had in store for them. They could only look now to the Tates for their protection.

12. But their Uncle Jim had their interests in mind. Their grandmother had taught them that their Uncle Jim was the best and smartest man in the world, to always obey him, not question anything he did, that everything he did would be for their best interests.

13. Col. Tate knew from the time the Wren children came to live in the Major Tate home that his wife was jealous of them and meant to swing the Tate property to her side of the house, and he was determined that this should not happen. For example (Tr., p. 180) when Lieut. J. Robert Wren, who had been on a visit to the Tate home during the first World War was leaving to join his batallion his Aunt Florence said to him, "Now, Rob, I don't intend you Wren boys shall

have any of Jim Tate's money". Col. Tate upon learning what she had *said, told J. Robert Wren, as his train 59* was leaving, outside the hearing of Mrs. Tate, "as for the money this is a very personal proposition between you Wren children and me, and your Aunt Florence hasn't a thing to do about that".

14. Col. Tate occupied the position of a father to the Wren children. They were his only blood kin. He could not have liked them better if they had been his own children.

15. The very last words that Col. Tate ever said to his mother in this world were: "Well, Ma, everything is going to be all right", and both were thinking of the Wrens.

As Mrs. Amelia Tate lay dying, in her semi-conscious condition, she was calling the names of the Wrens—but let James H. Wren describe this scene (Tr., p. 418):

"And Uncle Jim was there and went to her bedside. I can see him now, leaning over and trying to quiet and soothe her mind, and said, "Well, Ma, everything is going to be all right, everything is going to be all right."

It is said that the very last thoughts of any man in this world, even of those who lay dying on the battlefield, are of his mother. Certainly no man wants to die with a lie on his lips as to a promise he made to his mother.

So many strands of evidence occur throughout the record that it is not deemed necessary to attempt to name all of them, however, there are two mammoth cables, one for either side of the "bridge" of evidence, namely: (1) The promise 60* *of Col. Tate to his mother. This cable is as strong as death, and (2) the Parol Conference Agreement.

There is still another strand of evidence, not a small one. The defendants throughout their evidence stress the fact that the Wrens are such spendthrifts that Col. Tate thought it inadvisable to leave any appreciable amount of money to them; leave the impression that the Wrens are worthless and trifling. In answer to this, the evidence of complainants incidentally shows that the life of Edith Wren Whitney portrays the highest type of womanhood. As a babe she was brought to the home of her grandmother, Mrs. Amelia Tate, "who upon the death of her own dear mother became more than a mother to her". She was brought up on this Major Tate homestead, which she says was a "place of plenty". She was taught habits of thrift, and when she was eleven years old she was making everything she wore, and made shirts for her brothers, and had a happy childhood life, but let Edith Wren Whitney take up the story here (Tr., p. 175):

"Then later I went to Martha Washington College . . . I always had a yen to be independent, and when I finished at Martha Washington College I taught school at Chilhowie for a year, and I then went to Columbia University and Uncle Jim thought that was silly, and said, 'You have had your education at Martha Washington, why do you want to go off?' And I said, 'I want to make my own living,' and then I went to the University of Chicago, and all through that I think he was rather proud of the fact I could earn my own way. I was offered a scholarship at the University of Chicago, and I started in there and stayed until I got a degree, and after that shortly I was married. I was married right from Terrace Hall and to a man *that Uncle Jim and Aunt 61* Florence were proud of. I don't think anyone was prouder of anyone than Uncle Jim was of me and my husband the night of our wedding."

The winged years swiftly pass, and Mrs. Whitney tells of the last time she saw her Uncle Jim, in 1939 (Tr., p. 177).

In reply to the question: "Did you ever visit back at Terrace Hall?" she says:

"I did many times. I came through here bringing my family. Sometimes Aunt Florence was there and sometimes she wasn't. We were always made to feel welcome. Uncle Jim liked my children. I have four children, and he thinks they are mighty fine youngsters. He told me in 1939, the last time I saw Uncle Jim, he remarked what a fine job I had done in raising my four children . . . He said, 'Edith, you have raised your girls in this time when all girls smoke and drink, and yours do neither, I think you have done a wonderful job.' Those are his words."

As to James H. Wren, in answer to a question, he says (Tr., p. 403):

"I am connected with a firm known as F. W. Lafrentz & Co., an organization of certified public accountants. We have offices in this country and several abroad. I am a partner in that firm, and I am at the New York Office."

In reply to a further question as to whether his firm was recognized as one of the leading accountancy firms in America,

and in the world, for that matter, he reluctantly replies (Tr., p. 404):

"I would be too modest to say that. We have been in business fifty years. We are all members of the national organization The American Institute of Accountants, 62* state societies, and that is just about as far as I would go. No one higher than we are."

J. Robert Wren has been engaged in intellectual pursuits the greater part of his life, mainly in New York City—the theater, art, sciences, literature—which pursuits are always uncertain and seldom profitable. He appears to have more of the inclinations of Sir Christopher Wren, his ancestor, than any of the other Wrens.

William H. Wren was head of and operated a large automobile concern at Big Stone Gap during a large part of his adult life, which business failed during the great depression, due to adverse business conditions that he could not cope with. For a number of years he has been employed as Chief Accountant of the Unemployment Compensation Commission for the Commonwealth of Virginia.

It may be here observed, speaking legally and scientifically, that the five elements of a trust must combine at the same instant of time. What was this instant? The answer is, when Col. Tate asked the said Wrens at said August, 1912, parol conference: "Is it agreed?" To which the Wrens said, "Oh, yes; yes, sir". At that very instant of time an express parol trust agreement was created, and from that time forward no party to that parol trust had the right to change any term thereof. Confirming this thought, Perry on Trusts & Trustees, Sec. 77, says:

63* "If a trust is once effectually created by parol, it cannot subsequently be revoked or altered by the party creating it, for it is governed by the same rules that govern trusts created by writing."

PRESENT TRUST.

Scott on Trusts, Sec. 26, says:

"Although a manifestation of intention to create a trust is all that is needed for its creation, it must be a manifestation of intention to create a present trust and not merely to create a trust to arise at some time in the future."

POSTPONEMENT OF ENJOYMENT.

Scott on Trusts, Sec. 26, 1, says:

“A promise to create a trust in the future is to be distinguished from the present creation of a trust with a postponement of enjoyment by the beneficiaries.”

54 Am. Jur., Sec. 22, note 4, says:

“It is a general rule that future benefits does not prevent a trust from being presently created with full validity and effect.”

Russell's Ex'rs. v. Passmore, supra, is cited in the case of *Jimson v. Chandler* (Utah), 212 P. 1113, a similar and very instructive case, together with the cases cited therein, including the Supreme Court of Maine case. |

OTHER REFERENCES CONCERNING CREATION OF TRUST.

Pomeroy's Eq. Jur., Vol. 3, Sec. 1009;

26 R. C. L., Sec. 17, 18 and 19;

54 Am. Jur., Sec. 30, 32 and 38;

Am. Law Inst. Restatement, Trusts, Vol. 1, Sec. 66 and 74;

*65 C. J. Trusts, Sec. 21, 46;

64* Scott on Trusts, Sec. 17;

Bogert on Trusts and Trustees, Sec. 45, 148, 161.

LEGAL TITLE IN ONE PERSON, EQUITABLE ESTATE IN ANOTHER.

The doctrine of the necessity for the legal title being in one person and the equitable title in another is well stated in the case of *Reid v. Barry*, 112 So. 846, where it is said:

“A fundamental essential of the existence of any trust is the separation of the legal estate from the beneficial enjoyment; and no trust can exist where the same person possesses both. If the legal and equitable estates come together in the same person the equitable is merged in the legal, and the trust is terminated.”

Applying this doctrine to the case under consideration we find that Col. Tate had the legal title to the Rye Valley Residuary Lands; the equitable estate passed to the Wrens under the said August, 1912, parol trust agreement.

As to Robinson, Tate & Co., the M. B. Tate interest in this partnership was devised to the Wrens by M. B. Tate. In 1900 Col. Tate and the other partners converted the partnership into a corporation, and the stock certificate was taken in the name of James D. Tate, and so remained until his death. At the time Col. Tate took the stock certificate in his own name—at the time the corporation was formed—Col.

65* *Tate was Executor of the will of M. B. Tate and all the Wren were minors. Col. Tate was acting, as the evidence indicates, to conserve this interest for the Wrens who he anticipated might grow up to be spendthrifts. In so doing he created a perfect set-up for the creation of a trust, he having the legal title, the Wrens the beneficial interest.

SPENDTHRIFT TRUSTS.

The burden of a large part of defendants' evidence is to prove that the Wren boys were spendthrifts and that Col. Tate regarded them as spendthrifts. In so doing they assist the Wren Petitioners in proving their case, for the Original Bill states:

“After this vast estate (M. B. Tate Estate) came into the hands of James D. Tate it soon became apparent that he meant to get the entire estate under his own control, including the property willed to them as aforesaid, as the said James D. Tate said often, of preventing your immature and inexperienced complainants from wasting their means, and, he having no children or other blood relatives, of returning it to them when he was through with it.”

It is the spendthrift thought that was in the mind of Col. Tate that explains all his actions. In getting the Wrens' 600 acres of land under his own control, as well as the M. B. Tate or Wrens' interest in Robinson, Tate & Co., he was not concerned with the legality of his actions, but was acting with good intentions, so he was guilty of no wrong. Every wrong is made up of two elements, namely; *the intent and
66* the act. As before stated, to wrong, cheat, and defraud the Wren was a thought that never entered the mind of Col. Tate.

WHAT KIND OF TRUSTS ARE INVOLVED IN THIS LITIGATION?

It is respectfully submitted that counsel for said Wren Petitioners desire to make this point very plain. More than one kind of trust is involved in this litigation, namely, an Express Trust and a Constructive Trust.

An Express Trust was created in said August, 1912, meeting between James D. Tate and the Wrens, was a continuous trust, continued throughout the life of James D. Tate. A Constructive Trust relates purely to *remedy*. This Wren trust case was framed largely upon an article of Dean Pound that appeared in the Harvard Law Review about the year 1920. It had found its way deeply into the law already. Mr. Scott, Dane Professor of Law in Harvard, and, of course, author of Scott on Trusts, and largely of Restatement of the Law of Trusts and Restitution, has made use of Dean Pound's ideas to clarify this feature of trusts. A few observations from Dean Pound and Professor Scott follow:

THE DOCTRINE OF EXPRESS AND CONSTRUCTIVE TRUSTS.

Dean Pound, in 33 Harvard Law Review, page 420, says:

"A group of cases involving constructive trusts invite consideration of what such a 'trust' really is. An express trust is a *substantive institution*. Constructive trust, on the other hand, is purely a *remedial institution*. As the chancellor acted in *personam*, one of the most effectual remedial expedients at his command was to treat the defendant as if he were a trustee and put pressure on his person to compel him to act accordingly. Thus constructive trust could be used in a variety of situations, sometimes to provide a remedy better suited to the circumstances of the particular case * * * and sometimes to develop a new field of equitable interposition, as what we have come to think the typical of constructive trust, namely, specific restitution of a received benefit in order to prevent unjust enrichment."

Scott on Trusts, Section 462, 1, says:

"An express trust arises because the parties intended to create it. A constructive trust is not based upon the intention of the parties but is imposed in order to prevent one of them from being unjustly enriched at the expense of the other * * *

Dean Pound has spoken of the use of the constructive trust as affording 'specific restitution of a received benefit in order to prevent unjust enrichment'."

In Restatement of the Law, Restitution, Section 160, it is said:

"The term 'constructive trust' is not altogether a felicitous one. It might be thought to suggest the idea that it is a fiduciary relation similar to an express trust, whereas it is in fact something quite different from an express trust. An express trust and a constructive trust are not divisions of the same fundamental concept. They are not species of the same genus. They are distinct concepts. A constructive trust, unlike an express trust, is not a fiduciary relation, although the circumstances which give rise to a constructive trust may or may not involve a fiduciary relation."

Lewin on Trusts, 14th Ed., at page 160, adds the following thought:

68* **"A constructive trust is raised by a Court of Equity whenever a person, clothed with a fiduciary character, gains some personal advantage by availing himself of his situation as a trustee; for as *it is impossible that a trustee should be allowed to make a profit by his office.*"

Judge Cordoza's views—Scott on Trusts, page 2314, says:

"Judge Cordoza, speaking for the Court of Appeals of New York, has said: 'A constructive trust is then a remedial devise through which preference of self is made subordinate to loyalty to others * * * Judge Cordoza has also said: 'A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.'"

CONCLUSION OF THE WHOLE MATTER.

It is believed that Mr. Justice Buchanan, speaking for the Court, in the case of *Byars v. Stone, supra*, in two brief sentences sums up all of the foregoing, saying:

"It is well settled that where one person sustains a fiduciary relation to another he cannot acquire an interest in the subject matter of the relationship adverse to such party. If he does so equity will regard him as a constructive trustee and compel him to convey to his associate a proper interest in the property or account to him for the profits derived therefrom."

69* *ASSIGNMENT OF ERROR NO. II.

As to the November 25, 1912, written agreement, the Court erred in its opinion, in holding that "the verbal conference of August 29 or 30, 1912, did not constitute a contract or create a trust, and that if by any possibility it did so, it was rescinded and annulled, superseded by and merged in, the written contract under the hand and seal of all the parties entered into on November 25, 1912" (Tr., p. 523).

Note: Said November 25th agreement is set out in full on pages 16, 17 and 18 of the Transcript.

The Defendants say in Section 5 of their Answer (Tr., p. 15):

"said written agreement fully provided that it was intended to be a release from the said James D. Tate to complainants and from them to him."

The Defendants say in Section 6 of their Answer, T., p. 15):

"said written agreement constituted the agreement between the parties thereto."

The Court further says in its opinion (Tr., p. 539) as to said November agreement:

"By that agreement Col. Tate was authorized to keep the money from said sales" (Cole and Fry timber money and Frazier land sale money) "and he thereupon released the Wren lands from any liability or lien on account of the debts of the Mitchell B. Tate estate."

The Court further says in its opinion as to said *November agreement (Tr., p. 545):

"There is no ambiguity, as far as I can see, in the agreement of November 25, 1912. So far as the record shows, the

Wrens have never been called on to pay any of the M. B. Tate indebtedness. The title to their lands, which was cloudy, was cleared."

In answer to the foregoing, as to said November agreement being a "release" the only way to release a judgment lien is of record, which was the very thing that Col. Tate was determined not to do. He put a \$34,000 lien against the Wrens' lands to prevent them from selling it and wasting their means, and so effectively did he tie up their lands that there was never a second in the lives of the Wrens in which they could sell an acre of their lands without Col. Tate's consent. The said November 25 agreement shows on its face that it could not be recorded; it was not acknowledged or witnessed, and, therefore, could not be admitted to record. Col. Tate was so cautious in drawing up said November agreement that he provided for the possibility that said agreement might be admitted to record through error of the Clerk of the Court, so, he provides in said agreement (T., p. 17):

"And James D. Tate accepts this money" (Cole and Fry and Frazier money) "in full settlement as above stated, *and agrees to release the lien created by said debt from the Wrens' land whenever necessary for a sale of it or any part thereof.*"

If through error said November agreement had been admitted to record, what title attorney or title insurance
71* *company would have approved the title in any land sale made by the Wrens? As Shakespeare indicates, releases should be made of "sterner stuff". Col. Tate distinguishes between the release of a *debt* and a *lien*. Said agreement provides (T., p. 17):

"This is intended to be a full and clear release, *so far as this debt is concerned*, from Tate to Wrens and from Wrens to Tate."

To be a release "*so far as this debt is concerned*," not a complete settlement between Col. Tate and the Wrens.

The defendants, to make said November agreement harmonize with their erroneous view of the case, had to eliminate from their consideration the aforesaid words, "*so far as this debt is concerned.*" The said November agreement says:

"THIS IS INTENDED TO BE A FULL AND CLEAR RELEASE, SO FAR AS THIS DEBT IS CONCERNED."

The defendants say in their Answer (T., p. 15):

"that it" (November agreement) "was intended to be a release from James D. Tate to complainants and from them to him," and that "said written agreement constituted the entire agreement between the parties thereto."

It may be here observed that truth never conflicts with itself; does not behave itself unseemly.

Now what is the truth about said November agreement?

The agreement itself refers to two cases pending in the Circuit Court of Smyth County, in Judge Hutton's court,

one suit against James D. Tate, Executor and said five

72* Wrens, *brought when they were infants, by a creditor

of M. B. Tate's, among other things, to sell said residuary lands, and the case had progressed nearly to that point

when Col. Tate commenced to delay the proceedings, but the residuary lands were in jeopardy at the time of said

August, 1912, parol trust agreement and the November 25th

agreement, a sale of said residuary lands being one thing that Col. Tate wanted to avoid, because the lands had great

potential possibilities and it was an inopportune time to sell them as he told the Wrens in the August meeting, and Col.

Tate standing in a fiduciary relation to the Wrens, and said suit involving the settlement of the M. B. Tate estate by

James D. Tate as Executor, part of his duties as Executor being to sell said residuary lands and pay the M. B. Tate

indebtedness, could not be sure if Judge Hutton would agree, under such circumstances, to a settlement out of Court. If

one will read said November agreement, in view of the foregoing facts and the situation existing at that time, it will become as clear as light of day. The August meeting was

entirely parol, none of it in writing, nothing to show the Court. Col Tate expressly mentions in said August parol meeting

that there will be, among others, court papers to sign, and that the Wrens must sign them and return them without delay, that he did not want any dissention (which would have

been fatal if brought to Judge Hutton's attention) or correspondence about the matter. That is to say the said November

agreement was a part of the said August agreement

73* —both together constituting *the entire agreement. There is no conflict between said agreements. Wren

Petitioners are not trying to vary the terms of the said No-

vement agreement. The Wrens rely upon said November agreement filed as an exhibit to their Amended Bill. (See papers in the *W. A. Wren, Adm'r.*, suit, filed in Exhibits, No. 1, pp. 74, *et seq.*)

The other suit pending in Judge Hutton's court was the sale of part of the 600 acres of Wren land to Frazier, Col. Tate holding the proceeds of the sale as Receiver, suit brought when the Wrens, or most of them, were infants. This involved another paper to be signed so as to get this suit out of the way.

In view of what took place in the said August 29 or 30, 1912, meeting, whereby the Wrens agreed for Col. Tate to keep the \$7,152.09 derived from the sale of the said land to Frazier, it is interesting to observe the kind of report Col. Tate made to the court. Col. Tate in his report to Judge Hutton's court, as Receiver, dated November 15, 1912, says, among other things:

"Your Receiver would state that all the Wren children to whom the money is to be paid, are now over 21 years of age, the youngest, Edith G., having attained her majority in January, 1912, and they are anxious to have the money paid over to them, and your Receiver is ready to pay it, and requests that he be given permission to pay the same over to said parties, to-wit: B. T. Wren, W. H. Wren, J. H. Wren, J. R. Wren and Edith G. Wren, who are entitled to said money in equal shares."

74* *Not a penny, of course, of said land-sale money came into the hands of the Wrens. They merely signed a receipt saying, in effect, that the money had been paid to them. This receipt is dated November 25, 1912, and was sent along with the said November 25, 1912, agreement to be signed by the Wrens. (See Exhibits for Complainants, No. 1, p. 62.)

As to the law applicable to the situation, where part of an agreement is parol and another part in writing, 22 C. J., page 1283, quoted in *Gladden v. Keister* (S. C.), 140 S. E. 161, has the best statement that we have found, saying:

"Where a written instrument, executed pursuant to a prior verbal agreement or negotiation, does not express the entire agreement or understanding of the parties, the parol evidence rule does not apply to prevent the introduction of extrinsic evidence with reference to matters not provided for in the writing, and under such circumstances it is not

necessary that there should be any allegation of fraud, accident, or mistake in order to render parol evidence between the parties admissible.”

The same doctrine is set forth in the Virginia case of *Standard Paint Co. v. Victor*, 120 Va. 595, 91 S. E. 752.

See also *National Wire Bound Box Co., et al. v. Healey*, 189 F. 49; Wigmore on Evidence (3d Ed.), Vol. 9, Sec. 2429.

Further, Mr. Justice Burks, in the case of *Mathieson Alkali Works v. Virginia Banner Coal Corporation, et al.*, 140 Va. 89, after stating the wisdom of the parol evidence rule, says, at the bottom of page 105:

75* “but there are some exceptions to the rule, as well established as the rule itself, and there are circumstances under which the rule does not apply (*Tower v. Lucas' Ex'r.*, 13 Gratt. (54 Va.) 705.”

The last mentioned case cites Section 284a of Greenleaf on Evidence, Greenleaf saying:

“Nor does the rule apply in cases where the original contract was verbal and entire, and a part only of it was reduced to writing.”

The August, 1912, parol trust agreement was reciprocal, embodied certain obligations on the part of Col. Tate as well as the Wrens, but the said November agreement contains, for the most part, only the obligations of the Wrens. As to the law applicable to this situation, it is said in the *Towner-Lucas case*, *supra*, at page 714:

“Nor, as it seems, does the rule apply where the contract was reciprocal, and the part applicable to one party only has been reduced to writing. Of this class was the case of *Brent v. Richards*, 2 Gratt. 539.”

STATUS OF CONTRACT PARTLY ORAL, PARTLY IN WRITING.

In *Corpus Juris Secundum*, Vol. 17, Sec. 9, it is said:

“A written contract is one which, in all its terms, is in writing * * * A contract which is not entirely in writing is regarded as an oral or verbal contract.”

76* *ASSIGNMENT OF ERROR NO. III.

The Court erred in holding that (Tr., p. 545):

“The expressions that ‘eventually the Wrens would get everything that was coming to them’ and that ‘if you boys go along with me, eventually it will be yours anyway’ * * * The expressions seem to belong to that class of gratuitous and loose statements which, the Courts often declare, have no probative value” (T., p. 546).

It is respectfully submitted that the Circuit Court erred in disregarding complainants’ evidence, as to Col. Tate’s obligations, under the August, 1912, agreement, as being “gratuitous and loose statements which, the courts often declare, have no probative force.”

In other words, the Court did not take into consideration the *obligations on the part of Col. Tate*. According to Professor Graves’ article, the Court should consider the entire agreement, and not a part only, thereof.

77* *ASSIGNMENT OF ERROR NO. IV.

The Court erred in holding that (Tr., p. 552):

“The interest of M. B. Tate in Robinson, Tate & Co., was transferred to James D. Tate before the death of M. B. Tate.”

The facts and circumstances are so many that it is easy to arrive at the truth—that the Wrens are the owners of the beneficial interest in the M. B. Tate interest in Robinson, Tate & Co.

The Court admits that there is no written evidence of James D. Tate’s ownership except the records of the firm. M. B. Tate got title to his interest in Robinson, Tate & Co., by deed, as a conveyance of real estate was involved—a large lot in the City of Lynchburg, upon which a large brick building was built. Title to real estate is not transferred by making a notation on the “records of a firm.”

The Court in its opinion further supports James D. Tate’s ownership in Robinson, Tate & Co., by double hearsay evidence (T., p. 552), saying:

“The interest of M. B. Tate in Robinson, Tate & Co., was transferred to James D. Tate before the death of M. B. Tate.

James D. Tate treated it as his own and was recognized as the owner. W. H. McLaughlin, a partner, actively engaged in the management of the concern, stated that M. B. Tate wanted James D. Tate to have it. *W. H. McLaughlin's statement is not sworn to, but Richard Gorman swears that McLaughlin made the statement.* If M. B. Tate did not direct the transfer, McLaughlin made a false statement and connived at a fraud." (Note: Italics ours, which is intended to be *an answer to the Court observations.)

The Court further says in its opinion (Tr., p. 526):

"One of the recitals in the deed to the corporation in 1900 was that M. B. Tate in his lifetime transferred his entire interest in the partnership of Robinson, Tate & Co., to the said James D. Tate. It will not be *presumed* that Mr. Robinson and Mr. McLaughlin joined in such a recital without knowing it was true. If it was not true, James D. Tate was not honest, and your complainants expressly state that they do not charge him with any fraudulent conduct toward them. It is fairer and more consonant with the principles of law and equity to *infer* that the interest was legally and properly transferred to James D. Tate than to presume that James D. Tate committed a fraud upon his nearest kin and a crime against society; or to presume that Mr. Robinson and Mr. McLaughlin connived at such misdoings."

By dwelling in the suburbs of hearsay evidence, presumptions, and inferences, to support the defendants' contention that M. B. Tate transferred said Robinson, Tate & Co., interest to James D. Tate in the lifetime of M. B. Tate, the Court makes it very plain that James D. Tate did not have a deed from M. B. Tate, or even a writing or memorandum from M. B. Tate for this interest.

How did Col. Tate claim that he got title to the M. B. Tate interest in Robinson, Tate & Co.? The answer is that in 1900 when the partnership converted into a corporation, Col. Tate, in conveying this M. B. Tate interest, put the following recital in the deed he made to the corporation, saying:

79* **"And whereas the said M. B. Tate in his lifetime transferred his entire interest in the partnership of Robinson, Tate & Co., to the said James D. Tate, and by his last will and testament of record in the Clerk's Office of the County Court of Smyth County, devised to his son, the said

'James D. Tate all the rest and residue of' his 'property both real and personal, of every kind and description'; so that the entire legal and equitable title to the real estate herein-after mentioned is vested in the grantors in this indenture."

This recital shows on its face that Col. Tate could not have gotten title to the Robinson, Tate & Co., interest in the manner in which he said. In the first place, if he had had a deed to said interest he would have produced the deed to this effect; he admits, in effect, that he had nothing from M. B. Tate in writing transferring this interest. But he claims he got title, at least partly, through the residuary clause of the M. B. Tate will. In the residuary clause of the M. B. Tate will, however, the Robinson, Tate & Co., interest, as well as the 600 acres of land, is excepted, so he could not have gotten title in the manner he stated.

As Prof. Graves indicates let us look at the situation as it existed in 1900. At this very time Col. Tate is acting as Executor under the will of M. B. Tate. All the Wren children are under 21 years of age, the youngest 9 years of age, and the oldest nearly 16. Under such circumstances Col. Tate could not possibly have gotten title to the equitable interest in Robinson, Tate & Co. The last word by this Court on this point appears to be contained in an opinion by 80* Mr. *Justice Buchanan, in the case of *Byars, et al., v. Stone, et al.*, 186 Va. 518, 42 S. E. (2d) 847, wherein he says:

"It is well settled that where one person sustains a fiduciary relation to another he cannot acquire an interest in the subject matter of the relationship adverse to such other party. If he does equity will regard him as a constructive trustee and compel him to convey to his associate a proper interest in the property or to account to him for the profits derived therefrom."

The greatest expounder of the law since Ezra, the Christ-like John B. Minor, said practically the same thing, in 1st Minor, 4th Ed., p. 492:

"No fiduciary of any description is permitted to deal for his own benefit with the subject matter of his trust, not only because the parties are not on an equal footing in respect to the subject matter, but also because to allow the validity of such transactions would tend to corrupt the integrity of persons so situated, by setting their interest in opposition to their duty."

The GREAT CHANCELLOR HIMSELF said, soon after the Ten Commandments were handed down (Ex. 22:22, *et seq.*):

“Ye shall not afflict any widow, or fatherless child. If thou afflict them in any wise, and they cry at all unto me, I will surely hear their cry: And my wrath shall wax hot, and I will kill you with the sword: and your wives shall be widows, and your children fatherless.”

Col. Tate, being reared in a religious home, and having built a church for his mother, Tate's Chapel, and no doubt knowing what the Almighty had said about those who oppress fatherless children, not only had no thought of taking
81* *advantage of the Wrens, but sought to leave his affairs in such shape that no one could afflict the Wrens—left his will in a lock box in the bank of which he was president, made it out in his own handwriting so that no one could say it was not his will, but he failed to take into consideration that a lock box is no stronger than the key that can open it, making his will doubly insecure because there were two outstanding keys to his lock box.

It may here be observed, as before stated, that Col. Tate was acting without any fraudulent intent, for what he thought to be the best interest of the Wrens, trying to conserve the M. B. Tate estate, expecting to return it to the Wrens, and the increase thereof at the proper time, and since his administrators stand in no better position than he, stand in his shoes, Col. Tate would be the last man in heaven to want this Honorable Court to uphold the validity of this transaction and turn it to Mrs. Tate's side of the house.

It may be here observed that truth is like four-square brick, which lay up in a wall to form a perfect structure, while, on the other hand, falsehood is like warped and twisted brick, which, when laid in a wall of truth, can be discerned as far as the structure can be seen.

It is certain, if M. B. Tate owned the said Robinson, Tate & Co., interest at the time of his death, that it passed to the Wrens under the M. B. Tate will, for said will
82* *expressly says so. There is a decree of the Circuit Court for the City of Lynchburg, entered November 13, 1894, in the case of *Kean, Receiver, &c. v. Tate, Ex'or. & Devisee*, which says, in effect, that M. B. Tate was the owner of said Robinson, Tate & Co., interest at the time of his death. James D. Tate in his own right and as executor of the M. B. Tate estate, and the five Wren infants were before

the court. The Bill in the case alleges that M. B. Tate was the owner of said Robinson, Tate & Co., interest at the time of his death. James D. Tate did not answer said Bill. It was taken for confessed as to the said James D. Tate—at 2nd October Rules, 1894, and confirmed by the Court in said decree as aforesaid. (Exhibit for Complainants No. 7.)

A decree *pro fesso* appears to be made up of three elements; namely, (1) The Court must have jurisdiction of the cause, (2) of the person of the defendant, and (3) there must be failure to answer or default by the defendant. All three of these elements concur, as shown by the papers in said Kean case, *supra*.

In Corpus Juris Secundum, Equity, Sec. 669, at page 1101, it is said:

“In order properly to hold defendant to be in default the court must have jurisdiction of the cause, and of the person of the defendant.”

And in Section 668 thereof it is said:

83* “Strictly speaking it is the bill which is taken for confessed, and the decree entered thereon is a decree *pro confesso*.”

As to the effect of the default, Sec. 671 thereof says:

“The allegations of the bill are admitted by the default, as though they were admitted by the answer.”

See also Am. Jur. Vol. 19, Equity, Sec. 361, p. 249:

Mr. Justice Eggleston, speaking for the Court, in the case of *Bova v. Roanoke Oil Co.*, 180 Va. 332, 23 S. E. (2d) 347, states the conclusion of the whole matter:

“When a Bill (in Chancery) is taken for confessed, it alone is sufficient proof of all matters of fact properly and specially pleaded in the Bill.”

Further, the one person who was most likely to know the true status of Robinson, Tate & Co., was the grandmother of the Wrens, Mrs. Amelia Tate, who had been shipping produce off of this large and prosperous farm, she having 1,000 acres thereof as aforesaid, to Robinson, Tate & Co., (James D. Tate getting the money for these many and valuable ship-

ments and "saving it for her" (Tr. p. 364). She told J. Robert Wren, in 1906, when he was 17 years of age, in a discussion with him as to what he was going to do in life; and suggesting that he become associated with Robinson, Tate & Co., said: "Your grandfather gave you boys that." (Tr. p. 344.)

Everything must yield to truth, which although 84* *crushed to earth, will rise again. The whole matter becomes doubly clear when considered in a simple and practical way. Suppose that in 1900 John Doe, a practical business man, had been conducting negotiations with Col. Tate for the purchase of this interest in the partnership of Robinson, Tate & Co., and had sent his attorney, Richard Roe, to examine the title of record. What would the attorney have found? (See Exhibit No. 1 for Complainants.)

1. He would have discovered a deed in the Clerk's Office of the Corporation Court for the City of Lynchburg, dated September 21, 1884, whereby Stephen C. Hurt, et al, conveyed to John W. Robinson, M. B. Tate, W. H. Wren and W. H. McLaughlin, partners as Robinson, Tate & Co., a lot 80 feet square (upon which was erected said store structure).

2. He would have found in another Clerk's office the will of M. B. Tate, in which he devised and bequeathed said interest to the Wrens.

3. He would have found in the possession of James D. Tate an unrecorded deed from W. H. Wren to M. B. Tate, dated December 24, 1891, conveying:

"The interest, if any, and whatsoever it may be, of the *prty* of the first part in the Copartnership of Robinson, Tate & Company . . ."

This deed was recorded soon after Col. Tate conveyed "his" interest in said partnership to the corporation.

4. Said attorney would also have found in the 85* office of the Clerk of the County Court of Smyth County, where the M. B. Tate will was probated in 1892, that Col. Tate had qualified as sole executor of said will, and given a \$20,000 bond, which said Kean case, *supra*, says in said Bill was intended mainly to cover said M. B. Tate interest in Robinson, Tate & Co.

Said attorney would also have discovered that at this time, in 1900, 8 years after he qualified as executor thereof, that Col. Tate had not filed an appraisement of the M. B. Tate estate, and had made no settlement or report of any kind as executor, and that all five of the Wrens were infants.

5. *Said attorney would have looked in vain for a deed from M. B. Tate conveying said interest to James D. Tate.*

In view of the foregoing record evidence would Richard Roe report to potential buyer John Doe that James D. Tate had a good title to said interest, that a title insurance company would insure?

The position taken by the defendants is inconsistent with, and mutually contradictory of the position taken by Col. Tate when he executed the \$20,000.00 bond as executor, and when he allowed the Bill of Kean, Receiver, to be taken for confessed. It is also inconsistent with his recital in the deed from the partnership to the corporation that he got the Robinson, Tate & Co., partnership real estate under the residuary clause of the M. B. Tate will. The recital in 86* said deed that "M. B. Tate in his lifetime, transferred his entire interest in Robinson, Tate & Co., to James D. Tate is also inconsistent and in conflict with his execution of his executor's bond for \$20,000.00, and with his actions in allowing the Kean, Receiver, Bill to be taken for confessed.

A party is forbidden to assume successive positions in the course of a series of suits in reference to the same fact or state of facts, which are inconsistent with each other or mutually contradictory. See: *Burch v. Grace St. Bldg. Corp.*, 168 Va. 329, 191 S. E. 672, 677, and cases cited.

The Wren infants were defendants in the Kean, Receiver, suit, and if Col. Tate had filed an answer in that suit claiming that M. B. Tate, during his lifetime, had transferred the M. B. Tate interest in Robinson, Tate & Co., to James D. Tate, and that same had not passed to James D. Tate, Executor for the Wrens, under said will, the Heffernans, W. H. Wren's people, would have immediately contested the claim of James D. Tate, and the question would have been settled at that time, as it was settled by the decree pro confesso.

Further, as to the defendants' claim, and the opinion of the court below, that "the interest of M. B. Tate in Robinson, Tate & Co., was transferred to James D. Tate before the death of M. B. Tate," the defendants offer much evidence to disprove their own claim which is as follows:

1. Defendants inadvertently offer evidence that *M. 87* B. Tate was the owner of said Robinson Tate & Co., interest on January 25, 1892. (Tr. p. 290.)

2. Defendants' witnesses, W. A. Wolfe, B. L. Dickenson and Q. A. Eller, all testified that James D. Tate was a careful and successful business man, that he was careful to keep his deeds and other papers, and Mr. Wolfe testified that his

files were voluminous; if such transfer was made, it would have been in writing, and the defendants would have found it in his files as easily as they found the agreement of November 25, 1912, between Col. Tate and the Wrens, and produced it in this case.

Col. Tate by his record has proven that the M. B. Tate interest in Robinson, Tate & Co., passed to him as executor for the benefit of the Wrens by executing the \$20,000.00 bond as executor, there being no other personal property which could possibly have come into his hands as executor.

Again, when he refused to answer the Bill of R. G. H. Kean, Receiver, which alleged that the M. B. Tate interest in Robinson, Tate & Co., passed to his hand as executor, and allowed the Bill to be taken for confessed, and a decree to be entered directing him to settle his accounts, he thereby admitted that said interest had not been transferred to him by M. B. Tate during his lifetime.

The will of M. B. Tate is "the best evidence that his interest was devised and bequeathed to the Wrens. See *Millers v. Catlett* 10 Gratt. 477.

88*

*ASSIGNMENT OF ERROR NO. V.

The Court erred in holding that the claims of said Complainants against said Residuary Lands and the Robinson, Tate & Co., were barred by laches and the statute of limitations.

As to whether the doctrine of laches and the statute of limitations is applicable depends absolutely upon the *facts* of each individual case. What are the facts, then, in said Wren case, stated in the form of the elements thereof:

1. It is an Express Trust; it was created by Col. Tate and the Wrens, and not created by implication or by law. It came into existence or was created at said August, 1912, parol conference. The very instant of time when it came into existence was when Col. Tate asked the Wrens, "is it agreed?" and the Wren replied, accepting Col. Tate's offer, "Oh, yes; yes, sir". The duration of the trust agreement was the lifetime of Col. Tate. The Wrens, under said agreement, could not know until Col. Tate died that the agreement would not be complied with.

2. It was, therefore, a continuing trust.

3. There was no denial or repudiation of the trust by either side. Both sides were adhering strictly to the trust. Neither side asked for a settlement, from the time it was created

until the death of Col. Tate. The defendants, in their cross examination of the Wrens, apparently tried to show 89* *if they could get the Wrens to say that they had made no demand on Col. Tate for a settlement that it would be evidence that no trust agreement existed and, therefore, no settlement to be made. The bewildered Wrens, however, apparently thinking that they were making a damaging admission that might result in the loss of the case, repeatedly answered that they had made no demand on Col. Tate for a settlement. Col. Tate never repudiated the trust but always acted in harmony with it on the whole thing. After said trust agreement was entered into he indicated, on a number of occasions, that he meant to comply with his promise by will, and his last conscious dying words were that he had made his will and it was in his lock box in the Marion National Bank (and that a bank officer had the key thereof). He had repeatedly said that the "bulk of his estate" would go to the Wrens, evidently meaning that the "bulk of his estate" was the M. B. Tate estate.

What is the law applicable to the above state of facts?

Mr. Justice Eggleston, speaking for the Court, in the case of *Broadus v. Gresham*, 181 Va. 725, 26 S. E. (2d) 33, gives the clearest and most convincing answer to this question, saying:

"It is well settled that so long as there has been no denial or repudiation of an express and continuing trust, such as we have here, neither the statute of limitations nor laches will constitute a bar to an account or other proper relief to which the *cestui que* trust is entitled."

90* *The Court below, in its opinion (Tr., pp. 556, 557, 558), cites many cases, which state the doctrine of laches and the statute of limitations applicable, not to express trusts, but to a state of facts entirely different from the above state of facts, and it is not believed that a discussion of the cases cited by the court, which are so foreign and inapplicable to the Wren case, would serve any useful purpose.

91* *ASSIGNMENT OF ERROR NO. VI.

The Court erred in holding (Tr., p. 554) that:

"Until a short time before his death he may have so intended" (to make a will leaving probably 70% of his estate to the Wrens) but, if so, he changed his mind, and in my opinion this record fails to prove that he was under obligation, either by trust or contract, to make a will."

In said August, 1912, parol trust conference Col. Tate did not say how he meant to comply with his agreement to the Wrens to eventually leave them the M. B. Tate estate, but he made it plain thereafter that he meant to make a will. This is a suit to set up a trust, not to set up any will, but the fact that Col. Tate executed the 1933 will giving the Wrens 70% of his estate and left a draft of the 1939 will is evidence to show that he meant to comply with the agreement he made in said parol meeting. *Piebel's Estate*, 20 Pa. D. & C. 389. The evidence strongly indicates that Col. Tate considered the M. B. Tate estate, that the Wrens were entitled to, to be about 70% of the estate he left. Bogert on Trusts and Trustees, in the 1948 cumulative supplement, at page 92, note 77, in commenting on said *Piebel's Estate* case, says:

“Written declarations in successive wills that claimant holds half interest in property owned by testatrix and oral declarations to same effect held sufficient to establish a trust in claimant's favor.”

If it is a fact that Col. Tate left a will in his lock box in the Marion National Bank, at the time of his death, *leaving 92* the “bulk of his estate” to the Wrens, surely this is competent and convincing evidence that he recognized and meant to comply with his agreement with the Wrens, even though such will could not be established because the contents could not be proved.

Col. Tate said to Fred Buck, a banking associate, at a meeting of the Virginia Bankers' Association, in May, 1939, at Bermuda, that he had written his will, in his own handwriting, giving the Wrens the bulk of his estate, naming him as co-executor, and that in case of his death the will would be found in his lock box in The Marion National Bank (Tr., p. 470).

Shortly before Col. Tate left for the South on his fatal trip, he told Mr. Buck the same thing (Tr., pp. 472, 473).

As Col. Tate passed through Richmond, Virginia, on his way south, he told Griffin A. Rigney that he had taken care of the Wrens, and a fatherless boy he had raised by the name of Mahoney in his will, saying, “I have taken care of them in my will, and I am going down to Florida and take a rest, which my doctor has ordered, and see if I can get well” (Tr., p. 228).

Col. Tate went from Richmond to the DeSota Hotel, Savannah, Georgia. Mrs. Florence Lee Tate, his wife, soon arrives “to settle their differences which had existed through the

years". Col. Tate tells his wife that he has made his will, amply providing for her, and that his will is in his lock box in The Marion National Bank (Tr., pp. 475, 476). Col.

93* *Tate died soon thereafter.

The evidence conclusively shows that Col. Tate left a will in his lock box in The Marion National Bank, and that it was as far away from him at the time of his death as Savannah is from Marion, Virginia.

94* *ASSIGNMENT OF ERROR NO. VII.

The Court erred in failing to take into consideration the false statements in the Answer of The Marion National Bank that they "never had any knowledge that said James D. Tate ever executed the alleged will of November, 1933 (Tr., p. 69).

Since the execution of a will, or wills, by Col. Tate leaving the Wrens 70% of his estate, would be evidence of the agreement between Col. Tate and the Wrens, made at said August meeting as aforesaid, the Court erred in ignoring the solemn answer of The Marion National Bank that it "never had any knowledge that the said James D. Tate ever executed the alleged will of November, 1933 (and the answer of said bank to the same effect as to the 1939 will of Col. Tate), and erred in ignoring the testimony of William A. Wolfe, Vice-President and chief executive officer of said bank, George F. Britten, Assistant Cashier of said bank, and L. P. Haywood, an employee of said bank, who testified that Col. Tate executed said November, 1933, will in said bank, in the private office of said Vice-President and chief executive officer, in the presence of Attorney B. L. Dickenson, William A. Wolfe, George F. Britton and L. P. Haywood, the said Britton and Haywood being witnesses to said will, and that said bank paid Attorney Dickenson's fee for the preparation of said will in consideration of Col. Tate naming said bank as the sole executor of said will, which was done, and the bank paid Attorney Dickenson's fee, which was charged to the bank's expense account, and said witnesses *to said will, employees of said bank,

95* testified as to the date of the execution of said will by reason of the entry of said attorney's fee on the books of said bank (Tr., pp. 69, 70, 236, 232, 233, 234, 235). For copies of 1933 and 1939 wills of James D. Tate see Complainants' Exhibits No. 1, p. 153, *et seq.*, 159, *et seq.*)

The Amended Bill alleges, in effect (Tr., p. 40):

That the Marion National Bank (and other defendants), both as administrators of the estate of James D. Tate, and

individually, "knew that James D. Tate had executed his will of November, 1933, with employees of said bank as the witnesses thereto, and they knew from the provisions of said will that James D. Tate recognized his duty and obligation to complainants"; and that they had information about the May, 1939, will. (See Tr., p. 40, for complete allegations.)

In answer to the above allegations, as to the November, 1933, will and the May, 1939, will, the Marion National Bank and William T. Graham answer and say (Tr., pp. 69, 70):

"These respondents have never had any knowledge that the said James D. Tate ever executed the alleged will of November, 1933; and deny, if such will was executed that the said James D. Tate recognized therein any duty or obligation of his to said complainants as alleged in their Amended Bill.

"These respondents further deny that they have ever had any knowledge of the alleged will of said James D. Tate, claimed by complainants to have been executed in May, 1939."

96* *This answer of The Marion National Bank, et al., is signed by B. L. Dickenson, who, in the drafting of the November, 1933, will, was attorney for both the bank and Col. Tate, it being agreeable with both parties for him to act in that capacity, for The Marion National Bank had an agreement with Col. Tate that the bank would pay the fee for the preparation of the will, in consideration of Col. Tate naming said bank as sole executor of said will, which was done.

The said November, 1933, will was executed in said bank, in the private office of William A. Wolfe, Vice-President and Chief Executive Officer of said bank, Col. James D. Tate, Attorney B. L. Dickenson, George F. Britton, assistant cashier of said bank, L. P. Haywood, an employee of said bank, and the said William A. Wolfe being present. The will was witnessed by the said George F. Britton and L. P. Haywood, and probably by William A. Wolfe as there were spaces for three witnesses to sign.

The Marion National Bank paid Attorney B. L. Dickenson the fee for the preparation of the will, which was charged to the expense account of said bank.

Mr. Dickenson kept a copy of said will in his files, and immediately after the death of Col. Tate, or shortly thereafter, turned the copy over to William A. Wolfe, Vice-President and Chief Executive Officer of said bank as aforesaid.

And yet, The Marion National Bank, notwithstanding
97* *all this knowledge, especially of being executor of an estate that probably amounted to three-quarters of a million dollars, filed its solemn answer in which it says:

That it "never had any knowledge that the said James D. Tate ever executed the alleged will of November, 1933".

If The Marion National Bank would wilfully and deliberately tell a falsehood in its Answer about the November, 1933, will, it stands to reason that it would do the same thing about the 1939 holographic will of Col. Tate, where the evidence is less abundant.

As to the 1939 will, the said bank had a copy of the draft of said will, which was retained by Mr. Dickenson and delivered to the Vice-President and Chief Executive Officer of said bank at the time of the delivery of the copy of the 1933 will. Said Chief Executive Officer of said bank had the key to Col. Tate's lock box in said bank, the key being left with him by Col. Tate at the time he left on his fatal trip south. Col. Tate told Mrs. Tate in Savannah, Georgia, immediately before his death, that his will was in his lock box in The Marion National Bank, and that said Cashier and Chief Executive Officer of said bank had the key to said lock box. This information Mrs. Tate communicated to said bank about the time of the funeral of Col. Tate (Tr., pp. 167, 168, 169). Now it stands to reason, that if said bank would wilfully and deliberately tell a falsehood in its Answer about the said November, 1933, will, that, having a key to said lock box, they

98* *would not hesitate to open it and look at the contents.

A fair inference from the evidence is that said bank opened said lock box and looked therein, found an unwitting holographic will, which like a dead man tells no tales, as the bank thought, and reading said will they found the place where it is said that Fred C. Buck, an outside man, was named as one of the executors of the will, and given the voting power of Col. Tate's large block of stock in said bank—(Note: Mr. Dickenson testified that Mr. Buck was given the voting power of said stock to comply with a federal law, but there is nothing in the evidence to show that the bank had knowledge of this fact, and Mr. Dickenson being attorney for Col. Tate could not communicate this information to the bank. What the bank saw was that they could probably be voted out of office, and knowing Col. Tate had a dislike for the business methods used by one bank official. The bank also noticed that Col. Tate had violated his contract with the bank, whereby the bank was to be the sole executor.)

And yet, notwithstanding all this knowledge about the 1939 will, The Marion National Bank files its solemn Answer, saying:

“These respondents further deny that they have ever had any knowledge of the alleged will of said James D. Tate, claimed by said complainants to have been executed in May, 1939.”

With all this knowledge about the last will of Col. Tate, The Marion National Bank goes into court, within less
99* *than three weeks after the death of Col. Tate, and makes oath in qualifying as one of the administrators, that James D. Tate left no will so far as said bank knew.

No wonder the Great Chancellor said that it made him angry for anyone to wrong fatherless children.

At the time of Col. Tate's death the Wrens were scattered over various parts of the country—California, New York, Washington, D. C., and none closer than Richmond, Virginia. They knew very little about Col. Tate's affairs. They just trusted Col. Tate to take care of their interests and comply with his agreement with them, made in said August, 1912, meeting, and hardly gave a thought to what was going on during Col. Tate's lifetime. And here is The Marion National Bank, who alone has any information about Col. Tate's financial affairs, qualifying as one of the administrators of said estate, and deliberately telling a falsehood in its Answer and concealing information from said Wren petitioners and the Court, and trying to cheat the Wrens out of their inheritance. And now The Marion National Bank comes into what is probably the topmost Chancery Court in the world, known to be presided over by a Great Chancellor, like unto the Great Chancellor himself, and asks that it set its seal of approval upon the bank's infamous transaction.

That The Marion National Bank had notice, at the time of the funeral of Col. Tate, that he recognized his *said
100* August agreement with the Wrens by leaving a will; that he told Mrs. Tate immediately before he was stricken that his will was in his lock box in said bank; that Mrs. Tate communicated this information to the bank about the time of said funeral, but let William A. Wolfe, Vice-President and Chief Executive Officer of said bank, take up the story here (Tr., pp. 167-168):

“Mrs. Tate related to me a conversation that took place between she and Colonel in Savannah, in which Mrs. Tate asked Colonel just what her status would be should some misfortune befall him. He said, ‘Flossie, I have everything in shape for you. I am giving you everything I’ve got.’ She says, ‘Jim, I don’t want everything you have. All I want is

security.' Colonel told Mrs. Tate that everything was prepared, and his securities were all in the safety deposit box of The Marion National Bank, and W. A. Wolfe had the key. She says, 'Jim, since these papers are prepared, why not write Wolfe at the bank and have him send them over here to me, in order that I may know for myself that I have the proper protection?' He says, 'Aw, Florence, I am not going to that much trouble. I will just write it out here in my own handwriting and give it to you here. Then you will know definitely that you are cared for.' And that was the instrument he was writing at the time of his death."

The Marion National Bank not only had knowledge of what Col. Tate had told Mrs. Tate about this will, it had knowledge of the contents of said will, for, about the time of the funeral of Col. Tate, as said bank officer testifies (Tr., pp. 155-156) that Attorney B. L. Dickenson delivered to him copies of said wills, or as Mr. Wolfe states the matter (Tr., p. 161):

101* *"He (Mr. Dickenson) merely stated to me that I might be interested in looking over some copies of some wills that he had prepared for Col. Tate."

Col. Tate died telling his wife that his will was in his lock box in The Marion National Bank, but this was not sufficient "to settle their differences which had been existing through the years". Well might the old Colonel say with Lord Byron:

"My days are in the yellow leaf;
The flowers and fruits of love are gone,
The worm, the canker, and the grief
Are mine alone."

102* *ASSIGNMENT OF ERROR NO. VIII.

This assignment of error relates to the refusal of the Circuit Court to require the defendants to answer and respond to several sections of the Amended Bill, or to have those parts of the Amended Bill not answered taken for confessed, particularly Sections V and VI, relating to the M. B. Tate interest in Robinson, Tate & Co., devised and bequeathed to complainants by the will of M. B. Tate. (See Amended Bill, Tr., pp. 32-36; Answers, Tr., pp. 63, 69; Motions, 73-75; Decree, p. 80.)

The Amended Bill alleges that Defendants had refused to furnish data, vouchers, etc., from the files of Col. Tate (Tr.,

p. 26), and the Answer of the administrators stated that they had rightfully refused complainants' request for access to such books or files (Tr., p. 64).

It is respectfully submitted that when Defendants refuse to answer and state their position on a vital point in a case, that the answer should be taken for confessed on that point.

In *City of Portsmouth v. Weiss*, 145 Va. 94, 111, 133 S. E. 781, 786, this Court said: "We have repeatedly said that every litigant is entitled to be told by his adversary in plain and explicit language what is his ground of complaint or defense."

Fourth Minor, Vol. 2, p. 1312: "The answer must respond to all material allegations of the Bill, either *confessing 103* and avoiding, or traversing *each one*, not *literally* only, but according to its *substance*. It is not enough that it contains a general denial of the matters charged, nor even of each specific matter severally."

See Barton's Chancery Practice (3d), Vol. 1, pp. 375-379. At page 377 Barton states:

"The necessity for producing documents arises especially in the case of trustees and others who are called on by the bill to account, in which cases they are bound to give the best account they can by their answers, and *to afford the plaintiff a sufficient opportunity* to inspect the books, papers, and so forth." (Italics supplied.)

104* *ASSIGNMENT OF ERROR NO. IX.

The Court erred in not holding the administrators liable.

The fact that Col. Tate left 70% of his estate to complainants by his 1933 and 1939 wills was sufficient to put them on inquiry, if not actual notice to them, of the trusts asserted in the Bill and Amended Bill. Mr. Dickenson gave them his original file copies of the wills a few days after the death of Col. Tate. They had actual knowledge of the execution of the 1933 will, because that will was proven to have been executed in the private office of Cashier W. A. Wolfe, in The Marion National Bank, with L. P. Haywood and George H. Britton as attesting witnesses, and the fact that Mr. Dickenson's fee for drafting that will was paid by said bank in consideration of the bank being named Executor of the will. (See depositions of W. A. Wolfe, L. P. Haywood and George H. Britton, Tr., pp. 231-236.) Notwithstanding the belated disclosure of these facts, the Answer of The Marion National Bank and William T. Graham to the Amended Bill solemnly states:

“(2) These respondents have never had any knowledge that said James D. Tate ever executed the alleged will of November, 1933” (Tr., p. 69).

The defendants learned, soon after the death of Col. Tate, from Mr. Dickenson, Mr. Buck, Mrs. Tate and Mr. Wolfe all the facts about the drafting, execution and loss of the 1939 will, and the provisions thereof for complainants, 105* which *information was sufficient to put them on notice of the trusts asserted.

The record shows that all the Defendants knew that Col. Tate was the executor of the will of M. B. Tate, and the *de facto* guardian of complainants, and the records in the Clerk's office at Marion and Lynchburg were as available to them as to complainants, and the provisions of Col. Tate's will were sufficient to put defendants on inquiry about the trust arising out of the M. B. Tate will for the benefit of complainants.

The testimony of H. L. Kent, Clerk of the Circuit Court of Smyth County (T., pp. 137-143) proves conclusively that the administrators of Col. Tate did not comply with the provisions of Chapter 221 of the Code in that they did not file for record any report of sales required by sections 5404 and 5405 of the Code; that the Commissioner of Accounts did not post the names of said administrators in the list of fiduciaries whose accounts were before him for settlement as required by Section 5423 of the Code; that no order was entered directing said administrators to pay the debts and demands against the estate of James D. Tate as provided by Section 5434 of the Code; that said administrators did not file and have recorded in the Clerk's Office any such refunding bond as is required by Sections 5437 and 5438 of the Code; that no order was made or entered by the Court for the creditors of the estate of James D. Tate to show cause on some 106* date to be named in the *order against the payment and delivery of the assets of said James D. Tate to his legatees or distributees, as required by Section 5439 of the Code; that the settlement of said administrators filed February 2, 1944, dated December 29, 1943, covering the period from January 9, 1943, to December 29, 1943, was excepted to February 7, 1944, and that the same has never been confirmed by the Court; that the suit of J. Robert Wren, et al., v. Florence Lee Tate, et al. (to probate the will of James D. Tate) was instituted December 29, 1943, and process served on Florence Lee Tate and The Marion National Bank on December 29, 1943; and on Wm. T. Graham, December 30, 1943.

These facts show conclusively that the administrators distributed a large part of the James D. Tate estate to his widow, Florence Lee Tate, with actual notice of the trusts asserted in this case.

The deposition of H. L. Kent, Clerk, shows conclusively that said administrators distributed said funds to Florence Lee Tate without in any way complying with the mandatory provisions of Chapter 221 of the Code, and that the second report of disbursements filed by said administrators was duly excepted to and has not been confirmed.

This Court has repeatedly held in such cases that the provisions of Chapter 221 of the Code, particularly Sections 5404 and 5405, Section 5423, Section 5434, Sections 5437 and 5438, and Section 5439 of the Code, are mandatory, 107* and must *be complied with by administrators, before distributing the assets of a decedent to his distributees, and if they do not do so, they are individually liable.

Beverly v. Rhodes, 86 Va. 415, 420.

Bliss v. Spencer, 125 Va. 36, 56.

Carter v. Sillman, 108 Va. 204.

Lewis v. Overby, 31 Gratt. 601, 622-623.

The administrators' settlements for the years 1942 and 1943 (Exhibits for Complainants No. 1, pp. 138-148) show that the administrators paid to Mrs. Florence Lee Tate during the year 1942 the sum of \$15,500.00 in cash; that they paid to her, during the year 1943, the sum of \$19,684.17 in cash; and that during the year 1943 they distributed to Mrs. Florence Lee Tate various stocks valued at \$205,233.96; a total of \$240,418.13 for both years, of which \$224,918.13 was distributed and paid during the year 1943, the settlement for which year was excepted to and has never been confirmed, as then required by statute. There was also distributed, without any valuation, 1,100 shares of stock in Ranger, Rock Island Oil and Gas Company. The value of said stocks so distributed to Mrs. Tate has increased substantially since the delivery of same to her. To illustrate, the 500 shares of stock of Chilhowie Milling Company, Inc., was first appraised at \$11,420.00, and later increased by the tax authorities to \$28,000.00, and was distributed to Mrs. Tate at the 108* value of \$11,420.00, when it was actually worth more than \$50,000.00.

In this connection, the attention of the Court is invited to Section VIII of the Amended Bill (Tr., p. 45) alleging, on information and belief, that negotiable securities amounting

to probably \$100,000.00 had not been discovered and appraised, or included in the settlements. This allegation could only be proved by an examination of Col. Tate's bank accounts, and files, and by an examination of the files of The Marion National Bank, all of which has been refused complainants. It is proved, to some extent, by the exhibits filed by defendants (See Exhibits for Defendants No. 12).

109* *PRESENT STATUS OF FUNDS SUED FOR.

What is the status of the funds sued for: (1) as to facts, and (2) as to law?

(1) As to facts: At the time of the said August, 1912, parol trust agreement the trust res. consisted of said Rye Valley residuary lands, and the M. B. Tate interest in Robinson, Tate & Co. In 1918 Col. Tate sold said Rye Valley mineral acreage for \$100,000.00 and co-mingled these funds with his other property and these funds cannot now be identified. Col. Tate received through the years \$53,150.00 from Robinson, Tate & Co., one liquidating dividend being paid to Col. Tate's administrators after his death. These funds were also co-mingled with his other property which cannot now be identified.

The defendants admit that said mineral acreage was sold by Col. Tate for \$100,000.00 (Tr., p. 462), and admit that \$53,150.00 was received by Col. Tate, or his administrators, from Robinson, Tate & Co.

The defendants also admit that James D. Tate co-mingled these funds with his other property and that these funds cannot now be identified, the stipulation the defendants entered into (Tr., p. 86) saying:

"James D. Tate used the funds received as dividends from Robinson, Tate & Co., Incorporated, and as a partnership, and the funds received from the sales by him of lands devised in the said residuary clause of M. B. Tate's will, co-mingling these funds with his other property and these funds cannot now be identified."

110* *What is the law applicable to the above undisputed state of facts?

(2) As to the law: Bearing in mind that Col. Tate left a solvent estate, no creditors or innocent purchasers involved, all five Wrens living, thus no change in parties except the

death of Col. Tate, his administrators now standing in his shoes, under these circumstances who would have a first lien on the estate property? Who would have the right to take what belongs to him first, the Wrens or said administrators?

The eminent chancellor, Mr. Justice Sims, in the case of *B'd. Sup's. v. Prince Edw.-Lun'b'g. Bk.*, 138 Va. 333, speaking for a unanimous court, in approving the language of the great English chancellor, Sir George Jessel, Master of Rolls, in the case of *Knatchbull v. Hallett*, L. R., Ch. Div. 696, 707, gives the answer to this question, saying:

"Supposing, instead of being invested in the purchase of lands or goods, the money were simply mixed with other moneys of the trustee—using the term * * * in its full sense, as indicating every person in a fiduciary capacity. Does it make any difference, according to the modern doctrine of equity? I say, none. It would be very remarkable if it were to do so. Supposing the trust money was 1,000 sovereigns, and the trustee put them into a bag, and by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag. Could anybody suppose that a judge, in equity, would find any difficulty in say that the *cestui que* trust has a right to take 1,000 sovereigns out of that bag? I do not like to call it a charge of 1,000 sovereigns on the 1,001 sovereigns, but that is the effect of it. I have no doubt of it."

111* *Note: The above doctrine has been approved in several other Virginia cases, unnecessary, it is believed to mention here, but for other instructive cases from other States see *Noble v. Noble* (Cal.), 243, p. 439, 43 A. L. R. 1235 and comment at p. 1240; also *Ayers, et al., v. Fay* (Okla.), 102, P. (2d) 156. Another case, *Eaton v. Husted* (Texas), 172 S. W. (2d) 493, is an unusually well considered case, with a great wealth of authorities cited—also full of human interest and, therefore, reads like a novel.

112* *AMOUNT OF RECOVERY ASKED FOR.

As before stated, defendants admit that Col. Tate mingled the said \$100,000.00 and \$53,150.00 with his own funds. Defendants offer witness after witness who testify that Col. Tate was one of the most outstanding and successful business men of this part of the country. The evidence shows that the dollars that Col. Tate planted, like seed corn, brought forth fruit abundantly.

Major Tate left the Wrens, under his will, an abundant supply of "seed corn" available to them in 1912, in the vigor of their youth, when young people so much need to get a start in life to establish homes of their own. But Col. Tate comes along and sees this great supply of "seed corn" that had been grown on fields that he had protected from swarms of grasshopper creditors, and tells the Wrens of the danger of these devouring insects,—that he had had an awful time spraying against these vociferous pests, knows how to deal with them, and that the Wrens are inexperienced in such things. He suggests to the Wrens, at said August, 1912, conference, that upon the broad undivided fields of their grandfather's estate he has the ground already prepared for planting, and a wholesale grocery firm in Lynchburg, Robinson, Tate & Co., ready to market the product; that it is to their best interests to let him handle this affair, that it was their grandmother's wish that he do so, that eventually they 113* would not only get *the increase from the fields but all the fields as well, get the "whole thing". He pauses for a reply. The grief-stricken Wrens, there to attend the funeral of their own dear grandmother, and having been scattered over various parts of the country, they are together again, their thoughts racing back across the years, to the time when they as orphans had been brought to their grandmother's home, and how good she had been to them, always counseling and toiling for their welfare, who had always taught them to obey their "Uncle Jim" never ask him any question, let him handle their affairs, that whatever he did was for their best interests, that he was the best and smartest man in the world, would the Wrens now go against the very first test of their grandmother's advice?

At this point Beverly Wren, the oldest, says:

"I think Uncle Jim's right. He should continue to manage this affair, particularly as it is Grandma's wish and since he has already always done it."

As to the yield of this "seed corn" planted and replanted through the years, as well as his own individual "plantings" the Wrens do not know the amount of profits therefrom, for the evidence indicates that his lock box was opened, his will, and many thousands of dollars in securities removed therefrom, and, therefore, cannot hope to recover all they are entitled to, but there are plenty of precedents in equity that the Wrens are entitled to simple interest, not compound in-

terest, on the above amounts, 6 per cent interest on 114* said Robinson, *Tate & Co., dividends of \$53,150.00 from the time of their respective payments to Col. Tate until payment is made to the Wrens, and 6 per cent interest on said \$100,000.00 from the time Col. Tate received the money therefrom until paid to the Wrens.

Russell v. Passmore, supra, Riggan's, Admr., v. Riggan, 93 Va. 78, 91.

As Prof. Graves or Greenleaf would further check the amount of recovery, the principal sums of \$100,000.00 and \$53,150.00, with interest as aforesaid, Col. Tate by wills left the Wrens 70% of his estate, and even with the securities missing it checks fairly well with the 70% figure fixed by Col. Tate.

Note: It should be here observed that Col. Tate left Beverly T. Wren out of his 1939 draft of will, just why the Wrens do not know. The evidence of the defendants indicates that Beverly T. Wren was so unsuccessful financially that anything he left him would be devoured by his grasshopper creditors, and Col. Tate knowing that the Wrens would stick together—as, for example, J. Robert Wren gave Beverly several thousand dollars, his share derived from the sale of the remainder of the 600 acre tract of land, for which he was never repaid as the evidence shows—Col. Tate apparently thought that the other Wrens would take care of Beverly, in fact he knew they would. Besides Col. Tate said he might make some changes in the 1939 draft of will, 115* and told Griffin A. Rigney *in Richmond, Virginia in 1941, on his fatal trip South to regain his health, that, among other things, he had taken care of *all the Wren boys* in his will (Tr., p. 228). Also, Col. Tate said to Mrs. T. M. Jones, Jr., between March and April, 1941 (Tr., pp. 220, 221), “When I die I am remembering the Wren children.” Without a doubt meaning *all* the Wren children. He also told Fred C. Buck some four or five days before he started south on his fatal trip that he was leaving the bulk of his estate to the Wrens, without a doubt meaning *all five* of the Wrens (Tr., pp. 472, 473).

Surely the defendants, having a key to Col. Tate's lock box, and Col. Tate saying to his last conscious moment that his will was in his lock box in The Marion National Bank cannot come into a court of equity and say that they are entitled to Beverly's share, as well as that of all the rest of the Wrens (Tr., pp. 82, 351, 352).

In order that the administrators may recover approximately \$110,000.00 in estate and inheritance taxes, the Amended Bill prays that the Court decree that the trust asserted herein arose and became effective prior to November 25, 1912, if the court decides the appellants are entitled to the funds sued for.

116*

*CONCLUSION.

One can hardly think of John B. Minor without thinking of "the law and the reasons thereof". Likewise, one can hardly think of a court of equity without thinking that it should be a court of conscience.

Formerly a chancellor was a keeper of the king's conscience, the king having a "duty to see that none of his subjects was denied a remedy where conscience required that he should have one." In Virginia the chancellor, now Mr. Chief Justice Hudgins, is a keeper of the people's conscience, that God-given faculty that enables his court to decide a cause like the Great Chancellor Himself would decide it, providing the laws of Virginia permit it.

The doors of a chancery court swing open only to those who come with clean hands and truth on their lips.

From the very beginning of this case it was the plan of the Wrens to build their case upon the solid foundation of truth and keep falsehood out of their part of the case, and it is not believed that the defendants can successfully challenge the truth of even one word of the Wren testimony.

This case is presented as an advocate (Gr. parakletos—one called alongside to establish truth and justice) would present it; and not as a lawyer (Gr. grammateus—one who lades the helpless with burdens grievous to be borne) would present it; and not even as a lawyer (Gr. nomikos—one who all too often seeks to explain away truth and justice
117* with legal *technicalities) would present it.

The Wrens, having established a case, it is believed that the Great Chancellor Himself could set his seal of approval upon, it still remained for them to show that the case could be decided in their favor under the laws of the State of Virginia. This has been convincingly shown, it is believed, in the law sections of the Wren Petition, filed herein, and need not be repeated here.

An examination of the Virginia law and decisions, extending over a period of more than a century and a half, will show, as set forth in said petition, that there is not a single decision, applicable to the Wren case, that obstructs justice or would defeat the relief prayed for by the Wrens.

It is most respectfully submitted, therefore, that the Circuit Court of Smyth County erred in the particulars hereinbefore mentioned in entering the final decree complained of.

PRAYER.

Your Petitioners, therefore, pray that an appeal and *superseas* to said judgment and decree complained of may be awarded your Petitioners in order that said decree for the causes of error aforesaid before you may be caused to come, that the whole matter in said decree contained may be reheard; that said decree be reversed and annulled; that such judgment, decree, or order, as to the court shall seem right and proper, be entered,—that final judgment be entered upon the merits *of the cause.

STATEMENT REQUIRED BY RULE 9.

Counsel for Petitioners state that a copy of this Petition was on the 10th day of September, 1948, mailed to opposing counsel in the trial court, and that this petition was mailed for filing to M. B. Watts, Esq., Clerk of the Supreme Court of Appeals of Virginia, at Richmond, on the 10th day of September, 1948, with the request that he transmit the same to Justice A. C. Buchanan, at Tazewell, Virginia.

ORAL HEARING REQUESTED IN PETITION.

Counsel for Petitioners desire to state orally the reasons for reviewing the decree complained of and request that opportunity be afforded therefor.

Respectfully submitted,

W. H. WREN,
J. ROBERT WREN,
BEVERLY T. WREN,
J. HAROLD WREN,
EDITH WREN WHITNEY,
By Counsel.

VERNON C. BARKER,
Mendota, Virginia.

HENRY ROBERTS,
Bristol, Virginia,
Counsel.

We, Vernon C. Barker and Henry Roberts, Attorneys practicing in the Supreme Court of Appeals of Virginia, do certify that we have read the foregoing petition and the record annexed, and in our opinion the decree complained of ought to be reviewed by the Supreme Court of Appeals of Virginia. Given under our hands this the 10th day of September, 1948.

VERNON C. BARKER,
HENRY ROBERTS.

Received September 13, 1948.

M. B. WATTS, Clerk.

Received Oct. 19, 1948.

A. C. B.

Nov. 17, 1948. Appeal and *supersedeas* awarded. Bond \$500.

M. B. W.

RECORD

VIRGINIA:

In the Clerk's Office of the Circuit Court of Smyth County.

W. H. Wren, et al., Complainants,

v.

Florence Lee Tate, et al., Defendants.

Be it remembered that heretofore, to-wit: At the first May Rules, 1944, came W. H. Wren, et al., Complainants, by counsel, and filed in the Circuit Court of Smyth County, their Bill in Chancery against Florence Lee Tate, et al., Defendants, in the words and figures following, to-wit:

page 2 }

AMENDED BILL.

(Filed Aug. 5, 1944.)

To the Honorable Walter H. Robertson, Judge of said Court:

Your complainants, W. H. Wren, J. H. Wren, B. T. Wren, J. Robert Wren and Edith G. Whitney, respectfully represent:

That on May 11, 1944, to first May Rules, they exhibited in this Court their original bill of complaint against Florence Lee Tate, in her own right, and The Marion National Bank, William T. Graham and Florence Lee Tate, Administrators of the estate of James D. Tate, Deceased, to which bill said defendants appeared and demurred, answered, and filed a plea of the Statute of Limitations, as follows:

ORIGINAL BILL.

(Filed May 11, 1944.)

To the Honorable Walter H. Robertson, Judge of the Circuit Court of Smyth County.

Your complainants sheweth unto the court the following facts:

1. The grounds upon which this court's jurisdiction depends are that the principal defendant, Mrs. Florence Lee Tate, is a resident of Chilhowie, Smyth County, Virginia; that the cause of action arose in said county; that the subject matter of the suit is in said county; that the late James D. Tate, whose estate is the subject matter of this suit, was a resident of said county at the time of his death, and that his estate is being administered in said county by said administrators.

2. That the said James D. Tate died on the 21st day of December, 1941, leaving as his distributees and heirs at law the following persons: Mrs. Florence Lee Tate, his widow, and your complainants, the children of the deceased sister of James D. Tate, Rosa C. Wren. James D. Tate left no children; said Wren children, the above named complainants are his only blood relatives.

3. Your complainants are informed and believe that the said James D. Tate died testate, but no will has been found, after diligent search in every place where it might be found, and said estate is being administered as if he had died in-

testate. The assets of said estate are in excess of \$600,000.00, about one-sixth real estate and five-sixths personal estate.

4. The estate left by the said James D. Tate had its origin in the vast estate of his father, the late Major Mitchell B. Tate. James D. Tate's success in life was due to his conserving and managing the large estate of his father, both estates being of about the same value. A certified copy of the Mitchell B. Tate will is filed herewith, marked "Exhibit A", and made a part hereof. Said will was executed Nov. 22, 1883, and probated in said county Sept. 19, 1892, near the time of his death. The entire realty holdings of this vast estate—about seven and one-half square miles of land—went to James D. Tate, the only son, and to a daughter, Rosa C. Wren, for life, and then to her children, 2,375 acres of land passed to the said James D. Tate under the residuary clause of said will subject to the condition that the said James D. Tate pay any indebtedness against the said father's estate, but not an acre of said residuary lands were so used. The residuary clause of said will included what is designated in said will as the "Rye Valley property"

consisting of 1,510-119/160 acres and 128 15/160
page 4 } acres respectively. Nine tracts of land totaling 737
acres were added to said residuary clause after said will was executed in 1883 and before the death of the father in 1892. An abstract of the deeds to said residuary lands is filed herewith, marked "Exhibit B", and made a part hereof.

5. The said Mitchell B. Tate, after the execution of his will in 1883, and before he died, gave and transferred to James D. Tate all his personal property amounting to \$68,945.48 for the purpose of paying any indebtedness against his estate.

6. The daughter, Rosa C. Wren, died in the year 1891, shortly before the death of her father, Mitchell B. Tate, leaving the following children, your complainants, namely, B. T. Wren, age 7 years; W. H. Wren, age 5, J. H. Wren, age 3, J. Robert Wren, age 2, and a baby girl Edith G. Wren (now Edith G. Whitney). The father of said children William H. Wren, Sr., died about three years later. The oldest of said children being 7 years of age when their mother died, and 11 years of age when their father died.

7. That when the Mitchell B. Tate will was probated James D. Tate qualified as the sole executor of said estate, and thereby occupied a position of trust and confidence toward your complainants, a fiduciary relation of the highest character known to the law of justice and fair dealing toward said orphaned children, and your complainants believe to this day that their Uncle James D. Tate meant to act in good faith toward them. After this vast estate came into the hands of

James D. Tate it soon became apparent that he meant to get the entire estate under his own exclusive control, including the property willed to them as aforesaid, for the purpose, as the said James D. Tate said often, of preventing your immature and inexperienced complainants from wasting their means, and, he having no children or other blood relatives, of returning it to them when he was through with it, that is the bulk of the estate. Your complainants so understood and accepted the situation. It was a continuing relation, there never being any breach of it, and your complainants believe that James D. Tate meant to leave a will to this effect, devising and bequeathing to them the bulk of his estate, but, as above mentioned, no will was found at his death, and, as the matter stands, Mrs. Florence Lee Tate, although so far as is known she never invested a dollar in the estate, takes all of said cash and personal estate, being about 5/6ths of said estate, contrary to equity and good conscience and every principle of right and justice. But being a wrong, equity, under the circumstances of the case, has a remedy.

8. As above mentioned, the said Mitchell B. Tate turned over to James D. Tate personal property which yielded in cash the sum of \$68,945.48 to pay the debts against the estate, which James D. Tate, the astute business schemer that he was, used most effectively in disposing of said indebtedness, buying much of it at a few cents on the dollar. Although he was a young man, had no income or property of his own, he paid off said indebtedness and had \$34,924.61 left. In other words he bought most of the indebtedness at less than its face value but charged the estate 100 cents on the dollar, handled the matter so as to make it appear that the Mitchell B. Tate estate was indebted to him in the sum of \$34,924.61, and although he, the said James D. Tate, and your complainants became the sole owners of the Mitchell B. Tate real estate James D. Tate had a decree or judgment entered against said lands for the above amount of \$34,924.61. His motive could not have been other than to keep a large sum of money that was payable to your complainants by reason of a sale of part of their lands willed to them by the said Mitchell B. Tate, requiring court approval, James D. Tate being receiver of the money payable to your complainants, the sum being \$7,152.09, together with a large sum of money payable to your complainants from a sale of a large amount of timber from their lands, the amount of which they never did know, but James D. Tate had in his possession the

entire amount, and became the owner thereof in the manner set forth in the following paragraph—No. 9.

9. Soon after the youngest child became 21 years of age, that is, Edith G. Wren (Whitney), James D. Tate called all your complainants together at his home in Chilhowie, and without mentioning amounts, or giving any details of any transaction, told your complainants that the Mitchell B. Tate estate was indebted to him in a large sum and that he would cancel this indebtedness against their part of the land if your complainants would allow him to keep the money derived from the sale of land to Frazier and the sale of timber from the Wrens' land to Cole & Fry, not mentioning any amounts. To this proposal W. H. Wren asked if the Mitchell B. Tate will did not provide for the sale of the "Rye Valley property" to pay any debts against the estate. To this James D. Tate replied that the "Rye Valley property" was of little value, being rough mountainous poor land, which was a fact. So your complainants, not questioning the judgment of James D. Tate agreed for him to keep their moneys derived from the sale of land and timber as aforesaid. At this meeting James D. Tate told your complainants that the money realized from a sale of part of their lands willed to them by Mitchell B.

Tate was held by the Receiver of the court, but he
page 7 } did not tell them that he was the Receiver, nor did
he mention the amount, although your complainants
afterwards found out the amount; their timber which James
D. Tate sold to Cole & Fry when some of them were infants,
your complainants do not know to this day the amount of
said sale.

10. Complainants allege that, under the above circumstances, the "Rye Valley property" became theirs; that thereafter James D. Tate was a mere trustee of the legal title, that the entire beneficial interest in said "Rye Valley property" became your complainants'; that an implied, resulting or constructive trust, in favor of your complainants, was thereby created. Also a like trust was created in the other lands in said residuary clause of said will, amounting to 737 acres.

11. The said "Rye Valley property" which was practically worthless in 1912—at the time of the meeting set forth in paragraph 9 above—but due to the First World War and the urgent demand for manganese, about 95% of our domestic demands being imported during normal times, and due to German submarine sinkings of our ships, and the Rye Valley property containing a deposit of manganese, it became very valuable, and James D. Tate sold it for \$100,000.00, receiving cash for it. Since the beneficial interest in said property belonged

to your complainants they are also entitled to 6% interest thereon, as the said James D. Tate had the use of said money the rest of his life, which then passed into the hands of said administrators, the interest claimed amounting to \$154,300.00 to this date (May 10, 1944) or a total of, principal and interest, \$254,300.00. Likewise your complainants allege that they are entitled to the proceeds, principal and interest, derived from the sales of the said 737 acres, much of which consisted of rich agricultural lands—claim interest from the time page 8 } of the sale of such lands by the said James D. Tate. These trust amounts are subject to a credit of the value of the lands that passed to your complainants under the supposed intestate situation.

12. There was never a breach of the fiduciary or trust relation existing between your complainants and the said James D. Tate. It was the intention of James D. Tate to use this vast estate during his lifetime, and return the bulk of said estate to your complainants when he was through with it. Your complainants accepted this situation. Neither James D. Tate nor your complainants breached the understanding. It was a continuing, uninterrupted relation. As proof that James D. Tate meant to leave the bulk of his estate to your complainants, it is known that in 1933 James D. Tate duly executed a will, attested by three competent witnesses, in which he left to your complainants 70% of his estate. But, as before stated, at his death no will could be found, although James D. Tate stated to his last conscious moment that he had a will and indicated that the will was not in his possession (and therefore not subject to the legal presumption that he had revoked it). Other known wills were to the same effect, proving that he had an abiding intention of bequeathing and devising the bulk of his estate to your complainants; and it is significant that the amount due your complainants, as a matter of right, under the alleged trust, herein set forth, and the 70% fixed by the said James D. Tate, as the part of his estate he wanted your complainants to have, are not far apart as to amount. A copy of said will is filed herewith.

All the dealings of James D. Tate with your complainants concerning the property willed to them by their grandfather Mitchell B. Tate did violence to every principle of right, law and justice, standing in the fiduciary relation toward page 9 } them that he did, much of the incontrovertible appears in said Court records, enough to damn James D. Tate's name forever, or as long as said records last, unless said records also show that he meant to make restitution of the properties, or proceeds therefrom, that he took from the

helpless Wrens who dwelt upon the outer walls of his good pleasure. James D. Tate and his good wife, due to the vast estate of his father, lived sumptuously, extravagantly, and often distressingly, all the days of his life, while the helpless and fatherless Wrens were wanderers on the face of the earth, at least some of them, often without a place to lay their heads. All of James D. Tate's dealings with them, and his actions toward them, indicated that he thought it best for the Wrens that they be brought up the hard way, and to their advantage that he make restitution of said properties, or the proceeds from the sale thereof, when he was through with them. Or as J. Robert Wren, one of your complainants, born with a high sense of justice, like most everybody else, but having only a layman's knowledge of law, states the matter:

"The inescapable point is that, viewed in the plain light of day, without explanation of any kind, the fiduciary relations between James D. Tate and the Wrens would not stand a single minute's investigation: whereas, viewed in the light of orphaned children dealing with an all-wise far-seeing uncle who ever since they were babies had scolded them for the imprudence and carelessness which almost all children are heir to; and further, viewed in the light of Col. Tate's oft-repeated assurance that he would eventually make restoration—then, Col. Tate's relation to these orphaned children wears all the aspects of a trustee. That is precisely what Uncle Jim Tate was: the Wrens' *trustee*."

page 10 } And it may again be stated, that there was never any breach of that relation of trust and confidence, that fiduciary relation that the law of justice does not permit a man to lay aside when he shuffles off this mortal coil, nor did Col. Tate wish to lay it aside, and the law giving effect to his good intentions will be a monument to his memory, more lasting than the marble one at his grave.

In consideration whereof, and forasmuch as your complainants are remediless save in a court of equity where such trust matters are alone cognizable, and in this particular Court where the Spirit of Justice prevails, and not the corpse of the dead letter of the law, your complainants pray as follows:

1. That the following persons may be made parties defendant to this bill, and may be required to answer the same, but not on oath, answers on oath being hereby waived: Mrs. Florence Lee Tate, The Marion National Bank and William T. Graham, administrators of the estate of James D. Tate, deceased, and Mrs. Florence Lee Tate in her own right.

2. That it may be adjudged, ordered and decreed that James D. Tate was a trustee, in an implied, resulting, constructive or express trust, for your complainants for the money received by him from the sale of said lands included in the residuary clause of the said Mitchell B. Tate will, together with 6% interest thereon from the time of the respective sales, all free of widow's dower.

3. That an accounting may be had to determine the exact amount to which your complainants may be entitled by reason of said trust.

4. That when an account be stated and approved page 11 } the said administrators pay over to your complainants the amount found to be due with interest.

5. That it may be adjudged, ordered and decreed that no federal or state inheritance taxes apply to said trust fund.

6. That such other further and general relief may be granted to your complainants as the nature of their cause may require or to equity may seem meet, and your complainants will ever pray.

W. H. WREN,
J. H. WREN,
B. T. WREN,
J. ROBERT WREN,
EDITH G. WHITNEY.

VERNON C. BARKER, p. q.

(For convenience, the will of M. B. Tate, the 1933 will of James D. Tate, and the abstracts of deeds, exhibited with original bill, are copied and exhibited with the exhibits to the amended bill.)

DEMURRER.

(Filed May 23, 1944.)

The defendants say that the bill of complaint is insufficient in law, and state the grounds of demurrer as follows, to-wit:

Mitchell B. Tate's will was probated in 1892. The youngest of complainants was 27 years of age in 1917, the beginning of World War I, which was approximately five years after the settlement in 1912 between James D. Tate, as executor of the will of Mitchell B. Tate, deceased, and the complainants; that any mistaken belief of any of the parties in the value of the

“Rye Valley property” at the time of the 1912 settlement became known not later than the year 1919; that any page 12 } supposed claim which the complainants had against said James D. Tate arising out of the sale of said “Rye Valley property”, or any other property, arose not less than a quarter of a century prior to the institution of this suit; that said complainants passively acquiesced in the alleged determination of said James D. Tate for approximately a quarter of a century not to share in any wise in the proceeds of sale of said “Rye Valley property” or any other property which was in the possession of the said James D. Tate as executor of the will of said Mitchell B. Tate, or otherwise, at the time of the said 1912 settlement; that said complainants negligently slept on any and all rights alleged by them to have arisen in their favor against said James D. Tate; that they were guilty of laches in not attempting, during his lifetime and for more than two years after the death of said James D. Tate, to establish said alleged rights and to enforce a settlement of any and all alleged claims against said James D. Tate.

C. E. HUNTER,
B. L. DICKINSON, p. d.

ANSWER.

(Filed May 23, 1944.)

The joint and separate answer of Florence Lee Tate and The Marion National Bank, William T. Graham and Florence Lee Tate, Administrators of the Estate of James D. Tate, deceased, to a bill of complaint exhibited against them in the Circuit Court of Smyth County, Virginia, by W. H. Wren and others.

These respondents reserving unto themselves the benefits of all just exceptions to said bill, for answer thereto or so much thereof as they are advised that it is material and proper that they should answer, answer and say:

page 13 } 1. It is true that James D. Tate departed this life December 21, 1941, leaving as his distributees and heirs at law the following: Florence Lee Tate, his widow, and the complainants, who are the children of Rosa C. Wren, deceased, a sister of said James D. Tate.

2. It is true that respondents The Marion National Bank,

William T. Graham and Florence Lee Tate qualified as administrators of the estate of James D. Tate, deceased.

3. It is true that a diligent search was made after the death of said James D. Tate for any will which he might have made, but none was found.

4. It is true that Mitchell B. Tate was the father of said James D. Tate and that the latter was the executor of the will of Mitchell B. Tate, deceased, which said will was probated in 1892, and that the copy filed with said bill, marked "Exhibit A" is a true copy of said will.

5. These respondents, however, deny that the large estate left by said James D. Tate had its origin in the estate of his father, but on the contrary allege and state that said Mitchell B. Tate was heavily indebted to numerous creditors at the time of his death, and that the net worth of his estate was of little value; that as late as January, 1892, said Mitchell B. Tate assigned to James D. Tate and John H. Shuff, Trustees, all of his personal property, of every kind and description for the payment of his debts, with the hope that it might not be sacrificed by execution sales thereof, and by power of attorney authorized said James D. Tate and John H. Shuff to sign his name to any check, draft, note, etc., either as principal or endorser, to make and execute contracts in his
 page 14 } name; to adjust and compromise claims and demands; to confess for him judgments upon any just debts and to defend suits, etc.: that after the death of said Mitchell B. Tate it developed that his personal property was wholly inadequate to discharge his indebtedness; that it was necessary, in an effort to salvage any part of said estate, for some one to advance large sums of money to pay off and discharge the large indebtedness incurred by the said Mitchell B. Tate during his lifetime; that said James D. Tate, with that end in view, made out of his private means numerous advances to the creditors of said estate of Mitchell B. Tate to satisfy their respective claims; that thereafter in the suit of W. A. Wren, Administrator, etc., v. James D. Tate, Executor, et al., instituted in the Circuit Court of Smyth County, Virginia, and in which all of said complainants were properly before the court, the said James D. Tate, by decree entered therein on the 30th day of April, 1904, recovered a judgment against said estate in the sum of \$34,924.61, with interest; that thereafter, on November 25, 1912, a written agreement was entered into between said complainants and said James D. Tate whereby said complainants agreed that the money derived from the sale of timber sold to Cole and Fry from the Mitchell B. Tate lands and also the money realized from a sale to J. T. Frazier

of a part of what was known as the "Byars or Baugh place" (which said sums were then held by the receiver in the suit of Amelia Tate, Guardian, etc., v. J. Harold Wren, et al.) should go to said James D. Tate in full settlement of any and all liability that rested on the lands of complainants for the indebtedness due to said James D. Tate per said decree of April 30, 1904, in said suit of W. A. Wren, Administrator etc. v. James D. Tate, Executor, et al., the consideration therefor being that said James D. Tate look solely to lands other than those devised by said Mitchell B. Tate to said Rosa page 15 } C. Wren and her descendants for the payment of his indebtedness against said estate of Mitchell B. Tate, deceased; that it was expressly stipulated and agreed that said complainants were to have no further interest in said debt or its payment and that by reason of said agreement said James D. Tate should become the sole owner of all other lands of which said Mitchell B. Tate died seized and possessed; and said written agreement fully provided that it was intended to be a release from said James D. Tate to complainants and from them to him. A copy of said agreement is herewith filed, marked "Exhibit 1" and made a part hereof.

6. These respondents are advised and doth allege and charge that said written agreement constituted the entire agreement between the parties thereto and that neither in law nor equity will said complainants be permitted, at this late date, to undertake to alter, modify or change said agreement by parol testimony tending to show any promise or understanding that the said James D. Tate was to devise or bequeath to them anything.

7. These respondents further allege and charge that complainants were *sui juris* at the time said agreement of November 25, 1912, was entered into; that neither they nor said James D. Tate could have known at that time anything concerning the future value of the "Rye Valley property" by reasons of war conditions occurring five or more years after said agreement was entered into; that said agreement was entered into in good faith by all parties thereto and performed in good faith by said James D. Tate.

8. These respondents deny that under the circumstances set forth in said bill, or otherwise, did said James page 16 } D. Tate become a mere trustee of the legal title to said "Rye Valley property" and that said complainants were vested with the beneficial interest therein; and your respondents further deny that "an implied, resulting or constructive trust", in favor of said complainants was created, as alleged in said bill.

9. These respondents further deny that the allegation in said bill, to-wit: "All the dealings of James D. Tate with your complainants concerning the property willed to them by their grandfather Mitchell B. Tate did violence to every principle of right, law and justice". On the contrary, however, these respondents allege and state that each and every duty owed to said complainants by said James D. Tate, in his own right and in his capacity as fiduciary, was faithfully, efficiently and fully performed and that the said estate of James D. Tate is not indebted to said complainants in any sum or sums whatsoever.

And now having fully answered the complainants' bill, these respondents pray to be hence dismissed with their reasonable costs by them in this behalf expended.

FLORENCE LEE TATE and
THE MARION NATIONAL BANK,
WILLIAM T. GRAHAM and
FLORENCE LEE TATE,

Administrators of the Estate of James D.
Tate, Deceased,

By Counsel

C. E. HUNTER,
B. L. DICKINSON, p. d.

EXHIBIT 1''.

IT IS AGREED between James D. Tate and B. T. Wren, W. H. Wren, J. H. Wren, J. R. Wren and Edith G. Wren, that the money said Tate received from the sale of some timber to Cole & Fry a few years ago, off the land
page 17 } willed to them by the late M. B. Tate, and also the money realized from the sale of a part of the Byars or Baugh place to J. T. Frazier in 1908 (which money was held by the Receiver in the Chancery cause of Amelia Tate, Guardian, etc. v. J. Harold Wren, et als., pending in the Circuit Court for Smyth County Virginia,) is to go to James D. Tate in full settlement of any and all liability that may rest on the Wrens land for a debt due the same James D. Tate by the estate of M. B. Tate, per decree of the Circuit Court for Smyth County, Virginia, entered April 30, 1904, or any other decree in said case. And James D. Tate accepts this money in full settlement as above stated, and agrees to re-

lease the lien created by said debt from the Wrens land whenever necessary for a sale of it or any part thereof. The Wrens have no further interest in said debt or its payment, but Tate is to look solely to the other lands of M. B. Tate's estate for the payment of the debt, and is not to be held accountable to the Wrens for its payment, Tate thus becoming the sole owner of all the other lands of which M. B. Tate died seized wherever located. This is intended to be a full and clear release, so far as this debt is concerned, from Tate to Wrens and from Wrens to Tate.

IT IS FURTHER AGREED between Tate and Wrens that if a sale of the whole or any part of the Wrens land that came to them through M. B. Tate's estate, or that was deeded to them by James D. Tate, in exchange, per deed of even date, is to be sold, then the Wrens agree to give Tate the refusal of said land at same price and terms that may be offered by others.

THE PARTIES hereto agree to execute such other papers as may be necessary to carry out the provisions of this agreement.

page 18 } Given under our hands and seals this the 25th day of November, 1912.

JAMES D. TATE	(Seal)	J. H. WREN	(Seal)
B. T. WREN	(Seal)	J. R. WREN	(Seal)
W. H. WREN	(Seal)	EDITH G. WREN	(Seal)

PLEA OF STATUTE OF LIMITATIONS.

(Filed June 10, 1944)

The plea of the defendants, Florence Lee Tate and The Marion National Bank, William T. Graham and Florence Lee Tate, Administrators of the Estate of James D. Tate, deceased, to a bill of complaint filed against them in this court by Wm. H. Wren, J. H. Wren, B. T. Wren, J. Robert Wren and Edith G. Whitney.

For plea to said bill, and to the whole and every part thereof, and to all and every the relief therein prayed; the said defendants say that neither the complainants' alleged grounds of relief, nor any claim in said bill asserted, arose within five years before the bringing of this suit.

Wherefore said defendants pray judgment whether they shall be compelled to make answer to said bill, and pray to

be hence dismissed with their reasonable costs in this behalf expended.

FLORENCE LEE TATE and
THE MARION NATIONAL BANK,
WILLIAM T. GRAHAM and
FLORENCE LEE TATE,
Administrators of the Estate of James D.
Tate, Deceased

By counsel

B. L. DICKINSON
C. E. HUNTER, p. d.

page 19 }

AMENDED BILL.

Filed Aug. 5, 1944.

But your complainants, for the purpose of: further showing the fiduciary relationship between James D. Tate, deceased, and complainants: reciting and exhibiting public records, and pertinent private records, supporting the allegations of the original bill; stating more definitely and fully the claims asserted in the original bill; making William Tate Graham and The Marion National Bank, a corporation, individual defendants to the bill; and making other incidental amendments; respectfully represent that:

I.

Complainants' father, W. H. Wren, and mother Rosa Tate Wren, were married at the home of her parents, M. B. and Amelia Gwyn Tate, near Chilhowie, Va., July 11, 1883. They resided at Lynchburg, Va., where said W. H. Wren was employed by Robinson, Tate & Co., a wholesale grocery firm, in which he became a partner January 1, 1884, and continued as such partner until December 24, 1891. To them were born five children: Beverly Tate Wren, Dec. 7, 1884; William H. Wren, Jr., June 12, 1886; James Harold Wren, Jan. 1, 1888; Joseph Robert Wren, Feb. 11, 1889; and Edith Gwyn Wren, Jan. 2, 1891. Rosa Tate Wren died June 17, 1891. William H. Wren died Nov. 5, 1894. At the death of their mother, complainants were taken to live with Mr. and Mrs. W. A. Heffernan, in Lynchburg, Va. Mrs. Heffernan was a sister of William H. Wren. In the fall of 1892 complainants were taken to the Tate farm near Chilhowie, Va., to live with their grandmother, Amelia Gwyn Tate, who, from that

day to the day of her death, Aug. 29, 1912, was a loving mother to them.

James D. Tate and Florence Lee were married in Lynchburg January 7, 1890, and lived with the Wrens until the death of Rosa Tate Wren. Their only child, a son, born June 9, 1891, died Sept. 21, 1892. They lived at
page 20 { Lynchburg until 1902, when they moved to their new home, "Terrace Hall", Chilhowie, Va. M. B. Tate, father of James D. Tate and Rosa Tate Wren, died near Chilhowie, August 2, 1892.

As and when complainants became old enough to understand such matters, they learned that M. B. Tate had devised 600 acres of his farm to them; that Amelia Tate was their legal guardian, and that James D. Tate, whom they affectionately called "Uncle Jim", was their real guardian, and managed all of their property affairs, as well as the dower of 1,000 acres and business affairs of Amelia Tate, in connection with the 800 acres of the farm which had been devised to him by M. B. Tate, all of which lands were managed and operated by him as a unit.

From the death of their father, throughout complainants' childhood and adult life, "Uncle Jim" was a father to them until the day of his death. He made frequent visits to the farm at Chilhowie during the ten years he lived in Lynchburg, from 1892 to 1902, to visit the family and to superintend the farming operations. Frequently on such visits he brought small presents to each of complainants. He played and hunted with them while on such visits, and after he moved to Chilhowie. He encouraged them in their school work, and taught them habits of economy and thrift. As they grew older he employed some of them in his businesses and associated some of them in business with him. They, successively, one at a time, as they grew older, lived at Terrace Hall with Uncle Jim and Aunt Florence, until they married, or left Chilhowie.

Their grandmother taught them by precept and example to respect and have confidence in the integrity and outstanding business and financial ability of their Uncle Jim, and

they also learned to do this, as they grew older,
page 21 { from their own observation. Her constant thought during the twenty years they lived with their grandmother, was for their future happiness and success, and she impressed upon them the importance of leaving their affairs to the good judgment and management of their Uncle Jim.

During the final illness of their grandmother, the absent Wrens returned home. On August 30, 1912, the day after

her burial, Uncle Jim called a meeting of the family, at which all of the Wrens and Aunt Florence were present. Edith, the youngest, had become of age January 2, 1912. Uncle Jim opened the meeting by saying in substance, "Now that Ma has passed on, and you are all here, I want to discuss your affairs with you." He then stated in general terms that he had settled all the debts against the M. B. Tate estate, and that in that connection the estate owed him about \$35,000; that some years before he had sold some timber off the Wren lands to Cole and Fry, and had also sold some of the Wren land lying north of the Saltville road to J. T. Frazier, and without explaining the extent of their liability or the provisions of the M. B. Tate will for their protection and benefit, stated that if agreeable all around, he would apply the money derived from these transactions on the \$35,000 estate debt due him, in full settlement of all liability against the Wren land for the debt. W. H. Wren asked whether, under the M. B. Tate will, the "Rye Valley property" was not to sold to pay the estate debts. Uncle Jim replied that the will did so provide, but that the Rye Valley property was of little value at the time. He referred at length to his broad experience in handling such matters; stated that he had always managed the Wren property successfully, and to their best interests; that it had been his mother's wish
page 22 } that he continue to do so, uninterruptedly; that if the Wrens wanted to go along with him and continue this plan of leaving the management of their property entirely in his hands, he would restore everything to them in due time. He said that under this arrangement, with full authority vested in him, he could always be depended upon to assist them financially in case of real need, but pointed with some emphasis to his oft-repeated warning that young folks should make their own way, and not be continually writing home for money that somebody else had saved and was keeping for them. B. T. Wren spoke up, agreeing with everything Uncle Jim had said, and suggesting that the management of the Wren property be continued in his hands in the future just as in the past. Without further discussion or question, all the Wrens joined in giving Uncle Jim full authority to continue to manage their property for them exactly as he saw fit.

Uncle Jim complimented the Wrens on the wisdom of their decision, repeating, as his understanding of the matter, that his authority was to continue unquestioned by them, and again assuring them that he would make everything right in the end. He stated that he might sell the balance of the Wren land north of the Saltville road to J. T. Frazier, and

to expedite this, would exchange some lands with the Wrens.

He stated that he would prepare papers for the Wrens to sign, and admonished them to promptly execute and return to him, any and all papers sent to them at any time for their signatures, stating that delays incidental to correspondence and so forth could not be tolerated. The meeting broke up in the friendliest spirit, everyone feeling that a good and mutually profitable arrangement had been made. Thereafter, James D. Tate did send to the Wrens, from page 23 } time to time, various papers to be executed and returned to him, including the several papers dated Nov. 25, 1912, and the deeds conveying their undivided interests in the balance of their lands.

The fiduciary relationship between James D. Tate and complainants which had existed prior to said meeting, and the later signing of said papers and deeds, and which it was agreed at said meeting should continue indefinitely, did continue throughout the life of James D. Tate. He and Aunt Florence visited the Wrens in their homes from time to time, and they visited Uncle Jim and Aunt Florence at Terrace Hall from time to time, until his death. He advised them about their business affairs, and consulted with Harold and Will Wren about his own affairs. Harold became a Certified Public Accountant early in life, and was called upon by Uncle Jim several times to help him with accounting and tax matters. Will Wren was consulted by Uncle Jim about his business affairs, and particularly about administrative and tax matters, the last seven years of his life. His correspondence on such matters ran into hundred of letters. Will Wren neither expected nor received compensation for such services.

Uncle Jim not only advised complainants about their business affairs, but to a limited extent he helped them with money, usually taking their notes therefor, some of which were repaid, and some of which were charged to them, or placed in his files to be charged to them, respectively, on final settlement. No settlement was ever suggested or asked for by either party, because complainants had such confidence in Uncle Jim that they knew he would make such settlement at what he thought was the proper time. They aver that he recognized his duty and obligation to them page 24 } by devising and bequeathing 70% of his estate to them by his 1933 and 1939 wills, hereinafter referred to. After his death, his will was not produced and probated by those responsible therefor.

Complainants therefore allege a breach of trust on or about the date of his death, Dec. 21, 1941, and since then they

have searched the records in the Clerk's Office in the Circuit Court of Smyth County, as well as other Clerks' offices in Virginia, and the books of Robinson, Tate & Co., so far as available, and from said records and other data, evidencing the facts and the trust, and the amounts due complainants arising out of same, except certain amounts shown by the books and files of James D. Tate, deceased, which his administrators have wrongfully refused to make available, and from the same, complainants show unto the Court the following:

II.

Complainants show unto the Court, by the exhibits filed herewith, the following statements of the transactions mentioned in and arising out of the paper dated Nov. 25, 1912, exhibited with defendants' answer to the original bill.

First, the dates and considerations for the Wren timber and lands sold by James D. Tate, viz:

II-A To Cole & Fry, timber, 1907-1909	\$ 6,737.50
Interest from average date, 11/10/08, 11/25/12	1,633.86
Total	<hr/> \$ 8,371.36
II-B To J. T. Frazier, Court sale of land (See receipt dated Nov. 25, 1912, in this suit file)	7,152.89
II-C To J. T. Frazier, second land sale, Wren exchange lands, 1/15/1913	9,232.12
page 25 } II-D To Allison & Craig, balance of Wren exchange land, 9/2/1915	\$ 600.00
Total	<hr/> \$25,356.39

II-E and F Abstracts of exchange deeds and M. B. Tate deeds.

Second, following the execution of the paper dated Nov. 25, 1912, said James D. Tate took five separate deeds from complainants, from time to time, four of which are recited below, and one exhibited herewith, for their respective one-fifth interests in the residue of the lands devised to them by the M. B. Tate will, including the lands conveyed to them by James D. Tate in the exchange deeds, for \$5 and other valuable considerations, viz:

B. T. Wren and Wife to James D. Tate, Dec. 16, 1912, DB 38, p. 129, acknowledged in Washington County, 3/17/13.

J. H. Wren to James D. Tate, Dec. 1, 1913, DB 38, p. 522, acknowledged in Smyth County.

W. H. Wren and Wife to James D. Tate, Aug. 28, 1914, DB 39, p. 369, acknowledged in Smyth County.

Edith G. Wren to James D. Tate, June 7, 1915, DB 40, p. 91, acknowledged in Cook County, Illinois, June 7, 1915.

II-G J. R. Wren to James D. Tate, June 7, 1915, DB 40, p. 92, Acknowledged June 14, 1915, Hennepin County, Minn.

Since the language of these five deeds is practically the same, a certified copy of the last one is exhibited.

Thereupon, on Sept. 2, 1915, James D. Tate sold the greater part of such last mentioned Wren lands, at a public sale, a statement of which sales and other copies and information from the account book in which James D. Tate kept his accounts as guardian of complainants, furnished by counsel for defendants, is filed with exhibits. These data show net proceeds of sale of each one-fifth interest of \$5,552.80, and value of unsold lands \$2,386.15. total, \$7,938.95 each page 26 } (II-H).

Defendants, by counsel, have refused to furnish data and vouchers from the files and records of James D. Tate, from which this part of the account between the respective complainants and James D. Tate can be correctly stated.

As to the interests conveyed to James D. Tate by said five deeds, Edith G. Whitney may have been paid in full, J. R. Wren has probably been settled with in full; J. H. Wren has received the greater part of the amount due him; and B. T. Wren and W. H. Wren have received substantial payments on the amounts due them.

III.

III-A The complainants show unto the Court that, by his will, dated Nov. 22, 1883, probated Sept. 19, 1892, M. B. Tate, who died August 2, 1892, after making certain devises and bequests to his wife, Amelia Tate, and to his son, James D. Tate, made the following devises and bequests to James D. Tate and Rosa C. Wren and her children, viz:

"I also devise & bequeath to my son, James D. Tate, all the rest and residue of my property, both real & personal, of every kind and description, which I may now have & own or which I may acquire after this time & prior to my death, including debts, due me, except the property hereinafter named which I devise & bequeath to my daughter Rosa C. Wren & her children, if she have any.

"Out of this rest & residue above mentioned I require my son James D. Tate to pay all my just debts & funeral expenses and, I require him also to pay out of the same One thousand dollars to my friend Daniel Trigg of Abingdon page 27 } and One thousand dollars to my friend James H. Gilmore, of Marion, which sums, I bequeath to them and if he has to sell any of this property to pay the debts & legacies above mentioned, I desire him to sell first what is known as my Rye Valley property, which is included in this rest and residue above mentioned. . . .

"I devise & bequeath to my daughter Rosa C. Wren during her lifetime the following real & personal estate, to-wit: the Baugh place, the Byars place, the Patterson place, & the Ward place, containing about six hundred acres, in Smyth County, my interest in the mercantile concern of Robinson Tate & Co., of Lynchburg, except the sum of Ten Thousand Dollars, heretofore bequeathed to my son James D. Tate & Five Thousand Dollars, heretofore bequeathed to my wife, Amelia Tate, and one-third of my interest in certain houses & lots owned jointly by myself & John W. Robinson in the City of Lynchburg, and if at her death she should have any children or the descendants of any children living then over to them, but if at her death there should be no children of her or any descendants of her children living, then the property above mentioned shall go to my son James D. Tate, if he be then living or to his children if he be dead, & leave children, but if he die without children living at his death, then to such persons as he may devise & bequeath the same to."

III-B. On January 11, 1892, said M. B. Tate, being ill and in declining health, anticipated the bequest of certain personal property in his will by making a deed of assignment page 28 } ment, for the benefit of his creditors, to James D. Tate and John H. Shuff, Trustees, transferring to them his personal property, viz: Notes, bonds, accounts, judgments, decrees, claims and demands for money; all the stock of M. B. Tate in every joint stock and incorporated company in which he has any interest; and all other personal property owned by M. B. Tate. A companion power of attorney was executed the same day between the same parties.

John H. Shuff acted as one of said Trustees until Aug. 30, 1892, M. B. Tate having died Aug. 2, 1892, his will being probated Sept. 19, 1892. James D. Tate acted as Trustee from Jan. 11, 1892, until his final settlement was filed Feb. 10, 1904. See settlements III-C.

III-D. An analysis of the settlements made by James D. Tate Trustee, shows net collections of \$64,177.84, net disbursements of \$82,806.26, excess of net disbursements over net receipts, \$18,628.42, in addition to which commissions were charged of \$1,664.28, interest of \$14,526.27, of which \$1,918.01 was compound interest.

The facts stated in Section IV hereof, reflected by the exhibits filed therewith, show that James D. Tate sold and conveyed, from time to time, residuary lands devised to him by the will of M. B. Tate, prior to his final settlement of Feb. 10, 1904, the proceeds of which are not included in the statements of receipts in his settlements (so far as now ascertained), in the sum of \$3,950.00.

His disbursements include payment of purchase money notes of \$4,000 and interest, a total of \$5,531.11, for the George W. Palmer residuary tract, which tract was not sold or accounted for by him.

page 29 } Complainants show unto the Court that said James D. Tate never filed an inventory and appraisalment, either as Trustee or Executor, and never made a settlement as Executor, or otherwise accounted for the lands devised to him by the residuary clause of the M. B. Tate will, which were expressly charged with the payment of the M. B. Tate debts, as it was his duty to do, and that he had no right to charge commissions or interest, without accounting for the proceeds of sales of such residuary lands.

Complainants show unto the Court that James D. Tate never gave them any information about the provisions of the M. B. Tate will for their protection or benefit, nor did they know of such provision until after his death, except the provision that the Rye Valley property was to be first sold to pay the debts of M. B. Tate.

Complainants show unto the Court that the purpose of the suit, III-E, of *W. A. Wrenn, Admr., etc. v. James D. Tate, Executor of M. B. Tate*, to collect a judgment of \$289.51 costs, filed to Second July Rules 1902, is not clear. According to the record in the case, said debt and the debt due to James D. Tate were the only debts then outstanding against the M. B. Tate estate. White & Buchanan were counsel for both complainant and defendant. The decree of Sept. 5, 1903, directed Commissioner Copenhaver, and "in taking said account, he may take as a basis the settlements made by James D. Tate as Trustee—but proof shall be required of parties asserting claims against said estate." No proof was taken before Commissioner Copenhaver. By decrees of April 30, 1904, J. R. Sexton, Commissioner, was directed to report "an account of what lands M. B. Tate died seized,

and the order in which said lands are liable for page 30 } the indebtedness herein reported, and the rental of such lands." Commissioner Sexton's report of Feb. 10, 1906, covered only the lands of M. B. Tate in Smyth and Washington Counties, and reported that the residuary lands in Smyth County were first liable for the payment of said debts, and that the lands next liable "are the specific devises to Mrs. Amelia Tate, J. D. Tate & Mrs. Rosa Wren & children—lying near Chilhowie in the Counties of Smyth and Washington", and that the rental value thereof was \$2,500 per year. No further proceedings were had in the suit except a decree of May 5, 1906, reviving it in the name of a new administrator, and a decree of Feb. 26, 1923, dismissing it as settled. The infant Wrens were made parties defendant, and their guardian *ad litem* filed a formal answer for them. It seems to have been an *ex parte* proceeding, without definite purpose or accomplishment.

Complainants further show unto the Court that James D. Tate took over and operated the dower tract of 1,000 acres devised to Amelia Tate by the will of M. B. Tate, and applied the profits therefrom to the payment of the debts of M. B. Tate until all such debts were paid, and thereafter invested and reinvested the profits arising from the operation of said dower tract in connection with his own funds until the death of Amelia Tate. She died, intestate, Aug. 29, 1912. No administrator was appointed or qualified to administer her estate, and James D. Tate never accounted for the rents or profits from her dower lands. The witnesses in the foregoing suit testified that the rental value of the entire 2,500 acre farm was \$2,500 per year, which would make the rental value of the dower tract \$1,000 per year, or \$20,000 for the 20 year term of the dower, without considering the profits therefrom. Complainants are advised and aver page 31 } that these facts are proper to be considered in connection with the establishment of the trust therein asserted.

IV.

Complainants show unto the Court, by abstracts and certified copies of deeds exhibited herewith that James D. Tate sold and conveyed lands devised to him by the residuary clause of the will of M. B. Tate, and which was charged by said residuary clause of said will with the payment of the debts of M. B. Tate, at the dates and for the considerations following, and that simple interest thereon from said respective dates to July 1, 1944, is as follows:

			Consideration	Interest
IV-A	To John D. Peery,	8/19/1918	\$100,000.00	\$155,200.00
IV-B	To A. E. Williams	4/15/1904	157.50	380.00
IV-C	To C. P. Williams	4/15/1904	142.50	343.80
IV-D	To W. A. G. Cale	11/13/1901	1,000.00	2,558.00
IV-E	To R. F. McCarter	9/15/1924	500.00	593.75
IV-F	To Dora Furnace Co, (Pulaski)	5/ 3/1894	850.00	2,558.20
IV-G	To J. C. Parrish (Lynchburg)	6/17/1905	200.00	468.45
IV-H	To H. V. H. Smith (Norfolk)	8/ 1/1893	600.00	1,833.00
IV-I	To A. E. & W. D. Murray	10/ 9/1893	1,300.00	3,956.00
IV-J	The Geo. W. Palmer 33-Acre Sulphur Spring, residuary tract, paid for by James D. Tate, Trustee, but not sold or accounted for, is included at cost		4,000.00	12,988.00
Totals			<u>\$108,750.00</u>	<u>\$180,879.20</u>

page 32 }

V.

M. B. Tate and John W. Robinson became interested together soon after the Civil War (and later associated others with them), in industrial enterprises, mainly in Southwest Virginia, and in Robinson Tate & Co., wholesale grocers, in Lynchburg. This firm rented business property until they purchased a lot 80 feet square on the corner of Commerce and 8th Streets, Lynchburg, Sept. 21, 1887, from S. C. Hurt and others (V-A), and erected a building on half of this lot in 1890, and moved into same, and built on the other half of the lot in 1900. The lot was purchased and the buildings erected with partnership funds.

On Dec. 24, 1891, W. H. Wren, who had been made a partner in the firm since Jan. 1, 1884, transferred his then nominal equitable interest in the partnership to M. B. Tate (V-B).

On Sept. 1, 1900, the partnership property, real and personal, was incorporated for \$35,000, represented by 350 shares of stock, par value \$100, of which 100 shares were issued in the name of James D. Tate, 135 in the name of John W. Robinson, 100 in the name of W. H. McLaughlin, and 15 shares in the names of employees of the company. Later the 15 shares of employees and 35 of the Robinson shares were retired and canceled, leaving outstanding 300 shares. In 1920 and 1921 stock dividends were declared and issued of 600 shares and 100 shares, or \$60,000 and \$10,000 respectively, to the then stockholders.

One of the steps taken to incorporate the partnership property, real and personal, was a deed dated Sept. 1, 1900, from John W. Robinson, W. H. McLaughlin and James D. Tate, "late partners as Robinson Tate and Company", and their wives, conveying said real estate on the corner of
page 33 } Commerce and 8th Streets, Lynchburg, to Robinson, Tate & Co., Inc. (V-C), for a recited consideration of \$18,000, "cash in hand", which consideration was not paid in cash, but was paid by the issuance of said stock in Robinson, Tate & Company, Inc. One of the recitals in said deed is as follows:

"And whereas the said M. B. Tate in his lifetime transferred his entire interest in the partnership of Robinson Tate & Company to the said James D. Tate, and by his last will and testament of record in the Clerk's Office in the County Court of Smyth County, devised to his son, the said 'James D. Tate all the rest and residue of' his 'property both real and personal, of every kind and description'; so that the entire legal

and equitable title to the real estate hereinafter mentioned is vested in the grantors in this Indenture."

Complainants deny that M. B. Tate during his lifetime transferred his interest in Robinson Tate & Company to James D. Tate, or that said interest or any part thereof was devised to James D. Tate by the residuary clause of the M. B. Tate will.

Complainants show unto the Court by certificates of Richard Gorman, Secretary-Treasurer of Robinson Tate & Co., Inc., from the books of said company, showing the ownership of the capital stock therein from time to time, the ordinary dividends paid to stockholders from 1900 to 1928, inclusive, and the liquidating dividends paid to stockholders from 1920 to 1943, inclusive, together with statements, based on such certificates, showing the ordinary and liquidating dividends paid to all stockholders, and to James D. Tate, from the original issue of 100 shares and the stock dividends on account thereof, exhibited herewith (V-D). Such exhibits show dividends paid to James D. Tate, with interest thereon

from the dates of said payments to July 1, 1944, page 34 } viz:

	Dividends	Interest
Ordinary dividends, 1900-1928 incl.	\$30,233.33	\$49,888.43
Liquidating dividends, 1929-1943 incl.	22,916.67	16,993.75
Totals	\$53,150.00	\$66,882.18

The Lynchburg Court Order appointing Amelia Tate guardian of complainants, included the condition, at her request, that she was to make no charge for board or maintenance for complainants while at her home (V-E). The M. B. Tate will and his deed of assignment are asked to be read in connection with the averments of this section.

The Account Book, hereinbefore referred to, shows that it was kept in the handwriting of James D. Tate, and that James D. Tate (who was the surety on the bonds of Amelia Tate, as guardian of complainants), was in fact their real guardian and managed their property affairs; that he collected \$8,000 life insurance from their father's policies on Feb. 1, 1895, and had the use of that money until they became of age, allowing them interest thereon, and crediting them with rent of \$300 per year for their farm (50c per acre), instead of the profits therefrom, and charged them with their maintenance, but not their board.

VI.

Upon the basis of the facts and records set out in the original bill and in this amended bill, and the exhibits filed, complainants are advised and aver:

1. That the effect of the deed of assignments made by M. B. Tate, Jan. 11, 1892, was to anticipate the provisions of the residuary clause of the will of M. B. Tate in respect to the personal property bequeathed by said residuary clause; that John H. Shuff, one of the trustees in said deed of assignment, did not act thereunder after Aug. 30, 1892, M. B. Tate having died Aug. 2, 1892; that James D. Tate, one of the trustees under said deed of assignment, qualified as Executor under the will of M. B. Tate on September 19, 1892; that, by the time James D. Tate qualified as executor of said estate, about two thirds of the personal property had been converted into cash, and about half of the debts of M. B. Tate paid; that because of the failing health of M. B. Tate, James D. Tate, soon after said deed of assignment was executed, assumed the direction and management of all the property and affairs of M. B. Tate; that among other things, James D. Tate in so assuming the direction and management of all the property and affairs of M. B. Tate, and for convenience in continuing the partnership interest of M. B. Tate in the firm of Robinson Tate & Co., and as Executor under the will of M. B. Tate, took over and continued the said interest in said partnership in his own name; that when said partnership business and property was incorporated Sept. 1, 1900, said James D. Tate assumed to make the recital in the deed conveying the real estate to the corporation to the effect that he had acquired the interest of M. B. Tate in the partnership by transfer from M. B. Tate during his lifetime and by the residuary clause of M. B. Tate's will, whereas the will of M. B. Tate, under which James D. Tate was Executor, expressly bequeathed and devised his interest in Robinson Tate & Co. to Rosa C. Wren, for life, and then to her children, complainants, and expressly excepted the same from the residuary clause of the will; that when the business and property of Robinson Tate & Co. was so incorporated, James D. Tate caused the 100 shares of stock representing the interest of M. B. Tate therein to be issued in the name of James D. Tate, and that thereafter said James D. Tate received ordinary and liquidating dividends thereon, from 1900 to 1943, set out in detail in exhibits, in the amount of \$53,150, and that the interest thereon from the

respective dates received to July 1, 1944, amounts to \$66,-882.18.

Complainants are advised and aver that by reason of the provision of the will of M. B. Tate, devising and bequeathing his interest in the firm of Robinson Tate & Co. to complainants, and by reason of the fact that James D. Tate was Executor under the said will, and by reason of the fact that James D. Tate was the real guardian in charge of all the property and business affairs of complainants from 1892 to 1912, and by reason of the express agreement made between James D. Tate and complainants on or about Aug. 30, 1912, said James D. Tate held said interest of M. B. Tate in the firm of Robinson Tate & Co. from the time he assumed the management thereof in 1892 until his death, as trustee for complainants, and that said James D. Tate received and held said dividends as trustee for complainants; or, if said James D. Tate rightfully, which complainants deny, took over said M. B. Tate interest in Robinson Tate & Co. under said deed of assignment, or under the residuary clause of the will of M. B. Tate, or under both, then said M. B. Tate interest in said Robinson Tate & Co. was charged with the payment of the debts of M. B. Tate, both by the deed of assignment and by the residuary clause of said will, and by reason of the fact, reflected by settlements, that said James D. Tate did not use and apply the same for the payment of said debts, but in lieu thereof used and applied the proceeds of the sales of the property of complainants for said purpose, a trust was thereby created for the benefit of complainants, and said

James D. Tate became and was the trustee thereof
page 37 } for the benefit of complainants, which trust continued after the agreement of Aug. 30, 1912, until the death of James D. Tate.

Complainants aver that as Executor under the will of M. B. Tate, it was the duty of James D. Tate to protect, preserve and account for said interest in Robinson Tate & Co. for the benefit of complainants, in pursuance of the express provisions of said will, and that he and his administrators have violated this duty.

2. Complainants are advised and aver that by reason of the fact that James D. Tate, without explaining to complainants at the meeting of Aug. 30, 1912, that under the will of M. B. Tate all of the residuary property, real and personal, was charged with the payment of the debts of M. B. Tate, and that if any of the real estate devised by said will to complainants was liable for said debts, the proportion of the debts for which complainants' land would be liable was nominal, because that, as stated in his answer in the case of W.

A. Wrenn, Admr., etc., v. James D. Tate, Executor, etc., he was "the principal devisee under his father's will of the real estate of which he died seized", and under the influence of their confidence in him, induced complainants to consent to the use by James D. Tate of large sums of money received, and about to be received, by him from sale of complainants' timber and lands in the total amount of \$25,356.39, which amount is greatly in excess of the net amount, exclusive of commissions and interest, which James D. Tate had paid to settle the debts of M. B. Tate, in excess of the proceeds of the personal property of M. B. Tate's estate.

Complainants are advised and aver that in the light of the provisions of the will of M. B. Tate, and the facts set out in the bill and amended bill and exhibits, there was page 38 } no consideration for the agreement of Nov. 25, 1912, executed pursuant to the verbal trust agreement of Aug. 30, 1912, as a release or receipt in full as asserted in the answer of defendants, but that said agreement evidences the trust agreed to between James D. Tate and complainants on Aug. 30, 1912; and that by reason thereof, and of the facts stated in the bill and amended bill and exhibits, all of the real estate devised to James D. Tate by the residuary clause of the M. B. Tate will, and the profits and increase therefrom, and interest on the funds arising therefrom became trust property and funds in the hands of James D. Tate for the benefit of complainants.

Complainants have exhibited deeds or abstracts of deeds showing the proceeds of sales by James D. Tate of residuary lands devised to him by the residuary clause of the M. B. Tate will, amounting, so far as complainants have ascertained to the date of filing this amended bill, to the sum of \$108,750, on which interest, from the respective dates of such sales to July 1, 1944, amounts to \$180,879.20.

3. Complainants are advised and aver that upon the breach of the trust relationship existing between James D. Tate and complainants at his death, it became and was the duty of his administrators to state and render to complainants a fair and full account covering all the trust matters set out in the bill and amended bill, but said administrators, in total disregard of their duty in the premises, have not done so, but have refused to make available to complainants, or their counsel, the data, files and records of James D. Tate, in the possession of said administrators, to better enable complainants to state the trust account between James D. Tate and complainants, hence complainants have secured the facts from the records and sources herein stated.

page 39 } Complainants further aver that it was also the duty of said administrators to pay to complainants said trust funds, principal, profits and interest thereon, in full, before distributing any of the assets of the estate of James D. Tate to Florence Lee Tate, or to others by her direction, and because of their breach of this duty, with notice thereof as set out in the original bill and in this amended bill, the defendants are liable to complainants, both as administrators and personally and individually.

4. Complainants are advised and aver that while they have shown definitely the dates and amounts of all proceeds from sales of the residuary lands, so far as ascertained by them, as well as the dates and amounts of all dividends received by James D. Tate from the M. B. Tate interest in Robinson Tate & Company, Inc., complainants further show that upon the receipt of said funds, from time to time, said James D. Tate mixed and mingled the same with his own funds, and invested and reinvested the same with his own funds, until his death, hence complainants aver that they have the right to recover the amounts of said funds, with interest thereon, from the estate of James D. Tate, and the administrators of said estate, both as administrators and personally and individually.

5. Complainants show unto the Court that the statement quoted from the original bill in Clause 9 of Defendant's answer is unfair and misleading, in that it is only a part of an entire statement in Clause 12 of the original bill, and unless it is to be so considered and treated, complainants move the Court to strike the same from said answer.

VII.

1. Complainants have already shown unto the page 40 } Court that Florence Lee Tate was present at the meeting of August 30, 1912, at which complainants agreed with James D. Tate that he should continue to manage their property, and complainants further show that Florence Lee Tate, William Tate Graham and The Marion National Bank, both as administrators of the estate of James D. Tate, and individually, knew that James D. Tate had executed his will of November, 1933, with employees of said bank as the witnesses thereto, and they knew from the provisions of said will that James D. Tate recognized his said duty and obligations to complainants; they also knew that for some months prior to May, 1939, James D. Tate consulted and advised with his attorney, B. L. Dickenson, preparatory to executing the will of May, 1939, as a holograph

will, and that after such conferences with said attorney, at which the form and substance of said will of May, 1939, was approved, said will was written on the typewriter by B. L. Dickenson, and delivered to said James D. Tate to be copied and written and signed by him as his holograph will; they knew what James D. Tate had told William A. Wolfe, Cashier of The Marion National Bank, about said will; they knew that James D. Tate had told Fred C. Buck, one of the executors of said 1939 will, in May, 1939, and again in October, 1941, shortly before he started on the trip on which he died at Savannah, that he had executed said will and of the important provisions thereof, and that it would be found in his lock box in said The Marion National Bank; they knew that shortly before he died in Savannah he told said Florence Lee Tate that his will was in his lock box in The Marion National Bank; said bank knew before, and said Florence Lee Tate and William Tate Graham knew shortly after his death, that in October just before leaving on the trip on which he died, that James D. Tate en-

page 41 } trusted the key to his lock box in The Marion National Bank to William A. Wolfe, the Cashier and chief executive officer of said bank, which key continued in the possession of said Cashier from that time until after the death of James D. Tate, and until after defendants were appointed and qualified as administrators of his estate (VII-A). They knew that under the provisions of said wills the trust existing between James D. Tate and complainants was continued for 21 years by the 1933 will, and for 5 years by the 1939 will, after the deaths of James D. Tate and Florence Lee Tate.

Complainants show unto the Court that said B. L. Dickenson, the attorney who had prepared both of said wills for James D. Tate, and regular attorney for said bank, delivered his file carbon copies of both of said wills to said defendants shortly after the death of James D. Tate, and before defendants qualified as administrators of said estate on Jan. 9, 1942.

Complainants further show unto the Court that the public records from which complainants have ascertained the record facts set out in the bill, amended bill and exhibits, as well as the Robinson Tate & Co., records, from which complainants have likewise secured the facts reflected in the amended bill and exhibits since the death of James D. Tate, have been open and available to the administrators of James D. Tate, in addition to the private files and records of James D. Tate, from all of which said administrators could and should have ascertained the facts relating to the trust as-

serted by complainants before distributing any of the assets of James D. Tate's estate—all of which were sufficient to put said administrators on notice not to dis-
page 42 } tribute any of such assets until the rights of complainants were duly determined.

2. Complainants show unto the Court that after the death of James D. Tate, and before and since the qualification of defendants as administrators of his estate, defendants have not only not produced and probated the will of James D. Tate, but they have obstructed the efforts of complainants to do so, and complainants have made diligent, but unsuccessful efforts to find said will.

Some weeks after the death of James D. Tate, and after many promises to do so, defendants delivered to complainants photostatic copies of said 1933 and 1939 wills, made from said file carbon copies thereof, which had been delivered to defendants by said B. L. Dickenson, from which photostatic copies the copy of said 1933 will exhibited with the original bill, and the copy of said 1939 will exhibited herewith, have been correctly made, and are exhibited herewith for the purpose of showing that said defendants had notice thereby that James D. Tate recognized his fiduciary obligations to complainants.

3. Complainants exhibit to the Court the inventory and appraisalment of the estate of James D. Tate, deceased, reported to the Court by said administrators, showing total assets of \$538,712.89, together with a statement of adjustments thereof, furnished by defendants, showing additions to the gross estate of \$123,475.61, making a total of \$662,188.50.

Complainants also exhibit settlements of said administrators for the years 1942 and 1943, from which it appears that they have attempted to make large distributions of the assets to Florence Lee Tate, and there is also exhibited
page 43 } copies of receipts from Florence Lee Tate covering the attempted distribution and dissipation of three valuable assets of the estate, viz: 100 shares of stock of Chilhowie Motor Co., Inc., 253 shares of stock of Chilhowie Milling Co., Inc., and 50 shares of stock of States Motor Co., a corporation. Complainants aver, upon information and belief, that large amounts of other funds and assets so attempted to be distributed to said Florence Lee Tate have been dissipated.

This amendment made by order of Court, Sept. 15, 1944.

(Sept. 15, 1944. On p. 41 at the end of the first two paragraphs of sub-section 5 of sec. VII of the amended bill and as a part thereof):

Complainants show unto the Court and aver that the provisions of chapter 221 of the Code have not been complied with by the Commissioner of Accounts or by said administrators and that the so-called settlements of said administrators for the years 1942 and 1943 are of no effect so far as complainants are concerned. Among other provisions of said chapter not complied with, the Commissioner of Accounts neglected and failed to post said accounts of said administrators on the lists of fiduciaries whose accounts were before him for settlement as provided by sec. 5423 of the Code and said administrators did not in any manner comply with the provisions of sections 5434, 5437, 5438, and 5439, as well as of other sections of said chapter. Hence said pretended settlements and distributions thereunder are of no effect. Said 1943 settlement has not been approved by the Court.

Complainants aver that said administrators improperly and erroneously included said trust property and funds in the assets of the estate of James D. Tate, deceased, in the estate and inheritance tax returns filed with the State and

Federal governments, and improperly and erroneously paid taxes thereon in the sum of approximately \$110,000.00. Refunds of the amounts of taxes so erroneously paid can be secured by said administrators by filing claims therefor within the time provided by law.

Said defendants are called upon and required to file with their answer a statement showing where, and in what amounts and descriptions, and in whose possession, and under whose control, all the assets of said estate are now.

4. Complainants further show unto the Court that the Marion National Bank, with notice of the foregoing facts has allowed said William A. Wolfe, Cashier and chief executive officer of said bank, and Frank Copenhaver, a director of said bank, to participate in a trade relative to the farm listed as one of the assets of the estate in said inventory and appraisal of said estate, from which each of them received a profit of approximately \$2,500, which action of said Wolfe and Copenhaver have been condoned by said bank, with notice of the facts, which are as follows:

On Sept. 10, 1942, said Florence Lee Tate gave J. E. Thomas, of Marion, Va., a renewable lease for one year at \$100 per month on the 1,600 acre Tate farm, with an option to purchase her life dower rights therein for \$10,000. Thereupon J. E. Thomas negotiated with complainants for the purchase of the remainder interest in said farm. Complain-

ants refused to sell. Thomas thereupon negotiated a sale of said dower interest in the farm to complainants for \$15,500.00, which sale was concluded by Thomas taking a deed therefor from Florence Lee Tate, dated Oct. 30, 1942, on which \$11 Federal stamps were affixed, and conveying the same to complainants by deed dated Oct. 30, 1942. Some months after-

wards, it was learned that said William A. Wolfe
page 45 } and Frank Copenhaver had been secretly interested with Thomas in the option to purchase the dower interest, on the basis of one-third each, and that when the sale was made by Thomas to complainants, after complainants had deposited \$2,500 cash to bind the trade, Florence Lee Tate was induced to reduce the price to Thomas from \$10,000 to \$7,500, leaving a profit on the sale of \$8,000 of which Thomas paid \$500 to his real estate agent who negotiated the trade with complainants, and the net profit of \$7,500, less some nominal incidental expenses, was divided equally between Thomas, Wolfe and Copenhaver. The payments to Wolfe and Copenhaver by Thomas were made by checks. Neither Florence Lee Tate nor complainants had any knowledge or information that Wolfe and Copenhaver were secretly interested in the deal, until some months later.

5. Wherefore, complainants are advised and aver that The Marion National Bank and William Tate Graham (as well as Florence Lee Tate), are individually liable to them for any recovery herein, and they are made defendants by this amended bill.

VIII.

Complainants aver, upon information and belief, that James D. Tate owned, at the time of his death, negotiable securities and cash amounting to a large sum, to-wit, probably in excess of \$100,000, which have not been discovered and included in the inventory and appraisal and settlements so far made by the administrators of his estate;

And if it shall become necessary to discover and administer the same in order to satisfy any recovery granted to complainants herein, they will ask that such proper decrees be entered and action taken herein as will enable
page 46 } such a discovery to be made.

IX.

1. Wherefore, your complainants pray that said Florence Lee Tate, William Tate Graham and The Marion National Bank, a corporation, administrators of the estate of James D. Tate, deceased, and Florence Lee Tate, William Tate Graham and The Marion National Bank, a corporation, in-

dividually, may be made defendants to this amended bill; that process be executed as to William Tate Graham and The Marion National Bank, a corporation, individually, they being made new parties in their individual capacity by this amended bill; that Florence Lee Tate, William Tate Graham and The Marion National Bank, a corporation, and Florence Lee Tate, individually, be required to answer this amended bill, and all the allegations thereof, but not under oath, answer under oath being waived; that said William Tate Graham and The Marion National Bank, a corporation, in their individual capacity, be required to answer both the original bill filed in this cause and this amended bill, but not under oath, answer under oath being waived;

2. That all proper references be ordered and directed, and accounts taken and stated;

3. That the trust asserted by complainants in the proceeds of the sales of the residuary lands devised by the will of M. B. Tate to James D. Tate, and charged with the payment of the debts of M. B. Tate, together with the profits arising therefrom and interest thereon, and in the dividends received by James D. Tate from Robinson Tate & Co., Inc., with interest thereon, be declared, established and decreed as trust funds in the hands of James D. Tate, deceased,

page 47 } and of his administrators, for the benefit of complainants, and that complainants be allowed a recovery therefor in the amount of \$108,750.00, proceeds of the sales of said residuary lands, and interest thereon, which interest to July 1, 1944, amounted to \$180,879.20, together with interest on said principal amount until paid, and in the amount of \$53,150 ordinary and liquidating dividends received by James D. Tate from Robinson Tate & Co., Inc., and \$66,882.18, interest thereon to July 1, 1944, together with interest on said principal amount until paid; or in such other amounts as the Court may deem proper;

4. That if it shall be determined herein that complainants are not entitled to the specific relief on amounts set out, then, in that event, that they may be allowed to recover from defendants such sum or sums as may be deemed proper by the Court, and interest thereon.

5. That the Court decree that the trust asserted herein arose and became effective prior to Nov. 26, 1912.

6. That, if it shall become necessary or proper in order to satisfy any recovery herein in favor of complainants, to discover and administer any assets of the estate of James D. Tate not so far discovered or administered, that such action may be taken and decrees entered as may be proper to discover and administer such assets.

7. And that your complainants may have all such further and other and general relief in the premises as the nature of their case may require, or to equity shall seem meet.

W. H. WREN
J. H. WREN
B. T. WREN
J. ROBERT WREN
EDITH G. WHITNEY

VERNON C. BARKER
HENRY ROBERTS, p. q.

page 48 } COMPLAINANTS' EXHIBITS.

Where it has seemed sufficient to recite or abstract deeds, or other documents, without exhibiting copies thereof, this has been done in the Amended Bill, and in the abstracts exhibited and bound with the Amended Bill.

Certified and other complete exhibits to the Bill and Amended Bill are filed and indexed under separate cover. These also have been abstracted at the proper places in the abstract exhibits.

The abstract exhibits are bound with the Amended Bill, pages 47-56, and indexed therewith.

The abstract exhibits have been carefully checked, but if any errors have been made, which cannot be corrected at Bar, or if any question should be raised about the sufficiency of any of the abstract exhibits, certified copies thereof will be filed.

EXHIBITS FILED WITH SECTION II. OF AMENDED BILL.

II-A. (Affidavit of S. A. Cole). This affidavit states that James D. Tate sold to Cole & Frye \$6,737.50 worth of timber from the Wren lands, between 1907 and 1909, giving date and amounts of each check, on which interest calculated from average date of Nov. 10, 1908, amounts to \$1,633.86, total to 11/25/12—\$8,371.36.

II-B. (Certified copy of suit, Amelia Tate, Guardian v. J. Harold Wren, et al.) Bill filed 1st February Rules 1908 to sell to J. T. Frazier a tract of Wren land north of Saltville Road, 80 acres 3 roods and 20 poles, for \$5,651.25, which less costs and fee, with interest to Nov. 25, 1912, amounted to \$7,152.89, for which amount James D. Tate, Receiver, filed receipt of the Wrens, dated Nov. 25, 1912. The Receiver's report of Nov. 15, 1912, states that "all of the Wren chil-

dren to whom the money is to be paid are now over 21 years of age, the youngest, Edith G., having attained her majority in January, 1912, and they are anxious to have their money paid over to them, and your Receiver is ready to
 page 49 } pay it, and requests that he be given permission to pay the same over to said parties." The Receiver's report of March 1, 1913, states that "this money was promptly paid over to the above mentioned parties on Nov. 25, 1912, and their receipt for same is attached hereto."

II-C. By deed dated Jan. 15, 1913, DB 38, p. 200, James D. Tate and wife conveyed the Wren exchange tract of 92 acres, 1 rood and 13 poles to J. T. Frazier for \$9,232.12. Acknowledged Feb. 27, 1913.

II-D. By deed dated Sept. 2, 1915, DB 42, p. 13, James D. Tate and wife conveyed the second Wren exchange tract of $6\frac{1}{2}$ acres, 10 poles, to B. C. Allison and R. T. Craig, included in 2 tracts, containing 169.84 acres for \$15,285.00 or an average of \$90 per acre, or \$600 for this Wren tract.

II-E. (Exchange of lands). By deed dated Nov. 25, 1912, recorded Jan. 1, 1913, DB 38, p. 103, the Wrens conveyed to James D. Tate, for \$5 and four parcels of land in exchange, (1) a tract of 92 acres, 1 rood, 13 poles, being all of the Byars or Baugh tract lying west of the William Franklin road, of which M. B. Tate died seized, and (2) a tract containing $6\frac{1}{2}$ acres, 10 poles, part of the Patterson place of which M. B. Tate died seized. Both tracts being a part of the lands devised to the Wrens by the will of M. B. Tate.

Acknowledged by W. H. Wren and wife and Edith Wren at Chilhowie, Dec. 7, 1912; by B. T. Wren and wife, Abingdon, Dec. 3, 1912; by J. R. Wren, Marion County, Indiana, Dec. 9, 1912; by J. Harold Wren, District of Columbia, Dec. 13, 1912.

By deed dated Nov. 25, 1912, acknowledged Dec. page 50 } 6, 1912, DB 38, p. 101, James D. Tate and wife conveyed to the Wrens for \$5 and in exchange for two tracts aggregating 98 acres, 3 roods and 23 poles, four tracts, viz: (1) 39 acres, 3 roods and 3 poles, (2) 36 acres, 2 roods, $9\frac{1}{2}$ poles, (3) $\frac{1}{2}$ acre, old Liberty Academy lot. (4) Sulphur Springs Church lot. "The said James D. Tate derives title to tracts Nos. 1, 2 and 3, conveyed in this deed, under the residuary clause of the Last Will and Testament of the late M. B. Tate."

The deed recites that tract (1) was conveyed to M. B. Tate by A. H. Tate and wife, Dec. 20, 1887, DB 17, p. 443; that Tract (2) was conveyed to M. B. Tate by John L. Sanders and wife, Dec. 14, 1886, DB 17, p. 449; that Tract (3) was

conveyed to M. B. Tate by John L. Sanders and wife, Nov. 25, 1887, DB 18, p. 436.

II-F. By deed dated Dec. 20, 1887, DB 17, p. 443, A. H. Tate and wife conveyed to M. B. Tate for \$1,200 a tract of 40 acres, 1 rood, 5 poles, on west side of Saltville road. The above mentioned tract of 39 acres, 3 roods and 3 poles is a part of this tract.

By deed dated Dec. 14, 1886, DB 17, p. 449, John L. Sanders and wife conveyed to M. B. Tate, for \$1,855.54, a tract of 41 acres, 37½ poles, on both sides of the Chilhowie-Sulphur Springs Branch. This tract embraces the above mentioned tract.

By deed dated Nov. 23, 1887, DB 18, p. 436, John L. Sanders and wife conveyed to M. B. Tate, for \$100 and exchange of land, the ½ acre old Liberty Academy lot.

II-G. (Certified copy) Deed dated June 7, 1915, DB 40, p. 92, acknowledged June 14, 1915, in Hennepin County, Minn., J. R. Wren conveyed to James D. Tate, for \$5, his one-fifth undivided interest in the residue of the lands devised to the Wrens by the M. B. Tate will, including his one-fifth interest in the lands conveyed to the Wrens, in exchange, by James D. Tate.

II-H. (Statements and data) from account book of James D. Tate, relating to the respective one-fifth interest conveyed by the respective Wrens to James D. Tate, showing, on the statement of J. R. Wren, net proceeds of these lands sold, \$5,552.80, and in the account of Edith G. Wren "value of land unsold \$2,386.15", and on August 24, 1916, a 3 year note to W. H. Wren for \$3,000, and on Dec. 16, 1912, a credit to B. T. Wren of \$737.28, "being a part of the consideration for his one-fifth interest in lands of M. B. Tate's estate", and the one-fifth of exchange lands.

EXHIBITS FILED WITH SECTION III OF AMENDED BILL.

III-A. (Certified copy) M. B. Tate will, dated Nov. 22, 1883, probated Sept. 17, 1892, part of suit file of W. A. Wrenn, Admr. v. James D. Tate, Executor, III-E.

III-B. (Certified copy) Deed of assignment, Jan. 11, 1892, DB 20, p. 346, M. B. Tate to James D. Tate and John H. Shuff, Trustees, conveying personal property for benefit of creditors, part of file in above suit.

III-C. (Certified copies), three settlements of James D. Tate, Trustee, 1892 to Feb. 10, 1904, part of file in above suit.

page 52 { III-D *Analysis of James D. Tate, Trustee Settlements*

Year	Receipts	Disbursements	Excess of Receipts	Excess of Disbursements
1892 Tate	\$11,386.75	\$20,260.89		
1892 Shuff	31,861.22	32,012.82		\$9,025.74
1893 Tate	10,854.47	10,167.21	\$ 687.26	
1894	2,847.10	12,339.87		9,492.77
1895	1,149.99	3,132.94		1,982.95
1896	2,254.42	930.06	1,324.36	
1892-7	254.45 (2)	4,756.84 (2)		4,502.39
1897	305.92	3,104.04 (1)		2,898.76 (1)
1897		2,856.66		2,856.66
1898		1,239.33		1,239.33
1899		545.00		545.00
1900		2,387.27		2,387.27
1898-1901	8,285.61		8,285.61	
1901		414.28 (3)		414.28
1901		6,011.50 (2)		6,011.50
1904	187.25	3,757.93 (2)		3,570.68
1904		289.51		289.51
	<hr/> 69,387.18	<hr/> 104,206.15	<hr/> 10,297.23	<hr/> 45,216.84
Deduct	5,209.34 (4)	5,209.34 (4)		10,297.23
	<hr/> 64,177.84	<hr/> 98,996.81		<hr/> 34,919.61
Deduct		64,177.84		100.64 (5)
		<hr/> \$ 34,818.97		<hr/> \$34,818.97

W. H. Wren, et als., v. Florence Lee Tate, et als.

(1) Error in subtraction of \$100.64 here deducted at (5). Error of \$5.00 in carrying forward 1901 settlement, with above error of \$100.64, deducted from the settlement balance of \$34,924.61, leaves the balance of \$34,818.97 above.

(2) All of these items are interest. The interest disbursed amounts to \$14,526.27, and includes \$1,080.57, compound interest on the item of \$4,502.39 for 4 years; and \$837.45 compound interest on the \$4,502.39, plus the \$1,080.57, total \$5,582.96 for 2½ years, or \$837.44, total of compound interest \$1,918.01.

(1) The \$3,104.04 includes commissions of \$1,250 and the item (3), \$418.28 is commissions, total commissions \$1,664.28.

(4) This item is the total of temporary notes, and interest thereon, made and paid by the Trustees.

For further analysis of these settlements, see Sec. III-D of the amended bill.

page 53 } *Analysis of Receipts of James D. Tate, Trustee, Settlements:*

1. From M. B. Tate, Notes, Accounts, Judgments, Claims, and other debts and demands	\$11,334.08
2. From sales of M. B. Tate stocks, and liquidating dividends from stocks in joint stock and incorporated companies	44,181.22
3. From all other personal property of M. B. Tate, mainly live stock, products of farm, implements, etc.	7,180.21

(Note: No young cattle or hogs appear to have been accounted for.)

4. Interest credited by Trustee	254.45
5. Residuary lands sold and accounted for:	
Lynchburg house and lot	\$700.00
40 Acres Wythe County land to R. K. Shores,	527.88
(Feb. 17, 1893, DB 40, p. 573)	1,227.88
Total Net Receipts	\$64,177.84
Notes discounted and repaid and interest	5,209.34
Receipts, including notes discounted	\$69,387.18

Some Disbursements in James D. Tate, Trustee Settlements.

1892	1-15	Paid Robinson Tate & Co., Proceeds Shuff note	\$ 2,430.00
1892	7-29	Paid Robinson Tate & Co.	500.00
	12-1	Paid Robinson Tate & Co.	854.50
1893	12-15	Paid Robinson Tate & Co. a/c	613.70
Total			\$4,398.20

1892	3-9	Paid J. W. Robinson note and interest	6,286.57
1892-7		Paid Geo. W. Palmer for 33 acre residuary tract 3 notes \$1,333.33 each, \$4,000, and interest, vendor's lien in deed to M. B. Tate, 5-19-1890, DB 19, p. 363	5,531.11
1892		Paid Pulaski Land Co., presumably for 2 lots conveyed to M. B. Tate, and sold by James D. Tate to Dora Furnace Co., 5-3-1894, DB 16, p. 169 for \$850, the several payments amounting to	1,783.36

page 54 } EXHIBITS FILED WITH SECTION IV OF
AMENDED BILL.

IV-A. By deed dated August 19, 1918, DB 43, p. 150, James D. Tate and wife conveyed the "Rye Valley" property of 1,450 acres to John D. Peery, for \$100,000. This deed also conveyed the surface of 128-15/160th acres owned by James D. Tate.

By deed dated July 1, 1931, DB 64, p. 230, H. G. McCall, Trustee, conveyed to H. P. Brittain and R. O. Crockett the surface of the 1,450 acre Rye Valley tract, the 128-15/160th acres surface tract, and the surface of two other small tracts, for \$1,000.

By deed dated Jan. 2, 1893, DB 21, p. 510, A. G. Pendleton, Commissioner—M. B. Tate having paid the consideration of \$2,310, and having died before the deed was made—to James D. Tate, the Rye Valley property of 1,450 acres. Certified copy filed.

IV-B. By deed dated April 15, 1904, DB 31, p. 253, James D. Tate and wife conveyed to A. E. Williams, for \$157.50, 63 acres in Rye Valley.

M. B. Tate acquired this 63 acre tract from J. H. Gollehon, Special Commissioner, by deed dated June 23, 1890, DB 19,

p. 361. This deed conveys a number of tracts and a certified copy is filed. The consideration is not stated in the deed, and the Court file seems to be lost.

IV-C. By deed dated April 15, 1904, DB 31, p. 254, James D. Tate and wife conveyed to C. P. Williams, for \$142.50, one half of a tract of 50 acres in Rye Valley, which was conveyed to M. B. Tate by J. H. Gollehon, Special Commissioner, by the above deed of July 23, 1890, DB 19, p. 361.

page 55 } IV-D. By deed dated Nov. 13, 1901, DB 28, p. 487, James D. Tate and wife conveyed to W. A. S. Cale, for \$1,000, a tract of 300 acres on the west fork of Staley's Creek south of Marion. Mineral rights reserved.

This tract of 300 acres, apparently in fee, was conveyed by deed dated April 10, 1885, DB 16, p. 401, by A. G. Pendleton, Commissioner, to M. B. Tate, in the suit of *V. S. Williams v. George W. Henderlite*.

IV-E. By deed dated Sept. 15, 1924, DB 54, p. 427, James D. Tate and wife conveyed to R. F. McCarter, for \$500, the 63 acre tract in Rye Valley.

This is the same tract which James D. Tate and wife conveyed to A. E. Williams under IV-B above. It was reacquired by James D. Tate by deed dated Feb. 1, 1909, DB 34, p. 587 from A. E. Williams and wife, in exchange for the surface of a 60 acre tract on Comer's Creek adjoining Sheets and Barton.

The exchange made by James D. Tate and wife to A. E. Williams was dated Feb. 1, 1909, DB 34, p. 543, and conveyed the surface on 60 acres on Comer's Creek adjoining Sheets and Barton, being a part of the land conveyed to M. B. Tate by J. H. Gollehon, Special Commissioner, June 23, 1890, DB, 19, p. 361.

IV-F. By deed dated May 3, 1894, DB 16, p. 169, James D. Tate and wife conveyed to Dora Furnace Co., a corporation, in consideration of \$850 cash, "two certain lots in East Pulaski, being the same two lots deeded to M. B. Tate by the Pulaski Development Co., by deeds bearing date of May 6, 1890."

IV-G. By deed dated June 17, 1905, James D. Tate and wife conveyed to J. C. Parrish, consideration \$200, page 56 } a lot at Buchanan and 16th Streets, Lynchburg, DB 72, p. 183, which was conveyed to M. B. Tate by W. H. Wren December 21, 1891, DB UU, p. 183.

IV-H. By deed dated August 1, 1893, DB 109, p. 428, James D. Tate and wife conveyed, for \$600, lot 18 in the Atlantic City Ward of Norfolk. (See further under IV-I) to H. V. H. Smith.

IV-I. By deed dated Oct. 9, 1893, DB 110, p. 372, James D. Tate and wife conveyed to A. E. and W. D. Murray, for \$1,300, lots 11 and 12 in the Atlantic City Ward of Norfolk.

By deed dated Nov. 14, 1890, DB 94, p. 287, Atlantic City Improvement Company conveyed to M. B. Tate 8 lots in the Atlantic City Ward of Norfolk, Nos. 11, 12, 13, 14, 15, 16, 17 and 18, for \$3,915 cash. On the same date, M. B. Tate gave a deed of trust to G. Hatton, Trustee, on the 8 lots, to secure two notes of \$1,305 each, payable 6 months and 12 months. Lien released on margin DB 94, p. 389, Nov. 22, 1893.

On Jan. 15, 1892, DB 99, p. 115, M. B. Tate and wife executed a deed of trust on said 8 lots to E. M. Baum, Trustee, to secure Merchants and Mechanics Savings Bank of Norfolk, a note of M. B. Tate dated Dec. 9, 1891, for \$3,000, payable to Robinson Tate & Co., and endorsed by it, four months after date.

By deed dated Aug. 1, 1894, DB 112-D, p. 566, E. M. Baum, Trustee, conveyed to Merchants & Mechanics Savings Bank of Norfolk, for \$2,400, the five remaining lots, Nos. 13, 14, 15, 16 and 17. This foreclosure deed recites the deed of trust securing the \$3,000 note, and that "the said M. B. page 57 } Tate failed to pay the said note or curtail and renew the same" and that the trustee was directed to make the sale etc., Certified copy of this deed is filed.

The James D. Tate, Trustee, settlements show payment on note and interest at Norfolk, the last such payments being April 21, 1894, "interest on Norfolk note, \$59.24". No payments appear to have been made on the note after the foreclosures, although the Merchants & Mechanics Savings Bank and E. M. Baum, Trustee, executed a release deed Nov. 16, 1893, release, DB 6, p. 541, as to Lots 11 and 12, sold to Murray and a similar release Nov. 21, 1893, release DB 6, p. 43, as to Lot 18, sold to Smith.

IV-J. By deed dated May 19, 1890, DB 19, p. 363, George W. Palmer and wife conveyed to M. B. Tate the 33-acre Sulphur Spring tract, consideration \$4,000, represented by three notes in equal amounts, due in one, two and three years, secured by vendor's lien, which lien was released on the margin of the deed book, Dec. 13, 1906.

This residuary tract was not sold or accounted for by James D. Tate.

IV-K. By deed dated Nov. 22, 1889, DB 19, p. 101, J. R. Sexton, Special Commissioner, conveyed to M. B. Tate, for \$130, 10 acres, 8 acres and $\frac{1}{2}$ interest in 75 acres. There are now assessed to James D. Tate two 10-acre tracts and an 8-acre tract.

Certified copy of a deed dated June 23, 1890, DB 19, p.

361, referred to under IV-B above, from J. H. Gollehon, Special Commissioner, to M. B. Tate, conveyed 8 tracts of land.

EXHIBITS FILED WITH SECTION V OF AMENDED BILL:

V-A. By deed dated Sept. 21, 1887, DB 40, p. page 58 } 211, S. C. Hurt and others conveyed to John W. Robinson, M. B. Tate, W. H. Wren and W. H. McLaughlin, partners as Robinson Tate & Co., a lot 80 feet square on the corner of Lynch (Commerce) and 8th Streets, Lynchburg, for \$6,000, "evidenced by the bond of the parties of the second part, partners as aforesaid", payable to S. C. Hurt & Sons 3 years after date, with interest, secured by vendor's lien, released on margin Oct. 8, 1891. Certified copy filed.

V-B. By indenture dated Dec. 24, 1891, DB 61, p. 40, in consideration of large unascertained indebtedness, W. H. Wren transferred to M. B. Tate, among other things, his interest in the co-partnership of Robinson Tate & Co. Certified copy filed.

V-C. By deed dated Sept. 1, 1900, DB 60, p. 434, John W. Robinson, William H. McLaughlin and James D. Tate, "late partners as Robinson Tate & Co.," and their wives, conveyed to Robinson Tate & Co., a corporation, for \$18,000, the lot 80 feet square on the corner of Lynch (Commerce) Street and 8th Street in the City of Lynchburg, reciting a deed from S. C. Hurt & Son. Certified copy filed.

V-D. This exhibit shows "data in respect of capital shares and distribution out of earnings and in liquidation," of Robinson Tate & Company, Inc., from Sept. 1, 1900 to Nov. 12, 1943. It is based on certificates of Richard Gorman, Secretary-Treasurer of Robinson Tate & Co., Inc., showing the record of capital shares 1900 to 1928, and 1929 to 1943, inclusive, and the ordinary dividends, 1900 to 1928, and liquidating dividends, 1929 to 1943, inclusive, and the ordinary dividends and liquidating dividends received by James D. Tate.

page 59 } There is copied here Exhibits E and F, from said entire exhibit, showing said dividends received by James D. Tate from the original investment in Robinson Tate & Co., Inc., and interest thereon until July 1, 1944.

The Lynchburg Corporation Court Orders, relating to the appointment of Amelia Tate as guardian of the complainants, show that Amelia Tate offered to make no charge for board or maintenance of complainants while in her home, and

requested that this be made a condition of the order, which was done. Certified copies of orders filed, V-E.

EXHIBITS FILED WITH SECTION VII OF AMENDED BILL.

VII-A. (Certified Copy) Clerk's order, Jan. 9, 1942, appointing and qualifying Florence Lee Tate, William T. Graham and The Marion National Bank, Administrators of the Estate of James D. Tate, deceased.

VII-B. (Certified Copy) Inventory and appraisement of Estate of James D. Tate, filed Mar. 21, 1942, Will Book 14, page 29, shows total assets of \$538,712.89. Appraisers: A. C. Beatie, E. B. Bonham, David A. Rouse, J. Meek Dungan, Kenneth K. Snyder.

VII-C. (Authorized copy) Statement of adjustments, showing revisions in valuation of gross estate of James D. Tate, showing total additions to the above appraisement of \$123,475.61.

VII-D. (Certified Copy) Settlement of administrators for 1942, dated Jan. 9, 1943, shows:

Total receipts	\$190,845.21
Total Disbursements	121,558.31
Balance Cash on Hand	\$ 69,286.90
Principal Account--assets including cash on hand	\$435,162.36

page 60 } VII-E. (Certified Copy) Settlement of administrators for 1943, dated Dec. 29, 1943, approved by Commissioner of Accounts, Dec. 30, excepted to by J. Robert Wren, complainant, by Vernon C. Barker, Attorney, Feb. 7, 1944, shows:

Principal Account--Receipts (Including balance Cash on Hand)	\$125,032.27
Principal Account--Disbursements	102,681.03
Balance Cash on Hand	\$ 22,351.24
Principal Account--Assets (Including balance Cash on Hand)	87,781.24
Assets distributed to Mrs. Florence Lee Tate	261,032.96

VII-F. Certified extract from above 1943 settlement, showing receipts, in the form of letters, covering the distribution of 100 shares of Chilhowie Motor Company, Inc. stock, and

253 shares of Chilhowie Milling Company, Inc. stock, and 50 shares of States Motor Company stock, and the delivery thereof to Kenneth K. Snider and David A. Rouse, respectively.

VII-G. Copies of the James D. Tate 1933 and 1939 wills, made from photostatic copies furnished by defendants. Both wills give the entire income from the estate to Florence Lee Tate for life, and 70% of the estate to the Wrens, at her death. The 1933 will directs the Executor to hold the estate in trust for 21 years, and the 1939 will for 5 years, after the deaths of James D. and Florence Lee Tate. The Marion National Bank is named Executor in the 1933 will, and said bank and Fred C. Buck, Executors under the 1939 will, Fred C. Buck to vote the Tate stock in The Marion National Bank.

page 61 } DEMURRER TO AMENDED BILL OF
COMPLAINT.

(Filed 8/28/44.)

The defendants, The Marion National Bank, William T. Graham and Florence Lee Tate, Administrators of the Estate of James D. Tate, deceased, say that the amended bill of complaint is insufficient in law, and state the grounds of demurrer as follows:

Each and every claim mentioned in said amended bill of complaint of said complainants against the Estate of James D. Tate, deceased, originated and was perfected, if at all, more than twenty years prior to the institution of this suit; that any mistaken belief of said complainants of any of said alleged claims was known or should have become known to each of them more than twenty years next preceding the institution of this suit; that for more than a score of years said complainants have passively slept on any rights alleged by them to have arisen in their favor against said James D. Tate; that they have been guilty of laches in not attempting during his lifetime to establish their alleged claims and to enforce a settlement of any and all alleged claims against said James D. Tate.

C. E. HUNTER
B. L. DICKENSON, p. d.

page 62 } PLEA OF STATUTE OF LIMITATIONS.

(Filed 8/28/44.)

The plea of the defendants, The Marion National Bank, William T. Graham and Florence Lee Tate, Administrators of the Estate of James D. Tate, deceased, to the amended bill of complaint filed against them in this court by Wm. H. Wren, B. T. Wren, J. Robert Wren and Edith G. Whitney.

For plea to said amended bill of complaint, and to the whole and every part thereof, and to all and every the relief therein prayed, said defendants say that neither complainants' alleged grounds for relief, nor any claim in said bill asserted against the said Estate of James D. Tate, deceased, arose within five years before the bringing of this suit.

Wherefore said defendants pray judgment whether they shall be compelled to make answer to said amended bill of complaint and pray to be hence dismissed with their reasonable costs in this behalf expended.

THE MARION NATIONAL BANK
WILLIAM T. GRAHAM and
FLORENCE LEE TATE,

Administrators of the Estate of James
D. Tate, Deceased

By Counsel

B. L. DICKENSON
C. E. HUNTER, p. d.

page 63 } ANSWER TO AMENDED BILL

(Filed 8/28/44.)

The further joint and separate answer of Florence Lee Tate and The Marion National Bank, William T. Graham and Florence Lee Tate, administrators of the Estate of James D. Tate, deceased, the original defendants in this cause, to the original bill of complaint, and their answer to the amendments to such bill.

These defendants, saving and reserving to themselves the same benefit of exceptions to the said original and amended bill as by their former answer to such original bill are saved and reserved, for answer thereto, answer and say:

These defendants having fully answered said original bill adopt their said answer thereto to so much of said amended

bill in so far as it incorporates allegations contained in said original bill.

And these defendants for answer to the amendments made to said original bill or so much thereof as they are advised that it is material and proper that they should answer, answer and say:

1. The allegations contained in the first two paragraphs under I of said amended bill are admitted to be true.

2. It is true that amicable relations existed between the complainants and James D. Tate during the tender years of complainants.

3. These respondents, however, deny that any fiduciary relationship between said complainants and said James D. Tate arose or was created as is alleged and set forth page 64 } under I of said amended bill; that there was a breach of trust by said James D. Tate as is alleged and set forth under I of said amended bill; and these defendants further deny that said administrators of the estate of James D. Tate, deceased, have wrongfully refused to make available any book or files of James D. Tate, deceased, but on the contrary say that said administrators rightfully refused complainants' request for access to such books or files, especially in view of the fact that said James D. Tate has departed this life and it is not known whether all of his records have been preserved, and under the circumstances his testimony is not available for the purpose of explanation, clarification or otherwise; and these defendants, not being as fully acquainted with all facts with respect to the dealings between said complainants and said James D. Tate must, of necessity, largely depend upon such records as exist among the papers of James D. Tate, deceased, for the purpose of contradicting and refuting such testimony of said complainants as may be introduced in this cause in their effort to recover against said estate many thousands of dollars, and which these respondents say said complainants are not justly entitled to and should not recover.

4. These defendants deny that any one of said complainants are entitled to receive anything in addition to what he or she has already received from land sales mentioned under II of said amended bill, and allege and state that a full and complete settlement was made years ago by said James D. Tate with each of said complainants for all lands so sold.

5. These defendants deny that said complainants were ignorant of the provisions of the will of M. B. Tate mentioned under III of said amended

bill until after the death of said James D. Tate, deceased, but on the contrary allege and state that each of said complainants knew that their father, W. H. Wren, had been a fugitive from justice for many years; that prior to becoming a fugitive from justice he had virtually bankrupted his father-in-law, M. B. Tate; that because of M. B. Tate's financial difficulties said M. B. Tate shortly prior to his death, and in an effort to save at least a part of his estate, made the deed of assignment to James D. Tate and John H. Shuff, Trustees, mentioned under III-B of said amended bill; that said James D. Tate through much effort and efficient management, even to the extent of advancing considerable amounts of his individual money, managed to salvage a considerable part of said M. B. Tate's estate, and in so doing preserved the interests of said complainants therein; that on April 30, 1904, said M. B. Tate's estate was indebted to said James D. Tate for \$34,924.61, with interest, and no means existed whereby he could collect said debt without sacrificing the M. B. Tate estate by making forced sales of land; that in order not to do so, but in order that said James D. Tate might have some reasonable security for the indebtedness owed by the M. B. Tate estate to him, he reduced his claim to judgment in the suit of W. A. Wren Admr. etc. v. James D. Tate, Executor, et al., then pending in the Circuit Court of Smyth County, wherein all of said complainants, though infants, were properly before the court and fully protected by the court; that in furtherance of his consideration and devotion of and for said

page 66 } complainants said James D. Tate made no effort to force a sale of any of said lands belonging to the M. B. Tate estate, at a sacrifice, to satisfy said judgment, but patiently waited until all of said complainants were of age before undertaking to collect on said judgment; that in the year 1912, said complainants being then of age and fully advised of all matters and things connected with their rights and interests in said M. B. Tate estate, including the handling thereof by said James D. Tate, and the said judgment of said James D. Tate against said M. B. Tate estate, voluntarily and in furtherance of their own interests entered into the agreement with said James D. Tate, dated November 25, 1912, and filed as "Exhibit I" with the answer of these defendants to said original bill.

(6) These defendants further allege and state that the purported facts alleged under III-D and V of said amended bill do not accurately and completely set forth the true facts relating to the acts of said James D. Tate in connection with the estate of M. B. Tate and Amelia Tate, but the allegations

therein contained are primarily conclusions of complainants pieced together from fragmentary papers and documents relating to said estates, now remaining after a score of years and longer; that the true facts are: that said James D. Tate, during his lifetime rendered unto each and every person, including said complainants, full and complete duty with respect to said estates and made full and complete settlement with them, and that said James. D. Tate at the time of his death was in no wise indebted to said complainants or under any obligation or duty to them by reason of his activities in connection with said estates or otherwise.

7. These defendants further allege and state page 67 } that there was good and valuable consideration for said agreement between said James D. Tate and said complainants of November 25, 1912, and allege and state that said agreement was fully complied with and performed, and acquiesced in by all parties thereto to and including December 21, 1941, the date of the death of said James D. Tate; and these defendants deny the allegation in said amended bill that there was no consideration for said contract.

8. These defendants deny that they are or have been under any duty to said complainants as alleged in said amended bill, and deny that they, either as individuals or as administrators are liable to said complainants for any sum or sums of money whatsoever.

9. These defendants deny each and every allegation in said amended bill contained of breach of trust, fraud, concealment or wrongdoing on the part of said James D. Tate.

10. These defendants further deny that said James D. Tate died testate as alleged in said amended bill.

11. These defendants also rely upon the statute of limitations as to each and every of complainants' demands to the same extent and as fully as if the same were formally here pleaded to the complainants' bill.

12. These defendants are advised and doth allege and state that each and every demand of said complainants, claimed in said original bill and amended bill, and alleged to be due to the fraud or wrongdoing of said James D. Tate should be rejected because said complainants are chargeable with laches in that they delayed the bringing of this suit for more than a score of years after they knew or page 68 } should have known of any claims, if any they had, against said James D. Tate, growing out of the matters alleged in their said original and amended bills; and further, in that the delay in the bringing of this suit until

after the death of said James D. Tate has greatly, if not wholly, prevented a just and proper defense to such claims by reason of the loss of evidence pertaining to and bearing upon the many and numerous complicated transactions involved in the handling of said estates, thereby rendering it extremely difficult, if not impossible to bring to light all the facts whereby complete justice might be attained; that the nature and character of the allegations of said alleged fraudulent or wrongful acts on the part of said James D. Tate are such, when coupled with the great lapse of time since they are alleged to have occurred, as to raise the presumption of complainants' acquiescence therein or at least their waiver of any claims of said complainants growing out of such alleged acts of fraud or wrongdoing on the part of said James D. Tate.

And now having fully answered the complainants' amended bill, these defendants pray to be hence dismissed with their reasonable costs by them in this behalf expended.

FLORENCE LEE TATE and
THE MARION NATIONAL BANK;
WILLIAM T. GRAHAM and
FLORENCE LEE TATE,

Administrators of the Estate of James
D. Tate, Deceased

By Counsel

C. E. HUNTER

B. L. DICKENSON, p. d.

page 69 } ANSWER OF THE MARION NATIONAL
BANK AND WILLIAM TATE GRAHAM
TO AMENDED BILL.

(Filed 8/28/1944.)

The joint and separate answer of The Marion National Bank and William T. Graham, in their own right, to the amended bill of complaint filed in the above entitled cause, which, in so far as these respondents are concerned, is the bill of complaint exhibited against them in the Circuit Court of Smyth County, Virginia, by W. H. Wren, et al., these re-

spondents in their individual capacities not having been made parties defendant to the original bill of complaint filed in said cause.

These respondents reserving unto themselves the benefits of all just exceptions to said amended bill, for answer thereto or so much thereof as they are advised that it is material and proper that they should answer, answer and say:

These respondents as administrators of the estate of James D. Tate, deceased, but not in their own right, were made parties defendant to said original bill of complaint and amended bill; and they adopt their answers as such administrators to said original and amended bills, respectively, as parts hereof, and further say:

(1) These respondents deny that James D. Tate died testate.

(2) These respondents have never had any knowledge that said James D. Tate ever executed the alleged will of November, 1933; and deny, if such will was ever executed, that said James D. Tate recognized therein any duty or obligation of his to said complainants as alleged in their amended bill.

page 70 } (3) These respondents further deny they have ever had any knowledge of the alleged will of said James D. Tate, claimed by said complainants to have been executed in May, 1939.

(4) These respondents further deny that by either of said alleged wills any trust between the said James D. Tate and complainants was continued as alleged in said bill, to-wit: "for 21 years by the 1933 will, and for 5 years by the 1939 will after the deaths of James D. Tate and Florence Lee Tate."

(5) These respondents deny that they ever had any knowledge of complainants' alleged claim that a trust relationship existed between them and said James D. Tate as set forth in said amended bill until early in the year 1944, and after the bulk of the personal property of said estate of James D. Tate had been distributed to Florence Lee Tate on December 29, 1943.

(6) These respondents, as well as complainants, made diligent search for any testamentary papers which said James D. Tate might have had at the time of his death, but none was found. For nearly two years the corpus of the personal property of the estate of said James D. Tate was kept intact by the administrators without the production of any claim

by said complainants that said estate was indebted to them by virtue of said alleged trust; that under all the circumstances these respondents had the right to presume and did presume, to and including the time of such distribution that said James D. Tate died intestate and nothing was owed to said complainants by said estate by reason of any breach of trust or otherwise.

(7) These respondents are advised and doth allege and charge that it was the duty of said administrators to make prompt distribution of said estate, and that it was incumbent upon said complainants to have filed with said administrators, prior to any such distribution, and within the six months' period allowed by statutes for the presentation of debts against the estate, any claim which said complainants might have growing out of said alleged trust.

(8) These respondents are further advised and doth allege and charge that it was the duty of the said administrators, after said six months' period, to distribute said estate with reasonable diligence, notwithstanding a possibility of the existence of an undiscovered will, said administrators being satisfied by reasonable diligence that no will of said James D. Tate existed at the time of his death. These respondents allege and state that said complainants, with zeal and thoroughness, sought to produce a will of said James D. Tate; they interviewed all persons to whom said James D. Tate might have confided the whereabouts of a will; they searched many places therefor; they engaged the services of others to make investigations for them for the purpose of finding any clue or clues which might lead to a discovery of a will; they supplemented the efforts of the administrators to ascertain whether there was a will, and, if so, its whereabouts; all of which amounted to naught and was so reported to said administrators by said complainants.

(9) These respondents deny that said complainants, or either of them, are entitled to a recovery against the defendants, or either of them, by reason of any act, matter or thing alleged or claimed by said complainants in their
page 72 } said original or amended bills, and these defendants specifically deny each and every allegation therein contained of any wrongdoing, neglect, bad faith, violation of law, or the like, on the part of these respondents as a basis of claim against these defendants in their own right and as individuals.

And now having fully answered the complainants' original

and amended bills, these respondents pray to be hence dismissed with their reasonable costs by them in this behalf expended.

THE MARION NATIONAL BANK
WILLIAM T. GRAHAM

By Counsel

C. E. HUNTER

B. L. DICKENSON, p. d.

page 73 } MOTION TO STRIKE ANSWER OF THE
MARION NAT'L. BANK AND WM. T.
GRAHAM, OR TO HAVE THOSE PARTS OF
AMENDED BILL NOT ANSWERED TAKEN FOR
CONFESSED.

(Filed Sept. 2, 1944.)

Complainants respectfully move the Court to strike the answer filed herein on Aug. 28, 1944, by The Marion National Bank and Wm. Tate Graham, in their own right, or to have those parts of the amended bill not answered taken for confessed, because:

1. Said answer does not respond to any of the allegations of Sections I, II, III, IV, V, VI and VIII of the amended bill.

2. Said answer seems to attempt to respond to the averments of Section VII of the amended bill, but with a few exceptions it fails to do so.

Of the eight specific averments, in Section VII, on page 39 of the amended bill, the first seven are ignored, and the eighth answered.

Two or more of the averments on page 40 are not responded to.

None of the averments on page 41 seem to be answered.

The averments on page 42 and at the top of page 43 are not answered.

V. C. BARKER

HENRY ROBERTS

Counsel for Complainants.

. See *Wright v. Wright*, 124 Va. 114, at 117.

page 74 } MOTION TO STRIKE DEFENDANTS' ANSWER, OR TO HAVE THOSE PARTS OF THE AMENDED BILL NOT ANSWERED TAKEN FOR CONFESED.

(Filed Sept. 2, 1944.)

Complainants respectfully move the Court to strike the answer filed herein on Aug. 28, 1944, by Florence Lee Tate, and The Marion National Bank, William T. Graham and Florence Lee Tate, administrators of the estate of James D. Tate, deceased, or to have those parts of the amended bill not answered taken for confessed, because:

1. Said answer does not respond at all to the charges in several sections of the amended bill, and does not respond fully and directly to most of those charges in the sections of the amended bill to which it attempts to respond.

2. As to those charges in the amended bill to which the answer attempts to respond, the response is, for the most part, in general terms and to some extent evasive and argumentative.

3. Said answer does not distinctly respond to each several averment of the amended bill, and contains explanations, qualifications and counter statements without first answering the respective averments of the amended bill.

4. Said answer, in the 5th paragraph, alleges immaterial and extraneous matters, without supporting particulars, not in response to the charges of the amended bill, some of which are impertinent and scandalous.

Referring to the respective sections of the amended bill, complainants, for particulars of the foregoing grounds of motion, show:

I.

Said answer admits the allegations in the first two paragraphs of Section I of the amended bill, and denies page 75 } that there was a breach of trust by James D. Tate as alleged, but fails completely to respond to the other allegations of fact in this section.

II.

Said answer fails to respond to any of the facts alleged in this section of the amended bill.

III.

Said answer fails to respond to most of the allegations of Section III of the amended bill, and is evasive and argumentative in response to allegations where answers are attempted to be made.

IV.

The facts charged in this section of the amended bill are completely ignored in the answer.

V.

None of the allegations in this section are answered.

VI.

While this section of the amended bill states conclusions, and sets out the trust or trusts asserted in bill and amended bill, and the answer responds in a general way which might be considered as a response to the averments of this section of the bill, there are averments in this section not fully responded to by the answer, and to which it is believed a more complete answer should be made, and the answer should respond directly to the respective allegations of this section.

VII.

Said answer does not respond to the allegations in this section of the amended bill in any manner.

VIII.

This section of the amended bill is not answered page 76 } at all.

HENRY ROBERTS
VERNON C. BARKER
Counsel for Complainants.

page 77 }

DECREE ENTERED.

September 15, 1944.

This cause came on this day to be heard upon the original bill and the exhibits filed therewith by complainants, the de-

murrer of defendants to said original bill, the plea of the statute of limitations filed by defendants to said bill, the answer and exhibit filed by the defendants; the amended bill and exhibits thereto filed by complainants, the demurrer and plea of the statute of limitations filed by defendants to said amended bill, the answer of Florence Lee Tate, William T. Graham and The Marion National Bank, and Florence Lee Tate, to said amended bill, the answer of William T. Graham and The Marion National Bank to said amended bill; the motion of complainants to strike said pleas of the statute of limitations to said original and amended bills, the motion of complainants to strike said answers of defendants to the amended bill, and was argued by counsel.

Upon consideration whereof, the Court doth overrule said demurrers to said original and amended bills and doth sustain the motions of complainants to strike said pleas of the statute of limitations to said original and amended bills, to which rulings and actions of the Court, defendants except.

Upon motion of complainants, they are granted leave to amend the amended bill at bar by inserting a paragraph on page 41 of the amended bill, which is accordingly done.

By agreement of parties this cause is made a vacation cause. Enter this Sept. 15, 1944.

WALTER H. ROBERTSON, Judge.

page 78 } ANSWER TO AMENDED BILL AS AMENDED.

(Filed 10/11/44.)

The joint and separate answer of Florence Lee Tate, William T. Graham and The Marion National Bank, administrators of the estate of James D. Tate, deceased, Florence Lee Tate, William T. Graham and The Marion National Bank to the amended bill of complaint, as amended.

These respondents reserving unto themselves the benefits of all just exceptions to said amended bill, and as the same has been amended, for answer thereto or so much thereof as they are advised that it is material and proper that they should answer, answer and say:

1. Each of these defendants adopts as a part hereof, for and on his behalf, hers, his or its (as the case may be) original answer to said amended bill.

2. These defendants deny that the provisions of Chapter 221 of the Code have not been complied with by the Commis-

sioner of Accounts or by the administrators as alleged in the amendment to said amended bill at the end of the first two paragraphs of subsection 3 of section VII of the amended bill, page 41, and they further deny that the settlements of the administrators for the years 1942 and 1943 "are of no effect so far as the complainants are concerned."

3. These defendants further deny each and every material allegation contained in said amended bill of complaint, and in said amended bill of complaint as subsequently amended, not specifically admitted or denied in their respective answers to said amended bill of complaint and in this answer, and these defendants call for strict proof of the same.

page 79 } And now having fully answered said amended bill of complaint and as the same has been subsequently amended, these respondents pray to be hence dismissed with their reasonable cost by them in this behalf expended.

FLORENCE LEE TATE
WILLIAM T. GRAHAM
THE MARION NATIONAL BANK
ADMINISTRATORS OF THE
ESTATE OF JAMES D. TATE
FLORENCE LEE TATE
WILLIAM T. GRAHAM
THE MARION NATIONAL BANK
By Counsel

C. E. HUNTER

p. d.

B. L. DICKENSON

page 80 }

DECREE ENTERED.

October 23, 1944.

This cause came on this day to be heard upon the papers heretofore filed and read herein, and particularly upon the motions of complainants to strike the answers of the Marion National Bank and Wm. T. Graham and of Florence Lee Tate, and The Marion National Bank, Wm. T. Graham and Florence Lee Tate, Administrators of the estate of James D. Tate, which answers were filed herein on Aug. 28, 1944, and which motions to strike said answers were filed Sept. 2, 1944, which motions are amended and enlarged to apply to the answer of defendants to the amended bill as amended, filed herein Oct. 11, 1944, and was argued by counsel;

Upon consideration whereof, the Court doth overrule said motions to strike said answers, to which action of the court complainants and cross complainant except.

Enter this October 23, 1944.

WALTER H. ROBERTSON, Judge.

page 81 } STIPULATION FOR COMPLAINANTS.
(Ralph Vuono)

Dec. 18, 1944.

It is stipulated that the following statement may be read in evidence in lieu of the deposition of Ralph Vuono, in behalf of complainants in the case of W. H. Wren, et al., v. Florence Lee Tate, et al., and in behalf of complainant, in the case of J. Robert Wren, v. Florence Lee Tate, et al., both pending in the Circuit Court of Smyth County, Virginia. Subject to any objections to the statement as a whole, or to any parts thereof, which might be made to a deposition, viz:

My name is Ralph Vuono. I reside and have a photographic studio at No. 63 East 11th Street, New York City. I have known J. R. Wren for about twenty-five years.

In December, 1924, before Christmas, J. R. Wren telephoned to one of his partners at their offices in the World Tower Building on 40th Street, New York City, to come to a billiard hall in that vicinity to meet his uncle. I was in his office at the time. His partner, Joseph Koehler, could not go. I went with his other partner, H. J. Wolcher, to the billiard hall. Mr. Wren introduced us to his uncle, Mr. Tate, of Virginia. Mr. Wren and Mr. Tate were having a game of billiards and Mr. Wolcher joined them in the game. I sat in a chair nearby and watched the game, which continued for an hour or two. Between turns at the table, Mr. Tate most always sat in the chair next to me, and we engaged in conversation. The conversation was lively and frequently produced retorts and laughter. Mr. Tate stated that he didn't like the business in which Mr. Wren was engaged—publicity business (theatrical), and called it "whoop-te-doo" business, to which

Mr. Wren retorted that all business is "whoop-te-doo" when you haven't any money to start with, and added, addressing all of us, "What do you think of this boys? When I was a soldier during the World War, at the request of my brother, Beverly Wren, I signed papers giving Uncle Jim authority to turn over to Beverly

\$5,000 or \$6,000, which Uncle Jim was holding for me. Instead of turning the money over to Beverly, Uncle Jim applied the money to a debt which Beverly owed him." To which Mr. Tate retorted: "Well, what if I had lent that money to Beverly—you'd never have got a cent of it back?" And Wren replied: "I never got a cent back anyway." All parties laughed, and Mr. Tate said: "Don't worry—you'll get it back when I die—and for a fellow like you, that's soon enough."

During the times Mr. Tate sat next to me, he asked me several questions about the business Mr. Wren was in. He stated that he did not like the business, and said he hoped that Rob (Wren) would eventually get into some business where he (Tate) could feel justified in backing him. Mr. Tate told me that the Wrens' parents had died early, and of how he and his mother had raised them from infancy. He told me he was holding the Wrens' estate together for them, and that they would eventually get all that he had, because it was partly theirs anyway, "and also because of a promise I made Ma before she died." I am of Albanian descent and we always call our mother "Mama" and had never heard anyone use the word "Ma". That impressed the statement on my mind.

This Dec. 18, 1944.

C. E. HUNTER

Counsel for Florence Lee Tate and the administrators of the James D. Tate estate, W. T. Graham and The Marion National Bank.

VERNON BARKER

HENRY ROBERTS

Counsel for Complainants.

page 83 } STIPULATION FOR COMPLAINANTS.

Dated and filed 2/2/45.

It is agreed by all parties hereto, by counsel, that the following stipulations may be read at the hearing of this cause in lieu of depositions or certified copies of records, subject to objections by defendants for materiality or other proper legal grounds which could be made to depositions or certified copies:

1. The following stipulations shall not preclude either party from introducing other and further evidence, relating to the

facts so stipulated or relating to other points at issue, if such evidence shall be otherwise competent and relevant to the issues involved in the case.

2. Either party, or the court, may read any paper or record specifically referred to in the pleadings, or in the record, at the hearing of the cause, from the record, original document, or a certified copy thereof, and any such paper so read may be copied as a part of the record on appeal.

3. The affidavit of S. A. Cole, Exhibit II-A to the Amended Bill, may be read in lieu of his deposition covering the facts set out in said affidavit, and in addition it is agreed that the timber therein referred to was sold from the Wren lands.

4. It is agreed that the facts recited from deeds referred to in the Bill and Amended Bill, and in the abstracts exhibited therewith, are correctly recited and taken from said deeds; and that certified copies of said deeds so recited and abstracted need not be filed;

Provided that defendants shall have the right to point out any error therein, and to call for certified copies of any deed or deeds to be filed, by requesting counsel for complainants in writing within a reasonable time before the hearing of the cause.

Defendants do not agree to conclusions drawn from such facts.

5. It is agreed that more complete copies need not be filed of the records in the cases of Amelia Tate, Guardian, etc. v. J. Harold Wren, et al., Exhibit II-B, and W. A. Wrenn, Admr. v. James D. Tate, Ex'or. etc., Exhibit III-E, filed with Amended Bill, unless called for in writing to complainants' counsel within a reasonable time before the hearing of the cause.

6. The statement of adjustments showing additions of \$123,475.61 to the gross estate of James D. Tate, Exhibit VII-C to Amended Bill is correct.

7. It is agreed that the records of the Maryland Life Insurance Company of Baltimore show that said Maryland Life Insurance Company issued the following policies on the life of Wm. H. Wren, who died November 5, 1894, and that said Maryland Life Insurance Company paid such policies, or credited the amounts thereof, as follows:

a. Policy 6110, issued April 28, 1889, for \$585.00, payable to his wife, Rosa T. Wren and her children, share and share alike. On January 24, 1895, \$487.50 of said policy was paid to J. D. Tate, Attorney for Amelia Tate, guardian of said

children, and \$97.50 thereof to J. D. Tate, Admr. of the estate of Rosa T. Wren, deceased.

b. Policy No. 7102, issued Oct. 30, 1891, for \$2,000.00, which policy was assigned on Nov. 6, 1891, to said Maryland Life Insurance Company, in connection with and as security for a mortgage loan of \$6,000.00 made by said Insurance Company to Robinson Tate and Company. That on Jan. 22, page 85 } 1895, the amount of said \$2,000.00 policy was applied in accordance with the assignment of the policy as a credit upon said loan, which at that time amounted to \$6,000.00.

c. Policy No. 6820, issued April 7, 1891, for \$5,000.00, which policy was assigned on April 11, 1891, to said Maryland Life Insurance Company in connection with a mortgage loan made to the "Commercial Building Association, John B. Winfree, and others". This policy was later assigned, on Sept. 17, 1894, by William H. Wren to James D. Tate, Lynchburg, Va., subject to the assignment made to the Insurance Company on April 11, 1891. On Jan. 28, 1895, the amount of this policy, \$5,000.00, was applied in accordance with assignment of said policy as a credit upon said mortgage loan, which loan at that time amounted to \$9,000.00.

It is agreed that said \$5,000.00 policy is the same policy under consideration in the case of *James D. Tate v. Commercial Building Association et al.*, 97 Va. p. 74, and that the opinion of the Supreme Court of Appeals of Virginia, in said case, may be read as part of the record in this case.

8. It is agreed that the attached "Copies of eight deeds covering purchase and sales of certain Norfolk City property by M. B. Tate and James D. Tate, years 1890-1894" may be read in lieu of certified copies thereof, unless defendants shall within a reasonable time before the hearing of the cause require counsel for complainants, in writing, to file certified copies thereof.

9. B. L. Dickinson, Attorney, drafted wills for James D. Tate in 1933 and 1939. The copies filed with the Bill and Amended Bill are true copies thereof made from page 86 } the file copies of B. L. Dickinson, Attorney, of said original drafts of said wills, except as to signature.

10. James D. Tate used the funds received as dividends from Robinson Tate and Company, Incorporated, and as a partnership, and the funds received from the sales by him of lands devised in the residuary clause of M. B. Tate's will, commingling these funds with his other property and these funds cannot now be identified.

Richard Gorman.

11. It is agreed that, on the basis of the deposition of Richard Gorman, the audit Exhibit V-D, filed with Amended Bill, is a correct audit of the ordinary and liquidating dividends paid to James D. Tate by Robinson Tate & Company, Inc., on account of the original 100 shares of stock issued to him, and on account of other stock later purchased by him, respectively.

12. The George W. Palmer 32 acre Sulphur Spring residuary tract was never sold by James D. Tate, see Exhibit IV-J.

S. B. CAMPBELL,
of counsel for defendants
C. E. HUNTER,
of counsel for defendants
B. L. DICKINSON,
of counsel for defendants
HENRY ROBERTS,
of counsel for Complainants.

page 87 } DEPOSITION FOR COMPLAINANTS.

Deposition of

RICHARD GORMAN,
witness for Complainants, taken Nov. 24, 1944.

Present: Henry Roberts, of counsel for Complainants.
C. E. Hunter, of counsel for Defendants.

DIRECT EXAMINATION.

By Mr. Roberts:

Q. State your age and residence.

A. Age, 80 years; residence 1002 Rivermont Avenue, Lynchburg, Virginia.

Q. State your connection from time to time with Robinson Tate and Company.

A. Well, I went to work for them in May, 1884; and at that time did some work in the office, and mostly helped the book-keeper, just as general office assistant. Then in a few years after that, I don't know exactly what date, maybe two or three years, I went in what we used to call the front, the shipping department, and attended to shipping goods and receiving

Richard Gorman.

goods and delivering goods. That was kept up for five or six years and part of that time I also acted as traveling salesman for the territory adjacent to Lynchburg, and also out in southwest Virginia. Somewhere about 1890 or '91 a man who had been running the office, his health got bad, and they got me to give up my other work and for twenty-five years after that time I kept books and looked after the office, and I believe that condition continued until about the 1st of January, 1919. At that time W. H. McLaughlin, who had been in active management of the business, decided he
page 88 } wanted to quit and he retired from it. He retained his stock in the concern but did not take any active part in the management after that. Then I succeeded to him and had charge of the running of the business since that time. We began to liquidate the business in the fall of 1929. I had charge of the liquidation of the business and never have gotten entirely through liquidating it. I still have charge of that part of it.

Q. I believe up to September 1, 1900, the business was a partnership and on that date was it or not incorporated?

A. It was on that date incorporated. You will find among those papers there we incorporated under the authority of the Circuit Court. We didn't have the Corporation Commission until a few years after that.

Q. I should have asked you before this, do you have charge of the books and records and files of the company and have you had charge of them since 1919?

A. Yes, I still have charge of them, what we have left of them. That concern was organized in 1866 under the old-fashioned system of accounting where you opened up a new ledger each year, and sometime within a couple of years after we started liquidating we had in our attic an aggregation of ledgers and accompanying books running back for over fifty years at that time, so we took all those records—we didn't see where we would have any use for them, we didn't owe any money—didn't owe anybody a cent—and we had already rented our house to M. W. Callaham and Sons who were going to come in in a few months, and we took all
page 89 } of those books, all our papers, including correspondence, less than five years old and sent them out to the Crematory and had them destroyed.

Q. As I understand it, that applied to practically all of your records up to the time you begun to liquidate in 1929?

A. Yes, sir.

Richard Gorman.

Q. Now, I believe you still have the ledger sheet reflecting the dividends that were paid.

A. Yes, sir. Of course, sometime prior, a few years prior, to 1900 we introduced the loose leaf ledger system. That system only has one binder and you have another binder to which you transfer sheets as you have them filled up. All those sheets I had transferred they went in the holocaust with the others. The reason that dividend account stayed there was because it never was filled up very much, you see. That is one reason we have those few sheets of that time. The other records are gone glimmering.

Q. Now then, do you recall the date that you became a Director in the corporation?

A. I wouldn't recall it, but for reading those minutes last night. I think it was 1907 I became a Director, and prior to that we organized a concern and I didn't take any stock at first and didn't take it for some years after that, I have forgotten what time, and in 1907 I became a Director.

Q. Then when did you become Secretary-Treasurer?

A. In 1913.

Q. And have you been Secretary-Treasurer ever since?

A. Yes, sir.

Q. From the time you became connected with the page 90 } business in 1884, down to now, was any new money ever put into the partnership or the corporation by any of the parties interested?

A. No, I am quite sure there was none. That was one of our difficulties. The concern was built up on a very narrow basis to start with. Even before my time when they started in 1866, they had very little capital, so they told me, and the real reason for establishing it here was because of the conditions that then existed. John W. Robinson—the business was started by John W. Robinson and M. B. Tate, who never lived in Lynchburg, and J. J. Mahone managed the business up until a few years before I went with the concern, sometime in the early 1880's I don't remember the date—and then when Mr. Mahone got out of the business they had a man named William H. Wren, who had been bookkeeper, and W. H. McLaughlin, who had charge of the shipping and buying and selling of the goods. As I understand, those two became managers after Mahone's death and they were given membership in the concern without putting up any money. They ran the concern for several years, and W. H. Wren—I can't exactly recall what year he left the concern—but I should say about 1891, '92 or '93. He died in '94, I think.

Richard Gorman.

Q. Mr. Robinson—

A. (Interposing) Let me explain about that. He was largely interested in southwest Virginia, in Wythe County rather. His home was in Graham's Forge in Wythe County. He had married a daughter of David Graham, who owned a great deal of land in Wythe County—a great deal
 page 91 } of farming and grazing land, and also a good deal of land that contained iron ore. Mr. Robinson, after he married Miss Graham, conceived the idea of getting that ore out and turning it into pig iron, not the regular pig iron you get from these big blast furnaces but what they call charcoal pit iron. The pig iron they get from down in Pennsylvania and other places is made from iron ore, coke and limestone. The coke is the fuel and the limestone is used as a flux. Now, John W. Robinson started three or four of these small charcoal furnaces. I don't know what the output would be but I imagine around fifteen or twenty tons, if that much, and instead of using coke they used charcoal. I presume they must have had plenty of timber around there and cut that timber down and turned it into charcoal and that was used in these charcoal furnaces, and that particular kind of pig iron, I have been informed, at that time commanded much higher prices than the other and was used for making car wheels, and attached to all these furnaces—

By Mr. Hunter: (interposing) Excuse me, but I don't know that this has any thing to do with the issues in this case.

By Mr. Roberts: I think he is just beginning on something that would be pertinent and that was that they had commissaries.

Q. Is that what you were going to say?

A. Yes, sir, they had commissaries at all these places and that was one of the reasons for starting this con-
 page 92 } cern in Lynchburg. Mr. Robinson did not live here but Mr. Mahone was running it in the name of Robinson, Tate and Company.

Q. Mr. M. B. Tate was the other partner?

A. Yes, sir.

Q. And he lived at Chilhowie, Virginia?

A. Yes, sir.

Q. And he became interested with Mr. Robinson in all these enterprises?

Richard Gorman.

A. I am under the impression that he did—maybe not all of them, but they worked together. To what exact extent Mr. Tate had interest in these things I don't know, but John W. Robinson did, and probably the Grahams, though I don't know that definitely.

Q. And that is the reason that they had someone else manage the business here in Lynchburg?

A. Yes, sir. They turned it all over to Mahone. They didn't bother at all about running the business here, but they bought goods from us, you see, and, of course, when John W. Robinson undertook to organize these small furnaces it took a great deal of money, and while the Grahams were worth a great deal of land I don't suppose they had so much money and it was a great job of financing. We helped them that way. We sold them goods and took their notes in settlement of these goods and we were getting them discounted and using them in our business and in that way it was helpful to them to help finance this business.

page 93 } Q. Now, at the time that business was incorporated the deed from the partnership to the corporation conveying the property here in Lynchburg stated that the consideration for the conveyance was \$18,000.00 paid in cash. I would like for you to state whether or not there was any cash consideration paid at that time or was that a part or one of the steps taken to incorporate the business?

A. That was one of the steps taken to incorporate the business and the reason for the \$18,000.00 we had at that time simply a real estate account on the ledger to which account was charged the cost of the lot, which was \$6,000.00 and then when we put those buildings there the cost of construction at that time amounted to \$12,000.00.

Q. And you had built half of the building, or building on half of the lot about when?

A. About 1890.

Q. For about how much?

A. I can't recollect the cost of the first building put up. All I do know is the cost of the whole building was around \$12,000.00.

Q. And that is the reason they put \$18,000.00 in the deed?

A. That is right.

Q. It was incorporated for \$35,000.00 I believe.

A. Yes.

Q. And they issued stock for that amount, which covered the real estate also?

A. Yes.

Richard Gorman.

Q. Were the lots purchased and buildings erected
page 94 } entirely from partnership assets or did the part-
ners put up the money for that besides what they
had in business?

A. It was put up by the business.

Q. Now then, I don't believe you stated just what kind of
business it was.

A. Wholesale grocery business. When they first started
they also handled liquors in 1884. I will have to give some
explanation there. At that period a number of wholesale
grocers here and in Richmond did handle liquor and they
handled them in Richmond long after we stopped, but in a
few years the wholesale grocery business abandoned the
liquor business. I am quite sure we closed our liquor depart-
ment out about 1888. You see the United States Government
issued several kinds of licenses for the alcoholic trade and
distillers.

Q. We just wanted a general idea of the business. Now,
let's go to these affidavits. Last summer you gave me three
affidavits about the stock. These affidavits are a part of the
Complainants' Exhibit "V-D" and they are headed "Robin-
son, Tate and Company, Incorporated", and the first one I
want to ask you about is Exhibit "B-B", which is a part of
that general exhibit, and it is an affidavit in which you pur-
port to certify from the records the status of the stock of
Robinson Tate and Company, Incorporated, issued and out-
standing from 1900 to 1943, inclusive, and the part of the stock
outstanding in the name of James D. Tate during that period.

I will thank you to look at this exhibit and state
page 95 } whether or not that is correctly taken from the
records of the corporation and is a correct state-
ment of the status of the stock of the company.

A. It is a correct statement.

Q. Do you have with you the stock certificate book and the
minutes of the corporation from which you took this informa-
tion?

A. Yes, sir.

Q. Now then, the next exhibit I want to ask you about is
the exhibit "C-C" which is also a part of that general exhibit
"V-D", which purports to give the dates and amounts of the
ordinary dividends paid by Robinson, Tate and Company, In-
corporated, from the time it was incorporated in 1900, through
1928. Please state whether or not that is a correct statement
of all the ordinary dividends paid on all the stock of the cor-

Richard Gorman.

poration during the period mentioned and if you have examined the books again to check the correctness of the statement.

A. It is a correct statement of it.

Q. Please get the dividend sheet out of the ledger and let Mr. Hunter check it also if he desires.

Note by Mr. Roberts: At this point Mr. Hunter and Mr. Roberts checked the dividend sheets both as to all the dividends and as to the dividends paid to James D. Tate and found the statements correctly taken from the ledger sheets. This applies to both Exhibit "C-C" and Exhibit "D-D".

Q. Mr. Gorman, is the Exhibit "D-D" a correct page 96 } statement from the records in your possession of
all the dividends and dividends paid to James D. Tate from 1929 to 1943?

A. Yes, those are the dividends of liquidation.

Q. Of course the one in 1943 was paid to his administrators?

A. Yes, sir.

Q. Will you state whether or not the minute book shows that all of these ordinary dividends were declared by the Directors and that the liquidating dividends were paid under a general resolution authorizing it to be done?

A. That is correct.

CROSS EXAMINATION.

By Mr. Hunter:

Q. Mr. Gorman, when did you become a stockholder in Robinson Tate and Company?

A. I don't recollect what year it was. I bought some stock from James D. Tate, but I don't recall the year.

Q. At any rate, it was several years after the corporation was formed?

A. Yes, sir.

Q. Now, you don't pretend to know anything at all about the financial arrangement of setting up the corporation, do you?

A. Well, we just simply incorporated it and went along like we did before.

Q. I mean you don't know what arrangement the page 97 } incorporators had, what the agreement was among themselves.

Richard Gorman.

A. Well, there wasn't any, just simply each one took so much stock in accordance with his interest in the business.

Q. In accordance with his interest in the business?

A. Yes, sir.

Q. Mr. James D. Tate was issued, according to the books, 100 shares of stock to begin with, wasn't he?

A. I wouldn't recollect that. The only way I could answer that would be to refer to the stock book. He was issued all the stock he was entitled to, whatever it was, and my recollection is that after that stock dividend was declared he had forty-five percent of the stock.

Q. Your statement that you just glanced at shows that James D. Tate started off with the organization of the Corporation with 100 shares of stock. If your statement shows that that is correct?

A. That is undoubtedly correct.

Q. You say that the stock was issued and the corporation was organized in proportion to the interest that these parties had in the partnership?

A. That is my recollection of it.

Q. And James D. Tate owned approximately 45%?

A. I don't know whether it was 45% at first or not but after that big dividend was declared he owned from that time on 45% of the stock, but that included his part of the \$60,000.00 dividend.

Q. Are you familiar with the will of Major M. page 98 } B. Tate?

A. I think I read it but I don't recollect a thing that was in it right now. I may have read it through casually like I would any other will. I don't know anything about it at all. I don't remember ever seeing it.

Q. You don't know how James D. Tate got his interest in the partnership?

A. Oh yes, his father transferred his interest to him before his death because he wanted him to have his interest in the business and wasn't any entries or anything made about that except James D. Tate was recognized as the owner of the interest that M. B. Tate had. That is my recollection of the way it was fixed.

By Mr. Roberts: I object to that because it is not responsive to the examination in chief.

By Mr. Hunter: I will make him my own witness on that point then.

Richard Gorman.

Q. Did I understand you to say that Major M. B. Tate said that he wanted James D. Tate to have the interest that he had in it?

A. That is what W. H. McLaughlin, who was running the concern, told me at the time; that he wanted to give his interest to James D. Tate. That is my recollection of what happened. I haven't got any records on that. I am going by my recollection. At any rate, Mr. M. B. Tate didn't take any interest in anything done about the concern. We consulted James D. Tate instead of M. B. Tate.

By Mr. Roberts: I object to that because it is page 99 } hearsay.

By Mr. Hunter:

Q. You stated you read the will of Major M. B. Tate?

A. I don't believe I did read it. I can't recall reading the will.

Q. Do you recall whether or not the firm of Robinson Tate and Company ever paid to James D. Tate \$10,000 at any time?

A. I wouldn't recollect it at all. Everything that James D. Tate got is on that ledger sheet you have got, but *but* I wouldn't recollect any individual payment.

Q. I am not talking about payment in the way of stock dividends.

A. \$10,000.00 for what?

Q. There is a provision in the will of M. B. Tate which reads as follows: "I bequeath to my son James D. Tate also \$10,000 in money to be paid to him, or his guardian, if he has not reached the age at my death, as soon after my death as convenient out of the firm funds of Robinson, Tate and Company of Lynchburg." Do you remember whether or not any such payment was ever made?

A. I don't recall it at all.

Q. You stated you became a director of the firm in 1907?

A. Yes.

Q. You didn't attend Directors meetings prior to that time?

A. No.

page 100 } Q. What time did W. H. Wren leave the firm?

A. It was somewhere between '90 and '93 and '94, but I don't recollect the date.

Richard Gorman.

Q. Did the firm sustain any losses by reason of W. H. Wren?

A. They did.

By Mr. Roberts: I object to this because it is immaterial.

By Mr. Hunter:

Q. Do you know whether or not any of the stockholders or partners had to make good those losses?

By Mr. Roberts: I object to this because it is immaterial.

A. Give me the question again.

Q. I say did any stockholders in the firm or the partners have to make good those losses?

A. They were losses of the business and the concern itself had to make good the losses in the course of future business. It was a loss on the books charged off to profit and loss account.

Q. So no one made restitution for them?

A. No.

By Mr. Roberts: Objected to because it is immaterial.

By Mr. Hunter:

Q. What was the nature of those losses?

A. Well, you see when we were running as a partnership any member of the concern could sign checks and as he was in the office he signed most of the checks. For page 101 } instance, when I became bookkeeper I would write a batch of checks and turn them over to him to sign them. In that way only two members of the concern in Lynchburg, W. H. Wren and W. H. McLaughlin signed checks, and Wren was in the office and he signed most of the checks. Either one of them had the right to sign "Robinson Tate & Company" without being by anybody. Well, W. H. Wren had that authority, and to try to explain the various things he did would be rather difficult, but where we first got on to it was this: We had a bank account with the Peoples National Bank and on several occasions when I would send these checks out I would see if we had enough balance to cover them, and I got a message from the Peoples National Bank to come up to the bank—we were then at 817 Main Street and Peoples Bank was about where the Trust Company is now, in the same block, just two or three doors from us. I walked up and said, "What is the matter?" They

Richard Gorman.

said we were overchecked. I said, "Let me see the checks."

Q. Without going into any details—

A. (Interposing) That is the only thing I can tell you about what happened.

Q. Was any considerable amount of losses sustained in that respect?

A. A thousand or two thousand dollars each, I don't recall the amount, but different amounts. The way he did that was this: We had a check book with a thousand checks in it, five to the page, I believe. We wrote them off consecutively, one after another one, and forwarded them on each sheet the amount of the checks and amount of page 102 } the balance in the bank account but he would go to the back of that checkbook, take out a check, make it payable to himself, and get the cash. Well, under ordinary circumstances you wouldn't find that out until the end of the month, and if we had a balance of ten or fifteen thousand dollars you wouldn't discover it before the end of the month, but we had a very modest balance and to get a thousand or two thousand dollars thrown into it would throw it out of gear and make you overcheck. Now as soon as he did that—J. D. Tate had an interest in the concern but at that time he was only giving the business of Robinson Tate and Company very minor attention but he did have an office in the rear of our store. He had gotten connected with several enterprises around Lynchburg in the early 1890's—one was a shoe factory they were starting, a small shoe factory that didn't amount to much, and he and several friends started that. As soon as I went up to the teller and saw these checks I took a memorandum of them and took steps to make them good, called both of these men in, W. H. McLaughlin and James D. Tate, into the office. They both came there and I told them what had happened. I said "Now, here are the checks taken out of the back of the book and he has gotten the money on them", and I can't recall the exact amount but around a thousand, fifteen hundred or maybe two thousand dollars. I said to these two men—I used some language that was impolite, but I said, "If that thing isn't stopped it will be hell to pay one of these days." That was along Sep- page 103 } tember of the year he finally left the concern. I was helpless. Of course what should have been done was to stop letting him have authority to sign checks or get him out of the concern and they both said they were going to look into it. Now, what they did I don't know, but they went along that way. It looks singular that men, both

Richard Gorman.

good business men—reliable men—but they were associated with him for years and I suppose they listened to his statement that he would make everything all right. I don't know what took place except they did not take the necessary action to stop him from signing those checks and at intervals things like that turned up and finally about December of that year, three months after I exposed to them the whole truth of the matter, it got to be worse and worse. Now John W. Robinson never took any active part in this business at all. The concern was left to the people to run it, Mahone first and later W. H. Wren and W. H. McLaughlin, and after they left I had charge. It was run on that basis, the person in charge had full charge of it. Just before Christmas in that year—I have forgotten what year it was—I told Mr. McLaughlin, "We have got to do something about this thing. If we don't we will have to stop. We won't get enough money to pay our bills and what he wants to take." We discussed it for an hour before I got his permission to let me telegraph—by that time John W. Robinson had died and he had given his stock to Harry Robinson—I said, "Let me telegraph Harry Robinson to come down here and be here Monday morning. It was Sunday I was having this
page 104 } conversation with him. Of course I couldn't do that on my own authority, and finally after much urging he permitted me to send this telegram which I proceeded to do. I have forgotten exactly what the text of that telegram was but it had to be pretty good not to make anything public, and they were both here Monday morning.

Q. I don't care anything about going into details. You answered my question that the company took a loss.

By Mr. Roberts: All the foregoing is objected to because it is hearsay and immaterial.

By Mr. Hunter:

Q. Now M. B. Tate died shortly after he made an assignment to James D. Tate and Shuff. Prior to this assignment was James D. Tate active in the business generally?

A. What do you mean by active in the business generally?

Q. I mean was James D. Tate looked upon as a good business man? Was he successful in business?

A. He had the reputation of being a good successful business man.

Q. For how long had he been conducting business and what was the type of the business?

Richard Gorman.

A. I expect he began before he was 21 years old. He was a pretty well put up man about business methods and business ideas and showed a good deal of capacity for anything pertaining to business.

Q. Was he a money maker?

A. I can't tell you that. I don't know. He made investments in a number of things not connected with
page 105 } our concern that we didn't have a thing to do
with and whether they were successful I don't
know.

Q. He was active in business and on his own?

A. He was investing in this and that, lands, stocks and various things that people of that type do invest in.

Q. You don't know anything about how much estate he created prior to the assignment?

A. I haven't the slightest idea in the world. I don't know a thing in the world about that.

Q. Do you know the reason for the assignment that was made by M. B. Tate?

A. No, I do not. I don't know anything about that.

Q. He never discussed his financial difficulties with you before making the assignment or afterwards?

A. No. In fact he wouldn't come to Lynchburg over once a year or twice a year and if he came here and had any conversation about the business it would be conducted with Mr. McLaughlin. I never heard him say a word about it at all.

Q. And you knew nothing about the relationship in the way of business between James D. Tate and M. B. Tate prior to the assignment?

A. Not a thing.

Q. Or after the assignment?

A. Nor after the assignment either. James D. Tate was not a free talker. He was a well put up man, could size up all kinds of conditions, but didn't belong to a type of man who would talk about his personal affairs. I don't mean he had any motives of secrecy but he had the idea
page 106 } that so many men have that they just don't talk
about their affairs unless something makes it
necessary to talk about them and I knew nothing about his private investments or what he did with his money or what he invested in by talking with him. I have heard others say he was in this, that or the other but I didn't even know that. I knew he did consort with a number of people who made investments. Lynchburg was in a sort of stir-up between '90

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and '95 in the matters of boom town and Lord knows what along that line and he had some kind of contact with that kind of crowd or people and how much money he invested I don't know.

Q. And if he had money you don't know where he got it from or the circumstances?

A. Not a thing in the world.

By Mr. Roberts: Counsel for the complainants objects to all of the foregoing questions and answers from the point that Mr. Hunter made Mr. Gorman his witness because it is irrelevant, immaterial and hearsay, and moves to strike the same from the record, and without waiving said objection and motion cross-examines the witness on the matters objected to as follows:

Q. Mr. Gorman, I believe you said M. B. Tate did not come to Lynchburg but once or twice a year.

A. Well, it might have been two or three times a year. Occasionally he would drop in there without any reference to our business at all but when it suited his own appetite page 107 } fairs and pleasure.

Q. When he did come he never talked to you about the business?

A. I don't believe he talked to anybody there except he might come in and say, "Mac, how is everything going?" But he didn't go into any details. He didn't ask how much he sold this month, that month or any other business. The business was left to the man running it and they didn't bother with it.

Q. And he never talked to you about his business with Mr. Wren or James D. Tate?

A. No.

Q. And you don't know of your own knowledge or from him whether or not he transferred his interest in the business of Robinson Tate and Company to James D. Tate?

A. No. I knew the change took place but the method it took place I didn't know.

Q. You didn't know any change had taken place before M. B. Tate died, did you?

A. Well I can't definitely answer that. I am under the impression it did take place before that but I can't be positive about it because the matter didn't make any difference to me.

Richard Gorman.

Q. That impression was because Mr. McLaughlin told you that, wasn't it?

A. Yes.

Q. And that is the only way you got that impression?

A. That is correct.

page 108 } Q. Now then, you said that Mr. John W. Robinson didn't come down here often and that he didn't know anything about Mr. Wren checking on the company, and he died before this happened, as I understood you to say. Did I understand you correctly about that?

A. I don't recall what year Mr. John W. Robinson died.

Q. The minutes of the corporation here show that he was one of the incorporators and the charter shows that also. I show you the minutes. The first directors were John W. Robinson, William H. McLaughlin, James D. Tate, J. W. Singleton, and R. H. Stevens, and that was September 1, 1900. Now that minute is signed by John W. Robinson also. Now the minute of July 12th, 1903, John W. Robinson was President and signed that minute, did he not?

A. Yes. I didn't know he had signed it but that is his signature all right.

Q. Then he signed the minute of May 10, 1904, did he not?

A. Yes.

Q. Then I see he was elected again President May 8, 1906, but H. D. Robinson signed that minute, and then H. D. Robinson was elected a Director on May 9, 1906 and seems to have succeeded his father at that time.

A. That succession to his father's business may have taken place before John W. Robinson's death. I am not positive about that.

Q. How is that?

page 109 } A. Harry Robinson may have acquired his stock from his father before his father's death. It impresses me he did but I can't definitely recall that; that Mr. Robinson's health had gotten poor and my recollection is, but I am not definite about it, that he transferred his stock to Harry Robinson, his son, before his death.

Q. The point in my mind is I understood you to say that John W. Robinson was dead at the time W. H. Wren was writing the checks you referred to. I may have misunderstood you.

A. I didn't say that and I don't know whether that is the case or not. My impression is he was but I am not sure of that. My recollection is that I telegraphed that day to Harry Robinson and to James D. Tate and if Mr. Robinson had been

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living I probably would have telegraphed to him, but I didn't have any reason for recollecting the exact date of his death.

Q. You can see from the minutes there that he lived at least ten years after the time this happened that you are talking about.

A. Yes, of course he did.

Q. Now, to go back to M. B. Tate, did you know he had made that deed of assignment in January, 1892?

A. I did not know anything about it at all until I was advised in this meeting. This is the first notice I have had of that.

Q. Now, that did happen under date of January 11, 1891, and is it not possible that Mr. McLaughlin in talking to you was referring to that; that in that way he transferred or had made this deed of assignment to James D. Tate page 110 } and McLaughlin apparently was under the impression that it carried the M. B. Tate interest in the firm of Robinson Tate & Company?

A. No, I don't recollect anything about that.

Q. You don't know what McLaughlin based the statement on that he made to you that M. B. Tate had turned the business over to James D. Tate?

A. No, nothing except I know he did so and it was purely verbal as far as my knowledge went.

Q. And you don't know how McLaughlin got that information?

A. I do not.

Q. And you don't have any recollection about what any of the partners or anyone else drew out of the firm there from the time M. B. Tate died in 1892 until the business was incorporated in 1900?

A. No.

RE-CROSS EXAMINATION.

By Mr. Hunter:

Q. How many years prior to the death of M. B. Tate was James D. Tate a partner in that concern?

A. I couldn't tell you.

Q. Approximately?

A. I couldn't do that either because it just happened and didn't create a ruffle in the business. He didn't take any active part in it. It was just known and was one of the incidents that happened. I had no particular reason for remembering it and after that M. B. Tate never bothered us

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any more, and James D. Tate did, but about all page 111 } the processes that went between him and his father and other members of the firm I don't know. Nothing was said about it as far as I can recall.

Q. Can you give me any idea as to how many years prior to the death of M. B. Tate, roughly, was James D. Tate a partner in that concern or acted as a partner?

A. I couldn't fix the date definitely to save my life. I couldn't do it.

RE-DIRECT EXAMINATION.

By Mr. Roberts:

Q. Was M. B. Tate a partner in the firm at the time W. H. Wren retired from the firm?

A. What date did you say Mr. Tate died?

Q. He died August 3rd, I think it was, 1892. That was Tate, and Wren went out of the firm in December before that. At least that was the date that he transferred his interest in the firm to M. B. Tate.

A. I can't recall anything about that.

Q. As at the time this was happening, the Wren check incident to which you refer, you know that M. B. Tate was a partner in it at that time?

A. At what time?

Q. At the time Mr. Wren was writing the checks you referred to.

A. No, I don't believe he was because of the people I talked to. I talked to James D. Tate. I took him out to my office and laid these things on the counter and said, "Here is what happened." I can't fix these dates just on my recollection. All these things that I got from what I wrote down I know are right because they were written down at the page 112 } time and I know they are correct, but for me to try to recall an incident of that sort that didn't have any occasion to do with anything being put on our books, I just don't recall it.

Q. At that time James D. Tate had a desk there in the store?

A. Yes, he had an office in the rear of our store.

Q. And his father, M. B. Tate, hardly ever came out there?

A. He very seldom came there.

Q. Now isn't the reason you took it up with him was because—

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A. (Interposing) Because he was running the business, that is right.

Q. He was helping to run the business?

A. That is right.

Q. In other words, he had been in there just like you had perhaps for two or three years, hadn't he?

A. Yes.

Q. Helping to run the business?

A. Helped to a certain extent.

Q. But when he first came in there do you mean to say at that time that McLaughlin told you the business was turned over to him or was it after W. H. Wren went out?

A. I couldn't fix that date but I am quite positive it was about when W. H. Wren's affair turned up. There wasn't any particular reason to impress the date on my mind and I couldn't recall what year.

page 113 } Q. Anyhow, you got all that from McLaughlin?

A. The fact that James D. Tate did act that way. He was running the concern more than his father ever did because his father didn't bother with it at all. He was in charge to that extent. He was connected with the concern.

Q. In other words, he was helping to run the business from the time he came in there?

A. Pretty much.

Q. Let's go back a minute. Wren and McLaughlin had run the business from 1884 when you went there until W. H. Wren left there?

A. Yes, sir.

Q. Then when he left James D. Tate came in and was associated with McLaughlin in the management of the business wasn't he?

A. That is about correct.

Q. And that is all that you know about his interest in it?

A. That is all I know about it.

RE-CROSS EXAMINATION.

By Mr. Hunter:

Q. Let's see if we can't clarify one point. You say James D. Tate came there and had an office in the building about the time the Wren affair occurred?

A. Well, he had been there before that and he had developed these outside interests after he came here and he

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did have this office in which he transacted some of these other affairs, met his associates back there, and we page 114 } didn't have anything to do with it all. He just simply had his office back there.

Q. And when the Wren affair took place one of the men you took it up with was James D. Tate?

A. That is right.

Q. Didn't take it up with M. B. Tate?

A. No, he wasn't here. We had to have somebody to act immediately and he was on the spot and he was helping Mr. McLaughlin in the business but he didn't take much active part in the buying or selling of the business but he was recognized as being interested in the business.

Q. Was he recognized as a partner at that time?

A. I can't recall about him being a partner at that time. It is impossible for me to fix the date from which he was recognized as a partner. It was somewhere near that time but I couldn't possibly give the exact date it took place.

By Mr. Roberts:

Q. I believe you said when you called McLaughlin and James D. Tate's attention to these checks that Wren was writing there that they didn't do anything about it.

A. I didn't say they didn't do anything about it. I told them and they said they were going to do something about it and possibly they did. I don't know the nature of the action they took, if any, but I don't think it was as effective as it should be. Of course it wasn't any of my duty to take that up with the other members, with John W. Robinson or M. B. Tate either, but it was his place to do that.

page 115 } He was the resident man in charge. Both of them said, "We are going to stop it in the future." Now, it didn't stop but got worse in the next few months. They didn't tell me exactly what they did. They didn't even tell me they did anything. They did do something. They probably talked to him but the result of what they did was ineffective.

Q. Did M. B. Tate come down after that?

A. I can't recall if he did or not.

Q. Let me ask you something else. Can you state that Wren overdrew his interest in the business there with the checks he drew?

A. For a very large amount.

Q. You know that to be a fact?

Richard Gorman.

A. That is a fact.

Q. Did you know that he turned his interest in the business over, assigned it to M. B. Tate on December 24th, 1891?

A. Wasn't anything to assign except debts and they weren't going to assume those.

Q. You didn't know of the transfer of the Wren interest in the business to M. B. Tate on December 24th, 1891?

A. If I did I don't recall it. I have forgotten about it. So many incidents happened at that time that one or two more or less didn't amount to anything.

Q. In other words, you never did have much use for W.

H. Wren, did you?

page 116 } A. No, you couldn't possibly make a statement that would be farther from the truth than that. I will explain it and you will see. I had known him before I went with the concern. Mr. Wren was a man of very gentle and amiable disposition, very pleasant and affable and agreeable to everybody with whom he came in contact, and very few people in those days that didn't like him. I can't say I developed any crushes on people. Some people simply fall in love with a man, not in one way but another. I never could have exactly that feeling for anybody, but I did try to see what a man had and give him credit for it, and Mr. Wren, even before that, and during his career, I came to the conclusion that human vanity, the desire a man has to make a favorable impression on his fellowman, to be a prominent citizen, this, that and the other, without either the mentality or money to back it up, is the most painful tragedy that can happen to a human being, and that is what happened to W. H. Wren. He wanted to be a leader in anything he did. He just had that natural trend in his mind and that is at the bottom of his downfall. I would say ordinarily he wouldn't do anything wrong or crooked but if he came in contact with a man worth \$200,000.00 and he was going into an enterprise for \$25,000.00, which he could do without hurting his estate, Mr. Wren would want to do it too, without having the money. Now, that was the bottom of his trouble. He was a very pleasing man, and to illustrate it fully, it was distressing to all of his associates, to me as much as anybody else, and even his own son. You have come in contact with Harold Wren.

page 117 } By Mr. Roberts: I object to what Harold Wren said.

Richard Gorman.

By the Witness: As the colored people say, "You've brought it on yourself by asking me"? I wanted to explain that I didn't have any antipathy for the man.

Q. Did or not Major M. B. Tate have confidence in him?

A. I couldn't tell you that to save my life. I don't know what M. B. Tate had. I would judge he did, but that would be passing judgment. He couldn't continue to do it after what happened, but before that I imagine that he had a good deal of confidence in him, but that is just my imagination. That could very easily be wrong.

By Mr. Hunter:

Q. Is there any other living man that you know of who was associated with that business about that time, 1900 or prior to that time, other than yourself?

A. No, I don't think there is that would know anything about those things. People are coming and going all the time. The only person connected with it that would know something about these things is W. H. McLaughlin, Jr., and he wouldn't know of his own knowledge. Billy is about 55 years old. He was a little boy then and wouldn't know anything about it. That is the only man I know of that was connected with the concern in any sort of way. He went to work when he was about 15 or 16 years old as a salesman.

And further this Deponent *saieth* not.

RICHARD GORMAN,
Deponent.

page 118 } Depositions for Complainants of J. E. Thomas
and H. L. Kent, taken Jan. 22, 1945.

Present: Henry Roberts, Esq., of Bristol, Virginia, of
Counsel for Complainants.

B. L. Dickinson, Esq. of Marion, Va.,

L. P. Collins, Esq., of Marion, Va., and Stuart B. Campbell, Esq., of Wytheville, Va., of counsel for Defendants,

W. V. Birchfield, of Marion, Va., Counsel for James D. Mahoney.

J. E. THOMAS

the first witness, being duly sworn, deposed as follows:

DIRECT EXAMINATION.

By Mr. Roberts:

Q. State your name, age, residence, business and what public office, if any, you now hold?

A. J. E. Thomas; sixty-four years old; I live in Marion, Virginia; I am postmaster and farmer.

Mr. Collins: At this point we wish to object to the notice for the taking of depositions insofar as it purports to be notice that this deposition will be used in the suit now pending before the Circuit Court of Smyth County, undertaking to probate the will of James D. Tate, and the deposition is objected to at this point as proper evidence in the pending suit undertaking to probate the will of James D. Tate. The objection is made for the reasons that notice in this suit is not notice as to the pending will suit, which is in the page 119 } nature of a law action, and for the further reason that it cannot now be made to appear that the witness will not be available on proper summons to testify in that case before the jury, and be cross-examined, before the jury.

By Mr. Roberts:

Q. Did you on or about September 10, 1942, take a lease on the Tate farm and an option to purchase the dower interest of Florence Lee Tate in that farm?

A. I did.

Q. I show you the recorded lease and option and will ask the Clerk to make a certified copy of it, and will thank you to file the same as an exhibit to your deposition.

A. I will.

(Said lease and option filed as Complainants' Thomas Exhibit No. 1.)

Q. Through whom or by whom did you negotiate that lease and option?

Mr. Campbell: This question is objected to because any negotiation made between Mr. Thomas and any parties to the litigation cannot affect the merits of the case, so far as the complainants are concerned.

J. E. Thomas.

A. I first talked to M. Percy of the Marion National Bank and learned from him that Mr. Wolfe had charge of the renting of the farm and I then took the matter up with him.

Q. Do you refer to Mr. William A. Wolfe, Cashier of the Marion National Bank?

A. Yes, sir.

page 120 } Q. Go ahead and tell who worked out the trade between you and Mrs. Tate?

Mr. Campbell: All evidence of any negotiation between this witness and Mrs. Tate or any other party to this litigation, is objected to for the following reasons:

1. No party to this proceeding is seeking any relief from any contract so negotiated.

2. The evidence is not material to any issue in the case, and,

3. All questions between the complainants and James D. Tate were settled by the agreement of November 25, 1912, and filed as Exhibit No. 1 with the Amended Bill, and lastly, because the Complainants are not entitled to any relief because of their laches and it is agreed that this objection shall apply to all of the testimony introduced as to transactions between the witness and Mrs. Tate, with reference to any property owned by Mr. Tate in his lifetime, and objection need not be made to each specific question.

A. Well, I learned that this farm was for rent, that they wanted to rent the farm, and I was referred to Mr. Wolfe as being the proper man to take the matter up with, and I saw Mr. Wolfe. He told me that he would have to take the matter up with Dr. Graham, in Richmond, and after a few days he told me he was ready to talk to me about it, after he had consulted Dr. Graham and Mrs. Tate, and I rented the farm from him.

Q. And took an option to purchase her dower interest from Mrs. Tate? And this is the exhibit you filed?

A. Yes, sir.

Mr. Collins: In addition to the objections noted to this testimony it is objected to further upon the ground that the instrument itself speaks for itself, and that the conversations between this witness and W. A. Wolfe are hearsay evidence, and not pertinent to any issue in the case.

J. E. Thomas.

Q. A short time after you took that option did you or not undertake to purchase the remainder interest of the Wrens' in the Tate farm?

A. I did.

Q. With what success?

Mr. Campbell: The objection previously imposed to the evidence of a contract and negotiation with Mrs. Tate is also objected to for the same reasons as to the evidence of any negotiation or contract with the Wrens, and this objection is to all testimony introduced on this subject.

A. Well, I sent my representative to Richmond to negotiate with the Wren heirs, and I was unable to purchase their interest.

Q. Did you then negotiate with the Wrens to sell them the dower interest on which you had the option?

A. No, sir, they negotiated with me.

Q. Was that at the time you sent your representative to Richmond and they refused to sell to you at the price you offered and then the negotiations were opened to buy the dower interest from you?

page 122 } A. Yes, sir. My representative was in Richmond negotiating with Mr. Wren. Mr. William Wren called me on the phone and asked me what I would take for my rental contract and option to purchase Mrs. Tate's dower interest and I made him a price on it.

Q. Do you or not know that was after your representative, Mr. Catron, had made him a price on it of \$15,500, that he phoned you; I mean to confirm it?

A. No. He turned down my offer of \$45,000 to buy the farm and said he didn't want to sell their interest in it, but wanted to know what I would take for my rental contract and option and I made him a price over the phone of \$15,500 as a first offer, and then after we talked awhile he wanted to know if I would take \$15,000 and very reluctantly I did, and lost \$500.

Q. I hand you a telegram purporting to be from you to W. H. Wren, dated October 21, 1942, and will thank you to state if you sent that telegram and if it does not mention the price of \$15,500, and will ask you to file that with your deposition as Exhibit, Complainants' Thomas Exhibit No. 2.

A. Yes, he asked me if I would confirm the offer by telegram the next day and I sent him that telegram.

J. E. Thomas.

(Said telegram was marked and filed Complainants' Exhibit Thomas No. 2.)

Q. I now hand you what purports to be an escrow agreement of October 26, 1942, between J. E. Thomas and W. H. Wren and J. R. Wren, and will ask you to state if that was the escrow agreement you made with the Wrens which called for \$15,500 to be paid by them for the lease and option; and, if so, please file it as Exhibit No. 3 to your deposition?

A. Yes, sir, I signed that.

(Said deed was marked and filed Complainants' Exhibit, Thomas, No. 4.)

page 123 } Q. Then on October 30, 1942, you executed and delivered to the Wrens a deed transferring the lease and the dower in the Tate farm, and I hand you the original deed, and will ask you to file it as an exhibit to your deposition, Exhibit No. 4?

A. Yes, sir, I signed this deed.

(Said deed was marked and filed Complainant's Exhibit, Thomas, No. 4.)

Q. In the light of that telegram, escrow agreement, and deed, all specifying the consideration of \$15,500, do you or not now recall that you paid Catron, the real estate agent, \$500 for negotiating the sale to the Wrens?

A. No, sir, the \$500 was for rent I had paid on the farm before I turned it over to them. At least that is the way I figured it. I don't know how they figured it.

Q. The question is, did you or not pay Catron \$500 or any other amount for negotiating the sale to the Wrens?

A. Yes, sir, I paid his expenses to Richmond, and I don't remember what I paid him, but I have the check.

Q. Will you file the check with your deposition as an exhibit?

A. I will let you have it to make a photostat copy, but I want the check for my files. But I don't think it was for \$500. (Check for \$250, November 18, 1942, filed.)

Mr. Roberts: All counsel agree that photostatic copies of this and other checks to be referred to may be filed in lieu of the originals, subject to all objections to admissibility.

J. E. Thomas.

Q. Mr. Thomas, after you got that escrow agreement from the Wrens, did you or not take up with Mrs. Tate, or her representatives, the matter of reducing the price page 124 } or consideration mentioned in your agreement with her of \$10,000 for the dower interest to a smaller amount and, if so, state who represented her?

A. Well, about that time I negotiated with, or had Mr. Wolfe negotiate, with Mrs. Tate, and Dr. Graham, to see if I could get the price down on the option, thinking that would help me in my offer to the Wrens to buy the farm, and it was on account of her not giving me possession of the place when she was to give it to me that she agreed to reduce the price to \$7,500.

Q. Who went with Mr. Wolfe to see Mrs. Tate about that?

A. I don't know.

Q. To refresh your memory, was it not Mr. Kenneth Snider?

A. I wouldn't know.

Q. You say that was before you made the trade with the Wrens?

A. About that time, yes, sir.

Q. Then, under date of October 30, 1942, Florence Lee Tate executed a deed conveying to you her dower interest in the farm, pursuant to the lease and option agreement you had with her, and I will ask you to state if that is a fact, and I show you the recorded deed, and I will ask the clerk to make a certified copy of it to be filed as an exhibit to your deposition.

A. I assume that is correct. I don't remember the exact date.

(Said deed filed as Complainants' Exhibit, Thomas No. 5.)

Q. Please exhibit the check by which you paid Mrs. Tate the \$7,500.

(Check handed to Mr. Roberts.)

Q. You have handed me a check dated November 18, 1942, for \$7,484, for "Bal. in full for dower interest and rental contract in Sulphur Springs Farm". Do I cor- page 125 } rectly understand that this amount was arrived at in settlement for the rent then due, and the \$7,500 for the dower?

A. No, no rent was included in that check. That was a little

J. E. Thomas.

expense she was to pay, I think including the stamps on the deed, and that check there and the expense she was to pay, amounted to \$7,500, and that paid for her dower interest only, not including the rent.

Q. I notice this endorsement on the back of the check, "Cr. Ac. Mrs. Florence Lee Tate, for deposit only". Whose handwriting is that in?

A. I wouldn't know. Someone at the bank.

Q. Do you know Mr. Wolfe's handwriting?

A. I might be able to compare this with it.

Q. If so, is that Mr. Wolfe's handwriting?

A. I would say it looks like the same handwriting.

Q. You are comparing his signature on a letter?

A. Yes, sir.

Q. Will you file a copy of this check with your depositions?

A. Yes, sir.

(Copy of said check to be filed as Complainants' Exhibit, Thomas, No. 6.)

Q. I notice the deed of October 30, 1942, from Mrs. Tate to you, has revenue stamps of \$11.00 on it, which would be the proper amount of stamps if the consideration, which is not shown in the deed except by reference to the option, was \$10,000. Do you know why the stamps were attached on the basis of the \$10,000 consideration instead of the \$7,500 which was actually paid.

A. No, I didn't know. I didn't know how many stamps were attached.

page 126 } Q. While I think of it, Mr. Thomas, did the Administrator of James D. Tate, Deceased, make a public sale of the farm property, implements, livestock, etc., some time after you purchased the dower and sold it to the Wrens?

Mr. Campbell: Objected to as immaterial.

A. Yes, sir.

Q. There were a great many separate sales and purchases at the sale, were there not?

A. Yes, sir.

Q. Do you know the handwriting of Mr. Frank Copenhaver?

A. I don't know that I do.

Q. I show you a letter from Frank Copenhaver, on his

J. E. Thomas.

letter-head, dated October 2, 1942, to J. H. Wren, 100 Broadway, New York City, and signed "Frank". Can you identify that as the signature of Frank Copenhaver?

A. I couldn't say that is his signature. I think he would be more competent than I to say about that.

Q. Frank Copenhaver was then, and is now, a director of the bank, is it not?

Mr. Campbell: That is objected to as immaterial.

A. He is now and he was then?

Q. I hand you a letter dated November 19, 1942, from W. A. Wolfe, Cashier, of the Marion National Bank, to W. H. Wren, and will thank you to state if you can identify that as the signature of Mr. Wolfe; and if so, file it as an exhibit to your deposition, and I will ask the reporter to copy it into the record.

A. I think that is Mr. Wolfe's signature.

Mr. Campbell: The letter is objected to because immaterial, and because hearsay, and because not bearing on page 127 } any issue in this case, or *res inter alios* acts as to the parties to this suit.

(Said letter was filed as Exhibit Complainants' No. 7 (Thomas), and was in the following words and figures, to-wit:)

THE MARION NATIONAL BANK

Marion, Virginia

November 19, 1942

Mr. W. H. Wren
Arcade Building
Third and Grace Streets,
c/o Virginia Unemployment Compensation Comm.
Richmond, Virginia.

Dear Mr. Wren:

Some time back you mentioned to me that you would be interested in obtaining a little gold. I have a small quantity in my possession at the present time and if you will drop in

J. E. Thomas.

at the bank the first time you are in this section I shall take pleasure in showing it to you.

I am delighted to learn that you and your brothers have satisfactorily arranged for control of the Sulphur Spring Farm. In my opinion, you have made the right move as to farm in the manner that it would have been handled could have materially effected the value of your lands.

With kindest personal regards and very best wishes, I am,

Yours very truly,

W. A. WOLFE

Cashier

WAW/d

page 128 } Q. Mr. Thomas, state whether or not you divided that profit of approximately \$7,500 you made on the purchase and sale of the Tate dower tract with others and, if so, with whom, and file the checks showing such payment?

A. I did, with Mr. Copenhaver and Mr. Wolfe.

Q. Do you mean Mr. Frank Copenhaver and Mr. William A. Wolfe, Cashier of the Marion National Bank?

A. I do.

Mr. Campbell: This evidence is objected to for the reasons assigned in the general objections to the testimony, and also for the additional reason that personal transactions between the witness Mr. Copenhaver and Mr. Wolfe, cannot in any way affect the merits of the present case.

Q. You have handed me two checks dated November 18, 1942, drawn by you on the Marion National Bank, one to W. A. Wolfe for \$2,491.40, and the other to Frank Copenhaver for \$2,462.45. I will thank you to file photostatic copies of these checks as exhibits to your deposition, Nos. 7 and 8, and state why you paid that money to Mr. Wolfe and Mr. Copenhaver.

Mr. Campbell: This question is objected to for the reasons previously stated, and also because any motive operating on this witness to induce him to make those payments to Messrs. Wolfe and Copenhaver cannot affect the parties to this suit, and are not material on any issues in this suit.

J. E. Thomas.

A. I will file the copies.

(Said checks were thereupon marked Complainants' Exhibits Thomas Nos. 8 and 9, and photostatic copies are to be furnished.)

page 129 } A. Well, when I first learned that this land was for rent I went to see Mr. Peery there at the bank. I understood he had charge of it and it developed later he had charge of the machinery, etc., selling that, and then I saw Mr. Wolfe and he negotiated with Mrs. Tate and Dr. Graham, and we finally agreed on the rental and Mr. Copenhagen had no connection with the rental proposition at all, but if we could take up the option why then Mr. Copenhagen was going to take an interest with me. At that time Mr. Wolfe had absolutely nothing to do with it. He wasn't in on the proposition in any way, shape or form, except just as representing Mrs. Tate, and after it reached the point—a fellow by the name of Carico came up here from Abingdon, and he come in to talk to me about this contract and I don't know who he represented or whether he represented anybody, but he was a real estate dealer down there, as I understood, but I do know his name was Carico. I don't know his first name or his initials. He wanted to know what I would take for my contract and I told him I didn't want to sell it, that I wanted to buy, and that I was of the opinion that Wrens would not be interested in running a farm, and that I might be able to buy their interest, and he intimated to me that he was well acquainted with the Wrens and that he could buy it if anybody could, and I never heard nothing more from him, and all the while I was figuring on buying the farm, and my intentions were to sell off some. I wanted to have a nice grazing boundary left down there, as I was in the cattle business and farming, and he intimated that he thought it could be bought, and he said, "What would you be willing to pay for it?" And I said, "I will pay \$40,000 cash for their interest."

page 130 } Q. Mr. Thomas, I don't want to interrupt you, but all we are interested in is the interest, if any, that Mr. Wolfe and Mr. Copenhagen had?

A. I am leading up to where their interest come in.

Q. All right, go ahead.

A. But if you want me to I will leave that off and start where they came in, if you don't want me to lead up to it.

Q. I think that would be enough.

J. E. Thomas.

Mr. Collins: We would like to have the witness to answer the question as he wants to answer it.

A. If you want it short, I can tell you whatever you want to know about the transaction, if you want to know all or part of it, I can give it to you. I was relating it as I remember the transaction the way it happened, but if you want me to start at some point and go on from there all right, anything you want to know I am willing to tell you.

Q. What I wanted to know was the interest that Mr. Wolfe and Mr. Copenhaver had in it?

A. Well then, I will start from that point. After I decided, after I found out what the possibilities were for buying the place if it could be bought, it looked like it was a bigger proposition than Mr. Copenhaver and I could handle. Now they had nothing to do with the handling of it, or the rental of it; I was going to run the farm myself, if we didn't buy Mrs. Tate's option, and if I did Mr. Copenhaver was in with me, and Mr. Wolfe had nothing to do with it, but after we found out it would cost \$45,000 or more, and after we had started negotiations with Mrs. Tate to get her price reduced so we could raise the price to the Wrens, why then page 131 } I told Frank, I said, "This will be too big for me, we will have to borrow some money". And he went up to the bank to see about getting some money and that is where Mr. Wolfe came in, and he never had any understanding with me, and hasn't to this day.

Q. At that time had you taken it up with the Wrens?

A. I hadn't. I don't know what Carico had done.

Q. You hadn't yourself?

A. No, sir. I had not said a word to the Wrens, because after we got into it we found it complicated because the bank at Abingdon had loaned the Wrens some money.

Q. That escrow arrangement indicates after you made the trade they did that.

A. The information I got was they had borrowed some money on the estate before. I don't know if that is true, but that is the information I got and that is when Mr. Wolfe came into the transaction, through Mr. Copenhaver. He never had any understanding with me and I never had any with Mr. Wolfe, and that was in case we purchased the land he was to take a one-third interest in the land.

Q. Mr. Wolfe was to take one-third?

A. Yes, sir.

J. E. Thomas.

Q. And Mr. Copenhaver one-third?

A. Yes, sir, Mr. Copenhaver was already in it with me prior to that time.

Q. He was in it from the beginning?

A. Yes, sir, from the beginning he was in it, you see, if we purchased it, but nobody was ever in the farming part of it except me.

page 132 } Q. At the time Mr. Wolfe came into it you had not taken it up with the Wrens at all, yourself?

Mr. Campbell: This question interprets the evidence of the witness, who said he had been approached by Mr. Carico, with the information that the Wrens would sell.

A. No, no, not that they would sell. He come to see me to buy, and I just thought probably he was sent by the bank of Abingdon or the Wrens, but I thought more likely the bank at Abingdon, because they were involved in this at that time, I understood.

Q. Nothing came of the talk with Mr. Carico, did it?

A. No, sir.

Q. As I understand you, at the time Mr. Wolfe came into the picture, to take one-third interest in the contract you had the option on to buy the dower, you had not taken it up with the Wrens at all yourself?

A. No, sir.

Mr. Collins: I object to that question because the evidence is not that Mr. Wolfe participated in the dower contract at all.

Mr. Roberts: He told you just now he did do it.

A. He wasn't in the contract when the contract was made, but he come into it if we bought the land from the Wrens. He was going to take a one-third interest in it then.

Q. That was before you took it up with the Wrens to buy from them?

A. That all happened right at the same time, just a day or two before.

page 133 } Q. That was before you took it up with the Wrens?

A. Yes, sir. Before we sent the man over to see the Wrens, but not before we decided to take it up with the Wrens.

J. E. Thomas.

Frankly, I decided to take it up with the Wrens before Mr. Wolfe ever came into the matter at all.

Q. Mr. Wolfe knew when he came in then that you were about to take it up with the Wrens?

A. I don't know what Frank told him. I never had any talk with him myself.

Q. He was coming in to take one-third of it if you bought it?

A. Yes, sir, because the proposition was too big for me.

Q. Is that the reason that after you sold out to the Wrens you paid him and Copenhaver each one-third of the profits?

A. The reason I divided up with them was this: I didn't anticipate selling this. It never entered my mind when I made this contract that we would do anything except buy it when I had it up with Mr. Copenhaver, but it developed that the land probably couldn't be bought except beyond a price I wouldn't be willing to pay, and then Mr. Wolfe came into it, but I was not obligated to pay Mr. Wolfe or Mr. Copenhaver either a penny, because we didn't do what we had planned to do.

Q. As I understand, you mean, Mr. Thomas, that you went into it, or rather they went into it with you, to buy it?

A. Frank and I went into it first to buy it. I went into it to rent it and farm it and graze it. Mr. Copenhaver was in on the dower interest and nothing else.

Q. From the beginning?

A. Yes, sir, from the beginning, and Mr. Wolfe didn't come in until just before we sent Mr. Catron over to page 134 } see the Wrens in regard to it.

Q. And at that time Mr. Wolfe came in for a one-third interest in it?

A. He would have had one-third of the farm if we had bought it, but I never promised him anything in the contract because he wasn't in it.

Q. If you had bought the farm he would have taken one-third of it?

A. If he had paid for it one-third of it would have belonged to him.

Q. Now, then, you didn't buy it, and as a result of sending Catron to Richmond you sold it to the Wrens?

A. Yes, sir, I sold my contract to the Wrens.

Q. You were representing the others?

A. I wasn't representing anybody but myself.

Q. You made the deed to it?

A. Yes, sir, I made the deed to it and got the money and

J. E. Thomas.

disbursed the money, but I didn't have to give Mr. Copenhagen or Mr. Wolfe a penny, but I figured this way, I have done something here and made money I didn't know I would make, for I didn't have any idea I would sell the contract, and after I had made the money and these fellows had agreed to go in with me to buy the farm, I just give it to them. I didn't have to do it. It was nothing, but a verbal understanding with Mr. Copenhagen and not a word did I ever have with Mr. Wolfe about it.

Q. After you gave them approximately \$2,500 each, the Wrens knew nothing about them being interested in it, did they?

A. Not to my knowledge they didn't.

page 135 } Q. And Mrs. Tate didn't know anything about it either?

A. I don't know what she knew then or what she knows now.

Q. Didn't you tell me that—

Mr. Collins: This question and line of questioning is objected to for the reason this witness is a witness for the complainants and the effort on the part of the attorney to cross examine his own witness and lead his own witness, is objected.

Mr. Roberts: I will change he question.

Q. Now, Mr. Thomas, state whether or not after you filed your tax returns in March, 1943, whether or not the revenue man came to see you and inquired of you if you had not made \$5,000 on the trade?

Mr. Campbell: This question is objected to because immaterial and also because it is cross examination of complainants' own witness by their counsel.

Mr. Collins: And, in addition, the question could only be asked for the purpose of laying a foundation to impeach counsel's own witness.

Mr. Roberts: Not at all. I have talked to Mr. Thomas before about this.

A. He never come to see me about the 1943 return, but about my 1942 return.

Q. But he came to see you in 1943?

A. Of course. Yes, sir, in 1943, but the return was for 1942. He came to see me about the \$15,000 and asked me if

J. E. Thomas.

I had sold this property to the Wrens, and I told him I had and the records up here showed I had, and he page 136 } asked me to show him on my returns where I had accounted for the \$15,000 and I said I didn't account for the \$15,000 because it was all disbursed the same day I got it, and I could show him the checks where I disbursed it, and where I added in my return \$2,500, and that was the end of it. After I satisfied him I showed him the checks and he said, "You should not have done it that way. It all amounts to the same thing, as far as your return is concerned, but you should have shown the total amount you received, and then you were entitled to the deductions, "but it was as broad as it was long, but he didn't approve of the way I handled it.

Q. You showed him the checks you paid to Mr. Copenhaver and Mr. Wolfe?

A. Yes, sir.

Q. And that satisfied him you were in the clear?

A. I reckon so. I have not heard anything more from it, but that is the reason I want to keep these checks I have here, in case I should hear something more from it.

Q. As I understand you, neither the Wrens or Mrs. Tate knew that Mr. Wolfe or Mr. Copenhaver were interested in it until about that time, or afterward, which was the next spring?

A. I don't know Mrs. Tate knows it yet. I never have talked to Mrs. Tate about it.

Q. Did you or not hear that when she heard about it she created a scene down here in the bank?

Mr. Campbell: That is objected to because it is immaterial.

A. The only thing I heard about it was she said something to my sister criticising me and my sister didn't know a thing in the world about what Mrs. Tate was talking page 137 } about, and I never said anything to her or she to me about it. I haven't said anything but "good morning" or "good evening" to Mrs. Tate since Jim Tate died.

Mr. Roberts: You may take the witness.

Mr. Campbell: Stand aside, sir.

And further this deponent *saieth* not.

H. L. KENT,

the next witness for Complainants, being first duly sworn,
deposed as follows:

DIRECT EXAMINATION.

By Mr. Roberts:

Q. Mr. Kent, will you please state your name, age, and the office you hold, and how long you have held that office?

A. H. L. Kent, age fifty-eight; clerk of the Circuit Court of Smyth County. I have been clerk for twenty-five years.

Q. Mr. Kent, I asked you several days ago to look up the records as to the questions I am about to ask you, and without prefacing every question with the question whether or not you have examined the records in your office I will thank you to state whether or not you have, and what you found with respect to the following questions:

Amelia Gwyn Tate, widow of M. B. Tate, died in Smyth County in August, 1912. I will thank you to state whether any will of hers was ever probated in the clerk's office here, and if not, whether any administrator was ever appointed and qualified to administer her estate?

> A. There was no will or administrator of the estate.

Q. Referring now to Florence Lee Tate, Wil-
page 138 } liam T. Graham and The Marion National Bank,
Administrators of the estate of James D. Tate,
deceased, and also referring to Sections 5404 and 5405 of
the Code, please state whether or not said administrators
made any report of sales and had same inspected by the Com-
missioner of Accounts and filed for record in the Clerk's
office?

A. There was no report of sales recorded.

Q. Section 5423 of the Code provides that the Commissioner of Accounts shall post lists of fiduciaries whose accounts are before him for settlement, and I will thank you to state if the Commissioner of Accounts who examined the settlements of said administrators for the years 1942 and 1943 posted the names of said administrators on the list of fiduciaries, indicating that said respective accounts were before him for settlement?

A. I couldn't state positive as to this particular case, but I don't think this has been customary for some time. I haven't noticed any notices posted for several years.

Q. Does that apply to the years 1942 and 1943 and 1944?

H. L. Kent.

A. Yes, sir, and farther back than that—the last ten years, I expect.

Q. Do I understand you that no list of fiduciaries has been posted by the Commissioner of Accounts at the front door of the courthouse for the past ten years?

A. I said I have not seen any in that time.

Q. If there had been any posted would you or not have seen them?

A. I probably would have, unless they were torn down.

Q. Referring to Section 5434 of the Code, was or not an order entered directing said administrators to
page 139 } pay the debts and demands against the estate of
James D. Tate as provided by this section?

A. There was not.

Q. Referring to Sections 5437 and 5438 of the Code, did said administrators file and have recorded in the Clerk's office any such refunding bond as is provided for by Section 5437 and Section 5438?

A. They did not.

Q. Referring to Section 5439 of the Code was any order made and entered by the Court for the creditors of the estate of James D. Tate to show cause on some date to be named in the order against the payment and delivery of the assets of said decedent to his legatees or distributees, and a copy of any such order published, and an order entered directing the payment and delivery to the legatees and distributees of the whole or a part of the money or other estate not before distributed, with or without a refunding bond, as provided by this section?

A. There was no such order entered.

Q. State whether or not the papers and orders, etc., filed in said Clerk's office by the said Administrators, and the only orders entered thereon, are the inventory and appraisalment of the estate of James D. Tate, deceased; the annual settlements of said Administrators for the years 1942 and 1943, and the order or orders entered thereon or relating thereto, as shown by the certified copies thereof filed with the Amended Bill, as Exhibits VII-B, VII-D, VII-E, and the
page 140 } bond referred to in Exhibit VII-A?

A. The only papers I found, other than the original order appointing the administrators and the bond, are list of heirs recorded June 9, 1942; appraisalment recorded

H. L. Kent.

March 24, 1942; inheritance tax certificate recorded July 29, 1942; inheritance *tance* tax certificate recorded July 29, 1943; inheritance tax certificate recorded April 15, 1944, and inheritance tax certificate recorded July 10, 1944; administrators' settlement recorded April 29, 1943. This is dated January 9, 1943 and covers the period from January 9, 1942 to January 9, 1943. There was another settlement filed February 2, 1944, dated December 29, 1943, and covering a period from January 9, 1943, to December 29, 1943, but exceptions are filed to this report. The exceptions were filed on Feb. 7, 1944, and the same has never been confirmed by the Court.

Q. Now the last three documents you referred to there are the inventory and appraisement, which is Exhibit VII-B, and the 1942 settlement which is Exhibit VII-D, and the 1943 settlement, which is Exhibit VII-E.

A. I didn't have the list of exhibits and I couldn't identify them by the numbers you gave, as I did not have the exhibits before me at the time.

Q. Anyhow, the inventory and appraisement and the two settlements referred to are the ones of which you made the certified copies which are exhibited with the Amended Bill; is that right?

A. That is true.

Q. Coming now to the settlement of James D. Tate, and John H. Shuff, Trustees, under the deed of as-
page 141 } signment of January 11, 1892, from M. B. Tate, I
want to ask you the following questions:

Did said trustees, or either of them, file any inventory and appraisement and have the same recorded in said Clerk's office?

A. No, sir.

Q. Did said trustees, or either of them, make any report of sales and have same inspected by the Commissioner of Accounts and filed with the record in the Clerk's office? That refers to Sections 5404 and 5405 of the Code.

A. The only record I can find as to this trust estate was a trust settlement of James D. Tate, Trustee of M. B. Tate, recorded December 20, 1897, in Will Book 7, page 374, and trustee's settlement recorded January 20, 1902, recorded in Will Book 8, page 13. There are no other entries in regard to this trusteeship.

Mr. Roberts: Gentlemen, the copies we had exhibited with

H. L. Kent.

the Amended Bill do not show the references to the Will Book to which Mr. Kent referred. Do you agree that he is referring to the two settlements exhibited as Exhibit III-G to the Amended Bill?

Mr. Campbell: Is that a fact, from your own knowledge?

Mr. Roberts: Yes, sir.

Mr. Campbell: Then we agree to it.

Q. Referring again to Section 5434 of the Code, was any order entered by the Court directing said trustees, or either of them, to pay the debts and demands against page 142 } the estate of M. B. Tate, as provided by this section?

A. There was not.

Q. Did you say that the two settlements you referred to were the only settlements you found made by the trustees?

A. Yes, sir, the only ones made by the trustees.

Q. Or either of them?

A. Yes, sir.

Q. Did James D. Tate, Executor under the will of M. B. Tate file any inventory and appraisal of the M. B. Tate estate?

A. No, sir.

Q. Did James D. Tate, Executor of M. B. Tate, make and file any settlement as such executor, other than what was done in the suit of W. A. Wrenn, Administrator v. James D. Tate, Executor, exhibited with the Amended Bill as Exhibit III-E?

A. I think that is all.

Q. Are you sure about that; have you looked?

A. That question was not among your list and I didn't have a chance to look, but I think that is true.

Q. Will you go and look now?

A. Yes, sir.

(The witness retired to his office.)

Q. What did you find?

A. The only entry in the M. B. Tate estate entries are the will of M. B. Tate and the two settlements made by James D. Tate as Trustee for M. B. Tate.

Q. Now, Mr. Kent, will you refer to the file in the suit of J. Robert Wren, et al., v. Florence Lee Tate, et al., pending in this Court, for the purpose of setting up the will of James

H. Frank Peery.

D. Tate, and state the date that that suit was in-
page 143 } stituted and the process served?

A. The suit was instituted on December 29, 1943, and process was served on Florence Lee Tate, W. A. Wolfe, Cashier of The Marion National Bank, David Rouse, K. K. Snider, and David Rouse, President of the Chilhowie Milling Company, Sam Mountain, Manager, Chilhowie Motor Company, on December 29, 1943. Process on Wm. T. Graham was served on December 30, 1943. Process on Emily Jeffrey Williams was served on January 7, 1944.

Mr. Roberts: That is all. You may cross examine.

Mr. Campbell: No questions.

And further this deponent *saieth* not.

H. L. KENT.

page 144 } DEPOSITIONS OF H. FRANK PEERY AND
WILLIAM A. WOLFE.

For Complainants.

Taken Feb. 13, 1945.

Present: Vernon C. Barker and Henry Roberts, Counsel
for Complainants,

Charles E. Hunter, L. Preston Collins and S. B. Campbell,
Counsel for Defendants.

H. FRANK PEERY

the first witness, for Complainants, being duly sworn, deposed
as follows:

DIRECT EXAMINATION.

By Mr. Roberts:

Q. Mr. Peery, state your name, age, the position you occupy with the Marion National Bank, and how long you have occupied it.

A. My name is H. Frank Peery; I am fifty-two years old; Assistant Cashier and Trust Officer of the Marion National Bank. I have been Assistant Cashier for twenty years and Trust Officer for twelve years.

Q. I believe that as Trust Officer you have active charge of the administration of estates and property entrusted to the Trust Department of the Marion National Bank?

H. Frank Peery.

A. I have charge of the administration, but the administration is governed by a Trust Committee of the Board of Directors.

Q. Please state the dates and amounts of inheritance taxes paid on the estate of James D. Tate by the administrators thereof to the State of Virginia.

A. On July 28, 1942 we paid the Treasurer of Virginia inheritance tax of \$9,815.39; also on April 10, 1943 page 145 } we paid the balance of the inheritance tax to the Treasurer of Virginia, \$4,556.26. The total is \$14,371.65.

Q. Please state the dates and amounts of the estate taxes paid on the Estate of James D. Tate, Deceased, by the administrators thereof to the Federal Government.

A. On March 20, 1942 we paid the Collector of Internal Revenue estate taxes of \$66,658.80; also, on April 14, 1943, we paid the Collector of Internal Revenue the balance of estate taxes, amounting to \$35,954.21. The total of that is \$102,613.01.

Q. Mr. Peery, I believe those inheritance and estate taxes were paid to the State and Federal Governments on a gross estate of \$662,188.50.

A. Well, I don't have the record here and don't know those figures at all, because these additional taxes were paid on the amended returns, which I do not have.

Q. For your information, the estate was first appraised at, or the return was first made on the basis of total assets of \$538,712.89, and then a statement of adjustments was filed, showing additions to the gross estate of \$123,475.61, making a total of \$662,188.50. I don't mean for you to state that that is the exact amount without looking at your files, but is that the approximate amount on which these taxes were paid?

A. That is my recollection.

Q. Now, then, if the estate should be reduced by proper deductions, or the setting up of a trust which would permit the administrators to ask for a redetermination of page 146 } the amount of taxes payable on the estate, the amount which should have been paid would be reduced in proportion to the amount of the deduction, taking into consideration the brackets that would apply on the reduced amount.

Mr. Collins: This question is objected to because it calls for a conclusion of law on the part of the witness, with which he, of course, is not familiar.

H. Frank Peery.

Q. Let me put it this way: Mr. Peery, if the estate were reduced by two-thirds, then, roughly speaking, would not those taxes be reduced approximately that much?

A. I am not in position to answer that, because I don't know anything about the rates or anything.

Q. Mr. Peery, the counsel for the defendants had delivered to us a few days ago, and we filed as evidence or an exhibit on behalf of the complainants in this case, the red-backed account book, covering the guardianship accounts of the Wrens, but certain receipts and related papers which were attached to said book were taken out before delivering to us. Will you please deliver to the Clerk, or attach to that book in the Clerk's office, either the originals of said receipts and papers or true copies thereof?

A. What kind of papers do you refer to?

Q. Your counsel know what the papers are.

Now Mr. Peery, under date of Feb. 3, 1945, I sent Mr. B. L. Dickinson a written memorandum of data and documents which you would be requested to file when taking your deposition today. Have you examined the files and papers of Col. Tate to ascertain in a general way the contents page 147 } of his files?

A. Yes, sir, I made a very thorough search of his files and records.

Q. Where are his files and records?

A. They are in his former home at Chilhowie.

Q. Do you mean they are in his home or some of them in another building at the home?

A. They are all in the home.

Q. Now, then, did you find a book or books kept by James D. Tate and John H. Shuff, Trustees, or either of them, required by the deed of assignment from M. B. Tate of January 11, 1892?

A. Yes, sir. (Handing Mr. Roberts book.)

Q. May I see that, please? (Examining book.) I also asked you to look up the vouchers referred to in the settlements of James D. Tate, Trustee, which were made by him in 1897 and 1901. Do you have these?

A. Yes, I think so. We have some vouchers there.

Mr. Hunter: It is mutually stipulated between counsel that the memoranda which were attached to the red backed book and removed therefrom by C. E. Hunter before it was filed

H. Frank Peery.

with the Clerk, and all of the papers taken from the files of the said James D. Tate by Mr. Peery are to be lodged with L. Preston Collins, with the right to counsel for complainants to examine the same at his convenience, and to make photostatic copies of any of such papers as he may choose.

Mr. Collins: Mr. Peery, together with Mr. Dickinson and Mr. Hunter and Mr. Collins, based upon the page 148 } memorandum of request from Mr. Roberts have searched diligently through all the papers of Col. Tate having reference to the specific request of Mr. Roberts, and all such papers as we were able to find are now here and will be taken to the office of L. Preston Collins in line with the stipulation just stated by Mr. Hunter.

(As amendment to his answer on page 4 relative to taxes paid, Mr. Peery presented the following memorandum, which is herewith filed as an exhibit to his testimony.)

"JAS. D. TATE ESTATE.

N. B. Earley, Collector of Internal Revenue

Mar. 20, 1943 Series "C" Tax ctf. & Accd Int	\$50,075.00
Mar. 20, 1943 Series "A" Tax ctf. & Accd Int	5,048.00
Mar. 20, 1943 Cash	66,658.80
	<hr/>
Total 1st assessment	\$121,718.80
April 14, 1944 Cash	35,954.21
July 7, 1944 Cash	701.98
	<hr/>
Total payment	\$158,437.99

Mr. Collins: Presently Attorney Roberts has been delivered the red backed book with the memoranda which has been returned, and the account book of James D. Tate, Trustee.

And further this deponent saith not.

(Signature waived.)

WILLIAM A. WOLFE

the next witness, for Complainants, being first duly sworn,
deposed as follows:

pae 149 } Q. Please state your name, age, and the position
you occupy with the Marion National Bank.

A. William A. Wolfe; forty seven years of age; Vice President and Cashier of the Marion National Bank.

Q. How long have you been the Vice-President and Cashier of the Marion National Bank?

A. I have been Cashier for twelve years.

Q. And how long Vice-President?

A. I was elected Vice President at our annual meeting in January 1945.

Q. And you were re-elected Cashier at that time?

A. Yes, sir.

Q. Mr. Frank Copenhaver is a director of that bank, and has been for several years?

A. He is.

Q. And he was re-elected as director at that January meeting in 1945?

A. He was.

Q. Before you were cashier of that bank, were you connected with the bank, and if so, in what capacity?

A. I was Assistant Cashier before I was Cashier, and I have been connected with the Marion National Bank for twenty-seven years.

Q. Do you remember the date you were elected Assistant Cashier?

A. No, sir, I do not. It is so far back. I think it was about 1921 would be my guess.

Q. How long was Col. Tate connected with the
page 150 } Marion National Bank, so far as you know?

A. He was connected with the bank when I went there in 1917. I think possibly back to 1917 would catch Col. Tate's connection with the Marion National Bank. However, I have not examined the records.

Q. About when did he become a director in that bank?

A. Around that same time, around 1917, I think.

Q. Did he continue as a director until he died?

A. He did.

Q. When did he become President of that bank, and how long did he continue in that capacity?

A. He succeeded Mr. W. L. Lincoln as President, but just what year I couldn't tell. I could look on the records, but I

William A. Wolfe.

don't have it in my mind just what year. I would say around 1932 or 1933, but that is just a guess. He continued as President until he died.

Q. Had he been Vice-President of the bank before he became President?

A. He was Chairman of the Board before he became President.

Q. For how long, approximately?

A. I would say for ten years.

Q. I believe Mr. H. B. Staley succeeded Col. Tate as President at his death, and has continued as President since then?

A. That is correct.

Q. When did you become a director of the bank?

A. I think it was in 1930.

Q. And you have been a director ever since?

page 151 } A. I have.

Q. You and Col. Tate were more or less intimately associated in the bank, were you not?

A. We were.

Q. And did that association begin a good many years ago?

A. It did. I will say twenty years ago.

Q. And you would go on trips together to bankers' meetings occasionally?

A. Yes, sir, often.

Q. On those trips and on other occasions, did Col. Tate discuss his will with you?

A. He did, on a limited basis.

Q. Please explain.

A. Col. Tate was a rather close-mouthed fellow. He would tell even his best friends what he wanted them to know, and nothing more.

Q. Well, just what did he tell you about his wills from time to time?

A. Would you like for me to relate some specific instance?

Q. Yes, sir, if you will.

A. One particular instance that I remember was while we were attending the Virginia Bankers Association at Hot Springs, Virginia. Col. Tate and I occupied a room together, with twin beds, and one afternoon we were resting in the room and Colonel and I began to talk about his sizable estate and the disposition of same. I asked Colonel what he had in mind as to the method of disposing of his estate when he was finished, and he related to me that was a perplex-
page 152 } ing problem. He says, "You know the history of the Wren children. They have always been . . ."

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Mr. Collins: May I interpose to ask approximately what date that was, if you can fix it?

The Witness: That would be a guess, because I would have to refer to the meeting of the Association, (Mr. Roberts hands witness a booklet.) After reviewing a list of the bank meetings, I would judge this date to be 1935.

A. (Continuing). "They have always been a type of people that would spend more money than they could make, and I know if I left any appreciable amount of money to them it would immediately be scattered to the four winds." During the course of the evening we discussed at length various ways and means of investing funds, and the type of an estate that a man should leave. He talked much of his various stocks, and particularly his local stocks and business interests, such as the States Motor Company, Chilhowie Motor Company, Smyth County Motor Company, the Vance Company, etc. In all of these companies he took great pride in that he had been instrumental in their success. He stated that he preferred investments that he could have a personal contact with, rather than to deal too much on the listed stock market.

At this time he related the difficulties he had encountered, stating to me that most people figured his father had left him well off. He told me, as a matter of fact, his father was insolvent when he died.

Q. Mr. Wolfe, I don't want to interrupt you, but the point of my question was the discussion he had with page 153 } you about the disposition of his property by will.

If this has a bearing on that, go ahead. Otherwise, I don't consider it important.

A. I really don't think what I am getting into now would have any bearing on the preparation of his will. As a matter of fact, he didn't discuss his will at any length, other than to state to me that he was making his plans to have the Marion National Bank administer on his estate when he was finished, and that he had in mind to prolong that interest for a certain length of time after his death. That's about as far as he went in the discussion of his will.

Q. Well, was the reason that he wanted to prolong that interest the way you mentioned because he was leaving a sizable amount of it to the Wrens, and that he wanted to protect it, even after he was gone, from any mistakes they might make in handling it?

A. I didn't infer from my conversation that he had the

William A. Wolfe.

Wrens in mind, but was particularly interested in providing for the welfare of Mrs. Tate.

Q. As I understand you, he wanted to tie the estate up so that what he gave to her couldn't get away from her?

A. He possibly had that in mind. I couldn't so state.

Q. Do you say you did not infer from what he said about the Wrens that he was contemplating leaving any part of his estate to the Wrens?

A. I did not infer from my conversation with him that he had in mind the protection of the Wrens.

Q. But he did mention their names in connection with the discussion of his will?

A. He did, in so far as they were spendthrifts, and it would be of little need to leave any appreciable amount to them.

Q. Well, that was after he had made the will of 1933, wasn't it?

A. I presume so.

Q. Now, I believe that will was executed in your private office in the Marion National Bank, was it not?

A. It was.

Q. And it was executed before two witnesses, as provided by law?

A. That is right.

Q. And, of course, both you and Col. Tate knew the requirements of the law with respect to the execution of a will that way?

A. All three were present and all three signed at the same time, in the presence of each other.

Q. Do you recall who witnessed the will?

A. It runs in my mind it was Mr. George F. Britton and Mr. L. P. Haywood.

Q. The form of that will, as delivered to you by Mr. Dickinson, indicates that the attesting clause contemplated the signature of three witnesses. Do you know if it was, or was not, witnessed by three witnesses?

A. I do not remember that the form provided for three witnesses.

Q. Well, it does so provide. Do you recall whether or not you were the third witness?

page 155 } A. I do not think that I witnessed it.

Q. But you are positive that it was done in your private office and in your presence?

A. That's right.

William A. Wolfe.

Q. And it was executed before two witnesses, all together with the testator, at the same time?

A. Yes, sir.

Q. Now, that will does leave, with the exception of some small bequests, the income from his estate to Mrs. Tate for life, and directs that the estate be held in trust by the bank, as executor, for twenty-one years after his or her death, whichever occurred last, I believe.

A. I never read the original will that was signed by Col. Tate and witnessed, and all I know is what I have read in the copy that was presented to us by Mr. Dickinson.

Q. Now then, about that copy which was presented to you by Mr. Dickinson, it is already stipulated in the case that B. L. Dickinson, Attorney, drafted wills for James D. Tate in 1933 and 1939, and that the copies filed with the bill and amended bill are true copies thereof, which were made from the file copies of B. L. Dickinson of said original drafts of said wills, except as to signature. Now as I understand it, Mr. Dickinson did deliver to you his file copies of the two wills referred to soon after the death of Col. Tate?

Mr. Collins: I think the stipulation referred to by you is incorrect, in that you assume that Mr. Dickinson wrote a second will in 1939.

page 156 } A. Some time after his death. I don't know just what length of time. That is correct.

Q. It was within two or three days, was it not?

A. I would say within a week after the Colonel's death.

Q. And did you, in turn, deliver copies of both of those copies of wills to Mrs. Tate and Dr. William Tate Graham?

A. We did.

Q. I believe the copy of the 1939 will was not delivered to Dr. Graham until after the qualification of administrators?

A. That I do not remember just when.

Q. Does this letter help you refresh your memory on that? (Showing witness photostatic copy of letter.)

A. I remember something of that, yes, sir. I presume that is so, that it was after the qualification of the administrators.

Q. By the way, was that occasion there, at that bankers' meeting at Hot Springs, which you think was in 1935, was that the only time Col. Tate ever discussed the provisions of his will with you?

A. No, sir, he referred to it from time to time.

William A. Wolfe.

Q. Well, did he tell you anything about the provisions of his will?

A. No, sir, he did not.

Q. But he did tell you, on that occasion, that the Marion National Bank was to be the executor?

A. That's right.

Q. And did he tell you on that occasion, or I believe you said he told you on that occasion, that his thought was to provide that his estate should be held in trust page 157 } for a period of time?

A. That seemed to be the idea that he had in mind, but whether he had a will so prepared he did not state.

Q. Well, this will of 1933, which you say was executed in your private office in the bank, was executed two years prior to that time, was it not?

A. I didn't know what was in that will of 1933, and the incident that I am relating to you seemed to be an idea in the mind of Col. Tate as to the way it should be handled, and not to state that he had handled it as such.

Q. Now then, on that point, could it have been at the meeting of the Bankers' Association in Hot Springs in 1938 that he was discussing this with you, instead of 1935?

A. It could have been. I have no way to really say about that, or to tie that in.

Q. This might help you. 1938 was the last meeting of the Bankers' Association at Hot Springs up until the time Col. Tate died; would that help you fix it?

A. I don't believe it was on that occasion. If I am not mistaken, on the 1938 meeting we had separate rooms.

Q. Do you mean you and Col. Tate didn't get together sometimes, in each other's rooms when you were on conventions?

A. We always got together, but sometimes he would have some company.

Q. Now then, you did read and study the provisions of both of the copies of the 1933 and 1939 wills, which Mr. Dickinson delivered to you, as you told?

A. I read them over, yes, sir.

page 158 } Q. Didn't Col. Tate, from time to time, write wills for friends and associates? Did he ever tell you about that?

A. I have heard so. I never did see any.

Q. You have heard he wrote the will of John M. Gwyn, haven't you?

William A. Wolfe.

A. No, sir, I never have.

Q. Of course, you knew he wrote that Hawthorne will?

A. Yes, sir, that is the only one I knew of, and I really did not know he wrote that will. He had it in his possession.

Q. He had it in his lock box in the Marion National Bank?

A. Yes, sir, right on top of all his securities.

Q. At the time this 1933 will was executed in your private office at the bank, did Col. Tate put it in his lock box in the bank, or not?

A. Not to my knowledge. It seems to me that when we finished he placed it in his inside coat pocket. He could have gone back to the vault and placed it in his box, but I didn't see him.

Q. Well, he did have a large lock box in the bank?

A. He did. The largest box we have.

Q. And those boxes are probably eleven or twelve inches square by twenty two to twenty four inches deep?

A. Yes, sir, it is a tremendously big box, right in the center of the section.

Q. Did that lock box have one key or two keys?

page 159 } A. Two keys.

Q. Who had them?

A. It had a master key and the regular key. The master key will not open without the regular, and neither will the regular open without the master.

Q. The bank keeps the master key?

A. Yes, sir, and we send an employee with everyone entering the box, with this master key, insert the key, assist them to open the lock, and bring the key back in the main office.

Q. That master key is used to help open all or a number of the boxes?

A. All of them. They have exactly the same type of lock.

Q. Did Col Tate tell you, after May 1939, that he had changed his will in any respect? I believe you said he told you at this conversation you had at Hot Springs that the Marion National Bank was his executor?

A. That's right.

Q. Now, did he tell you, after May, 1939, that he had changed his will and his executors?

A. He told me on a trip to Pulaski, Virginia, to interview Mr. D. R. Wood, our National Bank Examiner, that he had made a change and the Marion National Bank would not administer on his estate, for the reason that he had become provoked at one of the members of our Board, and he did

William A. Wolfe.

not wish this particular member to have any hand in the administering of his estate. I stated to Colonel that I hoped he would reconsider that action, that I felt it would be very unjust for him to hold a grudge against the whole bank due to his ill feeling toward one member of the Board.

He stated to me, "That's the way I feel, and I page 160 } usually do just what I choose."

Can you fix that date, approximately?

A. I can't fix the date. I could refer to my records and very nearly fix the date.

Q. Could that have been before May, 1939?

A. I believe that was—I can't guess at it.

Q. You say you could fix a date?

A. I think I can, with my records.

Q. I would like for you to do that, Mr. Wolfe.

A. I will be glad to.

(In a letter dated Feb. 14, 1945, addressed to the reporter, Mr. Wolfe stated this date to have been July 9, 1938. Original letter is filed herewith as exhibit to Mr. Wolfe's deposition.)

Q. Do you recall that Col. Tate ever told you that he had changed his will with respect to his executor or executors?

A. He did not, no, sir. At no time did he ever mention to me that Mr. Buck was to be a co-executor.

Q. You did not hear from Col. Tate that he disliked Mrs. Jeffrey, the sister of Mrs. Tate, and that he stated, or did he ever state to you, that he did not intend to leave his estate so that any of it would go to Mrs. Jeffrey?

Mr. Hunter: Objected to as wholly irrelevant.

A. I don't recall that he ever made such a statement to me.

Q. Do you recall that on Jan. 19, 1942, Mr. W. A. Stuart, Mr. T. L. Hutton and Judge R. R. Parker had a conference with you in Mr. L. P. Collins' office here, and page 161 } that in that conference you stated, in substance, that Col. Tate had told you that he did not want to put Mrs. Tate's provision in such form that she could dispose of it to the children of Mrs. Jeffrey?

Mr. Campbell: Objected to, because the attorney cannot cross-examine his own witness.

Mr. Roberts: I will take the position that it is a hostile witness, and I invoke the sections of the Code relating thereto, and will cross-examine.

William A. Wolfe.

Mr. Hunter: This is objected to, because the witness is not hostile, and has no adverse interest, and that section is not applicable. In addition, the substance of the answer elicited is not admissible in any court.

A. I have no recollection of making such a statement.

Q. When Mr. Dickinson delivered those two copies of those two wills to you, what statement, if any, did he make to you about them?

Mr. Campbell: Objected to as calling for the statement of a third party, and the third party is available as a witness.

A. He merely stated to me that I might be interested in looking over copies of some wills that he had prepared for Col. Tate.

Q. On that trip to Pulaski, when Col. Tate told you that he was going to change his executor, did he or not suggest who he was going to make his executor?

A. He did not.

page 162 } Q. Now, then, the day that Col. Tate was getting ready to leave for Richmond and Savannah and Florida, on that last trip, which I believe was October 24, 1941, did he come to the bank that day?

A. I don't know as to the date, but he came to the bank prior to leaving for this last trip.

Q. And he did leave the night of the day that he came?

A. I can't state that. It runs in my mind that it was some two or three days after that before he left.

Q. Well, what conversation did he have with you that day?

Mr. Campbell: Objected to as immaterial and not having any bearing on any issue now before the Court.

A. He stated to me that he would possibly want to trade in some various stocks while he was in Florida during the winter, and wanted me to go with him back to the vault, get out his box and take it back into the Directors' Room and there make a list of all of the stocks, and so stack them that I would be familiar with them when he would write me for various certificates to be forwarded him for trading.

Q. Did you do that?

A. I did.

Q. Did you make a list of all the stocks in the box, or all that he expected he might want to trade in?

William A. Wolfe.

A. The Colonel did his own fingering in the box, and handed me the certificates he wished listed.

Q. Do you mean by that, that you don't know whether he listed all of them or not?
page 163 } A. I couldn't tell, because I did not look.

Q. Did you make two copies of the list?

A. No, sir, just one copy of the list on a yellow piece of paper.

Q. Did you keep a copy?

A. No, sir, the Colonel took it with him.

Q. Was that copy found in the papers when they were returned home after he died?

A. I do not know. I never did see it. I made a list, logged all of his various stocks, and placed them back in the box, and at that time Col. Tate handed me a will of old Mr. Hawthorne, and stated to me that the old fellow was in very bad health, and no doubt would pass away before he returned in the spring, and that should I hear of his death to deliver that will to his family.

Q. Do you mean by that, that he left the key of the lock box with you?

A. He did. He left it with me with the instructions that I hold that key in my own private safety deposit box in order that no one would have access to the box except we two, he having a key and I having a key.

Q. After he left he didn't have a key, though, did he?

A. Yes, sir we issue two keys and a master key to each box, so he had a key on his ring, and I had this one in my safety deposit box.

Q. I misunderstood you when you discussed that before. Do you mean that all boxes have two keys for the man who rents it, and the master key?

page 164 } A. That's right. That is for the purpose of being able to obtain a new key should one become lost, without having to drill the box and go to that additional expense.

Q. Then, with the duplicate he left with you and the master key the bank had, you could open the box?

A. That's right.

Q. And he left that so you could get out any stocks he wanted you to deal in, and to get out the Hawthorne will?

A. That is correct.

Q. Did he sell any stocks?

A. He did not.

William A. Wolfe.

Q. And Hawthorne didn't die until after he did, did he?

A. That's correct. I never opened the box after the Colonel left until Fred Buck came up and we went in the box.

Q. Why did you open the box in the presence of Mr. Buck?

A. Mr. Buck, at the time of Colonel's funeral, came to me in the cemetery, before Colonel's grave was filled, and asked me if I knew where Colonel's will was. I told him I did not know, and he said he thought it was in the safety deposit box at Marion, and how about going up there then and investigating to see if the will could be found. I told Mr. Buck that practically all of our bank force was down at the funeral and the time lock had been placed on the main vault and it would be impossible to enter the vault and box until the following morning. I stated to him the vault would open at eight o'clock the following morning, and if he would be there at that time we would look through the box and see if there was a will.

When I came to the bank—that was Wednesday page 165 } morning, Mr. Peery was already in the office, and

I related to him the conversation between Mr. Buck and myself the previous evening. I asked Mr. Peery not to open the vault until Mr. Buck arrived, which he did not do. Very soon Mr. Buck pecked on the side window. I went to the front door and admitted him, and as he came in Mr. Peery proceeded to open the vault, in which we entered. I took my key and opened my own safety deposit box, removed Colonel's key and entered that into the lock of Colonel's safety deposit box, opened the door, removed the box, placed it on the table in the vault, and Mr. Buck took the initiative in going through the box.

Q. To refresh your memory, didn't this conversation occur on the Sunday afternoon after the information had been received in Marion that Col. Tate had died Sunday morning, and weren't you and Mr. Buck and Mr. Williams, the undertaker, if that was his name, in the Tate home at Chilhowie, and Williams, the undertaker, wanted to know about the provisions for the funeral, and didn't he suggest that the will be examined to see if it made any provision for the funeral, and in the conversation that ensued there, didn't it develop that Col. Tate had told all three of you that he didn't want his body put back in the back room but wanted it put here at the front, and then Williams suggested that you all go and look at the will and find out any other directions, and it was on Monday morning, instead of Wednesday morning, that you went to the bank to look for the will?

William A. Wolfe.

A. No, sir, that is absolutely incorrect, and I can substantiate that by Mr. Peery. I didn't even go to Chilhowie on Sunday afternoon. I believe the body arrived on page 166 } Monday night, and I went down on Monday afternoon, and in a conversation with Mr. Buck he stated to me that the bank and himself were to be the executors. That was on Monday afternoon. I didn't go to Chilhowie on Sunday afternoon.

Q. That was before you looked in the box?

A. Yes, sir, and Mr. Buck and Mr. Williams did not come in the bank on Monday. When I came in on Monday morning I stated to Mr. Peery and Mr. Britton that they knew I had the key to the Colonel's safety deposit box, and I wanted them to be witnesses that I didn't enter that box until due representatives were present.

Q. By the way, the day you and the Colonel were in the box, and he was getting ready to leave, and you took out the securities, was anybody else there?

A. He had two nurses with him, and he said he wanted them to stay out, that it was private.

Q. Did they stay out?

A. Yes, sir, they stayed out.

Q. You kept the key to his lock box until after the administrator was appointed?

A. Yes, and then I delivered it to Mr. Peery, and it was held in his custody from then on.

Q. And you didn't find the will in the lock box when you and Mr. Buck—do you recall now that Mr. Williams was there when you examined the box?

A. Oh, definitely not. Mr. Buck was by himself. Mr. Williams was not present at all.

Q. By the way, about these copies of the wills, page 167 } some weeks after these copies were delivered to you by Mr. Dickinson you delivered photostatic copies of those file copies to the Wrens, I believe?

A. I did. We were delayed somewhat in obtaining those photostatic copies for the reason that we get our developments in Washington, and we are compelled to wait for what we call a cutting of the film, and then it takes about two weeks in Washington to get it out.

Q. Now, then, shortly after the funeral of Col. Tate, Mrs. Tate had one or more conversations with you about what Col. Tate had told her about the will at Savannah?

A. She did.

William A. Wolfe.

Q. What did she tell you he had said?

Mr. Hunter: Objected to as immaterial. This suit, as I understand it, is for the purpose of the establishment of a trust, and not a will, and anything of that sort should be taken care of in the companion suit.

Mr. Collins: This line of testimony is further objectionable upon the ground that he is asking this witness for details of a conversation between this witness and Mrs. Tate, which is hearsay evidence, and for that reason is obviously objectionable, and could not in any instance be used for any purpose than possible to impeach the testimony of Mrs. Tate.

A. Mrs. Tate related to me a conversation that took place between she and Colonel in Savannah, in which Mrs. Tate asked Colonel just what her status would be
page 168 } should some misfortune befall him. He said, "Flossie, I have everything in shape for you. I am giving you everything I've got." She says, "Jim, I don't want everything you have. All I want is security." Colonel told Mrs. Tate that everything was prepared, and his securities were all in the safety deposit box of the Marion National Bank, and W. A. Wolfe had the key. She says, "Jim, since these papers are prepared, why not write Wolfe at the bank and have him send them over here to me, in order that I may know for myself that I have the proper protection." He says, "Aw, Florence, I am not going to that much trouble. I will just write it out here in my own handwriting and give it to you here. Then you will know definitely that you are cared for." And that was the instrument he was writing at the time of his death. My opinion is that Col. Tate, knowing the status of his dying without a will, but also knowing that Mrs. Tate was of the opinion that unless a will was in existence that she would only inherit a one-third interest in his estate, that she would not be satisfied should he attempt to explain the status without a will, and the securities in the box at Marion would all be hers, but give her this will, which imparted to her all his earthly possessions, real, personal and mixed.

Q. Mr. Wolfe, I didn't ask you anything about your opinion, and I move to strike out your statement, so far as it gives an opinion, because not responsive to question.

Now then, the paper that Col. Tate was referring to, in which he had made provision for her, was his will?

William A. Wolfe.

A. I inferred from my conversation with Mrs. Tate that that was what he meant.

Q. And he told her it was in his lock box here in the bank at Marion?

A. That's what she said.

Q. Then she stated, "Jim, you send for that will and let me see it myself," and he told her that wasn't necessary, that he could write a new will there without having that one, or something like that?

A. That's right.

Q. And he started the will, the fragment of which was found among his papers?

A. That is correct.

No cross examination.

And further this deponent *saieth* not.

Signature waived.

Mr. Campbell: The defendants, by counsel, not believing that the evidence introduced through this witness is material, do not cross examine the witness at this time. Should the evidence hereafter become material, they reserve the right to cross examine the witness on it.

Mr. Roberts: In reply, we state that the purpose of this evidence is to prove the pertinent allegations of Section VII of the bill, the purport of which is that the defendants had notice of the fact that there was a will, and it was their duty to have that fact determined before they distributed the assets, and if the gentlemen desire to cross examine the witness, we think they should do so now.

page 170 } STIPULATION FOR COMPLAINANTS
(Dated 11/18/1946.)

(Covering the W. H. Wren—Northwestern Mutual Life Insurance Policy of \$2,000.00, and Testimony from the Tate will case.)

It is agreed by all parties hereto, by counsel, that the following stipulations may be read at the hearing of this cause in lieu of depositions, subject to objections by defendants for materiality or admissibility.

The following stipulations shall not preclude either party from introducing other and further evidence relating to the facts so stipulated, or relating to other points at issue, if such evidence shall be otherwise competent and relevant to the issues involved in the case:

(1) It is agreed that the records of The Northwestern Mutual Life Insurance Company, of Milwaukee, Wisconsin, show that said company issued its policy No. 121,380 to William H. Wren, on June 29, 1883, and that "the policy page 171 } for \$2,000 was on the Ordinary Life Plan and provided for payment to Mr. Wren's executors, administrators or assigns. On December 6, 1892 it was assigned to James D. Tate, creditor. Quarterly premiums were \$11.26.

"Proofs of death reached the Home Office on November 21, 1894 and the proceeds of the policy, \$1,984.82, were paid to James D. Tate. In the settlements two net quarterly premiums, totalling \$15.18 were deducted.

"The total premiums paid, including the deduction referred to above, amounted to \$540.48. The annual dividends from 1885 to 1894 inclusive amounted to \$146.06. At the time of settlement there was paid also a post mortem or terminal dividend of \$14.80."

(2) It is agreed that the following testimony of

Edith Wren Whitney

J. Robert Wren

J. Harold Wren

William H. Wren

Mrs. Thomas M. Jones, Jr.

Fred C. Buck

William Lee

Griffin A. Rigney

Marguerite S. Gentry

George F. Britton

L. P. Hawood, and

William A. Wolfe

adduced before the jury at the trial of the Tate will case, under the style of J. Robert Wren, et al., v. Florence Lee Tate, et al., in the Circuit Court of Smyth County, on page 172 } April 16, 1945, and following days, set out on pages 4 to 67 hereof, may be filed and read as depositions of said witnesses in this cause, provided that the

Mrs. Edith Whitney.

defendants shall have the right to cross examine said witnesses, or any of them, if desired, and it is understood that complainants intend to take further depositions of said J. Robert Wren, J. Harold Wren and William H. Wren, and that such cross examination of said three witnesses shall be made at that time.

This November 18, 1946.

HENRY ROBERTS
Of Counsel for Complainants.

S. B. CAMPBELL
Of Counsel for Defendants.

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MRS. EDITH WHITNEY

the next witness, for Complainants, one of the Complainants, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Roberts:

Q. State your name and age, if you don't mind, and place of residence.

A. My name is Edith Wren Whitney. I am fifty-four years old. I am a housewife. I live in Claremont, California.

Q. Mrs. Whitney, you are a niece of Colonel James D. Tate, are you not?

A. Yes, I am.

Q. I wish you would tell the jury briefly about the relationship of the Wrens to Colonel Tate, and the family relations between them throughout their lives.

A. I am the daughter of Rosa Tate Wren, who was Colonel Tate's sister. When she died I was six months old. I was taken, along with my four brothers to Southwest
page 174 } Virginia to live with my grandmother. At that time Uncle Jim lived in Lynchburg, Virginia. He was a frequent visitor there at the farm. He always brought gifts to the Wren children. He enjoyed playing with them and in fact when he would come he would have our governess declare a holiday and he and the boys would go off rabbit hunting. He brought us presents always. I remember him bringing each of us a banjo. We were very musical, in fact all five of us played a musical instrument, and he said one

Mrs. Edith Whitney.

day he was going to bring a banjo to the one that could play the best tune, and we all tried out and we all got banjos. This comradeship went on through all my childhood. It was a very happy childhood. It was a place of plenty.

When I was about ten, I would say, Uncle Jim came to Chilhowie to live, and I must say that Aunt Florence was also a frequent visitor at the farm, and we took long walks with her, and we looked toward her as a very dear friend and relative, and she brought city ideas with her in the way of food, and always saw we had a Christmas tree and nice things.

Q. When did your father die?

A. My father died when I was less than three, because I don't remember him. I don't remember either of my parents so the only parents I ever had were Uncle Jim and my grandmother and Aunt Florence.

When they came to Chilhowie to live at Terrace
page 175 } Hall we each took turns at living with them, and
it was very happy.

When I was about eleven years old I had a very serious back injury. I got the very best medical care. I was taken to Lynchburg to Dr. Dillard. My case was diagnosed and he told them what should be done for me. Uncle Jim built a trapeze on the back porch and I would swing there every day so long, and I had a massage treatment every night before going to bed, and Aunt Florence religiously did that, she always took care that service was performed, and if she had not done it I am sure I would have been a hunchback now, and that is a debt of gratitude I will never be able to pay to her, and I owe what I am now to the treatment she gave me as a little girl.

Then later I went to Martha-Washington College. If I wanted to bring friends home with me Terrace Hall was the home I came to or the farm. I had two homes then. My guests were always welcome. I was treated as a daughter. I went on long trips with Uncle Jim and Aunt Florence and I was treated as one of them.

I always had a yen to be independent, and when I finished at Martha-Washington College I taught school at Chilhowie for one year, and I then went to Columbia University and Uncle Jim thought that was silly and said, "You have had
your education at Martha-Washington, why do
page 176 } you want to go off," and I said, "I want to make
my own living," and then I went to the University of Chicago, and all through that I think he was rather

Mrs. Edith Whitney.

proud of the fact I could earn my own way. I was offered a scholarship at the University of Chicago, and I started in there and stayed until I got a degree, and after that shortly I was married. I was married right from Terrace Hall and to a man that Uncle Jim and Aunt Florence were very proud of. I don't think anyone was prouder of anyone than Uncle Jim was of me and my husband the night of our wedding.

Then when I moved to California he visited us there. He came there and visited in my home and he liked California so well he said, "Edith, you can have any house in Pasadena you want and I will take care of the upkeep and you and Walter can live in it, I like California so well I am coming back every year." But he never came back and we lived in that house several years until he wrote us, "I don't think I will be coming back any more, and I want to get rid of my Pasadena property, but I will not profiteer on you, I will sell it to you for what I paid for it."

Mr. Collins: I am very interested in this, but I don't feel it is in keeping with your Honor's ruling. Your Honor held the pertinent inquiry was statements of Colonel Tate's with reference to the will, but to relate all the incidents up to this time, pointing out the objects of his bounty, outside of your Honor's ruling, seems to us to be consuming time and not pertinent to the point.

The Court: Objection overruled.

Mr. Collins: Exception.

By Mr. Roberts:

Q. Did you ever visit back at Terrace Hall?

A. I did many times. I came through here bringing my family. Sometimes Aunt Florence was there and sometimes she wasn't. We were always made to feel welcome. Uncle Jim liked my children. I have four children, and he thinks they are mighty fine youngsters. He told me in 1939, the last time I saw Uncle Jim, he remarked what a fine job I had done in raising my four children.

Q. What particular points did he stress?

A. He said, "Edith, to have raised your girls in this time when all girls smoke and drink, and yours do neither, I think you have done a wonderful job." Those are his words.

Q. Were the relations between him and the boys about the same as between you and him?

J. Robert Wren.

A. Yes, I would say they were.

Q. Were the boys treated as the children of the family, like you were the daughter?

A. Yes, sir, my case is typical of the five of us.
page 178 } Q. Do you know about the Tate's Chapel out there, did Colonel Tate build that; and, if so, about when?

A. I don't believe I can answer that question.

Q. I guess you were too young for that.

A. I am afraid I was too young for that.

Q. You didn't know the Chapel was there?

A. Oh, yes, it is the Chapel he built for my grandmother.

Q. That is what I wanted to know.

A. I remember that but I don't remember the date.

Mr. Roberts: That is all. You may cross examine.

Mr. Campbell: That is all.

(Witness excused.)

J. ROBERT WREN

the next witness, for Complainants, one of the Complainants, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Roberts:

Q. Mr. Wren, Mrs. Whitney has told of the intimate relations between Colonel Tate and Mrs. Tate and the Wrens. I would like for you to just add to that very briefly about your own personal relations with Colonel Tate after you grew up and your visits to each other, etc.

A. Well, I was born in 1889 on the 11th of February. I was born in Lynchburg, Virginia, and do not remember anything about Lynchburg, that is to say my earliest recollection is on the Tate farm where we lived with our grandmother near Chilhowie. I will briefly say that Uncle Jim visited us very often.

Q. Mrs. Whitney has already covered that. Go on as you got older about your relations with your Uncle Jim, after you grew up.

A. I went to school. After discussing the school with Uncle Jim I went first to Emory and Henry College. I was there a couple of years and went to Blacksburg and got into trouble

J. Robert Wren.

at Blacksburg and was suspended over some boyish prank, and I have Uncle Jim's letter written me then. I still have it, in which he says "I will stand by you regardless, and if you fail in your efforts to reinstate come on back home."

I left Chilhowie on my own in the summer of 1911. I got employment in Louisville, Kentucky and returned one year later, about a year later, in 1912, to be at my grandmother's bedside, and to attend her funeral.

I left home again and the next time I saw Uncle Jim and Aunt Florence I was living in Minneapolis, Minnesota, when they visited me there in 1915 and spent about a week. I had gotten in some business venture that did not turn out very

well and I was scolded moderately by Uncle Jim,
page 180 } and the next time I came to Chilhowie by the way
in 1917, early in the spring, I joined the United

States Army as a private, and was sent to a camp in Louisville, Kentucky, and from there to Texas, and was made a Lieutenant, and was then assigned to a camp in Massachusetts as sort of a port of embarkation, and was given a one week leave which I spent en route at Chilhowie, at Terrace Hall, and as usual I was treated precisely as a son there, or a son could not have been treated any better I am sure. Uncle Jim and Aunt Florence seemed sort of proud of me. I remember Aunt Florence took me to a Red Cross group which she led and they asked me how long I thought the war would last—a Lieutenant was supposed to know everything—and I told them three years and I missed it about two and a half years. As I said, it was a pleasant visit for me. I had not been back for five years and both my aunt and my uncle were most cordial. I recall leaving on the two o'clock train going east toward Massachusetts, and I remember as we had our lunch Uncle Jim said goodby, and he went back down to the station and said the boy, the chauffeur, would take me down an hour later, which he did, but on leaving at the very back door of the house Aunt Florence said to me, "Now, Rob, I don't intend you Wren boys shall have any of Jim Tate's money." It was an expression that nearly knocked me down, and I said,

"Aunt Florence, I am awfully sorry you said
page 181 } such a thing, and now I have something to say to
you which I didn't intend to tell anyone, I have
volunteered for spy service behind the German lines, which
is dangerous, and I don't think I have much chance of coming
back so you can speak to the others about that," and I went
on down to the station and while waiting for the train I saw

J. Robert Wren.

my Uncle Jim come puffing up from the mill office. He was stout and breathing heavily. I remember he had to stand a minute to catch his breath, and he said, "What on earth have you said to upset your Aunt Florence so," and I—permit me to go back a second—after Aunt Florence said this and I told her I didn't think she should, she was sorry she said it and shed tears and said, "I should not have said it," and I said, "Aunt Florence, it is all right, I was a little shocked too, but let's not tell anybody about what has been said." So at the station I said, "Uncle Jim it is nothing, forget it, she will be all right," but he insisted, and the train was coming then, and well I told him exactly what had happened, and he held on to my arm as I got on the train and he said, "Rob, you should have notified me of such dangerous work, I don't know anything about it, and I want you to be careful, because we want you to come home, and as for the money that is a very personal proposition between you Wren children and me, and your Aunt Florence hasn't a thing to do about that." So I

page 182 } went on to the Army and the Armistice followed soon afterward and I never got across. I wound up my service at the port of embarkation ready to go, and came back as far as New York and then Chicago, and then I have lived abroad a little, and in 1924 my Aunt Florence and Uncle Jim accompanied by two young people came to see me in New York and spent a week with me there. I was at the time in the theatrical publicity business and had access to all the New York shows and I felt glad I was able to send them to a matinee and night performance every night they were there.

Q. You mean you got complimentary tickets?

A. Yes, sir, and Uncle Jim was displeased with the business I was in. He called it "whoop-te-do". I was going along not making much money and really having a good time. That was 1924.

I was visiting in Richmond just before Christmas 1938 and came out in this part of the country with Will Wren and spent a night at Terrace Hall with Uncle Jim who was living there alone. He was awfully glad to see me, I think, and we reminisced together and spoke of the ball games we had played when I was a boy, and he was a young man, and talked about my foolishness as he called it at V. P. I., and how much better it would have been if I had gone on and graduated instead of getting suspended for pranks, but never any scolding.

J. Harold Wren.

Then I returned for a day one year later and
 page 183 } found him sitting at his radio, still alone, and he
 was glad to see us again. I think Will Wren and
 me, and on Christmas day we drove as far as Wytheville. I
 drove with him, and I will just tell you of one incident. It is
 hardly—well, I will tell you this, Uncle Jim really thought I
 was intelligent but along with it foolhardy and he was ex-
 plaining as we drove along the ways of the world, how young
 folks now depended on candy and chewing gum, and Coca-
 Cola whereas in our days when we were younger that we
 amused ourselves by climbing trees, making whistles and so
 on, and now young folks had to have so much, moving pic-
 tures and so on, and I said to him, "Uncle Jim, those things
 you speak of, the things you are saying that most people are
 without prudence, but it requires those people to make people
 like you, to make prudent people, because if wealth was evenly
 distributed we would have about \$21 apiece, whereas you
 have so much," and he was so impressed with that—he had
 his Lincoln—and he went up to about eighty miles an hour
 while I was telling him that, and said, "You are right," when
 he slowed down, "I have no right to complain." And Uncle
 Jim left me, or rather I got out of his car at Wytheville, where
 I was going to visit Will Wren's son and daughter-in-law,
 and the last words I heard from Uncle Jim's mouth was,
 "Rob, write me often, because I always want to know where
 you are," and I never saw him again. And I will
 page 184 } say this, that although I deserved scolding all
 through my lifetime, as all young boys do, there
 was never one harsh word between Uncle Jim and me, never.

Q. That last time you saw him was Christmas, 1939?

A. That is right.

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J. HAROLD WREN

the next witness, for Complainants, one of com-
 plainants, being first duly sworn, was examined and testified
 as follows:

DIRECT EXAMINATION.

By Mr. Roberts:

Q. Please state your name, age, residence and occupation.

A. My name is James Harold Wren. I might add the
 James was given to me in honor of my uncle, James D. Tate,
 and the Harold in honor of Mr. Harold B. Jeffrey, a friend of

J. Harold Wren.

my father's, also the husband of Aunt Florence's sister, and my friend too.

My residence is Brooklyn, New York.

Occupation, accountant.

I am a certified public accountant in Virginia and also in New York.

Q. State what your connections are as a certified public accountant are you by yourself or in a firm?

page 186 } A. At present I am a partner in the firm of F. W. LaFrentz and Company, with offices in this country and abroad, and I am stationed at the executive offices in New York City, 100 Broadway.

Q. Now, Mr. Wren, we have had the relationship of the Wrens to the Tates pretty well covered, and I would just like for you, without going into that at all, to state what your personal relations were with Colonel Tate from the time you grew up until the time he died?

A. Well, Mr. Roberts, that covers a period perhaps from 1892 to the present, or to 1941 when he died, upwards of fifty years. Now if you will allow me, and I know time is precious, and I can condense that, if you will allow me to break it up, so the jury can get the sequence.

Q. All right, go ahead.

A. Let's take the first ten years, during which ten years I was on the farm, and I was having a happy and healthy life. From that period on to 1912 I believe, when Grandma died, I was perhaps between the farm and living with Uncle Jim and Aunt Florence and going to school and coming back and forth.

Then that leaves perhaps thirty years to account for, and all I can say, I have been doing in that time what I am doing today. It has gotten monotonous, but that is all I have done.

Now let me go back, if I may, Mr. Roberts, to page 187 } the first ten years and make one broad statement to this effect, that in my judgment there never was a set of orphans left in this world who had greater solicitude shown for their welfare than was shown to these Wren orphans by their grandmother, Amelia Tate, and by their Uncle Jim and Aunt Florence.

Q. Go ahead with your relations after you grew up and to the time your Uncle Jim Tate died.

A. That would pertain to the thirty year period I mentioned and I want to be as brief as I can. I will state first that I formerly was in accounting practice here in Virginia.

J. Harold Wren.

I lived in Norfolk, maintaining branch offices in Bluefield and over here in Bristol. During that period I recall Uncle Jim called me in for work he thought I could do and it was a satisfaction to me to have him say I knew as much about everything as he did, not more, but as much. Uncle Jim had been held up to us as knowing about all that one needed to know on any subject, and it so happened in my work in this technical line, income tax and systems and all, Uncle Jim paid me a distinct compliment. He called me in with Mr. Eller, his partner, and had Mr. Eller take the responsibility of engaging my services, and I recall the engagement at that time had to do with simplification of his motor company bookkeeping practices. I was engaged to make a study of that and I recall on that occasion I installed a little daily report, page 188 } which pleased Uncle Jim mightily. That was twenty-five years ago, and every day he got a daily report from Wytheville, Marion, Bristol and Johnson City, and I think that system is still used now. I don't know if the mention of such detail is relevant, and you will correct me, Mr. Roberts, if it is too broad.

I want to say, also, in that connection, he also employed me on his income taxes a good deal. I went to Washington in conferences before the Bureau there in connection with the Chilhowie Milling Company's additional assessment, and I succeeded in getting that assessment reduced and he also complimented me on that. I don't know if this is relevant or not, but when I got a compliment from Uncle Jim that outweighed the money he was good enough to pay me for such services as I was able to render, and I always took a delight feeling that somehow or other I could repay in some small measure his kindness and solicitude for me throughout the years. Now I mention that as an incident. There were many others.

I went to New York and there ensued a series of letters back and forth on every conceivable question it seemed that is in my knowledge, like accounting and banking matters and financial matters and taxation principally, and Uncle Jim naturally wanted to save taxes on every allowable item. He wanted to save all he could, and I wanted to help page 189 } him save all he could, and we had various conferences and trips on taxes, and a question arose before he died how he could comply with this new law commonly referred to as the Wage and Hour law or technically the fair wage standard act, and we wrote back and forth about that, and the last time I saw Uncle Jim was in 1939. We were

J. Harold Wren.

here on a visit, my brother Will and I, and I thought we had somehow wound up all pending matters and nothing more to discuss, because we had had a terrific amount of mail back and forth, but when we arrived that day, Will and I started for a walk. I remember we walked down toward the church and he called us back and said, "Harold, before you go I want your advice on a little banking matter that has come up." And it seemed, if I recall, and the letters will show, it seemed it had something to do with the duties and responsibilities of a national bank director in connection with his oath of office, and Uncle Jim wanted me to give that question some thought. I believe he wanted me to write him about it after I got back to New York, and I believe I did, and I received a reply from him and he said that was just what he wanted, and that pleased me mightily. That was the last time and last little item of service I was privileged to give Uncle Jim. I have perhaps gone to too much at length.

Q. Did those intimate relations between you and Colonel Tate continue unbroken to the time of his death?

page 190 } A. Mr. Roberts, there never was a year, I may say a month, when I didn't see my Uncle Jim out here or somewhere or hear from him. I remember when I was in Washington he and Aunt Florence came up there and I went around to see them where they were staying and Aunt Florence and I walked around and Aunt Florence may not remember this but I remember it, we passed a little cafe and I pointed out a sign "Open all night" and Aunt Florence said, "Harold, there is one place that is going to stay with us," and I remember that as we were walking around.

Q. I don't know if any of the others have mentioned anything about Christmas presents to you all from Colonel Tate.

A. Well, that should be mentioned, although it is just an item.

Q. What about it?

A. He just sent us Christmas presents periodically.

Q. For how long?

A. All the time, Mr. Roberts. There was one time he failed to send us one, as the letters show, and I remember once in the depression he said that—I think he mentioned "old man depression" had hit him that year. This was early in December, and he had decided to waive the practice of sending Christmas gifts.

Q. Did he do that up to the time he died; did
page 191 } he send the presents to all of you?

William H. Wren.

A. I can't speak for all of them.

Q. I mean to you.

A. I got them and they went to Jessie, my wife, and children.

Q. What form did those presents take?

A. Checks.

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WILLIAM H. WREN

the next witness, for Complainants, one of the Complainants, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Roberts:

Q. Mr. Wren, please state your name, age, and in what work you are engaged, and where you reside.

A. My name is William H. Wren. I reside in the City of Richmond, Virginia. I am employed as Chief Accountant of the Unemployment Commission for the Commonwealth of Virginia. I was born in June, 1886.

Q. Mr. Wren, before we go into other matters, I wish you would state who are the heirs of Colonel James D. Tate, the heirs at law. I mean by that his nearest kin.

A. The five of us. The Wrens and Mrs. Whitney are children of Mrs. Rosa Tate Wren, a sister of James D. Tate. There are no other close relatives that I know of.

Q. Suppose you state the names.

A. The names in order are Beverly T. Wren, William H. Wren, James Harold Wren, J. Robert Wren and Edith Wren Whitney.

Q. Who are or is the nearest kin of Mrs. Florence Lee Tate?

A. Mrs. Emily Jeffrey Williams is a daughter of Mrs. Florence Lee Tate's sister, therefore a niece of
page 193 } Mrs. Tate. She is the only near relative that she has that I know of.

Q. Now, then, Mr. Wren, I would like for you to confine your testimony as far as you can to telling the jury—let me change that—the Answer of the Defendants in the case states that Colonel Tate indicated shortly before he died that something had developed the last year of his life and that he was not going to leave you any part of his estate. For that reason I want you to tell briefly about the relations between you and

William H. Wren.

your family and Colonel Tate, throughout your life, from the time you left home until he died.

A. That is rather difficult to condense, considering the fact I am the only one of the Wren children that has remained in Virginia, and my contacts with Uncle Jim Tate have been so frequent and so numerous for a long period it is very difficult to sketch it, and to quote what should be said, however I will attempt it.

Beginning with my education I had one year of college education, which I completed in the summer of 1905. I was nineteen years of age. I immediately became employed in one of my Uncle Jim's enterprises at that time, the local bank at Chilhowie. The next position I had and which he helped me secure was the following year, in 1906. I went to Beckley, West Virginia.

Q. Just sketch all that.

page 194 } A. I went to Beckley, West Virginia and was employed in a bank, and I was recalled by Colonel Tate to come back to Chilhowie and assist him in the operation of his mill in Chilhowie, in 1907. I remained in Chilhowie then until 1914. Then I went to Norfolk for a year, and I was recalled again by Uncle Jim to return to Chilhowie and engage with him in the automobile business, which I did. I went to Big Stone Gap in 1917 from Chilhowie, still in the automobile business, and remained in that place until 1933, about sixteen or seventeen years. He then again assisted me.

Q. Was he interested with you in that business?

A. Yes, sir, he was interested with me in that business at various times.

Q. Go ahead.

A. After I was obliged to liquidate my business in Big Stone Gap he assisted me in obtaining a position in Richmond. We moved to Richmond in 1934 and we have remained there since, the last eight years or more. I have had the same position I have now. During all these times and places Uncle Jim and Aunt Florence Tate visited in my home, except when I lived in Norfolk. I don't believe they came there. .

Q. Did you visit them?

A. Of course we visited at Chilhowie and were welcomed whenever we had the opportunity to go there, and there was an exchange of visits all during that time.

page 195 } Q. Suppose you take up next the things that Colonel Tate asked you to do, in connection with his business and other matters the last few years of his life and sketch that briefly.

William H. Wren.

A. Well, he became dependent upon me it seems beginning with 1936. I had done various things for him prior to that but in 1936 Uncle Jim began to fail and he told me he said, "I will be obliged to lean on you, you can be of great assistance to me."

Beginning with 1936 I performed various duties for him that were of course in my power and knowledge to do. I will sketch a few things I have done. I made a note here so I wouldn't forget.

I assisted him in his tax matters, especially involving unemployment taxes, social security taxes, income taxes, I assisted him in the preparation of his income tax returns, especially where there were deductions involved, and I assisted him with the Fair Labor Standards Act, the Wage and Hour law, and made various contacts for him with the Motor Vehicle Division. I was there in Richmond and well acquainted with the department heads there, and I was a definite service to him. In addition I assisted him whenever he wanted me to in obtaining jobs for his friends from this part of the country, and in political matters, and I was of value to him,

I am sure.

page 196 } He wrote me one time too see Governor Peery about a position on the State hospital Board here in Marion, which I did.

He also wrote me about a position on the Conservation Commission which I handled, and he was appointed to that Commission finally in about October, 1940. Whether my work was the main thing that got him the appointment I will not say, but he got it, and I talked to Governor Price and others for him about it.

I have here some 350 —

Q. Let's finish this up a little more. Just generally didn't you collect some taxes for him that he had paid or something like that, handle some important matters like that?

A. I did. I collected refunds for him from the Federal Government on overcharges.

Q. Were those in substantial amounts at one time?

A. About \$1,100 at one time and other smaller amounts, but I made a trip to Washington and succeeded in getting an assessment reduced.

Q. Do or not those matters require a lot of time and attention?

A. Those things require quite a considerable amount of time. I also disposed of his used cars. In some instances I have sold some cars for him and also collected for them,

William H. Wren.

that was down in Richmond, and I interviewed the
page 197 } Motor Vehicle Commissioner relative to one of
his motor companies securing the franchise for
handling state license tags, which they are handling and have
been for some years, and there were various other little
matters.

Q. Did he call on you to purchase certain refreshments
for him frequently, and you had to go look after that and
advance the money, and then he would remit to you for it?

A. Yes, sir. Uncle Jim like Scotch whiskey, and there was
a time when his brand was unavailable in this part of the
country, and I had the shipments made to him direct from
Richmond, and he never paid me until after he got the cost,
so it was necessary for me to advance my own money in all
cases, which I didn't mind.

Q. Did that happen on an average of once a week, once
a month or once a lifetime?

A. It happened whenever Uncle Jim wanted it to happen.

Q. Now did those services continue right up to the time
he left here?

A. Right up to the time, yes, sir. About the last purchase,
if you are talking about those I made for him, were drug
store sundries, such as shaving material and things like that,
and one of the last letters I ever got from him was enclosing
a check for some advance I had made for drug store sundries.
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Q. For all that, over a period of six years, how
much did he pay you?

A. He paid me \$14.20 to go to Washington, which was five
cents a mile on my car.

Q. Did he ever pay for your services?

A. No, sir.

Q. Not a penny?

A. No, sir, not one cent.

Q. Did he pay your expenses?

A. He paid my expenses once or twice.

Q. You mean you paid your expenses?

A. He paid my expenses to Chilhowie I think twice.

Q. And you paid all your other expenses?

A. Yes, sir.

Q. Take up now, Mr. Wren, his illness during the last year
or so and tell how you looked after him during that, and what
you did for him?

A. Well, as I said, he became ill the first time in 1936, but
after about I think six months—he made two trips I think to

William H. Wren.

Hot Springs, and beginning with 1937 he seemed to be all right. In his last illness, which began April 13, 1941, at Richmond, he called me from the hotel and told me to come down and get him. That was on Sunday morning. He said he liked to have died last night. I immediately went down
page 199 } and brought him out to my house and he said he had a bad spell of choking and he wanted to go home and he said something he had never said before, he said, "I want you to take me to Petersburg," instead of getting on the train at Richmond and having to make that change. He realized he had baggage and hated to make that change. So me and my wife went with him and I loaded his baggage up and put him in charge of the porter and he came to Roanoke, and I learned afterward he collapsed in the Hotel Roanoke. In fact he told me he fell in the front door instead of walking in. That was the first Sunday in April, and his first illness, and he never got over that.

On the following Sunday a friend of mine, McCarthy Downs, called me on the telephone, and said, "Your Uncle Jim is in serious shape, you ought to go out and see him," and I was surprised, and he said he had stopped at Chilhowie—he was a great friend of Colonel Tate's, and he had stopped to see him, and found him very ill, so I went to Chilhowie, and I arrived there then on Saturday morning and found him pretty bad. I stayed with him as long as I could away from my work and returned to Richmond, and heard from him by phone and letter until the second of May I went again in my automobile to Chilhowie and saw him often. He continued to decline, not rapidly, but surely. I could see it every time I saw him between these visits.

On June 13th my wife and myself drove to
page 200 } Charlottesville and left our car and came to

Marion on the train and he had his car to meet us at the Marion station Friday the 13th of June. We returned on Sunday from the Marion station to Richmond.

Sometime about the 10th of July I came again. I brought my wife and left my car at Appalachia and returned to Richmond with Dr. Graham who was in Wytheville in his car, on the 30th of July. I came often on the train because my car was here. I drove back about the first of August. That is the last time I saw Uncle Jim in Chilhowie but I did succeed with the help of Dr. Graham in getting him to agree to come to Richmond for medical treatment.

On the 12th of August he telephoned me. He also wrote

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me a letter and told me when he was coming with his nurse, and Dr. Graham had made arrangements at St. Luke's hospital, and we had an ambulance at the Broad Street station and we hauled him down to the hospital and put him in the charge of Dr. McGuire. He was very sick. He had several examinations and the Saturday following, that was on Wednesday he arrived there, and the Saturday following his death was imminent and expected. Dr. Graham told me his heart was gone.

To go back a minute. The day after he got there he became dissatisfied with the hospital bed up in the air, and he was rolling off, and he was used to using all of a big bed
page 201 } when he sleeps and Dr. McGuire called me and said, "Mr. Tate wants you to send him a bed," and said he was sending a truck out for it. We sent him one of our beds with mattress and springs, and he was more comfortable.

Q. Did the bed stay there?

A. The bed stayed there until he left.

Q. How long was that?

A. Practically six weeks.

Q. Go ahead.

A. I visited him as I went to my office in the morning. I made one trip to the hospital at noon and also as I went home. I was there three times a day and my wife also visited him as often as she could.

One afternoon I was coming home and his nurse said to me: "You should take care of Colonel Tate's papers." I knew nothing about what she meant by papers. I knew nothing at all, but I said, "I am on my way home, and I have no way to keep them at my home, but I will stop as I go to work in the morning and put them in my safe," which I did stop, but instead of giving me any papers she gave me a hospital receipt indicating she had placed in the hospital safe for safekeeping these items—

Mr. Campbell: Give us the name of the nurse.

The Witness: Mrs. Summers.

A. (Continuing) One \$3,000 note executed by
page 202 } the Smyth County Motor Company to James D.

Tate, some few hundred dollars, I think it was around four or five hundred dollars in Traveler's checks, and \$38 in currency. His rule was to carry very little currency but an adequate supply of Traveler's checks.

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Q. And she gave you a receipt for those?

A. Yes, sir. I never saw the items at all. She gave me a pair of his gold cuff buttons, which I took to my office and kept until he left. All during his stay in the hospital we supplied his room as regularly as we could with roses, which he seemed to enjoy very much.

Q. Along toward the last of his stay what happened, if anything?

A. Along toward the last of his visit he wanted me to take him downtown to buy a hat and also to buy a trunk he could carry in his automobile, as he was planning a trip to Florida as soon as he got better.

Mr. Mahoney was working at Miller-Rhoads at that time and he arranged to have a wheel chair sent up from the store and I took Colonel Tate down and we rolled him through the store and showed him the trunk, but I don't remember if he bought one or not, but he bought a hat while he was there and maybe we went on additional rides, certainly on the last day he left Mr. Kenneth Snider and Beatty Gwynn happened to be in Richmond, the day Uncle Jim left the hospital, and before I got home from work that day after he called up my residence and told my wife he would like to be taken for an automobile ride, it seemed like he wanted a farewell automobile ride in Richmond, and he hated to ask me to do it, because I remember he said, "You have done so much," so we went riding, he and Mrs. Wren and the nurse and myself, and he enjoyed his ride very much and we took him back to the hospital and then I took him on to the train that night. He bought his own ticket. He liked to walk up to a ticket office himself. He didn't want anybody to fool with buying his ticket. And we put him on the train and he came on to Chilhowie and he arrived here the 22nd day of October accompanied by two nurses, and I heard from him on October 2nd, and October 10th, I believe, and he phoned me again on October 24th, saying, "I will be in Richmond tomorrow morning, the 25th," and asked me to meet him. For some reason I didn't meet him that morning. I don't remember why, but something interfered, but I went to the hotel. He got down there all right. It is no trouble to get from the station to the hotel and I saw him about ten o'clock in the morning. He had just finished talking on the telephone he said to Aunt Florence, who was then at Chilhowie. He seemed very much agitated and perturbed. I didn't know why but he began by telling me he was going to spend his money as he

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pleased, that he was going to get well if he could, page 204 } and that in no one year of his life had he ever spent as much as he made that year. Those three things I remember. I had no way of knowing what made him say it to me, because I certainly had not criticised him, but I inferred that something on the telephone had caused him to feel that way, but I let it go, for he was too sick to be in that condition, and I realized it, and I tried to talk about something else. That was on the 25th of October.

I visited him daily two or three times a day and oftener as I could and offered to take him to the train bound for Savannah on Tuesday, November 4th, I believe it was, but he told me that J. D. Mahoney had asked him first, and J. D. ought to be given that privilege, because he had not been hauling him around much, but he said, "You see me at the station though, but let J. D. take us to the train," which was fine for me, and we all met at the train and loaded him on a wheel chair and put him on the train and saw the train pull out, and he was in a gay humor and feeling good apparently, although he was mighty sick, and that was the last I saw of him, and I never heard a line from him from that day, although he had been writing to me frequently.

Q. Mr. Wren, didn't you take a chair down to the hospital?

A. No, sir, no chair, just a bed.

Q. During this last illness in 1941, when you page 205 } were at Terrace Hall and before that, was he there alone, I mean was Mrs. Tate there with him?

A. No, sir. Mrs. Tate was not there.

Q. How long had she been away from home?

A. Aunt Florence left Chilhowie for Asheville this last time about February, 1939. I visited her with Uncle Jim on July 4, 1939 at Asheville.

Q. Now, then, did you sometime during the summer of 1941 suggest or ask Colonel Tate's doctor if it would help if you would come out to Chilhowie, give up your work and come out there and take charge of his work and his home and let him get well, or something like that, and if so what ensued from that?

A. Well, I had been told by Dr. Graybeal that Uncle Jim was trying to do more than he was able to do, and as long as he was so intent on thinking about business matters and other things that it would retard any improvement or his recovery, so on my trip, I think it was about July 30th, I have

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the exact date, I suggested to Dr. Graybeal, I said, "I am doing right much work for Uncle Jim now, and it is quite difficult for me to come out here for these two or three day visits, and run my business too, and I would be willing, if it would help the situation any, to get a leave of absence from Richmond, and set out to get him well, with your help," and

I asked him what he thought of it, and he said—
page 206 } I asked him what he thought of it, and he said it was a fine thing and would be of much benefit if I would do so, and also said, "You talk to Dr. Graham about it, when you get back home and see what he says about it," so I did, but I never heard any more from it, and I never mentioned it to Uncle Jim.

Q. Did Colonel Tate ever by any word, expression or sign indicate to you that he had formed any dislike for you before he died?

A. Never.

Q. What had been your relations with Mrs. Tate up to the last year or two say of Colonel Tate's life, and if there was any change in her attitude toward you, state the facts about that?

A. Her attitude from boyhood was one of extreme cordiality, and I can testify as to the happy days like the preceding witnesses, as far as Aunt Florence was concerned. There was never anything between us and both my wife and myself were accepted in the home. She even came to Richmond to see us and stayed in our home, both Uncle Jim and Aunt Florence, and I went to Asheville, which was the last time I saw Aunt Florence, although in 1938 I made three or four trips or four or five trips to Baltimore to see her. She was in Johns Hopkins in 1938 for five or six months and the
last time I saw Aunt Florence was in Asheville,
page 207 } in July, 1939, when I went over there with Uncle

Jim, and she was very cordial and I could see no change in her attitude. So to get right down to brass tacks, on the night of December 23, Aunt Florence arrived from Augusta with Mr. Snider and Mrs. Summers. The previous day was Sunday. Can I go back a little?

Q. Wouldn't Monday have been the 22nd?

A. Yes, sir. I beg your pardon, on Monday. Let me go back to Friday night, to get my sequence. Friday night at eleven o'clock William Graham called me on the telephone after I had gone to bed to tell me that Uncle Jim had had a stroke, that was his expression, and he expressed great con-

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cern, and convinced me practically that it was the end of Uncle Jim. That was Friday night the 19th of December. I couldn't go there because the following morning at nine o'clock, Saturday morning, I was to take an examination required by the Commonwealth of Virginia already arranged for, and I couldn't get out of it, so I took that examination at nine o'clock, and with my wife left Richmond at three o'clock for this country. I spent the night at Norton, where my son was living. The next day at dinner, twelve o'clock, I received a phone call while I was sitting at dinner at my son's home in Norton, from Mr. Buck, who advised me that Uncle Jim had passed away at eleven o'clock. I said, "What shall I do, Mr.

Buck?" And he said, "You should go to his
page 208 } home and take charge of things. I was the only
relative there was here. Mrs. Tate was not here
and that appeared to Mr. Buck to be the natural advice to give me, which I accepted, and I started for Chilhowie. I reached Chilhowie at three-fifteen p. m., Sunday afternoon, the 21st of December. I was made very cordially welcome at the door by Mrs. Jeffrey, who had preceded me, also with Mrs. Jeffrey at that time was Mrs. Eller's daughter, Mrs. Johnson. The first thing I busied myself with that day was telephoning the relatives. I called up my brothers in New York and Washington, and my sister in California and told them what had happened. I then called up Mr. Bob Anderson who lives in this city, to come down and bring a typewriter and let us start on the publicity for the newspapers, and he came down in a short time. We worked out the story for the papers, and we got up a tentative list of pall bearers, just tentative. That was one thing I didn't want to take the responsibility for, but I suggested it anyway, and when Aunt Florence arrived on Monday the 22nd, just about dusk, I met her and I told her I had about completed this paper work, and I had a list of pall bearers to submit to her for her approval before I released the press matter.

Mr. Hunter: Your Honor, this may be interesting, but I
don't see it has anything to do with the issue, and
page 209 } we are consuming a lot of time about details and
traveling back and forth and what he did at the
home after Colonel Tate's death, and it certainly has no bearing on the destruction or revocation of the will or anything of that sort.

Mr. Roberts: You made him the big issue in your answer.

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Mr. Hunter: He is talking about after Colonel Tate's death. Colonel Tate couldn't change, revoke or change, his will at this point.

Mr. Roberts: We have a right to show it was Mrs. Tate that got the dilike for him and not Colonel Tate.

Mr. Campbell: But you don't charge Mrs. Tate with stealing the will.

Mr. Roberts: It touches on the revocation of the will.

The Court: I don't know, but I will overrule the objection.

Mr. Hunter: Exception.

Q. Go ahead.

A. I repeat, I asked Aunt Florence, and told her I was ready with every detail, and wanted her approval of the list of pall bears, both active and honorary, and she replied in a rather quick way that she did not need my services, that page 210 } she was going to handle her own business and that took the sails out of me, and here I was the only relative there, and been there since the day before, and I didn't like that, although I didn't show it by any word, but in a few minutes she did take this list and we got the list of pall bearers and Mr. Adams from Bristol took the press matter with him, as he went to Bristol. The next day was the funeral.

Q. State what you found about a picture of yours on Colonel Tate's desk?

A. I had had a photograph of myself taken. I think it was in 1938. I won't be sure which, 1938 or just when; which Uncle Jim kept on his writing desk right by the side of the fireplace, and I had seen it there numbers of times.

Q. Did you see it on the day of the funeral?

A. Yes, sir, it was all right that day, but on one of my trips there, I think it must have been on the 26th, December 26th, I won't be positive about that now, but I noticed it had been torn in two, but it was still sitting there.

Q. Mr. Wren, I want you to read excerpts from two or three letters from your Uncle Jim to you.

A. All right.

Q. This stack of letters here on the table are those letters you received from Colonel Tate about the matters page 211 } you have discussed here, from 1936 until the time he died?

William H. Wren.

A. Yes, sir, six years.

Q. About how many are there?

A. I think there are 330 some there, some dictated by Uncle Jim to Mr. Rouse.

Q. And they run from forty to sixty odd a year?

A. Yes, sir.

Q. Select two or three of them to show.

A. Here is a telegram dated March 8, 1938, to W. H. Wren, Richmond. It is dated at Baltimore. "Am confined in hospital with cold. Will return shortly." It is signed "Uncle Jim."

The next here is No. 3811, a letter. I won't read all that letter because it would take time.

Q. Just read an excerpt from it.

A. It closes by saying: "Glad to hear from you any time, you are a life saver under such circumstances."

Q. Now go to No, 3830.

A. All right.

Q. You can read it from your notes without getting the letter.

A. This letter is from Chilhowie, dated August 10, 1938, and in substance says: "Come to Hungry Mother Park with Governor Price. Mrs. Tate so nervous, hates to have any company at Terrace Hall. You are not in company page 212 } category however."

Q. Look at No. 3923 now.

A. This letter is dated Chilhowie, April 24, 1939, and I will read an excerpt from it: "You have always helped me out in disposing of my used cars." He wanted me to sell his 1938 Lincoln car. This used car business he speaks of was his own car which he would sell every year and buy a new one.

Q. Turn to #3926 and 27 and read about the Bermuda trip.

A. #3926 is dated at Chilhowie, May 8: "I hope Perrette will pay the balance on Packard." It had not been paid for altogether. "I want to come by Richmond a day or two before leaving for Bermuda."

#3927, the first line is, Chilhowie, May 23: "Returned from Bermuda trip yesterday."

#3935, Chilhowie, July 12, 1939: "In regard to repairs for Barton house, I hate to bother you with such matters but this seems the only way to get out of trouble."

#3945: August 31, 1939: Chilhowie. "I have some more trouble to put you to regarding the Diesel engine for the Chilhowie Milling Company," which I had purchased for him.

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Q. Now 3958.

A. November 14, 1939, from Chilhowie: "Your page 213 } letter is very informative and we certainly appreciate your interest in the matter." That refers to the transportation of an oil storage tank which he was considering buying in Richmond.

Q. Then the next letter below that, No. 3959.

A. The next letter is dated November 16, from Chilhowie: "Certainly thank you for the time spent and information secured."

Q. Then the next letter No. 4018 down the fourth line from the bottom.

A. He was having correspondence about a deduction from his income tax return on account of a forest fire he had.

Q. What date is that?

A. Chilhowie, April 29, 1940. He says: "I want to make a loss deduction to be filed before May 15. Have I a good case? You are an expert I know. I am leaving for Louisville with Frank Lemmon and Emmett Thomas. Going for diversion. Thanks for all favors."

Q. Read the last sentence on the bottom of No. 4024.

A. Chilhowie, May 21, 1940, regarding the Wage and Hour law, he says: "I hope I am not bothering you and Harold to an undue extent."

Q. Read No. 4031 there.

A. Chilhowie, June 17, 1940. "I enclose check page 214 } for \$87.50. I certainly appreciate your attention to this matter and I feel sure if it were not for your good graces I would have to run short of Martins." Please have twenty more bottles shipped."

I would like to read one from Chilhowie, dated December 30, 1940. He speaks of various matters I am handling for him or have been, and he winds up his letter by saying: "For the present and at this opportune time, which is next to last day of 1940, I hope that I will not have to call on you to attend to these various things for me in 1941 to the extent that I have in 1940. That is the best wish I can make for the present."

Q. Did Colonel Tate send you and your family Christmas presents or cards every year?

A. Without fail to the end, except I didn't get one in 1941.

Q. He died before Christmas?

A. He died December 21st.

Q. Suppose you read No. 4140 and 4141 or summaries from them.

A. This is from David A. Rouse, June 22, 1941: "Con-

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gratulations on good work you have done in saving Chilhowie Milling Company a mighty lot of money. I am sending the Collector a check for the tax \$1,280.08." That had been reduced by the way from \$2,200 or \$2,300, or about page 215 } half.

Q. Read the next letter from the Colonel.

A. Dave tells me you did a fine job in settling the Washington matter. Hope you will delay your intended trip until I finish relaxation period. We are grateful to you for your fine work in our behalf and feel that it could not have been handled better by anyone than it was by you."

Q. Now then, go ahead with the funeral week there, begin with the first thing that was said to you by Mr. Wolfe about the will, I think that is the first thing that happened perhaps the night of the funeral.

A. On the 23rd, which was Tuesday, just after the funeral, I think it was about five-thirty o'clock in the afternoon, I happened to be in Uncle Jim's office in the mill and there were present Mr. Wolfe and Mr. Rouse, and we were talking about the fact I had heard of no will being located, and I remember Mr. Wolfe made this remark, "that will will show up." He did that to reassure me.

Q. By the way, did Colonel Tate like Mrs. Jeffrey and did she like him?

A. Well, I have an incident that—

Q. Just tell the fact.

Mr. Hunter: What does that have to do with the issue here, your Honor? Do we have to prove friendship and everything wholly foreign to the subject in this case?

Mr. Roberts: She was alive at that time and page 216 } the point is he didn't want her to get any of his property through his wife.

The Court: He may answer the question but don't take much time on it.

Mr. Hunter: Exception.

A. It is just this way: He came to my apartment in Richmond sometime during 1939. I cannot identify the date but I think it was in the summertime and he was very perturbed and worried, but he wasn't sick, however, and he had a letter in his hand when he reached my apartment, and I asked him what was the matter, and he sat down in a chair and told us this story—my wife was present and heard it. He said, "I have a letter here from Mamie Jeffrey and she tells me to

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send Florence what she wants and not what she needs." Aunt Florence was at that time in Asheville. He explained the matter by saying, "Here is a bill for silk stockings and other things, she has unlimited credit at the department stores, and I pay the doctor and Appalachian Hall people, but that doesn't seem to be sufficient," and he said, "What is a Bubble Bath anyhow?" And I said, "I don't know." And he then put his hand on his head and said, "They can't wait until this old grey head gets cold," and then he said, "they will see."

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MRS. T. M. JONES, JR.,

the next witness, called by and on behalf of Complainants, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Roberts:

Q. Please state your name and where you reside and your age?

A. I am Mrs. Thomas M. Jones, Jr., of Alexandria, Virginia. I am forty-four years old and live at 1000 Janey's Lane, Alexandria, Virginia.

Q. Mrs. Jones, state what your husband's business is, and if he occupies any positions in Alexandria of any importance, and also your own background.

A. Well, my husband is in the men's clothing business in Alexandria, and he has been in business for twenty years. He is past president of the Kiwanis Club and president of the Retail Merchants Association. I am president of the Woman's Citizen League, and vice-president of the Alexandria Soroptimists Club.

Q. Have you been interested in hospital work in Alexandria?

A. Yes, sir. I am on the Alexandria Hospital Board, and I have given two and one-half years "Grey Lady" service to Walter Reid Hospital, and also volunteer hospital work.

Q. Did you know Colonel James D. Tate during his lifetime?

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A. Yes, sir. I knew him very well.

Q. I wish you would tell the jury just how you knew him and what your associations with him were, mentioning dates.

A. Well, I have known, or did know Colonel Tate, up to

Mrs. T. M. Jones, Jr.

his death, since 1936. I was working for the State of Virginia at that time. I was receptionist and stenographer for the Unemployment Compensation Commission and Colonel Tate came to Richmond frequently, practically every week, to see Mr. Will Wren, who was also connected with that Commission, and it was my duty at the Commission to receive the people as they came in. So Colonel Tate came in one morning to see his nephew and I called Mr. Wren and Mr. Wren introduced me to him. I was a widow at that time and I have three grown daughters, twenty-five, twenty-three and twenty-one years of age.

Q. How old were they at that time?

A. My youngest daughter now is twenty-one and that has been nine years ago. And when he would come to Richmond he would come down there to see Mr. Wren and I got in the habit of writing a lot of letters for him, and tending to little things for him. He was interested in things there in Richmond and I got to know him very well, and he was very fond of my children. It seemed his first concern was children, and he would talk at great length about the Wren children and J. D., and in a great number of instances
page 219 } he would mention to my children, "Well, you remind me of J. D. or the Wren children." I was married in 1938 and when I was married Colonel Tate said he wanted to come to the wedding and I said that would be just fine, and he came up to Alexandria and was in my wedding, and at that time he was talking to my husband and I about his will. He had told us previously he had this motor company at Statesville and wanted J. D. to get that motor company.

Q. You mean the States Motor Company, don't you?

A. Yes, sir, and that he felt he wanted him to have it, and he said, "as far as my will is concerned naturally I am going to look after the Wren children and J. D., because they are just like my own children," and he said, "I promised my mother I would always take care of them and look after them, and he was very devoted to his mother, and we had an opening at the hospital to endow a bed, and we had a name we wanted to give to that bed, and I wrote him, knowing how devoted he was to his mother, and asked if he didn't want to endow that bed in his mother's name, and he wrote back he was very delighted, and so—

Mr. Collins: It occurs to us, your Honor, that the incidents

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she is relating are not at all pertinent to the inquiry which the Court has outlined as being the subject of the inquiry here, which is the question of the execution of page 220 } the will, and I understand the Court has held, subject to revising his opinion later, that possibly for the present they could show statements of Colonel Tate as to that pertinent question, but as to conversations between Colonel Tate and this witness, and the exchange of letters and the general situation between her and Colonel Tate, not pertinent to the inquiry, we insist it is irrelevant and should not be gone into.

Mr. Roberts: I will ask her about the will right now then.

By Mr. Roberts:

Q. On what occasions did Colonel Tate discuss his will with you, and what did he say, if anything?

A. He just said, he told Mr. Jones and I one night, he said, "You know I am a very wealthy man, and I have always used sound judgment in my investments," and said, "Of course when I made my money the money I made I made it off of what belonged to the Wren children," and he said, "When I die I am remembering the Wren children and Mr. Mahoney."

Q. By the way, you referred to J. D. in your other answer. That was J. D. Mahoney, was it?

A. That is right.

Mr. Collins: Your Honor, we think that answer page 221 } is not responsive to the inquiry.

The Court: I overrule the objection at this time.

Mr. Collins: Exception.

Q. What did he say, if anything, about the way he wrote his will?

Mr. Campbell: Will you fix the date, please?

Q. Mrs. Jones, let's go back a little bit. Did he talk to you about his will at different times?

A. Well, at that time my husband was considering writing a will, which he had never written, and we were in the store one day, and he asked us to go around to the hotel and have lunch with him, and we did. This was the last time, of course

Fred C. Buck. William Lee.

he had mentioned it before that, but we went around to the George Mason Hotel and had lunch, and he had a way of joking quite a bit, and he was talking about when people write things they should write it in their own handwriting, because then it is definite proof it belongs to you, and we were sitting at the table having lunch, and he said, "I have written my will." This was in the spring of 1941, sometime between March and April, and he said, "I wrote it like that," (indicating) he said, "because when you write it in your own handwriting nobody can ever doubt whether it belongs to you."

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FRED C. BUCK,
witness for Complainants.

Q. Did he mention anything about the other beneficiaries under the will on that occasion, who they were or anything?

A. He made this statement there when he was talking about making some little changes, as he put it, in his will. The principal thing he referred to was for Mrs. Tate to have a guaranteed income of \$1,000 a month, and he said he had been thinking of making some provision for some of the people who had been working for him, but concluded, "Of course the bulk of my estate will go to my people."

Q. As I understand you, this was shortly before he left on the trip, and that was at the time he was preparing to leave?

A. As I recall it was two or three days before he left on his final trip south.

Q. About when was that?

A. It was sometime around or a little after the middle of October, 1941, as I recall.

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WILLIAM LEE

the next witness, called by and on behalf of the Complainants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Roberts:

Q. What is your name?

A. William Lee.

Q. Please state your age and your business and place of residence.

A. I am sixty-three years old; residence, Richmond, Vir-

William Lee.

ginia, 1109 West Avenue. I am in the real estate business.

Q. State whether or not some years ago you were looking after a piece of real property in Richmond for Colonel James D. Tate, and about the time that was?

A. Yes, sir, the property was 2026 Barton Avenue, a duplex house.

Mr. Campbell: You were asked the approximate time you were looking after this property. I didn't catch it if you gave that.

A. I should say for ten years.

Mr. Campbell: Between what dates?

A. 1933 I think is when the property was put into our hands.

Mr. Campbell: That would be between 1933 and 1943?

A. Yes, sir. I think it was 1933. I couldn't tell exactly without going back to the books, but about that time.

Q. Did you say that was residential property?

A. Yes, sir.

Q. Which Colonel Tate owned and you looked after; you looked after the renting and repairs of it?

A. Yes, sir, we were rental managers of the property.

Q. Did Colonel Tate have a talk with you about turning this property over to someone else to handle and look after?

A. Yes, sir.

Q. When was that?

A. It was about 1939.

Q. What did he say to you, if anything, about his nephew W. H. Wren in connection with the property at that time?

A. It was at a time we had had a rather serious breakage in the pipes of his property, needing quite a little expenditure, and we were walking up to the plumber at the time, and he said that hereafter he would expect me to confer with his nephew, and—

Q. Who was his nephew?

A. Mr. Wren.

Q. And what are his initials?

A. William Wren.

Q. Did he live in Richmond at the time, William H. Wren?

A. Yes, sir, he lived in Richmond at the time. I think he

William Lee.

was in the automobile business at the time. I am not sure. And on the way up there he said, "My reasons for turning this property over to Mr. Wren's supervision is that he will eventually own the property, he and his brothers will own this property, and he might as well become familiar with it, and you look to him for all arrangements."

Q. Did he or not at that time, and in that connection say anything about his other property?

A. He said at that time his nephew, as I stated, would inherit his properties, and later on, I think it was in 1940, Mr. Tate—we had interested his nephew in a piece of property from a purchasing standpoint, and he had seen the property and liked it very much, and said that he would buy it if his uncle would become interested in it too, so
page 226 } Mr. Tate was interviewed in reference to placing
his Barton Avenue property—

Mr. Campbell: You say Mr. Tate was interviewed. Do you mean you interviewed Mr. Tate?

The Witness: Yes, sir. I saw Mr. Tate, and he had been conferring with the firm before that, and Mr. Tate said no, he didn't want to enter into any negotiations like that, that he thought that Mr. Wren would eventually be in a position to pay for his own property, what he wanted, that he would inherit sufficient money to keep him thoroughly independent, and he might not live in Richmond at all, and he didn't think it was wise for him to purchase any property in Richmond when his interests were so far away from Richmond.

Q. Did he indicate where Mr. Will Wren's interests would be located?

A. Yes, he not only intimated, but he stated that he thought Mr. Wren's interest would be in Chilhowie.

Mr. Roberts: You may cross examine.

Mr. Hunter: No cross examination.

Mr. Roberts: May this witness be excused?

Mr. Collins: Yes, sir.

(Witness excused.)

page 227 }

GRIFFIN A. RIGNEY

the next witness, called by and on behalf of the Complainants, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Roberts:

Q. Please state your full name, age, where you reside and your business.

A. Griffin A. Rigney; age forty-six. I live at 3006 Letcher Avenue, Richmond, Virginia. At the time I knew Mr. Tate I was in the barber shop at the John Marshall Hotel in Richmond.

Q. State what, if any, conversation, you had with Colonel Tate in the barber shop in the John Marshall Hotel in Richmond, and just tell the jury what the conversation was, and particularly what Colonel Tate said on that occasion?

A. Well, I would wait on Colonel Tate for a number of years, but Mr. Mahoney called me up in 1941 and asked me to go and wait on one of his best friends, and before I went to him he happened to come in the shop, Mr. Mahoney came in and introduced me to Mr. Tate, and asked me to take care of him, and Mr. Tate said, "Why he has been taking care of me a number of years," which I had, but I never knew him except a customer, and a couple days later I went to his room and

cut his hair and shaved him, and we were speaking about Mr. Mahoney, and not knowing Mr.

page 228 } Mahoney only just through business, I said to Mr. Tate, "We think a lot of him down here, he has made such a good worker over there at Miller & Rhodes," and Mr. Tate said, "Yes, I raised him from a boy, the same as my nephews, he come up later after the boys had all left me," and said he thought as much or more of Mr. Mahoney as he did the other boys, and said, "I have taken care of all of them in my will, and I am going down to Florida and take a rest, which my doctor has ordered, and see if I can get well."

Q. Can you fix the time of that conversation?

A. It was in October. I don't know exactly the date but in October, 1941.

Q. I believe you said he was on his way then to Florida?

A. Yes, he came in the shop and I waited on him a couple times after that, and he was feeling some better, and we wished he would soon recover and come back to see us in Richmond.

Marguerite S. Gentry.

Q. In that conversation you had with him did he say in what way he had taken care of Mahoney and the Wrens?

A. He said he had made arrangements to take care of Mr. Mahoney the same as he did his own nephews, and they would be cared for later in his will.

Q. Did you understand he had already made page 229 } the will or was going to make it?

Mr. Collins: We object to his understanding. He stated he said he would take care of him later in his will.

Q. What did he say about that?

The Court: He has already answered your question I think before the objection was made. The objection overruled.

Mr. Campbell: We note exception. It also calls for the conclusion of the witness rather than a statement of facts.

A. Mr. Tate said, "I have taken care of him in my will." I don't know.

Q. You are referring to Captain James D. Mahoney, who is sitting over here, are you?

A. Yes, sir. That is right.

Mr. Roberts: You may take the witness.

Mr. Campbell: That is all, sir.

(No cross examination.)

(Witness excused.)

Mr. Roberts: Do I understand he may be excused?

Mr. Campbell: Yes, sir.

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MARGUERITE S. GENTRY

Affidavit (Read as deposition.) For Complainants.

Mr. and Mrs. Tate talked often about the elevator which was being installed at their home at the suggestion of his nephew, William Wren, and promised that when we visited them we would have the comfort of an elevator there as well as in the hotel. He often spoke of the improvement it would make, and what a comfort it would be to both he and Mrs.

George F. Britton.

Tate. He said William was always so thoughtful of their comfort and what a fine chap he was; and how much he had always tried to help Mr. Tate; and after breakfast the next thing he would do would say he had to write Bill.

page 231 }

GEORGE F. BRITTON

the next witness, called by and on behalf of the Complainants, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Birchfield:

Q. Please give your name, age, occupation and place of residence?

A. I am forty-five years of age. I work for the
page 232 } Marion National Bank, assistant cashier.

Q. How long have you been assistant cashier?

A. Since 1919.

Q. Do you recall an incident at the bank where you and other parties were called upon to witness a will for Colonel James D. Tate?

A. Yes, sir.

Mr. Campbell: If your Honor please, if it will save time we will admit the 1933 will was duly executed by Colonel James D. Tate and taken by him, kept in his possession.

Mr. Birchfield: And duly witnessed?

Mr. Campbell: I said duly executed.

Mr. Barker: As a matter of law you cannot admit the execution of a will.

Mr. Campbell: Go ahead then. We were just trying to shorten this.

Q. Did you in fact, together with some other parties, witness this will and sign it as a witness?

A. Yes, sir.

Q. Do you recall the parties that were present?

A. Mr. Wolfe and Mr. Haywood.

Q. And you?

A. Yes, sir.

Q. Were you all present at the same time?
page 233 } A. Yes, sir.

Q. And it was in the bank where you work, The Bank of Marion?

L. P. Haywood.

A. Yes, sir, in The Marion National Bank.

Q. Now will you fix the time, please, that occurred?

A. It was in 1933.

Q. How do you fix the time?

A. Well, it was shortly after Mr. King died and Mr. Wolfe had been made cashier and I had been made assistant cashier. It was a short time after that and also we have a record where the bank paid Mr. Dickinson for preparing the will.

Q. The bank paid Mr. Dickinson for preparing the will?

A. Yes, sir.

Q. What was the date of the record?

A. November, 1933.

Q. And you fix the time then as about the time that bill was paid?

A. Yes, sir.

Q. Was the fee paid out of the bank's account or paid by the bank out of Mr. Tate's account, did the bank pay the fee?

A. It was paid out of the expense account of the bank.

Q. Do you know why it was paid out of the expense account of the bank?

A. No, sir, I do not.

Mr. Birchfield: That is all.

Mr. Campbell: No cross examination. sir.

(Witness excused.)

L. P. HAYWOOD

the next witness, called by and on behalf of the Complainants, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Birchfield:

Q. You are Mr. L. P. Haywood?

A. Yes, sir.

Q. Are you employed by The Marion National Bank?

A. Yes, sir.

Q. And you have been there how long?

A. Twenty-two years.

Q. Do you recall an incident when you and some other parties witnessed a will for Mr. James D. Tate?

A. Yes, sir, I do.

Q. Do you recall who the parties were present?

W. A. Wolfe.

A. Mr. Wolfe, Mr. Dickinson, Mr. Britton and myself.

Q. Did you sign that will and were you all present at the same time, in the presence of the testator?

A. Yes, sir.

page 235 } Q. And you signed as a witness at his request?

A. Yes, sir.

Q. Fix the time of that, please?

A. It was sometime during the year of 1933, after Mr. Wolfe was elected cashier.

Q. I believe you talked to me about this matter at which time you could not fix the time, but since then you have fixed the time by something?

A. Yes, sir.

Q. Will you explain that?

A. The records of the bank show it was in 1933.

Q. And you didn't know about the records when you first talked to me about it?

A. I had not looked at the record when I talked to you.

Q. What records are there at the bank that show that?

A. An expense check was issued to Mr. Dickinson for the preparation of the will.

Q. Was that check issued by the bank to Mr. Dickinson?

A. That is right.

Mr. Birchfield: That is all.

Mr. Campbell: Stand aside.

(Witness excused.)

page 236 }

W. A. WOLFE,
witness for Complainants.

Q. Did you know whether or not the Marion National Bank was executor in any will?

A. I did.

Q. Which will?

A. We paid for the preparation of the 1933 will which was executed in my private office, in my presence, and that of Mr. Britton and Mr. Haywood, upon the condition that the bank was named the executor.

Q. You paid the fee for writing the will; you paid Mr. Dickinson for his services?

A. We did.

Q. Did Colonel Tate ever indicate to you after that time

W. A. Wolfe.

he was dissatisfied with The Marion National Bank as executor, and was going to change his executor?

A. He didn't state he was dissatisfied with The Marion National Bank as his executor, but due to a dislike of one of our directors and an officer, he stated to me that with one stroke of a pen he could change his executor and that he was not willing to allow the party in question to have any part in the distribution of his estate.

Q. Is that party still an officer in the bank?

A. He is.

Q. Did you not discuss that matter with Colonel Tate on a trip to Pulaski about 1938, and, if so, what was page 237 } said?

A. I did discuss it.

Q. Give the time and place.

A. I did discuss this matter at length while on a trip from Marion to Pulaski on July 9, 1938, in which I plead with Colonel Tate to not take so drastic an action as it was unfair to the rest of the bank to take such action due to his dislike for one member of the board.

Q. What did Colonel Tate reply to that, if anything?

A. Colonel Tate stated when, he said, "When I make up my mind I usually follow it through".

Q. Do you know why he was dissatisfied with some officer of the bank whoever it was?

A. Yes, I do.

Q. Why was it, please?

A. Colonel Tate felt that another officer of the bank, sitting on the board, was taking advantage of applications I presented to the Discount Committee, in order to obtain loans for his personal benefit.

page 238 } Deposition for complainants of Edith Wren Whitney, taken Apr. 27, 1945. Present:

Henry Roberts, Esq., of Bristol, Virginia, of counsel for complainants.

B. L. Dickinson, Esq., of Marion, Virginia, of counsel for defendants.

page 239 } MRS. EDITH WREN WHITNEY,
being first duly sworn, was examined and de-
posed as follows:

DIRECT EXAMINATION.

By Mr. Roberts:

Q. You are Mrs. Edith Wren Whitney?

A. Yes, sir.

Q. You are one of the Complainants in this case?

A. Yes, I am.

Q. State who handled the Wren land which was devised to the Wrens by M. B. Tate and the insurance money left to the Wrens by your father, W. H. Wren, and from whom you received payments out of those funds?

A. It was my uncle, James D. Tate.

Q. Did he pay you money from time to time before you became twenty-one years of age?

A. Yes, he gave me a little allowance when I was in Martha Washington College. He paid my bills with his own personal checks.

Q. Did he pay you that allowance by personal checks?

A. Yes, sir.

Q. How often?

A. Oh—once a month.

Q. State whether Amelia Tate either individually or as guardian ever paid you any money before you be-
page 240 } came twenty-one years of age?

A. She never paid me any money because she never had any money. I never saw her have any money.

Q. Just what do you mean that she never had any money and that she never paid you any?

A. Well, the only money she ever had was money derived from selling produce off of the farm, such as eggs and chickens or something of that sort, but other than small money I never knew her to have any.

Q. If she had had any money other than that at any time prior to the time you left home there would you have known it?

A. Yes, I am sure I would.

Q. Do you recall who operated the farm around and about the home she lived in there?

A. Well, Uncle Jim operated the farm. We would get supplies from Robinson Tate and Company. That was a whole-sale grocery.

Mrs. Edith Wren Whitney.

Q. Well, did your grandmother ever operate any part of the farm there?

A. No, sir, she never did.

Q. Did you know until recently that your grandmother had a dower in the tract of 1,000 acres there?

A. I didn't know that until this litigation came page 241 } up.

Q. Now then, did Colonel Tate ever give you any statement or any information about any funds that he was handling of yours?

A. Never.

Q. Did he or not pay you for your one-fifth interest in the residue of the lands which M. D. Tate devised to the Wrens?

A. He gave me a check for \$5,000 the day I was married, which was December 20, 1917, and that was for the land that was supposed to be willed to my mother by my grandfather.

Q. Of which you owned a one-fifth interest?

A. Yes, sir.

Q. And it was for that one-fifth interest?

A. That is what that was for. In fact that is all I ever thought I had.

Q. You mean by that you didn't know about the other funds he handled in which you were interested?

A. No, sir, I didn't.

Q. When did you learn that?

A. When this litigation came on.

Q. Did he never tell you anything about handling those other funds of yours?

A. No, sir.

Q. State whether or not any one was ever employed there or away from the home to sew and make clothes for the Wren children?

A. Well, never at my grandmother's home, but at Terrace Hall Miss Bertie Snaveley used to sew some for me.

Q. Who did the sewing at the Tate home?

A. I did, and my grandmother.

Q. Who did the sewing for the Wren boys there?

A. I don't know of anyone but myself and my grandmother. When I was eleven years old I was making everything I wore. That was one thing she taught me to do, was to sew.

Q. At that age were you making anything for the boys?

A. Yes, sir, I was making shirts for the boys.

Mrs. Edith Wren Whitney.

Mr. Roberts: You may cross examine.

CROSS EXAMINATION.

By Mr. Dickinson:

Q. Mrs. Whitney, your grandmother, Mrs. Amelia Tate, was actually your guardian, was she not?

A. As far as I know she was. I think that is what is in the papers.

Q. And you were well cared for financially, and otherwise, by Colonel Tate and by your grandmother?

A. Absolutely.

Q. And your college education was paid for?

A. Yes, sir.

page 243 } Q. And in December, 1917, when you were married, Colonel Tate gave you a check for \$5,000?

A. He did.

Q. Are you at all familiar with the account which Colonel Tate kept in an account book, which has been filed in this case, showing his record of his accounts with you and your brothers, relating to the sale of your real estate?

A. Mr. Dickinson, I didn't know such a book existed.

(A discussion was had off the record.)

Mr. Dickinson: It is admitted by counsel for Complainants that the payment of \$5,000 represented the final payment to Mrs. Whitney for her interest in the land, and that additional amounts had formerly been paid to her before the final payment of \$5,000.

Q. After you came of age, did you sign an agreement with Colonel Tate, which has been filed in this case, and which purports to show a full settlement between you and your brothers on one side and Colonel Tate on the other, of the settlement of your grandfather's estate, up to the date of this agreement?

A. If I ever signed any papers I don't know it, but I know if he had asked me to sign one I would have signed it without even looking at it, because I had that much
page 244 } confidence in him.

Q. You are one of the Complainants in this case, and this paper has been referred to in your own plead-

Mrs. Edith Wren Whitney.

ings, and also is relied on and filed by the defendants; isn't that true?

A. I am sure I don't know, Mr. Dickinson. You wouldn't ask your own father if this was all right if he asked you to sign something. We never questioned him when he asked us to do anything. We just did it. If I signed any papers I did it without thinking much about it I guess.

RE-DIRECT EXAMINATION.

By Mr. Roberts:

Q. Were you living at Terrace Hall when your grandmother died?

A. I was sort of bouncing around and between Martha Washington College and Terrace Hall and Columbia University, but Terrace Hall was my home, because my grandmother lived there.

Q. Were you there at the funeral?

A. I certainly was. I was right there.

Q. Do you recall that Colonel Tate had a conference with you children at which Mrs. Tate was present there?

A. I recall such a conference. All my brothers were there, but what happened at that conference I don't know.

Q. Did your Uncle Jim ever give you a state-
page 245 { ment of any affairs he had handled for you, or did
he ever tell you anything about your affairs?

A. Never. I never knew anything about what was going on. We just trusted him and thought everything would be all right, and that is what he *lead* us to believe.

And further this deponent saith not.

Signature waived by agreement of counsel.

page 246 { Depositions of W. H. Wren, J. Robert Wren and
James H. Wren, taken May 19, 1947, for Com-
plainants. Present:

Vernon C. Barker, Esq., of Mendota, Virginia; Henry Roberts, Esq., of Bristol, Virginia, Attorneys for Complainants.

C. E. Hunter, Esq., of Roanoke, Virginia; Stuart B. Campbell, Esq., of Wytheville, Virginia, Attorneys for Defendants.

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W. H. WREN,
the first witness, being duly sworn, deposes as follows:

DIRECT EXAMINATION.

By Mr. Roberts:

Q. State your name, age, residence, occupation, and if you are one of the Complainants in this suit.

A. Name is W. H. Wren; age, 61; residence, Richmond, Virginia; occupation, accountant; and I am one of the Complainants in this case.

Q. Accounting for whom?

A. Unemployment Compensation Commission of Virginia.

Q. Mr. Wren, the allegations in the first and second paragraph of the first clause of the amended bill have been admitted, and your testimony and the testimony of others in the trial of the will case has been stipulated and will be made a part of the record, subject to your cross examination on that here today, so I will not go into the matters covered thereby in detail.

The first thing I want you to state is how old were you when your mother died and your father died.

A. My mother died when I was five; my father died when I was eight.

Q. When did your mother die?

page 248 } A. June 18, 1891.

Q. I believe your grandchildren were brought from your home in Lynchburg to the Tate home near Chilhowie soon after your mother died?

A. Probably a year afterwards.

Q. And that was your home thereafter until you grew up?

A. That's right.

Q. When and from whom did you first learn that your grandfather, M. B. Tate, had devised to your mother and her children the 600 acres of land by his will?

A. Well, my recollection is that I was at least sixteen years old when I knew that to be a fact, maybe older.

Q. From whom did you learn it?

A. From various persons. I couldn't tell you any particular person, but probably the superintendent of the farm or my grandmother or the hands on the place. It was a matter of common knowledge, or my memory to that effect.

Q. Do you recall whether or not you learned it from your uncle Jim?

W. H. Wren.

A. Yes, probably did. I can't say particularly who it was, but I knew it all right. I knew it was a fact.

Q. When did you first learn of the provision of page 249 } the M. B. Tate will devising his interest in the firm of Robinson, Tate & Company to the Wrens, subject to some specific bequests?

A. I would say that that knowledge came to me between the years 1909 and 1912.

Q. Do you recall how you first learned that?

A. My memory is that I copied my grandfather's will from the records at Marion, and I later typed it at the office of the Chilhowie Milling Company.

Q. Well, did Colonel Tate ever at any time during his lifetime, before or after the death of Amelia Tate, tell you definitely or give you any statements or definite information about the provisions of M. B. Tate's will for your benefit or the provisions thereof for your protection?

A. I can't recall that question. That is such a long one, I will have to get the gentleman to read it to me.

(The question was read by the reporter.)

A. Yes.

Q. When and how?

A. Well, I would say at various times the will was discussed with me by my uncle. I can't give you the dates for it.

Q. What particular aspects of it were discussed, page 250 } if you recall?

A. Well, I believe only our interest in the 600 acres of land was the main thing discussed.

Q. Did he ever tell you about or discuss with you the provision of the will leaving the interest in Robinson, Tate & Company to the Wrens?

A. No.

Q. Did your grandmother ever mention that to you?

A. No.

Q. Well now then, when and from whom did you first learn of the \$8,000 insurance money that was collected by Amelia or Colonel Tate on the life of your father?

A. I would say that information came to me about when I was eighteen years old.

Q. Did you or not understand from Colonel Tate or from the provisions of the will which you examined yourself that all the residuary lands were charged with the payment of the debts of M. B. Tate?

W. H. Wren.

The Witness: Read the question, please.

(The question was read by the reporter.)

A. I understood from the provisions of the will that certain property was specified to be sold in case any property had to be sold for the payment of debt.

Q. To what do you refer?

page 251 } A. I refer to a boundary in Smythe County known as the Rye Valley property.

Q. Well, do you or not understand that that same provision applied to all of the lands left to Colonel Tate by the residuary clause of the will?

A. No, I didn't.

Q. Did he ever undertake to explain to you what your rights were under the will with respect to that matter?

A. No.

Q. Well, did you know before or at the time of the meeting or conference following the death of Amelia Tate that if the residuary property was not sufficient to pay all the debts, that then in that event the balance of the property would be liable in proportion—well, I will put it this way: that the Wrens only get 600 acres of the land and Colonel Tate got 800 and Amelia dower in a thousand and then the remainder of that thousand went to Colonel Tate, which gave him a large percentage of the land that was expressly devised, and that any deficit in the payment of the debts would be paid by them in proportion to the value of the land they got and not on a fifty-fifty basis?

A. Well, of course I understood that it would be a proportionate basis, rather than an equal basis.

Q. And in that way the Wrens would pay a
page 252 } much smaller proportion than Colonel Tate?

A. Yes.

Q. If their lands were liable?

A. Yes.

Q. All right. Now then, coming to the death of Amelia, the amended bill alleges that following her death—and I believe she died August 29, 1912—that your Uncle Jim called a conference either August 30, 1912, or it may have been the following day, of the Wrens.

A. Such a meeting was held.

Q. I wish you would state just what was said by Colonel

W. H. Wren.

Tate and what occurred, as nearly as you can remember it, at that conference.

Mr. Hunter: The question and any answer thereto is objected to on the ground that it is immaterial what may have been said or what the discussions were; that the agreement speaks for itself, and no parole testimony is admissible to change or alter or vary it in any respect.

Mr. Roberts: Read him the question.

(The question was read by the reporter.)

Q. And what agreement, if any, was reached page 253 } at that conference?

A. Colonel Tate called us together. We were there on account of the death of my grandmother, of course. We hadn't been together for a long time, and he said he would like to talk to us about our affairs, now that grandmother had passed away, and that our grandfather's estate was involved to the extent of some \$34,000, that there was a lien, of course, and that—

Q. A lien on what?

A. On the estate of M. B. Tate, and that of course our land was involved with the remainder or the other land, and that he had previously disposed of some of our land to other parties—

Q. Did he mention to whom?

A. To Frazier, particularly, and that he had also disposed of some standing timber on our lands to Cole & Frye, and that no amounts were mentioned as to what he realized from these sales, but that he would be willing to accept the amount so realized from our lands and timber to have the effect of cancelling whatever obligation or lien might rest upon our 600 acres of land, and our land would therefore be free of any encumbrance.

He also stated that he would continue to manage the estate, that he had promised our grandmother that he page 254 } would do such a thing and take care of us and our interests. He also said that there would be papers to sign, which he wanted us to sign as soon as he sent them to us.

In connection with this indebtedness of our grandfather, I had knowledge of provisions of his will and I brought out

W. H. Wren.

this fact that certain lands were designated specifically for the payment of debts.

Q. Which land?

A. Particularly the Rye Valley land. Then I asked Colonel Tate if that was not true and he said yes, it was true, but that the land was worth very little, probably not worth near enough to cover this indebtedness, and it was no time to sell it, and that if it was ever sold an adjustment with us would be made.

Q. You said that his mother wanted him to continue to manage the estate. What do you mean by that?

A. Well, I mean that while my grandmother was guardian in name, he had attended to all of our affairs from my earliest infancy and that he would continue to do so right on.

Q. Do you mean he would continue to manage the property of the Wrens?

A. Yes.

Q. Now then, did he or not say anything about page 255 } the time that he would make the final settlement?

A. No.

Q. Well, what impression did he leave about that on you, if you remember?

A. Well, my memory of it is that we would eventually get anything that was coming to us.

Q. Well, state whether or not he said anything about his ability to manage your affairs better than you children could do it, and about your inability to do it, if anything. What did he say about that?

A. Well, he referred to the fact that we were more or less incapable of handling funds and business, and referred to my case particularly. I had just finished up a venture in chicken-raising which was very unsuccessful and expensive, so it was no trouble to convince me that I couldn't handle it probably as well as he could, and there was no difficulty there at all in agreeing on the matter.

Q. Well, did he or not call your all's attention to the successful way he had managed so far?

A. He did, and he also recalled that we were spendthrifts.

Mr. Hunter: The question and answer, or any further answer which may be made, are objected to because page 256 } it involves an agreement or understanding, according to the witness, as to the handling of real estate, which should be in writing, signed by the party to be charged, if it is to be valid.

W. H. Wren.

Q. Did he at that time give you Wrens any written or oral information or statements of the status of your business affairs which he had been handling up to that time?

A. No.

Q. Did he ever do that?

A. No.

Q. Well now then, state whether or not all the Wrens were there at that conference.

A. They were all there.

Q. State whether or not they all agreed that he should continue to handle their affairs just as he had in the past, as he suggested.

A. Yes.

Q. Now then, did he later, pursuant to the agreement arrived at at that conference, prepare and deliver or send to the five Wrens for their signature the paper dated November 25, 1912, and set out on pages 15 and 16 of the amended bill?

A. That was sent to me or given to me; I page 257 } don't think I was away from Chilhowie at that time.

Q. And you signed that?

A. Yes, I did.

Q. On or about its date?

A. That's right.

Q. That paper states that Colonel Tate was to have the money realized from the sale of a part of the Byers and Ball place to J. T. Frazier. I show you a copy of a receipt on page 62 of the original exhibits and ask if you knew what that amount was until this form of receipt was presented to you for signature, and did you sign that receipt?

A. I signed it, but I knew nothing of the amount beforehand.

Q. Now did Colonel Tate at this conference following the death of Amelia, state that he might want to sell some more of the Wren lands, and in order to expedite that transaction he wanted to exchange some lands with the Wrens?

A. Well, he said at that meeting that there was a boundary of land belonging to us remaining on the north side of the Saltville road adjoining the land previously sold to Frazier, and we also had land in another part of the farm, and in order to get all of our boundaries together he proposed an exchange by selling us page 258 } some of his and buying ours.

W. H. Wren.

Q. And that's referred to near the end of this paper on page 16 of the amended bill, is it not?

A. Yes.

Q. Now then, on page 48 of the amended bill, in Exhibit 2-e, there are abstracts of two deeds dated November 25, 1912, one from the Wrens to Colonel Tate and the other from Colonel Tate to the Wrens, exchanging some lands. Were those deeds made pursuant to this provision of this agreement which you had made on or about August 30, 1912?

A. Yes.

Q. And which was carried into effect in their Exhibit No. 1?

A. Yes.

Q. All right. Now then, then on page 24 of the amended bill, in Section 2, there is a recital of five deeds from the five Wrens, conveying their one-fifth in what was left of their 600 acres of land to Colonel Tate.

A. What is the question?

Q. State whether or not those five deeds were made pursuant to the agreement made with Colonel Tate at the conference on or about August 30, 1912.

A. Let me see it. (After looking at document page 259 } ment.) That is true.

Q. State whether or not all of these papers to which we have referred, beginning with Defendants' Exhibit No. 1 down to the five deeds, were executed by you pursuant to the agreement made with Colonel Tate at that conference following the death of Amelia Tate.

A. That is true.

Q. Well now then, to go back: at the time of that conference August 30, 1912, you knew about that \$8,000 insurance money that they got from your father's estate?

A. Yes.

Q. And you knew about the interest in the Robinson, Tate & Company at Lynchburg which was left to the Wrens?

A. Yes.

Q. And you knew, of course, about the 600-acre devise to the Wrens?

A. Yes, sir.

Q. And the agreement then, as you understood it, covered the continued handling by Colonel Tate of matters for the Wrens, particularly the Robinson, Tate and the insurance money, inasmuch as it was provided that he had a right to buy your interest in the land?

W. H. Wren.

page 260 } Mr. Campbell: This question is objected to
as leading, and as calling for a conclusion of the
witness, and as varying the terms of the written agreement.

A. The answer is yes.

Q. Well now then, from that time on until Colonel Tate's death, did he ever in any way, shape, or form repudiate that agreement?

A. No.

Q. Or did he deny the trust or ever indicate in any way that it was not continuing?

A. No.

Mr. Campbell: This question is objected to because it calls for a conclusion of the witness instead of a statement of facts, it assumes some agreement which has not been proven, and it also attempts to vary the contents of the written instrument which is filed in the record and which was the repository of all the agreement between the parties.

Mr. Roberts: Perhaps I should state here that counsel for Complainants consider Defendants' Exhibit No. 1 as an acknowledgment of the trust by Colonel Tate and page 261 } as evidence thereof, and that it shows on its face that it was in conflict with the rights of the Wrens and the duties of Colonel Tate, both as executor of the will of M. B. Tate and as the residuary legatee under that will and as trustee under the deed of assignment made by Colonel Tate.

Q. Now then, Mr. Wren, did you and the other Wrens, so far as you know, ever in any way abandon your claim to your property and rights under the M. B. Tate will which it was agreed at that conference should be continued in charge of Colonel Tate?

Mr. Campbell: This question is objected to as assuming proof of a situation which has not been established, and as calling for the conclusion of the witness.

A. The answer is no.

Q. Was there ever any change in the situation or relations between you and the other Wrens, so far as you know, inconsistent with the continuance of this agreement?

A. No.

W. H. Wren.

page 262 } Q. By the way, did you know of the sale of
the Rye Valley property for a hundred thousand
dollars in 1918?

A. I didn't know it immediately. I found it out sometime later; I don't know just how or when.

Q. How long after?

A. I couldn't say.

Q. Well, would it be a few months or a few years?

A. Well, it couldn't have been over a year or two because things like that—news like that gets around.

Q. Well, did you ask Colonel Tate for a settlement at that time?

A. No.

Q. Why not?

A. Well, I just didn't choose to ask him anything about it.

Q. Well, had he said anything at this conference back there which influenced you in that regard?

A. Well, it was a delicate matter for me to be talking about, and I was getting along all right anyway, and I just didn't bring the question up. None of the others
page 263 } were there around close to Chilhowie.

Q. Well, by your silence did you mean to waive your rights to that money, and if not, why not?

Mr. Campbell: This question is objected to as calling for an opinion of the witness. He can state facts but not his conclusions. And also leading.

Mr. Roberts: Read the question.

(The question was read by the reporter.)

A. I did not waive my rights by my silence, and I concluded that eventually everything would be made satisfactory to me.

Q. State whether or not that was because of statements Colonel Tate had made you at that conference.

Mr. Campbell: This question is objected to as leading and immaterial.

A. Was that a question?

Q. Yes, that is a question.

The Witness: What is it? Please read that.

(The question was read by the reporter.)

W. H. Wren.

A. Yes.

Mr. Hunter: Off the record.

(Remarks off the record.)

page 264 } Q. Well now then, state whether or not Colonel Tate's statements to the Wrens that he knew better how to handle their business than they knew themselves and that they were spendthrifts had anything to do with your not asking him for your part of that money when you learned he had made the sale.

Mr. Campbell: The question is objected to as suggestive, leading, and immaterial.

The Witness: I will have to get that read to me again.

(The question was read by the reporter.)

A. I don't think it did.

Q. The suit of W. A. Wren *against* J. D. Tate, executor here, to collect an item of costs of about \$289, and after some of the Wrens came of age, I believe—I'm not sure about that—anyhow, they were parties by guardian *ad litem*; do you remember anything about that suit?

A. No.

Q. Was any settlement ever made or suggested between the Wrens and Colonel Tate by either party during his lifetime?

A. No.

page 265 } Q. This receipt here on page 62 of the record for that \$7,152.09, did you all get that money, or was that to carry out that agreement of August 30, 1912?

A. We got no money. It was for the purpose of carrying out that agreement.

Q. Oh, by the way, I hand you two account books here, which will be referred to as Account Book No. 1 and Account Book No. 2. If you have ever examined either one or both of them—and if not, examine them now, and state whether or not they appear to be entirely in the handwriting of Colonel Tate.

A. They are, although I've never seen them before.

Q. Coming now to the farming operations there: did Amelia Tate ever operate her dower tract of a thousand acres?

W. H. Wren.

Mr. Campbell: Objected to as immaterial.

A. No.

Q. Who did operate it?

A. It was operated as part of Uncle Jim's and our farm, all together.

Q. Who operated it all together?

A. Uncle Jim.

page 266 } Q. Was that from the time of M. B. Tate's
death until after that agreement of August 30,
1912?

A. Yes.

Q. Well, do you know anything about what rent or other compensation Colonel Tate paid Amelia for her thousand acres?

Mr. Campbell: Objected to as immaterial.

A. He paid her nothing, as far as I know.

Q. Did she ever have any money from the time you went there as a child until you left there as a man?

Mr. Campbell: Objected to as immaterial.

A. No.

Q. Did she have a bank account?

A. No.

Q. Did she ever say anything to you about what Major Tate had left her by his will?

Mr. Campbell: Objected to as immaterial, and hearsay evidence as well.

A. She knew, yes, she had said, she knew what was in the will.

page 267 } Q. Did she ever mention to you at all how he
left her fixed, anything like that?

A. Well fixed, she said.

Q. Well, did she say to you who was taking care of her money and property?

A. She said Uncle Jim was managing it for her--for us.

Q. Well, her property, though, her dower, though--not yours right now.

A. Well, managing it for her. It was all considered one unit.

W. H. Wren.

Q. In other words, do I understand from your answer that Uncle Jim just took the whole estate over and operated it as a unit from that time on?

A. Yes.

Q. From the time at or before his father died?

A. Yes.

Q. Until 1912?

A. Yes.

Q. Do you recall any incident reflecting the fact that Amelia Tate never had any money except small change?

Mr. Campbell: Objected to as immaterial.

page 268 } Q. When you were at college, say.

A. Well, there was to my knowledge never much money around our house, on the farm, and I remember when I was at Blacksburg in 1904 she sent me a box containing various articles—some fruit, a cake, a chicken maybe, and a Testament, and a small coin purse with a dollar or two in coins in the purse.

Q. Well, had you seen that purse before?

A. I can't recall exactly that I had.

Q. There is reference made in the answer to your father. Did he visit the Wrens and the Tates at the Tate home near Chilhowie before his death?

A. I can recall his last visit very well in September, 1894.

Q. Have you got the date?

A. It was about the 25th of September, and he probably was there two or three days.

Q. Well, while he was at home on that trip, did he bring you children to Bristol and have your pictures taken with him, and if so, produce the picture.

A. Yes.

Mr. Campbell: Objected to as immaterial.

Q. And file it as an exhibit to your testimony.
page 269 } You hand me a picture endorsed on the back,
"Made by Hodges Studio at Bristol, September
28, 1894". Is that the picture?

A. That's the picture.

Mr. Campbell: May I see it a minute? I would like to ask a question.

W. H. Wren.

On examining this picture, it does not appear to be an original, but appears to be a photograph of a photograph, and it has on the back in apparently fresh ink, "Picture made by Hodges Studio at Bristol, September 28, 1894", followed by various names and dates, all of which are of apparently recent origin.

By Mr. Roberts:

Q. Well now, Mr. Wren, as I understand, this is objected to because it's a copy. Do you have the original picture made by Hodges?

A. Yes. That is a photograph of it. It's framed.

(Discussion off the record.)

Q. Will you mail the original picture, of which this is a copy or photograph, to the reporter as Exhibit—Picture of the Wrens, taken in September, 1894?

page 270 } A. Yes.

Q. Mr. Wren, do you have in your possession a letter which Amelia Tate wrote to your father before his death there, in which she referred to you Wren children?

A. I have a photostat of the original.

Q. I say do you have the original of such a letter?

A. I have the original at home, yes.

Mr. Roberts: Off the record.

(Discussion off the record.)

Q. Is the letter to which you refer wholly in the handwriting of Amelia Tate?

A. Yes.

Q. How is it signed?

A. "Mother".

Q. Was that the way she treated herself with reference to you children?

A. That was to my father.

Q. Oh, to your father. It is dated July 12, 1892. I will ask you to file this photostat copy, and then send the original to be examined, and either the original or the copy to remain a part of the record.

page 271 } Mr. Campbell: This letter is objected to as being immaterial and hearsay, and not throwing light on any issue in this case. It is not under-

W. H. Wren.

stood that this is an attempt to probate the letter as a will.

(Photostat of photograph above referred to is attached hereto as W. H. Wren Exhibit No. 1—Direct.)

(Photostat of letter above referred to is attached hereto as W. H. Wren Exhibit No. 2—Direct.)

(The letter above referred to, W. H. Wren Exhibit No. 2—Direct, is in the following words:)

“July 12th 1892.

“My dear boy:

“I know you have been very anxious to hear from your precious darlings. I have attempted to write you several times but did not get it to office. I am glad to tell you that they are all in perfect health and as happy as you can imagine. Beverly is always at work at something. He says to Mr. G. when he is idle: “Now, I want another job”. He

drove the wagon when hauling wheat from shock
page 272 } to shock, all day, and every day they hauled. He

looked pale and thinner than I have seen him when he came up here. I gave him some worm medicine. Now he is greatly relieved and looks so much better. Will has improved though, more than any of them in flesh. He is just as jolly and merry as can be. They all sing remarkably well. They seem to know the words, as well as the tune. I will write Mrs. Heffernan for a book that has those Sunday School songs in it, that I may learn to sing with them. Dear little Robert and Harold are just as sweet as can be, they can say and do the cutest little things all day long, and laugh and squall and scuffle. They never disagree and hurt each other intentionally. I have been their constant companion since they have been here, and have tried to make them divide their toys and love each other. Harold and Will have those bumps on them some, but Beverly and Robert are not troubled with them. Will sleeps with Mr. Greever, Beverly has a little bed himself. They are all in the cribs, where they are shelling corn now. Mr. G. is having it shelled to

send off on cars. I have two good, nice white girls
page 273 } to assist me in the house keeping. They love the children and are delighted with them. One of the girls claim Harold, and the other Robert. I have an old colored woman that cooks and irons for them and us all. We

W. H. Wren.

are all getting on here in the same old even tenor. Those dear little children make our home happier and brighter than for a year before. Harold grows more like dear Rosa every day, is disposed like her as well as in looks. He said yesterday that he knew he was like his mother. Robert was running after the little turkeys the other day and turned to me and asked if I knew what they said, I said no, and he said, listen, they say wait Mama, wait. Will found a red bird's nest in the yard in a bush and grabbed the eggs and ran to show them to me. I told him, now the old mother was saying to the other old bird, bad boy. You ought to have seen him run and put them in the nest. And strange to know, the old one sat on, and hatched. I cannot tell you of all their cute little ways and words. I wish so heartily that you could be with them, and us, but rest assured that they shall have my undivided love, shall never want for anything

page 274 } that I can grant them. Mr. Tate is helpless, cannot stand alone or walk. I expect it is weakness.

He is anxious to go to Hot Springs and I expect he will try and go soon. He is very glad to have the little prattlers around him, says they are a lot of company. The flowers are just blooming and growing like a storm. I have pulled the buds off those rose bushes, that are held so sacred and dear to us. I am fearful that blooming so profusely, will kill them this fall. They all grew and bloomed but two. They have never sprouted up. The weather has been cool now, for two weeks. The children have worn their shoes and thick clothing, some days, though they have never had the least symptom of cold, or sickness anyway, since they have been here. I have about forty young turkeys and two or three hundred young chickens. I do know how many there are here. I gave B. and Will the money for their wool. I do not know what B. did with his. His aunt took it in charge. I expect their sheep are large fine ones. They had 11 lambs. Mr. G. sold all the lambs but about fifty, I believe. The little fellows have plenty of clothes of every sort I think

page 275 } for this summer I will roll up each one of them a waist or something their sainted mother made and keep it to show them when they get to be men. Your sister Neely kindly sent me the velvet polonaise, with the childrens clothes. I will take special care of it. I was fearful that Robert would be home sick, but he says he is glad he comed up here, that I was his sweetheart now. They all love to look at their pretty horses and want to know when they can ride them. B. rides little Dick all about, is not the

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least afraid of him. Will says he will get Mr. Vance to pay him the \$20 he is to pay for Lucy, his cow. Mr. Jim Vance bought 11 of our old cows this spring. Will has five cows here now, Beverly has three and two fine calves. They claim all the ducks and chickens. Will says the black chickens are his, R. says the red roosters are his. They catch a young chick nearly every evening and get Em (the cook) to fry it for them. They surely do enjoy the butter and milk they get here. I tell Rob that he is my butter boy. I fear he is eating too much butter, will make him to gross
 page 276 } his blood to rich. I manage it tho. Harold is not so flesh as used to be & R. more so. Little Robert is in here & says tell you that Edie is a good girl & he is a good boy for you. Harold says what are you doing and when are you coming. That he loves to stay at Grandpa's. Will and B. will go to Chilhowie with the loads of corn this morning (Wednesday, 13th) I must hurry and finish this to send to the mail. I cannot express my appreciation of the good and appropriate verses you sent us. Mittie and Mr. Shuff were here soon after received. They spoke highly of them, said they were very expressive and sentimental. Did you compose them? I think you did. Our gardens and crops are very fine, this season so far. The wheat is best have had for years. The field just above the road here was in wheat. It has been put in ricks on the hill above the old stone house. Mr. G. thinks we will have 1,000 or 1,300 bushels in all. We have the corn crop on the old place this year, it is laid by now, a good prospect for a fine crop. I have tomatoes nearly ripe and corn, too, in the garden. The peach crop is very plentiful everywhere. I think the berry crop has been
 page 277 } fine, too. We are getting raspberries, black and all kins, every day in here to can. I must write your sister Neely this eve, as she is anxious to hear from the children. I wish I had dear little Edith here. She is just as sweet as can be. I hope she will be a genial nice lady, like her mother. If I could have control of her I would enjoy seeing her grow up like her angel mother, more than anything I can think. She will tell you to kiss her foot and do some little imprudent things now, but I hope that she will forget, ere she grows too many months more. I hope your health continues to improve and you will soon get in a prosperous business that will bring you all you wish. You may rest assured that your dear little ones be provided and cared for and protected at all times here as long as I live and after they shall have all I leave first and over all others.

W. H. Wren.

I close now, with fondest hopes for your spiritual and temporal welfare, and best wishes that all your desires may be verified, very soon. All your dear ones join me in much love. I hope to hear from you soon. Believe me, as ever, your sympathizing and loving

page 278 }

MOTHER

"I think Florence is jealous. She says she will come and stay only a few days. I am determined on my course though. Nothing will change me towards my dearest ones that I have with me."

By Mr. Roberts:

Q. Mr. Wren, state whether or not the Wrens were all of the near kin of Colonel Tate when he died and throughout his life.

Mr. Campbell: This question is objected to as immaterial.

Q. Well, I wouldn't say throughout his life, but were they, after his sister, Mrs. Shuff, died, were they the only near kin he had?

A. Yes.

Q. Now then, who was the nearest of kin that Mrs. Tate has, or had?

A. At what time?

Q. Go ahead and answer it in your own way, any time.

A. Well, at the present time, her nearest of kin is her niece, Mrs. Williams, in Roanoke.

Q. And she is the daughter of whom?

A. Mrs. Jeffrey, Mrs. Florence Tate's sister.

page 279 } Q. After the Wrens grew up and left home, state whether or not, and if so whom, Colonel Tate took into his home to raise.

Mr. Campbell: Objected to as immaterial.

The Witness: Will you read that question again?

(The question was read by the reporter.)

A. I don't understand that question. After the Wrens grew up, you say?

Q. Did you ever hear of J. D. Mahoney?

W. H. Wren.

A. Oh, yes. J. D. Mahoney entered the Tate home about 1908, I believe.

Q. Well, how was he treated by Colonel Tate?

A. He was treated as a son.

Mr. Roberts: I think that's all. You may cross examine.

CROSS EXAMINATION.

By Mr. Hunter:

Q. Mr. Wren, you have testified concerning a letter from your grandmother, Amelia Tate, to your father. There isn't anything on it that shows to whom it was addressed page 280 } dressed other than "My dear boy", but you are sure that that was to your father?

A. I am quite sure.

Q. Are you familiar with your father's handwriting?

A. Quite.

Q. Now you've gone into the history of your family. Why was it that your grandmother, Amelia Tate, qualified as guardian of you children during the lifetime of your father?

A. Well, it was her desire to do so.

Q. Where was he?

A. He was in the South in various places.

Q. Do you know the circumstances as to why he was not at home?

A. I do not know the circumstances.

Q. You've never heard that?

A. I've heard reports.

Q. I show you a letter signed "Will" addressed to "My dear mother", dated October 3, 1892. Is that in his handwriting?

A. Yes.

Mr. Roberts: Are you going to offer this?

page 281 } Mr. Campbell: Yes, sir.

Mr. Roberts: We object to the introduction of this letter. It is irrelevant and immaterial to the issues in the case, and has nothing to do with this case.

Mr. Hunter: In reply to the objection, counsel for the Defendants say that the family history has been gone into quite extensively and the purpose of this letter is to show something of the family history and to rebut, in a measure

W. H. Wren.

at least, the testimony which has been introduced by the Complainants, and the letter is filed.

Can we agree that the stenographer make a copy of that letter and return the original?

Mr. Roberts: Yes. We hope you will do that for us too.

(The letter above referred to reads as follows:)

page 282 } "My dear Mother:

"Since writing you some ten days ago or more, I have rec'd a personal letter from my friend Judge Diggs, stating that he had made you Guardian of my children's Estate and giving his reasons therefor. Now that you are to manage their estate and further that you earnestly desire to have some of them with you, I wish to write you as their father & natural guardian and as your soninlaw. You are aware that I love them devotedly and that my separation from them is the greatest grief of my life. You are also aware of the causes, which led to this separation. I do not wish any further proceedings in court. I feel that you and I, through my sister, Mrs. Heffernan, can settle where the little ones shall reside, to our mutual satisfaction and for their good. Their present and future good is what we both desire. I wish to clear up all my business matters so that I can at least *visit them* and perhaps after awhile return to Va. and make it my home. Jim has a memo of these notes and writes me that he cannot arrange them. I gave up all

page 283 } my property to Mr. Tate as you know and left home penniless and in debt. I have no money and no friends, who will aid me in paying the aforesaid notes, and Jim says the holders will prosecute me if they are not paid. Under the circumstances and for my children's sake and my own future happiness, will you not come to my assistance and by doing so, save me and them from disgrace? I never before in my life asked a favor of you and if you love my children and still feel any interest in me please grant me this aid. You agreed to support and educate the children at your own expense. Cant some arrangement, be made, whereby you can divert this money to the payment of these notes? Could you not have the order of the court changed? Or if this cannot be done, advance the money and as soon as I am in a position to do so, I will return it. With these notes out of the way, I can see my children at stated periods and as I said, perhaps some day return to Va. and make it my home. I am struggling to get another start in life and fondly hope

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that some day and that not far distant I can
 page 284 } either be with them or have my little ones with
 me. Until this time comes, I want my children
 to divide their time between you and my sister Mrs. Heffer-
 nan. Harold & Robert might spend the winter with you and
 Will too, if he does not go to school. Beverly remain in
 Lynchburg this winter and continue school and Edith remain
 there too. I don't want any bitterness to exist between our
 families. In the event any of the children should go up to
 your house, this winter, please write me regularly every week.
 Do not allow them to have their own way. I know as a
 grandmother, you are apt to err in this regard. Also please
 be careful of their physical and moral training.

"I have written sister to see you or confer with you and
 talk these matters over together.

"At present I am a wanderer, not knowing what may hap-
 pen any moment. Of course in this state of mind continually
 I am hampered in business. Then too cannot visit those who
 are dearer to me than all else on earth. With
 page 285 } these facts before you, may I not hope you will
 grant the aid asked? I can say no more. I leave
 the matter in your hands. My health is steadily improving
 and I hope after awhile will get robust. The settlement of
 these business matters will largely aid in such a result. My
 motives have been misunderstood and I have been condemned
 for doing what I honestly thought was best. Please com-
 municate with Jim at once, and let him know what you will
 do. I judge from what he writes no time must be lost to
 prevent proceedings against me. I hope therefore you will
 give the matter immediate attention. I was pained to learn
 of the death of little Jim and deeply sympathize with Jim &
 Florence. Write soon. With much love, I remain, as ever,

Affy yr

WILL."

Oct 3rd 1892.

(Discussion off the record.)

Mr. Campbell: It is agreed that the photograph of the
 photograph [Exhibit No. 1 to Direct Examina-
 page 286 } tion of W. H. Wren] may be introduced in evi-
 dence, but the writing on the back is not offered
 in evidence.

W. H. Wren.

Mr. Roberts: Now I would like, since that happened I would like for the record to show that the witness definitely remembers that that picture was taken in the fall of 1894 before the death of W. H. Wren—on what date?

The Witness: About September 28th.

Mr. Roberts: No, before the death of W. H. Wren.

The Witness: November 5, 1894, is when he died.

Mr. Roberts: Yes.

By Mr. Hunter:

Q. Now, Mr. Wren, as a matter of fact, you stated that you heard some rumors about why your father went South. Wasn't it more or less of a family skeleton that your father was in the South as a fugitive from justice because—

A. I do not know. I was too young to know.

Q. I ask you wasn't it a skeleton in the family and discussed in the family that that was the situation? You said you heard some rumors of it.

page 287 } A. Well, not to that effect, no, sir.

Q. I show you a newspaper clipping which has on it in pen and ink, "Advance, January 25, '92". Do you know whose handwriting that is in?

A. Yes.

Q. Whose handwriting is that?

A. That is James D. Tate's.

Q. I also show you another newspaper clipping which has in pen, "Virginian, January 26, '92". In whose handwriting is that?

A. That's Uncle Jim's handwriting.

Q. I also show you another newspaper clipping which has in pen, "News, January 26, '92". Whose handwriting is that?

A. That is Uncle Jim's too.

Q. And another which has in pen, "Advance, January 30, '92". Whose handwriting is that?

A. That seems to be Uncle Jim's.

Q. And another, "News, January 30, '92". Whose handwriting is that?

A. That's his, too.

Mr. Hunter: These clippings are introduced in evidence with the understanding that they be copied in the page 288 } record and the originals returned, if that is agreeable.

Mr. Roberts: We object to the introduction of these clip-

W. H. Wren.

pings. They are absolutely irrelevant and immaterial to the issues in the case. W. H. Wren is deceased, and what he did during his lifetime cannot have any effect on the issue involved.

(Said newspaper clippings read as follows:)

"Advance, Jan'y 25/92

"WHERE IS WM. H. WREN?

**"A Prominent Citizen Mysteriously
Missing Since Friday Last**

"BAD PAPER COME TO LIGHT.

**"He Signed the Firm's Name to Individual
Paper—Other Charges Alleged**

"Wm. H. Wren, recently a partner of the wholesale grocery firm of Robinson, Tate & Co., left town unexpectedly last Friday, and his late partners say they do not [*sic*] where he is.

page 289 } "Mr. Wren had signed the firm's name to some papers for individual debt in several instances, as stated by one of his late partners today, to an ADVANCE reporter, though reluctantly, and without going into detail. Indeed, he said he did not know to what extent the false papers went, nor to all whom they were given.

"Mr. Robinson, of the firm of Robinson & Graham, of Graham's Ford, Southwest Virginia, is expected in town this afternoon, but too late for the ADVANCE to get a statement from him. One of the false signings is said to be that of a Mr. Graham, of Southwest Virginia; whether it is the same Graham that is a partner of Robinson & Graham, is not vouchsafed by those interested; for, to tell the truth, they are most reticent.

"There are wild rumors as to what amount Mr. Wren owes

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that he cannot pay, the highest figure being placed at \$60,000.

"Lawyer Lewis, the attorney for Robinson, Tate & Co., was seen by an ADVANCE reporter, and he de-
page 290 } clined absolutely to say a word about the matter;
well, it is a fair presumption that if lawyer Lewis could have said anything in defense of Mr. Wren, he would have been bound to express it; however, that is a matter for the public to determine.

"A reporter called at the house of Mr. Heffernan where Mr. Wren boards, his wife having died a few months ago. Mrs. Wren was a daughter of M. B. Tate, who is also a partner of Robinson, Tate & Co., and he lately made a deed of trust of all his personal property so that his affairs might be wound up. It is a current rumor that Mr. Tate and Mr. Wren are not on the best of terms, while another report is that Mr. Tate will see Mr. Wren out of all his troubles. The reporter was told at Mr. Heffernan's that Mr. Wren was out of town, and when he asked when Mr. Wren was expected back, the answer was that Mr. Heffernan would give all
page 291 } necessary information as to Mr. Wren and his business, but that Mr. Heffernan was out of town and would not be back till this afternoon.

"Mr. Wren has been a conspicuous [*sic*] figure in commercial and manufacturing in Lynchburg, and his misfortune will be regretted by all. He was a bold speculator in all that looked to the growth and upbuilding of his city, and his present misfortune is a personal sorrow to every one in the city."

"*Virginian*, Jan'y 26, '92:

—
"MR. WREN IN TROUBLE

—
"Very Grave Charges Laid at His Door.

—
"HE HAS LEFT THE CITY.

—
"And His Whereabouts is unknown—Charged With Signing the Firm Name of Robinson, Tate and Company to His Individual Obligations For \$8,000 or \$10,000.

"For several days ugly rumors have been current in the

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city affecting the credit and good name of Mr. W. H. Wren, until lately a member of the firm of Robinson, page 292 } Tate & Co. These rumors were to the effect that Mr. Wren had wrongfully used the firm's name upon his individual obligations for a considerable amount.

"The members of the firm, when first approached by a VIRGINIAN reporter declined to say anything, but yesterday Mr. John W. Robinson, of Wythe county, the head of the firm, arrived in the city, and upon consultation consented to make a brief statement for publication.

"Mr. Robinson said that he would probably be in a position to give a more complete statement tomorrow; that he had come here expecting to see Mr. Wren and did not know that he was out of the city until he arrived here. He did not know where he had gone. Mr. Wren's transactions with the firm, he said, had been very unsatisfactory of late. He (Wren) had signed the firm's name for limited amounts, which signatures they did not regard as legitimate or proper. So far as he (Robinson) was then informed Mr. Wren's page 293 } irregularities of this character amounted to \$8,000 or \$10,000.

"Mr. Robinson could not say whether or not the firm of Graham & Walker was affected by Mr. Wren's illegal transactions, but if it was affected at all it was for not more than a few hundred dollars.

"He did not state in what shape the irregular paper was drawn up.

"These irregularities will not affect the credit or standing of the firm in the least.

"Mr. Wren left the city several days ago and his whereabouts is not known.

"He has been greatly depressed of late in mind and body, suffering from an enfeebled physique and nervous prostration. For several days prior to his departure from the city he had been preparing ostensibly for a visit to a brother in another State and it may be that he has gone there.

"Mr. Wren has been universally regarded as a good man and useful citizen, and we can but hope that the page 294 } present distressing suspicions may be satisfactorily explained and cleared up."

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"News, Jan'y 26, '92:

"A STARTLING REVELATION.

"Mr. William H. Wren Said be Involved in
Irregular Business Transactions.

"A rumor gained circulation on the streets yesterday to the effect that Mr. William H. Wren, until lately a member of the firm of Robinson, Tate & Co., had left the city suddenly either Friday night or Saturday morning, leaving no trace of his destination, and that since his departure it had been ascertained that he had signed the name of Robinson, Tate & Co. for various sums, which he had fraudulently applied to his individual use. With a view of ascertaining the correct facts in regard to the matter, a NEWS reporter called at the establishment of Robinson, Tate & Co., and was cordially received in the private office by three mem-
page 295 } bers of the firm, Mr. Robinson, Mr. James A. Tate and Mr. McLaughlin. The reporter stated what he had heard and then asked if the firm were prepared to talk about the matter. All three of the gentlemen expressed their willingness to tell all they know. In reply to the reporter's question if they knew anything of the whereabouts of Mr. Wren, Mr. Robinson said:

" "I do not know where Mr. Wren has gone or when he left. I came here this afternoon expecting to meet Mr. Wren, but find he has left the city."

"Would you object to stating whether or not it is true that Mr. Wren has forged the name of your firm, and if so, for what amount? asked the reporter.

" "Some of Mr. Wren's recent transactions with the firm of Robinson, Tate & Co., have not been satisfactory," replied Mr. Robinson slowly. "He has used the firm's name for limited amounts, which acts we do not regard as legitimate. So far as I am informed at present, hav-
page 296 } ing only arrived in the city this afternoon, Mr. Wren's irregularities amount to \$8,000 or \$10,000."

"To what extent if any is the firm of Graham & Robinson, of Graham's Ford, affected by Mr. Wren's acts? was the reporter's next question.

" "I am not absolutely certain," replied Mr. Robinson, "that the firm of Graham & Robinson is affected at all; but

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if it is, however, the amount will not, in my opinion, exceed a few hundred dollars."

"Is there anything more you could give us in regard to the matter? asked the NEWS man.

" "No, I think not. At present you know about as much as we know. Tomorrow, however, we may know more that will be interesting to you."

"After some further conversation, during which nothing new was developed, the reporter took leave of the gentlemen. It was evident to the reporter that Mr. Robinson had withheld nothing for his manner was frank and candid
page 297 } throughout, as were also Messrs. Tate and McLaughlin. But it was also evident that they expected to learn something in the near future which they would prefer had not happened, viz; the discovery of more irregular paper.

"We are requested to state in this connection that the present firm of Robinson, Tate & Company will in no wise be affected by Mr. Wren's transactions, either financially or otherwise.

"Mr. Wren's departure from the city and the discovery of his business irregularities was the main topic discussed on the streets, in hotel lobbies and in many homes last night. Few men have enjoyed the confidence, esteem and good will of the people of this city and section to a greater extent than [sic] Williams H. Wren, and the disclosures of yesterday, involving his name in a compromising manner, was a painful surprise to the whole community and sincere expressions of regret and sympathy were heard on all sides.
page 298 } Many are of the opinion that Mr. Wren's departure from the city was on a legitimate mission, and that he will return and set matters right. Others there are, however, who would like to share this opinion, but they seem to know more than they are willing to tell, and shake their heads significantly."

"Advance, Jan'y 30, '92:

"THE WREN MATTER.

"The Firm of Robinson, Tate & Co., Repudiate
a Note with their Endorsement.

"The Wren matter has taken a new turn.

"Yesterday the first individual note bearing the unau-

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thorized endorsement of the firm of Robnsnson, [*sic*] Tate & Co., by Mr. Wren, was presented to the firm for \$100; and drawn in the favor of Mr. W. B. Freeman, the New York Life Insurance agent, in this city. The firm repudiated the note; and have employed two lawyers to fight the case. The firm announces that it will fight all others endorsed by Mr.

Wren, not for their regular business, or endorsed
page 299 } without full consent and knowledge of the firm as such.

"This will doubtless bring the matter into court, where the whole affair, so far as this firm is concerned, will be fully ventilated.

"A reporter of the ADVANCE asked Mr. Heffernan, brother-in-law of Mr. Wren, if he knew anything of the whereabouts of the missing man. He said he would not tell, but that he would say for publication and sign his name to it, that much of "these charges and talk about Wren, are rot, and a great deal more treachery."

"Mr. Wren was at the Richmond & Danville depot last Saturday morning at 4 o'clock, and he did not go north. Mr. Heffernan left Saturday afternoon for Spartansburg, S. C.

"There are yet more material and more serious charges against the integrity of Mr. Wren, which at an early day, probably Monday, the ADVANCE will make public, if true.

The ADVANCE thinks that a man who is dishonest in a breach of trust to his partners and personal friends, deserves no more sympathy than other dishonest people, and the high position that Mr. Wren occupied made his conduct all the more reprehensible; and as matters develop, it will, from day to day, lay them before the public without prejudice or malice.

"If his friends know where he is, and there is no danger of prosecution, there is no cause for keeping those whereabouts of Wm. H. Wren secret. As to who will or will not prosecute him, happily the State provides a prosecuting officer and a grand jury; and there is no more danger of Mr. Wren's not being prosecuted should he return here, than there is probability he will voluntarily return.

"When a big failure occurred [*sic*] here recently, Robinson, Tate & Co., were endorsers for several thousand dollars. Mr. Wren called on the ADVANCE, and asked that the endorsement be not noted in the ADVANCE. Not dreaming of any irregularity, and because there was no reason
page 301 } son to involve the substantial [*sic*] firm of Robinson, Tate & Co. in another's failure, the endorse-

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ment was not mentioned. Happily for the firm, the assignor had preferred it, and it was saved; but it subsequently transpired that the firm knew nothing of the endorsement which had been made by Mr. Wren."

"*News, Jan'y 30, '92:*

"MR. WREN'S TROUBLES.

"A Simple Statement of the Facts of the Case.

"The announcement that Mr. W. H. Wren, a popular and respected citizen and former merchant, had left town under the suspicion of irregular paper business transactions caused much more of pain and pity in the community than resentment or curiosity. There was nothing mysterious about Mr. Wren's departure as was at first suggested. He left with the knowledge and consent of some of the parties
page 302 } affected by his unhappy operations, and upon the advice of friends who are men of the highest integrity. His whereabouts is known to these persons, and while to ferret it out and blaze it to the public might appease the curiosity of people who are fond of sensation, and who take a sinister delight in the misfortunes of other people, it is not considered by everybody the province of a newspaper to engage in that sort of persistent mongering.

"The material circumstances of this case, such as are proper to be given in the public prints, have already been recited in the *News*—always with reluctance and a tender regard for the feelings of those who are innocent sufferers from a distressing misadventure. The facts briefly are, that Mr. Wren, not altogether wantonly, incurred debts through a series of years, which he was encouraged to believe would eventually be liquidated. In this expectation he was disappointed at about which time the fever of speculation seized upon the people of this State and
page 303 } among others this young man fell a victim [*sic*] to the beguiling solicitations of the boomer. With business failure staring him in the face, he thought to retrieve himself by investing in land schemes, to do which he made the fatal mistake of misusing the securities entrusted to him by a friend—to a limited amount at first, and afterwards, with

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increasing desperation, to a greater amount. Still hoping to repair this blunder, he made the further mistake of putting his firm's name and the name of Robinson & Graham and the Foster Falls Manufacturing Company (which he had been in the habit of signing), to his individual paper; and when the collapse of the land schemes came, Mr. Wren found himself hopelessly involved. He sent for a friend recently, made a clean breast of the matter and last Saturday left town, as stated above. Efforts are now being made by friends who feel a great sympathy for the young man, to straighten out his irregularities which aggregate \$15,000, of page 304 } which amount \$4,000 covers the paper improperly executed, and \$11,000 the coupon bonds which belonged to Mr. D. D. Hale, of Amherst county. Besides this, Mr. Wren's legitimate indebtedness amounts to about \$25,000. Mr. Hale has behaved most generously about the matter, refusing to prosecute and declaring his belief that if Mr. Wren survives the disaster, he will some day get his money back. Other creditors have displayed somewhat of a like spirit of magnanimity. Not one of them exhibits resentment, but in *very* case there is an expression of regret at the terrible misfortune of the young man, and a desire to assist in his restoration. It is not probable that Mr. Wren will return to Lynchburg to reside, so keenly does he feel the distress which his fatal indiscretion has brought upon him; but it is probable that the sympathy and practical aid of his friends may encourage him to start life anew and recover himself."

page 305 } By Mr. Hunter:

Q. Mr. Wren, these newspaper clippings refer to the difficulties your father had in Lynchburg and his leaving of the city. Do you know how long he was gone from Lynchburg?

A. No, sir.

Q. Now where did he die?

A. He died in Atlanta.

Q. Now isn't it a matter of history in the family that your father had a great deal to do with the difficulties which came to Major M. B. Tate, your grandfather?

A. I think not. I do not know.

Q. Well, didn't you hear, and isn't it a matter of family history familiar to all, that Major Tate lost a good bit of money by virtue of his endorsement for your father in business ventures?

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A. It's not known by me. Of course I've never seen these clippings before.

Q. That's not the question. The question is: wasn't it notoriously known in the family and all acquaintances of the family that your father caused Major Tate to lose a considerable part of his estate by virtue of paying debts that your father owed, whether legally or illegally contracted, and on endorsements on his papers?

page 306 } A. No.

Mr. Roberts: The question is objected to because if the answer to that question is pertinent at all it should be gotten from the records of Colonel Tate as trustee and executor of M. B. Tate, and not from newspaper stories or gossip which happened when Mr. Wren was a boy some six or eight years old and wouldn't know anything about it.

Q. Now, Mr. Wren, we are coming back to some further family history—

Mr. Robert: He hasn't answered.

The Witness: The answer is, as far as I know it was not a matter of common knowledge in my family.

By Mr. Hunter:

Q. Did you ever hear it discussed?

A. I've heard rumors. No one ever discussed it with me.

Q. Didn't your grandmother, Amelia Tate, tell you and the rest of the Wren children that your father had occasioned not only great losses to Major Tate but to Colonel Tate also?

page 307 } A. I do not recollect that she did.

Q. And didn't James D. Tate help support your father while he was away down South?

A. I do not know.

Q. Well, didn't you hear talk about it?

A. No.

Q. Didn't hear it mentioned?

A. (Witness shook head negatively.)

Q. Did you ever hear it mentioned that your father turned over everything he had to Major Tate before he left?

A. I think I've heard of that, yes, but I can't tell you where I found it from.

Q. Now you stated a moment ago that you copies the will

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of M. B. Tate, went to Marion and got it. How old were you at that time?

A. I was twenty—let's see—twenty-two or—three.

Q. Twenty-two or—three, and that was about what year?

A. 1909, somewhere along there.

Q. So you knew about Major M. B. Tate's will and had gone into the details of making a copy of it?

A. Yes.

page 308 } Q. Along in 1908 or—9?

A. Yes.

Q. What did you do with that copy?

A. I have it.

Q. And you have kept it all these years?

A. Yes.

Q. Kept it during all these transactions with Colonel Tate?

A. Yes.

Q. And you knew about it thoroughly in 1912 when you signed the agreement which has been referred to?

A. I did.

Q. You stated that you knew about Robinson, Tate & Company. What did you mean by that, that you knew about Robinson, Tate & Company?

A. Well, what do you mean by that question?

Q. Well, that is what I want to know. Mr. Roberts asked you something about Robinson, Tate & Company.

A. What is your question?

Q. I am asking you what did you know about it?

A. I just knew that it was my grandfather's company in Lynchburg.

page 309 } Mr. Roberts: You were asked in chief—if I may interrupt—if you knew that the property was left to the Wrens by the will of M. B. Tate.

The Witness: Sure, I knew that.

By Mr. Hunter:

Q. All right, now, your grandfather, M. B. Tate, died in what year?

A. 1892.

Q. '92, and his will was written when?

A. 1884, I believe. I'm not sure. I have it here—'83 or -4.

Q. I think that is correct.

Mr. Roberts: '83.

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Q. All right, put it 1883. Now although the Robinson, Tate & Company was mentioned in that will, you don't know that your grandfather owned any interest in the Robinson, Tate & Company at all at the time of his death, do you?

A. No.

Q. Have you read Mr. Gorman's testimony in this case?

A. No, I haven't.

Q. Do you know who Mr. Gorman is?

A. Yes.

page 310 } Q. You know that he was employed by Robinson, Tate & Company many, many years, don't you?

A. Yes.

Q. You never did ask your Uncle Jim Tate for any dividends or any accounting with respect to any interest in Robinson, Tate & Company, did you?

A. No.

Q. Now you spoke about the sale of the Rye Valley property in 1918 and that you knew about it or found out about it within a year or two afterwards. What was the occasion for that Rye Valley property selling for that price in 1918, a hundred thousand dollars, I believe you said?

A. The occasion was the need for metal or manganese.

Q. And the United States was in World War I at the time, wasn't it?

A. Yes.

Q. And no one ever had any idea that that property would bring such a figure as that before that time?

A. I don't know.

Q. You never had heard such a price as that put on it, had you?

page 311 } A. Never had heard it discussed.

Q. You never had heard the value of it discussed in any way?

A. Since the meeting of 1912.

Q. All right, at the meeting in 1912 what was it figured as being worth?

A. No value was put on it except that it wouldn't bring anything to amount to anything at that time.

Q. And everybody was of that opinion, weren't they?

A. I don't know.

Q. Well, you were of that opinion, weren't you?

A. I don't know. I have never been on the property in my life.

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Q. Never had been on the property?

A. No.

Q. Wild mountain land mainly, wasn't it?

A. I really don't know. I imagine it is.

Q. That is what you had heard about it, at any rate?

A. Well, I heard it was a tract of land in Rye Valley, is about all I knew about it.

(Discussion off the record.)

page 312 } Q. Now, Mr. Wren, you stated that you never made any claim against Colonel James D. Tate for any settlement or any share over and above what you had gotten prior to his death. As a matter of fact, for many years after you became of age weren't you at various times indebted to Colonel Tate for money which you had borrowed?

A. Well, I owed him at times, yes, but not continuously.

Q. No, I said at various times.

A. Yes.

Q. And many of those loans which he had made to you you paid off, isn't that correct?

A. Yes.

Q. Now can you explain how it is that when you made settlements from time to time with Colonel Tate you never set up any offset on any claim to your indebtedness to him, if you thought he owed you anything?

A. No, I didn't.

Q. Well now, that is what I am inquiring about. Why didn't you, if you thought he owed you anything?

A. I'm not able to tell you.

Mr. Hunter: That's all.

RE-DIRECT EXAMINATION.

By Mr. Roberts:

Q. Mr. Wren, at that conference August 30, page 313 } 1912, did Colonel Tate say anything to you all about if you needed money at any time, really needed it, that he would make advances or loans, but that the fewer transactions like that the better, or something like that?

A. Well, my impression was at the meeting, while I can't recall what actually was said in the exact terminology, that

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Uncle Jim would come to my rescue in case I needed assistance.

Q. And the loans that you got from him from time to time, were they intended to be paid back or to be charged against you in a final settlement of these other matters?

A. I don't recall.

Q. Well, you paid them back, didn't you?

A. Yes, as far as I could.

Q. Well now then, as far as you recall, did Colonel Tate ever pay you in full for your one-fifth interest of that 600 acres?

A. I don't remember that he did.

Q. Do you remember anything he paid you?

A. He financed that chicken venture—

Q. How much?

A. \$3,000, I believe it was, or \$3,500 maybe—
page 314 } \$3,500.

Q. Well now, I find on page 75 of this exhibit Account Book No. 1, an account headed "W. H. Wren, August 28, 1914, by my note for land, payable on or before five years with interest from date, \$3,500". He meant by that that that note was either in full or on account of your one-fifth interest in what was left of that 600 acres, did he not?

A. Yes.

Q. Well, did he ever tell you how much he was going to pay you for that one-fifth interest?

A. I don't recall the final settlement.

Q. Well, look at that account there. Does that show that there ever was any final settlement about that matter on his books?

A. That book certainly doesn't show that there was any final settlement.

Q. This particular account, though, seems to relate only to that one-fifth interest transaction, is that right?

A. Yes.

Q. And the other account as guardian is over here on pages 9 and 10 and so forth, of the book. This shows he charged you interest on that note of \$375.58 and page 315 } then some credits on it, and he carried forward a balance August 24, 1916, "by my note to balance, payable on or before three years, with interest from date for \$3,000". That was a renewal of the \$3,500 note for that much, wasn't it?

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A. I judge so.

Q. Well now then, as far as you know was that all he ever paid you on that sixth interest of that land?

A. I can't recall a final settlement.

Q. On that item?

A. Yes.

Q. And that land item—that occurred after you became of age, and was treated on a different basis, was it not, from the funds he handled as your guardian?

A. Yes.

Mr. Roberts: Well now then, I'm going to ask you gentlemen right now if you have any further records showing settlement between J. D. Tate and W. H. Wren, either about this one-sixth interest—one-fifth interest land transaction or any other matters, why to file them, and if you have them available we would like to see them now.

page 316 } Mr. Hunter: I don't recall any at all.

By Mr. Roberts:

Q. Well now, Mr. Wren, that was the money you lost in that chicken venture, wasn't it?

A. That was the purpose of that deal there, to raise money for that.

Q. And you had made the deed to him in November, 1912, as I recall, for your one-fifth interest but he had never paid anything on it until this time, is that right?

A. I don't remember when I deeded it to him.

Q. Well, I'll just find out. Well, you deeded it to him—no, it was this date here, August 28, 1914, the date of this note he gave you?

A. That was a deed of trust to secure that.

Q. Oh, you mean he took a deed of trust on the land to secure the note for \$3,500?

A. That's my memory of it.

Q. And then he took your deed conveying the land to him, for \$5, that is what the record shows here?

A. Yes.

Q. About the deed. Well now then, that indi-
page 317 } cates a record there that he was handling his end
of it pretty carefully, and in your financial trans-
actions with him did you handle them the way he wanted you
to handle them or the way you would have liked to handle
them?

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A. Well, I tried to please him as far as I could in my dealings with him.

Q. That is what I thought. And is that the reason you never asked him for a settlement of the trust affairs here?

A. Yes.

Mr. Campbell: Objected to as leading.

Mr. Roberts: Now then, in view of the introduction of these letters, gentlemen, I want to look at some more letters that he has here that I don't remember what is in them. Will you get the letters, some other letters there from Amelia to your daddy? And will you all excuse me just a minute while he is getting that?

(Remarks off the record.)

Q. Mr. Wren, you have handed me photostat and type-written copies of the following letters from Amelia Tate to your father, which I will thank you to read into page 318 } into the record and file them for the reporter to copy into the record: one dated January 15, 1892, and one dated March 23, 1892, and one dated March 31, 1892, and one undated and unsigned, with a note on the margin or at the top, "Written in spring of 1892, probably April 1".

A. I do so.

(The respective letters above referred to read as follows:)

Letter dated January 15, 1892 (attached hereto as W. H. Wren Exhibit No. 3—Direct):

"Jan 15th '92

"My dear Willie

"Your anxiously looked for letter came this eve. I am glad to know that you are feeling better. I hope you will soon be able to be up and out again. My dear child, I hope you will not blame me for anything that I have written you concerning your affairs. I do feel solicitous for you and will do all in my power to help and comfort you. Now, be assured of this, I would not for the world do anything against your interest and your dear little lambs.

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“I advised you to leave because Mr. Tate
page 319 } thought it would be best not that I knew or believed anything was pressing you. I cannot believe you would do a wrong intentionally to any one. You did not intend that all those difficulties and troubles should arise from your acts when perpetrated and I expect and hope all has been exaggerated.

“Mr. Tate is suffering with a Rheumatic affection of the chest and heart he seems weak too has no appetite. I hope you will not let that assignment trouble you any more. But use the furniture and everything as if it was yours for it is yours. Mr. Tate and no one will ever dispose of it while one of the children lives. Mr. Tate is not able to attend to his business, consequently has turned everything over to Jimmie and Mr. Shuff. Now he cannot give up the assignment. I will take your dear little children and do all I can for them in every way and you too. You shall not want for anything I can grant you and shall have all that I have to give when I am done with this world’s goods. I know you would
page 320 } prefer that the children should remain with Mrs. H. She is everything to them that could be. I raised their mother who was as tenderly and nicely raised as any need be and all my children that are spared me now are doing well, so you need not fear any very bad results from their being here and you must know that I feel very tenderly toward them as my grandchildren. I shall ever believe Rosa intended giving us Edith the evening she died she was not allowed to talk to me (as you know) she said the ones that raised and kept her would care for her children, would they not, I said yes you must not talk to me. I do hope my dear boy that you will pardon me for advising you to leave the dear ones. I would not have you leave for anything if you can remain and get out of those difficulties and you know better than I do.

“Mr. Robinson seems to be greatly alarmed about the business. I must say that I do not understand it. I do not think that Mr. Shuff would ever say anything derogatory of you without a cause. He is such a staunch and strictly straight out man that everything has to be at the notch.

page 321 } “Mr. Tate is much distressed about his business. He seems to want to have the children here. Sometimes he will cry as if his heart would break and talk about something I do [*sic*] understand it all and I do not inquire into it. Now do the best you can bear up and trust in the.

W. H. Wren.

Lord to help you. He has promised to bear our burdens if we trust Him. Hoping you will soon be well, I close with best wishes and much love for you all.

“As ever your loving Mother.”

Letter dated March 25, 1892 (attached hereto as W. H. Wren Exhibit No. 4—Direct):

“March 23, '92

“My poor grieved brokenhearted boy.

“Should this ever find you I want to say that we are all deeply grieved and sympathize with you most heartily. I expect you hear from those dear dear little ones every few days but that is not like seeing and being in their presence and listening to their sweet prattle (It does not suffice) I do hope and pray that you will be permitted soon to return, page 322 } enjoy that much craved blessing of living with your dear babies, friends and relatives. I suppose you know that Mr. Heffernan has notified Mr. Tate to take your furniture and everything out of his house and off his premises. Now I think that downright contrariness to deprive those precious little darlings of the few comforts left for them in your absence. Mr. Tate and I have said everything we could to persuade or induce him to let everything remain as it was but all to no avail unless Mr. Tate would release the assignment made to him in case he should have release one thing all would have been taken from the dear darlings and caste to the four winds ere this. Now my dear boy we all love you as ever and I can never feel that you meant to do a wrong to anyone in this world. You became entangled and could not get out as you expected and intended. Your friends in Lynchburg say they cannot or do not blame Mr. Tate for his course with you, as he has done the best he could and pursued the proper course with all your business transactions, after he found out the condition page 323 } of your affairs. I do hope you can see it in this light and try to see that we were all powerless to lift your burdens off. You know that no one knew the condition of your business until too late to save you. I have never felt so keenly for anyone as I have for you and I assure you that had it been in my power no money or effort would

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have been too much for me to do to have kept you here and set you up, tho I trust and pray every day. that things will be forgotten and forgiven and you will be permitted to come and live with us very soon. Now my dear boy I do wish and pray you to revoke that order or charge you gave Mr. Heffer-non and give us or me dear little children. You know I love them more than any one in the world except you—their devoted father. Do give them to me. I will be so glad and happy to take charge of the dear little babes for their own sake and their sainted mother's sake. I feel that every day that I live without them is lost to me and them as they are estranged from me and taught to look upon their grand-

father and mother as cruel and hostile to them in
page 324 } taking their furniture and everything from them
that their darling good mother and father had. Oh

now does it not seem cruel in you to give them to Mr. H. over us. What would our Angel Rosa say could she be permitted to see her little darlings estranged from her mother thus, and given by you to those that she least expected to ever have contrroll of her children, I remember her ideas of things and feel that I am wronged in this thing and it seems cruel treatment. I cannot think it is otherwise. Everyone here thinks very strange of you to withhold the children from us and fix it in a way that we are cut off entirely from our daughter's children by your act. It has always appeared so strange to me that you should do this thing as you have never showed us any animosity before. I think sometimes you are not yourself. Surely you would never have it in your once kind heart to treat me thus. Now do oh do write Mr. Heffernan to give us the contrroll that he has from you of the dear darlings and givè them to us instead, to train as you sug-

gest and care for and contrroll as our own and
page 325 } give them with you our home and our property.

You can come here and live with us I should think now any time. But I would not think you would ever want to live in Lynchburg or have your children there. Let's take up and bring here to our family burying ground, the remains of our dear Rosa and all of us live and die here together (and be burried). Mr. Tate is in Lynchburg. He seems so tender towards the little children, does want them here so much said write you and ask you for two of them if no more. I said I wanted all of them. I have never seen poor little Edith but twice and R. and H. does not know me, oh how dreadful it does seem to us. Mr. Tate is grieved beyond

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expression about the estrangement and the hostilities shown us in this thing. I think your sister is very kind to them but not more than I would be and always would have done as much as she has if had been allowed. She has children of her own too and ought not be imposed on if could be avoided.

In the eyes of everyone it would seem so natural
page 326 } that you should have left them with us. Well I have said enough I hope to convince you and hope to hear from you soon that your health is much improved and you will give us the children and you come and live here with us. You have so many friends here you will soon be satisfied I think and safe too. Jim will tell you more about that. Let me say in conclusion do please give us the children until you come and let us live with them as long as we live. Mr. Tate and I will soon be done with this world any way I trust and pray that we may all meet together around the Throne of God without the lack of one.

Your loving mother."

Letter dated March 31, 1892 (attached hereto as W. H. Wren Exhibit No. 5—Direct):

"March 31st '92

"My dear boy,

"Your long good nice letter received a few days since I have been thinking and studying what I could say or do. Oh I cannot express my anxiety about you and your dear little ones.

page 327 } I do want them so much here with me. I cannot have you just now with them but still entertain a hope that I may be blessed in the near future. Oh, do not take them from me. You surely do not know what you are doing. The people here think you are so cruel. They all know now and your best friends in Lynchburg say that Mr. Tate & Robinson could not have saved you if they had given up everything they had and made themselves and families paupers in their old age. When Mr. Tate promised to sacrifice everything he had for you he thought like many others he could save you with money. But now all your friends think it would have been impossible. I am sorry that Mr. Tate took that assignment as Mr. Hefferman wants your things so much and it will never profit Mr. Tate only create dis-sention. Mr. Tate only wished to keep all your personal prop-

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erty and still intends to do it for you and your children at all hazards. Mr. Hefferman tried every way he could to get Mr. Tate to release the things and because Mr. Tate would not he Mr. H. ordered Mr. Tate to have them repa-
page 328 }

page 328 } moved would not even keep the cow. When Mr. Tate tried to make dear little Edith a present of it. I do not know that Jimmie has removed the things yet. But he has had order after order from Mr. Hefferman. I think he has acted very contrarily and maliciously in it all. Now when such is the truth of the matter why not give us the children. If they cannot have and enjoy their own property, then why is it that you blame us for those things that we cannot avoid. Mr. Tate and I think Mr. Hefferman ought to have compensation for keeping the children but we cannot do anything with that as it is fixed now. Oh, do hear me now you and the dear little precious one will never suffer if you will revoke the order now while Mr. Tate lives and give us the children as you have and sister and Mr. Hefferman. But if you fail to do it and it stands as it does now I tell you as the best friend you have you will not share as you might by complying. I am sorry to think that Mr. Hefferman has to support the precious little things when your contract with him

page 329 } was to pay your board for this year. But Mr. Hefferman does not take it from me kindly as I mean it. He says he is not a pauper. We all know that. If he was a Girard and all the Vanderbilts I would not care. I am not anxious as you know. I tell you truly that I have never done or said one word concerning all your troubles but through the kindest motives. How could I ever be other than the best friend to you and your darlings. Oh do let me have them for mercys sake do I will work my best for them and no one shall ever speak even cross to them and I will keep them from bad company. Mr. Tate has changed much. You cannot imagine him so tender and thoughtful, says he will not live long and he is tired of life and he says all his property is for me and those precious little darlings and you if you will do your duty. I do wish so much to see you and trust I may be favored in this. I am sorry Mr. Hefferman is so contentious I do not want any hardness about those little innocent children. I would have taken the dear little things from the first, but you seemed to want to carry
page 330 } out dear Rosa's request and it was commendable in you tho now all are changed and that contempt-
able negro that has done more to trouble and ruin

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you than anyone in the world. I know your sis and Mr. H has kind to the children tho no more than I would have been. While I feel very grateful to them for their kindness I know I am the proper one to have the charge of your children in your absence. It is natural for me and everyone else to know that is so and it seems to us all very strange and even cruel in you to leave them as you have. Mr. Tate is in Norfolk now. I expect we will send to meet him this morning. He has been absent nearly two weeks. Was not here when I wrote before. I hope to hear from you soon. Now once more let me beg and entreat you to let your dear little ones come and stay with us till you get ready to take them. If ever you can fix it, better just revoke the order that you have given your sister and Mr. Hefferman. I assure you I will do with them just as you advise me or as they do. How can I live my little life out without them is a mystery to me. As you say it is all so dark so dark. Well I do hope
 page 331 } this will reach you safely. I must go down to L. soon and see those children anyway. But, I cannot leave them there. I must have them somehow. I must see after my picture too. I directed Mr. Hefferman to give it to Jimmie to keep till I saw it. I do not know what he has done, so let me hear very soon that the dear little ones can come home with They shall be mine till you call for them. Oh I must close with very best wish and just bushels of love.

Yours truly,

Mother''

Letter undated (attached hereto as W. H. Wren Exhibit No. 6—Direct):

“My dear boy

“I wrote you through Mrs. Hefferman, but have never heard from you. I do feel so anxious about you and the dear little ones, I cannot wait any longer. I want to go to Lynchburg soon and I do not see how I could ever leave my precious little children there, when poor little Will, Harold and Robert would cry to come home with me, how could I endure the parting? You have had this experience, I know, but I could not save you for my life, and you can save me and make me so glad and happy, I would not
 page 332 }

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know what to do with myself. Oh do consider and relieve me one time more. You always have been so good to me. You will not deny me this, the greatest favor I have ever asked of any mortal, and I do believe I desire it most. I will never tire of them and pledge you my word and all that is within me (and Mr. Tate, too I can vouch for him) I will never give or release my right to them, to any one living, unless you request it. We intend to bestow all our possessions on them and you for their education and comfort, through their lives tho under the present arrangement we cannot venture to go into this thing when others have charge of them. Oh I do hope they will not suffer for this world's needs. Tho Mr. and Mrs. H. have their own children to care for, I do think it wrong to impose on them without compensation. I believe you will see as we do and relent I trust. I pray you will before I or Mr. Tate dies and leaves them penni-

page 333 } less, while on the other hand they and you deserve our love and our all in this hard world of sorrow and pain. Hoping to hear from you very soon, I close, with sincere and heartfelt sympathy for you, my own dear boy. Look to your God in faith, and preach Jesus to dying sinners and all along your pathway you will get comfort that this poor world knoweth not of. I do trust you can be with your little ones and us, very soon, healthy and strong too. Send the certificatè that we are to have the children. Mrs. Hefferman will not care to give them up I do not suppose. I will go down for them at once and they shall see Aunt Neilie when they wish. Do not put this all important duty off my dear. You will regret it if you do. Life is so uncertain. When the * * * are rosy I want the children to be near too so let it be oh what can I say more Do grant me this thing *do do do* speedily. I want to make them some clothes. I have a woman hired and the goods here now."

page 334 } By Mr. Roberts:

Q. Mr. Wren, about that family picture of your father and you children, state whether there were a number of the original prints, if that is the proper word, of that picture, which were given to relatives or friends at the time, and if so, where did you get the picture that you have here, the original of it?

A. There were several distributed around among the kin-folks, and I received that from Mrs. Haynes L. Morgan in 1908, framed.

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Q. Well, is Mrs. Haynes L. Morgan a relative of Mrs. Stuart B. Campbell?

A. Mr. Haynes L. Morgan I believe is Mrs. Campbell's uncle, and Mrs. Haynes L. Morgan was my mother's first cousin.

Mr. Roberts: I just was told that there was some family relationship.

The Witness: Is that true?

Mr. Campbell: As far as my wife's kinship, that is correct; I suppose you know your own, sir.

Q. Well, do you know of your own knowledge if that is one of the pictures that was taken of the group by Hodge's in Bristol in September, 1892?
page 335 } A. I do know that.

Q. Now then do you hand me a picture here of what I understand to be the four Wren boys and Edith, and endorsed on the back, "At Chilhowie, 1912, when Grandma died"? What do you know about that picture?

A. Well, that is an original picture of that group taken at that time.

Q. Was that about on the day or a day or so after the conference that we have talked about here so much?

A. Well, that was in a day or two of the conference. I can't recall the exact date.

Q. I will ask you to file that as Exhibit—Picture of Wrens, "when Grandma died".

Do you want to see that, gentlemen?

Mr. Hunter: No objection.

(The photograph above referred to is attached hereto as W. H. Wren—Exhibit No. 7—Direct.)

Q. Mr. Wren, is there any other thing that I have overlooked that you wanted to make a statement about?

A. No.

Mr. Roberts: Well, you may stand aside, un-
page 336 } less—

Mr. Hunter: Just one moment.

Mr. Roberts: Wait just a minute. There is something here.

W. H. Wren.

By Mr. Roberts:

Q. The settlement that was made in the name of Amelia Tate, guardian, at Lynchburg, shows that as the Wren children came of age that the guardian filed receipts in full for the balance shown by the settlement to be due them, and the settlement—did you come of age just before October 31, 1906?

A. I became of age on June 12, 1907.

Q. Well, anyhow the settlement shows that your receipt was filed for \$1,946.18. Did you actually get that money at the time?

Mr. Hunter: I object. He contradicts his own receipt.

A. I don't recall.

Q. Well, on Colonel Tate's Account Book—I guess it's No. 1—yes, that's the order they've got them in—the settlement shows—well, there is some adjustments on that which Harry will explain later, but on page 16 of Account Book No. 1 Colonel Tate shows a balance that the guardian owed you of \$1,914, then he balances the account and carries forward—that's November 1, 1906, by balance per Commissioner's report, \$1,914, he carries it forward as if he still owed it to you, do you see that?

A. Yes.

Q. Well, does that help you remember what you gave him that receipt for at Lynchburg?

A. I can't recall the details of that receipt.

Q. Well, don't you know that a guardian has to make a settlement, supposed to make them every year, do you know that?

A. Yes.

Q. Well, and they've got to show receipts for each disbursement; you know that, don't you?

A. Yes.

Q. In order to settle with the Commissioner. Well now then, your Uncle Jim's record, the record at Lynchburg shows you gave him that receipt for \$1,914. It is in the name of Amelia, who was the guardian. Then his book shows that he carried forward the balance that he owed you, \$1,914. Well now, the question is did you get that money then or did he carry it forward on his books?

A. Well, I got the money later.

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Mr. Roberts: I think that's all.

Mr. Hunter: Just one question.

page 338 } RECROSS EXAMINATION.

By Mr. Hunter:

Q. Mr. Wren, I didn't expect to go into detail, but I show you a letter dated November 30th, 1940, from you to "Dear Uncle Jim". That is a letter from you to Colonel Tate, is it not?

A. Yes, that's my letter.

Q. At the time this letter was written, doesn't that reflect every cent owed to you to Colonel Tate or that he owed to you—owed by you to Colonel Tate?

A. I can't recall.

Q. Well now, you wrote this letter yourself, did you not?

A. Yes.

Q. And isn't that a true statement of the financial conditions then prevailing between you and Colonel Tate?

A. I don't know that that is true. No, I don't know that that is true as to financial condition.

Mr. Roberts: The question is objected to because this simply reflects a loan for a small amount which W. H. Wren was getting from Colonel Tate and which he was
page 339 } paying in the way reflected by the letter, and it does not refer to other transactions at all.

Q. Mr. Wren, I beg to differ with your counsel. I notice the first line in the statement, "Note due you June 19, 1937, \$100.00". You owed that \$100.00, didn't you?

A. I reckon so.

Q. And this letter refers to what you then owed and a request for additional advance, doesn't it?

A. It seems to.

Mr. Hunter: The letter is filed.

(The letter above referred to is hereto attached as W. H. Wren Exhibit No. 1—Cross.)

(The letter above referred to is in the following words:)

W. H. Wren.

"COMMONWEALTH OF VIRGINIA

"UNEMPLOYMENT COMPENSATION COMMISSION

"RICHMOND

"Nov. 30th, 1940.

"Dear Uncle Jim:

"Have received your letter of yesterday, returning the series of notes I had sent you, and suggesting page 340 } the method by which you preferred having my matter handled:

"Note due you June 19, 1937	\$100.00	
Interest, 6/19/37 to 12/1/40	20.70	
Cash desired at this time	254.30	\$375.00

"I am enclosing a note at 15 months for that amount, together with 15 checks in the following amounts, which checks include all the interest:

"Jan 1 1941	25.13
Feb 1 1941	25.25
Mar 1 1941	25.38
Apr 1 1941	25.50
May 1 1941	25.63
Jun 1 1941	25.75
Jul 1 1941	25.88
Aug 1 1941	26.00
Sep 1 1941	26.13
Oct 1 1941	26.25
Nov 1 1941	26.38
Dec 1 1941	26.50
Jan 1 1942	26.63
Feb 1 1942	26.75
Mar 1 1942	26.88

Total	\$390.04
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"Therefore, if the matter is quite acceptable to you, and you can do this for me without inconvenience, I will be glad

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if you will forward me a check for \$254.30, together with the canceled \$100.00 note, which I am including in this note.

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"Yours truly,

/s/ "W. H. Wren
"W. H. W."

Mr. Hunter. That's all.

RE-DIRECT EXAMINATION.

By Mr. Roberts:

Q. Mr. Wren; as I understand it, there were numbers of loans like that from time to time, through the years?

A. Yes.

Q. Did those loans have anything to do with the amount that Colonel Tate would owe you on the final settlement of the trust affairs he was handling for the Wrens?

Mr. Campbell: The question is objected to as being immaterial and a conclusion of the witness.

A. The answer is no.

Q. State whether or not you were expecting Colonel Tate at his death to make such provision for you and the other Wrens as would equitably settle the monies that he had handled for the Wrens throughout the years from infancy up to this agreement of August 30, 1912, and page 342 } which he continued to handle after that.

A. I did have such expectation.

Q. And had he ever said or indicated in any way, shape, or form that he did not expect in the end to settle with the Wrens for every dollar that he had handled for them as executor and as guardian?

The Witness: I didn't get that. Will you read that?

(The question was read by the reporter.)

A. I can't understand that question.

Mr. Roberts: Read it again.

(The question was read by the reporter.)

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A. I can't understand the question. Ask it over again.

Q. Well, he was executor under the M. B. Tate will, and as such the Robinson, Tate property passed into his hands to administer for the Wrens. Then he handled all your money as guardian for Amelia Tate. The question is did he ever repudiate his obligation to settle with you all for the funds that were in his hands, the property?

A. No, no.

Mr. Roberts: I think that gets it.

Mr. Hunter: That's all.

page 343 } And further this deponent saith not.

(Signature waived by agreement.)

(At this point a recess was taken for lunch.)

AFTERNOON SESSION.

(The taking of depositions was resumed at 2:00 o'clock p. m.)

J. ROBERT WREN

the next witness, for Complainants, being first duly sworn, deposed as follows:

DIRECT EXAMINATION.

By Mr. Roberts:

Q. State your name, age, and where you reside and are you one of the complainants in this case?

A. Joseph Robert Wren, born 1889, February 11th. I am a complainant. I reside here, now.

Q. James D. Tate was born—

A. Well, that I don't know.

Q. I've got it here and it's not in the record, and I want to get it in the record. Some of them might want to know. January 1, 1868, was he not?

A. I'll answer yes.

Q. And died?

A. December 21, 1941.

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Q. What did you know about M. B. Tate having devised his interest in Robinson, Tate & Company to the Wrens, and from whom and when did you learn it?

A. I learned it in a general way—amounts were not mentioned—from my grandmother. I stayed at the farm two or three years longer than any of the Wrens, particularly in the summers of 1905 and 1906 I was alone with grandmother and we didn't even have a cook. We talked over almost everything during those months Grandma wasn't well—I am speaking now of 1906; I was then seventeen. We were doing a lot of shipping to Robinson, Tate & Company, and I asked her if she couldn't have someone else to do this, that she wasn't able, and she—this is how the conversation got started: she at numerous times had discussed with me what I was going to do. I told her I didn't like farming. She asked what I thought of learning the wholesale grocery business because, she said, "your grandfather gave you boys that". Now that's in a general way what I know.

Q. Well, what and when did you know about the \$8,000 insurance money that Amelia and Colonel Tate got from your father's insurance, which is shown in the Lynchburg settlements?

A. I didn't know of the amount for a long time, or the amount in any case; but in these same months, discussing my affairs and grandma's, she told of the difficulties Uncle Jim had had, straightening up our estate, and how our insurance had come in very handy or saved the day, or words to that effect.

Q. Well, did you know anything about the other insurance which is described in the stipulations here at that time or at any time until after the suit was brought?

A. Didn't know a thing about it.

Q. Well, do you know as a matter of fact that all this other insurance information was dug up after the suit was brought?

A. Yes, I do know that.

Q. Well now, did Colonel Tate ever give you any information about the property left you Wrens by M. B. Tate?

A. I never one single time ever spoke to him about it or was told about it by him.

Q. Well, did he ever in his life give you any statement or any facts and figures of any kind, orally or in writing, which would give you any information about the property

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left to you by M. B. Tate and left in his hands as executor and which he also handled as *de facto* guardian?
page 346 } A. No statement at any time, no writing of any kind concerning the estate, but I learned of this 600 acres from—

Q. Wait a minute; I am talking about Colonel Tate now. Did he ever give you any information?

A. I'm just about to answer that, that among those who told me of the 600 acres he could easily have been one. The superintendent, all the farm hands knew it. I knew the fields by their names, so I knew about that; but as far as statements, I never had one, never asked for one, and never discussed one.

Q. And he never discussed it with you during his life?

A. At no time, at any time during his lifetime.

Q. Now then, the settlement at Lynchburg shows that when you became of age you gave him a receipt for the balance that he owed you in Amelia's name as guardian at that time. Do you remember signing that receipt?

A. I don't remember signing any receipt, but I know if he had asked me to I would have signed it, regardless of what it was. I just signed what he told me to.

page 347 } Q. Would you have signed it without knowing the purport of it?

A. Definitely.

Q. Well now then, coming to the conference of August 30, 1912, following Amelia's death, state just what was said and what agreement was reached at that conference.

A. Uncle Jim called us up to his room upstairs. It was following the funeral; I believe it was the same day. It may have been the next day, but I think it was the same day. Called the five Wrens into the room and he said, in effect—and I can almost quote these words—"Now that you are all here and Ma has passed on"—I say I can quote those because we were scattered then—"Now that you are all here and Ma has passed on, I want to tell you something of your affairs".

He began almost at once by saying that there had been a considerable debt against his father's estate, that he now had this in his hands, in the amount of some \$30,000, as I remember it. He said that that was a sort of lien on these 600 acres which belong to us. He said that he had just a

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little while before sold some standing timber and some land; he didn't mention any amount at all, but said that—

Q. Who did he sell it to?

page 348 } A. He said he sold the land to Frazier, the standing timber to Cole & Frye, not mentioning any amounts at all. He said, "I think, if you boys agree to it, I will just accept what monies I got and release your land from any lien of any sort."

Will Wren spoke up and said, "According to our grandfather's will, that Rye Valley property was to pay debts"—"was to be sold first to pay debts". Now I was surprised that Will would say that, or any of us say anything, for Uncle Jim's conferences were all one way, and Uncle Jim turned on him and just—not furiously but authoritatively, and he said, "That property, it is not expedient to sell it at this time. You boys don't know anything about such affairs, but since in the end you boys will have everything, you should go along with me and my mother's wish and let me manage it".

He proceeded then to say, turning to me, "You're just through with a trouble I bailed you out of at Virginia Polytechnic Institute", and he told Will about the chicken farm, and about this time Beverly Wren spoke up and said, "I think Uncle Jim's right, that he should continue to manage this affair, particularly as it is Grandma's wish and since he's already always done it". Beverly made a

page 349 } little speech there—conciliatory, I thought—and Uncle Jim said, "Very well, is it agreed?" To which we all said, "Oh, yes; yes, sir". I was very glad to say yes.

He said, "Now then, I want it understood that I don't want any correspondence on any requests I make of you. I'm thinking of selling some additional land to Frazier. I'm going to make an exchange there with equal acreage for some of yours. There will be another place where we must straighten a line fence to keep the thing straight. There is something I must get out of—or get in order with the Commissioner. You boys must—you children must sign. There are numerous papers and I'm going to send them to you as soon as I can get some of them up, and from time to time, and I want them sent back".

Now that's the substance of the meeting. I may have left out something. That's just about how it turned out. It

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wasn't a meeting; he just called us into the room and told us what he wanted us to do.

Q. I didn't catch just what you said about what would happen in the future if you did as he said.

A. That he had managed this estate very well, and he didn't hesitate to say that, either, and that he page 350 } knew how to manage it, and "if you boys will go along with us"—now I can quote those words exactly—"if you boys will go along with me, it will be continued to your advantage, because you are going to get the whole thing anyway", and he said those words.

Q. Well now then, while we are on that point, did he ever at any future time say anything to indicate the date or the time at which he expected to restore it to you?

A. Yes, he did. I recall two times, this meeting I've just described being the third. Uncle Jim and Aunt Florence and my sister and some other young folks stopped when I was living in Minneapolis, and I had just gone through another bankruptcy sort of a thing. My partner had absconded. I had lost \$2,000 that he had supplied me with. He first wanted to see if he could recover. Well, I knew he couldn't unless he went to Japan; that's where my partner went. And I got a little scolding then. "Now", he said, "this has demonstrated a second time that you don't know how to handle funds", and he says, "I don't think you are going to get any more from me until I die, and then you will get it".

A second time, it was in December, 1924. I was living in New York. He came up with Mrs. Tate and some page 351 } young folks again. I was in the theatrical business, theatrical publicity business, which he called "whooptedo", but I did manage to give him tickets to matinees and night all the time he was there, he and his wife and his group.

Q. How long were they there?

A. They were there for a week or ten days. The ladies—they were all ladies except Uncle Jim—had chosen on some shopping tour, and Uncle Jim and I were playing a game of billiards with one of my partners and a friend, one of my friends, sitting there, and we were in extremely good humor, joking and talking, and Uncle Jim was saying something about my business being "whooptedo" and so on, and I told him that all businesses were "whooptedo" if you had no money to operate them, and in this repartee Uncle Jim re-

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ferred to that, saying to the boys, "I don't know how well Rob—how Rob learned to come back at me so fast", he said, "He didn't learn anything at school. He was shipped from two of the schools".

I said, "Yes, that is so", but then I told the boys, I said, "What do you think of this?" I said, "When I went in the army I had a few thousands of dollars coming from Uncle Jim on a land deal, and not expecting to get out of the army very soon I agreed to let him turn that over to my brother,

Beverly Wren, who had six motherless children page 352 } and was hard up". "Now", I said, "What do you think of this, boys? Instead of giving this to my brother he just simply paid off some of my brother's debts and my brother didn't get anything and I didn't get anything".

Uncle Jim said, "Well, if I had lent it to him you wouldn't have gotten anything either", and I said, "Well, I didn't get anything anyhow", and he said, right in good humor to all the crowd, he said, "Well, when I am dead that is soon enough. You will get it then".

That is the second time. I'm sorry I went into so much explanation. That will establish it, though.

Q. Well, was that the occasion that he talked of Vuono?

A. Yes.

Q. Now then, did you at any time through his life ask for a settlement?

A. At no time did I ever ask for a settlement.

Q. Did he ever suggest that you have a settlement?

A. At no time, never.

page 353 } Q. Did he ever suggest that final settlement would not be made?

A. No, at no time.

Q. And the fact is you never knew how much he owed you until after—

A. He died.

Q. —he died and you dug into the records to find out?

A. Mr. Roberts, my grandmother cautioned me a dozen times or more than I can remember, to treat Uncle Jim as a father and never ask him any questions, and to let him handle my affairs because he was the smartest man in the world, and I never would have thought of asking him for a settlement, any more than you would have thought of asking your own father at my age.

Q. Well, what sort of confidence did you have in him?

A. Complete and sustaining.

J. Robert Wren.

Q. Now then, at this conference did he say anything about money that you might need from time to time, and if so, what did he say?

A. He did. His idea, he explained, was that young folks should make their own way, and that he didn't want to be bothered with demands unless they were very
page 354 } necessary, and he also said that he recommended that whatever help he gave to anyone that they pay it back, so as to keep the estate intact.

Q. Well, did he let you have money from time to time?

A. He did.

Q. Well, did you follow that practice?

A. I never was able to do it. I curtailed a note or two, but I don't think I ever paid one off.

Q. In other words, he was keeping the books?

A. That's right.

Q. And if you repaid him, it was an exception and not the rule?

A. Definitely.

Q. Do you remember the last time he ever advanced you any money?

A. I do. It was following his visit to New York. It must have been a month or two later, I wrote him that I needed some money, and he sent me, I think, \$200 and a note for it. That's the last I asked him for.

Q. Did you sign the note and return it to him?

A. I did.

Q. And as far as you know, that note is due
page 355 } to be paid in the settlement you get in this law suit?

A. Yes. I'll say this: in 1939 I spent Christmas with our uncle and had occasion to say—and I just don't know how it came up; we were talking of his visit to New York—that I had neglected to send him that \$200, and he said, "Oh, fiddlesticks. Forget it". Those were the words.

Q. I believe you said that he wanted to keep your personal loans and advances separate and distinct from the estate he was handling for you all?

A. Oh, yes.

Q. And that was the reason that he wanted you to repay your loans?

A. Definitely.

Q. But you were unable to comply with that particular part of the arrangement?

A. That's right.

J. Robert Wren.

Q. Well, now then, following that meeting—by the way, does this Exhibit 1 filed by the defendants here to their answer, or anyhow it is on page 15 and 16 of the record, is that a summary of at least a part of the things that were agreed to there on August 30, 1912?

A. That's one of the papers that I inspected on account of the change of land and so on.
page 356 { Q. And this refers to the Cole & Frye and the Frazier money that he had?

A. Yes.

Q. This says the receiver had the money. Did he say who the receiver was?

A. He mentioned the receiver, but he didn't say it was he.

Q. You learned—

A. After he died.

Q. When he sent you this receipt over here you learned that he was receiver, didn't you, this receipt here?

A. If I learned it, I only remember it now that it is in this law suit. That is the first I remember it. He may have told me but I didn't remember it then.

Q. Well, on page 62 of the original exhibits there is a receipt there showing that he was the receiver and that he paid you that \$7,052.09.

A. Yes.

Q. Well, was it paid, or did he keep it under this other agreement that he cancelled the lien, the debt against you all, for that money?

A. We didn't get one cent. That was just
page 357 { signed, and I doubt very much if I read it at the time. I signed it just like any other paper.

Q. I believe you said you had absolute confidence in him?

A. Utter confidence.

Q. Throughout your life?

A. Every day of it.

Q. Now then, these other—these exchange papers here on page 48 of the amended bill, there is the exchange deeds there between the Wrens and Colonel Tate for some lands. Those deeds are dated November 12, 1912, and was that one of the things he mentioned back there August 30, 1912?

A. Yes. Yes, I was living at either Louisville or Indianapolis, and I remember getting that by mail.

Q. Well, this shows it was acknowledged by you, Marion County, Indiana, December 9, 1912.

A. That is Indianapolis. I was both places at the time.

J. Robert Wren.

Q. Now then, I believe this first paper, Exhibit No. 1, states that he is to have the refusal of your one-fifth interest in the balance of the 600 acres if you decided to sell that?

A. He made that a stipulation when he was page 358 } instructing us what to do, that he was to have the refusal if and when we ever sold any of that 600 acres.

Q. I see the deeds from Bev was made in 1912, from Harold in '13, and from Will in '14, and from you—from Edith and from you, they are dated June the 7th, 1915, and they were all for five dollars consideration. Do you recall just why he got those deeds from you and Edith at the time?

A. I can tell you why. I didn't know it then. Uncle Jim—I saw after he died; I don't know where I got it—it may be in your files—a brochure announcing a sale of land, and this sale was successful, and from my experience in that same thing it must have taken him some time to prepare that, and that was dated in 1915, the sale of land, and he sold our land at that sale.

Q. Do you remember the month?

A. No. It was toward the end of the year. I just know—you have got it in that file somewhere. I didn't know a sale had ever been made for many years later.

Q. He sold—

A. A thousand acres, mostly the lands he had gotten on these deeds.

Q. And some other land?

page 359 } A. I think some other, but not much other.

Q. A number of sales—had a big auction, didn't he?

A. Yes, he did, and successful.

Q. Well, I don't have that advertisement with me; it's at my office—but I might have it here.

Mr. Roberts: I would like for Mr. Wren to supply that date to the reporter, gentlemen. It was either in September or October, I think September, of that year.

Mr. Campbell: That will be all right.

By Mr. Roberts:

Q. Well now then, it was the money—by the way, his book shows—that is, the red book, account book, shows a statement on his book of the result of that sale, don't it?

A. It does.

J. Robert Wren.

Q. And I believe it's in connection with your account, isn't it?

A. Yes, it is; it is a part of my account.

Q. Did he ever send you a statement of that?

A. At no time.

page 360 } Q. Did you ever see that till we got the books to file in this case?

A. I never saw either of those books or never imagined them to be in existence until we got them from Mr. Campbell in this suit—or Mr. Dickinson, rather.

Q. Or Mr. Hunter—whoever you got them from?

A. Well, Mr. Dickinson was there and Mr. Hunter too.

Q. Well, anyhow, his book shows, though, that he paid you for your one-fifth of that land on the basis of the net he got out of it?

A. It does.

Q. And he settled with Edith the same way?

A. Yes, and he includes in my account the debts he paid Beverley for me.

Q. To which you have already referred?

A. I've just referred to it, yes.

Q. Well now then, is it or not a fact that that land, one-sixth, that trade was made, those trades, after you all became of age, and that was separate and distinct from the trust business he was handling for you all, is that right?

A. Correct. In this meeting he referred to the sale of these lands, and that's all he did say anything about.

page 361 } Q. Now then, if and when you sold the lands he was on the same basis about the payment for that as anybody else you sold it to?

A. Definitely.

Q. And that was different from the time he was to settle the trust affair?

A. Altogether different. This land might just as well have been sold to us at that sale—by us at that sale. It was transferred at once by him.

Q. Well now, he had bought Harold out—while we are on that—for the flat sum of \$6,000; do you remember that?

A. I just heard Harold speak of it. I don't know the details.

Q. Did Colonel Tate ever in any way vindicate to you any repudiation of his duty to account to the Wrens here?

J. Robert Wren.

A. At no time in any form. Never saw him even in the attitude to make such a statement of any kind.

Q. Did I ask you if either you or he ever suggested a time for settlement had arrived?

page 362 } A. At no time.

Q. Except he did suggest, on the two occasions you mention, that that would be at his death?

A. That is true.

Q. Well now, since he has died, have you learned that by two wills which he had prepared, and one of which was certainly proven in this case to have been executed, that he was leaving the Wrens about seventy per cent or exactly seventy per cent of his estate—I'd like to ask you if that is in the approximate neighborhood of the amount involved in this litigation?

A. Yes. I thought he hit it just about right, and according to my expectations.

Q. Well now then, how was the farm operated there, and by whom?

A. It was operated by our uncle, who had the final say in everything. He employed a dozen of tenants and he employed a supervisor, two in succession while we lived there. He supplied us from Robinson, Tate & Company with sugar and essentials like that. We had a little store; we paid off the hands there. Grandma's work was limited to chickens and the supervision of the butter and milk and so on. That's all she did.

Q. Did she get any money from that?

page 363 } A. Grandma I don't believe ever had ten dollars that I can remember. It was generally a few copper coins and silver coins. Grandm kept nothing locked. She kept these in her writing desk. And I remember distinctly that this little purse in which she kept these coppers and coins, she sent them to our brother Will when he was at Blacksburg in about 1904 or '05.

Q. Was you at home at that time?

A. I was home at that time she sent them to him. She said that was all she had.

Q. Now then, did she ever have any money?

A. Never.

Q. Did she ever have a bank account?

A. I don't think she could have written a check to save her life.

Q. Did she operate the dower?

A. Uncle Jim operated that. She told me of it.

J. Robert Wren.

Q. By the way, did she ever tell you anything about what her husband had left her by his will?

A. Definitely.

Q. And who had it?

A. Definitely.

Mr. Campbell: Objected to as immaterial.

page 364 } A. Shall I answer?

Q. Go ahead.

A. At the time I have just noted here, when we were discussing my vocation and the possibility of working up in Robinson, Tate & Company, she told me definitely at that time, and other times, that during our grandfather's life he had promised her to return every dollar that she sent Robinson, Tate & Company in produce and double it every time, and I said to her, "Grandma, I keep these books here and I have never seen anything come back from Robinson, Tate & Company. Did Grandpa do what he said?" To which she replied, "He certainly did. He left me well fixed, and Jimmy is keeping my money and I don't even ask him what he is doing with it". No amounts stated.

Q. That was about 1906?

A. 1906, in the summer.

Q. Well now then, did she ever say to you what she was going to do with her property when she died?

A. No, not that, but she said in the last two or three times that I saw Grandma; it was on her mind to—and she stated positively that she intended to—build a home for the Wrens

to return to whenever they went broke or got in
page 365 } trouble, and that she was going to fix it so that
they couldn't sell that, so that they could come
back to that home.

Q. I'm rambling around a good deal, but what about that Rye Valley manganese sale for a hundred thousand dollars in 1918? What did you learn about that, and when?

A. Grandma referred to that property as "our Rye Valley ore property". I had never saw it then and I have never seen it since, and know nothing more about it. It must have been some time in the '20's, and I don't know from whom unless from my brother Will, I heard that he had sold that on account of ore. I don't think at the time I heard of anything like the price or anything, and probably didn't know anything of what he got for it until this law suit.

J. Robert Wren.

Q. Well, did you ask him—did he ever mention that to you or you to him?

A. Never. Never a time.

Q. Why didn't you mention it to him?

A. Well, I just wouldn't do it. To begin with, I don't think I could screw up the courage to. Uncle Jim spoke with authority. I had given him *carte blanche* to do what he wished with what I had or my expectations. I wouldn't
page 366 } any more have approached him than I would have approached a father, and I'm not the father to son. He is the only one I know of did that.

Q. In other words, you had put your property and your trust in him, and you were leaving it there for him to settle?

A. That is definitely the case.

Q. At the time he thought that he should settle for your benefit?

A. Yes, sir.

Q. All right. Now then, did I ask you if Colonel Tate *every* give you any information about the provision of the will for the benefit or protection of the Wrens?

A. Uncle Jim never mentioned Grandfather's will to me. He never mentioned my father's name to me. Those things if he had mentioned them I might have spoken of them, but I never would have asked him. I knew nothing of those affairs.

Q. Well, did you know that he had gotten that \$8,000 insurance from your father's estate?

A. Grandma told me that he had gotten some insurance which had saved the day. I didn't know the amount and she didn't mention it.

page 367 } Q. Well now then, this other—did I ask you about this other insurance?

A. You did. I know nothing of it.

Q. These two account books here, you have examined them repeatedly, haven't you?

A. Yes, I have.

Q. Are they in the handwriting of Colonel Tate?

A. Every word, as far as I can see.

Q. Did you know when you were going to school that Colonel Tate was paying your expenses out of your money?

A. I didn't have the slightest idea of that. I didn't know a thing about that. I didn't know Uncle Jim kept accounts, and if you want me to I'll tell you the reason why.

J. Robert Wren.

Q. All right.

A. In the attic of our old home, way back when Will Wren and I were little boys, we found an account book and a page and a half of entries, no more, in the handwriting of our first school teacher, in which she had put down everything. To be exact, she had written down against J. R. Wren, one cheap hat, twenty cents—we laughed at what kind of hat she could have gotten for twenty cents. It looked like that was page 368 } abandoned, just as if someone started to write a diary and quit at the end of a couple of months, and that is the only account I ever knew was being kept.

Q. Well, you did know as you grew up that they kept the farm accounts to the penny, did you not?

A. Oh, yes, but I kept those books myself.

Q. You have some of them here?

A. We have them right here.

Q. I believe you found those books, didn't you?

A. Yes, I did.

Q. Up there at the farm somewhere. Did I ask you: did you learn these facts about him paying for your education and so forth from these records at Lynchburg after you brought this suit?

A. Well, of course I knew that he was charging to me against some arrangement later what he was putting down of an important nature like that—for instance, if he sent me two or three hundred dollars there to bail myself out of some trouble I had at Blacksburg, and I expected—

Q. You knew he was keeping a record of that?

page 369 } A. I knew he was keeping that sort of thing.

Q. And you weren't keeping any books yourself?

A. Not a page.

Mr. Roberts: I think you may take the witness.

CROSS EXAMINATION.

By Mr. Campbell:

Q. Mr. Wren, you knew that your grandmother was your guardian?

A. Yes. Yes, I knew that.

Q. And you knew in order to have anything to make it necessary for her to be your guardian that she must have gotten some funds from some source, didn't you?

J. Robert Wren.

A. No, sir, I didn't know that at all. I don't see that that follows.

Q. You thought, and think now, that a person is appointed guardian even if there are no funds to administer?

A. I should think so. I don't know any different.

Q. And you thought she was just—being guard-
page 370 } ian was just a name?

A. No, she told us of the insurance money.

Q. Oh, she told you about the insurance money?

A. Yes.

Q. And she told you how much it was, didn't she?

A. No, sir.

Q. What did she tell you about the insurance money?

A. Said, "Your insurance money saved the day".

Q. That's all she said?

A. I don't remember any amount.

Q. Never said that but once?

A. Several times.

Q. And who did she say it to?

A. To me.

Q. Anybody else?

A. I don't know who else.

Q. Well, do you recall giving her a receipt when you were
twenty-one?

A. No, sir, I don't.

Q. You deny you gave her one?

page 371 } A. I don't deny anything. I don't recall it.
That is your question.

Q. And don't you know that your guardian account shows
\$1,600—

A. Yes, I know that.

Q. —received from insurance?

A. I know that now, yes.

Q. And that is a fifth of the \$8,000, isn't it?

A. Yes.

Q. Now, Mr. Wren, when were you twenty-one?

A. In 1911.

Q. And shortly after you were twenty-one your grand-
mother died?

A. Yes.

Q. Within a year or so?

A. About a year, I guess.

Q. About a year. At that time your sister was also twenty-
one, wasn't she?

J. Robert Wren.

A. Yes, sir.

Q. And you all signed her receipt and release, didn't you?

A. We signed what?

Q. A receipt and release.

page 372 } A. From what?

Q. To your Uncle Jim for any monies that had come into his hand for you.

A. We signed this paper that you have been looking at.

Q. Yes. And that was an agreement as to the payment of the debts of your grandfather and a release of your land from any liability for that, wasn't it?

A. Yes.

Q. At that time your Uncle Jim told you that he had a judgment for something like \$34,000, didn't he?

A. That's right.

Q. And one of your brothers, your brother Will, said, "We will want the Rye Valley land to pay that"?

A. To that effect.

Q. Yes. And your Uncle Jim told him that he couldn't find anybody to buy that Rye Valley land at that time, didn't he?

A. No, he didn't say that.

Q. What did he say?

A. He said it was the wrong time to sell it, that
page 373 } it wasn't worth much.

Q. Wasn't worth anything?

A. Yes.

Q. And from your investigation that was true, wasn't it?

A. I didn't investigate it.

Q. Well, from your subsequent investigation that was true, wasn't it?

A. I didn't investigate it.

Q. Well, from your subsequent investigation that was true, wasn't it?

A. I never did investigate it.

Q. You don't know anything about it, do you?

A. I know now, since it's been sold, that it brought a considerable price.

Q. And it was sold during World War I as a manganese proposition?

A. Yes.

Q. And that the people that bought it lost everything they put into it?

A. I don't know that.

J. Robert Wren.

Q. You've heard it, haven't you?

A. No, sir, I haven't heard that.

Q. You thought they had made a lot of money out of it?

A. No, sir. I heard they had made a bad deal, but that's quite different from losing every cent.

page 374 } Q. Heard they had made a bad deal?

A. Heard they had made a bad deal.

Q. Well now, you say you thought that Colonel Tate had some money that belonged to you?

A. I thought that he was managing some that belonged to me.

Q. What money did you think he was managing that belonged to you?

A. Well, I thought that what share of my expectation from the Robinson, Tate & Company, for example.

Q. All right. Did you ever ask him anything about it?

A. About what?

Q. About your share in Robinson, Tate & Company?

A. Not in those early days.

Q. Did you at any day ever ask him?

A. I think I may have discussed it with him some time.

Q. All right, sir, now where were you and when was it?

A. I don't know.

Q. And what did he say?

page 375 } A. I don't remember that. I remember having either seen an excerpt—I remember having received some sort of communication from Will Wren as to the will of our grandfather, and I remember having written Uncle Jim something about that. Now I don't know what it was. I remember I was in Minneapolis at the time.

Q. And you don't know what he might have told you?

A. I know I asked him for some money and he sent it to me, if that is what you mean.

Q. No, I mean ask him anything about this Robinson, Tate stock.

A. Stock?

Q. Yes.

A. I don't remember having.

Q. Well, about the Robinson, Tate business; did you ask him anything about that?

A. I may have. I think I did, but I don't know what I said.

Q. What do you think you asked him?

J. Robert Wren.

A. I don't remember—something about some expectation from it.

Q. Something about some expectation from it?

A. Yes.

page 376 } Q. What did you mean by "expectation"?

A. Well, he was managing it. How it was getting along or something. I don't know.

Q. Well, you mean expectations that you had of getting some of it, is that what you mean?

A. Eventually.

Q. What do you mean by "eventually"?

A. I mean when he saw fit to do it.

Q. You mean when he died; that is what you meant?

A. I meant when he saw fit. He could any time have done it.

Q. He could have given you anything he wanted to at any time?

A. Definitely.

Q. But you were looking for it when he died, weren't you?

A. That time or soon.

Q. Now just come right down to cases.

A. All right.

Q. And what you were expecting was that he was going to remember you in his will?

A. I expected—I certainly expected that he would.

Q. Yes.

page 377 } A. Yes.

Q. And that is just the reason you never mentioned anything to him, because you were afraid that he would cut you out of his will?

A. Now that is a pretty gross way of asking that.

Q. But it is a pretty blunt way.

A. It is not the truth. It is just the same—I wouldn't ask a father what I was going to get, and my uncle was in that relation to me.

Q. Just exactly.

A. Precisely.

Q. And you wouldn't ask your father what he expected to leave you when he died.

A. That is so.

Q. Yes, and you didn't ask your Uncle Jim.

A. I didn't ask him.

Q. What he expected to leave you when he died.

A. That's right.

J. Robert Wren.

Q. You realized in each instance that that would be something for the person that was writing the will to say, didn't you?

page 378 } A. Not altogether, no, sir.

Q. Well, that is the reason you wouldn't have asked your father about it?

A. No, it isn't, either, because law suits are brought if things don't come out right.

Q. Well, you didn't bring any law suit?

A. I did not.

Q. No.

A. That's right.

Q. And you never asked your uncle to pay you anything that you claimed he owed you, did you?

A. I asked him for money, but no payment of what he owed.

Q. No, and you didn't put it on the ground that he owed you anything, did you?

A. I don't believe I did.

Q. No.

A. I might have.

Q. You asked him just as a son would go to his father and say, "Father, I'm in a little hard luck and I want some help"?

A. A little stronger than that. I may have implied that it was coming to me. I think I may have done that.

Q. You may have implied it?

page 379 } A. That is right.

Q. But you certainly didn't say it?

A. I may have said it, but I don't remember.

Q. You can't tell us anything, that you said anything of that sort, can you?

A. No, I can't.

Q. Now you frequently borrowed money from your uncle and gave him notes?

A. Yes.

Q. If you were getting your own money you wouldn't have been giving notes for it?

A. I think that has been answered. He said to pay that back, and he always sent that note in the expectation of getting it back and keeping the estate intact.

Q. Keeping the estate intact?

A. Those were his words.

Q. He wrote you that, didn't he?

A. No.

J. Robert Wren.

Q. You say he would send it to you. You would be away when you would write for it, wouldn't you?

A. Yes.

Q. So he would have to write you, wouldn't page 380 } he?

A. I don't think so.

Q. How would you get the note if he didn't send it by mail?

A. Would you call a note a letter?

Q. And he always accompanied those notes with letters, didn't he?

A. I don't know about that. I think so. I think ordinarily he would.

Q. Have you got any letter from him that says anything at all about keeping the estate intact?

A. I haven't any letter of any kind kept out of my papers. I have no letters.

Q. And you realized that was an important matter, didn't you?

A. What?

Q. Keeping the estate intact.

A. I lost some letters in the fire. I lost a lot of papers. I thought it was an important fire.

Q. Whose estate was to be kept intact?

A. The estate of M. B. Tate.

Q. M. B. Tate?

A. Yes, sir.

Q. And you read M. B. Tate's will, didn't page 381 } you?

A. I don't believe I read the whole thing until after this trial. I remember reading excerpts from it.

Q. What excerpts did you read from it?

A. Some that were supplied me, I believe, by my brother. He doesn't remember it, but I remember having written to him about it.

Q. You wrote him about it; that was pretty soon after you were twenty-one, wasn't it, or maybe before?

A. No, that was after.

Q. Not much after, though, was it?

A. Well, it was after, because I certainly didn't leave home at twenty-one.

Q. All right. Pretty soon after you left home you wrote to your brother and asked him "what did Grandfather do for us"?

J. Robert Wren.

A. No, I didn't do such a thing.

Q. What did you do?

A. Well, in correspondence we speak of things. I might not have asked him at all. He may have written me without my asking him—did you ever think of that?

Q. You happen to be on the witness stand, Mr. page 382 } Wren.

A. All right, sir.

Q. Well, if that was the way of it, then how did he happen to write you and tell you what your grandfather's will was?

A. Well, you better ask him that. I don't know.

Q. But you happen to be on the witness stand.

A. I don't know.

Q. What did he say in the letter?

A. I don't know. I told you I can't remember what he said, what the occasion was.

Q. But be that as it may, you never asked your Uncle Jim to account for one penny of your money after your guardian affairs were settled up?

A. I never asked him for any statement.

Q. And never asked him for any money as belonging to you?

A. I asked him for money, why, yes.

Q. When?

A. Well, any money I asked him I assume it belonged to me.

Q. Why did you give him a note for it?

page 383 } A. Because that was his way of doing business.

Q. Oh, yes.

A. I didn't pay the notes.

Q. You didn't pay the notes?

A. No, sir.

Q. Never gave him any checks or anything like that?

A. I think I curtailed a note or two, at his suggestion; said it would look better.

Q. Look better to who?

A. That is what he wrote me.

Q. You haven't got any of those letters, have you?

A. No. I presume you have.

Q. Now you say you never asked your Uncle Jim for a settlement?

A. Never.

J. Robert Wren.

page 384 } By Mr. Campbell:

Q. Now, Mr. Wren, coming back to what we were talking about: you said you had no idea how your accounts stood with your uncle?

A. Correct.

Q. That is correct, is it?

A. That's right.

Q. I hand you a letter on stationery of Louisville Lodge No. 8, B. P. O. Elks, dated 8/4, and ask you if you wrote that letter.

A. Yes, this is mine.

Q. Show it to Mr. Roberts.

(The letter was handed to Mr. Roberts.)

Mr. Roberts: Have you got the envelope?

Mr. Campbell: No, sir. 8/4 is the date there. It is dated up at the top 8/4; the year is not given.

Q. You wrote that letter to your uncle, did you not?

A. Just a minute, please, sir. (After looking page 385 } at letter) Yes, I wrote it.

Q. I wish you would file it with your deposition, J. R. Wren No. 1.

(The letter above referred to was filed as J. R. Wren Exhibit No. 1—Cross, and is hereto attached.)

(Said letter, J. R. Wren Exhibit No. 1—Cross, is in the following words:)

“LOUISVILLE LODGE NO. 8

“B. P. O. ELKS

“Louisville

“Louisville 8/4.

“Dear Uncle Jim,

Money agin—this time tho, not so strong as formerly. This time its a moving picture show, with great prospects. Last week I cleaned up \$70. on a similar venture, but had to sell on account of limited capital. I dont know how much you have of mine, but presume its anyway a hundred or two.

J. Robert Wren.

I need about \$250, but have only \$100. available & thought you might pass me the remainder (\$150.) off that celebrated "Cooling Board." If I haven't so much there, page 386 } couldn't you let me have it on 60 days time? Feel confident I could reimburse you in much less time.

Please let me have your decision the same day you get this, as I have to "put up," or decline right away.

"No news here, any there? I'm contemplating voting for Roosevelt. Got Grandma's letter today. Hope you see fit to pass me the sheekels—Dont know who the devil else I would borrow from.

"Yours

"ROB."

Q. I hand you here a carbon copy of a letter dated August 16, 1912, beginning, "Dear Rob", and I will ask you if that is not the answer to the letter which you have just filed marked Exhibit J. R. W. No. 1.

A. Just a minute; let me read it. It sounds like an answer to it. I should say that it is.

Q. And you got the money that is mentioned in there, didn't you?

A. Oh, I assume that I did. I think maybe page 387 } I did.

Q. Will you file the answer, marked J. R. W. No. 2?

A. I do.

(The letter above referred to was marked J. R. Wren Exhibit No. 2—Cross, and is attached hereto.)

Mr. Roberts: This copy of letter is objected to because it is self-serving and because it was Colonel Tate's duty to settle as executor for the property which came into his hands from Robinson, Tate & Company and there is no record that he ever did so. Apparently this letter refers to any balance which might be owing by him as *de facto* guardian to the witness.

(The letter, J. R. Wren Exhibit No. 2—Cross, is in the following words:)

J. Robert Wren.

"Aug. 16, 1912.

"Dear Rob:—

"Your letter dated the 4th and mailed the 11th reached me this morning, as I have been away for two or three days.

page 388 } "I have not had time to foot up your account, but my memory tells me that it was about even when you left here, after making the loan to Will and paying that New York sporting goods bill.

"Will. tells me he has paid you \$100. on his note. I have his not [*sic*] to your order for the \$150. What must I do with it?

"I am in the same fix as when I wrote you last. Have had to furnish a good deal of money this summer to Edith and the others and this was unexpected and caught me unprepared, and no live stock has been shipped yet, and it has been very hard for me to keep even in Bank. I have no money on hand, but possibly I could get your not for \$100. at sixty days discounted by some of the Banks and send you the proceeds. This is all I could do now and regret the state of affairs, but such is the case.

"Everybody is well here and no news of special interest. When are you coming home? Write.

"Yours truly,

page 389 } "P. S.

"The QUAKER'S ADVICE TO HIS HOPEFUL:

"Me son, if thou wilt spend all thou makest, the less thou makest, the better off thou wilt be." "

By Mr. Campbell:

Q. Now then, Mr. Wren, this letter states explicitly on August 16, 1912, that Colonel Tate had not at that time had time to foot up your account but that if his memory served him correctly the account was about even when you left.

A. But what account?

Q. Your account.

A. An account involving a few hogs and a horse and a cow which I owned.

Q. Was that what this was about?

A. The best of my memory, that was it.

J. Robert Wren.

Q. And your Uncle Jim knew exactly what it was you were writing to him about when you told him that he had a hundred and fifty or two hundred dollars due you?

A. I'm pretty certain of that, yes, because he owed me a great deal more than that.

Q. He owed you a great deal more than that?

A. Yes.

page 390 } Q. Did you tell him so when you were writing this letter?

A. This was a separate account of a little business, we always bought and sold hogs and so on, like that, and he owed me some money, part of which he gave my brother and part of which he sent me.

Q. Now in speaking of your brother, you told us about an occurrence that happened up in New York—

A. Yes.

Q. --in which you said that your brother—that you had told your uncle to turn over your money while you were in the army to your brother who had six motherless children. Which brother was that?

A. That's Beverly Wren, but I think you are a little mixed there. I did not tell him that in New York. I spoke to him about having done that previously, when he was in New York.

Q. That is the question I intended to ask you, that when you were in New York playing billiards with some friends, you told about that?

A. That's right.

Q. And criticized your uncle jokingly?

A. That's right.

Q. For having paid your brother's debts with
page 391 } the money?

A. That's right.

Q. And said that neither you or he got any benefit out of it in that way?

A. Yes, sir.

Q. Were you serious in that?

A. You have just said it was joking. I was partly joking.

Q. Well, how much was joking and how much was serious?

A. Well, I said I didn't get anything out of it.

Q. Well, did you feel that your brother didn't get anything out of it either?

A. I felt that he didn't get what he expected. He didn't need debts paid; he needed food for his kids.

J. Robert Wren.

Q. He didn't need his debts paid?

A. Well, they weren't pressing.

Q. Now your uncle was joking when he replied too, wasn't he?

A. What reply do you refer to? We had quite a conversation.

Q. Yes. That you would get something when page 392 } he died.

A. Well, you can take it that way. I don't think so.

Q. You thought he was serious?

A. I really think so.

Q. And you think he took that occasion in a pool room up there in New York—

A. Billiard room.

Q. —to tell the bystanders that he was going to take care of you?

A. Not bystanders; close friends of mine.

Q. And that is the only time he ever said that, wasn't it?

A. No, sir.

Q. When was it he said it?

A. The testimony I said in Minneapolis, under a different condition, some years before.

Q. What did he say in Minneapolis?

A. Words to that effect, that when he wanted to get me out of this trouble with my partner and I told him there was no use—well, the ensuing scolding, that he didn't think he would let me have any more money until he died, that would be soon enough, or words to that effect.

Q. But you called on him after that?

page 393 } A. And got the money, yes, sir.

Q. So evidently he wasn't very serious in that conversation, was he?

A. Well, he relented. Let's put it that way.

Q. Relented?

A. Yes.

Q. And did you think he wasn't going to relent?

A. I knew he would relent. He never failed me whenever I needed something.

Q. And every time that you made a call on him he responded to it?

A. That is so.

Q. And whatever he thought was right for you he did, didn't he?

A. I assume that he did.

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Q. Yes. He liked you personally, didn't he?

A. I have the right to believe so.

Q. But he didn't have much opinion of your business ability?

A. I think that's right.

page 394 } Q. And he was trying at all times to keep you from over-spending, wasn't he?

A. That went for all of us, yes.

Q. Now, Mr. Wren, in this letter here he mentions having paid a sporting goods bill for you.

A. I have referred to that already in my testimony here. That was when I was in Virginia Polytechnic Institute.

Q. When did you leave Virginia Polytechnic Institute?

A. Nineten hundred—now wait, let me see—1911 in the spring, 1911 in the spring.

Q. 1911 in the spring. You weren't in any partnership with your uncle at that time in hogs?

A. Yes, even then.

Q. Even then?

A. At all times I had some little stock on the farm.

Q. And it would take right much of that, though, to amount up to the sum that you were mentioning, wouldn't it?

A. What sum is this you mention?

Q. Well, a hundred and fifty dollars.

A. I think not, no.

page 395 } Q. For your part of it?

A. No.

Q. And then he paid your debt to your brother Will; how much was that, do you remember?

A. No, I don't. I was surprised to see that, that I had no memory of. I don't know.

Q. Well now, your grandmother told you about Robinson, Tate & Company and you knew about it too, didn't you?

A. I knew about it when she told me, definitely.

Q. Well, I know, but you knew Robinson, Tate & Company was a business concern?

A. Oh, yes, we were shipping stuff to them all the time.

Q. And you were shipping stuff all the time down there?

A. Yes.

Q. And you understood that they were making money, didn't you?

A. Yes, I did. I just assumed it; I didn't understand it.

Q. Well, if you had a share in that, you thought that your

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share was making money along with other people's, didn't you?

A. Yes, that's right.

Q. And you were pretty hard up in those days, weren't you?

A. No, not seriously. I never was very hard up. I had no responsibility, Mr. Campbell, except to myself.

Q. Had no need for any money?

A. I had need for money. I won't say that.

Q. And you were a young man?

A. That's right.

Q. Flitting around the world?

A. That's right.

Q. And you didn't want to spend any money, did you?

A. Yes, I wanted to spend some money.

Q. Well, Robinson, Tate money would have been as good as any other spending money?

A. I didn't specify the kind I wanted.

Q. Well, it would spend just as easily as any other kind?

A. I believe it would.

Q. And you never asked for any of it?

A. Any what?

page 397 { Q. Robinson, Tate money.

A. I said awhile ago I may have referred to that Robinson, Tate & Company as something that I had some expectation from.

Q. Something you had some expectation from?

A. Yes.

Q. That is as far as you ever went?

A. As I remember it, and I may not have gone that far.

Mr. Campbell: That's all, sir.

Mr. Roberts: Now, Mr. Wren, you say that this correspondence referred to—

Mr. Campbell: Mr. Roberts, just wait one minute, please, sir. I will ask another question.

By Mr. Campbell:

Q. Mr. Wren, a good deal has been said about the agreement that was entered into on the 25th day of November, 1912, but I don't believe that agreement has actually been filed. I hand you here the original of that agreement and will ask you to examine it and see if that is not your signature

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and also your uncle's signature and the signature of your sister and of your brothers.

Mr. Roberts: Mr. Campbell, isn't that admitted page 398 } in the pleadings, and already in there?

Mr. Campbell: It may be, sir, but we are just taking this method of introducing it.

A. It is not only the right one but it's the one—it looks like the copy that belonged to Colonel Tate, because he's the only one where there is no indication where he should sign. It looks like that that is the McCoy.

Q. Now just in response to your question, no *oncidation* where they were going to sign, you mean that his name is the one that has no *incidation*?

A. That is what I mean. He knew where to sign.

Q. Will you file this with your deposition, marked J. R. W. No. 3?

A. Yes, sir.

(The agreement referred to above was marked J. R. Wren Exhibit No. 3—Cross, and is thereto attached.)

page 399 } RE-DIRECT EXAMINATION.

By Mr. Roberts:

Q. What was it you said this correspondence just introduced referred to?

A. I didn't say definitely what it referred to, but I said I had accounts with Uncle Jim just like a man might have two or three accounts with a bank, and this was a local affair which was sometimes up and sometimes down, and I had stock on that farm—that is, livestock. I remember I sold him a horse for a couple of hundred dollars once; it was a dandy. And I had some hogs and I had a share in a cow or two, and stuff like that, and it is to my best recollection this refers to those trades in stock.

Q. Well, let me ask you: had you got this livestock for your work there on the farm or had you traded for it, or how?

A. Well, if you have a colt and the colt grows up, it is yours when it is a colt, it is still yours when it is a horse, so that is the answer there. I don't know how I acquired those things.

Q. I notice from this Account Book No. 2, I reckon it is, on

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page 37 Colonel Tate has a record of his account with you for 1912 and I find no item charged to you in August or at any other time that year corresponding to the hundred page 400 } dollars he mentions in the correspondence here or the hundred and fifty that he says he paid to Will, neither one of them are charged in this account. Does that have any tendency to reenforce your recollection that that was—

A. A side deal.

Mr. Campbell: Objected to as argumentative.

A. Just a side deal; that's all it was.

Q. Now then, at that time that was shortly before this conference there that you made the agreement. Did you have any idea of how much was due you out of the Robinson, Tate interest which came into his hands as executor?

A. I had never been inside the store of Robinson, Tate & Company and never seen it, and I only had my grandmother's statement that "You boys, your grandfather gave you that", and I didn't know a thing about it.

Q. And Colonel Tate never told you the value of it?

A. At no time, never.

Q. Either before or after the conference on August 30, 1912?

A. No, never, at no time.

Q. And you never knew until it was dug up after you brought this law suit, did you?

A. This is the case.

page 401 } Q. And may the same be substantially true with respect to this residuary land?

A. It is true. It is true of Grandmother's estate; when she told me that she was well off, I certainly expected some of that, and it was never mentioned, I never said a word about it. It is true of everything appertaining to M. B. Tate's estate and Grandma's estate.

Q. And you, as I understand you, you had been taught from babyhood up to have confidence in your Uncle Jim?

A. To never cross him at any time; to let him manage your affairs.

Q. And I believe you have stated that you did have implicit confidence in him?

A. To the very last day.

Q. Now then, Mr. Wren, is there anything that I have told

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you to remind me of, if I forgot it to ask you, that you can think of?

A. Let me think a minute now. I don't believe there is, but give me a minute here. Let me see. I don't remember.

Q. When your grandmother was on her deathbed did you hear anything there at that time?

A. No. I had just gotten home from Louisville. I had got home a little late and Grandma was unconscious, gasping. Harold and the others were there when I got there.

Mr. Roberts: All right, I think that's all.

Mr. Campbell: One question.

RE-CROSS EXAMINATION.

By Mr. Campbell:

Q. I believe, sir, you have spoken of your Uncle Jim. You were one of the ones who were the unsuccessful litigants in the suit to establish a will for him, weren't you?

A. Not entirely unsuccessful.

Q. You don't think you were unsuccessful in that litigation?

A. I don't think unsuccessful.

Q. Well, if you had been more successful you wouldn't be prosecuting this case, would you?

A. I think I would.

Q. So you would want the 70% plus whatever you could get in that one?

A. No, that is not the answer.

Q. What is the answer?

A. I want the 70% if the will didn't provide it.

Q. I thought you said the will provided 70%.

A. It might have been renounced, Mr. Campbell.

And further this deponent *saieth* not.

(Signature waived by agreement.)

page 403 } Mr. Roberts: Come around, Harold.

JAMES H. WREN,

the next witness for Complainants, being first duly sworn,
deposed as follows:

DIRECT EXAMINATION.

By Mr. Roberts:

Q. State your name, age, residence, profession, and are you one of the complainants in this case?

A. I am one of the complainants. My name is James H. Wren. My age is 59. My residence is Brooklyn, New York. My occupation is that of a public accountant.

Q. Are you a certified public accountant in both Virginia and New York?

A. Yes, sir.

Q. How are you connected, and how does that organization stand in the accounting profession?

A. I am connected with a firm known as F. W. Lafrentz & Co., an organization of certified public accountants. We have offices in this country and several abroad. I am a partner in that firm, and I am at the New York office. Does that answer it?

Q. Yes. Well, is your firm one of the recognized—recognized as one of the leading accountancy firms in America, and in the world, for that matter?

page 404 } A. I would be too modest to say that. We have been in business fifty years. We are all members of the national organization The American Institute of Accountants, state societies, and that is just about as far as I would go. No one higher than we are.

Q. Now then, when did you first learn, and from whom, about this 600-acre farm M. B. Tate left you by his will?

A. In my childhood, year indefinite, from James H. Greever, supervisor of the Tate farm.

Q. Well, when did you learn, if at all, about the thousand-acre dower tract left to Amelia Tate?

A. Never learned about that.

Q. Well, you know it now, don't you?

A. I have learned about it in the very recent past, precisely.

Q. Well, did Amelia Tate operate any part of the farm there from the time you went there as a child until you left there as a man?

A. No.

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Mr. Campbell: Objected to as being immaterial.

Q. Who did operate the farm?

A. Uncle Jim, with the assistance of Mr. Greever, and then Mr. Hatcher, the overseers.

page 405 } Q. Did he operate the whole M. B. Tate farm?

A. Yes, sir.

Q. As a unit?

A. Yes, sir, no distinction.

Q. As far back as you can remember, up until and after August 30, 1912?

A. Yes, sir.

Q. Except the part you sold off to Frazier?

A. Well, there was something left to all. It was a diminishing farm.

Q. Sold off a little bit—

A. Yes, sir.

Q. Now then, did Amelia Tate ever have any money?

A. Only inconsequential sums.

Q. Did she ever have a bank account?

A. No.

Mr. Campbell: This and the preceding questions are objected to as immaterial.

Q. Did she ever say anything to you about how her husband had left her, or anything like that? If so, what?

A. Nothing.

Q. Did you know anything about the provisions of the M. B. Tate will for the benefit and protection of the Wrens prior to August 30, 1912?

page 406 } A. No.

Q. Did you know at that time and at that meeting that the will of M. B. Tate had devised his interest in Robinson, Tate Company to the Wrens?

A. No.

Q. When did you learn that?

A. In the recent past, since we have—well, I should say since Uncle Jim's death.

Q. You learned it when you went down there to investigate the records, did you not?

A. That's right, and then I saw the will of Grandfather's.

Q. Well now then, did Colonel Tate ever at any time during his life give you any information about the property which

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he held as executor and as *de facto* guardian for you and the other Wrens?

A. No, sir.

Q. Well, do you or not—before I leave that: were your relations with him intimate, and throughout his life?

A. Yes, cordial and intimate.

Q. Well, what about your confidence and your trust in him?

A. Well, as for my confidence and trust, it was page 407 } present and continuing. In so far as intimate relations, Uncle Jim was none too intimate with anybody, particularly on finance, financial questions.

Q. Well the question is to what extent, if any, did you trust him and have confidence in him?

A. I trusted him to the fullest extent and I had full confidence.

Q. Well now then, tell what you remember about this conference on or about August 30, 1912, following the death of your grandmother.

Mr. Campbell: This agreement already filed in the record merged all negotiations.

A. Mr. Roberts, my memory is dim. I remember we were gathered there at the suggestion of Uncle Jim, and I remember that he made a statement to us that we ought to trust him to continue the management of our financial affairs, and he said words somewhat as follows, that "If you boys go along with me, that eventually it will be yours anyway, and that your future, your financial welfare, will be far better served than if you try to manage it yourself or fail to let me go ahead with it". Now what "it" is, what he meant by "financial affairs"—I might add this to expand the question—is something that was very nebulous. It was a vague thing, in my mind at least. I knew, as has been brought page 408 } out here, that our father was under some cloud.

I knew that. Just how much or how it happened, I didn't know. But it was a circumstance that would make us perhaps more docile, certainly less inquisitive, than otherwise.

At the same time, Grandma had always told us of the complete integrity of Uncle Jim and that whatever he did was for our benefit, so in that meeting and before the meeting and after the meeting, I had that attitude towards Uncle Jim, that whatever equity we had, whatever was coming to us

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from these various sources, that I had a smattering idea and a very smattering idea about, that our welfare was best served if he kept on handling to our interest and subject to any settlement, to be made at any time he saw fit, and my thought was when he said, "Now I want that fully understood and I want you to sign these things, I don't want any dissension or delay", my thought was that when I got anything from Uncle Jim to sign, the thing to do was to sign it, whether I read it or not, and send it back to him.

You must understand I was young then, not familiar with transactions, the common transactions, and I knew Uncle Jim was familiar and I knew that whatever I did at his suggestion was the right thing to do, both for him and
page 409 } me and all the children.

Q. Well, did you or he ever suggest that the time had arrived for a settlement of these affairs which you all continued in his hands at that meeting?

A. No.

Q. By the way, was it or not agreed there that your affairs should be continued in his hands to manage as absolutely as he saw fit?

A. Yes, sir.

Q. And did that condition—well, how long did that condition continue?

A. It never stopped. I mean—

Q. You mean it never stopped—

A. As long as Uncle Jim lived, Mr. Roberts, my thought was that he was in charge of whatever arose in the old days, in connection with my grandfather, in connection with my father, offset as it might have been, in connection with my grandmother, if anything arose he was handling it for our best interests, and to be settled at a time he decided was the proper time, and I didn't question it.

Q. Now then, did he ever at any time give you any—well, at that meeting what particular matters did he mention that you recall?

A. I recall he mentioned that his estate, M. B.
page 410 } Tate's estate, was indebted to some \$34,000, and

I recall that he told us about some property that he had sold belonging to the Wrens and that he had retained the money or he had possession of the money, and that he thought it was proper—that is the way he put it, he thought it was proper—to apply that money against our share of this lien.

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Now my reaction was that if Uncle Jim thought it was proper, it was proper, that it was just uncontradictable it was the proper thing to do, and there was no discussion about it. I remember that was my attitude.

Q. Well then, was it or not agreed by all the parties there that he should continue to manage your affairs in the future as he had in the past?

A. There was little, if any, opposition to a suggestion of Uncle Jim made then or any other time. This meeting had a small exception in that Will, my brother, mentioned something about Grandfather's will, the first time I ever had heard it mentioned in my life, the first time I ever knew it had the provisions he asked about in it. But to answer your question, there was no opposition at all.

Q. Well, was it agreed to?

A. That's right, it was agreed to, his suggestion—page 411 } tion—we acquiesced, we concurred in his suggestion, what he wanted to do.

Q. What was the conversation about the Rye Valley property there?

A. The conversation started with a remark of Will's there, my brother, that instead of charging the Wren part with pro rata of the debt, that the certain property in Rye Valley should be sold and the debt reduced by the proceeds and the balance remaining, if any, I presume would be a proper charge to lands other than residuary land.

That's not a good answer, is that?

Q. Well, what did Colonel Tate—what was his reply to that suggestion or statement of Will's?

A. He replied that the suggestion—here is in effect what he replied—I don't know what he replied, but he replied this: the suggestion, while appropriate and in order, could not be acted upon because the Rye Valley land was of no value or little value.

Q. Well, do you recall that Colonel Tate said anything about if it proved to be of value in the future what would be done about it?

A. No, sir.

Q. You don't recall that. Now then, I believe you sold your one-sixth interest in the land after you be-
page 412 } came of age, your land that was left there after these exchanges and sales?

A. Yes, sir.

Q. You sold that to Colonel Tate for \$6,000 and he paid you for that?

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A. He paid me for it, with interest.

Q. Now, then, following this meeting of August 30, 1912, did Colonel Tate prepare and send this Defendants' Exhibit No. 1 here on pages 15 and 16 of the record to the Wrens for their signature?

A. Mr. Roberts, he specified at the meeting that there would be occasions where he would send various things for signature. Now you ask me if this was one of the items that was sent. I can't say it was from personal knowledge. I can say that it follows naturally, that it's got our signatures on it and it was sent, but it is not a good answer to your question. I don't remember having received that paper as that paper. I cannot remember.

Q. Well, here is the one with your signature on it.

A. I don't remember having received this, that paper. I don't remember that paper as a paper. I acknowledge that that is my signature.

Q. Well, let me put it this way: you have stated there that Colonel Tate said that he had sold some of your page 413 } land, I believe, to Frazier and some of your timber to Cole & Frye, and that he would keep that money and release the lien against your land for the debt, the M. B. Tate debt on him of some \$34,000?

A. Yes, that is right, our share of it.

Q. Doesn't this refer to that?

A. It certainly does. It is the logical sequence of the meeting.

Q. Then did he say anything about, or do you remember that he said anything about an exchange of land so that he could sell some more to Frazier?

A. No, sir, not specifically, but I remember generally he said that there would be various things to be signed, there would be occasions coming up now and then where we had to sign what he asked us to sign. What the purport of the document was didn't so much matter as signing it and sending it back to him quickly, and as far as I was concerned that would suit me fine.

Q. Well now then, this receipt here in that suit in which the land was sold to Frazier, do you remember that he said the receiver of the court had the money for the land sold to Frazier?

A. No, sir, I can't remember that.

Q. But you do remember that he said he had page 414 } sold some land to Frazier?

A. Yes.

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Q. And some timber to Cole & Frye?

A. Yes.

Q. And that he would keep that money for your part of the debt?

A. That was really the purpose of the meeting. I didn't realize it then, but that is why the meeting was called, to get our consent to that.

Q. But never mentioned amounts?

A. No, sir. No, sir, the only amount was that big figure, \$34,000, which was a pretty big figure in those days.

Q. Well now then, this receipt, also signed November 25, 1912, is to James D. Tate, receiver, for that \$7,152.09?

A. Yes, sir.

Q. And as I understand, you didn't get the money; you signed the receipt for the record and he got that money, is that right?

A. That's right. I got it indirectly as being relieved of that lien to that extent.

Q. Well, by the way, did he explain to you all there that the will made a charge on all the residuary lands, page 415 } which for instance would include the Palmer tract of some forty acres that M. B. Tate owed for, that there was a lien on all of that—no, all the residuary lands were charged with the payment of the M. B. Tate debts and that they would have to be exhausted before they could go on the other lands for those debts?

A. Mr. Roberts, that seems like it would be a pertinent subject, but it was not in Uncle Jim's mind. Uncle Jim was concerned with the present. It didn't occur to him that anybody was interested in what happened so many years prior. Now what he was concerned with is illustrated when I got a letter from him when I was in Washington. This was in 1909. I had just become twenty-one, and I remember this expression: he said, "The Commissioner is very particular and I want you to sign this and send it back by return mail." Now I remember that more than I do what it was I signed, but my thought was—I am just trying to answer your question—my thought is that Uncle Jim was concerned with the questions that arose now and wanted all the help he could and we wanted to give it to him to solve his question.

Q. Well, what I am getting at: did he in that connection explain to you all that the residuary land was first liable for those debts?

page 416 } A. No, sir. It took too far back. He didn't want to talk that far back.

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Q. Now then, this receipt that you referred to when you came of age, do you know now that that was the receipt for the money that the guardian—the balance the guardian owed you at Lynchburg?

A. I have a suspicion it was, but I really don't know. Commissioner—you know, Commissioner—Uncle Jim could say "The Commissioner" and to your way of thinking it was Jesus Christ himself. It had to be fixed up. Uncle Jim wanted to get things in order, and naturally I felt somewhat complimented I could do something towards that end.

Q. You signed the receipt without getting the money?

A. Oh, I remember that, but that was all right too.

Q. I believe you said you would sign anything he told you to sign?

A. Well, I felt if I needed money I could get it.

Q. Well now, this exchange deed here, do you remember that he mentioned that he was thinking about selling some more of the Wren land there on the north side page 417 } of the road or something?

A. No, sir.

Q. You don't remember that?

A. I remember nothing about that.

Q. Well, I notice you did sign this exchange deed here referred to on page 47 of the amended bill, dated November 25, 1912, conveying some of the Wren land to him, and there was a deed from him conveying some of his to the Wrens in exchange. Do you have any independent recollection of that?

A. No, sir, and had there been ten other instances I would have no independent recollection, because it wasn't received and handled with the idea of remembering it. It was signed and sent back with the idea to do what Uncle Jim wanted me to do, and quickly.

Q. Well now, that deed you acknowledged in the District of Columbia December 13, 1912?

A. Yes, I was up there then, no doubt, but I have no recollection of signing it and what it contained, no recollection.

Q. Now then, by the way, did anything happen on Amelia Tate's deathbed, anything she said or reply of Uncle Jim that made an impression on you, and if so, what was it?

page 418 } Mr. Campbell: Objected to as being immaterial.

Q. With respect to your confidence in Uncle Jim. Go ahead.

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A. Grandma was somewhat delirious in her last hours and she was mumbling something there which we could hardly make out except it had something to do with Harold and Rob, Harold and Rob, it might have been "Harold" or "Rob" or "watch" or something. But it showed we were on her mind. And Uncle Jim was there and went to her bedside. I can see him now, leaning over and trying to quiet her and soothe her mind, said, "Well, Ma, everything is going to be all right, everything is going to be all right."

I remember that, Mr. Roberts, now that you somewhat recall it to my mind.

Q. Well, how did that influence you at the conference which followed after her burial?

A. No, sir, Uncle Jim did then what I expected him to do, as he had done before and after.

Q. Now then, did you go to Lynchburg and make an audit of the settlements recorded there of Amelia Tate as guardian of the Wrens?

A. Yes.

Q. I will thank you—well, then, when was that page 419 } done?

A. That was done the summer of 1944, June, 1944. I remember I went to my mother's grave at the anniversary.

Q. Well now, I notice you sent that to me on April 9, '45.

A. I will explain that to you, though, if you wish an explanation.

Q. Well, you needn't mind. You know what you did.

A. We added something to it later.

Q. Now then, after this red-back account book, No. 1, of Colonel Tate's was filed, did you make an examination and comparison of your audit of the records at Lynchburg with recorded on that book?

the accounts of the Wrens which he had handled and

A. Yes, sir.

Q. And is that reflected—well, how much of that audit you have in your hand covers the Lynchburg records and what part of it covers the examination and analysis of the charges on the red-back book that is not on the record at Lynchburg?

A. As you say, what is in this binder you have given me is divided into two parts. The first part, up to page 420 } page 8, inclusive, has to do with analyzing and summarization of the accounts, reports, filed with the Commissioner of Accounts, as recorded in the ac-

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counts of fiduciaries in the Lynchburg Corporation Court; but after page 8 the matter deals with a comparison of the analysis, summarization, with the entries in Uncle Jim's book—I think we call it Book No. 1.

Q. That was because that was the first one he got?

A. It came into our possession, you see, and I had gone down there to Richmond and made these little summaries there.

Q. You mean Lynchburg.

A. I mean Lynchburg. Then the question was how they compared with this book. Now the rest of this binder takes up a comparison, giving the photostats here of the book.

Q. Well now then, I wish you would explain generally that analysis and the additions allowed in the records at Lynchburg which are not on Uncle Jim's book, and then the aggregate of the two; but I'm especially interested in those additions.

A. Well, Mr. Roberts, on page 9 there is a spread there, Table IV, and you will observe that the figures page 421 } thirteen thousand—the last column, that \$13,000 figure—

Q. \$13,849.62?

A. Yes. That figure is in accord with the annual reports to the Commissioner of Accounts. Now then, if you will glance to the left there, to the figure of \$10,532.73—you will see that under the caption "Total Payments"—that figure is taken from the data in this book of Uncle Jim's, right there, so that the difference between those two figures is composed of items not in the book but in the Commissioner's accounts, you see.

Now then, if you look below, that difference amounts to I think about \$3,316.89. If you look below, there is a little summary, the content of that difference. It tells you that part of it is for clothing—

Q. But that is under "Analysis of Additional Charges Allowed". Read the items there.

A. Well, they are here. You want me to go on and read this, do you?

Q. I want you to read that first one.

A. Well now, I would like to explain why those items are there. There were charges made against—made in the accounts to the Commissioner by Uncle Jim which didn't represent cash expenditure, although no doubt quite page 422 } proper, but there was nothing in his books for anything but cash, so consequently the only way

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to get these charges in the accounts would be to add them to the cash disbursements, as he did.

Q. Well now then, the first item you have got down there is "Annual Allowances—"

A. "—for Clothing and Sewing".

Q. \$1,080.00.

A. Yes, sir. Yes, sir.

Q. Well now, you have in the beginning of your book here, I believe, a copy of the order of the court appointing Amelia Tate as the guardian, in which it is stated that at her request it is written in the order that the children would not be charged with board and maintenance while at her home.

A. Yes, sir.

Q. And then those other items are all explained there in your note under that analysis, are they not?

A. Yes, sir, they are explained to the extent I had the room to explain them there.

Q. I understand that.

A. They could be explained more.

Q. They are summarized.

A. I might tell you something, that taxes, the page 423 } item of taxes, \$354.15, you notice that, Mr. Roberts?

Q. Yes.

A. Ordinarily that was put as a disbursement by Uncle Jim over here [Indicating], but for several years there he evidently just forgot to do that, but it was proper to put it in here, in making his report, so that is what he did.

Q. Well now, so far as not in conflict with that order of the court appointing the guardian, why the account is correct, then?

A. And to what extent it conflicts I'm not prepared to say.

Q. I understand that. Now then, on page 3 of that audit, about two-thirds of the way down there, you show five items which the books show that the guardian filed receipts for showing that he had settled with the Wrens in full, the total amount being \$6,256.49.

A. That's right.

Q. And you signed one of those receipts at Washington for your part of that, I believe you said?

A. I daresay I did that. I would like to explain that, if I may, Mr. Roberts.

Q. Yes, sir.

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A. What I show on page 3 are quotations from page 424 } the public records; you understand that, these are quotations.

Q. And there are errors in writing on them?

A. Just quoting what the record says.

Q. Now then, does the account book show, immediately following the entries of those figures on the accounts with each of the Wrens, that he balanced the account and then he carried it forward as owing the respective Wrens by balance due per Commissioner's report and state the balance that he owed them?

A. That's right.

Q. Notwithstanding those receipts?

A. They weren't closed on the books. The books—

Q. In other words, the receipts were for the settlement and his books were for the record between him and the Wrens?

A. That's right. That's right, he had to settle up and that was the way he thought—

Q. Getting rid of it as far as the Commission was concerned?

A. He thought that was the best way to handle it.

Q. Well, and it's been done that way before page 425 } in other cases?

A. I daresay. It has to be wound up and then he can settle—

Q. Now then I will ask you to file that audit and the supplementary data as "Exhibit—Audit of Lynchburg Records and Supplemental Data from Account Book No. 1."

Mr. Campbell: This is objected to for the following reasons: The evidence shows Amelia Tate made regular settlements as guardian before the Commissioners of Accounts. These settlements were confirmed and no exceptions have been filed to these settlements to this date, and if this is an attempt to surcharge and falsify the accounts of Amelia Tate, guardian, it cannot be done in this proceeding.

Mr. Roberts: It is not for that purpose. We simply want to show how Colonel Tate handled the whole estate, to give it just from beginning to end, and it's our position that he handled it that way for convenience and for the best interests of all of the parties and with the intention page 426 } that what he thought was a proper time of making a settlement of all the parties on the correct basis.

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(The documents above referred to were identified as Exhibit James H. Wren #1—Direct, and accompany the original of these depositions.)

Q. Now then, I did want to ask you there about one or two items in that. This supplemental data, it reflects part of the account before the settlement with each of the Wrens and then the account from that on. I notice on page 7 there in Beverly Wren's account an item guardian's commission on \$1,600, original amount of insurance collected, should have been charged when collected, \$1,600, 5%, \$80.

A. Yes, sir, I see that.

Q. Now then, that was after the settlement that was put on, wasn't it?

A. Yes, sir, after this settlement with the Commissioner.

Q. Now then, there are similar charges in the W. H. Wren account on page 17.

A. I see it.

Q. And on the J. Harold account on page 27, all made after the settlement at Lynchburg.

A. Yes, sir.

Q. Now then I want to ask you, does this account page 427 } count book of Colonel Tate's—state whether or
not it shows that he was actually handling the
funds which the Wrens owned.

Mr. Campbell: This question is objected to because the account speaks for itself and the witness's interpretation would be of more assistance to the Court.

Mr. Roberts: Read the question now.

(The question was read by the reporter.)

A. Yes.

Q. On page 15 of Account Book No. 1, at the top of the page, don't it show Amelia Tate, guardian, had an account with J. D. Tate

A. That's correct, Mr. Roberts.

Q. And then on 14 Amelia Tate, guardian, payments made by J. D. Tate?

A. That's correct.

Q. And it appears elsewhere, but the bookkeeping entries themselves show that, as I understand you, the way the account is set up.

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A. The bookkeeping entries are in the hand-
page 428 } writing of James Tate.

Q. The way it is set up, he is handling the
money?

A. Yes, sir.

Q. All right. Now then, these two account books that we
have here, No. 1 and No. 2, you have studied photostat copies
of these page by page and item by item, have you not?

A. I have looked over them, not altogether casual.

Q. Well, are they all in the handwriting of Colonel Tate?

A. Yes, sir.

Q. Is the analysis of the settlements of James D. Tate,
trustee, as set out on page 49 and the top half of page 50.
substantially correct?

A. Yes.

Q. Now then, you've made an examination of the settle-
ments of Colonel Tate which are exhibited in the original
exhibits in this case, have you not?

A. I have.

Q. And I hand you some papers here which are entitled
"J. H. Wren Exhibits in Connection with Amended Bill of
Complaint" in this suit which you prepared and
page 429 } I'll ask you to file a copy of this as such exhibit
to your deposition, and I would like to run over
it with you.

(Said document was marked James H. Wren Exhibit #2—
Direct, and is hereto attached.)

The first item, near the top of page 1 there, what is that?
What does that represent?

A. Well, 1, proceeds from sales—

Q. Just don't go in detail. What is it? Does that repre-
sent sales of residuary land included in Colonel Tate's settle-
ment, or excluded from?

A. Excluded therefrom.

Q. I should have said "omitted therefrom". They amount
to \$3,750.00, is that right?

A. Correct.

Q. What is the next item, \$13,105.47?

A. Farm profits, by which I mean excess of receipts over
disbursements, omitted from the settlement.

Q. During what period?

A. During the period from January 11, 1892, to Decem-
ber 31, 1903.

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Q. That covers the period of the three settlements, as I understand it.

A. Correct.

page 430 } Q. And the detail for each year on that is set out on page No. 5 of the exhibit, does it not?

A. Correct.

Q. Well, as I understand that detail, it shows the profits or losses from the operation of the farm which were not accounted for in the settlements filed by Colonel Tate.

A. Yes.

Q. Then the next item, No. 3, what is that?

A. That is an item—let me read it first—it's a bank loan that should have been included in the settlements as received. The reason for it is explained in that notation there.

Q. Well, just briefly isn't it this: that Colonel Tate—yes, Colonel Tate had borrowed a thousand dollars from the bank to pay interest to Princeton Bank on some notes the estate owed there—

A. It is all explained there.

Q. —but didn't include that thousand dollars in his receipts?

A. That's exactly it, and the explanation—

Q. But you don't have it in his disbursements and that makes a difference of that, just an inadvertent mistake?

A. Well, he also has the payment of that note
page 431 } in the disbursements.

Q. Yes. Now then, to take the next item of \$700.00. What is that?

A. That is a duplicate voucher, Mr. Roberts. Inadvertently the same voucher to the extent of \$700.00 was put in for the same debt.

Q. Well then, the next item there of—is it \$214.72?

A. Very similar. That is a duplication. That arose, however, by virtue of settling a debt for less than the face of the note, and Colonel Tate put in the full face of the note as his voucher, although the actual payment was less. That is all explained there.

Q. Well now, that makes a total there of \$18,770.19 by way of reduction in net disbursements reported?

A. That's right. The effect of this, this little tabulation here, would be to reduce the net disbursements—namely, the \$34,000, being net disbursements, and this would reduce it to that extent.

Q. Now then, then No. (6) on page 2, I believe that reflects the principal and interest which the trustee paid on

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the George W. Palmer \$4,000 note for the 33
page 432 } acres which was a part of the residuary land?

A. Yes, sir.

Q. And you take all of that from the settlements, I believe?

A. No, sir, I merely make a notation that the payments on the Palmer land as follows were included in the settlements. I make no change at all. These are notes.

Q. What I mean is that those payments all are reported.

A. In excess. All this is self-explanatory.

Q. I know it is, but I sort of want to index it.

A. O. K.

Q. Then the next, No. (7), what is that under there? Index that for us.

A. I will read the caption: "(7) Note executed by James D. Tate, executor, to finance farm operations".

Q. All right. And are those notes in the settlement or not, or was that—

A. No, sir; no, sir.

Q. In other words, he made the notes as executor to run the farm?

A. And these are illustrative of that practice,
page 433 } some notes—these are some of the notes, but practically all of them that I saw.

Q. Now then, the next item is (8).

A. Yes, sir.

Q. The farm profits for nine years from 1904 to 1912; that is detailed on page 6, isn't it?

A. Yes, sir.

Q. And that is \$32,806.64. Now then are those figures or not the same as shown by Colonel Tate as his profits and losses for those years in a slip pinned to his Account Book No. 2 on page 76?

A. That is supposed to be. I'll note that, Mr. Roberts, and see if they are here. [After consulting book]. Yes, sir. Yes, to answer your question, the tabulation on page 6, total thirty-two thousand, is in accord with the slip pinned on page 76.

Q. Well, as I understand, you checked his farm account there?

A. Yes, sir.

Q. And got the same result he did?

A. That's right. I just checked him to see if he got the right figures, which he did.

Q. Now then, item No. (9) on page 3, can you index what

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that is any more than you have stated it there,
page 434 } briefly?

A. I doubt it, but I shall endeavor to.

Q. All right.

A. All you read here, Mr. Roberts, are notes, notes that were set down at random resulting from examination of the settlements and of the red-back books in conjunction therewith.

Now this note (9), that is the one you refer to, (9), that has to do with the record of bills payable which is contained in the back of this book.

Q. Pages?

A. It is contained in back of the red-back account book No. 2, from page 158, in double-page style, to page 171. That is in the handwriting of Uncle Jim and he put down there the notes as he renewed them from time to time, beginning in 1892 and ending, the last entry being in 1901. Now this notation (9) has to do with the procedure that Uncle Jim followed, and the little tabulation towards the end there is something put down to illustrate that procedure, procedure he followed.

Q. You mean that you don't have all the items like that but these are the larger ones, is that it?

A. Well now, to index it further, as you say: you will note in the body of that notation it says that—it goes page 435 } on to describe the practice, the procedure of renewing these notes, and then it is stated that such renewals are largely concerned with eight bank obligations. They are largely concerned. These eight bank obligations were renewed—they take up most of all the renewals that you see here, from page to page, just these eight, because Uncle Jim reduced them only about \$25, maybe 50. Towards the last he began to pay more, but they took up a lot of writing. Now that first one you will notice there has been renewed nine times, and the next one has been renewed twenty-one times, twenty-two times, and so on.

Q. Well now, how did Uncle Jim handle those things in his settlements?

A. Well, he reported them in the settlements in 1892, as I show there, give the voucher numbers, but he didn't pay them until by this renewal process. He got it in his voucher—in his settlements in a year prior to the payment, and of course that would give him the advantage of interest, but he would lose the interest that he actually paid on the curtailments on diminishing amount, would be a slightly—it is in favor

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of the trustee, no doubt; I don't know just how much, but I just wanted to show how this worked, that the actual payments in '92 as reported were much greater than those according to that book as paid.

page 436 } Q. I believe these notes, the eight which you pick out here, amount to \$13,594.45?

A. Yes, sir, that is the total stated.

Q. As reported paid in 1892, is that right?

A. That is correct, Mr. Roberts.

Q. And he actually paid of those notes the sum of \$1,320.59 in that year?

A. In that year; that is correct, Mr. Roberts.

Q. Yes, sir, and he financed these debts then by renewing the notes as executor from time to time until 1901, when he paid them all out?

A. Well, some of them were paid out sooner, and some—now here is one, only nine renewals, that was paid out rather quickly; but there is one here—if I can find it quickly I will read it to you.

Q. Well, there is one, twenty-one renewals; one, twenty-two; and one, twenty-two, sixteen, twenty-five and eleven. In other words, his own record at the back here of the notes shows that he finances the debts by making and renewing notes as executor.

A. Yes, sir. I just came across this one here, paid finally in 1899. Another paid finally in 1900. You can find it at the bottom of that following page.

Q. Well now then, the next thing in there un-
page 437 } der (9) is a list of the endorsers of those notes,
and then we come to those exhibits about the
Wrens already referred to.

A. Well, all I do in (9) is to save the trouble of looking at this book. They are all in here; I just copy them from this book.

Q. Now then, go to page 7. Have you examined these three farm books here of the Tate farm which are marked on them "N", "O", and "P"?

A. Yes, sir.

Q. For the period from January 11, '92, to July 31, '97, and is the statement on page 7 a list of all the charges—no, of all the payments made to Amelia Tate by or for James D. Tate, is that correct?

A. That is correct, Mr. Roberts.

Mr. Campbell: This question is objected to because the

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statements itself shows payments made for the account of James D. Tate by James H. Greever, farm manager.

Mr. Roberts: Well, he was the manager. The point is—

The Witness: Mr. Greever was the only cashier on that farm, and if there ever arose a need for money he page 438 } would have to look in his pocket and see if it was there; otherwise, there would be none paid; and these little charges represent accounts—I mean little cash items that Grandma wanted that Mr. Greever paid. It is in the book there, you see.

Q. Now then, did they keep detailed, itemized accounts of all the farm operations in these books there?

A. No, sir, most of those books are accounts with the hands.

Q. With the hands?

A. And Mr. Greever has accounts there. But they didn't keep like the proceeds from the farm and all the expenses from the farm, nobody kept books like that on a farm.

Q. Colonel Tate kept that part of the books?

A. Somewhat. He kept it in a fashion, but all those farm books are mostly books of hands.

Q. And this photostatic copy on page 8, that shows the profits for the period there by years as Colonel Tate had figured it out?

A. Yes.

Q. And you checked with him on that?

page 439 } A. I did that, Mr. Roberts.

Q. Well now then, I will ask you to file that as an exhibit to your testimony.

Mr. Campbell: This is objected to because if it is an attempt to surcharge and falsify the accounts of the trustee, the proceedings are not appropriate for that purpose.

Mr. Roberts: It is not for that purpose. It is for the purpose of showing how accounts were kept of everything by Colonel Tate.

Mr. Campbell: And if for any other purpose, it is immaterial.

(The document referred to is included as a part of James H. Wren Exhibit #2—Direct.)

Q. Now then, since the defense is relying on your father

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as a defense here, have you prepared a statement of the items paid out and the items collected by James D. Tate, trustee, on account of that Mt. Athos transaction in which M. B. Tate endorsed for W. H. Wren?

A. I have.

Q. And it shows net disbursements over—no, page 440 } it shows payments of \$12,747.06 and collections or receipts from the syndicate members of \$3,601.90, and a net disbursements in respect of Mt. Athos claims of \$9,145.16. Is that correct and did you take that from the settlements of the trustee?

A. May I look at it, Mr. Roberts, just a minute?

This is correct, Mr. Roberts. I took it from the red-back book, as well as from the information contained in the settlements. In some cases I notice here it is just no voucher, not reported, but it put it in anyway to make it complete.

Now Uncle Jim spent \$250.00 apparently and didn't report it, so I put it in there. I don't know why he didn't.

Q. That is in disbursements?

A. Yes, it shows in his account book that he spent that money, and why he didn't put it in his settlement I don't know.

Q. Well, I will ask you to file that Mount Athos statement as page No. 9 of your exhibits.

A. Well, I better put "9" on there, then.

Q. Yet, put it on.

Mr. Hunter: This exhibit is objected to be—page 441 } cause it is irrelevant and an attempt to surcharge the lawful settlement.

Mr. Roberts: The exhibit is not included for that purpose, but to show the facts disclosed by the exhibits.

Q. Now then, have you checked the statement on page 23, section 2 of the amended bill with the exhibits referred to to the left of the items there?

A. Yes, I have done so.

Q. And is that a correct statement from those exhibits of the names, dates, and amounts and interest as indicated on that page?

Mr. Campbell: What is that, Mr. Roberts?

Mr. Roberts: Page 23.

The Witness: Page 23 of the bill.

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A. Whether he's made a correct summation, is that right? Whether mathematically you copied it down right?

Q. Yes.

A. Well, I will say you have.

Q. Now then, on page 30, section 4 of the bill, is that a correct statement from the exhibits referred to—

page 442 } Mr. Campbell: Do you mean is your addition correct?

Mr. Roberts: I mean is those amounts correctly taken from the abstracts.

A. Has he summarized properly, is that what you mean? Yes.

Q. And is the interest properly figured?

A. Correct, Mr. Roberts.

Q. Now then, go to page—by the way, going back of that last one a minute, four of those items on page 30 there, are the four items shown in your exhibit as proceeds of residuary lands sold during the period of the settlements but not included in the settlements as receipts, are they not?

A. That's right. That's right.

Q. And this statement on page 30 shows all the residuary lands sold at any time, so far as we have reported them here?

A. That's right.

Q. Now then, go to page 32. We have there the summary of the ordinary and liquidating dividends paid to Colonel Tate on that hundred shares of stock which he received for the M. B. Tate interests in Robinson, Tate & Company. I want to ask you if the amount of those dividends are page 443 } correctly stated from the exhibits and affidavits and testimony of Mr. Gorman.

A. They are.

Q. Well, did you make an independent examination and audit of the ledger sheets and the stock certificate books and any other books in his possession there, and if so, do you or not know from your own audit and examination that those amounts are correctly stated there?

A. I do. They are correct.

Q. The ordinary dividends being \$30,233.33, liquidating dividends \$22,916.67, total \$53,150.00?

A. That's correct.

Q. Well now, the interest figured there, did you check that? Is that correct?

A. I made that calculation.

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Q. You did. Is it correct?

A. I don't know.

Q. Well, do you think it is correct?

A. In my opinion it is correct.

Q. And you prepared the exhibit at the back supporting that in detail, did you not?

A. Yes, sir, I prepared them.

Q. Both from your own examination and from Mr. Gorman's testimony and exhibits?

page 444 } A. That's right.

Q. Well now then, have I asked if you knew about the sale of that Rye Valley property for a hundred thousand dollars?

A. You asked me about it.

Q. I have already asked you about that?

A. Yes.

Q. When did you first learn that Colonel Tate had collected that \$8,000 life insurance of your father?

A. June 8, 1944.

Q. That is when you went down there to check these records?

A. I had heard that he got some insurance, but the way Grandma put it he had saved our father's insurance by paying the premiums, which was a good thing, that is the way Grandma—

Q. And do not the records show down there that he was allowed that as a disbursement in his settlements?

A. If he hadn't paid the premiums we wouldn't have got anything and he wouldn't either, but it turned out it helped us both. It gave him money when he needed it.

Q. And the Court allowed him credit for those
page 445 } payments in the settlement?

A. That is correct.

Q. State whether or not that he paid these Mt. Athos debts about the time he got that \$8,000. Don't the records show that?

A. Yes, following close on the heels of it.

Mr. Roberts: That's all.

Mr. Hunter: No cross.

And further this deponent saith not.

(Signature waived by agreement)

(Thereupon the taking of depositions was adjourned.)

page 446 } STIPULATION FOR COMPLAINANTS.

(Filed Dec. 23, 1947.)

It is stipulated that the following testimony of W. H. Wren, in the Tate will case, may be read in evidence on behalf of complainants in the case of W. H. Wren, et als, v. Florence Lee Tate, et als., and that James D. Tate was Executor of the will of Mittie B. Shuff, and that the attached picture of Mitchell Beverly Tate may be filed as an exhibit for complainants, subject to defendants' objections for relevancy.

From transcript of evidence, Pages 306-307, printed record p. 287.

Q. State about that, about some gold coins he gave you.

A. I got another letter from Mr. Wolfe after I went back to Richmond, that the next time I was in this section to call at the bank, that he had some gold for me. Well, I kinda hurried my trip up a little bit to come out to see Mr. Wolfe.

Q. Why did he think you would want gold?

A. I am a coin collector and he knew that, and I did come to see Mr. Wolfe and my brother was with me that day. We went into Mr. Wolfe's private office and he came in with a little bag of gold coins, a pocketbook, not a bag, and another pocketbook with some silver coins in it, and he put it on the table there and there was one \$20 gold piece in it, and a lot of smaller coins, and the total amount was \$72. The other pocketbook he gave me had some coins of no value in it, not old coins, but they amounted to \$5.26 and there were also in that other pocketbook two of the old style one dollar bills, and he said, "This is a part of the Shuff collection"—Shuff meaning my mother's sister, Mrs. Shuff, who died in 1931. In her will she willed me a bag of coins which I thought were the gold coins and some others too, because as a little
page 447 } boy I had played with this coin collection of hers
and when Mr. Wolfe gave me the \$72 I said, "Where are the twenties?" I remembered in her collection there were several \$20 gold pieces. And he said, "I gave them to Mrs. Tate", and said he supposed she gave them away as keepsakes.

HENRY ROBERTS,
of counsel for complainants.
S. B. CAMPBELL,
of counsel for defendants.

This December 23, 1947.

Walter H. Gollehon.

page 448 } DEPOSITIONS FOR DEFENDANTS.

Depositions of Walter H. Gollehon and William A. Wolfe, taken July 29, 1947, for defendants.

Present: Henry Roberts and Vernon C. Barker, Counsel for Complainants.

C. E. Hunter and S. B. Campbell, Counsel for Defendants.

page 449 } WALTER H. GOLLEHON,
the first witness for Defendants, being duly sworn,
deposed as follows:

DIRECT EXAMINATION.

By Mr. Campbell:

Q. Mr. Gollehon, please state your age, residence and occupation?

A. Well, I am sixty-seven years old. My residence is at Chilhowie, Virginia. I am a farmer. I have practiced surveying almost continuously for forty-two years, land surveying and engineering.

Q. I believe you are county surveyor of Smyth County?

A. I am a state certified surveyor.

Q. Mr. Gollehon, are you familiar with the mountain land in Rye Valley, in a general way, that was sold by Colonel Tate during World War I?

A. I am fairly familiar with it. I know its location. I know the exact location of the northern boundary line, and I know pretty well how the whole tract lies.

Q. What is the general character of it, Mr. Gollehon?

A. Well, it is, so far as the surface is concerned, it is rather a rough tract of mountain land, as I considered it.

Q. In your opinion, did it have any substantial
page 450 } value?

Mr. Roberts: I object to that because immaterial and irrelevant.

A. I didn't regard its value as very much. I couldn't know what was under the ground. It was said to be mineral property, and, of course, I couldn't tell how much iron or mineral was there, but as to the surface and timber I regarded it as a cheap piece of mountain land.

Walter H. Gollehon.

Q. You are generally familiar with land of that character in this county, are you not?

A. Yes, sir, I know it about all.

Q. Please state whether or not it came as a great surprise to people when information came out that Colonel Tate had sold this property during World War I?

A. It certainly was a surprise to me, the amount that he sold it for.

Q. During early times was property like this saleable property at all?

A. Not so very much. It would bring a price of perhaps not over \$2.00 or \$3.00 an acre, I would say.

Q. You know whether the timber had been cut off or whether there was any timber on this property?

A. There has been no timber on any of it so far page 451 } as I have seen on the outer edges that is of any great value. I haven't been over the tract enough to know about the timber but I never had an understanding there was very much timber on it. That is, it had been cut years ago.

Q. Prior to World War I would this value you put on the land of possibly two or three dollars have been generally what it was considered to be worth?

A. That would have been my judgment, yes, sir.

Mr. Campbell: Cross examine.

CROSS EXAMINATION.

By Mr. Roberts:

Q. Mr. Gollehon, at what period are you talking about now with respect to this land?

A. Well, that was at the time this big so-called sale was made by Colonel Tate and prior to that time I would say.

Q. Well, had you ever made any survey of that land to ascertain what ore it had on it?

A. No, sir.

Q. Did you know Amelia Tate pretty well during her lifetime, the mother of James D. Tate?

A. I just barely knew her. I wasn't very well acquainted with her at all.

Q. Did you know in the Tate Family that Rye page 452 } Valley property was referred to as the ore property?

Walter H. Gollehon.

A. I understood the property was considered iron ore property, and I have heard talk and evidence here in this court with regard to its value, but as to knowing the quantity or quality of ore that was there, I never knew, but I heard that stated here in this court, that the ore was almost valueless on account of, I believe, phosphate they claimed was in the ore that injured its value, but I don't know to what extent or anything about that.

Q. The fact of the business is that Major M. B. Tate bought the land for the ore that was in it, did he not?

A. I don't know.

Q. You do know they referred to it as ore property?

A. Yes, sir, that has always been my understanding its chief value was for its ore.

Q. Now then, you knew nothing about the quantity or quality of the kind of ore it had on it, did you, of your own knowledge?

A. Not of my own knowledge, but I have heard it testified here. I heard Mr. B. F. Buchanan state the ore was practically worthless on account of being contaminated with other things they couldn't handle.

Q. What litigation was that in?

page 453 } A. I don't remember.

Q. Was Mr. B. F. Buchanan versed in the value of ores?

A. I do not know.

Q. Did you know that this property had manganese ore on it?

A. I have heard that, yes, sir.

Q. You heard that was the thing that caused it to sell for what you considered a very high price during World War I?

A. I only had the impression that it was referred to as iron ore was what I had, and that there was a very large tract of land closely adjacent to it, and the name of the property was the Staley's Creek Manganese and Iron Company on the South Fork River and Staley's Creek.

Q. Did it adjoin the Tate property, the Rye Valley property?

A. I cannot say but if it didn't it was very close to it.

Q. Did you know in World War I that manganese that had not been profitably operated before became profitable because of the war demand for the mineral and that ore that couldn't have been worked under ordinary conditions was worked during that war; you remember that, don't you?

Walter H. Gollehon.

page 454 } A. I think the price of the ore, the real value, would be much increased by reason of the war.

Q. Isn't it a fact that Colonel Tate made this sale to which you referred during the first World War?

A. It was some time about that time, probably during the war. I don't know the date of the sale that was made.

Q. Now, Mr. Gollehon, have you heard that in the manufacture of guns and war implements that you make from steel that you have got to have the manganese to mix with the other ore you use in doing that?

A. I know scientifically that is essentially necessary, to have manganese in the manufacture of a product for guns and so on and fine steel.

Q. And the guns would go to pieces if they didn't have something like that to hold them together, wouldn't they?

A. That is my understanding, yes, sir.

Q. Did you know that in normal times the most of the manganese used in this country in the manufacture of things requiring manganese was imported in normal times?

A. I have heard a great deal of it came from Norway.

Q. And during the war it was difficult to get it
page 455 } here from foreign countries?

A. I would think so.

Q. And that that fact makes it profitable or rather it makes the market value of manganese so high that these ores which in normal times were not considered valuable became very valuable, didn't they?

A. There is no question about the value of it, if you can find it, if you have it.

Q. Don't it depend on the quantity of it, the cost of getting it out, and all of that, and the other stuff you find with it, the processing of it, and all of that?

A. Of course I don't know so much about the processing but I know a good deal about the open hearth process of running out iron and manganese but in this case I don't know anything about the quantity and quality of the manganese that was on this property, nothing at all about it.

Q. Do you recall that this Rye Valley tract owned by the Tates had some 1,600 acres or more in it?

A. I understood it was a fairly large tract. I understood it was around 1,300 acres but I don't remember exactly how much, but something over a thousand acres, a pretty large tract, as I understood it.

William A. Wolfe.

Mr. Roberts: That is all.

page 456 } RE-DIRECT EXAMINATION.

By Mr. Campbell:

Q. Mr. Gollehon, I believe that there were no commercial operations on this property and it was never mined actively; is that correct?

A. It has been my understanding that the property was mined or mined at from time to time for a number of years prior to the World War but it was never my understanding that it was profitably mined.

Q. I think you and I are talking about the same thing, that it was not profitably operated?

A. That was my understanding.

Mr. Roberts: We make no claim that Colonel Tate operated it profitably before the sale he made.

And further this deponent saith not.

Signature waived by agreement.

page 457 } WILLIAM A. WOLFE,
the next witness for Defendants, being duly sworn,
deposed as follows:

DIRECT EXAMINATION.

By Mr. Hunter:

Q. Please state by whom you are employed, Mr. Wolfe.

A. I am employed as Vice-President and Cashier of the Marion National Bank, Marion, Virginia.

Q. It has already been brought out in testimony here that the Marion National Bank is one of the administrators of the late James D. Tate; is that correct?

A. Yes, sir.

Q. Who was the Trust Officer of the Marion National Bank?

A. Mr. H. Frank Peery.

Q. Mr. Peery, I believe, is now dead?

A. Yes, sir, he died on September 14, 1946.

Q. Would you please state whether or not Mr. Peery was instructed soon after this suit was brought to go to the home

William A. Wolfe.

of the late James D. Tate and make a search of the papers and books of Colonel Tate?

A. Yes, sir, he was instructed, and I think he accompanied Mr. Hunter and Mr. B. L. Dickenson and they spent to the best of my memory approximately a whole day page 458 } searching through the records at the Tate home.

Q. Did Mr. Peery make a report to you that all of the papers and books relating to the guardianship account of Amelia Tate and also all of the transactions, all of the books and papers relating to transactions of Colonel James D. Tate, as the executor of the estate of Major M. B. Tate were brought back to Marion and filed so that the counsel for complainants could inspect them?

A. He did. He informed me that those records were brought back to Marion and left in Mr. L. P. Collins' office, I believe.

Mr. Roberts: We object to these questions and answers, and this line of testimony generally, because Mr. Peery's deposition has already been taken in the case and my recollection is he was examined on this point, and anything Mr. Wolfe would state about it would be hearsay and incompetent and irrelevant.

Mr. Hunter: Mr. Roberts, you are correct in stating Mr. Peery was examined along this line, but it was not a full examination, and those questions were propounded by counsel for the complainants.

Q. Now, in addition to any search or any papers page 459 } found by Mr. Peery, did you also look through the papers at the bank in Colonel's lock box to ascertain whether or not there were any documents there or books relating to the guardianship account or the accounts of the executor, as just mentioned?

A. I did.

Q. Were any found throwing any light on the subject?

A. I found nothing at all.

Mr. Hunter: The witness is with you.

CROSS EXAMINATION.

By Mr. Roberts:

Q. Mr. Wolfe, Colonel Tate's files were and are voluminous, were they not?

William A. Wolfe.

A. I don't understand you.

A. He had a great many files of papers, didn't he?

A. Yes, sir.

Q. And a great many old checks and all sorts of papers covering his business of a lifetime, didn't he?

A. It appeared that Colonel Tate kept all papers of every nature, the best I observed.

Q. And he made a record of everything he did and kept it in his files?

page 460 } A. That is my understanding.

Q. Now then, just how many files, file cases, did he have full of papers?

A. I didn't count them.

Q. A whole lot of them, did he not?

A. Several.

Q. He had his office at Chilhowie Milling Company and most of his papers were kept there during his lifetime; were most of them kept there or some of them at his home?

A. That I cannot answer definitely, but I thought most of his papers were kept at the mill, however, he had several files of old papers in that little room up at his house.

Q. Those files were extensive, were they not?

A. Yes, sir.

Q. And then when the mill was sold by the administrators his books and files that had theretofore been at his mill office were moved to his home, were they not?

A. I believe that is right, but to tell you the truth, I did not see them after they were moved from the mill.

Q. And you don't know they are still in his home?

A. I do not.

page 461 } Q. There were several cabinets, was there not?

A. That is right.

Q. You don't mean to say you looked through all those files, did you?

A. I didn't look through any of the files down at the mill or at the house. I was not there.

Q. You didn't look at his books either?

A. No, sir, I did not.

Q. And you don't know of your own knowledge anything about the contents of the files or books?

A. I do not.

Mr. Roberts: That is all.

William A. Wolfe.

And further this deponent saith not.

Signature waived by agreement.

STIPULATION.

Mr. Campbell: Subject to its admissibility in evidence, it is stipulated that on February 26, 1936, R. O. Crockett and wife and H. P. Brittian, the purchasers of the Rye Valley property at the foreclosure sale conveyed this property to the United States of America for the consideration of \$3,354, reserving for a period of twenty-five years from page 462 } January 1, 1934, the right to mine and remove, except by hydraulic operations, the minerals underlying the property conveyed. This deed is of record in the Clerk's office of Smyth County in Deed Book No. 71, page 441.

Mr. Roberts: Complainants object to the foregoing because it is irrelevant and immaterial.

Mr. Campbell: The defendants are not in position to contradict the recital in the deed from James D. Tate to H. Frank Peery that the purchase price received by James D. Tate for the foregoing land was \$100,000.

STIPULATION.

Mr. Campbell: It is stipulated that there was found among the papers of James D. Tate an original letter on the stationery of Wilson and Manson, dated February 6, 1906, addressed to James D. Tate, Chilhowie, Virginia, the original of which is filed with these depositions, marked Exhibit "Letter from Wilson and Manson."

Mr. Roberts: This stipulation is subject to the former objection as to its admissibility in evidence, and the complainants object to the introduction of the letter because it is irrelevant, immaterial and self-serving.

(The said letter was marked and filed in evidence, and by request of counsel is copied herein as follows:)

page 463 }

STIPULATION.

Mr. Campbell: It is further stipulated between the parties that regular annual settlements made before the Commissioner of Accounts of the Corporation Court of the City

Fred C. Buck.

of Lynchburg, by Amelia Tate, guardian of the Wren children, and final settlements, were duly made as each of these children became of age, when they became twenty-one years of age, and such settlements are of record in the Clerk's office of that Court, and which settlements are summarized in Exhibit No. 1 filed by James H. Wren with his deposition.

It is further stipulated between the parties, subject to its admissibility in evidence, that John W. Robinson, Sr., the senior partner of Robinson-Tate Company was a *residence* of Wythe County and died in that County in the year 1907; that two of his sons, Harry G. Robinson, and John page 464 } W. Robinson, Jr., qualified as his executors; that both of them are now dead, and that Mariam Robinson Simmerman, only child of John W. Robinson, Jr., qualified as administratrix CTA *de bonis non* of John W. Robinson, Sr., and that there came into her hands no papers or records of any sort in connection with the business of Robinson-Tate Company, and that she is now unable to find any papers or records relating to the business of Robinson-Tate Company or the relation of the partners of that concern.

Mr. Roberts: You mean that is what she would testify?

Mr. Campbell: Yes, sir.

Mr. Roberts: We object because irrelevant and immaterial.

(Discussion off the record.)

page 465 } Depositions of Fred C. Buck, Kenneth Snyder, B. L. Dickinson, Q. A. Eller, Byron Anderson and W. A. Wolfe taken Nov. 28, 1947, for Defendants.

Present: Vernon C. Barker and Henry Roberts, Attorneys for Complainants.

S. B. Campbell, Attorney for Defendants.

page 466 } FRED C. BUCK
witness for Complainants, being first duly sworn,
was examined and deposed as follows:

DIRECT EXAMINATION.

By Mr. Campbell:

Q. Please state your age, residence and occupation.

A. I am of lawful age; my residence is Abingdon, Virginia,

Fred C. Buck.

and I am president of the Farmers' Exchange Bank of Abingdon, Virginia.

Q. Mr. Buck, did you know Colonel James D. Tate?

A. Yes, sir.

Q. I wish you would tell us somewhat of your association and acquaintance with him so you can show about how long you have known him.

A. I was elected assistant cashier of the Bank of Glade Spring, at Glade Spring, Virginia, in June, 1921. At that time Colonel James D. Tate was a director in the Bank of Glade Spring. Subsequent to my election as assistant cashier, Colonel Tate was elected Chairman of the Board of Directors of the Bank at Glade Spring, which position he held until his death in 1941. In 1931 Colonel Tate and other associates of mine acquired the controlling interest in the Farmers' Exchange Bank of Abingdon, Virginia. I was at that time elected cashier of the bank, and Colonel Tate was elected a director of the bank, and subsequent to that
page 467 } time he was elected president of the bank, which position he held at the time of his death in 1941.

Subsequent to 1931 I was elected vice-president, as well as cashier of the bank. During that period of twenty years I had a great many business transactions with Colonel Tate, and knew him very intimately.

Q. Mr. Buck, please state Colonel Tate's ability as a businessman, and how he was generally regarded in this section of the country by those who knew him from a business standpoint.

A. Colonel Tate was very able and capable in business, and was so regarded throughout this section.

Q. Would it be fair to say he was one of the ablest, if not the albest businessman in this section of the country for this time?

A. That was my judgment.

Mr. Campbell: Cross-examine.

CROSS EXAMINATION.

By Mr. Roberts:

Q. Mr. Buck, did Colonel Tate ever tell you of any of the business transactions he had handled successfully?

A. Yes, sir.

Q. Well, did he ever tell you anything about how he had

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handled certain matters in connection with the
page 468 } settlement of the estate of his father, M. B. Tate,
and if so, state just what he told you.

A. I am unable to state whether or not he was discussing the affairs of his father's estate. He discussed some transactions with me that he handled, but he did not say they were transactions for the estate.

Q. Well, just state what it was he told you.

A. On one occasion he was telling me of his getting an account settled in Richmond. He indicated that he was at Richmond, I believe, at the time, and he made this engagement with the gentleman in Richmond to meet him at the Richmond Hotel, and he said that the man in Richmond owed him—or he owed the man in Richmond approximately \$2,000, or someone else owed it, in which the Colonel was interested in collecting it.

Q. You mean in settling it?

A. In settling it; that's right. As I recall, the Colonel said about this, that he decided to go down and see what kind of a settlement he could make with this man, and he carried with him a certified check for \$1,750, and a certified check for \$1,250, and a certified check for \$750.

After he discussed the matter with the gentleman, the gentleman offered to settle with him for \$750, and
page 469 } he stated that he would be willing to pay him \$500. Whereupon, the gentleman said, in view of the fact he needed the money, he would go ahead and settle for \$500. Then the Colonel said he found himself in the position where he didn't have the wherewithal to settle, and he said to the gentleman, "Well, I will just have to give you my personal check."

And the gentleman said that would be all right, so he said they got a notary public in, and had the account properly assigned and transferred, and he settled.

Q. You say that was either his debt or a debt that he was interested in settling for someone else?

A. On further reflection it is my recollection that he indicated that he was purchasing the debt.

Q. You do not recall whose debt it was?

A. No, sir, he didn't tell me whose debt it was.

Q. You were named as one of the executors in the holographic will of 1939 of Colonel Tate, were you not?

A. Colonel Tate told me that he had named me co-executor in the will which he had written in the spring of 1939.

Fred C. Buck.

Q. Now, please state the time and place he told you and just what he told you about that will on that occasion.

Mr. Campbell: This question is objected to because this matter has already been concluded in the litigation which we have referred to as the will suit. page 470 }

By Mr. Roberts:

Q. Go ahead.

A. Colonel Tate and I went to Bermuda in May, I believe it was, in the year of 1939. It was the occasion of the Virginia Bankers Association holding their annual meeting, on the trip to Bermuda.

When we got off of the ship in Bermuda Colonel Tate asked me if he might join me and my family for the day. I told him we would be delighted to have him join us, and we got one of these buggies with a couple of horses, and a driver, and went sightseeing over the island, returning to the main part of the town about noon, and then the Colonel asked me if I would mind if I had lunch with him alone, and let my family have their lunch separately; that he wanted to talk to me and I told him that I would be glad to do that, so we had lunch together, and during the lunch hour he said to me, "I am going to tell you something that may surprise you. I have named you co-executor, along with the Marion National Bank, in my will."

He said he had written the will in his own handwriting, and I asked him then where I would find the will, or where the will would be found in case of his death.

He said, "In my box at the Marion National Bank." He didn't tell me much about the provisions of the will. He indicated that he had left the bulk of his estate to his people, was the term he used. page 471 }

He indicated also that he had placed the estate in trust for a five-year period beyond the lifetime of his wife in case she survived him; in other words, five years from his death.

That is about the extent of the discussion on that occasion, as I recall it.

Q. Did he tell you what provisions he had made for his wife?

A. Not on that particular occasion, specifically, as I remember. Later he did go into some details as to the provisions.

Q. Well, I believe you said that he stated he was leaving

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the bulk of the estate to his own family; to whom did he refer?

A. I definitely understood at the time he referred to the Wrens.

Q. They are the only people he had?

A. That was my understanding, that they were his nearest kin.

Q. Did you know he had raised them?

A. Yes, I knew that.

page 472 } Q. Well, now, on the later occasions that he discussed his will with you, just what did he say, and give the background of it?

A. Well, in discussing the will later with me he stated that he was thinking of making some changes in the will specifically with reference to provisions for his wife. He said that the taxes were getting pretty high, and one couldn't tell just what an estate might produce, and he indicated that he had provided the entire income from his estate to go to his wife, but that he was thinking of making a provision that she should get a minimum of a thousand dollars a month so long as she lived, even if a portion of that had to come out of the corpus, that she was to get the entire income regardless of what it amounted to, but if it amounted to less than a thousand dollars a month he was thinking of putting a provision in, and asked me what I thought about it, and I advised him I thought it was a good thing to do.

Q. What time was that, now?

A. Well, as I recall, that conversation took place a short time before his death. It was, as I recall, at the Bank of Glade Spring, some four or five days before he started south on the trip that he died on.

Q. Did he on that occasion state to whom he page 473 } was leaving the bulk of his estate?

A. Well, he indicated his leaving it to his people, and I am sure—I understood all the time when we were discussing it he meant the Wren when he referred to that.

Q. Did he state why he was providing that his estate should be held in trust for five years after the death of himself and his wife?

A. No, I do not recall that he gave any reason for that.

Q. Well, on this last occasion, and on any other occasion during that year, did or not tell you again that he had written this will in his own hand?

A. Yes, sir, he told me that.

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Q. And did he not indicate that he was talking about the same will which he had told you about at Bermuda?

A. Yes, sir, that was my understanding, he was referring to that will.

Q. Well, now, on this last occasion just before he left on the trip south on which he died, did he tell you the place his will would be found if anything happened to him?

A. Yes, sir.

Q. What did he tell you?

A. He said it would be in his box at the Marion page 474 } National Bank.

Q. Well, did you look in that box soon after his death for the will, and if so, with whom, and what did you find?

A. Mr. William A. Wolfe and myself looked in the box, as I recall, the day after Colonel Tate's death. The occasion for looking at that particular time was that the question had been raised about whether or not he had made provisions in the will for his funeral. We did not find the will in the box.

Q. Who was and is William A. Wolfe?

A. He is cashier and, I believe, vice-president of the Marion National Bank at Marion, Virginia.

Q. And was at that time?

A. He was cashier at that time. I am not sure whether he was vice-president or not.

Q. And is still connected with the bank?

A. Yes, sir.

Q. Well, how did you get into the box?

A. Mr. Wolfe had the keys to the box—had Colonel Tate's keys which had been left with him.

Q. State whether or not Mrs. Tate made any statement to you about what Colonel Tate had told her about his will, and the place he left it, and so forth.

page 475 } Mr. Campbell: This testimony is objected to, as well as the testimony that has already been introduced as to statements in regard to the will, because these matters were all concluded in the will suit, and the Supreme Court of Appeals held that Colonel Tate died intestate.

The Witness: Would you read the question?

(Question read by the Reporter.)

Fred C. Buck.

By Mr. Roberts:

Q. And the time and place she told you, if she told you anything.

A. I had a conference with Mrs. Tate at her residence in Chilhowie, Virginia, a day or two after Colonel Tate's funeral or burial.

On that occasion Mrs. Tate told me that Colonel Tate had told her in Savannah, Georgia, shortly before his death, that he had written his will, and that he had made ample provisions in it for her, and that the will was in his box at the Marion National Bank.

Q. What other conversations did she state she had with Colonel Tate in Savannah about the will, if you remember?

A. She told me that Colonel Tate told her that he had made ample provisions in this will for her, but if she was not satisfied he would just draw a new will, and page 476 } would give her everything he had. The occasion was a suggestion that they settle their differences that had been existing through the years, and that she go on to Florida with him for the winter, and that they come back to Chilhowie in the spring, and live at the residence in Chilhowie.

She suggested, so she told me, that he write up to Mr. Wolfe and get him to send the will down there so that she might see it in writing. Whereupon, he told her that he was not going to bother Mr. Wolfe about it, but that he would just draw a new will.

Q. Did she or not say anything to indicate that she knew Mr. Wolfe had the key to the lockbox?

A. Yes, she told Colonel Tate to write up to Mr. Wolfe and get the will, that he had a key to the box.

Q. Did she say she had a key to the box?

A. No, sir, she didn't say that.

Q. Mr. Buck, did Mr. Tate ordinarily take you or anybody else into his confidence about his business affairs?

A. Only to a very limited extent. Colonel Tate was very secretive, and he usually only took you into his confidence to the extent of where he needed assistance.

Q. On this occasion did he say anything to you about needing your assistance?

A. Which occasion do you refer to?

page 477 } Q. When he was talking about his will.

A. Yes. At the time we had the conference in the bank at Glade Spring, shortly before he started south on the trip he died on, he said to me that he had helped me a

Kenneth Snyder.

great deal through the years, and that the time had come when he was going to have to have some help from me, and he felt he could count on me, or words to that effect. Which, of course, I assured him he could.

Mr. Roberts: That is all.

The Witness: I would like to add one statement there, if I may.

Mr. Campbell: All right, sir.

The Witness: I kept no written memorandum of those conferences, and it has been a number of years, and where I purport there to quote individuals I would like to say that it was my intention only to give the gist of what was said, and not the specific words.

Further this deponent saith not.

(Signature waived.)

page 478 }

KENNETH SNYDER

a witness for Defendants, being first duly sworn,
was examined and deposed as follows:

DIRECT EXAMINATION.

By Mr. Campbell:

Q. Please state your age, residence and occupation.

A. I am 49 years old, and I am part owner of the Ford business here in Marion.

Q. What is the style of that business?

A. Smyth County Motor Company, Incorporated.

Q. Did Colonel Tate own any part of that business?

A. Yes, sir, he owned a controlling part in the business.

Q. Do you recall when he acquired that?

A. I believe the business was incorporated in 1918.

Q. When did you go with the business?

A. In 1919.

Q. And were you with it continuously from that date up to the present?

A. Except for the period of two or three months.

Q. Did Colonel Tate keep in touch with the Smyth County Motor Company?

A. Yes, sir, that he did.

Q. Do you know how he was regarded in this section of the country as to business ability?

Kenneth Snyder.

page 479 } A. He was considered a good businessman.

Q. Was he or not active and energetic and an alert person?

A. Well, yes, in the motor business he supervised the operation; so far as the financial end of the business.

Q. Mr. Snyder, was he or not generally regarded as one of the outstanding, if not the outstanding businessman of this section of the country?

A. I would consider him that, yes.

Q. Now, in the conduct of this business did he keep in close touch with it or not?

A. He kept in close touch with it, either by telephone or personal visits.

Q. Did he indicate that anyone other than himself had any interest in the share of the stocks in his name?

A. Not in the share of the stock in his name. There was outside stockholders in the business. Mr. Eller was the largest stockholder, next to Mr. Tate.

Q. But as to the stock that was in his name, was there any question as to the fact that he was the owner of that stock?

A. No, sir.

Q. Did you ever hear him speak of other properties that he owned besides his interest in the Symth County Motor Company?

page 480 } A. I don't know that I did directly. I probably have asked him if he was connected with this business or that business.

Q. And did he say whether he was?

A. Yes, sir.

Q. And did he indicate that anybody other than himself had any interest in what was in his name?

A. No, sir.

Mr. Campbell: Cross examine.

CROSS EXAMINATION.

By Mr. Roberts:

Q. You said this Symth County Motor Company business was organized in 1918?

A. I believe that's correct.

Q. And it was successful, was it not?

A. Yes, sir. At times it has lost money, some years, and made a little money in some years.

Kenneth Snyder.

Q. But on the whole it was successful?

A. Yes, sir.

Q. And I believe after Colonel Tate's death Mrs. Tate gave you a hundred shares of the stock in that company, having a par value of a hundred dollars a share, did she not?

A. Yes, sir.

Q. And you later, you and an associate, later
page 481 } bought all of the stock that Colonel Tate's estate owned, did you not?

A. In the Chilhowie and Smyth County Motor Company.

Q. How much did you pay for that per share?

A. \$115 a share.

Q. Colonel Tate was also interested in Chilhowie Motor Company?

A. Chilhowie Motor Company owned the capital stock of the Smyth County Motor Company.

Q. They did?

A. Yes, sir.

Q. Well, when was the Chilhowie Motor Company organized?

A. That I don't know.

Q. Was it organized some time before the—

A. Some-time before the Smyth County Motor Company was organized.

Q. Well, some time in 1921 or '2 or '3, along in there, Colonel Tate bought the State Motor Company from Dr. Reynolds, at Bristol, Tennessee, did he not?

A. They bought it some time about that year, I think.

Q. I believe Mr. Eller was interested in that also?

A. Mr. Eller was interested.

page 482 } Q. Now did you observe that Colonel Tate was more successful, and made more money after 1918 than he did before that?

A. I wouldn't know about his personal affairs. He would consult with me regarding the business that I was operating for him, but he did not consult with me on his personal business affairs.

Q. Well, did you know that after 1918—did you know about when he became interested in the Marion National Bank?

A. No, I did not.

Mr. Roberts: That is all.

B. L. Dickerson.

Mr. Campbell: That is all. Thank you, sir.

Further this deponent saith not.

(Signature waived.)

page 483 } B. L. DICKERSON,
a witness for defendants, being first duly sworn,
was examined and deposed as follows:

DIRECT EXAMINATION.

By Mr. Campbell:

Q. State your age, residence and occupation.

A. I am 54 years old; live at Marion, Virginia, and I am a lawyer.

Q. Mr. Dickerson, did you know Colonel Tate in his lifetime?

A. Yes, I knew him well.

Q. What were your opportunities for knowing him well?

A. I worked for him, represented him in a great many business affairs in connection with law practice, and also was associated with him as a member of the Board of Directors of the Marion National Bank.

Q. I believe you also wrote one will for him that was executed in 1933, was it?

A. Yes.

Q. And made a draft or form for another will in 1936 or '7?

A. That's correct. I don't remember the year, offhand.

Mr. Roberts: That last will was May, 1939.

page 484 } By Mr. Campbell:

Q. Mr. Dickerson, in Colonel Tate's discussion with you as to his affairs, or the disposition which he would make of his estate, please state whether he ever said anything to indicate that anyone other than himself owned the properties of which he was disposing, or had any interest in them?

A. No, he never made any statement of that kind.

Q. What was the general understanding between you and Colonel Tate as to the ownership of the properties disposed of by these papers?

B. L. Dickerson.

Mr. Roberts: We object to that because he has stated Colonel Tate never said anything to him about that.

The Witness: My understanding was that the property was his, and that he treated it in that way.

By Mr. Campbell:

Q. Well, as far as you could observe, did he treat it as his own property?

A. Yes.

Q. In any of the meetings of the Board at the bank did a question ever come up as to his control over his properties, and if so, what was said?

A. I never heard any question raised on that page 485 } point. I never heard anything to indicate that the property—that anyone was interested in the property other than himself.

Q. Did you ever hear him say whether he had filed financial statements with the bank?

A. Yes, he made a financial statement to the bank, at least, on one occasion, that I know of.

Q. In that was there any indication of anyone owning any of his property except himself, or having any interest in it?

A. No.

Q. Mr. Dickerdson, how was Colonel Tate regarded as a business man?

A. He was regarded as an unusual capable business man, and attended to his affairs very closely, and attentively, and was regarded as very successful.

Q. From your observation of him was he a man who did keep close touch on all of his business matters?

A. He was unusually attentive to the details of his business. He kept in touch with everything that he was interested in.

Mr. Campbell: Cross examine.

CROSS EXAMINATION.

By Mr. Roberts:

Q. With respect to details, was he or not careful about keeping a record of all of his financial transactions?

A. Yes, he was, to an unusual extent.

B. L. Dickerson.

Q. And did he or not also keep his papers and his files and his old cancelled checks and things like that?

A. I don't know particularly about the checks, but he was careful of keeping a memorandum, or keeping in touch with his business.

Q. And he kept his papers, his deeds, his contracts, and everything like that?

A. Yes, I think so.

Q. Now, then, in that 1933 will, which you say was duly executed, did he or not give you a written memorandum of the beneficiaries to whom he wished to leave his property, and a percentage of the property that he was leaving each one of them?

A. I don't remember now whether he gave me a written memorandum, or whether I wrote it down in his presence, and at his direction. We discussed the thing in great detail, and I went over it with him, and made it in his presence. I don't remember, off-hand, whether he gave me *gave me* a memorandum to start with, or not.

Q. As I recall, you and he were considering that will for two or three years before you finally prepared it, and it was executed over here in the bank?

A. We discussed it over a long period of time.
page 487 } I don't recall just how long, but we talked about it, and made a memorandum, and prepared at least two or three drafts of the will before it was finally executed.

Q. That will left everything, the income from his entire estate to his wife during her lifetime, and then it was put in trust, and left 70 per cent of the residue or remainder to the Wrens, did he not?

A. That's right.

Q. He told you, or did he tell you exactly how much he wanted to leave the Wrens in percentages?

A. Yes.

Q. Well, now, then, come to the—by the way, I believe the bank paid your fee for writing that 1933 will in consideration that the bank was named executor in it, was it not?

A. The bank paid me for writing the will, with Colonel Tate's knowledge, yes.

Q. Now, come to the 1939 will. When he came to you about that, was that the purpose, or for the purpose of writing a new and different will, or simply to make some changes in the 1933 will to bring it up to date?

B. L. Dickerson.

A. Well, it amounted to rewriting the will. He had several changes that he wanted to make, and, of course, page 488 } that involved—or, at least, we put it in the form of writing as a new will, rather than a codicil to the old one.

Q. But you followed, so far as were consistent with the changes he wanted to make, you followed both the form and the language of the '33 will, did you not?

A. Yes, that's true.

Q. In other words, the two wills are practically copies or duplicates—the last will would be a copy or duplicate of the first will, with the exception of the changes in the beneficiaries, and changes in the language to make the last will conform to his wishes at that time?

A. Yes, I had the first will, or a copy of it before me, and used the same language and phrasing in the second will that I did in the first.

Q. Well, do you recall the changes that he wanted to make in the will in writing the last one?

A. Well, I believe there was a change there in the executor, and then some variation in the gifts to the Wrens. One was left out, I believe, and one was increased.

Q. Weren't the changes these: He left out the bequest to Arch Smith, an employee, who had died in the meantime?

A. Yes, that's true.

page 489 } Q. And then he changed the executor to make the Marion National Bank and Fred C. Buck, co-executor?

A. Yes.

Q. And then in order to make—in order that his bank stock might be voted, you provided, at your own suggestion, in the will that Buck should vote that stock because the bank under the law, had no right to vote it?

A. Yes.

Q. Then, with respect to the Wrens in the '33 will, three of them were given—well, all of them were given 70 per cent of his estate in both wills, and in the last will Bev Wren was cut out, and his ten per cent given or added to Will Wren's ten per cent?

A. I believe that's right.

Q. The net result was he gave the Wrens 70 per cent of his estate in both the wills, of course, subject to the life estate of his wife?

B. L. Dickerson.

A. Yes, I believe too in the second will, the period of the trust estate was shortened.

Q. Yes, from 21 to 5 years. That is all the changes I remember. Were there any other changes you remember?

A. I don't remember, off-hand, of anything else.

Q. Well, now, then, was there any change in his
page 490 } mind from the time of *the time* of the first will
until the last will about the percentage of his
estate he was going to give to the Wren as a whole?

A. Well, I can't say anything about that, except just to repeat what he told me to write in the will; that is, the first time he told me the names of the Wrens, and the percentages, and the same thing in the second will, except he had made that change of leaving out Beverley Wren, and adding something to the share of Will Wren.

Q. Now, you testified before that when you delivered this draft of the 1939 will to him he said, "I will take this"—well, I believe you first said you had both worked it out to what looked like as good as you could write it to meet his requirements, and then you gave it to him, and he said, "I will take this and read it and when I get it to suit me I will write it out in my own hand, and sign it."

Q. Did you understand when you gave it to him there was any question in his mind about the bequest to the beneficiaries in the will?

A. Well, I can't answer that, except just to repeat what he said. The second will had been prepared all along with the idea it was a form for him to use. In other words, he was not going to sign the actual paper that I was preparing, and
after we had talked it over, and I had put it into
page 491 } the last form which I did write, then he said when
he got it to suit him he would write it out himself.
That is as far as I can say as to what he had in mind.

Q. And it shows at the end that you had finished it up in May, 1939, as the blank day of May, 1939?

A. That's right.

Further this deponent saith not.

(Signature waived.)

page 492 } COMMISSIONER'S OFFICE.

No. 37 Law Building,
Lynchburg, Va., July 31st, 1895.

To R. G. H. Kean Receiver of the Circuit Court of Campbell County in the Chy suits of *Bolling & Wife v. Robertson etc* and *Robertson etc v. Bolling and Wife Plaintiff and James D. Tate under own right, and as Exor of M. B. Tate deceased, Amelia Tate, Willie B. Ship, Dan'l Trigg and John H. Seurs Guardian ad Litem for Beverly Tate Wren, Wm. H. Wren, James H. Wren, Jo's. R. Wren and Edith Wren, Defendants.*

You are hereby notified that I have fixed upon the 30th day of August, 1895, between the hours of 9 o'clock A. M. and 6 o'clock P. M., and my office, No. 37 in the Law
page 493 } Building, in the city of Lynchburg, as the time and place, to take the following accounts and make the following enquiries in pursuance of a decree of the Circuit Court of Lynchburg, rendered November Term, 1895, in the Chancery suit of *Kean Rec'r v. Tates Excr. etc* to-wit:

(1) The account of James D. Tate as Excr of M. B. Tate dec'd showing what personal estate of said testator came to his hands and how he has administered the same which account the said Executor is directed to render before the said Commissioner.

(2) An account of the debt claimed in the plaintiffs bill.

(3) An account of all of the real estate of which M. B. Tate deceased was seized or entitled at the date of the two judgments of the plaintiff in the bill mentioned and the fee simple value thereof, and the net annual value of the same.

(4) On account of all charges liens or encumbrances on the real estate of said M. B. Tate with the order of priority among the same.

At which time and place you are notified to appear before me, with the necessary evidence to enable me to state said accounts and make said enquiries.

page 494 } Given under my hand as Commissioner in Chancery of the Circuit Court of Lynchburg, this the 31st day of July, 1895.

(Signed) CH. H. SACKETT,
Commissioner.

page 495 }

Q. A. ELLER,

a witness for Defendants, being first duly sworn,
was examined and deposed as follows:

DIRECT EXAMINATION.

By Mr. Campbell:

Q. Please state your age, residence and occupation.

A. I will be 80 years of age on November 15. I live at Chilhowie, Virginia. I am vice-president of the Vance Company, merchants and manufacturers of fertilizer.

Q. Mr. Eller, what was your association with Colonel James D. Tate?

A. Mr. Tate became associated with James L. Vann & Company, the predecessor of the present Vance Company, in 1909, as a stockholder, and he became quite active in the business, and I was quite intimately associated with him up to the time of his death.

Q. Who were the other persons associated in that business, if any?

A. In 1909 besides Mr. Tate and myself, James L. Vann, William T. Smith, and A. J. and George C. Huff, and Frank L. Sanders.

Q. Except for yourself are any of those gentlemen now living?

A. I guess not.

Q. Mr. Eller, how did you regard Colonel Tate
page 496 } as a business man?

A. He was a very—well, a very capable business man.

Q. Was he successful in his affairs or not?

A. Yes, he was successful.

Q. Mr. Eller, did Colonel Tate ever discuss his personal business affairs with you?

A. Yes, at various times.

Q. On any occasion did he ever say anything that indicated that anyone except James D. Tate had any interest whatever in his affairs?

A. He did not.

Q. Did he deal with his properties and stock in the various corporations that he owned as his own, or how did he manage them?

A. Very much so.

Q. Did you ever see any indication or hear him say anything to indicate that he was acting as trustee for the Wrens in any of these business transactions?

Q. A. Eller.

A. I did not.

Q. Mr. Eller, you knew of the relation between Colonel Tate and the four Wren boys and Mrs. Whitney, I presume?

A. Yes, sir.

Q. What were the personal relations between Mr. Tate and his nephews and this one niece?
page 497 { A. They were very pleasant, so far as I know.

Q. Now, how did he regard the business ability of his nephews?

A. Well, I don't know that he ever discussed that with me. However, I did know enough about his affairs to feel that he was not sure of their business stability.

Q. Did he ever discuss with you probably the matter connected with the mill at Abingdon?

A. I knew of his relationship with Beverley Wren in a business at Abingdon, and with the business having been right unsuccessful. I am just not sure that he discussed it with me, but I heard him say enough about it to know that that was his feeling.

Q. Did that seem to cause any differences between him and Mr. Beverley Wren?

A. I think so.

Q. How did it react on Mr. Tate, as you observed him?

A. He evidently was not satisfied with the way Beverley had handled the business, and my understanding was that they had no further business relations after the winding up of that business.

Mr. Campbell: Cross examine.

page 498 { CROSS EXAMINATION.

By Mr. Roberts:

Q. How old was Beverley Wren at that time?

A. How old was he?

Q. Yes.

A. I couldn't tell you that. I don't recall when that business was liquidated.

Q. Wasn't that about the time he became 21 years of age?

A. No, it was subsequent to that.

Q. He was a young man anyhow, wasn't he?

A. Yes, he was a young man.

Q. Isn't it a fact that about that time it was no uncommon thing to have business failures?

Q. A. Eller.

A. Well, I don't recall the exact business period. I couldn't answer that question intelligently.

Q. Well, don't you know there are times that good businesses have failed?

A. Yes.

Q. Now, then, you say Colonel Tate never told you this; it was just your opinion from things you observed?

A. I do not recall that he discussed the matter with me, but I knew of the dissatisfaction with the management of the business.

page 499 } Q. Well, did you know about the will of M. B. Tate, the provisions of that will?

A. No.

Q. Well, you knew when he died, in 1892?

A. I didn't remember that. I had heard of it.

Q. Well, he did die in 1892. You remember the occasion, don't you, of his death?

A. I was not living in Chilhowie at that time. I went to Chilhowie in 1902. Mr. Tate's father had been dead several years prior to that.

Q. Where did you live before going to Chilhowie?

A. Atkins.

Q. When you went to Chilhowie in 1902 did Colonel Tate—was he in charge of the entire M. B. Tate estate, and of the farm there near Chillhowie?

A. So far as I know, he was.

Q. He was operating the farm as a whole at that time?

A. Yes.

Q. As if he owned it?

A. Yes.

Q. And as if he owned it in fee simple?

A. He was operating it. I presume that it was his.

Q. Well, did you know that Amelia Tate had a dower tract there of a thousand acres

page 500 } A. No, I heard that she had an interest in the estate, but I knew nothing personally about it.

Q. And he had charge of the home and all of the farm there when you went there?

A. Yes.

Q. And he continued in charge of it, farming and conducting livestock, and other business there, and had a lot of tenants on there from 1902 until she died in 1912, didn't he?

A. Yes, sir, so far as I know, he did.

Q. And did you know that the Wrens had 600 acres there left them by the will of M. B. Tate?

Q. A. Eller.

A. I never knew about it personally.

Q. But you do know that he had charge of the whole farm and estate?

A. Yes.

Q. That related to both the real estate and the personal estate left by M. B. Tate?

A. Yes.

Q. Did you know that he sold some timber up there about 1907 or '08 to Cole & Fry?

A. I believe I remember that he did.

Q. And you just assumed that he owned that timber?

A. Well, I never thought anything about it.

page 501 } Q. He sold it as if he owned it, did he?

A. So far as I know, he did.

Q. Did you know anything about the Tate interests in the Robertson, Tate & Company of Lynchburg?

A. Yes, I knew that Mr. Tate owned an interest, and probably did know at the time what it was, but I don't recall now.

Q. Did you know M. B. Tate owned that interest and left it to the Wrens in his will?

A. No, I didn't know that.

Q. You didn't know that?

A. No.

Q. When you came there Colonel Tate was in charge of handling it as if he owned it?

A. Yes.

RE-DIRECT EXAMINATION.

By Mr. Campbell:

Q. Mr. Eller, you were asked a question about the Wren land. Was it well known there in the community that the Wrens did own a part of the real estate?

A. I don't know that I could say that as far as I am concerned that it was well known. Mr. Tate never discussed that with me. It may have been. Others may have known that, but I couldn't say that I did.

page 502 } Q. I believe that you and Mr. Tate came to Chillhowie in the same year?

A. The same year, 1902. He came from Lynchburg.

Q. At that time?

A. Yes.

Q. But you told Mr. Roberts that you had heard that the

Byron Anderson.

Wrens did own some real estate there, and how it was sold, or what happened to it, you did not know?

A. Yes.

Mr. Roberts: I did not understand he told me he knew they owned any. I didn't ask him that.

The Witness: Well, I knew that their mother, or whoever it was, did own an interest in the estate, but I didn't know but what it had been settled before I came there. I didn't know anything about that part of it.

Mr. Roberts: And when you came there Colonel Tate was in charge of the whole farm and estate?

The Witness: Yes.

Mr. Roberts: Real and personal?

The Witness: Yes.

Mr. Roberts: Is that right?

The Witness: Yes.

Mr. Campbell: That is all, Mr. Eller.

page 503 } Further this deponent saith not.

(Signature waived.)

page 504 } **BYRON ANDERSON**

a witness for defendants being first duly sworn,
was examined and deposed as follows:

DIRECT EXAMINATION.

By Mr. Campbell:

Q. Please state your age, residence and occupation.

A. Fifty-two, Marion, Virginia, County Treasurer.

Q. How long have you been treasurer, Mr. Anderson?

A. I have been treasurer since '41.

Q. And before that time I believe your father, Mr. J. L. C. Anderson was treasurer for about how many years?

A. About 33 years.

Q. How long have you been connected with the treasurer's office either as treasurer or deputy or employee in the office?

A. I have been there continuously since '23, 1923.

Q. Mr. Anderson, during that time was there any tax ticket against James D. Tate, as trustee for the Wrens, either for any personal estate or any real estate?

W. A. Wolfe.

A. Not to my memory.

Q. Did Colonel Tate pay the tax tickets assessed against him himself?

A. He did.

Q. Mr. Anderson, did you know Colonel Tate and his reputation as a businessman?

page 505 } A. I did, sir.

Q. Please state how he was regarded as a businessman in this part of the state?

A. Well, he was considered a very good businessman.

Q. Was he regarded as one of the outstanding businessmen in this whole section?

A. He sure was.

Mr. Campbell: Cross examine.

Mr. Roberts: You may stand aside.

Further this deponent saith not.

(Signature waived.)

page 506 } W. A. WOLFE

a witness for Defendants, being first duly sworn,
was examined and deposed as follows:

DIRECT EXAMINATION.

By Mr. Campbell:

Q. Mr. Wolfe, I believe you are cashier and executive vice-president of the Marion National Bank?

A. I am, sir.

Q. I hand you here three financial statements, three statements purporting to be financial statements of Colonel James D. Tate. Two of them are signed in ink, and one bears no signature. Please examine these papers and see whether they are original records of your bank, which you handed me this morning.

Mr. Roberts: We object to the introduction of these statements because they are irrelevant and immaterial.

The Witness: They are the original records from my files.

By Mr. Campbell:

Q. Mr. Wolfe, please state how the bank happened to have these statements.

W. A. Wolfe.

A. The Bank Examiners require us to furnish financial statements of all directors and officers of our bank, and although Colonel Tate owed our bank nothing we page 507 } obtained these statements for the benefit of the examining department.

Q. I hand you the three statements, one marked "Statement of the financial condition of James D. Tate, as of March 15, 1933, given to the Marion National Bank."

One similarly marked but as of August 20, 1936.

And one marked "Statement of the financial condition of James D. Tate, as of July 15, 1938."

Will you please file these with your deposition, marked Exhibit W. A. Wolfe, Nos. 1, 2 and 3?

A. I will, sir.

(The documents referred to are in words and figures as follows:)

page 508 } By Mr. Campbell:

Q. Mr. Wolfe, do any of those financial statements show any liabilities and if so, what are the liabilities, and what statement is made on the statements as to liabilities?

A. They show absolutely no liabilities; all marked "None."

Mr. Roberts: We object to that question and answer because the statements speak for themselves.

page 509 } By Mr. Campbell:

Q. Now, examine the statements as to contingent liabilities. Is there any notation or any statement as to contingent liabilities?

A. In the statement of March 15, 1933, Colonel Tate listed as contingent liabilities, as endorser on notes in banks for Chilhowie Milling Company, Smyth County Motor Company, Universal Motor Company, States Motor Company, Sulphur Springs Farm, R. S. Edwards, and others, amounts to about \$32,000.

On the statement of August 20, 1936, Colonel Tate's statement revealed a contingent liability as endorser on notes in bank for R. S. Edwards in the amount of \$3,000.

On the statement as of July 15, 1938, he listed no contingent liabilities.

Q. Mr. Wolfe, did Colonel Tate ever discuss with you his father's affairs?

W. A. Wolfe.

A. He did, sir.

Q. Please state what he said, if anything, in regard to the manner in which he had liquidated his father's estate.

Mr. Roberts: Objected to because it is self-serving.

The Witness: Colonel Tate on various occasions stated to me that when his father died his estate was insolvent, and had they been forced to settle at the time of his death it would not have paid more than 75 cents on the dollar. He stated to me that he went to Lynchburg where most of the indebtedness was held, and stated to them if they would give him the opportunity he would pay off his father's indebtedness in full, but if he were forced to settle at that time he would not be able to pay his creditors.

He also stated that many people thought he had inherited a vast sum from his father's estate. Where, as a matter of fact, he had been instrumental by his own management in paying off the indebtedness against his father's estate.

Q. Did he tell you anything about pledging his own personal credit for his father's debts?

A. He did. He stated that he pledged his own personal belongings, or financial backing to satisfy these customers until he could manage the estate and make the payments.

Q. Mr. Wolfe, did he discuss with you the sale of the Rye Valley Manganese property?

A. He did.

Q. Do you recall anything in regard to the de-
page 511 } tails of that sale?

A. I remember very vividly when he received a fifty thousand dollar payment on this property, which I believe he sold for one hundred thousand dollars. On that occasion Mr. T. E. King, then cashier of the bank, and I, remained at the bank until eleven o'clock one night in order to clear the fifty thousand dollar check, which was indeed a sizable sum in our bank at that time.

Q. To whose credit did that \$50,000 go?

A. That was placed to James D. Tate's personal credit, personal account.

Q. When the rest of the purchase money was paid do you know to whose credit it went?

A. I don't remember as to the final amount as to how it was credited.

W. A. Wolfe.

Q. The fifty thousand dollar check did impress itself upon you at that time?

A. It certainly did. That was just about the most money I had ever seen in one check at that time.

Q. Did Mr. Tate deal with this as his own property?

A. Absolutely, yes.

Q. In the discussion of his affairs with you, or in any of his transactions, did he ever at any time say or do anything that indicated that he was acting as trustee for page 512 } the Wrens, or for anyone else?

A. Never at any time in any way whatsoever.

Q. Please state whether Colonel Tate handled all of these business transactions openly and obviously as his own property.

A. There is no doubt but that he did handle them definitely as his own property.

Mr. Campbell: Cross examine.

Just one more question.

By Mr. Campbell:

Q. You have mentioned Mr. T. E. King as being the cashier of the Marion National Bank at the time of the sale of the manganese property. Is Mr. King living now?

A. Mr. King is dead. He died in 1933.

CROSS EXAMINATION.

By Mr. Roberts:

Q. You say you and Mr. King stayed up until eleven o'clock at the bank to clear that fifty thousand dollar check when it came in. Why did you have to stay up late there?

A. We did not have to stay up. We did it because Colonel Tate had asked us to do it.

Q. Well, it wasn't any trouble about clearing it? Wouldn't you handle that just like you would a check for \$10?

A. Not in that day and time. That was a six-page 513 } able sum then.

Q. Well, I know, but wouldn't it be handled the same way in the bank?

A. It was.

Q. Well, it wasn't necessary to stay up until eleven o'clock to do it? What you did was to put it in your bank business for the day, and then you mailed it out for collection?

W. A. Wolfe.

A. We mailed it on through the clearing house that night.

Q. That wouldn't have taken but a few minutes, would it?

A. That's right. We had waited from approximately seven o'clock, but he didn't complete the transaction until eleven was the reason it was so late.

Q. He didn't get the check until about eleven?

A. No, sir.

Q. You say that Colonel Tate told you that he handled the estate of his father M. B. Tate so that it paid out the debts, I believe?

A. That is correct.

Q. In full. And at that time that is when his father died, Colonel Tate was worth very little himself, was page 514 } he not, so far as you know?

A. I didn't understand the question.

Q. I say at the time M. B. Tate died, J. D. Tate was not wealthy; he didn't have much property then, did he, himself?

A. I am unable to answer that question for the reason that I was not familiar with Colonel Tate's holdings at that time.

Q. Anyhow, you do know that he told you that he handled his estate and held the creditors off until he could pay the debts from the M. B. Tate estate?

A. Until he could pay the debts; I presume from the M. B. Tate estate?

Q. Now, then, he had a big farm down there, M. B. Tate did?

A. That is my understanding.

Q. And did you know that by his will he had left a thousand acres of that, about the middle of it there, with the home on it, to his widow, Amelia, and six hundred acres on the east end to the Wrens, and then eight hundred acres on the west end to Colonel Tate, and then at the death of his mother her dower of a thousand acres was to go to Colonel Tate; did you know that?

A. I knew nothing of an existing will at that page 515 } time.

Q. And you never did know about the will until this litigation came up, did you?

A. That is correct.

Q. And when did you first become associated with Colonel Tate, did you say?

A. In 1916.

Q. Was that in the bank here?

A. Yes, sir.

W. A. Wolfe.

Q. He made money along those years on the farm down there, livestock and one thing and another, didn't he?

A. Colonel Tate was an excellent businessman, and he made money, to the best of my knowledge and belief, in any and everything he tackled.

Q. And that 1,600 acre Tate Farm down there was a magnificent farm, wasn't it?

A. It was a nice farm.

Q. Rich land and a good home and substantial tenant houses on it?

A. That's right.

Q. Do you recall at that time that he had ten or twelve tenants down there?

A. I never did know how many tenants he kept on the farm.

Q. But you knew that there were a lot of them page 516 } there?

A. I knew he had tenants.

Q. And made money out of the farm?

A. Well, he made money out of everything, and I presume out of the farm too.

Q. When Mrs. Tate came home from Savannah just after Colonel Tate had died, she brought his key to the lockbox in the Marion National Bank with her, did she not?

A. I was just trying to think. I am not sure she brought any key with her. If she did I never saw it.

Q. Well, as I understand it, he had two keys?

A. I had one.

Q. And he left one with you when he went to Florida?

A. That's right.

Q. Had you had it before that?

A. Before he went to Florida?

Q. Yes. I mean to Savannah.

A. I had it during that year. When Colonel Tate left for Savannah, or was getting ready to leave for Savannah, he asked me to keep the key, as he wanted to trade in some stocks during the winter, and wanted to write me so I could use the key to go in the box and get out such stocks as he directed.

Q. Had you the key before that, though?

A. I don't think so. I don't remember of ever page 517 } having it before that time.

Q. Now, then, he took one key with him, as I understand. He had two keys?

A. Presumably so. There were two keys issued to the box.

W. A. Wolfe.

Q. When he left, he left the one with you, and so far as you know he took the other one with him?

A. So far as I know.

Mr. Campbell: This evidence in regard to the key and the safety deposit box is objected to as being immaterial, as all matters connected with testancy or intestancy were concluded in the other suit.

By Mr. Roberts:

Q. Well, do you know then when that key which Colonel Tate had was returned to the bank and delivered to the bank, and by whom?

A. I do not.

Q. Well, does the bank now have, or do you have, both of the keys?

A. The box has since been rented.

Q. In other words, it has been given up?

A. It is possible we obtained a new key. I would have to examine our records to see if that key was delivered, or whether we obtained an additional key from the page 518 } Mosler Safe Company. I am unable to answer that.

Q. I wish you would look at your record and write the stenographer a letter as to the fact about that, just what you find.

A. I will give you that. Mr. Frank Peery, the Trust Officer at that time, as you know, has since died, and these key transactions were handled by him as Trust Officer during this time, and would not have come into my hands, or to my knowledge.

Q. But if there has been a new key you would have a record?

A. I would, Yes, sir.

Q. And if this key was returned you would have the two keys, and wouldn't have to have a new one?

A. The two keys, and then there would be no record. I would be glad to examine the record, and in the event we ordered a new key I will write you a letter.

Q. Just tell her what you find.

(The following is letter received by reporter from Mr. W. A. Wolfe:)

W. A. Wolfe.

THE MARION NATIONAL BANK

Marion, Virginia

December 8, 1947.

page 519 } Miss Grace McNire
Grace McNire and Associates
204 First Federal Building
Bristol, Va.

Dear Miss McNire:

It was my understanding I was not to write you unless a duplicate key had been ordered for the James D. Tate box. I find the extra key was delivered to our Mr. Peery, Trust Officer, in January following Col. Tate's death. We had both keys to the box, which has since been rented, and keys delivered to our present renter.

Regreting the misunderstanding, I am

Yours very truly,

(Signed) W. A. WOLFE

Vice-President & Cashier.

By Mr. Roberts:

Q. At that time the bank kept no record of who entered the safety deposit boxes there or the time they entered?

A. They did not, no, sir.

Mr. Roberts: That is all.

FURTHER THIS DEPONENT SAITH NOT.

(Signature waived.)

page 520 } Mr. Roberts: It is stipulated between counsel that the opinion of the Supreme Court of Appeals in the will case of Florence Lee Tate against J. Robert Wren, reported in 185 Virginia, page 773, is made a part of the record by reference.

Complainants introduce and file in rebuttal a certified copy of the deed from V. L. Denby to M. B. Tate, dated September 15, 1890, conveying seventy and a half acres in Norfolk County, recorded in Deed Book 160, page 135.

Mr. Campbell: Defendants object to the introduction in evidence of each of the foregoing deeds as being irrelevant and immaterial to any issue now on trial, and as not being proper evidence in rebuttal.

page 521 } DECREE of Dec. 31, 1947.

This cause having this day been argued and submitted and the court not being advised of its judgment, takes time to consider, it is ordered that this cause be made a vacation cause, and any order or decree entered in vacation to have the same force and effect as if entered in term.

WALTER H. ROBERTSON,

Judge.

page 522 } OPINION OF JUDGE WALTER H.
ROBERTSON.

Filed May 17, 1948.

Preface to Opinion.

The gravamen or burden of complainants' case is to show that by virtue of an express trust growing out of a parol contract between James D. Tate and complainants on August 29 or 30, 1912, almost immediately following the death of Mrs. Amelia Tate, James D. Tate became a trustee holding the legal title to the Mitchell B. Tate estate for the benefit of complainants and that upon his death on Dec. 21st, 1941, without having conveyed or devised said estate or any part thereof to complainants he committed a breach of trust thereby rendering his estate liable to complainants for many thousands of dollars.

In a brief to clarify the issues in the case, counsel for complainants say that the only issues in the case are whether or not complainants are entitled to the Residuary Lands of the M. B. Tate will, and whether or not they are entitled to M. B. Tate's interest in the mercantile firm of Robinson Tate & Co., of Lynchburg, Va.

First.

My opinion is that the verbal conference of Aug. 29th or 30th, 1912, did not constitute a contract or create a trust, and that if by any possibility it did do so, it was rescinded & annulled, superseded by and merged in, the written contract under the hand and seal of all the parties entered page 523 } into on Nov. 25th, 1912.

At that time all of complainants were of age, Mrs. Edith Wren Whitney, the youngest of them having reached the age of 21 in January, 1912.

The written contract expressly provided that James D. Tate should be entitled to keep the monies received from the sale of some of the Wrens' timber to Cole & Fry & from the sale of some of their land to Frazier; that the lands to which the Wrens were entitled under the will of M. B. Tate should be held by them free from any lien or liability on account of the large indebtedness of the M. B. Tate estate; and that James D. Tate who had settled that indebtedness & had taken judgment against the M. B. Tate estate for something over \$34,000.00 should be entitled to all of the other lands of M. B. Tate wherever located.

These other lands embraced & included the Rye Valley & other Residuary Lands which were expressly charged with the debts of M. B. Tate.

So far, no trust has been created. But complainants say that in the verbal conference of Aug. 29th or 30th, 1912, in pursuance of which the written agreement of Nov. 25, 1912, was executed, James D. Tate said that if the Rye Valley lands were ever sold an adjustment would be made with the Wrens.

The Rye Valley lands were sold in 1918 for \$100,000.00. It was admitted that in 1912 they were practically worthless.

If the verbal conference of Aug. 29th or 30th, 1912, was not merged in the written contract of Nov. 25th, 1912, which I think it was, and if James D. Tate's statement that he would make an adjustment can be considered as a contract, which I think it cannot, then what was the contract? In no event would James D. Tate have been obligated to do more than to pay *pay* back to the Wrens the amounts received from the Cole & Fry timber sale & the Frazier land sale, with interest. If James D. Tate was so obligated, then a cause of action on a money demand accrued to complainants in 1918, 23 years before the death of James D. Tate.

Second.

My opinion is that complainants are not entitled to the residuary lands of the M. B. Tate will.

Title to those lands were perfected in James D. Tate (1) by the will of M. B. Tate, (2) by the payment of M. B. Tate's indebtedness by James D. Tate, and (3) by the written contract of Nov. 25, 1912, under the hand and seal of the complainants and James D. Tate.

Furthermore, if any cause of action accrued to complainants on James D. Tate's statement that if the Rye Valley lands were sold he would make an adjustment with complainants, the cause of action accrued when James D. Tate sold the land for \$100,000.00 in 1918, twenty-three years before his death, during which time complainants never asked for an adjustment or settlement & never mentioned the matter to James D. Tate, who through all those years treated the money received from the sale of his own.

If complainants had any claim upon it the claim was barred by their laches and by the statute of limitations long before the death of James D. Tate.

Third.

My opinion is that complainants are not entitled
page 525 } to the M. B. Tate interest in the partnership, later
a corporation, of Robinson Tate & Co.

The larger part of this interest was bequeathed to Rosa C. Tate who afterwards married W. H. Wren & became the mother of complainants. M. B. Tate's will was dated Nov. 22, 1883. It was admitted to probate Sept. 19, 1892.

Prior to M. B. Tate's death his interest in Robinson Tate & Co. was transferred to James D. Tate. Mr. Richard Gorman the only living person who was connected with Robinson Tate & Co., who has been employed by the firm for about 60 years, says that Mr. W. H. McLaughlin, who was a partner in the firm and in large part its manager, said that M. B. Tate wanted his interest transferred to his son James D. Tate. Mr. Gorman went on to say that the interest was transferred. James D. Tate was looked upon and treated as the owner and held himself out as such. M. B. Tate was not consulted about the firm business and never interposed an objection to the transfer nor to James D. Tate's exercise of ownership.

On Jan. 11, 1892, M. B. Tate assigned to his son James D. Tate & to his son-in-law John H. Shuff, Trustees, (1) all of his notes, bonds, accounts, judgments, decrees & claims for

money; (2) All of his stock in joint-stock or incorporated companies; and (3) all of his personal property of every kind & description not enumerated above.

In his will he described his interest in said firm as "my interest in the Mercantile Concern of Robinson Tate & Co., of Lynchburg" and if he had intended to convey it in the trust deed to Tate & Shuff he would in all probability have described it in the same way. The fact that he did not so
 page 526 } convey it, considered along with the other circumstances, indicates strongly that it was not his to convey.

On September 1, 1900, the business of Robinson Tate & Co. was incorporated and John W. Robinson, W. H. McLaughlin and James D. Tate & their wives conveyed a certain lot in Lynchburg to the corporation. One of the recitals in the deed was that M. B. Tate in his lifetime transferred his entire interest in the partnership of Robinson Tate & Co. to the said James D. Tate. It will not be presumed that Mr. Robinson and Mr. McLaughlin joined in such a recital without knowing it was true. If it was not true, James D. Tate was not honest, and yet complainants expressly state that they do not charge him with any fraudulent conduct toward them.

It is fairer and more consonant with the principles of law and equity to infer that this interest was legally and properly transferred to James D. Tate than to presume that James D. Tate committed a fraud upon his nearest kin & a crime against society; or to presume that Mr. Robinson & McLaughlin connived at such misdoings.

If complainants ever had any right to an adjustment on the price of the Rye Valley lands, they being *sui juris*, slept on those rights for twenty-three years before the death of James D. Tate and said nothing about such a claim until after their uncle had passed away and could say nothing in his own behalf.

And if they had any rights in or claims upon the M. B. Tate interest in Robinson Tate & Co. they slept on those rights for forty-one years before the death of James D. Tate & never asserted them in any way until he was dead and
 page 527 } gone and unable to defend himself. For more than 25 of these 41 years all of complainants were *sui juris*.

My reasons in detail for the foregoing conclusions are given in the following 38-page opinion written in long-hand, which will be filed in the Court papers for the benefit of Parties & Council, but which I will not read unless requested so to do.

I.

Opinion.

That Col. James D. Tate died intestate has been positively adjudicated by the Supreme Court of Appeals of Virginia. See *Florence Lee Tate et al. v. J. Robert Wren et al.*, 185 Va. 773.

The sole question in the instant case is whether the Wrens, the complainants herein, are entitled to the M. B. Tate interest in Robinson Tate and Company, including the profits therefrom and interest; and also whether they are entitled to the property contained in the residuary clause of the M. B. Tate will, including profits and interest.

See compl's brief, marked for identification "Considered by W. H. R. Jdg. 3-18-48-W. H. R. Jdg'", at p. 18 thereof.

Beginning near the middle of p. 18 of the aforesaid brief, compl's, by their attorneys, also say:

"It may be helpful to the Court to point out what the Wrens are *not* claiming. (1) To begin with they do not claim one penny of James D. Tate's money in this suit, but on the other hand their claims are based solely upon the will of M. B. Tate and not upon any will of James D. Tate. (2) The Wrens do not question any settlement, decree, judgment or page 528 } any other thing that has had court approval. (3)

The Wren do not claim that James D. Tate ever acted fraudulently with them and do not charge fraud on the part of James D. Tate, but on the other hand the Wrens assert that James D. Tate meant to restore everything and his methods of getting sole control of the M. B. Tate estate was to conserve and finally return the estate to them, or, as the original bill states: 'Your complainants believe to this day that their uncle, James D. Tate, meant to act in good faith toward them.' "

There has been a vast deal of discussin about Trusts—Constructive Trusts, Resulting Trusts and implied Trusts. But the discussion was unnecessary for complainants now say that this case arises out of an Express trust created by a parol agreement.

On page 6 of brief above referred to, compl's say the trust here involved is "an express and continuing parol trust". On p. 9 of same brief they say: "The Wrens did not know until Col. Tate failed to leave a will that he would not comply with his express trust agreement." And on p. 13: "It is admitted that the trust agreement entered into between Col.

Tate and the Wrens on Aug. 29, 1912, is not in writing but was a parol agreement."

From this last statement it is easy to identify the occasion and the occurrence out of which compl's say the Express Trust arose on which this suit is based.

It is set out in detail in secs. 9 & 10 of the original bill, page 5 of amended bill, which again sets out in full the original bill, and on pages 20, 21 & 22 of amended bill.

It is mentioned in re-direct examination of Mrs. page 529 } Edith Wren Whitney, p. 7, Dep. Apr. 27, 1945.

In the deposition of W. H. Wren, same date, Direct Examination, pp. 15-19, p. 22 where W. H. Wren states that defendants' Ex. No. 1, the agreement of Nov. 25, 1912, was executed in pursuance of the agreement with Col. Tate at the conference following the death of Mrs. Amelia Tate;

In the deposition of J. Robert Wren, same date, direct exam. pp. 110-113, cross exam. p. 135-6;

In the deposition of James H. Wren, same date, direct examination, p. 175, 177, 178, 179, 180, 181 (where James H. Wren states that the agreement of Nov. 25, 1912, refers to and is the logical sequence of the meeting of Aug. 29, 1912).

II.

Sec. 9, Original Bill alleges that

Soon after the youngest child, Edith G. Wren (Whitney) became 21 years of age, James D. Tate called complainants together at his home in Chilhowie and without mentioning amounts, or giving any details of any transactions, told complainants that the Mitchell B. Tate estate was indebted to him in a large sum and that he would cancel this indebtedness against their part of the land if complainants would allow him to keep the money derived from the sale of land to Frazier and the sale of timber from the Wrens' land to Cole and Fry, not mentioning any amounts.

To this proposal W. H. Wren asked if the Mitchell B. Tate will did not provide for the sale of the "Rye Valley property" to pay any debts against the estate. To this James D. Tate replied that the "Rye Valley property" was of little value, being rough mountainous poor land, *which was a fact* (underscoring mine).

So your complainants, not questioning the judgment of James D. Tate, agreed for him to keep their moneys derived from the sale of land and timber as aforesaid.

At this meeting James D. Tate told your complainants that the money realized from a sale of part of their lands willed to them by Mitchell B. Tate was held by the Receiver of the Court, but did not tell them that he was the Receiver, nor did he mention the amount, although your complainants afterward found out the amount; their timber which James D. Tate sold to Cole and Fry, when some of them were infants, your complainants do not know to this day the amount of said sale.

Sec. 10, Original Bill is as follows:

Complainants allege that, under the above circumstances the "Rye Valley property" became theirs; that thereafter James D. Tate was a mere trustee of the legal title, that the entire beneficial interest in said "Rye Valley property" became your complainants; that an implied, resulting or constructive trust, in favor of your complainants was thereby created. Also a like trust was created in the other lands in said residuary clause of said will, amounting to 737 acres.

Sec. 11, Original Bill states that

The said "Rye Valley property" which was practically worthless in 1912, at the time of the meeting set forth in paragraph 9 above, but due to the First World War and the urgent demand for Manganese * * * became very valuable; and James D. Tate sold it for \$100,000.00, receiving cash for it.

The amended bill restates the incident of the meeting narrated above, but adds some matter believed to be material.

At page 20, amended bill, the date of the meeting page 531 } ing is given as Aug. 30, 1912.

It is stated that Mrs. Whitney, the youngest of the Wren children, became 21 years of age on Jan. 2, 1912; that Col. Tate ("Uncle Jim") stated that he had settled all the debts against the M. B. Tate estate & that if agreeable all round he would apply the money derived from Cole & Fry timber sale & the J. T. Frazier land sale on the \$35,000.00 estate debt due him in full settlement of all liability against the Wren land, for the debt; he stated that the M. B. Tate will provided that the Rye Valley property was to be sold to pay the estate debts but that the Rye Valley property was of little value at the time; that he had always managed the Wren property successfully & to their best interest & that it had been his mother's wish that he continue to do so; on pages 20-21 it is stated that if the Wrens wanted to go along with him and continue this plan of leaving the management of their property entirely in his hands, he would restore everything to them in due time.

On page 21:

"B. T. Wren spoke up, agreeing with everything Uncle Jim had said and suggesting that the management of the Wren property be continued in his hands in the future just as in the past; without further discussion or question, all the Wrens joined in giving Uncle Jim full authority to continue to manage their property for them exactly as he saw fit."

"Uncle Jim complimented the Wrens on the wisdom of their decision * * * and again assuring them that he would make everything right in the end."

On page 22:

page 532 } "The fiduciary relationship between James D. Tate and complainants which had existed prior to said meeting * * * did continue throughout the life of James D. Tate. * * *

"No settlement was ever suggested or asked for by either party." * * *

They aver that he recognized his duty and obligation to them by devising & bequeathing 70% of his estate to them by his 1933 & 1939 wills. * * * After his death his will was not produced and probated by those responsible therefor."

On page 23

"Complainants, therefore, allege a breach of trust on or about the date of his death, Dec. 21, 1941", & so on.

III.

In reference to the meeting of Aug. 29th or 30th, 1912, Mrs. Edith Wren Whitney said:

"I recall such a conference. All my brothers were there, but what happened at that conference I don't know" (p. 7 of her deposition. Re-direct examination).

W. H. Wren said that

Col. Tate said it was true that the Rye Valley land, particularly, was designated in the M. B. Tate will for the payment of debts but that the land was worth very little, probably not worth near enough to cover this indebtedness, and if it was ever sold an adjustment with us would be made.

That Col. Tate said he would continue to manage the property of the Wrens.

(Direct exam. p. 17.)

That Col. Tate did not say when he would make final settlement, but he, W. H. Wren, got the impression that eventually the Wrens would get everything that was coming page 533 } to them.

Col. Tate "referred to the fact that we were more or less incapable of handling funds and business, and referred to my case particularly. I had just finished up a venture in chicken raising which was very unsuccessful and expensive, so it was no trouble to convince me that I couldn't handle it probably as well as he could, and there was no difficulty there at all in agreeing on the matter."

(Direct exam. p. 18.)

Col. Tate called attention to the successful way he had managed so far and recalled that the Wrens were spendthrifts.

(*Id.* p. 18.)

W. H. Wren went on to say that all of the Wrens were there and all agreed that Col. Tate should continue to handle their affairs just as he had in the past; that later, pursuant to the agreement arrived at at that conference the paper dated Nov. 25, 1912, set out on pp. 15 & 16 of amended bill was sent to him or given to him.

(*Id.* pp. 18-19.)

That he signed the paper.

That he knew about the \$8,000.00 insurance money, the Robinson Tate & Co. interest and about the 600 acre devise (in the M. B. Tate will) to the Wrens, and that from that time (Aug. 29 or 30, 1912) on until Col. Tate's death he never in any way shape or form repudiated that agreement.

W. H. Wren was asked: "Did Col. Tate "deny the trust or ever indicate in any way that it was not continuing?" and answered "no".

(*Id.* pp. 22-3.)

page 534 } *J. Robert Wren* stated the circumstances substantially as W. H. Wren had stated them. He said that Col. Tate stated that he had a considerable debt against the M. B. Tate estate; some \$30,000 as Robt. Wren

remembered it, that was "a sort of lien" on the 600 acres that belonged to the Wrens; that shortly before that time he had sold some standing timber to Cole and Fry and some land to Frazier; that when Will Wren suggested that under the M. B. Tate will the Rye Valley property was to be sold first to pay debts. Col. Tate said: "That property, it is not expedient to sell it at this time. You boys don't know anything about such affairs, but since in the end you boys will have everything you should go along with me and my mother's wish and let me manage it.

He stated that Col. Tate said he had sold some land to Frazier & standing timber to Cole & Fry, not mentioning any amounts at all and also said "I think if you boys agree to it, I will just accept what monies I got and release your land from any lien of any sort." (J. Robert Wren. Direct. pp. 110-11.)

According to this witness, Col. Tate then turned to him and said: "You are just through with a trouble that I bailed you out of at Virginia Polytechnic Institute" and told Will Wren about the chicken farm. About this time Beverly Wren spoke up and said: "I think Uncle Jim's right, that he should continue to manage this affair, particularly as it is Grandma's wish, and since he's already done it." * * * "And Uncle Jim said "very well, it is agreed"; to which we all said "Oh yes, yes, sir". The witness said: "I was very glad to say "yes". (*Id.* pp. 111-12.)

He referred to several instances when he concluded from what his Uncle Jim said, that it was Col. Tate's page 535 } intention to restore his property to him when Col. Tate died.

On cross examination, p. 135, he stated that he signed an agreement as to his grandfather's debts and a release of the Wrens lands from any liability for that and that at that time Col. Tate told him he had a judgment for something like \$34,000.00.

The agreement dated Nov. 25, 1912, under the hand & seal of the Wrens & Col. Tate was filed as Exhibit 3 to his cross examination.

(J. Robert Wren. Cross. pp. 163-5.)

James H. Wren stated that as to the conference on or about Aug. 30, 1912, his memory was dim; that Col. Tate said the Wrens ought to trust him to continue the management of their financial affairs and said about as follows: "If you boys go along with me, eventually it will be yours anyway, and your

future, your financial welfare will be far better served than if you try to manage it yourself or fail to let me go ahead with it" (p. 175). James H. Wren thought that if anything arose, Col. Tate was handling it for the Wrens' best interest to be settled at a time Col. Tate decided was the proper time, and James H. Wren never questioned it (p. 177). He stated that Col. Tate mentioned that M. B. Tate's estate was indebted to him for some \$34,000.00 and told of some of the Wren's property that he sold and thought it was proper to apply that money against the Wren's share of this lien (p. 178). The agreement releasing the Wren lands from the M. B. Tate debts certainly referred to the verbal conference of Aug. 29th or 30th, 1912. It was the logical sequence of that meeting (p. 181).

It appears, I think, from the foregoing testimony of complainants that two matters only were discussed.

A. The monies received by Col. Tate from timber sale to Cole and Fry and land sale to Frazier, which Col. Tate proposed that he keep, and *therefor* release the Wren lands from any sort of lien for the debts of the Mitchell B. Tate estate; and

B. The proposal by Col. Tate that he continue to manage the affair of the Wrens, (1) because it was his mother's, their grandmother's wish, that he do so; (2) because the Wrens were inexperienced. One of them had already been unsuccessful in a business venture and another, apparently, in Col. Tate's opinion was reckless, and all of them he feared were spendthrifts, and (3) because he believed he could manage their estate better than they could, that their financial welfare would be far better served under his management than if they tried to manage it themselves. To all of which they agreed.

It was brought out in the complainants' evidence that W. H. Wren got the impression at this conference that eventually the Wrens would get everything that was coming to them (W. H. Wren p. 17-18); that at this conference Col. Tate said "since in the end you boys will have everything, you should go along with me and my mother's wish and let me manage it" (J. Robt. Wren p. 111; that "if you boys go along with me eventually it will be yours anyway" (Jas. H. Wren p. 175); and that at this conference, Col. Tate said that if the Rye Valley property was ever sold an adjustment would be made with the Wrens (W. H. Wren, p. 17).

It was also brought out in complainants' evidence that later "pursuant to the agreement arrived at at that conference the paper dated Nov. 25, 1912, set out in pp. 15, 16 of amended bill" was executed.

(W. H. Wren pp. 18-19; J. Robt. Wren, 163-65; James H. Wren p. 181.)

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IV.

It is difficult for me to understand why complainants seek to establish a trust in reliance on the conference of August 29th or 30th, 1912, in absolute disregard of the written contract dated Nov. 25, 1912, signed and sealed both by James D. Tate and themselves, unless complainants had completely forgotten that they had executed such an instrument. That contract was brought into the case by the defendants who filed it as an exhibit with their answer and introduced it in evidence by Robt. J. Wren, one of the parties and a witness for complainants and again filed it as an exhibit to his deposition. After it was brought into the case by the defendants, complainants continued to ignore its devastating effect except to say in their amended bill (p. 36) "that in the light of the provisions of the will of M. B. Tate, and the facts set out in the bill and amended bill and exhibits there was no consideration for the agreement of Nov. 25, 1912, executed pursuant to the verbal trust agreement of August 30, 1912, as a release or receipt in full as asserted in the answer of defendants, but that said agreement evidences the trust agreed to between James D. Tate and complainants on August 30, 1912, and that by reason thereof and of the facts stated in the bill and amended bill and exhibits, all of the real estate devised to James D. Tate by the residuary clause of the M. B. Tate will, and the profits and increase therefrom and interest on the funds arising therefrom became trust property and funds in the hands of James D. Tate for the benefit of complainants."

(The following observations on the above quotation from the amended bill are warranted, I think:

page 538 } 1st There was a consideration for the agreement of Nov. 25, 1912, as complainants own evidence shows, and as will hereinafter be pointed out.

2nd The words quoted constitute an admission that the verbal (so-called) agreement was merged in the written agree-

ment because it says the written agreement is evidence of the alleged trust & was entered into in pursuance of said verbal conference.

3rd When the written agreement is read it is necessarily seen that it means exactly the opposite of what the statement says it means.)

A.

The conference of Aug. 29 or 30, 1912, did not create a trust.

The evidence narrated above, in my opinion, entirely fails to support the bill, particularly sec. 10 thereof, and the amended bill. It contradicts complainants position as to the Residuary lands in the M. B. Tate will & throws no light on the issue as to the M. B. Tate interest in Robinson Tate & Co.

The verbal conference was had Aug. 20 or 30th, 1912, and was not mentioned until after Col. Tate's death in December, 1941, nearly thirty years thereafter.

The conference was between complainants and Col. Tate. Suit is not brought on it until after the latter's death. There is no corroborating evidence of the conference. On the contrary, its meaning, as interpreted by complainants in sec. 10 of original bill, is contradicted by the agreement of Nov. 25, 1912, & by the record of M. B. Tate's interest in Robinson Tate & Co., as will presently be pointed out.

The verbal conference, in so far as it mentioned Col. Tate's keeping the money received from the sale of timber to Cole and Fry and from sale of land to Frazier was merged in and consummated by the agreement of Nov. 25, 1912. By that agreement Col. Tate was authorized to keep the money from said sales and he thereupon released the Wren lands from any liability or lien on account of the debts of the Mitchell B. Tate estate. The debts were to be charged exclusively to the other lands of Mitchell B. Tate, which it was agreed should belong to James D. Tate. This agreement was under the hand and seal of all the parties.

The verbal conference insofar as it mentioned Col. Tate's proposal to manage the Wrens' lands or affairs, according to complainants' own evidence, was prompted, not by any promise or consideration moving from the Wrens to Col. Tate, but by Col. Tate's desire to comply with the wish of his mother, who was the grandmother & who had been the guar-

dian of the Wrens, by his belief that the Wrens were not as experienced as himself & by his belief that he could manage their affairs better than they could themselves. Col. Tate's proposal, as shown by complainants' own exposition of the conference, was prompted by his interest in his niece and nephews. If the proposal was prompted by any desire of his to get the property in his own hands for his own enrichment, then it was a piece of base deception, a gross fraud, as it seems to me, which is disavowed by the complainants in their solemn assertion quoted near the beginning of this opinion, that they "do not claim that James D. Tate ever acted fraudulently towards them and do not charge fraud on the part of James D. Tate;" and is refuted by all the events that took place thereafter.

page 540 } If the idea of a trust, and this suit is based on Col. Tate's statement as narrated in pp. 20, 21 Amended Bill, that if the Wrens wanted to go along with him and continue this plan of leaving the management of their property entirely in his hands, he would restore everything to them in due time," the agreement of Nov. 25, 1912, effectually proves the execution of the trust. By said agreement the Wrens were to have the lands devised to them free of any lien or charge on account of Mitchell B. Tate's indebtedness, and James D. Tate was to have the lands devised to him including the residuary lands and James D. Tate was responsible for the settlement of that indebtedness. The Wren lands were finally sold and accounted for and complainants are not claiming anything in this case on account of those lands.

So also, if the idea of a trust, and this suit, is based on Col. Tate's statement that "since in the end you boys will have everything, you should go along with me and my mother's wish and let me manage it," the agreement of Nov. 25, 1912, & subsequent events in pursuance of it prove the execution of the trust, so far as the lands devised in the Mitchell B. Tate will are concerned.

The agreement of Nov. 25, 1912, was signed and sealed by all of the complainants and by James D. Tate. It is filed as exhibit 1 to defendants' answer. It is set out in full on pages 15, 16 of the amended bill, and is introduced in evidence on cross examination of J. Robert Wren filed as ex. No. 3 thereto and copied in full at page 163-4 of his depositions, cross examination. It is clear-cut, unequivocal & page 541 } unambiguous. It provides (1) that the money received from the sale of the Wrens' timber off the land willed to them by M. B. Tate to Cole and Fry and from

the sale of their land to Frazier is to go to James D. Tate in full settlement of any and all liability that may rest on the Wrens' land for a debt due the said James D. Tate by the estate of M. B. Tate per decree of Circuit Court of Smyth County, Va., entered Apr. 30, 1904, or any other decree in said case.

(2) That Tate accepts the money in full settlement & agrees to release the lien created by said debt from the Wrens' land whenever necessary for a sale of it or any part thereof. (3) That the Wrens have no further interest in said debt or its payment, but that (4) Tate is to look solely to other lands of M. B. Tate's estate for the payment, and (5) that Tate thus becomes the sole owner of all the other lands of which M. B. Tate died seized wherever located.

If the complainants had any idea that the verbal conference of Aug. 29 or 30, 1912, was a contract that created an equitable title in them for all of the M. B. Tate lands legal title to which should be held thereafter by James D. Tate in trust as alleged by them in sec. 10 of original bill for them, that idea was obliterated and the supposed oral contract was annulled and rescinded by contract under the hand and seal of all the parties on Nov. 25, 1912. The ideas or notions that James D. Tate held legal title as trustee for the Wrens and as sole owner for himself are contradictory. The two ideas could no more exist & be operative contemporaneously than total darkness and perfect light could exist & be operative at the same time and in the same place.

page 542 } The contract of Nov. 25, 1912, amounted to an equitable partition of the M. B. Tate lands by which the Wrens took the lands devised to them by M. B. Tate, unencumbered & free of any actual or potential liability for the indebtedness of M. B. Tate; and James D. Tate took all of the other M. B. Tate's lands, subject, however, to the payment of said indebtedness.

But complainants say that James D. Tate agreed to manage their property for them in-as-much as they would have everything in the end. Here, again, if that was a contract it was rescinded by the contract of Nov. 25, 1912, which provided which lands should be the Wrens' and which should be James D. Tate's. If the verbal conference was a contract to manage the Wrens' lands for them, the contract was complied with, for the evidence shows that James D. Tate did manage their lands until they were sold and accounted for and complainants are not claiming anything on that account their sole claim being that they are the owners of the residuary lands, the proceeds thereupon & interest thereon; and that they are

the owners of M. B. Tate's interest in Robinson Tate & Co., the proceeds therefrom and interest thereon.

Nevertheless complainants seek to avoid the contract of Nov. 25, 1912, on the ground that there was no consideration for it.

Complainants base their conception of a trust squarely and exclusively on the verbal conference of Aug. 29 or 30, 1912, as set out in Sec. 9 of the original bill and in paragraph 6 of sec. 1 of amended bill. The original bill does not mention the agreement of Nov. 25, 1912. This agreement page 543 } was brought into the case by the answer of the defendants. In paragraph 2 of sec. VI (p. 36) of amended bill complainants say "there was no consideration for the agreement of Nov. 25, 1912, executed pursuant to the verbal trust agreement of Aug. 30, 1912, as a release or receipt in full as asserted in the answer of defendants." That this conclusion is erroneous is demonstrated, I think, by a consideration of the pertinent portions of the M. B. Tate will as set out in the amended bill. (See Sec. III, p. 25 thereof.)

By said will, M. B. Tate made certain bequests & devises to his son, James D. Tate and to his daughter, Mrs. Rosa Tate Wren, the mother of complainants. By said will he also devised and bequeathed to his said son, James D. Tate, "all the rest and residue of my property, both real and personal. * * * Out of this rest and residue above mentioned I require my son James D. Tate to pay all my just debts and funeral expenses and I require him also to pay out of the same one thousand dollars to my friend Daniel Trigg of Abingdon and one thousand dollars to my friend James H. Gilmore of Marion, which sums I bequeath to them, and if he has to sell any of this property to pay the debts and legacies above mentioned, I desire him to sell first what is known as my Rye Valley property, which is included in this rest and residue above mentioned."

Thus, it seems, that it was mandatory upon James D. Tate to pay the debts but not absolutely mandatory upon him to pay them out of the residuary estate. If he paid the debts out of his own estate, the residuary estate passed to him by the very terms of the will. If the residuary estate was insufficient to pay the debts, the other estate of M. B. Tate, page 544 } even though specifically bequeathed or devised, would be liable for their payment. This conclusion, I think, is in accord with the Report of Commissioner J. R. Sexton as set out in Sec. III, p. 28 of the Amended Bill. It is there said: "Commissioner Sexton's report of Feb. 10, 1906, covered only the lands of M. B. Tate in Smyth & Wash-

ington Counties, and reported that the residuary lands in Smyth County were first liable for the payment of said debts, and that the lands not liable are the specific devises to Mrs. Amelia Tate, J. D. Tate and Mrs. Rosa Wren and children, lying near Chilhowie in the Counties of Smyth & Washington and that the rental value thereof was \$2,500.00 per year."

The foregoing conclusion is also supported by the letter of Feb. 6, 1906, from Mr. Wilson, of Wilson & Manson, Lynchburg, to Col. Tate, filed as an exhibit in the case. Say counsel for defendants' in brief: "From this letter it is apparent that all parties were of opinion, which was in accordance with the facts then existing, that the mountain land and outlying lands would not pay the indebtedness and it would be necessary to go against the lands specifically devised to the Wrens and Col. Tate."

It is nowhere denied in this record, but on the contrary is expressly admitted in part & in part, I think by necessary implication, that on Nov. 25, 1912, the residuary lands were totally inadequate to pay the debts of the M. B. Tate estate. It is certainly admitted that at that time the Rye Valley lands were practically worthless. (Sec. 11, original bill.) James D. Tate had already at that time taken a decretal judgment against the estate for \$34,924.61, with interest, the page 545 } judgment having been rendered Apr. 30, 1904.

Thus even though the devises to James D. Tate may have been larger than those to Mrs. Rosa Tate Wren and her children, still there was not only a potential but an actual liability on the Wren lands for the indebtedness of the M. B. Tate estate. James D. Tate proposed to release the Wren lands from the liability if the Wrens would allow him to keep the money from the Cole & Fry & Frazier sales. All of the Wrens being *sui juris* agreed to this proposition. James D. Tate proposed to charge all of the lands, other than the Wren lands with the payment of the debts provided it should be understood that such other lands were his. Here again, all of the Wrens agreed to his proposition.

There is no ambiguity, as far as I can see, in the agreement of Nov. 25, 1912. So far as the record shows, the Wrens have never been called on to pay any of the M. B. Tate indebtedness. The title to their lands, which was cloudy, was cleared and without a doubt, as I see it, there was a valuable consideration for this agreement as contained in the instrument of Nov. 25, 1912.

The large indebtedness of the M. B. Tate estate was paid. At any rate, no creditor of the estate is here complaining.

The expressions that "eventually the Wrens would get

everything that was coming to them" and that "if you boys go along with me, eventually it will be yours anyway" were uttered at a verbal conference about three months, only, before the execution of the written contract of Nov. 25, 1912, in pursuance, as complainants themselves say, of the verbal conference. The expressions were never mentioned until this suit was brought nearly thirty years after they were uttered, nor was suit brought, or any claim based, upon page 546 } them until after the death of Col. Tate, the other party to the contract.

The expressions seem to belong to that class of gratuitous & loose statements which the courts often declare, have no probative force.

Ingles v. Greear, 181 Va. 838, 841-3, 846.

Hunter v. Bane, 183 Va. 165, 172.

If the idea of a trust, and this suit, is based on Col. Tate's statement in the verbal conference that "if the Rye Valley property was ever sold an adjustment would be made with the Wrens," the complainants are again confronted with the written contract, signed and sealed by all of the parties, of Nov. 25, 1912, which complainants themselves say was entered into in pursuance of the verbal conference, and is evidence of it.

The uncorroborated verbal statement is if the Rye Valley property is ever sold an adjustment will be made with the Wrens. The contradictory written agreement made less than four months thereafter, in pursuance of the verbal statement, is that by virtue of Col. Tate's having paid the indebtedness of the M. B. Tate estate & having taken judgment against the estate for something over \$34,000.00 and having released the Wrens' land from liability for the debts of the estate or on account of said judgment, he should have the Wrens' money received from sale of timber to Cole & Fry & land to Frazier and that Tate becomes the sole owner of all the other lands of which M. B. Tate died seized wherever located. He therefore became the sole owner—not trustee—of the Rye Valley and other residuary lands.

page 547 } The verbal statement was necessarily merged in, or rescinded superseded or contradicted by the written agreement. The verbal statement is not corroborated but is contradicted. It was made nearly thirty years before it came to light by the institution of this suit after the death of Col. Tate.

The statement was made in August, 1912. The Rye Valley

land was sold several years later, to-wit on Aug. 19, 1918 (amended bill p. 21) during World War I; for \$100,000.00 & yet complainants never asked Col. Tate for any part of it or for any adjustment but after his death when he cannot speak for himself, they claim that he held the Rye Valley lands in trust for them—that they are the beneficial owners & he merely a trustee.

It is impossible for me to escape the conclusion, that the verbal conference of Aug. 29 or 30, 1912, did not create a trust of any sort, and that if by any possibility it did do so, it was rescinded, canceled & annulled by the agreement of Nov. 25, 1912, entered into in pursuance & as evidence of said verbal conference.

If from any standpoint Col. Tate could have been considered bound by a verbal promise to make an adjustment with complainants on the sale price of the Rye Valley property if it should ever be sold, the promise was broken when the sale was made during World War I and the proceeds appropriated by Col. Tate. A right of action then accrued to complainants more than 20 years before the death of Col. Tate. It might have been his personal privilege to waive the Statute of Limitation, but as I understand it, his personal representatives cannot do so.

B.

Complainants are not entitled to said Residuary page 548 } Lands. On the issue, defined by complainants in their brief quoted at the beginning of this opinion, my conclusion is that complainants are Not entitled to the property contained in the residuary clause of the M. B. Tate will, nor to the profits therefrom nor interest thereon.

Title to that property, in my opinion, was perfected in James D. Tate by the will of M. B. Tate; by the payment by James D. Tate of the indebtedness of M. B. Tate; and by the agreement of Nov. 25, 1912; and that any right of action of complainants on any real or supposed promise of Col. Tate to make an adjustment on the Rye Valley Property when sold, would be barred by the Statute of Limitations if a proper suit of action were brought to enforce such promise, which this suit is not.

C.

Complainants are not entitled to M. B. Tate interest in Robinson Tate & Co.

The remaining issue, as defined by complainants, is whether complainants are entitled to the M. B. Tate interest in Robinson Tate & Co., including the profits therefrom and interest.

The M. B. Tate will was dated Nov. 22, 1883. Codicil No. 1, not dated. Codicil No. 2 dated Sept. 25, 1886. Will probated Sept. 19, 1892, near the time of M. B. Tate's death, as alleged in original bill.

M. B. Tate & his wife, Amelia, had three children. A son, James D. Tate & two daughter, Rosa Tate who married W. H. Wren, and Mittie Tate who married John H. Shuff.

In said will M. B. Tate bequeathed to his daughter Rosa C. Wren, during her lifetime his "interest in the mercantile concern of Robinson Tate and Co. of Lynchburg, ex-
page 549 } cept the sum of Ten thousand dollars, heretofore bequeathed to my son James D. Tate and Five Thousand dollars heretofore bequeathed to my wife, Amelia Tate, * * * and if at her death she should have any children or the descendants of any children living, then over to them, but if at her death there should be no children of her or any descendants of her children living, then the property above mentioned shall go to my son James D. Tate, if he be then living or to his children if he be dead & leave children, but if he die without children living at his death, then to such persons as he may devise & bequeath the same to."

W. H. Wren, husband of Mrs. Rosa Wren and father of complainants, was a partner in the firm of Robinson Tate & Co. & participated largely in its management. He became involved in some business transactions, as a result of which both the firm of Robinson Tate & Co. & M. B. Tate became also involved. M. B. Tate put his own estate in jeopardy in an effort to straighten these matters out.

The evidence, I think, supports the position taken by the defendants that M. B. Tate transferred his interest in Robinson Tate & Co. to his son James D. Tate, although there is no written evidence to that effect except the records of the firm, if that can be considered written evidence.

Mr. Richard Gorman, of Lynchburg, who was 80 years old when he testified on Nov. 24, 1944, went to work for Robinson Tate & Co. in 1884 and was with them until his deposition was taken on the date aforesaid, a period of about 60 years. He testified that Mr. W. H. McLaughlin, who had been in active management of the business, decided about January 1st, 1919, that he wanted to quit & that he retired,
page 550 } whereupon he, (Mr. Gorman) succeeded him & has had charge of the running of the business since that time.

(Dep. Richard Gorman, p. 1.)

He also stated that he did not think there was any other living man that would know anything about those things he had testified about. (*Id.* p. 30.) He was called by complainants but I think defendants made him their witness as to the following questions on cross examination, and the answers: Q. "You don't know how James D. Tate got his interest in the partnership?" A. "Oh, yes, his father transferred his interest to him before his death because he wanted him to have his interest in the business and wasn't any entries or anything made about that except James D. Tate was recognized as the owner of the interest that M. B. Tate had. That is my recollection of the way it was fixed. (*Id.* p. 11.)

Q. "Did I understand you to say that Major M. B. Tate said that he wanted James D. Tate to have the interest that he had in it?" A. "That is what W. H. McLaughlin who was running the concern told me at the time; that he wanted to give his interest to James D. Tate. That is my recollection of what happened. I haven't got any records on that. I am going by my recollection. At any rate Mr. M. B. Tate didn't take any interest in anything done about the concern. We consulted James D. Tate instead of M. B. Tate. (*Id.* p. 12.)

On January 11, 1892, M. B. Tate executed a deed of trust for the benefit of his creditors to James D. Tate & John H. Shuff, Trustees, and conveyed to them:

(1) All notes, bonds, accounts, judgments, decrees, claims for money or any other thing and demands be-
page 551 } longing &c &c to M. B. Tate.

(2) All of the stock of every kind and description which * * * M. B. Tate may hold own or be entitled to * * * in each and every joint stock and incorporated company in which M. B. Tate may have an interest.

(3) All the personal property of every kind character and description belonging to the said M. B. Tate not above specifically enumerated, including not only the personal property in the possession of the said M. B. Tate but including also all the personal property and estate to the possession of which he may be entitled. (See "Notes of Argument for complainants," 11 & 12.)

If M. B. Tate had intended to convey, by said deed of trust any interest in Robinson Tate & Co., he would probably have described it as he did in his will as "My interest in the mercantile concern of Robinson Tate & Co., of Lynchburg." (See "Notes of Argument &c. p. 9.)

If, at that time, he owned an interest in Robinson Tate & Co., it would have been safer, it seems to me, to have included it in the trust deed. His creditors, I take it, were not bound by the trust deed. They could have sought to subject to the payment of their claims any property he had and his interest, if any, in Robinson Tate & Co. could have been easily reached by them. The fact that no such interest was included in the deed of trust is a strong indication to my mind that, at that time, M. B. Tate owned no such interest.

On Sept. 1, 1900, the business of Robinson Tate & Co. was incorporated. One of the steps taken to incorporate was a deed dated Sept. 1, 1900, from Jno. W. Robinson, W. H. McLaughlin, and James D. Tate, "late partners as Robinson Tate & Co.", and their wives, conveying certain page 552 } property in Lynchburg. One of the recitals in the deed was that M. B. Tate in his lifetime transferred his entire interest in the partnership of Robinson Tate & Co. to the said James D. Tate. (See amended bill pp. 31, 32.)

Mrs. Edith Wren Whitney, the youngest of the Wren children was born Jan. 2, 1891, and therefore became 21 yrs. of age on Jan. 2, 1912. (Amended bill, sec. 1.)

The recital in the aforesaid deed from James D. Tate & others that M. B. Tate in his lifetime had transferred to James D. Tate his entire interest in Robinson Tate & Co. stood unchallenged until after the death of James D. Tate on Dec. 21, 1941, only a few days less than 30 years after the youngest of the Wren children had become of age.

The interest of M. B. Tate in Robinson Tate & Co. was transferred to James D. Tate before the death of M. B. Tate. James D. Tate treated it as his own and was recognized as the owner. W. H. McLaughlin a partner, actively engaged in the management of the concern, stated that M. B. Tate wanted James D. Tate to have it. W. H. McLaughlin's statement is not sworn to, but Richard Gorman swears that McLaughlin made the statement. If M. B. Tate did not direct the transfer, McLaughlin made a false statement and connived at a fraud.

In 1900, when the business of Robinson Tate & Co. was incorporated, James D. Tate recited in his deed that M. B. Tate had transferred his entire interest in Robinson Tate & Co. to him, James D. Tate. This was a false statement if James D. Tate was not the owner of the interest and if he was not the owner he was a dishonest man.

M. B. Tate never questioned it & when he made the assign-

ment to James D. Tate & John H. Shuff he did page 553 } not mention any interest in Robinson Tate & Co.

Under all of the circumstances it seems fairer and more consonant with principles of law and equity to infer that M. B. Tate's interest in Robinson Tate & Co., was properly and legally transferred to his son James D. Tate than to presume that James D. Tate committed a fraud upon his nearest kin and a crime against society, or that W. H. McLaughlin & others interested in Robinson Tate & Co., connived at such misdoings.

Fraud must be proved by cogent and convincing evidence—It is never presumed—And complainants say in their brief that they do not charge that James D. Tate ever acted fraudulently towards them.

I cannot escape the conclusion that M. B. Tate prior to his death transferred his interest in Robinson Tate & Co. to his son, James D. Tate. M. B. Tate had no such interest when he died & therefore no such interest passed by his will.

On the other hand, if M. B. Tate did not transfer said interest to James D. Tate, nevertheless James D. Tate solemnly asserted that it was his in 1900 & for more than 41 years treated it as his own. The youngest of complainants became 21 years of age in January 1912—For a few months less than 30 years after all of the complainants had become *sui juris* they slept upon their rights, if any, until after their uncle's death, without at any time asserting them.

If complainants were ever entitled to the M. B. Tate interest in Robinson Tate & Co., it seems undeniable that the assertion of such rights are now barred by the Statute of Limitations.

On page 21 of Original Bill complainants allege page 554 } a breach of trust on or about the date of Col. Tate's death Dec. 21, 1941.

It has been shown, however, that if Col. Tate was bound by trust or promise as to the Rye Valley lands, he breached the trust & broke the promise during World War I when he sold the lands & kept the money, more than 20 years before his death.

It has also been shown that if Col. Tate did not own the M. B. Tate interest in Robinson Tate & Co., he at any rate claimed it and solemnly asserted under his hand & seal in 1900, when the business was incorporated, that it was his. If he ever held that interest in trust he breached the trust 41 years before his death.

Until the Supreme Court of Appeals decided otherwise in the former suit of *Florence Lee Tate, et al., v. J. Robert Wren*

et al., 185 Va. 773, I thought the evidence in that case was sufficient to rebut the presumption that Col. Tate had revoked his last will, and even now complainants seem to think that he intended to bequeath and devise a large part, probably 70% of his estate to them. Until a short time before his death he may have so intended, but, if so, he changed his mind, and in my opinion this record fails to prove that he was under obligation, either by trust or contract, to make a will.

However, even though Col. Tate died intestate—as he had the right to do—these complainants have received much from him.

In the former case of *Tate v. Wren*, 185 Va. 773 at p. 780, the court said “the record discloses that Col. Tate had strong affection for his niece and nephews.” This record shows that for more than fifty years they looked upon him almost as if
page 555 } he were their father, and that he was kind con- siderate and watchful of their best interests.

They, themselves, say that “From the death of their father, throughout complainants’ childhood and adult life, ‘Uncle Jim’ was a father to them until the day of his death. He made frequent visits to the farm at Chilhowie during the ten years he lived in Lynchburg, from 1892 to 1902, to visit the family and to superintend the farming operations. Frequently on such visits he brought presents to each of complainants. He played and hunted with them while on such visits, and after he moved to Chilhowie. He encouraged them in their school work and taught them habits of economy and thrift. As they grew older he employed some of them in his businesses and associated some of them in business with him. They, successively, one at a time, as they grew older, lived at Terrace Hall with Uncle Jim and Aunt Florence, until they married or left Chilhowie.”

And upon Col. Tate’s death intestate these complainants, as his sole heirs at law, received real estate which, subject to the widow’s dower, was worth in excess of one hundred thousand dollars. Said the Court in *Tate v. Wren*, *supra*, at p. 776 (185 Va.) “The estate consisted of more than four hundred thousand dollars in personal property, and in excess of one hundred thousand dollars in real estate” and at page 781 “Mrs. Tate, the nephews and niece treated the estate as though Col. Tate had died intestate, and the real estate, with the exception of the home place, was sold. Mrs. Tate sold her dower interest to the nephews and the niece, and they, in turn, treating themselves as heirs of Col. Tate, and asserting that he had died intestate, sold these properties.

Unless I, myself, am mistaken, complainants
 page 556 } have proceeded from a mistaken view of the law
 in some particulars and, possibly, in ignorance
 of some vital facts which, but for their indifference, or maybe,
 negligence, or laches, they could and should and would have
 discovered from twenty to forty years before the death of
 Col. Tate.

I believe my conclusions are supported by the authorities.

As to Parol Trusts in real estate & this character of evidence to establish them see:

Jesser v. Armentrout, 100 Va. 666, 674.

Young v. Holland, 117 Va. 433, 435, 443-4.

Shield v. Atkins, 117 Va. 616, 619.

Berry v. Berry Ex'or. 119 Va. 9, 12.

Taylor v. Delaney, 118 Va. 203, 206.

Page 1. Page, 132 Va. 63, 69.

Hunter v. Bane 152 Va. 165.

Pomeroy's Eq. Jur., 3rd ed. Sec. 1008.

As to voluntary and gratuitous statements or casual conversation and loose declarations of trust, see:

Hunter v. Bane, 152 Va. 165, 172.

Ingles v. Greear, 181 Va. 838, 841-43, 846.

As to the danger of sleeping upon one's rights and not asserting them until after the death of the other party to the transaction, or until after the lapse of many years, see:

Code Va. Sec. 6209.

Hunter v. Bane, 152 Va. 165.

Harrison v. Tilson et al., 23 Gratt. 212, 223.

Covington v. Griffin, 98 Va. 124, 128-9.

Tate v. Jones, 98 Va. 544, 547.

Hatcher v. Hall, 77 Va. 576.

Gibboney v. Kent, 82 Va. 383.

page 557 } *Milligan v. Milligan*, 145 Va. 184; 133 S. E. 672,
 where parent-child relationship did not exempt
 compts. from exercise of ordinary prudence and diligence.

Hagan Estate v. New York Mining Co., 184 Va. 1064, 1074-5.

As to Family Settlement & compromise, see

Weade v. Weade, 153 Va. 540.

As to the merger of prior oral negotiations or conversations in a later written agreement in reference to same subject matter, see

Mathieson Alkali Works v. Va. Banner Coal Corp., 147 Va. 125.

Jones v. Franklin, 160 Va. 266.

Stewart Warner Corp. v. Smithey, 163 Va. 476.

Cox v. Parsons, 165 Va. 575.

Wood v. Southern Shale Brick Corp'n., 173 Va. 364, 368.

Godwin v. Kearns, 178 Va. 447, 451.

The contract of Nov. 25, 1912, was signed & sealed after all of complainants had become of age. The sanctity and obligation of contracts are regarded so essential to the public welfare, that where they are freely & voluntarily made by persons *sui juris*, the impairment of their obligation is forbidden by our organic law.

Broaddus v. Broaddus, 144 Va. 727; 130 S. E. 794, 795.

Where a *cestui que* trust, who is *sui juris*, has a settlement with the trustee, which is acquiesced in for many years, such settlement will not be disturbed though some rights of the *cestui que* trust may have been violated thereby. So even if James D. Tate was a trustee, which I think he was not, complainants would still be bound by the settlement as to Rye Valley & other residuary lands.

page 558 } *Farrish et al., v. Wayman et al.*, 91 Va. 430, 436,
Syllabus 3.

The complainants knew or by the exercise of any sort of care & diligence would have known all about the Robinson Tate & Co. interest; and about the sale of the Rye Valley land, many years before the death of Col. Tate.

Persons cannot close their minds to every avenue of information and knowledge, benumb their acquisitive interest with indifference and subsequently expect the Court to relieve them from their self-imposed ignorance.

Broaddus v. Broaddus (130 S. E. at p. 801) and *Farrish v. Wayman*, *supra*. *Milligan v. Milligan*, 145 Va. 184.

My opinion is that complainants have failed to establish the trust alleged in their bill and amended bill, and that they are not entitled to the residuary lands of the M. B. Tate will nor to the M. B. Tate interest in the firm of Robinson Tate & Co. I am of the opinion that the law, the evidence and the equities of this case are with the defendants & that complainants suit must be dismissed.

W. H. R. Jdg. 5-17-48.

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DECREE.

Entered May 17, 1948.

This cause came on a prior day to be heard on the papers formerly read, the depositions of complainants and defendants and exhibits filed therewith, and was argued by counsel.

On consideration whereof, and the court having maturely reached its decision, after taking time to consider, and being of the opinion for reasons stated in writing and made a part of the record that the law and the evidence are with the defendants, and that the complainants are not entitled to the relief prayed for in their original and amended bills of complaint, doth so ADJUDGE, ORDER AND DECREE, and it is further ADJUDGED, ORDERED AND DECREED that the original and amended bills of the complainants be, and the same are, hereby dismissed, and that the defendants, Florence Lee Tate, William Tate Graham and The Marion National Bank, Administrators of the estate of James D. Tate, deceased, and Florence Lee Tate, William Tate Graham and The Marion National Bank, a corporation, individually, have and recover from the complainants, W. H. Wren, J. H. Wren, B. T. Wren, J. Robert Wren and Edith G. Whitney, their costs in their behalf expended in this cause.

Whereupon, the complainants, by counsel, excepted to the action of the court in dismissing said original and amended bills and in rendering said judgment against said complainants, and having signified their intentions to apply to the Supreme Court of Appeals of Virginia for an appeal, it is ORDERED that execution of this decree be suspended for 90 days from this date upon the complainants, or someone for them, executing a suspending bond within fifteen
page 560 } days from the entry of this decree in the penalty of \$100.00, with surety to be approved by the clerk of his court, conditioned according to law.

Enter this, May 17, 1948.

W. H. R. Judge.

page 561 } STIPULATION OF COUNSEL FOR RECORD.

(Filed July 23rd, 1948.)

It is hereby stipulated and agreed between counsel for the parties to the cause of W. H. Wren, et al., v. Florence Lee Tate, et al., that the record on appeal shall contain the following:

1. The pleadings, motions, decrees, stipulations, depositions, testimony, and other papers referred to in the Index to the transcript, and the exceptions taken in the decrees and depositions, which index and transcript are here referred to and made a part hereof, by reference.

2. The exhibits referred to and described in the "Descriptive Index of Exhibits", a copy of which is attached to the transcript, and made a part hereof, by reference, and which exhibit it is agreed shall not be copied but shall be sent up as a part of the record.

3. This stipulation.

This July 14th, 1948.

VERNON C. BARKER,
HENRY ROBERTS,
Counsel for Appellants.
C. E. HUNTER,
S. B. CAMPBELL,
Counsel for Appellees.

page 562 } CERTIFICATE OF JUDGE.

I, Walter H. Robertson, Judge of the Circuit Court of Smyth County, Virginia, do hereby approve the foregoing record, in the case of W. H. Wren, et al., v. Florence Lee Tate, et al., which has been agreed to by counsel by stipulation duly signed, and containing 567 pages numbered consecutively, together with the exhibits referred to in the "Descriptive Index of Exhibits", attached to the transcript, which exhibits are not to be copied, but shall be sent up as a part of the record.

This 21st day of July, 1948.

WALTER H. ROBERTSON, Judge.

page 563 } CLERK'S CERTIFICATE.

I, H. L. Kent, Clerk of the Circuit Court of Smyth County, Virginia, hereby certify that the foregoing is a true, full and correct copy of the record and proceedings had in the Chancery Cause, lately pending in the Circuit Court of Smyth County, in which W. H. Wren, et al., are complainants, and Florence Lee Tate, et al., are defendants, as the same appears either of record or on file in my office;

Together with those certain exhibits, which have not been copied, by request of counsel, and which are referred to and described in the "Descriptive Index of Exhibits", a copy of which is attached to the transcript, and are hereby certified as a part of the record in said cause, and sent up to the Clerk of the Supreme Court of Appeals, Richmond, Virginia, as a part of the record, as requested by counsel for the parties in the foregoing stipulation.

I further certify that C. E. Hunter and Stuart B. Campbell, Attorneys for the defendants, have had notice of the intention of the complainants to apply for the foregoing transcript.

Given under my hand this 23rd day of July, 1948.

H. L. KENT, Clerk.

By: RUTH ALLEN, Deputy Clerk.

Clerk's Fee \$2.50.

Pages 564-565-566 index.

page 567 } DESCRIPTIVE INDEX OF EXHIBITS.

Exhibits for Complainants:

1. Certified and other exhibits to Original Bill and Amended Bill. See Index at front of bound volume of these exhibits.
2. J. D. Tate's account book No. 1, containing his accounts with the Wrens, and with Amelia Tate, their guardian.
3. J. D. Tate's account book No. 2, containing his account with M. B. Tate's estate, the farm account, and a record of bills payable, executed by J. D. Tate, Executor.
4. Data and supplemental data in respect of funds held in trust by James D. Tate for benefit of wards of Amelia Tate, by James H. Wren, C. P. A.
5. James H. Wren exhibits, showing farm profits and other funds not included in settlements, and receipts and disbursements on account of the Mt. Athos matter.

6. Personal property assessments 1892-1912.
7. Copy of record in cause of *R. G. H. Kean, Receiver, v. James D. Tate, Executor, et al.*, in Lynchburg Circuit Court, September, 1894.
8. Photograph W. H. Wren and children, taken in Bristol, Va., Sept., 1894. Photograph of the Wren children, taken Aug. 30, 1912. Photograph of Major M. B. Tate.
9. J. E. Thomas' exhibits of contracts, deeds and checks covering purchase and sale of Florence Lee Tate's interest in Tate farm.
10. Copies of 10 deeds covering real estate trades of M. B. Tate in Norfolk, Va., 1890.

Exhibits for Defendants:

11. Original agreement between James D. Tate and the Wrens, Nov. 25, 1912; Exhibit No. 1, to answer to Original Bill.
12. Financial statements of James D. Tate to The Marion National Bank, 1933, 1936 and 1938, Exhibits 1, 2 and 3 to W. A. Wolfe's dep'n.
13. Letter of Wm. V. Wilson, Jr., to James D. Tate, Feb. 6, 1906, advising as to procedure in the case of *Wrenn, Admr., v. Tate*.
14. Vouchers filed with settlements of James D. Tate, Trustee, executed by the Robertson heirs, assigning to J. D. Tate their respective interests in the debt due by M. B. Tate's estate to R. G. H. Kean, Receiver, as follows:
Voucher 162, from E. A. Logan by Henry Logan;
Voucher 164, from Wm. I. Barksdale;
Voucher 165, from Powhatan Robinson;
Voucher 167, from J. B. Robertson;
Voucher 168, from Kate H. Robertson;
Copy of voucher from Gay R. Fleming;
Also vouchers 181 and 183 from White and Penn, Attorneys for Merchants Exchange Bank.

A Copy—Teste:

M. B. WATTS, C. C.

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