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Record No. 4980

In the Supreme Court of Appeals of Virginia at Richmond

MARION T. BAIN, ET AL., ETC.

v.

DOUGLAS HOLDEN PULLEY

FROM THE CIRCUIT COURT OF SOUTHAMPTON COUNTY

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three 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 the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4980

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 23rd day of January, 1959.

MARION T. BAIN, ET AL., ETC., Appellants,

against

DOUGLAS HOLDEN PULLEY, Appellee.

From the Circuit Court of Southampton County

Upon the petition of Marion T. Bain and Harry L. Bain, Trustees, an appeal is awarded them from a decree entered by the Circuit Court of Southampton County on the 11th day of September, 1958, in a certain proceeding then therein depending wherein the said petitioners were plaintiffs and Douglas Holden Pulley was defendant; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of five hundred dollars, with condition as the law directs.

RECORD

* * * * *

BILL OF COMPLAINT.

To the Honorable John K. Hutton, Judge:

The complainants respectfully represent unto the Court the following:

1. In June, 1936, the defendant was employed as manager and agent for the owners of various farm and business properties which were formerly a portion of the Estate of Thomas L. Bain, deceased, the then owners of said properties being Frank B. Bain, Sallie F. Bain, R. F. Bain, R. G. Bain, H. L. Bain, J. F. Bain and Elizabeth B. Richardson.

2. The defendant entered into possession, operation, control and management of the said properties and continued in such capacity as manager and agent until December, 1951.

3. On December 20, 1951, the then owners of the said properties, namely, R. G. Bain, Marion T. Bain, Robert F. Bain, Jr., Jack P Bain, J. Franklin Bain, Elizabeth B. Richardson and Harry L. Bain, by trust agreement and deed dated December 20, 1951, and recorded in the Clerk's Office of the Circuit Court of Southampton County, Virginia, in Deed Book 102, page 287, conveyed the said properties to the complainants, Marion T. Bain and Harry L. Bain, as Trustees, a copy of which trust agreement and deed is attached hereto as Exhibit A and made a part hereof. Under the said trust agreement and deed the complainants were given full powers to hold, to manage and, by sale or
page 2 } otherwise, to dispose of the said properties in such part or parts and in such manners as they deemed to be to the best interest of the said owners and beneficiaries in an orderly liquidation of the subject properties, and in furtherance thereof, the complainants were invested with each and every right, title, interest and power of the said owners and beneficiaries in, to, over or with respect to the said properties and, specifically, were fully authorized and empowered to sue and to be sued and to institute any and all proceedings, judicial or otherwise to accomplish the purposes of the trust.

4. The present owners of the said properties and beneficiaries under the aforesaid trust agreement and deed are Robert F. Bain, Jr., Jack P. Bain, J. Franklin Bain, Elizabeth B. Richardson, Harry L. Bain and Marion T. Bain, all as is

more fully set forth in that certain deed, assignment and agreement dated December 31, 1953, which is recorded in the Clerk's Office of the Circuit Court of Southampton County, Virginia, in Deed Book 109, page 384.

5. Upon execution of the trust agreement and deed aforesaid the defendant continued in possession, operation, control and management of the said properties in the employ of the complainants upon agreed compensation and remained in such capacity until on or about January 1, 1956, at which time he resigned.

6. At all times during the course of the employment of the defendant as manager and agent as aforesaid, the defendant was authorized to, and did, control, manage and direct the operations of the said properties and, specifically, performed the following functions, among others: made sales of commodities and properties; collected rents due and owing on properties; made all purchases for the operations and functions of the properties; entered into agreements, leases and other obligations with tenants for the operation of the properties; contracted for, procured and completed sale of products from the properties; collected all debts and receivables from the operation of the properties; and, in general, was authorized and did all and everything necessary for the discharge of his duties as manager and agent.

page 3 } 7. By virtue of the fiduciary relationship between the defendant and the complainants it was the duty of the defendant to account to the complainants for all transactions carried on and expenditures made by him during the course of his employment and in the performance of his functions as manager and agent, and to account for all properties of the complainants, and proceeds therefrom, which have come into the defendant's possession, custody and control at any and all times during such employment.

8. Notwithstanding the duties aforesaid, and although an accounting has been demanded of the defendant by the complainants, the defendant has failed to account to the complainants for such transactions and expenditures, and has failed to account for all properties of the complainants, and proceeds therefrom, for which the defendant has the duty to account.

9. The complainants are advised and, upon information and belief, allege that during the course of his employment the defendant has acquired and gained or is charged with properties of the complainants, and proceeds therefrom, a value greatly in excess of One Hundred Thousand Dollars ($100,000.00), for which no accounting has been made and which properties and proceeds the defendant has converted and taken to his own uses and purposes.

10. The complainants further are advised and, upon information and belief, allege that the defendant has used the properties of the complainants, and the proceeds therefrom, for the purchase in his own name of other properties, some of which are set forth and described in the schedule attached hereto as Exhibit C and made a part hereof, but that the defendant's assets are insufficient to allow of reimbursement of the complainants for the defendant's deficiencies.

11. The properties operated, controlled and managed by the defendant were and are so extensive that an accounting with reference thereto will be complex and will involve information primarily within the knowledge and con-
page 4 } trol of the defendant.

IN CONSIDERATION WHEREOF, and for as much as the complainants are without remedy save in a court of equity where all such matters are properly cognizable, the complainants pray:

A. That the defendant be required to account to the complainants for all transactions carried on and expenditures made by him in his capacity as manager and agent aforesaid and for all properties of the complainants, and proceeds therefrom, which have come into the defendant's possession, custody and control at any and all times during such employment.

B. That the complainants may be given judgment against the defendant for the value of any and all properties of complainants, and proceeds therefrom, for which defendant cannot properly account, together with interest thereon from the date due and the value of any and all profits which have accrued or which may accrue to the defendant through use of complainants' properties, and proceeds therefrom, for his own uses and purposes.

C. That the properties described in Exhibit C and all other properties purchased by defendant with properties, and proceeds therefrom, obtained from the complainants by fraud and concealment, as aforesaid, are held in constructive trust by the defendant for the benefit of the complainants and that the defendant be forthwith enjoined and restrained from transferring any of the said properties described in Exhibit B and any and all other property of the defendant until the defendant makes a full and accurate accounting to the complainants as herein requested.

D. That the defendant may be required to make a full and true discovery of all the matters aforesaid pertaining to his operation, control and management of the properties of the

complainants, and proceeds therefrom, to the end that a full accurate accounting may be had.

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MARION T. BAIN, Trustee
HARRY L. BAIN, Trustee

* * * * *

CHRISTIAN, BARTON, PARKER AND BOYD
506 Mutual Building
Richmond, Virginia,
Counsel for Complainants.

ALEX W. PARKER
Of Counsel.

Filed in the Clerk's Office the 7th day of Feb., 1957.

Teste:

H. B. McLEMORE, JR., Clerk.

* * * * *

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EXHIBIT A.

WHEREAS, R. G. BAIN, MARION T. BAIN, ROBERT F. BAIN, JR., JACK P. BAIN, J. FRANKLIN BAIN, ELIZABETH B. RICHARDSON and HARRY L. BAIN, hereinafter sometimes called beneficiaries, are *seised* and possessed, in fee simple as tenants in common, of the hereinafter described properties in which the said R. G. Bain owns an undivided 12/42nd interest and in which each of the said Marion T. Bain, Robert F. Bain, Jr., Jack P. Bain, J. Franklin Bain, Harry L. Bain, and Elizabeth B. Richardson owns an undivided 5/42nd interest;

WHEREAS, the said beneficiaries desire that the said hereinafter described properties should be sold, liquidated and disposed of in an orderly fashion and the net proceeds thereof divided, from time to time, among the said beneficiaries according to their respective interests; and the said beneficiaries, being dispersed and mindful of the uncertainty of life, are agreed that this, together with the management of said properties pending liquidation, may be best accomplished through the medium of the trust hereinafter established;—

NOW, THEREFORE, THIS TRUST AGREEMENT AND DEED, made this 20th day of December, 1951, WITNESSETH:—

That for FIVE DOLLARS ($5.00) and other good and valuable consideration, the receipt whereof is hereby acknowledged, the said R. G. Bain by H. L. Bain, his attorney-in-fact, the said Marion T. Bain, widow, the said Robert F. Bain, Jr, single, the said Jack P. Bain, single, the said J. Franklin Bain, the said Harry L. Bain and the said Elizabeth B. Richardson, and Lillian T. Bain, wife of the said J. Franklin Bain, S. E. Richardson, Jr, husband of the said Elizabeth B. Richardson and Susie G. Bain, wife of the said Harry L. Bain, parties of the first part, do hereby, with GENERAL WARRANTY, grant and convey and transfer, set over and assign unto Marion T. Bain and Harry L. Bain, Trustees, parties of the second part, the following described properties:—

The entire interest in and to all of the properties wherein the said beneficiaries were conveyed an undivided one-fifteenth (1/15th) interest by T. F. Jarratt and others by deed, dated November 1, 1951 and recorded in the Clerk's
page 7 } Office of the Circuit Court of Southampton County, Virginia, in Deed Book 101, page 505, to which reference is hereby made for a more complete description of the properties hereby conveyed. (The interest hereby conveyed in and to the said properties is the entire interest therein including not only the one-fifteenth (1/15th) interest therein acquired by said beneficiaries from said T. F. Jarratt and others by said deed but also the remaining fourteen-fifteenths (14/15) interest therein previously and otherwise acquired by them).

IN TRUST, NEVERTHELESS, to hold, manage and, by sale or otherwise, dispose of the same in such part or parts and in such manners as they, the said Trustees, shall in their absolute discretion, deem to the best interest of the said beneficiaries in an orderly liquidation thereof, and, from time to time, to distribute the net proceeds thereof, after deducting all proper expenses, costs and commissions, to the said beneficiaries, their personal representatives or assigns, in the following proportions:

R. G. Bain	-12/42
Marion T. Bain	-5/42
Robert G. Bain, Jr.	-5/42

Jack P. Bain—	-5/42
J. Franklin Bain	-5/42
Harry L. Bain	-5/42
Elizabeth B. Richardson	-5/42

The purpose of this trust is to enable and empower the said Trustees to liquidate and, while so doing and as an incident thereto, to conduct and utilize the said properties in such manners as they (the said trustees) shall, in their sole discretion, deem most beneficial to said beneficiaries in an orderly liquidation of said properties, and to distribute the net proceeds thereof as aforesaid; and, in furtherance thereof, the said trustees are invested with each and every right, title, interest and power of the parties of the first part in, to, over or with respect to said properties to the end that the said trustees may, pending and in making an orderly liquidation thereof, deal with said properties as freely, fully and completely as the parties of the first part could have immediately prior to the execution and delivery of this trust agreement and deed; and no party dealing with the trustees shall be required to see to the necessity or propriety of the trustees' acts or to the application of the proceeds or avails arising from the exercise of the powers herein
page 8 } granted. Without in any wise limiting the generality of the foregoing, the said trustees are hereby fully authorized and empowered:—

To hold, manage, conduct, utilize, lease, let, pledge, mortgage, encumber, sell, exchange, assign, deliver, transfer and convey said properties or any part or parts thereof; to acquire, by purchase or otherwise such other properties as they, in their sole discretion, deem advisable in accomplishing the purpose of this trust; to enter into contracts and undertakings; to collect, receive and receipt for properties; to sue and to be sued and to institute any and all proceeding, judical, quasi-judicial or otherwise; to lend, make advances, credit, invest and reinvest; to make compromise settlements; to have depositories and to maintain bank accounts; to employ and appoint agents, attorneys, attorneys-in-fact, employees, and servants to assist or act for them in the execution hereof; to make, execute, acknowledge and deliver contracts, options, leases, deeds, deeds of trust, pledges, notes and other instruments; and to pay all expenses, costs, obligations, debts, commissions, taxes and other charges incurred in the execution hereof; and, in short, to do each and every act that the Trustees, in their sole discretion, deem necessary to accomplish the aforesaid purpose:—

all, however, in such manners and ways as the Trustees shall, in their sole discretion, deem to the best interest of said beneficiaries in an orderly liquidation of said properties.

And and all property received by the Trustees in the execution hereof shall be held, managed and disposed of by them upon the same trust as the properties hereinbefore conveyed to them.

No assignment by any beneficiary of his interest hereunder shall be binding upon the Trustees unless and until the Trustees shall have received notice in writing of such assignment and shall have acknowledged receipt of such assignment.

page 9 } If any Trustee hereunder shall cease to act, then all authority powers, titles, interests, rights, discretions and duties which otherwise would be vested in both trustees shall be vested in the one continuing to act until such time as a substitute trustee may have been appointed: and, a majority in interest of the then adult beneficiaries shall, as soon as practicable, appoint a Trustee in the place and stead of a Trustee who has ceased to act by executing, acknowledging such appointment and recording the same in the Southampton Circuit Court; and such appointed or substituted trustee shall have all the rights, titles, interests, authority, powers and discretions and be charged with all the duties of the trustee in *whole* place and stead he had been appointed.

The Trustees shall not be liable for any error of judgment, or for any loss arising out of any act or omission in the execution of this trust, so long as they act in good faith, nor shall they be personally liable for the acts or *omissions* of each other, or for the acts or omissions of the agent, attorney, attorney-in-fact, employee or servant employed or appointed by or acting for them.

For their services hereunder as trustees the said Marion T. Bain and Harry L. Bain shall receive commissions of 2½% and 3½% respectively of the gross sale prices of such of the aforesaid real estate as they may sell, provided, however, that should the said trustees sell any timber, but not the land whereon it is situated, they shall receive commissions of 2½% and 4% respectively on the gross sale price of such timber.

This trust agreement and deed shall be binding on each of the beneficiaries, his or her heirs, devisees, personal representatives, next of kin, legatees, assigns and successors in interest.

WITNESS the following signatures and seals.

R. G. BAIN
By /s/ H. L. BAIN (Seal)
his attorney in fact

page 10 } /s/ MARION T. BAIN (Seal)
/s/ ROBERT F. BAIN, JR. (Seal)
/s/ JACK P. BAIN (Seal)
/s/ J. FRANKLIN BAIN (Seal)
/s/ HARRY L. BAIN (Seal)
/s/ ELIZABETH B. RICHARDSON (Seal)
/s/ LILLIAN T. BAIN (Seal)
/s/ S. E. RICHARDSON, JR. (Seal)
/s/ SUSIE G. BAIN (Seal)
/s/ MARION T. BAIN, Trustee (Seal)
/s/ HARRY L. BAIN, Trustee (Seal)

(Acknowledgments omitted).

Filed Feby. 7th, 1957.

H. B. McLEMORE, JR., Clerk.

page 11 } EXHIBIT B.

All those certain parcels of land lying and being in Southampton County, Virginia, and more particularly described as follows:

PARCEL I

93.35 acres situated near Crumpler's Crossing and adjoining the Norfolk and Western Railroad, being more fully shown by plat recorded in the Clerk's Office of the Circuit Court of Southampton County, Virginia, in Plat Book 3, page 27-A, and being the same property conveyed to Douglas H. Pulley by deed from Frank P. Pulley, Jr. and wife, dated September 19, 1950, and recorded September 22, 1950, in the aforesaid Clerk's Office.

PARCEL II

250 acres adjoining the property of August Drew and Great Branch, being the same property conveyed to Douglas H. Pulley by deed from Harry L. Bain, et al., dated July 2, 1948 and recorded in the aforesaid Clerk's Office in Deed Book 95, page 373.

PARCEL III

That certain lot adjoining the Norfolk and Western Railroad and the Smithfield and Jerusalem Road, containing approximately 1 acre, being the same property conveyed to Douglas H. Pulley by deed from Shelly L. Doles, Jr. and wife dated ....., 1947 and recorded in the aforesaid Clerk's Office in Deed Book 92, page 446.

PARCEL IV

That certain lot adjoining the Norfolk and Western Railroad and County Road, being the same property conveyed to D. H. Pulley by deed from Junius Pulley, Special Commissioner, dated ....., 1950 and recorded in the aforesaid Clerk's Office in Deed Book 100, page 115.

Filed Feby. 7th, 1957.

H. B. McLEMORE, JR., Clerk.

page 12 } MEMORANDUM OF *LIS PENDENS.*

Marion T. Bain and Harry L. Bain, Trustees, complainants in the hereinafter styled cause, do give notice of *lis pendens* by this momorandum setting forth the following information:

1. There is now pending in the Circuit Court of Southampton County, Virginia, a certain cause, the title of which is *Marion T. Bain and Harry L. Bain, Trustees* v. *Douglas Holden Pulley.*
2. The general object of said cause is to require an accounting of and by the defendant to the complainants and, in connection therewith, to impose a constructive trust upon the hereinafter described property of the defendant.
3. The amount of the claim asserted by the complainants is in excess of $100,000.00, the precise amount to be determined by said accounting.
4. The description of the property is as follows:

All those certain parcels of land lying and being in Southampton County, Virginia, and more particularly described as follows:

PARCEL I

93.35 acres situated near Crumpler's Crossing and adjoining the Norfolk and Western Railroad, being more fully shown by plat recorded in the Clerk's Office of the Circuit Court of Southampton County, Virginia, in Plat Book 3, page 27-A, and being the same property conveyed to Douglas H. Pulley by deed from Frank P. Pulley, Jr. and wife, dated September 19, 1950, and recorded September 22, 1950, in the aforesaid Clerk's Office.

PARCEL II

250 acres adjoining the property of August Drew and Great Branch, being the same property conveyed to Douglas H. Pulley by deed from Harry L. Bain, et al., dated July 2, 1948 and recorded in the aforesaid Clerk's Office in Deed Book 95, page 373.

page 13 } PARCEL*L* III

That certain lot adjoining the Norfolk and Western Railroad and the Smithfield and Jerusalem Road, containing approximately 1 acre, being the same property conveyed to Douglas H. Pulley by deed from Shelly L. Doles, Jr. and wife dated April 26, 1947 and recorded in the aforesaid Clerk's Office in Deed Book 92, page 446.

PARCEL IV

That certain lot adjoining the Norfolk and Western Railroad and County Road, being the same property conveyed to D. H. Pulley by deed from Junius Pulley, Special Commissioner, dated December 21, 1950 and recorded in the aforesaid Clerk's Office in Deed Book 100, page 115.

5. The name of the person whose estate is intended to be affected thereby is Douglas Holden Pulley.

Witness our signatures this 1st day of February, 1957.

MARION T. BAIN, Trustee
HARRY L. BAIN, Trustee

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

I, J. N. Barnes, a Notary Public in and for the State and County aforesaid, do certify that Marion T. Bain and Harry L. Bain, Trustees, whose names are signed to the foregoing writing bearing date on the 1st day of February, 1957, have acknowledged the same before me in my County aforesaid.

Given under my hand this 4 day of February, 1957.
My commission expires 3/28/60.

J. N. BARNES
Notary Public.

Virginia:

In the Clerk's Office of the Circuit Court of Southampton County, the 7th day of February, 1957. This Memorandum of *Lis Pendens* was presented and with certificate annexed, admitted to record at 2:35 o'clock, P. M., and indexed according to law.

Teste:

H. B. McLEMORE, JR., Clerk
By B. M. WILLS, D. C.

Fee $3.00.

page 14 } PROOF OF SERVICE.

* * * * *

Returns shall be made hereon, showing service of Subpoena in Chancery issued February 7th., 1957, with copy of Bill of Complaint and Exhibits A & B filed February 7th, 1957, attached:

Executed on the ..... day of ....., 19 ...., in the County of Southampton, Virginia, by delivering a true copy of the above mentioned papers attached to each other, to ..... in person.

Sheriff, County of Southampton, Va.
By ....., Deputy Sheriff.

(Use the space below if a different form of return is necessary).

Not finding the above named Douglas Holden Pulley at his usual place of abode, and no member of his family there over the age of sixteen years, I executed the above mentioned papers issued on the 7th day of February, 1957, by posting a true copy of the Bill and Exhibits A and B attached thereto, on the front door of his usual place of abode, this 7th day of February, 1957.

T. B. BELL, Sheriff
Southampton County, Virginia.

Returned and filed the 9 day of February, 1957.

H. B. McLEMORE, JR., Clerk
By BESSIE T. SHAUD, Deputy Clerk.

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* * * * *

DEMURRER.

Defendant demurs to complainants' bill and says that the same is not sufficient in law or equity.

THOS. L. WOODWARD
Of Counsel for Defendant.

* * * * *

Received and filed, this the 21st day of February, 1957.

H. B. McLEMORE, JR., Clerk.

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* * * * *

ORDER REQUIRING PARTICULARS OF GROUNDS OF DEMURRER.

This day came the parties, by counsel, and the complainants moved the Court that the defendant be required to specify

the particulars of his grounds of demurrer, which motion the Court does sustain, and it is ORDERED that the defendant file the particulars of his grounds of demurrer within fifteen (15) days hereafter.

Enter March 15, 1957.

J. K. H.

I ask for this:

R. HARVEY CHAPPELL, JR.
Of Counsel for Complainants.

Seen:

THOS. L. WOODWARD
Of Counsel for Defendant.

* * * * *

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* * * * *

GROUNDS OF DEMURRER.

For grounds of demurrer defendant says the complaint:

(a) Is vague, indefinite, and uncertain, and alleges no cause for equitable relief;

(b) Alleges fraud but does not specify any act, or acts, account, or accounts, of defendant prejudicial to complainant;

(c) Alleges conclusions and does not set forth by clear and sufficient allegations upon what basis the supposed fraud is predicated with the particularity required by law;

(d) Shows complainants have a complete and adequate remedy at law;

(e) Asks for discovery and relief upon a purely legal claim, and no allegations are made which will confer jurisdiction upon a Court of Equity;

(f) Does not allege defendant is possessed of any records or data from which information sought by complainant may be had, or that the data are not available to complainant;

(g) Discloses no right in complainants to file this suit for any year preceding 1951, and a misjoinder of causes;

(h) Alleges a criminal offense which defendant expressly denies, and defendant is under no duty to disclose page 18 } or furnish any information which will expose him to pains, penalties or punishment or to a criminal prosecution;

(i) Is a colorable disguise to change the forum of litigation from a Court of Common Law to a Court of Chancery;

(j) Discloses laches sufficient to bar prosecution of this suit.

THOS. L. WOODWARD
Of Counsel for Defendant.

Received and filed, this the 16th day of March, 1957.

H. B. McLEMORE, JR., Clerk
By BESSIE T. SHAUD, D. C.

* * * * *

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* * * * *

OPINION.

This matter is before the court on the bill of complaint and the exhibit thereto and upon the defendant's demurrer to the bill of complaint and the grounds of demurrer filed herein. Implicit in the grounds of demurrer is the contention that the case as alleged in the bill is one for discovery and relief. The "Legal Memorandum For Defendant" is for the most part predicated on that hypothesis.

The relationship between the defendant and the complainants and their predecessors was fiduciary in character. This trust relationship is clearly set forth in the allegations of the bill, which, for the purpose of the demurrer, are admitted. The *gravrmen* of the case is one of accounting between a trustee and *cestui que trust*. The jurisdiction of the court of equity arises from its jurisdiction to entertain a suit for accounting, in which discovery might be incidentally involved. This is not a suit for pure discovery in which relief is an

incident. The Court is of opinion to overrule the demurrer.

WILLIAM OLD, Judge Designate.

April 10, 1958.

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* * * * *

ORDER OVERRULING DEMURRER.

This cause, which has been duly matured, set for hearing and docketed, came on this day to be heard upon complainants' bill, with exhibits, and defendant's demurrer thereto, and was argued by counsel.

On consideration whereof, it is ordered that the said demurrer be, and the same hereby is, overruled for the reasons stated in the opinion of the Court, dated April 10th, 1958, and filed herewith, to which action of the Court defendant excepted, on the grounds stated in the demurrer.

On motion of defendant leave is granted him to further plead, answer, or demur under Section 8-99 of the Code, to complainants' bill within twenty-one days from the date of the entry of this order.

Enter 30 day of April, 1958.

WILLIAM OLD, Judge Designate.

I ask for this:

R. HARVEY CHAPPELL, JR.
Of Counsel for Complainants.

Seen and objected to:

J. EDWARD MOYLER
THOS. L. WOODWARD
Of Counsel for Defendant.

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* * * * *

ANSWER.

The answer of Douglas Holden Pulley to a bill in chancery filed against him in the Circuit Court of Southampton County, Virginia by Marion T. Bain and Harry L. Bain, Trustees, complainants.

For answer to said bill of complaint, or to so much thereof as he is advised it is material he should answer, this respondent answers and says:

1. The allegations contained in Paragraph #1 of said bill of complaint are true as to said employment, and are assumed to be true as to the owners of the properties therein mentioned.

2. The allegations in Paragraph #2 of said bill of complaint are true, except that other employees were, from time to time, employed by the principals in said business, and made charges and credits, sold merchandise and received payment therefor, and had access to the cash received in said business, and made entries and charges and gave receipts.

3. For answer to Paragraph #3 of the bill of complaint this respondent admits the execution and recordation of the trust agreement therein mentioned, but strict proof of the authority, power and scope thereof, and of the inclusiveness and coextensiveness thereof is demanded.

4. The allegations contained in Paragraph #4 of the bill of complaint are neither admitted nor denied, and strict proof thereof is demanded.

5. The allegations contained in Paragraph #5 are true, but said possession, operation, control and management of said properties was not exclusive.

6. The allegations in Paragraph #6 of the bill of complaint are true. However, for further answer thereto, page 22 } this respondent says that, from time to time, other employees of the complainants and their principals had access to the properties and assets under the control of the complainants, made charges and credits, sold merchandise and received payment therefor, had access to and received cash for and on account of said business, made entries and gave receipts, delivered merchandise and supplies to tenants and others, and did many other various things in and about said business, and complainants authorized, ratified, countenanced, were consulted with and agreed to all of said transactions.

7. The allegations contained in Paragraph #7 of the bill of complaint are true, as generally stated therein, but as to

such, this respondent answers and says that in the discharge of his duties he was only required to exercise due and reasonable care to do and perform the several things and matters therein alleged, based on the facilities, systems and business customs and practices which obtained and which were initiated, established and maintained, and had been in required usage by the complainants and their principals.

8. This respondent denies the allegations contained in Paragraph #8 of the bill of complaint, and strict proof thereof is demanded. For further answer thereto this respondent says that he has fully accounted and has duly, regularly and annually rendered an accounting of his transactions to the complainants, and their principals, and has had settlements thereof with them; that said accounting and settlements were compiled and arrived at by accountants and auditors employed by the complainants; that the system of bookkeeping in use was the one which had been followed by the late Thomas L. Bain, who originally owned said business and properties during his lifetime and which complainants and their principals, had not changed since; that said complainants and their principals, had in their possession, control and custoday, all the books, papers and records, and still have, or should have, the same, unless they have suffered and permitted them to be lost, misplaced or destroyed by lapse of time by their own carelessness and neglect; that said records were continuously and constantly kept and lodged in the store building owned by the page 23 } complainants' principals, where the said complainants and their principals had access to them at all times; that annual meetings of the owners and their agents and representatives (including complainants) were held with this respondent upon the completion of statements each year by the accountants and auditors employed and paid for by the complainants, and their principals; that complainants, and their agents and principals saw and went over said statements and accounts and accepted them as and for a full and complete accounting and settlement, and that payments and distributions of profits and capital were had and made based on said statements and settlements, and that in the preparation of said statements and accounts this respondent rendered full cooperation to those in charge of making same and all records were available and open to said person for their use in preparing same: that the owners, the complainants and this respondent relied upon same and the complainants and their principals, who were the owners, never raised any question regarding same; that this respondent assumed and accepted the same compiled as aforesaid;

that the owners and complainants accepted same in full, final and complete settlement with and by this respondent, and made out their own income tax returns, or had the same prepared by their own accountants, based on said settlements, and paid their Federal and State income taxes, based on same, as this respondent is informed, advised and verily believes; and that this respondent does not now have, nor has he ever had, or kept any of said records in his personal possession, but they have always been and remained in the aforesaid place of business, as this respondent is informed, understands and verily believes, unless removed by some other party which, if done, was without his knowledge, consent and authority and, therefore, by reason of the foregoing, the great lapse of time, and the enfeebled condition of this respondent, who is now paralyzed and unable to attend to his business and affairs, it is now impossible for him to make and prepare, or to have made and prepared, any accounts or accounting.

9. The allegations contained in Paragraph #9 and #10 of the bill of complainant are denied and this re-
page 24 } spondent denies owing the complainants anything.

10. For answer to Paragraph #11 of the bill of complaint this respondent answers and says that the allegations therein contained are predicated upon an assumption by the complainants that this respondent is indebted to them, which is expressly denied by this respondent; that this respondent is under no duty to the complainants to file with them any statement or accounting whatsoever pertaining to his own personal affairs and properties; that respondent is under no duty to make a discovery to the complainants of his own personal assets and transactions; that this suit has been determined by the Court in argument on demurrer not to be a suit for discovery and relief, but one for an accounting on account of fiduciary relationship.

For further answer to said bill of complaint this respondent says:

(A) The bill of complaint should be dismissed on the ground of laches by the complainants and their principals.

(B) Any alleged claims or accounts which complainants may claim that they have, or which they may wish to present, are barred by the statute of limitations.

(C) The bill of complaint alleges mere conclusions and inferences and does not set forth by clear and sufficient allegations the facts upon which such alleged inferences and claims are based. Complainants have had, now have, or should have, all the records pertaining to the matters alleged and have

given no tangible, definite, exact and certain figures, data, or information on which an answer could be made, and, even if given, this respondent is under no duty to make answer to any matters or things, or to furnish any information that may expose, or tend to expose, him to pains, penalties, punishment or prosecution, or affecting title to his real property.

(D) This respondent says that at least one of the complainants (if not both) is an experienced, capable, exact and exacting businessman, with considerable business shrewdness and acumen, and who is engaged personally and for himself in the same and exact kind of business as that in
page 25 } which the complainants are engaged, and by long years of training and experience is and was thoroughly familiar with the business in which the respondent was employed, and has and had a personal and financial interest in same; and that by reason thereof he had a right and did see, examine and understand the same in the protection of his own personal interest and of the fiduciary relationship reposed in him, or should have so done in the discharge of his fiduciary relationship.

(E) That said bill of complaint merely alleges a fiduciary relationship and asks for discovery and nothing more, and does not set forth any account or any facts and particulars on which complainants rely with sufficient particularity to enable this respondent to more fully and completely answer same, and this respondent asks for further particulars of said bill of complaint, if complainants rely upon anything tangible, or otherwise, than as set forth in said bill.

And now, having fully answered, etc.

DOUGLAS HOLDEN PULLEY
By THOS. L. WOODWARD
J. EDWARD MOYLER
Of Counsel.

Received and filed, this the 9th day of May, 1958.

H. B. McLEMORE, JR., Clerk.

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PLEA OF ACCOUNT STATED.

Plea of Douglas Holden Pulley, the defendant, to a bill of complaint exhibited against him in this Court by Marion T. Bain, et al.

The defendant, for plea to said bill, says that complainants' bill is for discovery and general accounting, which complainants allege to be open and unsettled, and defendant says that, prior to the institution of this suit, for each and every year he was employed, as alleged in said bill, he made, stated, and settled his accounts with his employers annually, which his employers and their accountants examined, accepted, agreed and settled upon, and pursuant thereto distribution was made to, and accepted by, his employers, from funds at all times to the credit of complainants in their bank account, in full, final, settlement, satisfaction and discharge of all matters pending between the parties, and resulted each year in no balance due to his employers, the record whereof is in the hands of complainants in said account stated and in the books of his employers.

This defendant denies any and all allegations of fraud contained in said bill of complaint and states that the accounts stated and rendered by him were agreed on and accepted by complainants, as and when rendered, and that full, final and complete settlements were made thereon; and that said accounts were and are just and true to the best of his knowledge and belief.

Wherefore, defendant prays judgment whether he be compelled to make any further or other answer to said bill of complaint.

DOUGLAS HOLDEN PULLEY
By THOS. L. WOODWARD
Of Counsel for Defendant.

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Received and filed, this the 20th day of August, 1958.

H. B. McLEMORE, JR., Clerk.

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MOTION TO DISMISS.

Motion of Douglas Holden Pulley, the defendant, to dismiss the bill of complaint exhibited against him in this Court by Marion T. Bain, et al.

The defendant says that complainants' bill pretends to ask for discovery and an accounting of defendant, but in fact and in essence is a bill to surcharge and falsify defendant's account, but sets forth no item, claim, or demand with any particularity, or the nature, character, extent, sum, or the date thereof such as to afford defendant any idea or basis upon which to account.

Wherefore, defendant prays judgment that complainants' bill be dismissed.

DOUGLAS HOLDEN PULLEY
By THOS. L. WOODWARD
Of Counsel for Defendant.

Received and filed, this the 20th day of August, 1958.

H. B. McLEMORE, JR., Clerk.

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PRE-TRIAL CONFERENCE ORDER.

On the 11th day of August, 1958, came the complainants and the defendant, by counsel, and at a pre-trial conference pursuant to Rule of Court 4:1, it was stipulated and agreed by counsel for the complainants and the defendant as follows:

1. The defendant will advise the complainants forthwith as to the names and addresses of those persons referred to in paragraphs Nos. 2, 5 and 6 of the defendant's answer who are alleged to have been employees of the complainants.

2. The defendant will advise the complainants forthwith as to the names and addresses of those persons referred to in paragraph No. 8 of the defendant's said answer who are alleged to have been accountants employed by the complainants.

3. The books and records maintained by the defendant

while in the employ of the complainants are in the handwriting of the defendant.

4. All the books and records including customers' ledger, day book, sales tickets, purchase invoices, cancelled checks and deposit slips will be produced at the trial of this cause and may be introduced in evidence without formal proof of same subject to proper identification and ruling as to admissibility.

page 32 } 5. Any and all checks, vouchers and other writings now in the possession of persons not parties to this cause may be produced at the trial of said cause without the necessity of the issuance of a subpoena *duces tecum* and may be introduced in evidence without formal proof of same subject to proper identification and ruling as to admissibility.

6. Copies of the following instruments may be introduced in evidence without necessity of formal proof as to execution or recordation, to-wit: The will of Thomas L. Bain dated May 3, 1933, and probated in the Clerk's Office of the Circuit Court of Southampton County, Virginia; that certain trust agreement and deed between R. G. Bain, et al., dated December 20, 1951, and recorded in the aforesaid Clerk's Office in Deed Book 102, page 287; that certain deed, assignment and trust agreement between W. Tucker Bain, et al., dated December 31, 1953, and recorded in the aforesaid Clerk's Office in Deed Book 109, page 384; that certain deed between T. F. Jarratt, et al., dated November 1, 1951, and recorded in the aforesaid Clerk's Office in Deed Book 101, page 505.

Enter August 30, 1958.

WILLIAM OLD, Judge Designate.

We ask for this:

R.HARVEY CHAPPELL, JR.
ALEX W. PARKER
Of Counsel for complainants.

THOS. L. WOODWARD
J. EDWARD MOYLER
Of Counsel for defendant.

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* * * * *

This day came defendant and asked leave to file his plea of accounts stated which leave is hereby granted and the same are accordingly this day filed; to which action of the court counsel for complainants objected and excepted.

Enter August 30, 1958.

WILLIAM OLD, Judge Designate.

We ask for this decree.

THOS. L. WOODWARD
Of Counsel for Defendant.

Seen:

R. HARVEY CHAPPELL, JR.
Of counsel for complainants.

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DECREE OF DISMISSAL.

This cause came on this day to be heard upon the papers formerly read, upon the evidence *ore tenus* and exhibits therewith, and Defendant's motion for dismissal of Complainants' bill and was argued by counsel.

On consideration whereof and for reasons orally assigned, and reported and made a part hereof, it is adjudged, ordered and decreed, that Defendant's motion be sustained and that Complainants' bill be, and the same hereby is, dismissed, and that Defendant recover his costs herein, to all which Complainants duly excepted, and upon their motion execution of this decree is suspended for 90 days upon Complainants giving bond in the penalty of $1,000.00, within 30 days from this date.

Enter this decree this 11th day of September, 1958.

WILLIAM OLD, Judge Designate.

We ask for this decree.

J. EDWARD MOYLER
Of counsel for defendant.

Seen and objected to:

R. HARVEY CHAPPELL, JR.
Of counsel for complainants.

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NOTICE OF TENDERING TRANSCRIPT OF TESTIMONY AND INCIDENTS OF TRIAL.

You are hereby notified that on the 6th day of November, 1958, at 10:00 o'clock A. M., or as soon thereafter as counsel may be heard, the complainants, by counsel, will tender the reporter's transcript of testimony and incidents of trial of this cause, had on September 8, 9, 10 and 11, 1958, to the Judge designate of said Court, the Honorable William Old, at Chesterfield Courthouse, Virginia, for the certification pursuant to Rule 5:1 of the Rules of the Supreme Court of Appeals of Virginia.

MARION T. BAIN and
HARRY L. BAIN, Trustees
By Counsel.

CHRISTIAN, BARTON, PARKER & BOYD
506 Mutual Building
Richmond, Virginia, Counsel.

R. HARVEY CHAPPELL, JR.
Of Counsel.

Received and filed, this the 30th day of October, 1958.

H. B. McLEMORE, JR., Clerk.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

NOTICE OF APPEAL.

The complainants, Marion T. Bain and Harry L. Bain, Trustees, hereby give notice of appeal, pursuant to Rule 5:1, §4, of the Rules of the Supreme Court of Appeals of Virginia, and set out their assignments of error below:

ASSIGNMENTS OF ERROR.

The Circuit Court of Southampton County erred in the following particulars:

1. The final decree entered on September 11, 1958, and the opinion of the Court referred to therein, are contrary to the law and the evidence in dismissing the bill of complaint and, specifically, thereby in denying the following prayers thereof:

(a) That the defendant be required to account to the complainants for all transactions carried on and expenditures made by him in his capacity as manager and agent for all properties of the complainant, and proceeds therefrom, which have come into defendant's possession, custody and control at any and all times during such employment.

(b) That the complainants be given judgment against defendant for the value of any and all properties of complainants and proceeds therefrom, for which defendant page 37 } cannot properly account, together with interest thereon from the date due, and the value of any and all profits which have accrued or which may accrue to the defendant through use of complainants' properties, and proceeds therefrom, for his own uses and purposes.

(c) That the defendant be required to make a full and true discovery of all matters aforesaid pertaining to his operation, control and management of the properties of the complainants, and proceeds therefrom, to the end that a full and accurate accounting may be had.

2. The said decree, and the opinion of the Court referred to therein, are contrary to the law and the evidence in the findings:

(a) That the question presented in this cause involves the defendant's management of complainants' properties acting solely pursuant to contract entered into with the beneficiaries of the Estate of Thomas L. Bain in 1936.

(b) That numbers of the beneficiaries operated businesses for themselves virtually upon the same basis as that of the complainants' properties managed by the defendant.

(c) That the defendant was not an expert bookkeeper nor trained in the arts of accountancy.

(d) That there was no disposition on the part of the defendant to withhold facts regarding the handling and management of the complainants' properties.

(e) That had there been any large discrepancies or diversions by the defendant the complainants or the beneficiaries, or any of them, should have detected the same upon receipt of dividends and distributions and failure to do so would constitute negligence.

page 38 } (f) That the yearly distributions to the beneficiaries were intended to be or were accepted as distributions of the profits for each year.

(g) That the complainants or the beneficiaries, or any of them, have acquiesced in the defendant's methods of accounting and bookkeeping or methods by which the said businesses were conducted.

(h) That in 1950 one of the complainants, Harry L. Bain, was told that the accounting operation was deficient and that he did not insist on a change in the practices of accountancy but tended to permit the same to be continued.

(i) That there would be an unconscionable reaping of rewards or profits if judgment were entered for complainants.

3. The said decree, and the opinion of the Court referred to therein, are contrary to the law and the evidence:

(a) In dismissing the complainants' bill without reference to a Commissioner in Chancery to marshal the books, records and vouchers and to determine the accountability of the defendant to the complainants or, in lieu of this, without entry of a judgment at least to the extent of discrepancies disclosed by the evidence for the years 1951 through 1955, inclusive.

(b) In dismissing complainants' bill on the basis that the beneficiaries accepted the distributions as made, acquiesced in the method of accounting and bookkeeping and the method by which the businesses were conducted and thereby cannot, in equity, ask for recovery from the defendant at this time.

page 39 } (c) In dismissing complainants' bill, there being no evidence or finding that complainants or the beneficiaries, or any of them, had knowledge of, actual or

implied, or acquiesced in the said discrepancies disclosed by the evidence or in the lack of books, records and vouchers which might have explained and accounted for such discrepancies.

(d) In failing to apply the legal principles applicable to a true bill for an accounting in equity as presented in this cause, namely: that the defendant, a fiduciary, be required to account; that the defendant be required to keep his accounts and preserve his vouchers; and that the burden of proof is on the defendant to present his account and to sustain its correctness by proper evidence.

MARION T. BAIN and
HARRY L. BAIN, Trustee.
By Counsel.

CHRISTIAN, BARTON, PARKER & BOYD
506 Mutual Building
Richmond, Virginia, Counsel.

R. HARVEY CHAPPELL, JR.,
of counsel.

Received and filed, this the 7th day of November, 1958.

H. M. McLEMORE, JR., Clerk.

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DEFENDANT'S ASSIGNMENT OF CROSS-ERROR.

The Court erred in refusing to sustain defendant's demurrer for the reasons therein assigned, and in consequence this cause should be dismissed.

DOUGLAS HOLDEN PULLEY
By THOS. L. WOODWARD
Of Counsel for Defendant.

Received and filed, this the 19th day of November, 1958.

H. B. McLEMORE, JR., Clerk
By BESSIE T. SHAUD, D. C.

* * * * *

RECORD.

Stenographic report of all the testimony, together with all the motions, objections, and exceptions on the part of the respective parties, the action of the Court in respect thereto, and all other incidents in the trial in the case of Marion T. Bain, et als., *v.* Douglas Holden Pulley, tried in the Circuit Court of Southampton County, Courtland, Virginia, on September 8, 1958 through September 11, 1958, before the Hon. William Old, Judge of said Court.

Present: Messrs. Alex W. Parker and R. Harvey Chappell, Attorneys for the Complainants.

Messrs: Thomas L. Woodward, J. Edward Moyler, J. Edward Moyler, Jr., Attorneys for the Defendant.

page 2 } Mr. Parker: If it please the Court, I would like to inquire as to whether the tape recorder is apparently a part of the Court's recording.

Mr. Moyler: I can answer that. Mr. Junius Pulley asked me if I thought it was permissible to have that tape recorder put in here; I told him I couldn't speak for the Court but that I personally had no objections to it. Mr. Douglas Pulley is not here, as has been stated, he's sick. We thought that if the tape recording was gotten that he could probably—he would want to have the opportunity to refer to it, if he wanted to do so, and that if we needed to play back anything in the course of the trial we could do it without having the expense of having it transcribed by the court reporter. I want to state if it's agreeable with Mr. Parker and Mr. Chappell that they will be privileged to hear it played back at any time they want to.

Mr. Parker: If it please the Court, it's unusual with counsel not having been confronted with the matter before; we knew nothing about it whatsoever. No request has been made for us to give any consideration to the matter. We have an official qualified stenographer here which expenses are being borne by agreement by each side and I would like to object at this time to having the tape recording.

Mr. Moyler: The matter was not mentioned to me until Sunday or Saturday night and I haven't had the
page 3 } opportunity to say anything to anybody. There has been nothing on our part to be discourteous, and they are the facts.

The Court: Many of our courts take a tape recording of the proceedings in court. I see nothing objectionable about it.

Mr. Parker: Except that this tape recording is taken by

counsel for one of the parties; not under the official jurisdiction of the court. Now if the Court has somebody who can work a tape recorder and keep the tapes in his possession until we're through, then we have no objection.

The Court: I think the whole proceedings will be taken in the tape recorder.

Mr. Parker: It's being operated by one of the counsel for one of the parties.

Mr. Moyler: We don't expect to use any information that may be played back on the tape recorder to us as official testimony in the case, Your Honor. We expect the court reporter, I think Mr. Woodward will agree with me on that, to have the official record and if any questions come up in the testimony his transcription will control and govern, and at no time do we anticipate using the tape recorder for the purpose of any vocal or oral statements of any witnesses about it, is that correct?

Mr. Woodward: Yes.

Mr. Parker: If the court please, if this tape re-
page 4 } corder is going to be allowed, I would like to record my objection and exception to the Court's ruling.

The Court: The Court will allow the tape recorder.

Mr. Parker: Counsel objects to allowance of the tape re corder in this case because there is an official stenographer taking the testimony and the arguments and the rulings, and because the tape recording is under the control of and being operated by one of the counsel for the defendant.

Mr. Moyler: I am not directing it. Mr. Burt Pulley, nephew of the defendant, is operating it. I am not directing as how it shall be done.

Mr. Parker: Let the record show that a nephew of the defendant, Mr. Burt Pulley, is operating it and we still object to it.

HARRY L. BAIN,

having been first duly sworn, was called as a witness for the complainants, and testified as follows:

Examined By Mr. Parker:

Q. You are Mr. Harry L. Bain, are you not?

A. Yes, sir.

Q. Where do you live?

page 5 } A. Capron.

Q. Are you one of the complainants in this suit?

A. Yes, sir.

Harry L. Bain.

Q. In what capacity are you one of the complainants?
A. Trustee of the Thomas L. Bain Estate.
Q. Who is the other trustee in this agreement?
A. Mrs. Marion Bain.
Q. I hand you herewith a photostatic copy of an agreement dated December 20, 1951, which has been recorded in the Clerk's Office of the Circuit Court of Southampton County in Deed Book 102, Page 287, and ask you to identify it and file it as your Exhibit No. 1?
A. Do you want me to identify this?
Q. Is that the trust agreement you had reference to?
A. That's the first trust agreement.

Mr. Parker: Will you file that as your Exhibit No. 1, please, sir.

Q. Prior to the execution of this trust agreement, the date of December 20, 1951, what had been your status or what had been your interests in the properties and business of the Thomas L. Bain Estate?
A. I was one of the partners in the partnership of the Thomas L. Bain Estate from '36 to '51.
Q. You are one of the beneficiaries; legatees, is that correct?
page 6 } A. Yes, sir.
Q. Who were the other members of the partnership and how long had the partnership existed?
A. It existed from March 9, 1936, and the partnership consisted of a brother, Thomas L. Bain, a sister, a niece, and a number of nephews.
Q. As time went on were there any changes in the partners in this partnership; any change of people who were *entitle* to receive the balance of Mr. Thomas L. Bain's Estate?
A. Yes, sir.
Q. Those changes were brought about by what?
A. All except one brother by death. One change was made brought about by interests of the others buying out the interest of the Jarratts.
Q. And the other were brought about by the deaths and their property descending to the heirs?
A. Yes, sir.
Q. I hand you herewith what purports to be a copy of the Will of Thomas L. Bain, dated May 3, 1933. Will you look at it and state whether that is a copy of his will?
A. Yes, sir, that's a copy of the Will of Thomas L. Bain.

Harry L. Bain.

Q. Would you treat that as your Exhibit No. 2, please.

Q. Now, in connection with the sale of the Jarratt interests, about which you have mentioned, I hand you here-
page 7 } with what purports to be a photostatic copy of that deed which is recorded in Deed Book 101, page 505, of the Clerk's Office of the Circuit Court of Southampton County, and ask you if that's a copy of that deed?

A. Yes, sir, that's the copy of the deed from the Jarratts to the Bains.

Mr. Parker: Will you please file that as your Exhibit Number Three?

Q. Will you please look at that deed and tell me, Mr. Bain, does that list all of the properties and tracts of land and farms in the Thomas L. Bain Estate at that time?

A. Yes, sir.

Q. Was there any change in or amendment to the trust agreement which you have filed as your Exhibit Number One?

A. Yes, sir, it was amended and signed December 31, 1953, and recorded February 18, 1954.

Q. I hand you herewith a photostatic copy of an agreement dated December 31, 1953, and ask if that's the amendment to which you have reference?

A. Yes, sir.

Q. Will you please introduce that as your Exhibit Number Four?

Q. Now, will you explain generally of what the Thomas L. Bain, the remainder of the estate, consisted of and what part of the business was involved in the Thomas L. Bain
page 8 } Estate at the time of his death in 1936?

A. At the time of Thomas L. Bain's death in 1936, he operated a country store at Ivor, it's a general mercantile business, and he owned a number of farms and real estate around Ivor. These farms were supplied by the store. The store was used more or less as a general supply for the farms, and he also did outside business. Now, on thse farms he raised corn, cotton peanuts and hogs, and they were operated by him prior to '36.

Q. Did he have anybody help him operate his business prior to his death?

A. Yes, sir.

Q. Who was it?

A. Mr. Douglas H. Pulley.

Q. Now, upon Mr. Bain's death, who operated those busi-

nesses; that is, the farms and that store and so forth, that belonged to the estate?

A. Do you mean who looked after them?

Q. Yes, sir.

A. Mr. Douglas H. Pulley.

Q. Was there any sort of contract or understanding in writing entered into between the heirs of Mr. Pulley relative to his managing the affairs of the estate?

A. Yes, sir.

Q. I hand you herewith what purports to be a
page 9 } copy of an agreement dated June 1936, between
Frank B. Bain, Sally F. Bain, R. F. Bain, R. G. Bain, H. L. Bain, J. F. Bain and Elizabeth B. Richardson, and D. H. Pulley, and I ask if that's the agreement to which you have reference?

A. Yes, sir.

Q. That is only a copy of the contract, do you know where the original is?

A. I do not.

Q. Do you know of your own knowledge if the original of that contract was signed and delivered?

A. Yes, sir.

Q. Was there any other contract written or otherwise—

Mr. Bain: Do you wish that to be introduced?

Q. Will you please file that as your Exhibit Number Five?

Q. Was there any other contract written or otherwise ever entered into between your family and Mr. Pulley?

A. No, sir, except in one exception after the trust agreement, we increased his compensation in that we paid him a certain two and a half per cent of the gross price of the lumber that was sold from the farm.

Q. From the farm?

A. From the farms of the Thomas L. Bain Estate.

Q. That was in addition to his salary?

A In addition to his salary.

page 10 } Q. Up until that time, what had been his salary?

A. Well, it varied from the time of the year. He was paid a certain salary different years, and he was paid a commission on the profits concerned and also he was allowed to do the hauling for the Thomas L. Bain Estate, such as fertilizer and peanuts, that added into his net income from the estate.

Harry L. Bain.

Q. They were the only variations from the written contract that you have here?

A. Yes, sir.

Q. Will you please give a summary of the duties which were to be performed and which were performed by Mr. Pulley in his capacity as farm manager while employed by Mr. Bain and then also while employed by the partnership?

A. The duties of Mr. Pulley prior to Mr. Bain's death was varied from what it was after his death. Before his death, he assisted Mr. Bain in the operation of these farms. Mr. Bain was active up to a very short time before his death. After his death, these people in the Thomas L. Bain Estate appointed him manager of the entire outfit. He had charge of the store; buying and selling merchandise. He kept all books, maintained all bank accounts. made all deposits, and he supervised the operation of these farms. He employed tenants and then he changed tenants, and he saw the crops were properly worked, properly fertilized. In the fall of the year, he had complete charge of selling all farm prod-
page 11 } ucts and collecting for them, paying the tenants, collecting for the estate, depositing money. You might say he was the director—I mean complete manager of the estate. The heirs had no part in directing tenants and the operation there; they were left entirely with Mr. Pulley to manage in complete, or in other words, he had complete control of the farm products.

Q. Well, in order that we may not overlook what he actually did, I'd like to ask you what you, or the other members of the partnership, that is, the other beneficiaries in the Thomas L. Bain Estate, what did any of you do in connection with the management of the property in the Thomas L. Bain Estate? In the running of that store from 1936 until 1956?

A. We left the whole thing to him. Only in a general way did we have anything to do with the property.

Q. How about the farms and how about the store?

A. Same thing about the store.

Q. Where were the books and records pertaining to the estate's business kept; that is, where were they physically located?

A. Kept in the store of the Thomas L. Bain Estate there in Ivor.

Q. I believe you said you live in Capron; how far is Ivor from there?

A. Approximately twenty-seven miles.

Harry L. Bain.

Q. Who kept the books and records of the
page 12 } estate in Ivor?
A. Mr. Douglas H. Pulley.
Q. Was that true all the way up to the end of 1955?
A. Yes, sir, with the exception when Mr. Pulley became ill, I think in April, 1955, and then it was carried on by—that is, the balance of that year, by his son, Mr. Robert H. Pulley.
Q. Who designated Mr. Robert Pulley to carry on?
A. Mr. Douglas Pulley.
Q. Was that satisfactory to you and the other trustees?
A It met our approval.
Q. What's your answer?
A. It met our approval.
Q. And had Mr. Robert Pulley been around with his father prior to that time?
A. He had been working in the Thomas L. Bain Estate prior to that time.
Q. With Mr. Douglas H. Pulley?
A. Yes, sir.
Q. Did you ever, after Mr. Robert Pulley took over in the spring of 1955 and acting for his father, did you ever talk to him on the telephone or have a conference with him about the estate matters?
A. I talked to him a number of times after his father became ill. I conversed with him a number of occasions during
the summer. I asked him didn't he need some
page 13 } help while his father—

Mr. Woodward: We object to any conversation with Mr. Robert Pulley.
Mr. Parker: If the Court please, it's been testified here and there's no contradiction of it that Mr. Robert Pulley was acting for his father during this period, so I think any conversation with Mr. Pulley is the same as having had conversation with the defendant.
Mr. Woodward: Mr. Robert Pulley is here and he can be called as a witness to testify as to any statements he made to this gentleman. Any statements Mr. Robert Pulley made to this gentleman is not evidence; he's not an agent of the complainant's.
Mr. Parker: Not of the complainant, but of the defendant.
The Court: He's not a party to the suit.
Mr. Parker: No, sir.
The Court: I believe that evidence of conversation with

Harry L. Bain.

Mr. Robert Pulley is hearsay unless it is linked up a little bit more than just a statement to the effect that he acted for his father during that period.

Mr. Parker: I had finished anyway, if Your Honor please.

The Court: All right.

Mr. Parker: We said that we would bring in the available books and records of Mr. Pulley in connection with this case.

Now, we have some of those books here at the
page 14 } present time.

Mr. Chappell: If it's all right, we'll put some of the ledgers right here on this bench; the other books are available out in the car. We will bring them in as we need them, if counsel has no objection to them.

The Court: You don't care to introduce those books in evidence as exhibits?

Mr. Parker: Yes, sir, we're going to—

The Court: You're going to, but not at this time?

Mr. Parker: That's right.

Examination by Mr. Parker continued:

Q. At my request, Mr. Bain, have you looked over the books that were kept by Mr. Pulley for the affairs of Thomas L. Bain Estate?

A. No, sir.

Q. Will you look at them and glance through them, and tell me—strike that. Are you familiar with Mr. Douglas H. Pulley's handwriting?

A. Yes, sir.

Q. Will you glance at—what book is that?

Mr. Chappell: It's a copy of the ledger.

Examination by Mr. Parker continued:

page 15 } Q. Does that appear to be Mr. Douglas H. Pulley's handwriting?

A. It appears that it is his handwriting.

Q. You have just looked over one of the Customer Ledger books, have you not?

A. Yes, sir, Account Ledger.

Q. I wish you'd look over the Day Book, Mr. Bain, and see if you recognize the handwriting there?

A. That's the handwriting of Mr. Douglas Pulley.

Q. Did you, or Mrs. Bain, the other trustee, or any of the

heirs of the Bain Estate, ever make any entries in the books of the estate similar to those books there?

Mr. Moyler: He can't answer for anybody but himself, I would think.

Examination by Mr. Parker continued:

Q. Did you as trustee ever make any deposits in the bank?

A. I did not.

Q. Do you know whether any of the other heirs or beneficiaries ever made any deposits?

A. I don't know of any; I never heard of it.

Q. Did you ever draw any checks on the estate accounts?

A. No, sir.

page 16 } Q. Did you ever get in contact with the tenants relative to their affairs with connection with the estate?

A. No, sir.

Q. Who did all these things?

A. Mr. Douglas H. Pulley.

Q. That is up until he became sick?

A. Up until the time he became sick.

Q. And then who?

A. Mr. Robert H. Pulley finished out the year '55, and Mr. Robert H. Pulley—

Mr. Parker: I don't think anything after '55 is in issue here.

Examination by Mr. Parker continued:

Q. Where were these books kept in Ivor?

A. In the Thomas L. Bain Store.

Q. Were they kept in a safe or out in the open?

A. They were kept in the safe.

Q. Did you have a key to the store?

A. I did not.

Q. Did the other trustee, Mrs. Bain, have a key to the store?

A. No, sir, so far as I know she did not.

Q. So far as you know, did any of the heirs or

page 17 } beneficiaries have a key to the store?

A. They did not.

Q. Did you know the combination of this safe where the books were kept?

Harry L. Bain.

A. I did not.

Q. Did Mrs. Bain, the other trustee, know the combination?

A. No, sir.

Q. Did any of the heirs and so forth—

A. I don't think anybody knew the combination of the safe.

Q. When did you and your co-trustee, after that agreement, and you and your partner, prior to the agreement, have any conferences with Mr. Pulley about the estate?

A. We had a meeting sometime the first part of the year, and then occasionally during the year we'd have meetings mostly to consider the advisability of selling certain tracts of timber of the estate, and at those meetings during the year on occasions when we had them, we'd arrive at a price to sell this timber, then the trustees would proceed to offer it for sale.

Q. You say the trustees would proceed to offer it for sale?

A. Yes, sir.

Q. Prior to the time that the trust agreement

page 18 } was entered into, did you have a similar conference about the sale of timber?

A. Yes, sir.

Q. Who would proceed to offer it for sale then?

A. Well, I for one, as one of the partners with the assistance of the other partners, and Mrs. Rob Bain from the time of Mr. Rob Bain's death up to the time of the trustees.

Q. After arrival of the sale price, who would handle the sale and proceeds, and so forth?

A. I would handle the sale and contact various timber men and give them a price on it and they bought it. When they bought it, I'd proceed to have the deed made and then the proceeds were sent to—made payable to Thomas L. Bain Estate, sent to Ivor, and Mr. Douglas H. Pulley made the distribution to the heirs or to the owners of the Thomas L. Bain Estate.

Q. Now, was the sale of timber that you are speaking of now, is that the only item that was handled in that fashion, that is, that you would handle the sale in its entirety and send the proceeds to Mr. Pulley?

A. That's the only thing that I handled the sale of. The balance of the farm products and things were handled on the farm by Mr. Pulley himself.

Q. Where did these meetings that you are talking about

customarily take place prior to the time of the trust agreement?

page 19 } A. They, the meetings, prior to the trust agreement, from '36 to '42, they were held at Wakefield at the home of Mr. Frank Bain. The reason for that was Mr. Frank Bain was an invalid and was unable to get to Ivor, and these different partners at that time, Mr. Rob Bain, Mr. Guy Bain, and myself and Mr. Douglas Pulley met at Wakefield for those meetings. In October of '42, Mr. Bain died.

Q. Which Mr. Bain?

A. Mr. Frank Bain. When Mr. Frank Bain died, those meetings were held in Suffolk, either at the office of Mr Guy Bain's, or his home, up through 1951. The reason those meetings were held at Suffolk was due to the fact that Mr. Guy Bain was an invalid, or he was on crutches; he was unable to get to Ivor, so we met and he went to his office there, but a few years before he died, he was unable to get—I mean, he was at his home.

Q. That brings us down to 1951; tell me this, were the books and records pertaining to the estate brought to these meetings by Mr. Pulley?

A. No, sir.

Q. They were never brought to those meetings by Mr. Pulley?

A. No, sir.

Q. Now, beginning with the year 1951, where were the meetings that you are talking about held?

page 20 } A. They were held in the Thomas L. Bain Store in Ivor.

Q. Were the books and records at those meetings held there at the store, were the books and records presented to you by Mr. Pulley at that time?

A. No, sir, they were never asked for. We didn't ask for them unless there was some question we may have asked. We never examined them ourselves. We left it up to him to get the information that we asked for.

Q. What about the checkbooks, were they ever presented to you by Mr. Pulley to look over them?

A. No, sir.

Q. Why didn't you ask for the books and records and checks and deposits and various things like that at these meetings?

A. The fact that we just trusted him to give us the proper information; he was in the employment of Thomas L. Bain

from '23 to '36, Mr. Thomas Bain trusted him and after '36 Mr. Frank Bain, who was brother to Thomas L. Bain, he trusted him, and we just naturally trusted Mr. Pulley. We didn't realize that but what he was doing.

Q. You say you trusted him, how long did you continue to trust Mr. Douglas H. Pulley?

A. Until he resigned, effective January 1, 1956.

Q. Did you do anything about his resignation and his leaving?

page 21 } A. We accepted his resignation and when he left effective January 1st, 1956, we presented him—

Q. Wait, when?

A. '56. We presented him with a silver tray in recognition of long service to Thomas L. Bain.

Q. Do you remember whether there was an inscription on that tray, or anything of that sort?

A. The inscription on that tray, it was, "From Thomas L. Bain Estate to Douglas Holden Pulley, January 1, 1923 to January 21—to January 1, 1956."

Q. Mr. Bain. let's get back to that one meeting that you said that you had with Mr. Pulley around the first of the year, or after the first of the year, what type of meeting was that?

A. It was a meeting to consider—look over the tax information that Mr. Shands prepared for the different heirs of the Thomas L. Bain Estate. A copy was sent to each one of the heirs and also a copy was sent to Ivor. We met there to look over that income tax information for our personal income taxes.

Q. You say Mr. Shands?

A. Yes, sir.

Q. Who is Mr. Shands?

A. He's the accountant that made out these income tax information things for the Thomas L. Bain Estate

page 22 } from the year 1947 to 1955.

Q. Who employed Mr. Shands?

A. Thomas L. Bain Estate.

Q. What was the purpose that he was employed for?

A. He was to make out these—that, I mean, this information for our tax returns, and he made out mine and several income taxes for the different individuals.

Q. Different individuals?

A. Yes, sir.

Q. I hand you herewith, Mr. Bain, a list of sheets, the top

one of which is entitled Income Report 1951, and will ask you if they are the sheets or information about which you have just testified that were presented at that meeting, say, for the year 1951?

A. These first top sheets, Mr. Parker, you present is information that Mr. Douglas Pulley got up and sent to Mr. Shands. This was an inventory of the store and it was made up at the end of each year and these first few sheets were here the information was sent to Mr. Shands—carried to Mr. Shands and I think in some cases, he being in Wakefield, I picked this information up.

Q. Then were these sheets, the other sheets he made out, what we might call information for Tax Returns Schedule, aren't they?

A. Schedules. They were made out to be attached

page 23 } to our personal income tax report.

Q. Now, those last sheets that you have reference to there were copies of those attached to your personal income tax return?

A. Yes, sir.

Q. Will you file that as your Exhibit Number Six, and will you point to the Judge the pages that were sketched so you can see them and the other pages that were submitted by Mr. Pulley? Just file the whole batch as Exhibit Number Six.

Q. Did you receive a similar batch of sheets for each of the years, 1951, '52, '53—Cut out '51, for the years '52, '53, '54 and '55?

A. I received the similar information each year.

Q. I hand you herewith a group of sheets, the first one of which in each case is entitled, "Income Report" and the year, and will ask you whether or not these are the sheets that you have reference to?

A. They are similar sheets, and the information is to the one filed in '51, this is '52, this is '53, '54, and this is '55.

Q. Will you file them respectively as your Exhibits Number Seven, Eight, and Nine, and Ten? Chronologically, if your Honor Please.

Q. Now, Mr. Bain, you say that you received copies of those last sheets in each year to file your schedule

page 24 } for your personal income tax return and that they were sent to you by Mr. Shands, did he send the other members of the partnership the benefit of these sheets too?

A. If he made out the personal income tax report, which

he did for most and part of them, he attached a copy of that to their personal income tax return.

Q. I see.

A. One of those reports came to me just for my files and as I was heading up the T. L. Bain Estate and I just kept it in my files, but he kept one copy and made out mine and filed it with the income tax return, and for the Federal Government and also for the State Government.

Q. You were sent one copy as one of the trustees?

A. Yes, sir.

Q. Were you particularly interested in seeing that your own individual tax return was proper in all respects?

Mr. Woodward: We object to that; it's argument, Your Honor.

The Court: I think the Court would presume that he would be able to give that testimony.

Examination By Mr. Parker Continued:

Q. On the assumption that you were interested, will you tell the Court particularly why you were intensely
page 25 } interested that these sheets, schedules, should be correct?

A. I was especially interested in that for the fact that a few dollars in my income would change my income bracket and I was especially wanted to go and see those tax reports before I filed my income tax.

Q. Well, were your brackets high or low?

A. They were rather high.

Q. Around sixty?

A. I'd say around sixty; I'd say between fifty and sixty.

Q. Other than to furnish you this information concerning the income of the estate and the schedule for your income tax return, was Mr. Shands employed for any other purpose?

A. No, sir.

Q. At any time during the years for which he worked for you all?

A. No, sir.

Q. Now, if you will take your exhibit covering 1951, it's Number Six, if Your Honor please, you may wish to retain that copy and I will give him this to ask him something about it.

The Court: All right, and then I can follow him.

Mr. Parker: Yes, sir.

Harry L. Bain.

Examination By Mr. Parker continued:

page 26 } Q. You have, I believe, Mr. Bain, examined the first four or five sheets of this exhibit, have you not? How many are there?

A. Four sheets.

Q. Are these the ones constituting the information you said that was presented by Mr. Pulley to Mr. Shands?

A. These four sheets were furnished to Mr. Shands to make out the income tax information.

Q. And later attached to the schedule and you got a copy of it?

A. Yes, sir.

Q. I will ask you to look on those first four sheets there and on one of them, the fourth I think it is, it shows a balance of cash in bank at 1-1-52, of $107,000.00 plus, is that correct?

A. Yes, sir.

Q. Now, so far as you know, that statement about the amount of money in the bank was correct, was it not, as to the actual amount of money in the bank?

A. We had no reason to think it wasn't correct.

Q. Now, Mr. Bain, will you look at each and every one of those first four sheets, look at them carefully, and tell me whether or not there's any information on those first four sheets to enable you to say whether the $107,000.00 plus is the proper amount that should have been in the

page 27 } bank to the credit of the estate at the end of the year?

Mr. Woodward: We object to that; he's not qualified to answer that unless he's been over all the records himself.

The Court: From those sheets I think it's proper; objection overruled.

Mr. Woodward: We except.

A. There's no way to tell whether the amount is correct or not.

Examination By Mr. Parker Continued:

Q. As a matter of fact, looking over those sheets, Mr. Bain, could you tell whether there should have been a little over $100,000.00, or perhaps maybe over $200,000.00 that should have been to the credit of the estate at that time?

A. No, sir.

Mr. Woodward: We object to that on the same grounds.

Harry L. Bain.

The Court: Objection Overruled.
Mr. Woodward: We save the point.

Examination By Mr. Parker Continued:
Q. By looking those first four sheets over carefully as you can, is there any possible way that you could determine whether that bank balance is what it should have
page 28 } been?
A. No, sir.
Q. Is there any possible way that you could have—I want you to look them over again carefully, is there any possible way that you can look these sheets over and tell how much money was actually received on behalf of the estate by Mr. Pulley, and how much was disbursed on behalf of the estate by Mr. Pulley?
A. No, sir.

Mr. Woodward: We object, Your Honor, the statement speaks for itself.
The Court: Objection overruled.
Mr. Woodward: We save the point.

Examination By Mr. Parker Continued:
Q. Mr. Bain, did you or Mrs. Bain, or any of the others, ever consider those sheets that I have given you together with the sheets from Mr. Shands as settlement of account between you and Mr. Pulley?
A. No, sir.

Mr. Woodward: That's a legal question.
Mr. Parker: I asked him did they ever consider them to be—I withdraw that question.
The Court: Well, ask him did *he* consider.

page 29 } Examination By Mr. Parker Continued:
Q. Mr. Bain, as one of the trustees did you ever consider the sheets from which you are testifying, in your Exhibit Number Six and the other similar sheets and Exhibit Seven, Eight, Nine and Ten, did you ever consider them in any way a settlement of account with Mr. Pulley?

Mr. Moyler: Wait just a minute, Mr. Bain. We want to object to that on the grounds he's now asked to answer questions extending over a period of years whereas these statements were handled annually and submitted annually and

whether or not he ever considered them as account may or may not be a question of facts, and I think that the question is too general and leading to ask it at the end of seven years, or six years, as to what he considered or didn't consider at the end of each particular year.

Mr. Parker: I will ask him then at the end of each particular year.

The Court: I think you should. If the question is asked for each particular year, then the objection is overruled.

Examination By Mr. Parker Continued:

Q. Mr. Bain, take your Exhibit Number Six for '51 and look those sheets over and state to me whether—
page 30 } state to the Court whether you ever considered these sheets to be any sort of a settlement of account between you and Mr. Pulley?

A. I did not; neither did Mrs. Bain, the other trustee.

Mr. Parker: Wait a minute.

Mr. Woodward. We object to that.

Mr. Parker: Let's limit it to you.

Examination By Mr. Parker Continued:

Q. Will you please look at the other exhibits, Seven, Eight and Nine, and Ten, and will you tell me whether you consider the sheets in Exhibit Number Seven in any way to be a settlement of account between you and Mr. Pulley for the year 1952?

Mr. Woodward: Our objection goes to all the questions, and you overruled, and we except.

The Court: I overruled each.

A. We did not consider them as a settlement.

Examination By Mr. Parker Continued:

Q. How about '53?

A. The same thing in '53, '54 and '55.

Mr. Woodward: We object to him leading the witness.

Mr. Parker: I'm asking him—
page 31 } Mr. Woodward: Ask him what the agreement was.

Mr. Parker: If Your Honor please, I'm going to ask him whether there was an agreement.

Harry L. Bain.

The Court: You've got a right to ask him was there an agreement.

Examination By Mr. Parker Continued:

Q. Was there ever any agreement of an accounting between you and—as trustee, and Mr. Pulley?

A. No, sir.

Q. Referring to your Exhibit Number Six, was there ever any agreement between you and Mr. Pulley that would constitute settlement of an account?

A. No, sir.

Q. Is that true as to the papers shown in Exhibit Seven; that's for '52?

A. No, sir.

Q. In other words, let's get the "yes, sir" and "no, sir" straight.

A. There's no acceptance as a settlement, and the same existed in '53, '54 and '55.

Q. Now, Mr. Bain, for the year 1951, you have introduced as your Exhibit Number Six certain sheets which have been sent to you and which you have identified the first page 32 } four as being copies of sheets prepared by Mr. Pulley; the other four copies of the sheets were prepared by Mr. Shands for that year, did Mr. Pulley ever send to you as trustee any other written sheets or statement or figures?

A. No, sir.

Q. Did he ever submit to you during that year or for that year any settlement of account for any matter whatsoever?

A. No, sir.

Q. Were these the only written or otherwise figures which you received from Mr. Pulley for the year 1951, relative to what had taken place in the estate?

A. They were all. These sheets were delivered to Mr. Shands before we ever saw them. In other words, in this first meeting we were submitted a copy of these sheets.

Q. At that meeting did you discuss anything other than those income tax receipts or returns?

A. No, sir, the only thing we discussed—

Mr. Moyler: We object to that information and move it be stricken on the grounds that the meetings were held, the first one was held in 1951, according to the exhibits here, and it's impossible for Mr. Bain to go back over his memory and describe, what is incredible, to say whether or not anything

else besides one specific thing was discussed at any meeting. I think it would be proper to ask what was discussed regarding these particular matters, if he can, but as to page 33 } asking whether or not anything at all was discussed is just simply improper.

Mr. Parker: If the Court please, I think if the Court wishes to think that Mr. Bain cannot remember, it might affect his credibility, if the Court wishes to think that, but I think my question is perfectly proper as to what was discussed at this meeting.

The Court: I think the purpose of the meeting and what they discussed—I think he may testify to it. Now, if his memory is faulty about it, then that goes to the weight of the testimony and not to the admissibility of it.

Mr. Moyler: I don't mind him doing that.

Examination By Mr. Parker Continued:

Q. My question was pertaining to the meeting at the first of the year that you had in 1951, did the meeting—how about the meeting that you had in 1952, what was the purpose of that meeting and what did you discuss generally?

A. It was the same thing each year. We had these meetings after this information for taxes was provided. We had all the meetings for the similar purpose; it was for taxation purposes only.

Q. Now, let's get back to the bank accounts and the fact that Mr. Pulley, I believe you said, handled the page 34 } bank accounts and deposits, the checks, that you never did that?

The witness gave no reply.

Q. I will ask you when is the first time that you had any knowledge that Mr. Pulley had been co-mingling his funds with those of the estate?

A. When we received the audit from A. M. Toler and Company, July '56.

Q. That's the first information you had that Mr. Pulley—

Mr. Woodward: We object to that; you've been over it.

Mr. Parker: What's your objection?

Mr. Woodward: I'm objecting to your rehearsing the testimony with the witness.

Mr. Parker: I wanted to emphasize that.

Harry L. Bain.

Mr. Woodward: I know you do; you've already got it in the record.

Mr. Parker: I guess it's emphasized enough.

Examination By Mr. Parker Continued:

Q. I believe you stated that Mr. Douglas Pulley's employment was terminated as of January 1, 1956, is that correct?

A. Yes, sir.

Q. Did you receive a resignation from Mr. Pulley?

A. Yes, sir.

page 35 } Q. I hand you herewith an undated letter, which purports to be signed by Mr. Douglas H. Pulley, did you receive that letter?

A. Yes, sir.

Q. Is that Mr. Pulley's signature on the letter?

A. Yes, sir.

Q. Can you tell when you received that letter?

A. The letter was not dated by Mr. Pulley, but I received it October 8, 1955. I wrote across the top of the letter the date I received it.

Q. That notation on the top right-hand corner is your own handwriting?

A. Yes, sir.

Mr. Parker: Will you introduce that as your Exhibit Number Eleven, please?

Mr. Parker: I believe I'd like for you to read that exhibit, if you will, Mr. Bain.

A. The letter reads:

THOMAS L. BAIN'S ESTATE
Ivor, Virginia

Mr. Harry L. Bain and
Mrs. Marion T. Bain, Trustees,
Thomas L. Bain's Estate

As you know for the past several months I have been greatly incapacitated by an illness which has rendered me unable to engage in activities to which I was accustomed.

page 36 } While I am now improving and hope to be able very soon to resume, in large part, a normal and active life I feel that my doctors will curtail my activities to such an extent that my future efforts will be

limited to an advisory capacity. As you know I have been associated with the affairs of the Thomas L. Bain Estate for over thirty years and in that time have come to have high regard not only for the two of you who have been selected by the others as trustees, but also for all who have any interest whatsoever in the subject matter of my employment. I hope that the feelings are mutual as I have always endeavored to do whatever possible to promote the interest of those whom I represented. It is therefore with extreme regret that I tender my resignation as manager of the Thomas L. Bain Estate and I ask that said resignation be accepted and effective as of the first day of January, 1956. I will, of course, be more than glad to do whatever I might in the interest of the Bain Estate after the effective date of this resignation and I request that you feel free to seek my services in this connection or as a friend of long standing, to call on me if I can be of help to any of you on matters of a personal nature. Please convey the expressions of this letter to all of those who may be interested.

Respectfully,

DOUGLAS H. PULLEY.

Mr. Parker: That's Plaintiff's Exhibit Eleven.
page 37 } The Court: Yes, it's been marked.

Examination By Mr. Parker Continued:

Q. I believe, Mr. Bain, the tray that the trustees gave Mr. Pulley was following that letter, around Christmas?

A. Between Christmas and the first of the year; I don't remember the exact date.

Q. That's Christmas of '55?

A. Yes, sir.

Q. You did replace Mr. Douglas Pulley as of January, 1956?

A. Yes, sir.

Q. Did you or did you not—why did you, or did you request an audit of the accounts of Mr. Douglas Pulley?

A. When we received this resignation and employed Mr. Robert Pulley to succeed him, we told Mr. Robert Pulley at the time—

Mr. Woodward: We object to what was told to Mr. Robert Pulley.

Harry L. Bain.

Examination By Mr. Parker Continued:

Q. What did you do?

page 38 } A. We proceeded to employ an accountant to audit the books to close out Mr. Douglas H. Pulley's regime and we did this, because we wanted a complete account for Mr. Pulley, for the affairs up to the time of his effective resignation.

Q. Was that the purpose for which you made that request for an audit at that time?

A. We made the request, because it was the end of Mr. Pulley's regime.

Q. Because that was the end of Mr. Douglas H. Pulley's regime?

A. Yes, sir.

Q. Had there been any other audit made of his accounts between 1936 and the one that you ordered in January of 1956?

A. That was the audit made for the years '41 and '42 and the first part of '43.

Q. Who made that audit?

A. Elkins and Durham.

Q. Will you state why you obtained an audit for that year?

A. Yes, we wanted an audit for that year, because Mr. Guy Bain had information—

Mr. Woodward: We object to that, Your Honor. He's dead, Your Honor. We object to what Mr. Guy Bain had or what information he got.

Examination By Mr. Parker Continued:

page 39 } Q. Did you have any information?

A. Yes, sir.

Mr. Woodward: We object to anything based on information that's strictly hearsay.

Mr. Parker: I'm not producing this information to prove the fact of the information; I'm proving this as the reason for his obtaining the audit. I think he may testify as to his reasons for obtaining an audit.

Mr. Woodward: The fact is that he got the audit and the result of the audit is all that we can possibly be interested in; whether he had a good or bad motive is not evidence, or what information he got is not evidence, it's strictly hearsay; the motivation for the audit is not an issue.

Mr. Parker: I anticipate that these gentlemen, they have

indicated to the Court, that they're going to argue to the Court that we should have audits regularly made and, therefore, I think the reason for making this audit in one year between '36 and '56 is very properly evidence, that this Court should consider in considering the case.

Mr. Woodward: What we expect to do, Your Honor, is not any part of his case until we do it.

The Court: The objection is overruled.

Mr. Woodward: We save the point, Your Honor.

A. We had a report that things were not going well in the store; that was the reason we had the audit for
page 40 } the years 1941 and 1942 made.

Examination By Mr. Parker Continued:

Q. You say you had information that things were not going well in the store, without being specific, just generally, what do you mean by that?

Mr. Woodward: Same objection, Your Honor.

A. Things were not carried on in a satisfactory way and needed some attention there.

Examination By Mr. Parker Continued:

Q. Was the audit made by Elkins and Durham?

A. Yes, sir.

Q. Was there ever an official copy of the audit submitted to you or any other beneficiary of the estate?

A. Nothing but letters and conversation.

Q. In other words, you didn't get an official document bound by the accountants and filed?

Mr. Woodward: We object to that; he's already stated what he got.

Mr. Parker: Will you please let me examine my own witness?

Mr. Woodward: No, I'm not going to let you examine him to my prejudice.

page 41 } The Court: I think he had a right to testify to what he got, and I think he has a right to ask what he got.

Examination By Mr. Parker Continued:

Q. In other words, you didn't get an official document put in booklet form and sent to you?

Harry L. Bain.

A. We didn't have any booklet form.

Q. As a matter of fact, did you get any actual tabulation of figures from Mr. Elkins and Durham, sheets of figures, anything of that sort?

A. No.

Q. Did you get a letter from them stating—

Mr. Woodward: We object; we call for the letters, the best evidence. We are objecting, it's simply a self-serving declaration and hearsay.

The Court: If there's a letter, of course, I don't think he could testify without an explanation as to what happened to the letter.

Mr. Parker: The letter is here. I am going to introduce it to show what happened to the audit.

The Court: I think that will be all right.

Mr. Woodward: Unless it's a mere self-serving declaration and that's all it is; it couldn't be anything else, it couldn't possibly be evidence against Mr. Pulley who has never seen it, who has never been confronted with
page 42 } it, never been informed of it; it's some correspondence that goes on between parties and is not evidence against Mr. Pulley.

The Court: I think the letter will be admissible. I don't say that it would have any considerable probative value, but I think it's admissible to show what happened at that time.

Mr. Parker: That's the only purpose.

A. When we received this information of things not going well, we called Mr. Pulley in conference with Mr. Rob Bain, Mr. Guy Bain and myself, and told him that we had reports that we didn't like about the operation there and that we were going to proceed to have the books audited.

Q. So Mr. Douglas Pulley knew that?

A. Yes, sir.

Q. I hand you herewith a letter dated February 25, 1943, addressed to you, and purported to be signed by Mr. W. L. Elkins, will you please state whether or not you received that letter?

A. Yes, sir.

Mr. Woodward: I make the additional objection: it's not fortified by any conclusions and figures by Mr. Elkins or by Mr. Durham upon which the letter is predicated. It's simply a bald statement by somebody who has had experience in

these proceedings. That person has not been called and cannot be cross-examined on the witness stand. I
page 43 } submit it's not evidence in this case, some letter that took place between some other parties in 1943.

The Court: The letter does not purport to be an audit?

Mr. Parker: No, sir.

The Court: The letter is admissible as the explanation of the situation at that particular period.

Mr. Woodward: But, Your Honor, it's not acceded to by Mr. Pulley.

Mr. Parker: We're not contending that.

Mr. Woodward: It's simply a statement which might have been made by anyone of the accountants of the United States, as to what was the status of Mr. Pulley's accounts. It's simply worth nothing except to prejudice Mr. Pulley about some statement that was made back in 1943.

The Court: I don't think we can assume that the letter was to prejudice Mr. Pulley.

Mr. Parker: No, sir, after the testimony is through, you will see that it is not. Certainly the Court should have the privilege of seeing the letter and hearing it to determine whether or not it's admissible.

Mr. Woodward: We object to it, Your Honor. The admissibility of evidence is not different between the Court and the jury. This is brought in here to prejudice the mind of the Court against us and that's the sole purpose of it.

Mr. H. L. Bain
page 44 } Capron, Virginia

Dear Mr. Bain:

I have your letter of the 24th, requesting to send you, if possible, the statement of your share of the taxable income from the Estate of Thomas L. Bain by Friday of this week. I am sorry to advise that this is impossible. (I had written him to send us a copy—

Mr. Woodward: We object to that, as to what he had written him; we call for the letter.

A. I just stated what I had written.

Mr. Woodward: I know you did, and that's what I'm objecting to.

Harry L. Bain.

The Court: I don't think what he had written him is proper evidence.

Examination By Mr. Parker Continued:

Q. Just read the letter.

A. "I have been out of the city and have just returned to the office this morning and am making plans to go to Ivor one day next week. We have recently made an audit of the accounts of the Estate of Thomas L. Bain, but the income shown by our representative is about $5,000.00 more than is shown by the figures of Mr. Douglas H. Pulley. I want page 45 } to get these figures reconciled before I make a complete statement and cannot go to Ivor before sometime around the first of next week. I hope to get this statement into your hands by the end of next week. This is the very best that I can do. We are just like all other people at this time, we are up against it. We are short of help and we are doing the very best we can, so I hope you will be patient with us."

Now, Mr. Elkins did go to Ivor the following week and after a study of the situation there, he reported to us that instead of this $5,000.00 discrepancy—

Mr. Woodward: We object.

The Court: I think the evidence is proper.

Mr. Woodward: He's talking about what was reported to them. We call for the reports if it's evidence at all and we call for these reports. We don't want to be understood as waiving our objections as to receipt of any such evidence.

Mr. Parker: We understand that you are objecting, but it seems to me that the reading of this letter and then stating what Mr. Elkins told as a completion of the audit is all part of the same picture; that's all I'm trying to get over to this Court.

The Court: I think it's proper testimony.

Mr. Woodward: We save the point.

A. After he had gone to Ivor and checked these records, he told us instead of the $5,000.00 discrepancy, there page 46 } appeared to be only a few dollars and suggested that we just forget it.

Q. Was it agreeable to you all at that time?

A. We accepted Mr. Elkins' recommendation.

Q. And didn't even ask Mr. Elkins to put it in the form of an official—

Harry L. Bain.

Mr. Woodward: We object to that, Your Honor, it's leading.

Mr. Parker: That's filed as Exhibit Number Twelve.

Mr. Woodward: We move that entire testimony with reference to Mr. Elkins and the letter to which we have been alluding to be stricken from the record, which I understand Your Honor overrules, and we except.

The Court: Yes.

Examination By Mr. Parker Continued:

Q. Getting back to the recent audits, that is the audit that you said you ordered in January, 1956, at the end of Mr. Douglas H. Pulley's tenure of office and the beginning of Mr. Robert Pulley's tenure of office, what year did you ask Mr. Toler to cover?

A. Asked Mr. Toler to audit the years of '54 and '55.

Q. Why those two particular years?

A. Because they were the last two years that Mr. Pulley worked with the estate.

Q. The immediate last two years?

page 47 } A. Yes, sir.

Q. Did Mr. Toler make the audit and give the report?

A. Yes, sir.

Q. What did you do after you received Mr. Toler's audit and report?

A. We consulted our attorneys.

Q. After that, what, if anything, did you do?

A. We were so amazed at the report Mr. Toler gave, and we thought it would be better, or rather we wanted to have another accountant to go and see if there was any errors in Mr. Toler's account, because we were so amazed at the figures.

Q. Amazed in what way?

A. That they showed discrepancies.

Q. Discrepancies, what do you mean by discrepancies?

A. There were funds not accounted for.

Q. And then—so you were amazed, then what did you do?

A. We employed Hardy and Irving, and now Hardy and Lewis, to check the audit made by Mr. Toler, or corroborate with Mr. Toler, not that we had any reason to think anything was wrong with Mr. Toler's audit, but we wanted—of the size of this audit of the funds unaccounted for, we wanted to have some other accounting firm to check with him.

Q. You wanted to check and double check?

A. Double check.

Harry L. Bain.

Q. Did Hardy and Irving, now Hardy and Lewis,
page 48 } did you ask them to make any further audits of any further years?

A. They corroborated—

Mr. Woodward: We object to whether they corroborated with Mr. Toler. We object to whether they corroborated with Mr. Toler; we have neither one before us.

The Court: I think that he can testify as to what they did, and introduce the report, but as to whether it *collaborates* or whether it does not, that's a question that will stand out from the report.

Mr. Parker: Let's strike that out.

The Court: Yes, sir.

Examination By Mr. Parker Continued:

Q. Now you can answer my question. Did Mr. Hardy's firm present to you audits covering the years '51, '52 and '53?

A. He proceeded to audit the year '53. After he completed that, he audited the year '52. After he completed that, he audited the year '51.

Q. Was that very expensive?

A. Rather expensive.

Mr. Parker: That's all. You may inquire.

CROSS EXAMINATION.

page 49 } Examined By Mr. Woodward:

Q. How old are you?

A. Sixty-six.

Q. How long have you been in the mercantile business?

A. Been at Capron since 1914.

Q. Do you engage in the same line of business as Mr. Thomas L. Bain did?

A. We're engaged in the general mercantile business, fertilizer and peanut business.

Q. You buy peanuts?

A. Yes, sir.

Q. You operate farms?

A. Yes, sir.

Q. Do you sell fertilizer?

A. Yes, sir.

Q. Do you have tenants?

A. Yes, sir.

Harry L. Bain.

Q. In what way does your business differ from that of Thomas L. Bain Estate?

A. More or less similar.

Q. Then you are familiar with such operations?

A. Familiar with our operation.

Q. How many farms do you operate by tenancy or supervision?

page 50 } A. I haven't counted them up.

Q. Let's count them now.

A. I'd say approximately, around twenty.

Q. Assuming that the Thomas L. Bain Estate had seventeen farms, you operate more than he did?

A. I did not.

Q. What acreage do you farm?

A. I'd have to refer to my farm book to tell you how many acres we farm in Capron.

Q. You got any idea whether it's fifty acres?

A. No, sir, I wouldn't guess at that.

Q. Do you farm as much as two thousand acres of land?

A. I said I wouldn't guess at that.

Q. Well, why wouldn't you give us an estimate of it?

A. Because I don't know. If you want that information, I'll bring it to you tomorrow.

Q. I'm asking you why you can't give it to us now?

A. Because I don't know.

Mr. Parker: He said he didn't know. He said he'd bring it to you tomorrow. I object. The witness stated that he doesn't know, and that he will get him this information tomorrow. I object to him continuing to—

The Court: He may question him as to why he doesn't know. I think he can pursue that line of questioning.

page 51 } Examination By Mr. Woodward Continued:

Q. Do you know how many farms you own?

A. Yes, sir.

Q. Do you know the acreage—

A. I do not know the acreage on each farm until I refer to my farm book; I don't carry these things in my head.

Q. Is there anything—any reason to think that Mr. Douglas H. Pulley carried them in his head?

A. I couldn't tell you that.

Q. Now, you supervise all that yourself, don't you?

A. No, sir.

Q. You have somebody to help you?

Harry L. Bain.

A. Yes, sir.

Q. Now, you're not only engaged in the mercantile business, but you farm and you're also president of the Dixie Guano Company?

The witness gave no reply.

Q. That's right, isn't it?

A. Yes, sir.

Q. And you also are an officer and director in the Bank of Sussex and Surry?

A. No, sir.

Q. Do you have any stock in it?

A. Yes, sir.

page 52 } Q. You have access to the bank records if you really wanted to see them, don't you?

A. No, sir, I don't have anything to do with the bank records of the Bank of Sussex and Surry.

Q. Have you ever been there to inquire?

A. No, sir.

Q. Which bank do you do business with?

A. Bank of Capron.

Q. Are you an officer in that one?

A. Yes, sir.

Q. What's your position?

A. President.

Q. We can assume that you are pretty conversant with the business life and affairs in Southampton County at least?

A. I have that connection that you mentioned.

Q. Mr. Douglas H. Pulley went to work for Mr. Thomas L. Bain when he was comparatively a young man, did he not?

A. I think he went in 1923.

Q. And he stayed there with Mr. Thomas L. Bain until Mr. Bain's death?

A. That's right.

Q. And so he was conversant with the business when Mr. Bain died?

A. He was working there for Mr. Bain at the

page 53 } time of his death.

Q. Was there any audit or inventory made of the Estate of Mr. Bain at the time he died?

A. They—yes, sir, there was. They filed the tax report.

Q. Well, assuming—

A. The Bank of Sussex and Surry was Administrator for the Estate of Thomas L. Bain.

Q. Just answer my question. Was any audit made of the Estate of Thomas L. Bain when he died?

Harry L. Bain.

A. I don't know what the bank did.
Q. Well, you were an interested party, weren't you?
A. I said, I don't know what they did.
Q. In fact, you were one of the chief beneficiaries of the estate, were you not?
A. No, sir, I was just one of them.
Q. Have you drawn an income from it every year since then?
A. A little.
Q. How's that?
A. I say I've drawn a little.
Q. And you have drawn an income ever since Mr. Douglas H. Pulley has had it?
A. We've had some income from it every year.

page 54 } Q. In good years and bad years, you've had income in the operation from the T. L. Bain Estate as presided over by Mr. Pulley?

A. Yes, sir.
Q. And some have been quite exceptionally good years, have they not?
A. Some have been better than others.
Q. Now, you had this audit, and we ask the question without waiving our objection. You had this audit by Elkins and Durham and you found this discrepancy of just a few dollars, that's right, isn't it?
A. Yes, sir.
Q. Not enough to bother about?
A. No, sir, that's correct.
Q. And that was in 1943?
A. It was '41 and '42, made in the first part of '43.
Q. Now, so you succeeded in 1936 and seven years later you had an audit made and you found in that entire thing and everything you inquired into that there was just a difference of a few dollars?
A. That's right.
Q. Now, you have a single entry set of bookkeeping there, don't you?
A. They have a system that's presented here.
Q. Is it double entry or single entry?

page 55 } A. I think it's single entry.
Q. You know the difference, don't you?
A. I'd say it's the old system of bookkeeping.

Q. It's the same way Thomas L. Bain kept books, isn't it?
A. Yes, sir.
Q. Douglas Pulley had farms of his own, did he not?

Harry L. Bain.

A. I understand so.

Q. And he bought what he bought right from your store—right from the Thomas L. Bain Store?

A. I didn't know that he had any account or did not with Thomas L. Bain Estate.

Q. Well, wouldn't you think it was unusual for him to go outside the store and buy from some other place rather than buy where he was working?

A. I would think so.

Q. Now, you trusted Mr. Pulley implicitly, didn't you?

A. Yes, sir, I did.

Q. And that's the basis upon which you relied for having an audit made from 1943 until 1945?

A. Mr. Pulley was trusted by Mr. Bain in his life, and he was trusted again by the estate, and we had confidence all during that period.

Q. And you trusted him throughout, that's right, isn't it?

A. Yes, sir.

page 56 } Q. You are trustee along with Marion T. Bain of the affairs of T. L. Bain Estate, aren't you?

A. Yes, sir.

Q. And still being trustee, you haven't had an audit made since 1951, when you were appointed, right on down to the present date, with reference to the estate until after Mr. Pulley quit?

A. That's correct.

Q. Well, if there's anything wrong, then you're just as guilty of negligence as you can possibly be, aren't you?

Mr. Parker: We're not conducting a suit here that the beneficiaries may have, or trying the rights the beneficiaries may have under the trust agreement against Mrs. Marion Bain and Mr. Bain in the negligence, if there was any negligence.

Mr. Woodward: We have a right to—

Mr. Parker: It has nothing to do with this case as to whether or not he's guilty or anything else.

Mr. Woodward: He's on cross-examination.

The Court: On cross-examination I think he has full latitude to question as to why no audit was made during those years.

Mr. Parker: That's right, but not to say, "you're as guilty as anybody else." He's not on trial, neither is the trustee.

The Court: Proceed.

Harry L. Bain.

page 57 } Examination By Mr. Woodward Continued:

Q. And each and every year you as trustee and you individually beforehand accepted Mr. Pulley's figures and paid off on it, didn't you?

A. We didn't accept any figures from Mr. Pulley.

Q. Well, now, Mr. Bain, do you think that we are so naive as to think that you had a meeting solely for the purpose of declaring what your income was?

A. It's a fact whether you think so or not.

Q. Didn't you know what the income was for the year?

A. We had it sent out there by Mr. Shands for income purposes.

Q. Well, if Mr. Shands sent it to you, why did you have to go all the way down to Suffolk to find out what your part of it was?

A. He said we'd meet there and go over it with Mr. Pulley, and discuss it with him.

Q. Go over what?

A. The reports that came from Mr. Shands.

Q. What were you asking Mr. Pulley about?

A. Well, we were just going over what it was during the year.

Q. Exactly, you went over it with Mr. Pulley?

page 58 } A. It was in no way a settlement, no audit or anything else.

Q. Now, nearly everybody that's concerned with this estate lives close enough by to the Thomas L. Bain Store to go in there whenever they get ready with just a minor motor trip, don't they?

A. No, sir.

Q. You live within twenty-seven miles of it, don't you?

A. There's a big difference between twenty-seven and seven hundred.

Q. Well, any of them live in Wakefield?

A. Three of them live in Wakefield.

Q. And you live in Capron?

A. Yes, sir.

Q. How far is Wakefield from Ivor?

A. About six miles.

Q. Have you ever been locked out of the Thomas L. Bain Estate Store?

A. No, I don't think—

Q. Have you ever asked for access to any of the records?

A. No, sir.

Q. Have you ever asked for access to the books?

Harry L. Bain.

A. No, sir.

Q. Have you ever checked the bank account?

A. No, sir.

page 59 } Q. Have you ever checked with any of the tenants?

A. No, sir.

Q. Just what have you done except receive your dividend every year?

A. Just act as trustee, sold some timber, act as trustee for interested parties.

Q. In what way did you serve them as trustee, if you claim now somebody got away with $266,000.00?

A. Well, we trusted too much.

Q. Well, just in what way did that come about, that you trusted so much that you abdicated your position?

A. We had confidence in Mr. Pulley, and we just trusted him.

Q. Now, I ask you if it isn't a fact that in the year 1951, you received for your share of twelve different people, the sum of $2,564.95?

A. I'd have to see what you got there; I don't know what you have reference to.

Q. I'll ask you if during that year that you didn't declare a dividend of $27,139.55?

A. We didn't declare any dividend—

Q. Did you make any more money in the operation of your business than the operation of the business of the T. L. Bain Estate?

Mr. Parker: If it please, Your Honor, I certainly don't see what money he made in his business has anypage 60 } thing to do with the Thomas L. Bain business.

The Court: There's a large latitude in cross-examination; I'll permit him to proceed.

Examination By Mr. Woodward Continued:

Q. Did you make any more per acre than the Thomas L. Bain Estate made and declared?

A. I don't know what I made per acre at Capron or Ivor, as far as that is concerned. I only know about this tax information.

Q. Well, now, Mr. Bain, as a matter of fact, if Mr. Pulley was $266,000.00 short, then you knew he would be bound to be $266,000.00 short with the tenants also, wouldn't he?

A. I couldn't answer that.

Harry L. Bain.

Q. Do you know any tenants, that are tenants in fact, and who look after their business and don't check their accounts every year?

A. How was that, sir?

Q. Do you know any tenants of any consequence who do not check their accounts every year?

A. I have heard of some land owners that don't make settlement to tenants every year, and I have heard of others that do, but I think most do settle accounts every year.

page 61 } Q. If there's anything wrong with it, they're pretty apt to find it, aren't they?

A. Some of them would, and some of them wouldn't.

Q. But the vast majority of them with any education would, wouldn't they?

A. A lot of tenants don't have any education; a lot of them can't write their own name.

Q. But they know pretty well what they get during the year, don't they?

A. They have a report we give them.

Q. But they know what they get; they know how much fertilizer they get and how many advances, don't they?

A. They know about that.

Q. And they know what the crop brings?

A. Yes, sir.

Q. And they bring the tickets from the factory when they deliver the crop, or deliver it to you, don't they?

A. They do that.

Q. And there's nothing to keep them from getting somebody else to compute their tenancy if it's not right, isn't it?

A. They have a right to settlement every year.

Q. Now, the fact is, Mr. Bain, and I want to put you on your guard as to this, I ask you if it isn't a fact that from 1951 to and including December 31st, 1956, if you did not receive during that time from the sale of timber from

page 62 } Thomas L. Bain $387,486.00? Now, I mean all of you together?

A. I couldn't tell you; I'd have to have those different reports each year to substantiate that.

Q. What sort of reports are you talking about?

A. I'm talking about these information reports for income that Mr. Shands had, and I'd have to see those various reports that were submitted when the timber was sold; those reports where the money went into the Thomas L. Bain Estate and Mr. Douglas H. Pulley made distribution, but I

Harry L. Bain.

couldn't say one figure or another figure is correct unless I had the reports that's pertaining to those years.

Q. Who determined how much was going to be paid out each year?

A. The trustees, such as from the operation of the farms.

Q. Well, then, you knew what was coming in on the farms every year, didn't you?

A. No, sir, I didn't.

Q. How did you get that information?

A. Well, at these meetings we had with Mr. Pulley at the first part of the year, we'd often ask how much money he had in the bank, we'd take that figure with no proof of whether that figure was correct or not; we took it as the statement. If we thought it was more than enough to operate during the year, we made disbursements to the

page 63 } interested parties during that year.

Q. Every year?

A. Yes, sir.

Q. Well, now, you had no trouble with the checks you got—you got your money every year, didn't you?

A. Those timber sales were disbursed as the sale of timber was completed.

Q. I ask you further, Mr. Bain, if you ever been over any records with Mr. Pulley?

A. What kind of records?

Q. Records of the Thomas L. Bain Estate?

A. Nothing except these reports that we got at the first of the year.

Q. Did you ever ask him any questions about anything which you did not understand?

A. We often asked various questions, generally.

Q. Well, was his answer satisfactory to you?

A. Well, what questions we asked, but the facts, we didn't go into detail whether these statements were correct or whether they were not; we took them—

Q. I ask you if his answers were satisfactory to you at the time?

A. His answers to us were satisfactory.

Q. Now, the record shows that between '51 and 1956, you got $248,000.00 profit from the Thomas L. Bain

page 64 } Estate, are you prepared to deny that?

A. I'm neither prepared to deny or affirm it, unless I had those reports that were submitted each year.

Q. What percentage of the business, if you know, resulted

from the operation of the store as a store, and the operation of the farms as farms?

A. They were not separated.

Q. Mr. Pulley operated a trucking business, did he not? Mr. Pulley and his son?

A. He did.

Q. And he was also in the ham business?

A. He was at the time being.

Q. And he was also engaged in selling crops from his own farms?

A. We had nothing to do with that.

Q. What was that?

A. We had nothing to do with what he sold on his farms.

Q. Did the Thomas L. Bain Estate ever have any stocks in various corporations?

A. No, sir.

Q. You took his figures every year and upon your oath gave them to the Federal Government as being your income, didn't you?

A. We took the figures from Mr. Shands—that Mr. Shands prepared from information Mr. Pulley gave him.

page 65 } Q. But you took them nevertheless and swore to them as your income every year?

A. Took it from Mr. Shands—information—from this information furnished by Mr. Pulley, and we submitted those with our tax income report.

Q. Was there ever anything about Mr. Shands' examination of the books of the Thomas L. Bain Estate that would ever restrain you from looking into any transaction that was there?

A. Mr. Shands never made any checks on the books there.

Q. Well, wasn't it open and available to him to find out what the income was?

A. It was, but so far as I know, he was not authorized to go there and check any books, examine any books. The only thing he was to get that information from Mr. Pulley and Mr. Pulley delivered it to him, and if Mr. Shands examined those books in any way, he was doing so without our authority.

Q. You already had it in your possession before Mr. Shands got it, didn't you?

A. Got what?

Q. What Mr. Pulley had?

A. No, we did not. That report was sent to Mr. Shands before we saw it. We didn't see that until after Mr. Shands had made up his report.

Q. Did you ever question Mr. Pulley about it?

page 66 } A. We talked over those reports, and we would ask various questions sometimes, and we'd ask what was due any tenants, if any were unpaid, we asked him to give us what each farm—who worked each farm and the receipts and disbursements and expenses and income on each farm.

Q. Do you know whether Hardy and Irving ever consulted Mr. Douglas H. Pulley concerning the accounts, and explanation of the terms and conditions that existed with reference to tenants and business?

A. I don't know what Mr. Hardy and Mr. Irving—I mean Mr. Hardy and Mr. Lewis, they audited the books, but you'd have to get that information from them.

Q. Well, now, Mr. Hardy and Mr. Irving wouldn't know whether the tenants were on one-fourth share, one-third share or one-half share, would they?

A. He would get that information from the man in charge.

Q. I asked you whether or not the Thomas L. Bain Estate had any stock and you answered "no." I'll ask you further if the estate had any stock in Lowe's, Incorporated?

A. They did not.

Q. Did it have any in the Great Northern Power Company?

A. No.

Q. Did it have any in the Chesapeake and Ohio Railroad Company?

A. Mr. Woodward, I told you it didn't have any.

page 67 } Q. All right then—

A. I've answered your question.

Q. So that if any dividend checks went into the bank account of Thomas L. Bain and Company, or Thomas L. Bain it couldn't have come from the source of Thomas L. Bain Estate, could it?

A. I said they didn't own any stocks in any corporations.

Q. Now, Mr. Pulley had top authority to sell the crop and deal with the tenants and operate the place?

A. That's right.

Q. No doubt about that?

A. He was complete manager of the operation of the farms and the store.

Q. Well, you were evidently satisfied with the services all the time from 1943 until 1955, weren't you?

A. We were satisfied, because we had great confidence in Mr. Pulley, and we found out that we were wrong in all this going on.

Harry L. Bain.

Mr. Woodward: I move that this be stricken; it's purely a voluntary expression of opinion; it's not responsive to the question.

The Court: He said he had confidence up until a certain time; I think the answer is proper.

Examination by Mr. Woodward continued:

page 68 } Q. Did you buy from Thomas L. Bain Estate?

A. There were a few things we bought together. We bought some wire and probably some rye grass from time to time.

Q. Did you sell to the Thomas L. Bain Estate?

A. No, sir, we didn't sell anything to Thomas L. Bain Estate, as I recall.

Q. Didn't you ask them to handle their fertilizer account in a certain way so it would increase the tonnage?

A. We made contracts for all the fertilizer accounts, L. J. Bain and Son, at Capron, had made contracts for fertilizer for Thomas L. Bain in his life; L. F. Bain and Son, another organization at Wakefield. We made contracts for those and also Capron and back in Mr. Frank Bain's life and Mr. Tom Bain, and we continued to do it over a period of years, and L. F. Bain and Son, and we continued to make contracts for fertilizer and taking the cases in Ivor and Wakefield, they ordered their own fertilizer, a copy of the invoice was sent there, sent to Capron we made settlement at the end of each year, or end of the fertilizer season with Thomas L. Bain Estate, with L. J. Bain and Son in Capron.

Q. You were doing business as L. J. Bain and Son, weren't you?

A. I was manager of L. J. Bain and Son.

Q. That's the same as H. L. Bain in Capron?

A. That's L. J. Bain and Son.

page 69 } Q. And that's the one we've been referring to as being operated by you?

A. Yes, sir.

Q. Well, how about the farms?

A. There are three ownerships of the farms at Capron.

Q. Do you have any individual ownership?

A. I have a few farms individually.

Q. Do you run them through L. J. Bain and Son?

A. It's operated through L. J. Bain.

Q. You told Mr Douglas Pulley to get his fertilizer from the store, or through the Thomas L. Bain Estate, because that would increase the tonnage?

Harry L. Bain.

A. Mr. Woodward, as I stated before, for every, since probably for the last forty years L. J. Bain and Son had been buying fertilizer or making contracts for fertilizer for three places; it wasn't anything that we told Mr. Pulley. We had dealings with Mr. Thomas L. Bain.

Q. Well, is it fair then to say that you managed the fertilizer agreement?

A. We made the contracts; they did their own ordering. We had nothing to do with how much fertilizer was received, or how much was bought, or anything about it.

Q. But the greater the purchase, the cheaper the price?

A. I don't know, it's just a habit or custom that we had been buying it together.

page 70 } Q. Well, Mr. Bain, a five thousand ton customer gets it at a cheaper price than a fifty ton customer, doesn't he?

A. I couldn't tell you that.

Q. You're president of the Dixie Guano Company, don't you know?

A. I don't know whether they compare a thousand tons to five thousand tons.

Q. Are you serious in your answer about that?

A. I say it's a question of what the fertilizer concerns make. I don't know what fertilizer concerns make at one thousand and five thousand tons.

Q. Now, Mr. Bain, you handled your farms through L. J. Bain and Son in Capron exactly like Mr. Pulley handled his farms through the Thomas L. Bain Estate at Ivor, didn't you?

A. We did not; each farm stood on its own bottom. L. J. Bain and Son didn't finance the farms that were not owned by L. J. Bain in Capron.

Q. You just pay your account when it runs up to a certain figure, don't you?

A. They are operated different ways. They are paid at different times.

Q. You run an account with L. J. Bain and Son, don't you?

A. Yes, sir. L. J. Bain and Son, when they charge fertilizer to a farm, they charge it as owned by H. L. Bain

page 71 } or L. J. Bain Estate. They charge the same price as they charge anything else. We have individuals—just like we have accounts with customers; we have no interest.

Harry L. Bain.

Q. And you never had an audit made of L. J. Bain and Son by Toler or Hardy?
A. No, sir.
Q. Did Mr. Shands make your reports for income tax purposes?
A. Yes, sir, he made it from '47 to 1955.
Q. Is he making them now?
A. No, sir.
Q. Will you tell me what the appraisement of the Estate of Thomas L. Bain was when he died?
A. I—
Q. Approximately?
A. I—
Q. I'm asking you the original appraisal of it in 1933, when he died—I mean '36?
A. The real estate—I don't know what the personal property was. The real estate was around $133,000.00.
Q. Well, was there more in the personal estate than real estate?
A. I don't recall. I don't have the figures on the personal property.
Q. Have you ever compared the earnings from
page 72 } the Thomas L. Bain Estate farms to that of your own?

Mr. Parker: If Your Honor please, I can't see any relevance—

A. It has nothing to do with the agreement.

Examination by Mr. Woodward continued:
Q. I just asked you if you had ever compared it?
A. No, sir.

Mr. Parker: It just as well be compared with my law office.
The Court: I think—
Mr. Parker: I withdraw my objection.

Examination by Mr. Woodward continued:
Q. Just in order to get this plain, I don't want to make any mistakes, Mr. Shands prepared the tax reports for you and the Guy Bain Estate, and for the Robert Bain Estate, and L. F. Bain and Son, all of them were prepared by Mr. Shands?

Harry L. Bain.

A. I said they were prepared for me. I didn't say they were prepared for any others you mentioned.

Q. Did he pass on the amount of taxable income?

A. He gave me this report. He made income tax returns for several members of this Thomas L. Bain
page 73 } Estate. For those he did not make out the income taxes, he sent them two copies, rather, four copies, for them to have their accountants to make them out. My brother down in Georgia—

Q. So upon Mr. Shands' working up the income tax reports of all heirs, they were prepared pursuant thereto?

A. These reports that he gave us were sent to each one of the other members.

Mr. Woodward: That's all.

RE-DIRECT EXAMINATION.

Examined by Mr. Parker:

Q. Mr. Bain, Mr. Woodward is making a lot about L. J. Bain and Son, that's your office, you own that business, don't you, over in Capron?

A. I own part of it.

Q. He's also saying that you do a whole lot of fertilizer—you sell a whole lot of fertilizer to the Thomas L. Bain Estate, and so forth, I want to ask you one question about that. You said that for a long time there had been contracts whereby all these concerns were ordering together, how much profit did L. J. Bain and Son make out of the fertilizer which it ordered and which it delivered to the Estate of Thomas L. Bain?

page 74 } A. Not one penny.

Q. Has it ever made a penny?

A. Not a penny.

Q. One other point. Mr. Woodward wants to know whether you have made or had an official audit made concerning L. J. Bain and Son, and I think you said that you had not, is that correct?

A. Never been an audit made of L. J. Bain and Son.

Q. Who runs that?

A. I do.

Mr. Parker: Thank you, sir. That's all.

Edward I. Hardy.

RE-CROSS EXAMINATION.

Examined by Mr. Woodward:

Q. The farms that you own and operate are pretty much contiguous or in the same vicinity of Capron and Southampton County?

A. Southampton County and Sussex County.

Q. They are pretty much the same nature as the Thomas L. Bain farms?

A. The farms in one part of the county are farmed entirely different from the farms in another part; what ap-
page 75 } plies to conditions in Capron will not apply to the other part of the county.

Q. What is the difference between what you farm and what the Bain Estate farmed?

A. Well, we raise cotton; they don't raise any cotton.

Q. Well, that's a matter of just recently, isn't it?

A. In the operations of farms, they are operated different. They raise more hogs; we just recently started raising hogs around Capron. Now, up to a few years ago, we didn't know what it was—

Q. Generally speaking, the crops in Southampton County and Sussex are: Corn, cotton, peanuts, beans and hogs; that's right, isn't it?

A. Yes, sir.

Mr. Woodward: That's all.

Mr. Parker: We have no questions.

EDWARD I. HARDY,

a witness for the plaintiff, having been first duly sworn, took the stand and testified as follows:

Examined by Mr. Parker:

Q. Will you please state your name and your
page 76 } age and your address?

A. My name is Edward I. Hardy. I am forty-five years of age, and I live in Richmond, Virginia.

Q. What's your occupation?

A. I'm a Certified Public Accountant.

Q. Will you please state, for the record, your qualifications as a Certified Public Accountant, and what background do you have?

Edward I. Hardy.

A. I started with a large state-wide accounting firm in the year 1937, and in 1944, I was made a partner in that firm, and remained in that capacity until 1951, at which time I resigned and started my own accounting firm. I have been reasonably active in accounting circles of all types. I have taught accounting a number of years at the University of Richmond; I still lecture there occasionally. I did serve as the president of the Virginia Society of Certified Public Accountants, and I served as a member of the council for one year of the American Institute of Certified Public Accountants; the council being the board of directors.

Q. Now, you have your own firm, I believe?

A. Yes, sir.

Q. Who is your partner in this firm?

A. I have one, Mr. Herbert R. Lewis.

Q. Did you have any other partners in the last two or three years?

page 77 } A Mr. Julian Irving.

Q. He's now practicing elsewhere?

A. Yes, sir.

Q. At the request of Mr. Harry Lee Bain, as a trustee, under a trust agreement, which has been introduced in this case, did your office make an audit of the affairs pertaining to the properties included in the trust agreement whereby Mr. Bain and Mrs. Marion Bain were appointed trustees?

A. We did, yes, sir.

Q. What did your audit of these affairs cover?

A. It consisted of a detailed examination of all of the available records together with the supporting documents, such as sales tickets, invoices, bank statements, cancelled checks, and also included outside checks with some of the concerns with whom the Estate of Thomas L. Bain was doing business.

Q. When you referred to this estate, do you mean the Estate of Thomas L. Bain and the business and properties shown in that trust agreement and the deed?

A. Yes, sir, I do.

Q. And the deed is the one relative to the Jarratt interest, which has been introduced in evidence?

A. Yes, sir.

Q. What years were covered by the audit that you and your firm made, Mr. Hardy?

A. We audited the years 1951, 1952, 1953.

page 78} Q. In that order?

A. No, sir, we audited them in the reverse order.

Edward I. Hardy.

Q. What about the years 1954 and 1955?

A. Those years were audited by another firm, A. M. Toler and Company; however, their work was reviewed by us.

Q. At the request of whom?

A. At the request of Mr. Harry Lee Bain.

Q. And with the consent or cooperation or not of the—cooperation of Mr. Toler?

A. With the consent and complete cooperation of Mr. Toler.

Q. What do you mean by reviewing the audit of Mr. Toler for the year 1954 and the year 1955, please, sir?

A. Well, by that I mean we reviewed first, his work papers, which is customary; of course, you always want the work papers. We then test checked the work papers against the records to the extent necessary to satisfy ourselves that the audit was conducted as we ourselves would have done it.

Q. And did you arrive after that review as to any opinion of your own as to the accuracy and the validity of Mr. Toler's audit?

Mr. Woodward: That's a matter of opinion. That's for the Court to decide. We object to his opinion.

The Court: He's an expert witness; I think he's qualified.

Mr. Moyler: The further objection, Your Honor,
page 79 } on the grounds, unless he testified that he has
actually made the audit that Mr. Toler, I think that his opinion would necessarily be limited and, therefore, inadmissible. If they are going to undertake to introduce the Toler audit and prove it by Mr. Hardy, then we take the position that he must have virtually audited it himself.

The Court: He would have to show personal familiarity.

Mr. Parker: He's already shown that, if Your Honor please. He said he reviewed it, spot-checked it, and went back and looked at all the records.

Mr. Moyler: We object to the spot-checking, because if he has not checked it in detail, he can't say whether in his opinion the entire audit is correct or is not correct, and if it's going to be introduced in evidence and this witness is going to testify to it, we object to his testifying to something that he has not verified.

Mr. Parker: If I want to introduce Mr. Toler's audit by Mr. Hardy, I think counsel's objection will be well taken, but I haven't asked that to be introduced. I asked one simple question: After his review, and after checking, did he satisfy himself as to its accuracy and validity.

Edward I. Hardy.

The Court: I think that question is proper. I overrule the objection.

Mr. Moyler: I object to it on the ground that he has not testified that he verified the entire audit, and, page 80 } therefore, his opinion would be *ex parte* opinion about it and would not be necessarily mathematically accurate.

The Court: I think on cross examination you can ask him what he did.

Mr. Moyler: We except for the reason stated.

Examination by Mr. Parker continued:

Q. All right, Mr. Hardy.

A. The answer to your question is yes.

Q. Why and how did you arrive at that conclusion?

A Because my tests were to the extent necessary to satisfy myself.

Mr. Woodward: Same objection and same exception.

Examination by Mr. Parker continued:

Q. Actually, without going into great detail, were there any adjustments that had to be made in Mr. Toler's first report after you and he had reviewed them?

A. Yes, sir, there were.

Q. Did you and Mr. Toler come to any conclusions as to those adjustments?

A. Yes, we did.

Q. And they were made in the final report?

page 81 } A. Yes, sir, they were.

Q. What happened—

Mr. Woodward: What final report do you refer to?

Mr. Parker: The final report of Mr. Toler and Mr. Hardy.

Mr. Woodward: Do you mean they collaborated in making the audit?

Mr. Parker: Are you asking me or the witness?

Mr. Woodward: I'm asking that it be clarified as to what audit he refers, to, and I think we're entitled to that information.

A. I'll answer that, sir.

Edward I. Hardy.

Mr. Parker: I'm referring to the audit made by Mr. Toler, about which Mr. Hardy is now testifying.

The Court: Are you referring to the Toler audit of '54 and '55?

Mr. Parker: That's correct.

The Court: I think your question is proper; objection overruled.

Mr. Woodward: Exception.

A. It was corrected in the form of a supplementary letter of which I received a copy.

Examination by Mr. Parker continued:

page 82 } Q. Which member of your firm, Mr. Hardy, did the majority of the actual examination of the reports and did the majority of the records of the Thomas L. Bain Estate?

A. My partner, Mr. Lewis.

Q. Did you go with him any times during this examination and work with him so as to be fully familiar yourself with the entire audit?

A. Yes, sir. As a matter of fact, I not only went with him, but I did a substantial portion of the work myself and we were in complete agreement with everything that was finally showed in our report.

Q. Will you please state what books and records were in Mr. Pulley's office when you went down there?

A. There were two basic books. One was what we might call a Customers and Tenants Ledger, and the other was a Day Book. In addition to the books, there were the bank statements, canceled checks, invoices, sales tickets, and memoranda, and so forth, that you would normally find in an office of that type.

Mr. Parker: If it please the Court, we have all of the books and records to which this witness has referred, either here in the courtroom or outside in the station wagon. Now, if counsel for either side wishes all of those records to be introduced here in Court, we'll be very glad to bring them in and identify them at the present time; otherwise, we're

page 83 } going to confine our suggestion that these books be identified and explained as to what they are and be made here available to the Court, but not to be introduced in the record themselves.

Edward I. Hardy.

The Court: Do you have any comment on that, Mr. Woodward?

Mr. Woodward: He'll have to rise or fall on his own decisions.

Mr. Parker: You have no request?

Mr. Woodward: I don't know what I'll have.

Mr. Parker: As a matter of practical approach, if the Court please, we would not introduce the books at the present time, but I would like for the record to show that we reserve the right to introduce all books and all records in rebuttal if we find it to be necessary.

The Court: All right, sir.

Examination by Mr. Parker continued:

Q. Now, referring to the books and the records that you have testified to, Mr. Hardy, did you and your firm have to go outside of the office in order to find records and documents by which to make the audit?

A. Yes, sir, we did.

Q. In what way?

A. As an example, we went to the P. M. A. Office here to check the peanut sales. The records that were in the office of the estate were insufficient to do so. We page 84 } also checked with folks like Lummis and Company, and H. P. Beale and Sons, to determine the nature of certain transactions that we ran into on the books.

Q. How about the banks?

A. Oh, yes, of course, we went to the banks. As a matter of fact, we couldn't locate any copies of deposit tickets in the office of the estate, so we went to the bank and arranged for them to furnish us with duplicate copies for deposits in the years in question.

Q. How about the invoices?

Mr. Woodward: Are you talking about the Toler account or your own?

A. I'm talking about my own, sir.

Mr. Woodward: All right.

Examination by Mr. Parker continued:

Q. How about the invoices?

A. We examined all of the available invoices.

Edward I. Hardy.

Q. Where did you find them?
A. They were in the office of the estate.
Q. Were they filed away or how were they filed?
A. Yes, sir, they were—I guess you'd call them filed. They were in the upper part of the building there, you'd probably call it a loft. They were strung from
page 85 } rafters by years on what appeared to be baling wire.
Q. You finally got them?
A. Yes, to the extent that they were there. We didn't get invoices to support all the transactions that we wanted.
Q. Had these invoices on baling wire, had they been gone over recently or disturbed, or did they appear to have been there for some time?
A. It appeared obvious that they had been there for some time, and we had quite a dusting problem, you might say, to handle them.
Q. In going over the books and checks and various things, did you become familiar with Mr. Pulley's handwriting?
A. Yes, sir.
Q. That is, the handwriting of Mr. Douglas Pulley?
A. Yes, sir, Mr. Douglas Pulley.
Q. Did you also become familiar in connection with your review—strike that. Did you also audit the affairs of the Thomas L. Bain Estate for the year 1956, when Mr. Robert Pulley was managing it?
A. We did.
Q. Did you become familiar with Mr. Robert Pulley's handwriting at that time?
A. I did.
Q. Will you please state in whose handwriting all of the entries of the books of the Thomas L. Bain Estate
page 86 } available to you and which you saw from the years 1951 through 1953, or which you may have checked also the years 1954 and 1955, in whose handwriting were those entries made?
A. Well, I have checked the other years, and the entries were all made in Mr. Douglas Pulley's handwriting up until the time of his illness in the spring of '55.
Q. And then whose handwriting?
A. And then Mr. Robert Pulley's handwriting.
Q. In connection with your audit of the affairs of the estate for the year 1951, will you state the results insofar as the balance shown as unaccounted for by Mr. Pulley with the estate, if there was any such balance?

Edward I. Hardy.

A. For the year 1951, our audit shows that there was $29,399.06.

Mr. Moyler: Will you give us the page number, please?

A. These figures will be on page one of every report, sir.

Examination by Mr. Parker continued:
Q. Now, is that figure a combination of two figures, or is that a single figure?
A. No, sir, it's just one figure and the report also shows that in addition to that figure, there was $5,920.55 that was not supported by either vouchers or what we con-
page 87 } sidered proper vouchers or proper invoices.

Mr. Moyler: What page is that on?

A. Same page.

Examination by Mr. Parker continued:
Q. Now, then, you mean not supported, when you are making an audit of an account, would those items if not supported have to be disallowed?

Mr. Woodward: We submit it's not up to him to allow or disallow; he goes there to find out what the record is.
The Court: I think it would be clearly apparent that he disallowed it in his report, but it doesn't mean that he has the power to allow or disallow.

Examination by Mr. Parker continued:
Q. Now, did you get my question?
A. No, sir, would you repeat it?
At this time the court reporter repeated the question that was previously asked and objected to.
A. Yes, we would disallow, if that's the term. In making an audit, one of the things you attempt to do, of course, is to account for the disbursements of cash and in accounting for the disbursements, it's standard procedure that
page 88 } they be supported by proper documentary evi-
dence in the form of invoices or whatever else it might be to necessitate the disbursements.
Q. And under sound accounting principles, if it's not

supported by proper vouchers and support, what is the result?

A. It's not a proper disbursement, from the accounting standpoint.

Q. Who is charged with that amount?

A. Whoever is charged with the responsibility for accounting.

Q. And that's under sound accounting principles?

A. Yes, sir.

Q. Now, I believe you referred to your audit, what was the total of those two figures?

A. I have them summarized here, I think.

Mr. Parker: If the Court please, he's prepared this and I think that I would like to have him testify to this, and I'll lay the foundation if you wish.

Examination by Mr. Parker continued:

Q. This is the summary of the audit reports for the years in question?

A. Yes, sir.

Q. Did you prepare that?

page 89 } A. Yes, sir.

Q. Now, answer my question.

A. The answer to your question is, $35,319.81.

Q. Now, please refer to your reports and papers for the year 1952, and give me the same report on that that you gave on the 1951?

A. May I use this summary, Your Honor?

The Court: Yes, sir.

A. For the year 1952, the cash not accounted for amounted to $34,598.66. Cash disbursed for which there were improper or no supporting vouchers amounted to $7,114.42. The total of those two figures is $41,713.08.

Q. Now, please refer, Mr. Hardy, to the 1953 report and give me the same information?

A. The cash not accounted for amounts to $30,241.57. The improper or not supporting vouchers figure amounts to $5,940.57. A total of $36,182.14.

Q. Now, for the year 1954 and the year 1955, you have testified that you collaborated with Mr. Toler's firm and checked and reviewed and came up with an approval of the audit for those two years, will you please state the same

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thing that I have just asked for the years '51, '52 and '53, and for the year 1954?

A. For the year 1954 ,the amount of cash not accounted for amounts to $39,433.74. The cash disbursed page 90 } for which there were no supporting vouchers or improper vouchers amounted to $7,285.45. The total of those two figures was $46,719.19.

Q. Now, Mr. Hardy, assuming that these totals were due and owing by Mr. Pulley at the end of the year which was audited, have you calculated—let's take the first one, 1951, have you calculated the interest on that amount down to August, 1958?

Mr. Woodward: We object—

Mr. Parker: At the rate of six per cent per annum?

Mr. Woodward: We object to any calculation of interest; that's up to the Court. You don't add interest to any recovery. Recovery of interest is from the date the account becomes due. It has no relevancy to the computation—

The Court: I see no reason why the interest, if you calculated the interest, why it shouldn't be; of course, there would be no interest on anything unless it's allowed by the Court.

Mr. Parker: This is actually not material, except that the judgment of the Court, if we are fortunate enough to obtain the judgment from the Court, would speak as of the date of that judgment and that's simply the question—I simply wanted to ask if he calculated the interest down to August 31, which is a convenient date.

Mr. Woodward: It's absolutely immaterial. He couldn't recover any judgment on it. It's not the subject page 91 } of inquiry. If he owed anything on the first of January, 1952, then it bears interest from that date.

The Court: It's purely and simply a mathematical calculation.

Mr. Woodward: That's all.

The Court: Now, if the principal items are not supported, then the calculation would not be either. I think it's proper to place it in the record.

Mr. Woodward: We save the point, Your Honor.

Examination by Mr. Parker continued:

Q. Did you calculate that?

A. Yes, sir, I did.

Q. Will you state what it was on the year 1951?

A. It was $14,127.84.

Q. Now, for the year 1952, assuming that the amount was due on December 31, 1952?

A. The interest would be $14,182.44.

Q. Same assumption on '53?

A. $10,131.00.

Q. And the same assumption for '54?

A. $10,278.22.

Q. And the same assumption for '55?

A. $7,994.50.

page 92 } Q. Now, you have prepared, I believe, you have been testifying from it, a summary of the figures that you have just been giving to us?

A. Yes, sir, they also included the year 1955, I don't believe you asked me about '55 as to the basic amount; you asked me only as to the interest.

Q. I thought I asked you about the total of 1955. Give me the principal amount.

A. The amount of cash not accounted for amounts to $28,-294.69. The amounts not supported by vouchers or proper vouchers amounted to $21,669.71. The total of those two figures is $49,964.67.

Mr. Parker: Will you please file as your exhibit, the summary from which you have been testifying showing the various totals, as your Exhibit Number Thirteen?

Examination by Mr. Parker continued:

Q. Now, Mr. Hardy, you have been referring to your audit for the years 1951, '52 and '53, and I'll ask you whether you have these audits in written form?

A. I do.

Q. I hand you what is entitled, "Estate of Thomas L. Bain, Ivor, Virginia, Report on Examination for the Year Ending December 31, 1951," and ask you if that's

page 93 } your written report of audit for the year 1951?

A. It is.

Mr. Parker: File that as your Exhibit Number Fourteen.

Examination by Mr. Parker continued:

Q. Now, do you have a similar bound report for 1952?

A. Yes, sir.

Mr. Parker: Will you file that as your Exhibit Number Fifteen?

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Examination by Mr. Parker continued:
Q. Do you have a similar report for the year 1953?
A. Yes, sir.

Mr. Parker: Will you file that as your Exhibit Number Sixteen?

Examination by Mr. Parker continued:
Q. Now, referring back to your Exhibit Number Thirteen, will you please state the total amount of cash not accounted for, improper or no supporting vouchers, plus interest accrued to August 31, 1958, in connection with this account?
page 94 } A. The total amount of cash not accounted for is $161,968.99. The total amount disbursed for which there are no supporting vouchers or improper vouchers is $47,930.70. The total is $209,899.69. The total of the interest figures I have previously read amounts to $56,714.00. For a grand total of $266,613.69.
Q. Now, disregarding the interest item, have you figured, or will you figure the average yearly unaccounted for or improperly supported amount for that period?
A. It would be a shade under $42,000.00.

The Court: Did you mean to calculate the interest in that figure?
Mr. Parker: No, sir.

A. The interest is not in that figure.

The Court: Is not in there?
Mr. Parker: No, sir.

Examination by Mr. Parker continued:
Q. That figure, a shade under $42,000.00, does not include any interest?
A. No, sir.
Q. And that was the average?
A. That's the average for the five years.
Q. Were you requested to carry your audit back any further than the year 1951?
page 95 } A. No, sir.
Q. As a matter of fact, Mr. Hardy, was your work in connection with preparing these audits very short or was it extensive, or how?
A. It was very, very long in detail. As a matter of fact,

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I would estimate that each year took a good solid month of Mr. Lewis's time, perhaps a little more, and I'd say a third of my time for a month, at least that much.

Q. That's for each year?

A. For each year.

Q. Was the auditing of this account a simple matter or difficult matter?

A. It was very complex. We had never seen anything quite like it before from the standpoint of the work that had to be done and from the fact that you couldn't—you had to check every transaction; I'll put it that way.

Q. Well, in connection with your auditing and in connection with your accounting and in connection with recognized principles of accounting—

Mr. Woodward: Who recognizes—you keep talking about recognizing accounting principles, whose recognition are you talking about? I object to that.

A. That's a standard term used in accounting, sir.

Mr. Woodward: It may be, but we want some
page 96 } explanation of it.

Mr. Parker: If it please the Court, it's a standard term used in accounting procedure.

The Court: As you would say, recognized judicial opinion—

Mr. Parker: Right, sir, or recognized like medical procedure.

The Court: I think any details along that line could be brought out by counsel on cross examination.

Mr. Woodward: All right.

Mr. Parker: He can ask anything he wants to on cross examination.

Examination by Mr. Parker continued:

Q. What steps were necessary to be taken by you in order to come up with an audited conclusion in an account of this sort?

A. In an account of this sort, it was necessary for us to conduct what we call a completely detailed examination, every account with the customers and tenants had to be analyzed in complete detail and summarized all of the available charge tickets for merchandise, sales of merchandise, advances, advances paid by check, credit for payments on

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account, all had to be checked to the basic records individually.

Q. Did you deal at all with some of the cash in possession of the fiduciary?

page 97 } A. Well, the principal item flowing through the business was cash. Between 3 and $400,000.00 a year was flowing through the business.

Q. In your checking, would you or would you not have to determine just how that cash came in?

A. You would have to. You would have to reconstruct the thing as we did from the analysis of the account to determine the nature of the source of cash that came into Mr. Pulley's possession.

Q. What happened to that cash, did you have to do anything about that?

A. Well, we traced it to the extent that we could to its flow into the bank and then we determined that each year a certain amount of the expenditures had been made in cash, and the difference between the cash available and the cash that went into the bank and that paid out by cash, that wasn't accounted for, we don't know where that was or what happened to it.

Q. Is that the reason that you put that absence of cash as "cash not accounted for" in a heading?

A. Yes, I think we called it "cash not accounted for."

Q. And on your other heading you got "improper or no supporting vouchers"?

A. That's correct.

Q. Tell me just generally what that was?

page 98 } A. The item under column "improper or no supporting vouchers" represents actually the disbursements made, but there's no evidence to show why they were made or for what, except in one or two instances and in those instances we did not consider it to be the right kind of evidence.

Q. Will you state, Mr. Hardy, whether or not in your examination of the books and the bank accounts that you were able to determine whether Mr. Douglas H. Pulley comingled any of his own funds with the funds of the estate?

A. We were able to determine that, and he did.

Q. He did?

A. He did.

Q. How far back did that go?

A. To my knowledge, to '49, perhaps beyond that.

Q. In your audit of an account of this sort where the fidu-

ciary is co-mingling funds with that of his own—with that of his principal, does that make any difference in your audit or verification—

Mr. Woodward: That's something that he cannot answer. That's not within his province to say one way or the other. You have to determine what the agreement was between the parties, whether it was with consent of the principal or whether it was not with the consent of the principal, and items of that nature, I don't think this man is qualified to pass on that in one way or the other.

page 99 } The Court: I think he can testify as to what effect there would have upon—

Mr. Parker: On the audit.

The Court: On the audit.

Mr. Parker: That's my question.

A. I think in any instance that you would find the person handling and responsible for cash funds mingled his own with those for which he was responsible, you would greatly extend the scope and extent of your verification to make sure there's a completely strict accounting for all the cash.

Examination by Mr. Parker continued:

Q. Would that be known as examining it as an arm's-length transaction or just the reverse?

A. Would what be known?

Q. Strike that question. Now, Mr. Hardy, there has been introduced in evidence as Exhibits Number Six, Seven, Eight, Nine and Ten, and I hand you copies of those exhibits from a certain sheet, the first of which in each case is entitled, Income Report, and then the year follows, for the years 1951 through 1955, are you familiar with these documents?

A. Yes, sir, I am.

Q. And you have seen at my suggestion, I think, those sheets several times before, have you not?

page 100 } A. I sure have.

Q. Will you refer to the one which is Exhibit Number Six called, Income Report, 1951, and I ask you what in your opinion that document consisting of those several sheets is?

A. In my opinion, this is merely a summary for income tax purposes. The first four or five sheets are a series of figures that obviously show inventory, sources of income and the following sheets show disbursements, and if you will

take those sheets, you can check the figures from them right into the attached summary.

Q. The summary consisting of what sheets?

A. The last four or five sheets, the ones that were discussed in Court this morning as having been prepared by Mr. Shands.

Q. Well, why are you so much of the opinion that they deal with income tax return?

A. Well, the first four sheets, those supposed to have been prepared by Mr. Pulley and furnished to Mr. Shands, are as I say, they are just a list of figures. They don't come to any balance or anything of any sort. However, they are summarized in this other form, and I noticed that the terminology, for example, is not accounting terminology.

Mr. Woodward: Your Honor, the Courts have held time and time again before Federal and State Courts that terminology is not something to be set up on a pedestal. page 101 } If the books are adequate and are such as you can determine from an analysis of them what the status of accounts is, the terminology of what he thinks about it is neither here or there.

The Court: You certainly don't have to keep books in any certain way.

Mr. Parker: No, sir. If Your Honor please, counsel missed the point. I'm not trying to prove anything except his reason for thinking that they were the—that they were for income tax purposes only. I'm not trying—

The Court: I think he has a right to do that.

A. For example, if any accountant were preparing a statement of this type solely, let's say for accounting purposes, there would be no point of having a column showing capital gains, nor would there be any point in showing a column for ordinary income. There's another column here, "net earnings from self-employment." Now, the three columns I mentioned, those are strictly income tax returns. They are right out of regulations. That's the way all accountants would prepare a summary of this sort to support a tax return.

Q. Now, before going on with that 1951 report, I do want to ask you from an accounting standpoint, you have given us the figures on this total, cash amount not accounted for and also the figures on improperly or no supporting vouchers,

from an accounting standpoint and in accounting, what does that mean?

page 102 } A. Well, it means that he should account for it, either that or he owes for it.

Mr. Woodward: We object to that; it's a conclusion which he is unable to tell.

The Court: From an accounting standpoint—

Mr. Parker: But from an accounting standpoint, I want him to explain what these two items meant. Now, what is your answer?

A. My answer was that he should either account for it or that he owes it.

Q. Now, going back—

Mr. Moyler: I'd like to object on the ground further that it doesn't show whether or not he understands whether he has accounted for it or not. He says he can't explain it, but he says, improper or unaccounted for or not supported by vouchers.

The Court: The question of whether items that might not show up in this accounting could be items—other matters that would explain that.

Examination by Mr. Parker continued:

Q. Mr. Hardy, the objection has been made to the question that you don't know whether it's in order or not because it might be accounted for or perhaps it might be

page 103 } submitted. I will ask you, if proof that it's properly accounted for or if proper vouchers should be submitted, then would that change your report?

A. It certainly would, if proper vouchers were submitted.

Q. Yes, sir.

A. It would change the report.

Q. If any of these figures in here shown on this report to that extent that they were submitted, what would happen?

A The same thing. In other words, for example, if there was a bank account in the name of the estate, of which we have no knowledge, and it showed a balance of $209,899.66 in it, I think that would account for it.

Q. And you would have to change your report and say

there's a bank account showing that amount and therefore, he has accounted for it?

A. Yes, sir.

Mr. Woodward: That's argument.

Examination by Mr. Parker continued:

Q. Now, will you take—let's go back to the 1951 batch of sheets that you have there. Now, would you be kind enough to explain to the Court just what each sheet is, that's Exhibit Number Six.

A. The first sheet is headed Income Report,
page 104 } 1951, and on that sheet are a list of figures designated with a title of, I guess you'd call it, consisting of Inventory of Merchandise, that's January 1, 1952, Inventory of Peanuts, Seed Peanuts, January 1, 1952. Then following that are items that obviously are items of income, sales of merchandise, Guano, commission on sales of peanuts and a list of items that are obviously in the nature of income. However, this is obviously the estate's share only of the income. Now, for example, the $59,000.00 of peanut sales is probably only about one-half or a fraction under one-half of the total sale or the total cash represented by those sales. Page two is still headed Income Report for 1951, however, after the two inventory items again, this time at the beginning of the years there are a list of items that appear to be expenses or purchases rather than income. That's such as the Purchase of Merchandise, Peanuts Bought, Corn Bought, Fire Insurance Paid, License, Taxes, and a whole list of them. Page three is a continuation of the same part of the items that I described on page two. Page four is a continuation of that—of that type of item except there *is* also two other figures, one of which says Cash in Bank, January 1, 1951 and the other, Cash in Bank, January 1, 1952. The next sheet is called Farm Accounts and this is some sort of a summary; incidentally, this sheet is not used as near as I can determine in the summary of income tax information. This is a summary of names and they
page 105 } are flagged there as being the tenants and it shows of acres, which is apparently total acres of the farms, open acres, then it says Debit and Credit, and for each of these farms and names, there's a figure which tells me nothing more than just a debit and credit. Then the next set of sheets are the ones that seem to be the ones summarized for income tax purposes. The first one is

called Schedule of Distribution of Income for the Year Ended December 31, 1951. There are listed the various devisees of the estate and on there is the information for each of them showing how much is their share of capital gain, how much is their share of ordinary income, a total and then a figure, net earnings from self-employment, on the theory that these people have to report self-employment taxes. There's also a note on there which states that certain of the joint venturers referred to above have accepted distribution in kind of their interest in this joint venture. However, they did not participate in, nor receive, any of the 1951 income and are no longer of this joint venture. They are listed here and show they don't report any of them.

Mr. Woodward: That might be all interesting, but we can read it as good as he can. I don't see any need of him filling up the record—for him to read to us what's on a piece of paper.

Mr. Parker: If Your Honor please, I'm sure Your Honor is very versed on matters of this sort and much better versed than I am, but very frankly until he explained to
page 106 } me what it was, I didn't have the slightest idea, and that's what I thought the Court would like to have, as an accountant, as an expert, to have him explain it.

The Court: I say, the Court is not well versed in matters of accountancy and I'd like to have him—have amplification of these figures.

A. The next sheet is headed Farms of the Estate of Thomas L. Bain, Ivor, Virginia, Operated as a Joint Venture by the Heirs or Beneficiaries, Profit and Loss Statement, for the Year Ended December 31, 1951. It is broken down in two parts as to farms and store, and a total. Now, that statement is in the form that would be required on a partnership return and the final net profit at the bottom of $40,197.75, is broken down on the preceding page and tied in as to how much is capital gains and how much is ordinary income.

Q. Is that all?

A. That's all for that page, sir.

Q. Go ahead.

A. The next sheet is a schedule of expenses showing the detail of expenses totaling $64,543.66, and that total is referred back to the preceding page, Exhibit B, and if you look back on Exhibit B, which was a Profit and Loss Statement,

you will see there near the bottom Deduct-Expenses (Schedule 1) is brought in there merely as a detail. The next schedule is depreciation schedule and it's in the
page 107 } form required for income tax purposes. For example, there again I notice they used the term "Cost Basis"—

Mr. Woodward: I object to him arguing the case to the Court. I think he's a special pleader, and I think that's up to the counsel and the Court.

The Court: I think he's making in his expert quality as an accountant his explanation of these figures to show those of us who are not experts. I think it's proper.

A. This deduction schedule is a supporting schedule and if you look under the column Year 1951, you'll see the total, $5,492.67. Then, if you come back to the schedule of expenses preceding the next to the last item, it shows Deduction, $5,492.67. The last page is called Schedule of Capital Gains for the same year, and that's a detail of the $1,433.92 of capital gains that is shown on the first page of this summary under the heading Capital Gains. Those are all the sheets.

Examination by Mr. Parker continued:

Q. Have you examined each one of those sheets for the years '52, '53, '54 and '55?

A. Yes, sir, basically they are all the same.

Q. Mr. Hardy, will you please tell me in light of your examination of the contents on those sheets
page 108 } whether that under any circumstances could be a settlement of accounts between the parties?

Mr. Moyler: Objection; it's not a question of whether he thinks it should have been; it's a question of whether or not in fact it was between the parties and he'd be rendering an opinion as to what could happen.

Mr. Parker: He's an expert witness. I'm asking him in his opinion, as an accountant, whether it could under the circumstances, whether it could happen, and I think the Court is entitled to his opinion as to what it's worth.

The Court: I think he's an expert in that field and he can give his opinion.

Mr. Moyler: That does not necessarily mean what actually transpired between the parties.

The Court: Of course not, there may be other evidence as to the understanding of the parties and various evidence of that kind, but this is simply the opinion of an expert in the field of accounting as to the nature of the paper.

Mr. Moyler: We further object to it on the grounds that this is a Certified Public Accountant and these other people were laymen and this statement was prepared by their accountant and this gentleman does not know and cannot know the contemplation of minds of the parties at the time the statement was rendered and what disposition was made out and the intentions of the parties thereto at the time it was done.

page 109 } The Court: Objection is overruled.

Mr. Moyler: Exception on the ground stated.

A. In my opinion this could not be construed as an accounting or settlement between the parties.

Examination by Mr. Parker continued:

Q. Will you state why or wherein it falls short of being one, in your opinion?

A. In my opinion, it falls short because it doesn't show how the opening and closing of cash balances are reconciled. Now, for example, in a situation where 3 to $400,000.00 cash is flowing through the business, in my opinion a detailed statement showing the sources and natures of cash and also the disbursements, the nature of the disbursements and to whom made, tying in with the opening and closing balances is necessary to make an accounting.

Q. Now, Mr. Hardy, Mr. Bain has testified that as a layman he couldn't look at those sheets and tell how much money Mr. Pulley owed the estate or how much money the estate owed Mr. Pulley. Now, I'll ask you as an accountant whether you can look at those sheets and look at them all and whether you can tell me as of the end of any one of those years how much money Mr. Pulley owed the estate or how much money the estate owed Mr. Pulley?

page 110 } A. No, sir, you can't do that.

Q. Now, there's a bank balance on one of those sheets, isn't there?

A. Yes, sir.

Q. And one at the beginning of the year and one at the end of the year?

A. Yes, sir.

Q. Does that tell you anything?

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A. Yes, sir.

Q. Well, what does it tell you?

A. It tells me the amount of money in the bank on a certain date.

Q. Does that tell you how much money should have been in the bank on that date?

A. No, sir.

Q. Is there anything in any of those sheets that would tell you or from which you could in any way possible—from which you could in any possible way obtain information as to how much money should have been in the bank at the end of those years?

A. No, sir.

Q. Do you have the total of the various figures set forth on those sheets and have you attempted to reconcile them with the bank balance?

A. Yes, sir, I have.

page 111 } Q. Do they reconcile?

A. No, they do not.

Q. What was the result?

A. Well, if you take the items shown as income—

Q. Now, you're talking from the sheets themselves?

A. Yes, sir. If you take the item that's shown there as income and add those up and add them to the opening bank balance and then if you add up the items shown as disbursements and add those up and deduct them from the sum of the first two, then for the year 1951, if these sheets are correct, you should have $75,000.00 more in the bank there than was shown at the end of the year.

Q. That's in '51 that you're talking about?

A. Yes, sir.

Q. Did you make a similar comparison on the others?

A. Yes, sir.

Q. Did you find any similar discrepancies or not?

A. These are not really discrepancies. This statement is not supposed to add that way; that's what I'm saying, it's not supposed to account for the cash, but the same thing would be different in each year. The difference would range from 28,000 to 80 some odd thousand dollars throughout the years, each year.

Q. You say it's not supposed to add up?

A. No, sir.

page 112 } Q. In other words, the figures don't tell you anything?

A. If they were presented to me for the purpose for which

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I think they were presented, they would tell me how to make up the man's tax return.

Q. Tax return?

A. Right.

Q. On the assumption, and Mr. Bain has so testified, that that was the purpose for which they were submitted, are those figures so far as you know substantially correct?

A. Yes, sir, as a matter of fact, I believe they are very substantially correct. There may be some immaterial differences of inconsequences, but I would say, well, for example, if this thing here should result in some money coming back to the Estate of Thomas L. Bain, I strongly suspect that I'd recommend that it be treated as non-taxable income for purposes of income taxes. I think these statements are substantially correct.

Q. In other words, they have already paid income tax on income they have not received?

A. That's right. No, they paid taxes on income for which some of the cash is not accounted for.

Mr. Woodward: I'd advise you not to try that.

Mr. Hardy: It's bad enough when you got the cash.

Examination by Mr. Parker continued:

page 113 } Q. Then, as far as those sheets are concerned and the information that they give, would you or would you not be in a position to say that they were wrong, those immaterial errors?

A. I couldn't say that for income—for any purpose that they are wrong.

Q. Then, why in the world wasn't it an accounting between the parties? Why wasn't it a settlement of accounting between the parties?

A. Because it doesn't tell what happened to the cash. There's no statement of cash receipts or disbursements; that's the biggest single item that Mr. Pulley was handling. The farms are a large item also.

Mr. Parker: Your witness.

CROSS EXAMINATION.

Examined by Mr. Woodward:

Q. Mr. Hardy, how much of this work did you do yourself?

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A. I would estimate, and this is an estimate, of course, approximately one-third.

Q. Well, when you say that you checked out all of the items, don't you think you're misleading us?

page 114 } A. No, sir.

Q. Well, if somebody else did two-thirds of the work, you couldn't say whether it was accurate or inaccurate, could you?

A. Yes, sir.

Q. How?

A. For example, the young man in our office is a Certified Public Accountant; he makes audits for me and I sign the reports.

Q. Let's say he's not with the firm, can you vouch for an item until you go through it yourself?

A. If my partner shows me what he's done, and has gone through the work papers, yes, sir.

Q. But you don't know whether he has left out any work papers?

A. That's not correct. I know that he has a complete analysis in his work papers of every account on the books.

Q. How do you know whether he's checked all the invoices or not?

A. He told me.

Q. Then, you are relying strictly on hearsay, aren't you?

A. No, sir, I don't consider it that—

Q. Well, what do you consider it, if you don't consider it hearsay?

page 115 } A. A direct statement to me.

Q. Direct statement based on hearsay, isn't it? Just what somebody told you?

A. Yes, it's just what Mr. Lewis told me.

Q. And whether he did the work or not, or whether he was efficient in the work or not, or whether he went after it in detail, you don't know of your own knowledge, do you?

A. Yes, I do.

Q. Well, how do you know?

A. I have known Mr. Lewis for a number of years, and one of the reasons he's my partner is because I think he's one of the finest accountants in this part of Virginia, and I know the way he works, the way he does, and how he does, and how he conducts his examination, and the work papers show—

Q. And that's the foundation for your statement?

A. Yes, sir.

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Q. And so if he says he did not find an unsupported invoice, you assume that's gospel too?

A. That's right.

Q. And that's the basis of your report?

A. No, sir.

Q. If you only did a third of the work, how can you say that it is accurate or inaccurate?

A. Well, let's put it this way, I signed the report.

page 116 } Q. I don't care what you say. How can you say whether it's accurate or inaccurate if you didn't do the work?

A. I did enough work to satisfy myself about that work that it was correct.

Q. But you only did one-third of the work?

A. Of the actual work. By work, Mr. Woodward, I mean so far as actually putting the figures down on paper, and that sort of thing. During this examination, I would say Mr. Lewis and I ensulted two to three times a week in my office.

Q. Your conversation with Mr Lewis was based on whatever he chose to tell you, wasn't it?

A Yes, sir, plus what he showed me in his work papers.

Q. So you were limited in your knowledge to one-third of the work?

A. No, sir, that wouldn't be correct. I'm not limiting my knowledge to one-third of the answers here, if that's what you mean.

Q. Let's see how accurate you are, Mr. Hardy. I note that in your statement for 1951, you got cash deducted from deposits of $12,952.82, which you charged to him?

A. Yes, sir.

Q. Well, now, do you know what became of that $12,952.82?

A. No, sir.

page 117 } Q. Well, why did you charge it to him if you didn't know?

A. Because if you don't know, we're charging it to him and asking him to show us where.

Q. You may be just as wrong as anybody can possibly be, just because you didn't get an explanation.

A. He may show us that.

Q. Did you ever ask him?

A. No, sir.

Q. Well, how would you know?

The witness gave no reply.

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Q. You can reach up there and get that answer, but how would you know if you didn't ask him?

A. I don't propose to reach up and get the answer. I come back to my original answer. That is, that we don't know and, therefore, it's part of the items for which we ask him to account.

Q. What do you mean, "we ask him to account?" Since when have you been a party to this proceeding?

A. When I say, "we," I mean in our report.

Q. In your report, then, you went in it with the idea of seeing how much you could charge up against Mr. Pulley?

A. That is not correct.

Q. What did you go there for?

A. To make a detailed examination to determine what had happened to the cash for those years involved.

page 118 } Q. If you went in there to examine impartially to all parties, why didn't you ask Mr. Pulley as to certain definite items?

A. The reason I didn't go into a discussion with him about it was because I was under the impression—I was told that he was quite ill.

Q. Well, did you go down there to see or ask to see him?

A. No, sir.

Q. Well, then, you don't know what his condition was with reference to answering questions, do you?

A. No. Now, do you mean from the standpoint of my having seen him personally?

Q. Yes, sir.

A. I have never seen him.

Q. Now, this business was limited to about ten per cent—and the rest was farm operation—

A. Yes, sir.

Q. Now, you mentioned about co-mingling, did Mr. Pulley buy his merchandise through the store?

A. Yes.

Q. Didn't he do hauling for the store?

A. Yes, sir.

Q. Didn't he buy his fertilizer from the store?

A. He did.

Q. And didn't he deposit his check from the property in the store?

page 119 } A. No, sir, not all of it.

Q. Well, any of it?

A. Some years.

Q. Did you charge him with them?

A. Not the ones that we could find copies of, no, sir.

Q. Where did you credit him with them?

A. We didn't credit him with them, because we didn't charge him with them.

Q. Then your accounting is incorrect in this respect, isn't it?

A. You're wrong.

Q. If money went into the deposit of the partnership that was Mr. Pulley's and you didn't credit him with it, why not?

A. I understand your question better now. Of course, we did, because of the credit of the deposit in the bank.

Q. Let's see if you show anything in here as to deposits in the bank. Look over your account there and see.

A. What exhibit is that?

Q. That's page one of his account, '51.

A. Deposits in the bank per bank records $215,183.00.

Q. Does that show what it had in the beginning of the year?

The Court: What page is that?

Mr. Woodward: Page one. That's it, the double sheet.

page 120 } Examination by Mr. Woodward continued:

Q. You have deducted from that certain items that you say is cash deducted from deposits, haven't you?

A. Deducted from that?

Q. Yes.

A. Well, we've added it in on the first page of this exhibit.

Q. Haven't you charged him with cash that was deducted from deposit?

A. Yes, sir.

Q. Why?

A. Because we don't know what happened to it. We can't find out what happened to it.

Q. Did you ask him?

A. No, sir.

Q. How would you expect ever to get this information if you don't ask the man who has charge of the books?

A. We were making an examination solely of the books and came up with a figure each year of cash to be accounted for, as the books show.

Q. To start with, you got cash deducted of the deposits of $12,952.82, did you ever inquire as to where that went to?

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A. No, sir.

page 121 } Q. Don't you know, as a matter of fact, that it went into the partnership and to the cash drawer to handle the tenants accounts?

A. There's no record to that effect.

Q. Did you ever consult with any of the tenants about whether they got cash or checks?

A. No, sir.

Q. If you wanted to be fair about this matter, why didn't you take these accounts one by one and take the tenants accounts and verify them?

A. Well, we were dealing with the accounts solely by Mr. Pulley's handwriting—

Q. I'm not talking about Mr. Pulley's handwriting—

Mr. Parker: He cut the witness off in the middle of his question.

Examination By Mr. Woodward Continued:

Q. You charged him with that even though you could have found out if you wanted to, or if you had asked him when you went back in there?

A. He may have explained it, if we went to him.

Q. Well, why didn't you go to him if you wanted to be fair about this audit?

A. I answered that earlier.

page 122 } Q. I'll ask you to answer it again?

A. I'll answer it again. We were advised that he was, as I said before, extremely—we were advised that he had been gravely ill, and our thought was that any questioning about this matter would probably greatly upset him.

Q. Don't you know his son, Robert, was right there?

A. Yes, sir.

Q. Did you ask him?

A. No, sir.

Q. Well, why didn't you ask him seeing that he had been there ten or twelve years?

A. We were not auditing Robert.

Q. You took everybody else's information, why didn't you take Robert's?

A. We didn't seek that information.

Q. You didn't seek it?

A. No, sir.

Q. Well, then, you can't vouch for the validity of the items?

A. Yes, sir, that's what the records show—

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Q. Show that—

A. Shows that amount of cash was deducted from the deposits.

Q. But what went with that cash, you can't say, can you?

page 123 } A. No, sir.

Q. All right, now, you have the next item, "Checks Payable to Cash." I say, *you're* next item is, "Checks Payable to Cash," and that's $2,200.00, you know what they were for?

A. No, sir.

Q. Did you ask?

A. No, sir.

Q. Well, why didn't you ask?

A. For the same reason.

Mr. Parker: Do you want him to repeat it again?

Mr. Woodward: Yes, why didn't you?

A. As I said before, because we understood that Mr. Pulley was gravely ill.

Q. Why didn't you talk to Robert?

A. The same answer, whatever it was that I gave before.

Q. Now, you got down at the bottom, "Unidentified Deposits," $6,314.75, even though you don't know where it came from, you charged him with that too?

A. That's right.

Q. So, now you have on that account $12,952.00, plus $2,200.00, plus $6,314.75, that you're charging him with, and you don't know any more about it than that?

A. The way you put it, that's correct. We don't know what happened to it.

Q. If you don't know, why do you charge him

page 124 } with it and accuse him of stealing, if you don't know?

Mr. Parker: If the Court please, there has not been one single evidence on the part of Mr. Hardy of accusing Mr. Pulley of stealing. I take very violent exception to the counsel's statement that he said that he had accused him of stealing; to the contrary, he says, he doesn't know whether he can account for them or not, and if he could, the report would be changed. So, I do not wish to have—and I wish to object to this counsel saying that he has accused him of stealing.

Mr. Woodward: You put this witness on the stand and

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asked him how much Mr. Pulley was short. Now, in my vocabulary, shortage is thieving; I don't know what it is in yours. You have asked him how much he was short, and I am finding out how much it is.

Mr. Parker: There's no word of that in the record whatever.

The Court: Mr. Woodward has very wide latitude in cross-examination.

Mr. Parker: I don't think he can put words in the witness's mouth.

The Court: I don't think he can say the witness has accused Mr. Pulley of stealing.

Mr. Parker: That's what we object to.

Examination By Mr. Woodward Continued:

page 125 } Q. Let's take page two of your audit of 1951. Starting right at the top, it says, *CASH: NO RECORD OF CASH RECEIPTS AND DISBURSEMENTS WAS MAINTAINED.* Now, Is that true?

The Court: I'd like to see the copy of that.

Examination By Mr. Woodward Continued:

Q. It says, *NO RECORD OF CASH RECEIPTS AND DISBURSEMENTS WAS MAINTAINED.*

A. That's correct.

Q. Well, how can you make an accurate report on it then?

A. Because that means there was no cash book, as such.

Q. How can you give us any record of it, if no record was maintained?

A. By analysis of the accounts.

Q. That's simply a conclusion on your part?

A. No, sir.

Q. Well, he did have accurate records. He either had accurate or inaccurate records. Now, which was it?

A. The transactions that were recorded, by and large, were recorded accurately to the extent that they were recorded.

Q. Can you look at the book and tell what was not recorded in them?

A. In this case, yes, sir.

page 126 } Q. Well, tell us what was not recorded?

A. Well, for example, you might see an entry in there: Farmer Joe Blow's Account for Sale of One-half of so-many hogs, and the reason for that is, of course, that

the tenant is on one-half share, but you can't find the other half.

Q. Do you know whether Joe Blow got it or not?

A. Yes, sir, he—

Q. The other half?

A. No.

Q. You don't know whether he got it, or whether he didn't get it?

A. I only know what the books show.

Q. If he got the whole check and charged Joe Blow up with it; that would be what the Bain Estate got and what Joe Blow got?

A. What was that?

Q. If he got the whole check and charged Joe Blow up with it; that's what the Bain Estate got and that's what Joe Blow got?

A. I don't quite follow that question.

Q. I'll pass on to another.

Examination By Mr. Woodward Continued:

page 127 } Q. I read from page two as follows: "A large portion of the cash receipts were not deposited in bank and many disbursements were made in currency rather than by check." Now, what's the basis for that?

A. The reference to Mr. Pulley's handwriting.

Q. Where did the money come from?

A. For the disbursements?

Q. Yes, sir.

A. It came from the various sources of income that we show here.

Q. Don't you know it's bound to have come from the deductions of the deposits in the bank or checks drawn against the account, don't you know that?

A. No, sir, I don't.

Q. Don't you know that the business that the company was doing was entirely credit for farmers for about ten months out of the year and don't you know that only about ten per cent of it was over-the-counter sales?

A. Yes, sir.

Q. Well, then, he had to have cash to run the tenants, didn't he?

A. I think so.

Q. Well, where was he going to get it, if he didn't draw checks out of deposit?

A. I don't know, unless there were some checks that didn't

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go into the bank, but were cashed instead.

page 128 } Q. Well, wouldn't that be the same thing as deducting it from the deposit, Mr. Hardy?

A. In effect.

Q. Well, he had this authority, didn't he?

A. I presume so.

Q. Now, you said no copies of the deposit tickets were maintained. You found them all in the bank, didn't you?

A. No, the banks had to make copies for us.

Q. You found deposit tickets in the bank, didn't you?

A. Yes, sir.

Q. And the cash checked out was Mr. Pulley's, wasn't it?

A. The cash checked out was—

Q. The cash on deposit checked out by Mr. Pulley, came out of Mr. Pulley's account, didn't it?

A. No, sir.

Q. What was the difference?

A. Well, there were any number of items that you couldn't locate on deposit tickets. There were any number of payments that you couldn't find on the deposit tickets.

Q. Did the amount on deposit in the bank coincide with the amount of cash that Mr. Pulley said was in the bank?

A. Yes, sir.

Q. Well, then, they reconciled, didn't they?

A. Insofar as the amount of money that was in

page 129 } the bank, yes.

Q. You go further down—on the ninth line, and I read as follows: "We further discovered that cash was deducted regularly from the total of checks listed on the deposit tickets and this cash was returned to the depositor." Now, that's the same cash that you got him charged with, isn't it?

A. That's right.

Q. All right. I'll now read on: "We were unable to determine the ultimate disposition of this cash which amounted to $12,952.82." In other words, you were guessing about that item that you charged to him?

A. It doesn't say we were guessing. It says, we were unable to determine the ultimate disposition.

Q. Well, then, you charged it to him?

A. Yes, sir.

Q. Did you ever take into consideration the amount of expenses he had in paying the tenants during the year?

A. Oh, yes, as a matter of fact, the tenants had numerous

entries showing, of which we show allowed that they were paid advances.

Q. Did you ever add up the tenants' tickets to show how much—we'll say, to October 1st, to see how much the tenants had charged up against them in the accounts?

A. No, sir.

Q. Well, that would have been the finest way
page 130 } in the world to find out whether they got any cash and what they got on credit?

A. Yes, sir. I think you'll probably find that was done, but not by me.

Q. Who was it done by?

A. My partner, Mr. Lewis.

Q. Why isn't it shown in your account?

A. You'll have to go a little slower, Mr. Woodward. Would you go back a question, please?

Q. Why isn't the account balance of disbursements to the tenants by credit or cash for that year up to October, 1951, or '52, whichever you want to take, why haven't you got some idea what those advances were up to that point?

A. Well, we do know what they were.

Q. Well, what were they?

A. We made a complete analysis of all that.

Q. Well, why aren't they in the account?

A. They are in the account.

Q. Well, show it to us. We're limiting this to your account here I'm not talking about something you've got in your valise out there.

A. You mean in this account?

Q. Yes, sir.

A The answer to that is, those items that were charged to the tenants, were not chargeable to Mr. Pulley.

page 131 } Q. Well, didn't he either come out with stock or cash?

A. Yes, sir.

Q. Well, how are you going to get stock without cash?

A. How are you going to get stock without cash?

Q. Yes, how are you going to purchase stock without cash?

A. You can't.

Q. How are you going to pay tenants, if you pay cash advances to them without cash?

A. You can't.

Q. Then he had to get it from somewhere—

A. Yes, sir.

Q. You got down on here, on April 26, 1951, the account of

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George Wells, a tenant of D. H. Pulley, was credited with $622.79 for one-half the sale price of twenty-eight hogs, and on the same date the account of D. H. Pulley was credited with $622.79, making a total sale price of $1,245.58; however, there was no record of a check for this amount being deposited in the bank. Was it incumbent on Mr. Pulley to deposit that check in the bank?

A. I think so—

Q. Was it his check or wasn't it?

A. It was made payable to him, but it was incumbent upon him to put that check in the estate bank.

Q. How do you know he didn't account for that
page 132 } sum of money?

A. Because he didn't put it in the bank.

Q. How do you know he didn't put it in the bank?

A. From the analysis of the deposit tickets.

Q. How do you know he didn't cash it and put the cash in the drawer?

A. I don't know that he didn't.

Q. Well, you can't say he's short that and question the item?

A. Yes, I can question the item.

Q. In what respect?

A. Because there's no record to show that the money is in the bank, or that it went to cash.

Q. It's Mr. Pulley's tenant, isn't it?

A. That doesn't make any difference.

Q. I say it's Mr. Pulley's tenant, isn't it?

A. It is.

Q. And it's Mr. Pulley's cash, isn't it?

A. No, it's the estate's cash.

Q. How do you figure that if the check is made payable to Mr. Pulley for his hogs?

A. Because he has an account on the books of the estate just as any other tenant, and he financed his operation with the estate's funds.

Q. And a lot of times didn't he put his own
page 133 } money into the estate's credit?

A. No, sir, only on rare occasions. As a matter of fact, the record will show that insofar as his own account was concerned, he settled with himself like any other tenant at the end of the year.

Q. Didn't he settle a lot of times during the middle of the year?

A. No, sir.

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Q. Well, why did you make a pointed reference there in one of your reports and say that he settled his account three times in one year, as if you were making a big issue of that?

A. I said, usually he didn't do that, but there was one earlier year that he did.

Q. Why do you want to raise the point of suspicion about somebody by commenting on the fact that the man paid his account earlier than he otherwise did?

A. In the first place, I don't intend to raise the point of suspicion. The purpose of that statement was to show that he was not entitled to the discount that he was taking on the fertilizer that he sold to himself.

Q. I'm glad you mentioned fertilizer. Do you know the basis of his purchase of fertilizer?

A. Generally, yes, sir.

Q. What was it?

page 134 } A. It's in here. His discount ranged somewhere from around twelve per cent to nineteen percent on fertilizer.

Q. Did you know the contract existed between the parties about the fertilizer?

A. Yes, sir.

Q. What were they, did you ever see it?

A. No, sir.

Q. Well, where did you get your information?

A. In the discussion with Mr. Harry Lee Bain.

Q. Well, you never gave Mr. Pulley an opportunity at all to say what his discount was, did you?

A. No, sir.

Q. Well, Mr. Pulley could have bought fertilizer on equal basis with the Bain Estate if he wanted to, couldn't he?

A. I wouldn't know whether he could or not.

Q. He could buy it just as cheap as the Bain Estate could, couldn't he?

A. I wouldn't know.

Q. And if they had had a custom for years gone by and Mr. Pulley got his fertilizer at cost, you're not in a position to say that, are you?

A. Will you repeat that?

Q. If a contract existed between the parties whereby Mr. Pulley got his fertilizer at cost, you're not in a position to deny it, are you?

page 135 } A. In conversations with Mr. Harry Lee Bain—

Q. Let's get away from Mr. Harry Lee Bain.

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I'm asking you, are you in position yourself to deny that such a contract existed, of your own knowledge?

A. To deny that such a contract existed?

Q. Yes.

A. No.

Q. How much have you got him charged with excessive commissions on fertilizer on that year, or excessive discount?

A. $601.81.

Q. So that's an arbitrary and capricious item that you've got charged against him?

A. I think not.

Q. Well, what authority did you have to charge him?

A. I asked Mr. Bain the terms of the sale of fertilizer with Mr. Pulley, and asked was he entitled to any special discount or consideration, and I was told, "no."

Q. Well, did you talk to Mr. Robert Pulley?

A. No, sir.

Q. Did you consult with the years 1943 and 1944 as to what was done?

A No, sir.

Q. Then, you just simply took what Mr. Bain said in order to make up your audit on that, didn't you?

A. On that particular item, I referred on Mr. page 136 } Bain's advice.

Q. Wasn't Mr. Pulley working right in the store right at that time, Mr. Robert Pulley?

A. No, sir.

Q. Well, who was there?

A. Mr. John Faircloth and Mr. Jack Bain.

Q. When did you make your audit, Mr. Hardy?

A. In the year, 1957.

Q. Well, why didn't you ask Mr Robert Pulley or Mr. Douglas Pulley about that?

A. Well, I have explained before about Mr. Pulley being gravely ill, and we weren't auditing Mr. Robert Pulley.

Q. Well, seeing that Mr. Robert Pulley was conversant with the business and had been there since he was a boy, wouldn't you think he would know just as much about it as Mr. Bain who lived over there twenty-seven miles away?

A. I would have no knowledge of how competent he was with the business or what else he might know.

Q. You knew he worked there, didn't you?

A. Yes, sir.

Q. And you took a lot of figures that he made on the books in his handwriting?

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A. For the year 1955.

Q. Well, you knew then that he was conversant with the business to the extent of knowing how to manage

page 137 } the business and keep the books, didn't you?

A. Not to that extent.

Q. Whenever you found a point of difference, who did you consult anyhow, Mr. H. L. Bain?

A. We didn't consult him very frequently. We merely made a summary of what the books showed.

Q. Without explanation to anybody?

A. We made a summary of Mr. Pulley's handwriting, you might say.

Q. You have down here, Commissions on Peanuts, on page five at the bottom. The estate acts as agent for peanut millers during the peanut buying season, and receives as compensation a commission on each bag of peanuts bought; five cents. Now, you have charged Mr. Pulley with the sum of 200 and some odd dollars on the account at the bottom of your exhibit, page nine, Exhibit A. Commissions-Peanuts (Schedule-4) $234.60. If you had known that they were his peanuts, would you have charged him with that?

A. Yes.

Q. Why?

A. Because the estate was entitled to a commission on all peanuts bought.

Q. Do you mean to say that the Bain Estate would charge Mr. Pulley for selling his own peanuts to the estate?

A. Yes, sir.

page 138 } Q. Where did you get that information from?

A. Again, Mr. Bain on one year made him pay that amount, because he had not credited the estate with the commission on his own peanuts.

Q. Would it be fair to say that you and Mr. Bain got up this account?

A. No, sir.

Q. All right. Did you rely on Mr. Bain about the fertilizer and peanuts?

A. I did as to that information.

Q. Now, on page six you got Unidentified Checks Deposited: Checks deposited in bank that we could not identify are listed in Schedule 5. Now, if you could not identify that as belonging to the estate, certainly Mr. Pulley would be entitled to credit on that, wouldn't he?

A. No.

Q. Well, why wouldn't it if the money came in that you

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couldn't identify otherwise, wouldn't it be a natural assumption that it was for Mr. Pulley?

A. Not if it was in the estate's banking account, no, sir.

Q. Why not?

A. Well, why would he put it in the estate's banking account?

page 139 } Q. Because he's doing business with the estate. Now, instead of crediting him with unidentified checks, you charge him with them?

A. That's right. That's part of the cash that's coming into his possession.

Q. Instead of giving him credit under your theory of what the situation was between the parties, you charged him with $6,314.77, under your theory, which you should credit him with the same amount, making a difference of nearly $13,000.00.

A. We don't think you should credit him with it.

Q. Well, that's just a matter of opinion, isn't it?

A. You're entitled to your opinion.

Q. Did you see any evidence of any stock being owned by the Bain Estate?

A. There was no evidence at all.

Q. When you saw different checks coming in from various corporations, whose did you assume they were?

A. I assumed they were Mr. Pulley's.

Q. Did you credit him with them?

A. Yes.

Q. I want to call your attention to that, because I expect to pick you up on that on one of your later examinations.

Examination By Mr. Woodward Continued:

page 140 } Q. Now, you also made the statement—let's take page seventeen of your account in which you got: Check Disbursements not Supported by Invoices. I notice about fourteen or fifteen items down is a check from Virginia Electric and Power Company for $2.00, do you know what it's for?

A. No, I do not know what it's for.

Q. Do you know what another check on page seventeen—

Mr. Parker: On what page is that, Mr. Woodward?

Mr. Woodward: Page seventeen.

Examination By Mr. Woodward Continued:

Q. There's another check down there from Virginia Electric and Power Company in the same amount?

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A. Yes.

Q. Now, Mr. Hardy, when you started testifying you said that the records were complex.

A. Yes.

Q. Is that a fact?

A. That's correct.

Q. Now, this was a single entry system?

A. That's correct.

Q. And this was a country store?

A. That's correct.

Q. And they had been doing business that way for better than fifty years?

page 141 } A. That's correct.

Q. And there's no way you can look at the books and balance a single entry set of books, is there?

A. Not balance—you can't balance them insofar as offsetting an equal debit against an equal credit.

Q. Now, you have talked about unsupported invoices, did you ever know a farmer to give an invoice for seven hogs he was carrying to his landlord?

A. I'm trying to think of all the farmers I've dealt with. I don't know.

Q. Do you know of any farmer who renders any invoices for his produce?

A. No.

Q. Well, then, you charged him with all the stuff that came from these farms which went into invoices, haven't you?

A. No, sir.

Q. Where did you leave out any?

A. The invoices that we have charged him for, for which—rather, the disbursements that we charged him for, for which there are no invoices are these items listed in Schedule 6.

Q. Now, you have said that some records were there and some were not there?

A. That's correct.

Q. Well, taking the fact into consideration that this was a store that had been operating for years and was

page 142 } using a single entry system to keep the farm accounts, the tenants accounts, and the principal parts, how can you say you can ever get a figure with any accuracy whatsoever as to what Mr. Bain owed Mr. Pulley or what Mr. Pulley owed Mr. Bain?

A. I'll answer that by saying, I said we examined everything that we could find, everything available, and on the

basis of that examination, together with the fact that this was all in Mr. Pulley's handwriting, this was our answer.

Q. That's your answer, and that's the thing you couldn't find, and you don't have any answer for that, do you?

A. That's right. We say exactly what it is. We say, Disbursements not Supported by Invoices, which is true. We have these disbursements, and no invoices to support them.

Q. Well, Mr. Hardy, you're trying to charge Mr. Pulley up with these things. Don't you know that in the sense of fairness that you ought to have consulted him or consulted somebody before you charged him with something he's not responsible for?

A. If Mr. Pulley will come forward and show these invoices, of course, he couldn't be charged with them.

Q. Did you make an effort to get him to explain them to you?

A. No.

Q. Did I understand you to say that you consulted with some of the tenants?

page 143 } A. No.

Q. You did not?

A. No, sir.

Q. Well, that would be the only way that you could find out as to the accuracy with that tenant?

A. No, sir, I don't think so.

Q. How could you find out in seeing that you didn't have adequate records?

A. From analysis of the records themselves.

Q. Well, if you didn't analyze part of the records, you'd come up with a part answer, wouldn't you?

A. The accounts with the tenants were not shown in part; they were shown in complete details with a settlement each year.

Q. All right, then, you had all the way in the world to check the accounts of the tenants against Mr. Pulley's accounts, didn't you?

A. As against what?

Q. As against Mr. Pulley's accounts. You had all the opportunity in the world to check with the tenants—

A. You mean check with them personally?

Q. Yes.

A. I expect we could have sort them out.

Q. Well, I understood you to say that you spent almost a month down there on each one of these years. It

page 144 } looks like you could have got around there sometime and seen somebody about these things.

A. We relied on the fact that all the entries were made by Mr. Pulley.

Q. On page three it has, Customers' and Tenants' Accounts: "We made a complete analysis of all of the accounts with tenants and outside customers, showing charges, payments on account, and credits for crops sold." Now, do you know whether they were right or wrong?

A. Yes.

Q. Mr. Hardy, on page twelve, Sale of Crop, 1951, you've got $154,149.81?

A. Yes.

Q. Now, go back to page nine, Exhibit A, you show the same item as Sale of Crops?

A. Yes, sir.

Q. $154,149.81, is that the gross sale?

A. Yes, sir.

Q. Then, you've got, Collections on Accounts, $19,603.39?

A. Yes.

Q. That's right, isn't it?

A. That's right.

Q. Well, if that's not included in the gross sales, why then you're collecting out of the tenants and Mr. Pulley twice, aren't you?

page 145 } A. No, sir.

Q. Then, how do you figure that?

A. Those are the collections that show on the analysis of the tenants' accounts and customers' accounts as to money that should have come into his possession.

Q. Well, do you know that it did come into his possession?

A. Yes, sir.

Q. How?

A. This is the statement right here, Cash to be Accounted For and Cash Accounted For. It is in effect a statement showing just that. These are the sources of cash that should or did come into his possession and disposition.

Q. Well, that statement doesn't rise any higher than the other one. How can you account for it other than what you have shown in there—how the $19,603.39 should be charged to Mr. Pulley?

A. Besause it was cash coming into his possession.

Q. Did it come in the shape of crops?

A. No, it came in the shape of cash.

Q. What did it come for?

A. For the payment of the account.

Q. Well, wasn't it representative of gross sales of crops?

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A. No, sir.
page 146 } Q. You sure of that?
A. Yes, sir. I'm sure of that.

Q. I want to put you on your guard as to that. Where would he get cash to run this business, Mr. Hardy, all through the years?

A. The estate always maintained a very substantial balance.

Q. Well, it maintained it too, instead of drawing from it, didn't it?

A. It was always a large amount of cash in the bank.

Q. Exactly, and it didn't vary much, did it, except it increased?

A. It didn't vary very much.

Q. It increased all during the year, didn't it?

A. Yes, sir. Now, did you say, all during the year, or all the years?

Q. I'm talking about during the years?

A. During the years?

Q. Yes.

A. Yes, sir.

Q. Now, at the end of 1951, it paid out to the Bains as a dividend $23,654.55. Have you got a record of that?

A. Not here, no, sir.
Q. Why didn't you put that in your account?
page 147 } A. Why didn't I—
Q. Why didn't you put it in your report?

A. Well, because it had nothing to do with it.

Q. You don't think taking $23,000.00 out of the account had anything to do with it?

A. No, sir, not as far as he being accountable for it, no, sir.

Q. If he put the money in the bank, he should be given credit for it, shouldn't he?

A. He was credited with it.

Q. If you say there was a shortage that year and there was not only a dividend of $23,654.55 paid out by him, but there was a substantial increase in the bank balance at the end of the year?

A. Yes, sir.

Q. You said that, did you not?

A. Yes, sir, I'd like to correct that word "shortage."

Q. Well, what would you like to correct it to?

A. Cash to be accounted for.

Q. Well, what was it, cash to be accounted for, what was it anyhow?

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A. He may be able to account for what happened to this money.

Q. Well, why didn't you ask him instead of having all of this to do, why didn't you ask him about it?

page 148 } A. Because he was too ill to be asked.

Q. How do you know that?

Mr. Parker: If the Court please, maybe for once and for all, let's get the question answered; he's asked him fourteen different times why he didn't see Mr. Pulley.

Examination By Mr. Woodward Continued:

Q. I'll put it to you this way: Now, knowing Mr. Pulley was sick in bed and unavailable, you charged up everything you could possibly charge to him under the theory of cash to be accounted for, didn't you?

A. No, sir.

Q. What could have been charged to him that you didn't charge?

A. Checks listed on the deposit tickets which could not be identified, but we assumed could have been for cash purposes or for cash for customers and that we did not include in Mr. Pulley's accountability were as follows: 1951, $2,603.66.

Q. I asked you if you haven't got in your account as cash disbursements not supported by invoices the sum of $5,920.53?

A. We do.

Q. Were those checks that you have referred to there paid to people other than the Pulleys?

page 149 } A. They were.

Q. Isn't that a good invoice in anybody's language?

A. No, sir.

Q. Why?

A. If they are not charged on the books. For example, if the Virginia Electric and Power Company's check of $2.00, if you can't find where it's charged on the books to a tenant, then, when you settle with the tenant at the end of the year, you're overpaying him $2.00.

Q. Isn't it true that in every concern that you have ever audited the books, there's a lot of times you don't have invoices, don't have a thing in the world but a stub and check?

A. No, sir, that's not true.

Q. Well, let's say—

A. It's the exception rather than the rule.

Q. Let's say you're examining the books of the Virginia

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Electric and Power Company, which is a right big concern, and you came across an item of $10,000.00 payable to the Pocahontas Coal Company, would you throw it out?

A. I would certainly take exception just as I have here, if there was no invoice to support it.

Q. And would you charge that up against your audit?

A. Yes, sir.

Q. Did you ask Mr. Pulley?

A. No, sir.

page 150 } Q. Why?

A. He was too ill.

Q. Each and every one of those items were payable to a reputable business concern or some individual, isn't it?

A. You're missing the point, Mr. Woodward. If those items, and many of them were not charged to somebody, then when you settle with those tenants at the end of the year, you are overpaying them.

Q. Overpay who?

A. Whoever the tenant is that should have been charged with this amount.

Q. Well, why charge this disbursement to a recognized person who is getting so much money, why charge that up to Mr. Pulley if it's in the regular course of business?

A. Well, for example, the Virginia Electric and Power Company, we think that was probably paying a power bill for one of the tenants. We don't know, but we think that. If we had been able to locate it as being charged to a tenant, then it would not be in here.

Q. Well, what about the Virginia Associated Businessmen, whose account did you think he was paying that for?

A. I would guess that he was paying it for the account of the estate.

Q. Well, why didn't you credit him for it?

A. Because there was no invoice to show why

page 151 } he made the disbursement. In the absence of an invoice saying here's what you owe and paid, you have no way of knowing just because the check was drawn to the Virginia Associated Businessmen. it didn't list the disbursement.

Q. How many years does the Federal Government require you to keep these invoices when you're running a double entry set of books on this basis?

A. They recommend five years.

Q. How many years back is that?

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A. Oh, golly! I guess there must be invoices there back to the year 1900.

Q. Exactly.

A. For those that are there.

Q. And because you couldn't find them in that batch of invoices, you charged them to Mr. Pulley?

A. That's right.

Q. And the same theory that you used with reference to 1951, goes all the way through your audit for 1952, 1953, and 1955—

A. That's right.

Q. And for 1956?

A. Well, we don't charge Mr. Pulley with—

Q. Well, I'll withdraw that. But you went over Mr. Toler's records for 1954 and 1955, with the same theory and the same basis of computation?

page 152 } A. That's right.

Q. Can you say that your records are correct?

A. Yes.

Q. Can you say that it accurately reflects the condition of affairs between Mr. Puley and the Bains?

A. We think so.

Q. In what respect? If you don't have the records available, how can you say so?

A. We are asking him to produce them.

Q. What do you mean, we ask him when you didn't open your mouth to him?

A. Well, if Mr. Pulley would come in here right now and show us these invoices, then that charge would be eliminated.

Q. Well, did Mr. Pulley know that you were down there?

A. I don't know.

Q. Well, how would he know what to produce in the way of invoices?

A. Well, these reports were delivered last fall; nearly a year ago.

Q. Do you know whether the invoices had been there or not?

A. Were they ever there?

Q. Yeah.

A. No, I don't know whether they were ever there.

Q. Wouldn't it be past your comprehension for fifty or sixty checks in the course of the year to be made payable to reputable business concerns and individuals for absolutely nothing?

page 153 }

A. No.

Edward I. Hardy.

Q. Did you look on those checks to see if they were endorsed by the payees?
A. We did.
Q. What did you think they got them for?
A. We didn't know.
Q. Why didn't you ask him?
A. Because he was too ill.
Q. Well, why didn't you ask the payees?
A. Well, in some cases we did.
Q. Which ones did you ask?
A. On the H. P. Beale and Sons and Lummis and Company.
Q. All right. Did Lummis and Company tell you what the checks were for?
A. Yes.
Q. Did Mr. McKinney tell you that?
A. No, sir, the stub on the checks showed that.
Q. What did it show?
A. For the purchase of peanuts.
Q. Did it show for hauling?
A. No, sir.

page 154 } Q. Did you ask Mr. McKinney?
A. No.
Q. Well, how did you know what they were for?
A. Well, actually, if the check had gone in the bank, it would not have mattered.
Q. Well, the Bain and Company checks would not have gone to the banks—in the bank anyway except to be paid?
A. Bain and Company—
Q. The Bain and Company checks would not have gone into the bank except to be paid to the payee, would it?
A. I'm talking about Lummis and Company.
Q. Let's go back now, you originally started talking about the checks that you got him charged with that were payable to recognized business houses and individuals, and you say you never consulted anybody except Lummis and Company and H. P. Beale?
A. I was wrong about that when I said that. I realize that now. I didn't consult him about payments made to them.
Q. Would you be surprised to know that the business dealings between Mr. Pulley and H. P. Beale was to the extent of over $50,000.00 a year?
A. I can't answer that.
Q. You wouldn't know anything about that?
A. No, sir.

Edward I. Hardy.

Q. And so individual checks you just picked at random and charged them off to Mr. Pulley?

page 155 } A. No, I wouldn't say that.

Q. Well, let's see if you haven't. Didn't these checks on page seventeen have the endorsements on them?

A. Yes, I think they did.

Q. Charged to Mr. Pulley?

A. Yes.

Q. Well, Mr. Pulley would have been just as well off if they had been charged to his original bank account, wouldn't he?

A. No, sir, because if invoices or some other proper evidence to support these disbursements were presented, then they would not be charged to him.

Q. What you're getting down to is that a country store didn't have invoices like you keep records in the Merchants and Farmers Bank in Richmond?

A. No, sir, I don't think so.

Q. Well, I think you're wrong. I think so.

Mr. Woodward: That's it.

RE-DIRECT EXAMINATION.

Examined By Mr. Parker:

page 156 } Q. You stated to Mr. Woodward that you didn't do much, that you took Mr. Lewis's figures in making up this report. I think in your direct testimony you said that you came down in the field and did some of that work yourself, which is correct?

A. The second statement is correct.

Q. In other words, you did do some of the actual audit in the field itself?

A. Yes, sir.

Q. On the books?

A. Yes, sir.

Q. Did you do any spot-checking with Mr. Lewis?

A. Yes, sir.

Q. So you were satisfied from your own work on the field, were you, that his work papers were all right?

A. Absolutely.

Q. Now, also in answer to one of Mr. Woodward's questions, you said that there was—that you didn't go outside of the books of the company for any explanation or anything of that sort, I want to be sure that the Court understood exactly what you said or what you meant on that. Did you or did

you not go outside for any verifications or explanations of any figures found on the books?

A. We did go on the outside—to outside sources.

Q. What sources?

page 157 } A. To the banks, to the peanut office here, to Lummis and Company, and to H. P. Beale and Sons.

Q. Now, you have been asked time and time and time and time again by Mr. Woodward why you did not inquire of Mr. Douglas Pulley as to why he had not had vouchers to support these smaller amounts, and why he had not accounted for the larger amounts of cash, will you state whether or not you had any conference with me relative to Mr. Pulley's health at any time that you were working on these audits?

A. Yes, I did.

Q. Did I tell you anything about having consulted Mr. Pulley's doctor?

A. You did.

Q. What did I tell you?

Mr. Woodward: We object to that.

Mr. Parker: Now, you have been—

Mr. Woodward: Just a minute—

Mr. Parker: You have been wanting to know why he had not consulted Mr. Pulley—

Mr. Woodward: Now, you can take the stand and testify if you want to; it's purely hearsay and a self-serving declaration.

The Court: I think it's self-serving. The witness has stated that he didn't consult Mr. Pulley on account of Mr. Pulley's health.

Mr. Parker: All I want to know, is how he

page 158 } knew about that.

The Court: It seems to be general knowledge —Mr. Pulley's health. I don't think it's necessary to go into details.

Examination By Mr. Parker Continued:

Q. Now, Mr. Hardy, I believe you stated that you finished these audits sometime in the *later* part of the fall of last year, is that correct?

A. That's correct.

Q. And the evidence will show that copies of these audits were delivered to counsel for Mr. Pulley many months ago, I just want to ask you one question. Has Mr. Pulley, Mr. Doug-

las Pulley, or Mr. Robert Pulley, or any of his counsel prior to your coming to this trial come to you and offered any explanation of any of these items?

A. No, sir.

Q. If they had come—strike that. I believe you have testified that if Mr. Pulley would bring in his vouchers, or would come in with a satisfactory explanation of the cash unaccounted for at the present time, that you would be glad to amend your audit, is that correct?

A. That's correct.

Mr. Parker: That's all.

Mr. Woodward: Is that all?

page 159 } Mr. Parker: Yes.

RE-CROSS EXAMINATION.

Examined By Mr. Woodward:

Q. And if I had come to you and asked you for an explanation of your audit, you would have told me politely that it was none of my business, wouldn't you?

A. No, sir, not if I knew you were his counsel; I certainly would not.

Q. You would not?

A. No, sir.

Q. Well, we've been counsel in this case a year and a half, and you haven't sought to get in touch with us about any explanation.

A. We made the first move. We made the reports, sir.

Q. What do you mean, we made the first move?

A. I mean we delivered the reports to our counsel.

Q. Well, seeing Mr. Pulley had counsel for a year and a half, and Mr. Parker got this information, why didn't you send us the information if you thought that there might be some explanation of the charges?

A. At the time I delivered the reports to coun-
page 160 } sel for my client, I was advised that you were being furnished copies immediately.

Q. Mr. Hardy, don't you know as good as you know your name isn't Peter that you could not have consulted with Mr. Moyler and me privately about part of this audit?

A. I would have been very happy to have consulted with you and Mr. Moyler.

Q. You mean that you would have disclosed Mr. Bain's business to me?

Edward I. Hardy.

A. Why, certainly; with the permission of counsel, I would have been happy to talk to you.

Q. I'm talking about irrespective of the permission of counsel.

A. If that report properly found its way into the hands of a third party and you came to me and showed me that, I would have been happy to have discussed it with you.

Q. And you would have carried right straight to Mr. Bain what we had discussed with you, wouldn't you?

A. I would very probably have explained the conversation.

Q. Now, Mr. Hardy, all the books and all the records have been entirely in the hands of the Bain Estate or its agents every since Mr. Robert Pulley ceased his activities, that is, from January 1, 1956, right down to the time that they were delivered to Mr. Thedieck for audit, except for

page 161 } five or six weeks, they have been entirely in the hands of the Bains?

A. So far as I know, that's correct.

Q. And if Mr. Pulley had wanted to get rid of any of the records, there was nothing in the world to prevent it, was there?

A. Not from the basis of the testimony I've heard here today.

Q. And he could have thrown them in the stove and burned them up, couldn't he?

A. Yes, sir, I guess he could.

Q. He could have burned up all the invoices if he had wanted to?

A. Yes—

Q. He could have done anything he wanted to and there would have been no records at all for you to go over? Now, that's correct, isn't it?

A. Yes, sir.

Q. And you would have found a hundred thousand dollars right there in the bank, wouldn't you?

A. Unless he burned those records too.

Q. Have you found any alterations in his records?

A. Any alterations?

Q. Yes.

A. No.

page 162 } Q. Have you found any erasures?

A. No, sir.

Q. Have you found any fictitious entries?

A. No, sir.

Edward I. Hardy.

Mr. Woodward: All right, that's all.

RE-DIRECT EXAMINATION.

Examined by Mr. Parker:

Q. Have you found any evidence of any taking out of anything—any invoices and throwing them away or anything of that sort?

A. None whatsoever.

Q. Have you found evidence of anybody tampering with the accounts, statements and books that have been down there?

A. No, sir.

Q. Now, did you have a conference with Mr. Thedieck?

A. Yes, sir.

Q. Mr. Thedieck, did he tell you that he was going over the books for Mr. Pulley?

A. Yes, he did.

Q. Did he ask for the books?

A. He did.

page 163 } Q. Did he have a copy of your report, so far as you knew?

A. He said that he had seen a copy of what he thought must be our report.

Q. Did he ask you for any explanation for any of these amounts of cash unaccounted for or any invoices to support any of those items?

A. No, sir, he did not. As a matter of fact, we went to great lengths as a matter of courtesy to offer our work papers to Mr. Thedieck, knowing the details we had in there, but that offer was not accepted.

Q. And he never, on behalf of Mr. Pulley or Mr. Pulley's counsel, he has never asked you, never told you that he's got an invoice that would explain where any of these matters were, is that correct?

A. That's correct.

Q. He never offered any explanation for any of the cash which you have—

Mr. Woodward: We object to him leading the witness.

Examination by Mr. Parker continued:

Q. Has he offered any explanation whatever—

A. No, sir.

Edward I. Hardy.

Q. As to cash or cash unaccounted for?
page 164 } A. No, none whatsoever. I never seen Mr. Thedieck.

Mr. Parker: That's all.

RE-CROSS EXAMINATION.

Examined by Mr. Woodward:

Q. Here you say that you reconciled the accounts of Thomas L. Bain on the records that you had a composite reference from Mr. Toler—Mr. Toler's records from 1951 through 1955 indicating a 1954 and 1955 cash not accounted for in 1954, was how much?

A. $46,719.19.

Q. Without interest?

A. That's right.

Q. What does it show on Mr. Toler's record?

A. $53,256.35.

Q. That's kind of sorry reconciliation, isn't it?

A. No, sir, I don't think it's sorry. Would you like for me to explain it?

Q. I'm just asking the question for 1955, what have you got? Before you answer that, I've got $39,249.00, now what have you got?

A. $49,965.67.
page 165 } Q. That's a difference of over $10,000.00, you consider that reconciliation?

A. Oh, yes.

Q. All right, then.

A. There was a subsequent letter that I testified to earlier that tied the Toler figures in with these figures.

Mr. Woodward: That's all.

RE-DIRECT EXAMINATION.

Examined by Mr. Parker:

Q. Let me have the subsequent letter and the report.

Mr. Woodward: We don't have any subsequent letter.

Examination by Mr. Parker continued:

Q. Did I ask you on direct examination whether there was some modifications on Mr. Toler's original report?

Edward I. Hardy.

A. I think you did.

Q. And did you say that you and Mr. Toler agreed perfectly as to the modifications?

A. Yes, sir.

page 166 } Q. Now, let's refer to those two items that Mr. Woodward has so carefully asked you about, and would not let you explain, and will you explain the items?

Mr. Woodward: Let's see what you handed to the witness.

A. What happened was that when we were called into the engagement, we made a trip to Ivor to the office of the estate and we found invoices which had not been available to Mr. Toler, totaling these amounts previously he had charged them, because he had no invoices for them, and his letter says that subsequent to the date of issue of this report, certain receipted bills and other documentary evidence have been discovered which reduced the stated accountability of management for those two years, and then he shows how you reconcile the figures from the original report to the new figure.

Examination by Mr. Parker continued:

Q. When you discovered those—that additional supporting evidence, you immediately, you and Mr. Toler, immediately gave him credit for—

Mr. Woodward: We object to you leading the witness.

Examination by Mr. Parker continued:

page 167 } Q. Again, did you and your partner make a thorough search of all the premises down there in trying to find invoices and statements and things of that sort?

A. We did.

Q. Where did you finally find some of the invoices, old invoices?

A. Well, they were up in what I previously called the loft, which I had referred to as hanging from the rafters on baling wire, on what appeared to be baling wire.

Q. Did you at my insistence bring any of those invoices to court?

A. Yes, sir, they're outside.

Q. Would you please, with the help of whoever you need, bring in about four or five of those invoices so that we can

show them to the Court and introduce them in evidence, I think, if the Court please?

The Court: Court will now recess.

Time is now 4:08 P. M., September 8, 1958.

Time is now 4:15 P. M., September 8, 1958.

Examination by Mr. Parker continued:

Q. Mr. Hardy, did you bring in one or two samples of invoices that I asked you to?

page 168 } A. Yes, sir, I did. I picked at random the invoices for the year 1953, and here are those for the year 1955.

Q. Would you please hold those up? Now, they are the ones that you found hanging from the rafters in the loft?

A. Yes, sir.

Q. Were they, so far as you could tell, arranged so all the invoices would be on one piece of baling wire for a year?

A. Yes, sir, and by years and reasonably in good chronological order.

Q. Well, what's the difference—you got one in an envelope and one on the baling wire there?

A. I think the audit for 1953, I think instead of putting them back on the baling wire, they put them in an envelope like this, but the 1954 and 1955 invoices are still on the wire.

Q. Did you look all over that building after having found the invoices found on baling wire, did you look all over that building as best you could to see if any was any place where any other invoices could be found?

A. Yes, sir, we did.

Q. Any other records of any sort?

A. We did. As a matter of fact, we checked a lot of others of that type hanging to rafters to make sure that there was nothing for years that are involved here.

page 169 } Q. Did you find any more records anywhere in that office or building pertaining to the items appearing on the books?

A. No, sir.

Q. Will you please introduce both those lists of invoices, one is Exhibit Number Seventeen and the other is Exhibit Number Eighteen, please, sir?

Edward I. Hardy.

Examination by Mr. Parker continued:

Q. I will ask you one question, I guess it's senseless, but I will ask it anyhow. Now, in making up your account, did you and Mr. Lewis take into consideration each and every one of those invoices that you found?

A. We did.

Mr. Parker: That's all.

RE-CROSS EXAMINATION.

Examined by Mr. Woodward:

Q. Mr. Hardy, after you had made your report, I believe Mr. Toler came along and gave you—

Mr. Parker: Do you want that letter?
page 170 } Mr. Woodward: Yes, sir.
Mr. Parker: It's over there.

Examination by Mr. Woodward continued:

Q. This letter is dated September 27, 1957, the letter from Mr. Toler to the Trustees of the Thomas L. Bain Estate, in which a rectification of items affected, do you know when Mr. Toler made his examination?

A. Yes, sir.

Q. When?

A. In the year 1956.

Q. Well, it took him from 1956 on up until November 27, 1957, to find out that Mr. Pulley actually had been charged with $25,409.44 more than he should have been charged with according to his own figures, that's right, isn't it?

A. The dates that you stated are correct.

Q. And the amount I stated is correct, isn't it?

A. Yes, sir, this represents invoices that we ourselves found which Mr. Toler had not located.

Q. Well, you told us that Mr. Toler had made his report according to acceptable accounting practices?

A. That's correct.

Q. Well, if it's acceptable accounting practices to see the invoices, Mr. Toler was rather negligent, wasn't
page 171 } he?

A. No, sir.

Q. Well, what about the $25,000.00—

A. May I say what Mr. Toler told me?

Edward I. Hardy.

Q. No, I'm asking you, you're the one that vouched for the accounts.

A. These were invoices that Mr. Toler had never seen before and asked for.

Q. And you found them?

A. That's correct.

The Court: Why did Mr. Toler not find them?

A. I think, Your Honor, the reason is that when he completed his audit, he asked Mr. Robert Pulley if there was any other additional evidence and was told, "no," and he accepted the statement.

Mr. Woodward: That's hearsay, Your Honor.

The Court: Who gave those to you?

A. We just found them. We found them the first day we went down; neither Mr. Douglas Pulley or Mr. Robert Pulley were there, so we made a search of the place and found them up there in what I keep calling the loft.

Examination by Mr. Woodward continued:

page 172 } Q. You have testified with reference to Exhibits Six, Seven, Eight, Nine and Ten, which are the accounts that Mr. Pulley rendered for the years 1951 to 1955, inclusive, to which Mr. Shands had added his computations, did you check those reports for accuracy as to amounts?

A. Yes, sir.

Q. Did you find his figures to be correct?

A. Substantially correct, yes, sir, I have already testified to that effect.

Q. Now, in making your report, did you allow anything for depreciation?

A. No, sir.

Q. Did you allow anything for losses?

A. No, sir.

Q. Did you allow anything for destruction of property?

A. No, sir.

Q. But you did add an arbitrary ten per cent to the accounts of the tenants, didn't you?

A. Yes, sir.

Q. Why?

Edward I. Hardy.

A. Because it was customary to charge ten per cent as a financing charge.

Q. Do you know that those sums were collected?

A. Yes, sir.

Q. How do you know that?

A. Because the accounts were settled with the tenants at the end of the year.

page 173 } Q. Were they all charged ten per cent?

A. In most cases, yes, sir.

Q. Well, now, seeing that he had tenants on all sorts of bases, how did you arrive that it was a correct amount each time?

A. The record showed almost without exception that the charge was ten per cent.

Q. Didn't you find some as low as four and a half?

A. They may have been, I don't recall.

Q. You relied on what Mr. Bain told you in that respect?

A. No, sir, we relied on what the books showed.

Q. Well, the books couldn't have showed that at the end of the year, could it?

A. No, sir, that's not correct. No, I mean your question, it could have showed that before the end of the year.

Q. But did it?

A. Yes, sir, because lots of times you would see advances made to a tenant and the ten per cent tacked on.

Q. Was that sum on the wholesale price of the merchandise or on the retail price of the merchandise?

A. This was advances to the tenants.

Q. That's advances of money?

A. Yes, sir.

Q. How about material and supplies?

page 174 } A. I don't think it went on those, if my memory is correct, I think it was only on cash advances.

Q. And that represented the interest on the money?

A. Finance charge.

Q. How about groceries and supplies?

A. I don't think so.

Q. Do you know what the purchases of the store was of groceries and supplies during the year?

A. Not at this moment.

Q. Did you take an inventory at the beginning of the year in figuring up your account here?

A. Not for the years in question here, no, sir.

Q. Well, the inventory at the first of the year and the

Edward I. Hardy.

inventory at the last of the year would be a most material inquiry as to what was there, wouldn't it?

A. No, sir, not in this type of examination.

Q. You don't think that would show up?

A. No, sir.

Q. Well, if he had $5,000.00 worth of merchandise at the beginning of the year and had $50,000.00 worth at the end of the year, he'd have $45,000.00 more than he started with, wouldn't he?

A. He would have $45,000.00 more in inventory.

Q. That would show up in his account, wouldn't it?

page 175 } A. Only to the extent of an accurate account at the end of the year. It wouldn't have anything to do with the cash coming into his possession here.

Q. It would have something to do with the purchases in his recent inventory?

A. Yes, sir.

Q. Those purchases would be reflected in his checks?

A. That's right.

Q. Whether the invoices are there or not, that would be reflected in his checks unless they were bought with cash?

A. If he paid for it without invoices, it would still be in there, yes.

Q. Have you taken into consideration the depreciation of stock on the shelves?

A. No, sir.

Q. Have you taken into consideration the difference between the market value and the replacement value?

A. No, sir, but that has no bearing on this cash.

Q. Do you know of anything that has any bearing on what Mr. Pulley is accountable for?

A. No, sir.

Q If he bought merchandise that cost a dollar and sold it at a quarter, do you think he should balance after losing the difference?

A. Well, that would depend on the circumstances.

page 176 } Q. Well, it wouldn't depend on anything except it was a loss of seventy-five cents on a dollar, would it?

A. If he wilfully sold it at a loss; I don't think he did, but if he wilfully sold it at a loss, it would be.

Q. Well, suppose he had canned goods on the shelves and the labels on the cans had become defaced, and he had sold

it at half its value, why would you reject that in your account?

A. It would be in the cash, sir.

Q. Well, it would be that much less cash for Mr. Pulley, wouldn't it?

A. That much less.

Q. Well, it would be that much more cash for the Bains?

A. No, sir.

Q. If you charged it to Mr. Pulley, it would be that much more cash for the Bains?

A. No—

Mr. Parker: Go ahead and explain it.

A. I was merely going to say, that it doesn't make any difference what the item sold for. The question is, how much is coming into his possession and of that cash, what did he do with it? It doesn't make any difference whether he sold it for half or full price.

RE-DIRECT EXAMINATION.

page 177 } Examined by Mr. Parker:

Q. For example, following Mr. Woodward's statement, I'm asking this, I may not know what I'm talking about, but if he can come in and show any cash unaccounted for that he spent $10,000.00 in buying stock and has supporting vouchers, would that reflect in this?

A. If he would come in and show that? Yes, sir, it would reduce the amount.

Q. That's merely supposition, you have no evidence that he did that. have you?

A. No, sir.

Mr. Parker: That's all.

RE-CROSS EXAMINATION.

Examined by Mr. Woodward:

Q. In order to arrive at an accurate account, you have to have all those things in account, don't you?

A. No, sir, not of that type.

Q. Just what is the difference between this type and any other accounting?

Edward I. Hardy.

page 178 } A. This is an account that shows from the record what cash came into, or what should have come into Mr. Pulley's possession, and how it was disposed of. It was disposed of by deposits in the bank and plus payments in cash.

Q. Disposition of merchandise comes under the heading of Merchandise Reduced in Price, doesn't it?

A. Merchandise what?

Q. The disposition of merchandise less than the cost price comes under the heading of Disposition of Merchandise, doesn't it?

A. If he sold it at less than his cost price, we would only be charging him with the amount at which he sold it.

Q. Well, what would be fair about that?

A. Well, I think you're being fair in that you're not charging for, say, if it's worth twice what he sold it for.

Q. Well, he's supposed to get credit for various things that go in the store?

A. Sure.

Mr. Woodward: That's all.

RE-DIRECT EXAMINATION.

Examined by Mr. Parker:

page 179 } Q. As a matter of fact, Mr. Hardy, the matter of inventory did not enter into this account at all?

A. In no way.

Q. You just had a certain amount of cash that came into his hands?

A. That's correct.

Mr. Woodward: We object to him leading the witness and putting words in his mouth.

Examination by Mr. Parker continued:

Q. What did you get then insofar as accounting is concerned?

A. We found that of the total amount of cash that came into his possession, some of it went into the bank and some went for cash disbursements.

Q. Did you give him credit for all of that?

A. Yes, sir, same as those unidentified checks; they went into the bank and he got credit for them.

Edward I. Hardy.

Mr. Parker: That's all.

Examination by the Court:

Q. In those vouchers which you discovered after Mr. Toler had made his account, were those vouchers all in
page 180 } one chronological period or were they scattered through the years or through the period?

A. They were hung on the wire just like the others.

Q. Hung on a wire?

A. Yes, sir.

Q. Were they—did they reflect the vouchers for any particular period, like, say, from the 1st to the 15th of a month, or were they scattered through the year?

A. I don't recall, sir, I think they were just scattered for the year.

Mr. Parker: May it please the Court, I'd like to find out if we can get a stipulation in here at the present time as to the time that we delivered to counsel for defendant audits furnished by this accountant.

Mr. Moyler: I don't know that we even got them.

Mr. Woodward: We've had them for a long time.

Mr. Parker: For a minimum of six months.

page 181 } SECOND DAY.

(The court convened at 10:00 a. m., September 9, 1958.)

Mr. Parker: May it please the court, before we proceed with our next witness, I have delivered to counsel for the defendant a letter which was written to Mr. Harry L. Bain by me. I do not, in view of the ruling of the Supreme Court, care to get on the stand to testify,but I was going to put him on to ask him whether he received that letter, unless counsel for he defendant will admit by stipulation of the letter being written and received. It is entirely on Mr. Pulley's health.

Mr. Woodward: It doesn't make any difference whether he introduced it or not.

Mr. Parker: That was filed by me; date, November 1, 1956.

Mr. Chappell: Plaintiff Exhibit Number 19.

Mr. Parker: I won't read it myself, Judge. You can read it as you file it.

The Court: Plaintiff Exhibit 19.

Herbert M. Lewis.

Mr. Moyler: What is the date of that letter, Your Honor?
The Court: November 1st, 1956.
Mr. Chappell: I would like to call Mr. Herbert Lewis, please.

page 182 } HERBERT M. LEWIS,
having been first duly sworn, was called as a witness for the complainants, and testified as follows:

Examined by Mr. Chappell:
Q. Will you please state your name and age?
A. Herbert Morrow Lewis; age, fifty.
Q. Where do you live?
A. Hopewell, Virginia.
Q. What is your occupation?
A. Certified public accountant.
Q. Will you please state your qualifications as a C. P. A., and give us your background?
A. I worked for nine years for two different accounting firms in Norfolk, and later worked seven years for one of the largest accounting firms in Richmond.
Q. What is the name of that firm?
A. Leach, Parker and Scott; and for the past two years I have been in practice with Mr. Hardy. I am a member of the American Society of Public Accountants, Virginia Society of Virginia Public Accountants, and enrolled as an accountant before the U. S. Treasury Department, and have done considerable work in tax cases, including testi-
page 183 } mony in U. S. District Courts, and the U. S. Tax Court in Washington, D. C.
Q. How long have you been practicing your profession?
A. Approximately eighteen years.
Q. And you are a partner at the present time of Mr. Edward I. Hardy, who testified yesterday?
A. Yes, sir.
Q. Did you assist Mr. Hardy in his audit of the books, records and accounts of Mr. Douglas H. Pulley as they obtain to the estate of Thomas L. Bain?
A. I did. In fact I did a greater part of the actual field work.
Q. By "field work" what do you mean?
A. The field analysis of the accounts, the preparation of the work, payments, and the various schedules that go to make up the reports.
Q. Mr. Hardy testified yesterday that the audits of your

and his firm covering the years '51, '52 and '53—I believe those, the reports covering those audits, Plaintiff Exhibits 14, 15 and 16. I ask you if you assisted in the preparation of those reports?

A. Yes, I did.

Q. Now, Mr. Lewis, how much time, approximately what is involved in your work alone in making these audits?

A. About a month on each year.

Q. Why was so much time involved?

page 184 } A. Well, there was so much detailed work that had to be done, and listing every account completely in detail, and just finding out what actually happened.

Q. Now, Mr. Lewis, yesterday there was considerable testimony concerning ledgers. I believe they were called customers' ledgers, and I hand you three volumes and ask you if you will identify these.

A. This is what is generally known as a customer's ledger, or accounts receivable ledger, or whatever you choose to call it.

Q. What years are covered in the volume you are examining?

A. Page 1 entry is January 5, 1949.

Q. How far does it run, approximately?

A. To December, 1951.

Q. All right. Now will you take the next ledger in chronological order and tell me what years they cover also?

A. The first entry in this is dated December 27, 1951, and it runs on through 1955, and has some transactions in 1956.

Q. What was that third book that I handed you?

A. This is entirely for the year 1956.

Q. Take the first two ledgers that I gave you in chronological order—and plaintiff would like to offer those as Exhibits—I believe it is 20 and 21—and would

page 185 } you give these to the judge, Mr. Lewis, and starting with the earlier years first. The next, Mr. Lewis, I hand you three volumes and ask you if you can identify those?

A. These are what are termed as day books. This one first entry is January 1, 1949. It has transactions, we call it, on through December, 1951. It is principally a list of sales by days, showing the cash sales by days, and the charge sales by days. It also has lists of various expenses, rents

received, truckage paid, freight and express, hogs sold, and peanuts sold.

Q. Is that the earliest of the day books you have there, as to the point of time?

A. Yes, 1949.

Q. Will you please hand that to the judge as Plaintiff Exhibit Number 22? What is the next volume, Mr. Louis?

A. The next is the same kind of book, same type, first entry dated January 1, 1952.

Q. Through what year, sir?

A. And it has entries through 1953.

Q. Would you hand that to the judge, and we wish to have that marked Plaintiff Exhibit Number 23. And the third volume, please?

A. The third volume is the same thing.

Q. Through what year?

A. Most of these transactions seem to be in page 186 } 1956.

Q. Are any in '55?

A. The first one is not dated, except the month and the day of the month.

Q. Does it show the year?

A. It doesn't show the year.

Q. Does that volume cover any transactions prior to 1955, during the year '55 or earlier?

A. Not that I can tell. The first transaction is dated August the 4th, and *go* over a couple of pages and you find one dated October 18, 1956, so apparently this is August, '56, too.

Mr. Chappell: If it please the court, I hate to trespass on the clerk to pass on the box of papers. Unfortunately the nature of the case is such, which matters we mentioned to the court yesterday, the vouchers and things of that sort, we feel will be of such importance we have them in the courtroom this morning. You will see that they are in cardboard boxes. We have the boxes set up according to years. I believe it would be almost an impossible task for Your Honor to initial each exhibit. We wish to introduce these in evidence, and I was going to suggest to the court, subject to the approval of opposing counsel, that the boxes be marked as particular exhibits rather than the items in the box.

Mr. Woodward: We object to that. We don't know what

is in the boxes, taken out or left in. It certainly
page 187 } isn't for us to get in court and go through a raft
of stuff that you couldn't get in an automobile
and get in court today.

The Court: Suppose we consider those as being introduced in evidence, and before we leave, we will figure how to identify them by the court's designation.

Mr. Woodward: Some we may want to object to.

The Court: You may, and of course I believe that would be a better procedure at this time.

Q. Mr. Lewis, rather than bring these boxes over to you, I will take only one, the year 1951. So that the court and counsel may understand the contents of these boxes, I hand you a packet, an envelope, and ask you to identify the contents.

A. These are the invoices that were paid by check.

Q. And they are the invoices for the year 1951?

A. That's right.

Q. I hand you another one.

A. These are invoices paid in cash, year, 1951.

Q. And I hand you another one for you to examine. What is this?

Mr. Woodward: Let us see that, if you don't mind.

(Mr. Chappell complied.)

Mr. Woodward: Your Honor, it is a physical impossibility for us to have these things entrusted enmasse to us and have us accept them without objection to them.

The Court: It seems to me that just a physi-
page 188 } cal effort of going through all those would be—I
don't know what good purpose would be set
up.

Mr. Woodward: It would take us as long to go through them as the auditors, I would think.

The Court: It would take the court just as long too.

Mr. Chappell: If it please the court, these books and records, anything that is in our possession is a matter of record, made available to the defendant several months ago. They were advised they could have them any time they wanted them. I do not wish to burden the court with a lot of papers. I can well appreciate it. The fact remains that

this is a matter involving accounting, and the accounting, the vital feature of it all, and the vouchers and maintenance of the record, in view of the fiduciary nature, we want to have these vouchers on which our accountants base their work available to the court. We would like to introduce them at this time, with the thought rather of manually identifying each paper. If it develops at a later time that the court does not need or desire them, we will be glad to withdraw them and take them back in our possession.

The Court: I would say to have them available for the court and they are part of the records, but that to go through all of those, either by testimony or by the efforts of counsel or the court, would be an impossible task, and one that would be productive of mighty little return for so much

page 189 } labor.

Mr. Chappell: I certainly agree with you that we keep them in the box until needed. I want to have them available for the court and counsel.

The Court: And considered as evidence, subject at each stage to objection by counsel.

Q. I merely picked at random one or two items, so counsel will understand what is in the box. I ask you, Mr. Lewis, if you will identify that?

A. Cancelled checks and bank statements; year, 1951.

Q. And lastly, this group of papers?

A. Sales tickets representing charge sales for sales to customers and tenants, and also for charges to farm operating expense accounts.

Mr. Chappell: If it please the court, this box from which I lifted these examples is marked 1951 in black crayon on the side. I would suggest to the court that the 1951 box be marked as an exhibit in toto, and assigned an exhibit number with possibly an identifying label on it.

The Court: Could you put it in a packet that could be in some way sealed up and marked with that?

Mr. Chappell: My thought was that each of these boxes can be so sealed by closing the lids, or still possibly we can find another box.

The Court: If you seal them, how are you going to examine them without breaking the seal?

page 190 } Mr. Chappell: I think the best thing is to let them stay right where they are, and if they are needed, treat them—can make use of them, and before the

record is made up, then we will find some way to have them in the record, in the course of events.

The Court: It may be that counsel on both sides might say that in conference, what is to be considered. I can imagine the Court of Appeals going into them right now.

Mr. Chappell: All right, Judge. Bearing that in mind, for the years 1951, 1952, 1953 and 1954 and '5, they are in these boxes here available to counsel and the court.

Mr. Woodward: For how long?

Mr. Chappell: I would be delighted to leave them right in the clerk's office, but I don't believe the clerk would take too kindly to that.

The Court: Maybe the evidence will develop a need or lack of need for them. That is the reason I don't think it would be necessary to make technical admissions and identification of those records at this time. I would sincerely hope that they would not be necessary.

Mr. Chappell: I can understand that, sir.

The Court: I sincerely hope that.

Q. Now Mr. Lewis, in addition to the ledger day book and these papers in these boxes over here, what other materials did you use in conducting your audit, and
page 191 } I have specific reference to the deposit tickets?

Mr. Moyler: They are labeled "Deposit Tickets," Your Honor. I think they should be labeled "Duplicate Deposit Tickets." They are duplicates, and ought not to be labeled Deposit Tickets.

The Court: I think so.

Q. I ask you, Mr. Lewis, if you will identify those?

A. These are copies of deposit tickets for the year 1953, furnished to us by the Bank of Sussex and Surry.

Mr. Chappell: If the court please, I would like to have those introduced as Plaintiff Exhibit Number 24.

Witness: These are copies of deposit tickets also furnished us by the Bank of Sussex and Surry for the year 1951.

Mr. Chappell: If the court please, I should like to have that introduced as Plaintiff Exhibit Number 25.

Witness: And these are copies of deposit tickets furnished by the Bank of Sussex and Surry for the year 1952.

The Court: Fifty-one is 24; fifty-two is 25?

Mr. Chappell: The 1951 deposit ticket, duplicate, would be Plaintiff Exhibit Number 24.

Herbert M. Lewis.

The Court: It has "Duplicate Deposit Ticket" on there.

Mr. Moyler: Was this made by the Bank and notations added to them since then were not put on there by the Bank, were they?

page 192 } Witness: Well, if you see some pencil notations on there, I made them, and all those carbons were by the Bank.

Mr. Moyler: And anything, pencil or red ink, you made them?

Witness: Yes, sir.

Mr. Moyler: I would like for the record to show that, Your Honor.

Q. The year 1952 would be Plaintiff Exhibit Number 25. You have Number 53.

A. I have Number 53.

Q. In 1953, it would be Plaintiff Exhibit Number 26. Now Mr. Lewis, yesterday counsel for the defendant examined Mr. Hardy initially concerning the audit, Plaintiff Exhibits 14, 15 and 16. I believe some particular attention was devoted to Plaintiff Exhibit 14 for the year 1951. Do you have a copy of that report?

A. No, I don't have it here.

(Mr. Parker handed a purported copy of the report to the witness.)

Q. Now before referring in any detail to this report for 1951, which was explored rather thoroughly yesterday afternoon, I ask you if you will briefly explain to the court the auditing procedures which you and your office follow in auditing these books and records and in preparing your reports such as that you have in your hand?

page 193 } A. In order to make this audit, it was necessary to examine every transaction in complete detail. We had to start out by analyzing every account in the books.

Q. What do you mean by "analyzing" the account?

A. List all the charges and all the credits in every account. Then we added these schedules, to see if they total the same as they totaled on the books; and in listing these accounts, they were segregated. The items were segregated in columns as to cash transactions, that is, cash that was paid and charged with the various tenants, the farm operating accounts and charges for merchandise credit for crops sold,

payments on account, and for merchandise returns. The checks were listed in detail, invoices sorted out and matched with the checks, to determine what the check was for. These schedules were added and proved with the bank's statements. We examined the endorsements on the check. We traced the deposits shown on the bank statements to copies of the deposit tickets. We traced the items shown on—

Mr. Woodward: What do you mean by "we" as we go on?

Witness: Mr. Hardy helped me in this work too.

Mr. Woodward: Was he present all the time?

Witness: Not all the time.

Mr. Chappell: Just a minute.

Mr. Woodward: I want to know whether Mr. Hardy was present or not when you say "we."

Mr. Chappell: I think it is highly improper page 194 } to—

Mr. Woodward: I object to the question in respect to "we."

Q. Who is we?

A. Mr. Hardy and myself.

Mr. Woodward: Was he present at all times?

Witness: No, sir, not at all times.

Mr. Woodward: All right. We object to the use of the word "we."

Witness: The credits in the accounts were represented as sales and were traced to the copies of the deposit tickets and identified, where they could be identified. A lot of credits for sales could not be traced—

Mr. Woodward: What was the answer? I didn't get that.

Witness: A lot of credits representing sales could not be traced to deposit tickets as deposits.

Q. Go ahead, Mr. Lewis.

A. There were items in the accounts that represented cash payments for the year 1951. We found no charge tickets, merely an entry in the book indicating that cash was paid out. Subsequent to 1951 there were also charges of this type, and the items were listed on the regular charge tickets along with sales and merchandise and other things to the tenants and customers both.

Q. How were these transactions ear-marked in 1951?

Herbert M. Lewis.

A. The record in the day books simply says "ticket," and the amount, which would be the total amount of
page 195 } the ticket. If you go back to the ticket and examine the individual items going to make up the total, some of the items are listed as cash.

Q. Is that subsequent to '51?

A. Subsequent.

Q. How about the '51?

A. I didn't find any list on the tickets for 1951. The listings were simply made in the ledger.

Q. Now referring to the report for the year 1951, which would be Plaintiff Exhibit Number 14—Strike that question. Mr. Hardy testified yesterday that you and he had received the audits performed by A. N. Toler and Company for the years 1954 and '55. Is that correct?

A. Yes, sir.

Q. Will you very briefly explain to the court what auditing procedures you followed in checking the work of A. N. Toler on those years?

A. Mr. Toler made his work papers available to us. I took his work papers and went over them very thoroughly. I also traced some of the entries in the papers.

Mr. Woodward: You say "traced some of the entries"?

Witness: Some of the entries to the actual records themselves. I also found that there were quite a few invoices and sales tickets up on the second floor that Mr. Toler had never had access to.

page 196 } Q. Would you explain the location of these invoices and tickets, and so forth? What do you mean by the "second floor"? Was it this attic?

A. Yes, sir. You could call it an attic. We had open rafters, and these invoices, tickets also, and things, were strung on hay bailing wire and hung from the ceiling.

Q. I believe yesterday there was introduced as Plaintiff Exhibit Number 18 this bailing wire that I show you now, with some papers on it. Is that the sort of thing you mean?

A. That is one of them.

Q. How many of those wires were there up there in the attic? Do you have any idea?

A. The whole ceiling was full of them. I found some of them dated all the way back to 1937.

Q. Did you check through all those invoices and other papers on these bailing wires and obtain all pertinent data

pertaining to the years '51 to '55?

A. Yes.

Q. Getting back to these wires, did it appear that these papers were arranged in any sort of order?

A. Yes, they were. They were all of one year on most of them, one on one wire. In some instances there were two wires and some as many as three.

Q. Did it appear that they had been in place for any considerable length of time, or did it appear that

page 197 } they had been recently put there?

A. It appeared they had been there, had to knock the dust off before you could read the dates on some of them.

Q. Now referring you again to your report of 1951, with Plaintiff Exhibit Number 14, I would like for you to skip the first nine pages for the time being, the first eight pages, rather, and turn to page 9 entitled over in the right corner Exhibit "A."

The Court: Mr. Chappell, do you have an extra copy of that? He is using the exhibit that was—

Mr. Chappell: Yes. Here you are. Give the judge the original. Thank you, Your Honor.

Q. Page 9, Exhibit A, now what is that?

A. This Exhibit A, in effect, is a reconstructed cash book, showing the various sources of cash, and a total of the cash to be accounted for. It also shows a total of the deposits for the bank's records, and a total for the payments made in cash, a total of the deposits and the payments in cash, deducted from the total cash to be accounted for, and arrives at a balance that has not been accounted for.

Q. Now how do these latter pages, starting with page 11, fit in with Exhibit A?

A. They are supporting schedules for the items appearing in Exhibit A. Schedule 1 on page 11 is simply a summary of the bank transactions beginning with the balance

page 198 } at the beginning of the year, plus the deposits made during the year less the checks issued, and receiving a balance at the end of the year. None of that information is contained in Exhibit A.

Q. What is the purpose of this Schedule 1?

A. It is just a summary of bank transactions to prove the beginning and ending of the balance, and it also ties in with the total of deposits at the top of page 10.

Herbert M. Lewis.

Q. Now what about the remaining schedule starting on page 12, not necessarily taking them individually, unless it be necessary? What do these schedules do? How do they tie in with Exhibit A?

A. The total from page 12 is the sale of crops, which is carried into Exhibit A and shown as the first item, and shown as the first item, sales of crops. It refers to Schedule 2.

Q. Page 3—Schedule 3, page 13—

Mr. Woodward: Your Honor, please, I submit that the accounts speak for themselves.

Mr. Chappell: If it please the court, I don't mean to be taking the court's time, in light of the court's comment yesterday. Yet counsel could be well versed in some of this accounting. I thought it might be helpful information.

The Court: I think an explanation is helpful.

Q. Very well. Proceed, Mr. Lewis.

A. Schedule 3, pages 13 and 14, is entitled
page 199 } "Items not Properly Accounted For," which represents items that either did not go into the bank account that we could not trace to the bank account, or various other items that we found memorandums also, and so forth, indicating that cash did come into the hands of the management. This total is also carried to Exhibit A, down near the bottom, $10,090.42.

Q. How about Schedule 4?

A. Schedule 4 was a computation of the commission on peanuts handled, and that is computed by totaling the number of bags of peanuts sold by the estate, and peanuts sold for other farmers around in the vicinity. It totals $1,438.30, less a check that was deposited on January 12, 1952 for $1,203.70, which apparently represents a check that Mr. Pulley deposited in the estate's bank account.

Q. And you carried this balance due to Exhibit A?

A. I carried the total, $234.60, to Exhibit A.

Q. All right. On page 16, Schedule 5, "Unidentified Checks Deposited," will you please explain that?

A. Schedule 5 represents checks that were deposited in the bank that could not be identified with any creditable sales on the books. These checks were listed on the deposit tickets, and they have been included in the total of the deposits per bank records of $215,183.00.

Q. You are saying that you both charged them for it and

gave him credit for the same amount?

page 200 } A. That is right.

Q. So it, in effect, would be a washout?

A. It would in one respect, but in another it wouldn't, because we didn't find any evidence they were ever recovered on the books.

Q. Now take your Schedule 6.

A. Schedule 6 is a list of checks, paid checks to these various payments that we could not find invoices to support the transaction. In other words it means the check was issued to these various parties and we could not find invoices that would match the amount of the check, so there was no supporting evidence as to what the amount was for or who it was paid for or anything.

Q. And finally your Schedule 7?

A. Schedule 7 is a list of payments made in cash that we determined from an analysis.

Mr. Woodward: What do you mean by "we"?

Witness: I did.

Mr. Chappell: If it please the court, the witness has testified previously when he talked about "we," he meant he and Mr. Hardy.

The Court: He is using "we," or he and Mr. Hardy.

Mr. Woodward: I understand he did some and Mr. Hardy did some work. What I am objecting to is his reference to "we" unless Mr. Hardy was there from the be-

page 201 } ginning to the conclusion they reached.

Mr. Chappell: If it please the court, this is a small point. If this were a case involving any witness, whether a laboratory technician or otherwise, obviously the particular person who may have testified may not have been there every minute of the day. The fact when they said "we," they are talking about the firm of Hardy and Lewis.

The Court: When he says "we," he means in connection with the operation when he did it. Mr. Hardy was there about one-third of the time, and he is using "we" in connection with the operation.

Mr. Woodward: He cannot impute to Mr. Hardy what he did.

The Court: He couldn't do that, when he said Mr. Hardy was there only one-third of the time.

Mr. Parker: I would like at this moment to interpose on defense counsel constantly interrupting this witness in his examination, and evidently for the obvious purpose by bring-

ing up this "we," which is known to all of us, to interrupt the trend of thought, and I would like for the record to show that we interpose an objection to defense counsel's procedure on that.

Q. Mr. Lewis, getting back to Schedule 7, would you tell us what that is?

A. Schedule 7 is a list of payments made in cash, as determined by the date and analysis of the records.

page 202 } Some of the items, actually there was no evidence that the payment was made. For example, we—or I—found that Mr. J. B. Britt sold some hogs, and I found no record of a payment to Mr. Britt. There is no credit to his account. However, a check for the full amount of the sale was deposited in the bank. I allowed as disbursement one-half of that amount, assuming that Mr. Britt must have gotten his money, or else he would have complained.

Q. Now tell me, Mr. Lewis. Yesterday there was some discussion during the course of examination of Mr. Hardy by counsel for the defendant how the farm operations were to be financed and maintained by reason of the fact that tenants had to more or less get along on credit. Do you on Schedule 7 see any items dealing with any figures that would cover such cash advances?

A. Yes, the item in the middle of the schedule, cash advances to tenants and customers per analysis of accounts, $21,084.67.

Q. So you have reflected a credit in your schedule here for these particular advances to run the farm?

A. That is right.

Q. Now, if you please, turn back to page 2, under "Explanatory Comments," and direct your attention to the bottom of page 2. Now yesterday, during the cross examination of Mr. Hardy, it was suggested by counsel for the

page 203 } defendant to Mr. Hardy—and I presume you were covered by that canopy, had merely gone in to see if you couldn't charge Mr. Pulley with everything you could find. I call your attention to this last sentence on page 2 dealing with an error in fertilizer sales, and another figure of $2,978.58, and ask you if you will explain what that is?

A. In those records I found a list of the cash sales of fertilizer. I added that list and found out that the total was a hundred dollars more than it actually added up, so I reduced the cash sales for a hundred dollars.

Herbert M. Lewis.

Q. In other words you picked up an error in addition on Mr. Pulley's part in his favor?

A. That's right.

Q. What is the next item?

A. The next item is $2,978.58. That was also listed on the same list showing a cash sale of fertilizer to Mr. Pulley. The check credited to his account included this one, so if you include it in cash payments on account, and also in cash sales of fertilizer, you would have duplication of $2,978.58, so I deducted that from cash sales, as shown by his records.

Q. And that is reflected on your Exhibit A?

A. That's right.

Q. Now still in line with this question of putting everything you could find to charge Mr. Pulley with it, on page 6, and under "Unidentified Checks Deposited," I

page 204 } notice there is a figure in that paragraph of $2,603.66. I wish you would tell us something about that.

A. In analyzing these deposit tickets, it was necessary to list the items on deposit tickets in detail and match the items with the credits and the books on the sale of merchandise, crops, or payments on account.

Mr. Woodward: You assume that, you say?

Witness: No, sir. I got that from the analysis of the records.

Q. Go ahead, Mr. Lewis.

A. There were small items aggregating $2,603.66 that we couldn't match up with any sales, or with any credits on the books that we did not charge, assuming that they could possibly be cash sales or collections that were cashed for customers, or things of that nature.

Q. So you did not charge Mr. Pulley with this amount?

A. That is right.

Q. Now Mr. Lewis, directing your attention to page 7, yesterday during the course of examination, by Mr. Parker, the question was raised as to why you had inserted this statement concerning settlement of Mr. Pulley's account with the estate. I wish you would tell the court exactly how these businesses, that is, the farms of Mr. Pulley, the farms and businesses of the estate were conducted, insofar as the books and records were concerned?

page 205 } A. The farms of Mr. Pulley were handled in the estate books just the same as any other

tenants. They were charged with all the merchandise they bought. They were charged with fertilizer. Mr. Pulley was charged with fertilizer and various other items of merchandise. They were credited with the sales of crops for returns of merchandise, merchandise returned, and for payments on account.

Q. Now how did Mr. Pulley ever get his money out then?

A. At the end of the year he added up his account and drew a check on the estate's bank account and paid himself off.

Q. I wish you would take one of these ledgers, if you can do so with some ease, and take Mr. Pulley's account in there, and let's see how he struck that balance at the end of the year, so far as his share of the earnings were concerned?

A. Any particular year?

Q. Makes no particular difference.

A. I think that '51 would be best.

The Court: Will it take you any time to locate that, Mr. Lewis? If so, possibly we could take a break at this time.

Witness: It will take a while.

The Court: We will take a short recess at this time.

(Whereupon, the court then, at 11:07 a. m., recessed until 11:20 a. m., at which time it reconvened.)

(Mr. Lewis resumed his seat as a witness.)

Examined by Mr. Chappell (Cont'd):

page 206 } Q. I believe when we adjourned, Mr. Lewis, you were in the process of locating this customers' ledger, which would be Plaintiff Exhibit Number 20, trying to locate in there a typical example of a year in which Mr. Pulley struck a balance, so to speak, of his running account with the estate, and, in effect, paid himself? Have you found such an example?

A. Yes, sir. Here is an example, December, 1951, actually dated December the 19th, checked with—

Mr. Woodward: Talk a little louder.

Witness: The entry, December 19, check to Mr. Pulley, $15,481.59. That was a check drawn on the estate bank account, which balanced out Mr. Pulley's account at that date.

Q. Now looking at the ledger book, would you please point

out to the court how it came about that there would be such a balance or a settlement. In other words, what other items were reflected on that account?

A. Sales for peanuts, December 14, 120 bags, $749.18, which represents Mr. Pulley's one-half. The other half is indicated here as credit and account of George Wells, his tenant. That is calculated as credit.

Q. What about debit?

A. To cash paid fire insurance on meat in smokehouse, $100.00.

Q. Does that mean that the money for that
page 207 } particular item for the insurance, for example, was paid out of the total funds in the hands of Mr. Pulley?

A. Presumably so. You can't tell whose cash was used to pay that.

Q. But at least it was on the estate's books?

A. That's right.

Mr. Chappell: For the purpose of the record, page 383 of Exhibit 20.

Q. Mr. Lewis, in preparing your audit, making your audit for the years 1951, '52 and '53, what was the source of your examination? Where did you begin? What was the source of material?

A. These books were the principal source of material, plus the cancelled checks and invoices and sales tickets in those boxes. The deposit tickets, we found no copies of deposit tickets in the office, and we made arrangement with the bank to furnish us with copies of their deposit tickets.

Q. Now leaving this, Plaintiff Exhibit 14 for the moment, which would be the report for the year 1951, so as not to be repetitious and unduly lengthy in this examination, are your reports for the years 1952 and '53 set up in the same general form?

A. Yes, sir.

Q. And would be explained schedule-wise and explanation comment-wise the same way?

page 208 } A. That's right.

The Court: Did you find the same bookkeeping difficulties in each of them?

Witness: Yes, sir, very little difference. The same system was used all the way through.

Herbert M. Lewis.

Q. Now Mr. Lewis, I noticed in Plaintiff Exhibit 14 you have previously referred to, category entitled "Items Not Properly Accounted For"—

Mr. Woodward: Exhibit 14?
Mr. Chappell: Yes. That is the 1951 account.
Mr. Woodward: What page is that on?
Mr. Chappell: Items not Properly Accounted For on page 5, and the explanatory comment, and pages 13 and 14—
Mr. Woodward: You mean pages 13 and 14?

Q. You are looking at pages 13 and 14, and now I am talking about pages out of the Exhibit, pages 13 and 14, and Schedule 3, coupled with page 5, dealing primarily with these items not properly accounted for, as you have headed them. Is that correct?
A. That's right.
Q. Do you have sales provisions for the years '52 and '53 in Plaintiff Exhibits Numbers 15 and 16?
A. Yes.
Q. I refer you to Plaintiff Exhibit Number 16, which would be for the year 1953.

page 209 } The Court: May I have the Exhibit?

(Counsel handed the Exhibit to the court.)

Q. And Plaintiff Exhibit 16, on page 13, which is Schedule 4. I call your attention to an item under the heading, "Peanut Sales," and I ask you, as an example of this sort of material covered in this Schedule to explain that first item appearing under "Peanut Sales." What is that? What does it mean?
A. That is the details of breakdown of the sale of peanuts. These peanuts were grown. so far as our information we could get, on the estate of a piece of property owned by the estate of T. L. Bain. This property was farmed by Mr. Pulley and George Wells.
Q. Who was George Wells?
A. He was at the time with Mr. Pulley, a tenant of Mr. Pulley. The peanuts sold, $1,182.99.
Q. How do you know that?
A. That is what the two credits add up to in the accounts of Mr. Pulley and George Wells, from the records. At the

same time the estate of L. J. Bain is credited for $295.74, which represents one-fourth of the total sales price.

Q. Well, now, how much does that add up to? How many fourths is that?

A. It adds up to five- fourths.

Q. How much money actually came in for pay-
page 210 } ment?

A. Eleven-eighty--two-ninety-nine cents, which is represented as 100 per cent of the total sale.

Q. Now, Mr. Lewis, referring specifically to these items not properly accounted for, I notice the next item deals with a transaction with Lummis and Company. Now will you please explain just what that transaction consists of, from your examination of the books and records?

A. According to the records, 151 bags of peanuts—

Mr. Woodward: We call for the record.

Witness: Here it is right here.

Q. Would you be good enough to pick it out on that record? Have you located it, Mr. Lewis?

A. Here it is, the account. I can also show it credited, the account of the other man, if you want to, October 27th; one-half of 151 bags of peanuts, sold, $1,924.35, which indicates that the other half was credited to the account of Wells.

Mr. Woodward: You mean you are construing it that way?

Witness: I can show the account.

Mr. Parker: If the court please, I don't think he should cross examine our witness.

The Court: I think your objection is well taken.

Q. Now will you please turn to the account of W. E. Wells and show a comparable entry?

A. October the 27th, one-half of 151 bags of
page 211 } peanuts sold, $1,924.35, exactly the same thing
as the credit of $962.18. A total of these two amounts to $1,924.35.

Mr. Chappell: Now for the purpose of this record, I would like the reporter to take down the fact that the entry on Mr. Pulley's account on the amount involved here appears on page 159 of Plaintiff Exhibit 21, and that the entry with reference to Wells appears on page 136 of the same Exhibit.

Herbert M. Lewis.

Q. Now Mr. Lewis, particularly with this particular item, did you find any record of the deposit of this check?

A. Yes, we found—well, you can't tell where the check was actually deposited, but it went through the bank other than the estate bank account.

Q. Let me ask you this. To begin with, in what bank, or with what bank does the estate customarily do business?

A. The Bank of Sussex and Surry at Ivor.

Q. And from the things available to you, you found that the checks had been deposited in that bank?

A. No.

Q. Did you find that it had been deposited to the credit of the Bain estate in any bank?

A. No.

Mr. Chappell: Now if it please the court, I have made available to the counsel for the defendant a check which we will relate to the transaction under discussion dealing with Lummis Peanut Company. We have summonsed page 212 } Mr. McKinney, who, as you recall, appeared yesterday morning as one of the witnesses with reference to the Lummis Company; and we, of course, would be delighted to have Mr. McKinney return for any sort of cross examination counsel for the defendant decides. However, at the time we do wish to introduce through this witness this check he has located with reference to this transaction, and if any subsequent identification is needed, we will enter it subject to later connection in that regard.

Mr. Woodward: We object to it, Your Honor, because the part he has testified to is hearsay—paid by Lummis, payable to D. H. Pulley and endorsed by D. H. Pulley and D. H. Pulley got the money.

The Court: I think the check is relevant for what it may show.

Mr. Woodward: We except to it.

Q. Mr. Lewis, I hand you a writing which purports to be a check, and I ask you to identify it.

A. This is a check dated October 27, 1953, made payable to D. H. Pulley in the amount of $1,924.35, drawn on the Corn Exchange National Bank and Trust Company, Philadelphia. It is signed by Doris O. Pitt, authorized signature; Charles McKinney, authorized signature.

Q. Would you look at the reverse of that check and tell me if it bears an indorsement—First of all, whose hand-

writing is that on the rear?

page 213 } A. Mr. D. H. Pulley's. The first indorsement that appears on the back of the check is that of D. H. Pulley.

Q. Now I am interested in the amount of the check. You have testified that the check in the amount of $1,924.35— how does that compare with that transaction you discussed?

A. Right to the penny.

Q. Referring to this check again, would you tell me if you see—

Mr. Woodward: It is understood our objection goes for all this?

The Court: Yes.

Q. Would you tell me if it appears that that check had been in the Bank of Sussex and Surry, which I believe you testified was the Estate's bank?

A. The next indorsement is the Farmers Bank of Windsor, a little bit hard to read.

Q. Is that the first indorsement under Mr. Pulley's name?

A. Yes, sir.

Q. Where is the Farmers Bank of Windsor located?

A. It is about eleven or twelve miles from Ivor.

Q. To your knowledge, and your examination of the books and records, did the estate of Thomas L. Bain maintain a bank account there?

A. Not that I know of.

page 214 } Mr. Chappell: The plaintiff offers this as the next exhibit.

Mr. Woodward: We object to the questions and answers. There is no foundation, and it is still negative. I would like to be heard on the objection, Your Honor. We object to any statement of this witness as to where the estate had the books, or any account, which he has no knowledge. It is a negative statement and has no value.

Mr. Chappell: If it please the court, the witness has testified that the estate maintained accounts in the Bank of Sussex and Surry. This witness has testified from his own knowledge. I submit this question is proper and should be admitted.

The Court: It is a negative proposition, but it is admissible for whatever probative value it has.

Herbert M. Lewis.

Mr. Chappell: What would be the next exhibit, Your Honor?

The Court: It is 27, I think. The last was 26.

Q. One more question, Mr. Lewis. With reference to that exhibit, would you tell me the date of the check, as compared with the date of the entries to which you have just referred?

A. Exactly the same date.

Q. Mr. Lewis, referring again to page 13 of Plaintiff Exhibit Number 16, "Items Not Properly Accounted For," and I refer you to the last heading, "Hog Sales"—

Witness: I don't believe I have a copy.

Mr. Chappell: Excuse me. Here it is.

page 215 } Q. The last item under Hog Sales, I ask you if you will explain just that item?

A. November the 16th, '53, entry in the record crediting Mr. Pulley's account for one-half of seventy hogs sold. The amount of the credit is $1,610.74.

Q. Now will you please turn to that ledger and locate that entry, and when I say "that ledger," I mean Plaintiff Exhibit Number 21? Have you located that entry?

A. Yes.

Q. What page does it appear on that Exhibit?

A. On 159.

Q. What is the amount of that?

A. The date is November 16, and the description, one-half of seventy hogs sold, $3,221.49. The credit extended is $1,610.74.

Q. Now who is being credited in that latter mentioned amount?

A. Mr. Douglas H. Pulley.

Q. I hand you a writing which purports to be a check of H. P. Beale and Sons. I will ask you if you will identify it?

A. The check was dated November 16, 1953, payable to D. H. Pulley in the amount of $3,221.49. It is drawn on Vaughan & Company, Bankers, Franklin, Virginia, and is signed H. P. Beale and Sons by Lena M. Beale.

page 216 } Q. Tell me whose endorsement appears on the rear.

A. The first endorsement, written in pen and ink, "D. H. Pulley."

Herbert M. Lewis.

Q. What is the next endorsement that you see?

A. The next endorsement is a bank endorsement, the Farmers Bank, Windsor, Virginia.

Q. Now how does the amount of this check compare with the amount reflected in the entry?

A. Except for a difference of one cent, it is exactly half of it.

Q. I am talking about the explanatory matter in your entry.

A. The explanatory matter item is exactly the same.

Q. And in whose handwriting does the explanatory matter appear?

A. D. H. Pulley. (The check was marked Plaintiff Exhibit 28.)

Q. Now Mr. Lewis, I notice both of these checks are made payable to D. H. Pulley. Why are you including these checks payable to D. H. Pulley in your items of accountability?

A. He ran a sales of his crops and hogs right on through the estate's books, just as if he was another tenant, credited himself with the sales price and paid himself for the estate's funds at the end of the year, settled his account.

Q. Assuming all that, Mr. Lewis, that these checks never found their way into any of the Estate's funds, page 217 } bank accounts, or otherwise, what would be the significance of these credits Mr. Pulley had given himself in each of these two instances when he came to settle up at the end of the year?

A. These credits are included as part of the balance of his account at the end of the year, so when he pays himself the full amount of the account, he pays himself for something that never went in the bank account.

Q. Mr. Lewis, yesterday several inquiries were made on cross examination of Mr. Hardy as to items considered by you in your audit. While I did not have a tape recording or anything to refresh my recollection, I think my notes will cover most of them. The item of depreciation was discussed as having been a proper consideration in preparing an audit of the account. Would you please tell me if you included the depreciation in your report?

A. No, sir. It has no bearing on this estate whatsoever, because you are dealing with cash transactions, or what should represent cash transactions entirely.

Q. What about the amount of losses? Does it reflect that?

Herbert M. Lewis.

A. No, that has no bearing. You have the same situation as you have appreciation.

Q. The matter of the dented canned good or defaced labels I suppose we could call obsolescent, did you consider that?

page 218 } A. No, you don't have to. All he is charged with is the cash that came in for sales of merchandise. You are not charged with the cost price or the market value, or anything else.

Q. How about the question of inventory?

A. That doesn't come in to cash either, because you are reflecting the cash that came in from the sale of merchandise in the inventory; so it doesn't make any difference what the inventory was at the beginning or the end of the year as to what we have in this estate. The inventory may be higher in one than the other, which would be reflected through the purchase of merchandise.

Q. In other words if they kept invoices or any sort of receipts, it would reflect such purchases?

A. That's right.

Q. Have you examined any of the books and records for the years prior to 1951?

A. Just casually.

Q. You made no detailed examination such as you testified to today?

A. No, sir.

The Court: Was the bookkeeping system the same all the way back to 1936?

Witness: So far as I could determine, it was. It didn't seem to be much difference.

page 219 } The Court: But the bookkeeping system used by Mr. Pulley was the same that had been used by the Bain estate?

Witness: I couldn't say about that, because I haven't seen the books back in the 30's. I think they were.

Q. Let me ask a question in line with what Your Honor was asking. But in general did it appear back to as far as you looked, which was approximately how far?

A. To '43.

Q. Back to '43, did it appear that the same general sort of bookkeeping system was maintained?

A. The same thing.

Q. Getting back once again to the bailing wires in the

attic, did you have occasion to observe the volume or number of vouchers and what not that appeared on these bailing wires prior to the year 1951?

A. Yes, all the way back to 1943.

Q. Did it appear that there was any similarity or dissimilarity in the number or volume of such vouchers?

A. I noticed one exception, that there didn't appear to be any charge tickets prior to the year 1950.

Q. Except for charge tickets, did they seem to be generally the same?

A. The volume seemed to be about the same.

Q. Now Mr. Lewis, I hand you a copy of Plaintiff Exhibit Number 13, which was the summary, and to which

page 220 } Mr. Hardy testified yesterday, and I ask you if you are familiar with, and if you subscribe to the figures set forth in that summary?

A. Yes, sir. They all came from the reports, with the exception of the calculation of the interest.

Q. And for those years in question there, on that summary for 1951 through 1955, does that, or does that not, in your opinion, properly reflect the items of accountability or the amount of accountability?

A. Yes.

Mr. Woodward: That is strictly a matter of opinion, Your Honor, to be substantiated by—

The Court: We understand that.

Q. Could you give the average amount unaccounted for for each of those five years?

A. You mean amount excluding interest?

Q. Yes.

A. Approximately $42,000.00—$41,900 and some dollars.

Q. Per year?

A. Yes.

CROSS EXAMINATION.

Examined by Mr. Woodward:

Q. Mr. Lewis, you say you have been practicing account- any for eighteen years and you were theretofore

page 221 } engaged in some other occupation?

A. You mean prior to the time I practiced accounting?

Q. Yes.

Herbert M. Lewis.

A. Yes, sir.

Q. What was it?

A. I was bookkeeper for a firm in Washington, Virginia for seven years.

Q. And who was that firm?

A. W. S. Peoples Company, Incorporated.

Q. That is a department store, general merchandise?

A. Yes, sir, that is right.

Q. They also have a store in Franklin?

A. Yes, sir; I believe; I believe they do.

Q. Now what sort of set of bookkeeping did you do there, double or single?

A. Most every established system uses double entry.

Q. I didn't ask you that. What kind did you do there?

A. We used double entry.

Q. Did you ever keep a single entry set of books?

A. No, sir, I never had occasion to.

Q. Did you ever work in a country store?

A. No.

Q. Did you ever have a fellow bring a couple of hams for sale and give you an invoice for it?

A. No.

page 222 } Q. Did you ever know a farmer to give you an invoice for anything you bought from him?

A. No, I don't recall any.

Q. Well, why do you charge up items payable to people where there is no invoice where there is no check?

A. It is quite a difference there, Mr. Woodward, where a man is running a business for somebody else and where he is running one that he owns and everything that comes in belongs to him.

Q. What is the difference between him with respect to the outside customer?

A. What do you mean, sir?

Q. What is the difference in the amount of bookkeeping whether you are keeping it for somebody else or keeping it for yourself?

A. Well, a canceled check, so much money was paid to some individual. It does not indicate what it was paid for, whether or not it was a proper payment; unless you have an invoice to indicate what it was for and who it was for, then you don't have the proper voucher.

Q. Assuming that T. L. Bain bought 15 bags of peanuts from John Jones, where would the invoice come from?

Herbert M. Lewis.

A. There wouldn't be an invoice if he sold them to somebody else.

page 223 } Q. If T. L. Bain estate gave a check to John Jones for a certain amount of money for 15 bags of peanuts, would you expect to find an invoice to cover it?

A. No reason why he couldn't make one.

Q. Who is going to make it, the seller or the purchaser?

A. The purchaser.

Q. If he has got the check?

A. He has his invoice too.

Q. When a check is payable to an outside party for a certain amount in an established business for a sale outside, isn't it a *prima facie* presumption that that went into the business of the company?

A. No, sir, unless you have the invoice to indicate what it was for and it is a proper disbursement.

Q. You mean that applies to a country store operating a single entry bookkeeping system since 1900?

A. It doesn't make any difference what kind it was.

Q. You are applying the same rule of thumb to the T. L. Bain store in Ivor dealing with farmers as Miller and Rhodes would apply to their purchases to their various manufacturers in New York?

A. T. L. Bain didn't deal exclusively with farmers. They had some that were not farmers.

Q. Well now, just what percentage did they have?

A. I don't know. I didn't see that.

page 224 } Q. Do you have any estimate of it?

A. No, I don't know. I couldn't identify all these customers as to whether they might have some farms.

Q. Why didn't you consult the customers, if you wanted to challenge the item?

A. Well, what good would that do you?

Q. I ask you why you didn't verify it by the customers if you wanted to challenge the idea that a check was paid out by T. L. Bain?

A. That is for him to explain.

Q. Well, why is it necessary for him to explain it from '36 to '56? Why is it necessary for him to be called on when he is sick in bed?

Mr. Chappell: If it please the court, there is not one shred of evidence that we have asked this man to account for

the years 1936 to '56. I believe in early pretrial conferences we were willing to begin with 1943.

The Court: I believe this is the proper line of cross examination.

Q. You say it was up to him to explain. Did you ask him?

A. No.

Q. How is he going to explain if you don't ask him and he doesn't know what you are talking about?

A He was sick. He wasn't available.

page 225 } Q. How do you know whether he was available or not? Just answer the question, if you don't mind. How do you know if he was available or not?

A. No, but we had been told he was sick.

Q. You had been going by hearsay, hadn't you?

A. To some extent.

Q. Wouldn't it be the most unusual thing in the world that there could be a long list of people in the community and without the community, in your accounting for 1951 it was $6,314.70, would you charge him for it? Wouldn't it be most unusual to have a consortium with Mr. Pulley whereby he would defraud the Bain estate?

A. There are unidentified checks that were deposited.

A. All right then. Why did you charge them to Mr. Pulley instead of crediting him with them?

A. I did credit him with it.

Q. Where did you credit?

A. Those checks are shown on the deposits, and the full amount of the deposit is credited.

Q. Well, let's see. On your 1951 account, haven't you got charged at the bottom of the page, the very last item, $6,-314.77 charged to him?

A. Yes, sir, and on the next page—

Q. I ask you.

page 226 } A. Yes, sir, I do. I have them charged to him, and I also have him credited, because these are exactly the same checks are listed on the deposit tickets, and he is credited with the full amount of the deposit.

Q. Will you show us the full amount for that?

A. Give me the deposit tickets and I will show them to you.

Mr. Chappell: The deposit tickets, Your Honor, for 1951 are right here.

Herbert M. Lewis.

Witness: I need the '51 report.

The Court: Gentlemen, may we suspend for a few minutes?

(The court then, at 12:10 p. m., took a recess until 12:15 p. m., at which time it reconvened.)

Examined By Mr. Woodward (Cont'd):

Q. Show us where it is included in the $215,000?

A. This item dated December 15, 1951, it shows on the deposit ticket "PP Company," apparently Parker Peanut Company, $1,665.45, this item right here. Credit has been given for the full amount of this figure right here, the deposit.

Q. Show us the entry where you gave him credit?

A. That figure is the total for the entire year. This deposit makes up a part of that total.

Q. Why didn't you list that if you were going to list the other?

A. We didn't list any in detail.

Q. How can we look at that entry of $215,000 and tell whether there was $6,900 and some dollars in
page 227 } there or not except by the audit of your books? How can we tell by that single item of $215,000 what you have done with the other item?

A. You can't unless I tell you.

Q. Exactly. Now the fact is, if items come in for which you have no corresponding entry, you should credit him with it instead of charging him?

A. That is exactly what I did.

Q. Why did you make a record, to start with?

A. If you credit him with the deposit and don't charge him with the $1,600 as coming in the business, he is crediting him with something he has never been charged with.

Q. Why did you charge him with unidentified checks to start with if you weren't going to credit him in the next minute for something that was identified?

A. To credit him for cash coming in, I could have deducted from the total of the deposit tickets. You get the same answer.

Q. You make a big issue of things unaccounted for to the extent of $6,314.77, which in toto amounts to nothing?

A. I credited it on the books.

Q. That is what you say, not what we say now?

A. We didn't find it on there.

Q. Now you got on the top cash deducted from the deposit

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of $12,952.82 shown on Exhibit A, on page 9, the
page 228 } 9th line down; why do you charge him with that?
A. It is cash that came into his possession. He apparently used it in making all these cash payments.

Q. Why do you charge him for it if you find out that he has made payment for the Bain estate? Why do you charge him at all?

A. You can leave out that amount payment if you want to arrive at it that way.

Q. That is what you show it as?

A. We got the figures from the books just as they were, and we included all the information that we could find.

Q. Don't you show it there as cash deducted from the deposit and charge him with it?

A. In the total cash, yes.

Q. Now below that you show cash deducted, checks payable to cash for $2,200?

A. That is right.

Q. Now will $2,200 run that business on the basis of which it was operated?

A. No, sir.

Q. Then where was he going to get the cash from?

A. The cash that he deducted from the deposit tickets plus these cash sales up here.

Q. If you had knowledge of it, why did you charge him with it?

page 229 } A. Because I am crediting him with the disbursements.

Q. Where are you crediting him that?

A. Page 10. We are crediting him with the $240,850.62 which is made up of deposits in the bank of $215,183 plus payments made in cash as shown in detail on Schedule 7 of $25,177.52.

Q. Now show us where the difference between the $12,000 and the $25,000 came from?

A. It could have been any of these items.

Q. So you really don't know what it is all about, do you?

A. I think I do.

Q. Now did you ever preface what you had to say about this account by making certain statements in your opening account on page 1, in the second paragraph, the purpose of this examination was to determine the amount of cash that should have been collected? That's right, isn't it?

A. Yes, sir.

Q. Why didn't you go there and audit the books to find out

what the status of the account was instead of going there for a specific purpose?

A. That is what we are employed for.

Q. For a specific purpose?

A. Yes, sir.

Q. Then you weren't employed to show the true
page 230 } status between the parties, were you?

A. Sure. We were employed to show what the records actually show.

Q. Let's take the next paragraph. "Due to the lack of adequate records for the recording of cash receipts and disbursements, it was necessary for us to examine all transactions in detail, including all the available purchase invoices and sales tickets." Now you have prefaced that by stating that there was lack of records, and then you stated that you had just had what was available to go by. Now what did you do for the records that weren't available?

A. Well, you could audit what you had and what was available. You couldn't audit something that wasn't in existence.

Q. That in itself, how could you make up anything if you didn't have all the records?

A. We had all the basic books, the date books.

Q. If you had them all, why did you make that statement?

A. We didn't have to support the documents for all disbursements.

Q. Why do you charge him with things just because you can't find the record?

A. Because it was up to him to explain what it was for.

Q. How could he explain it if you didn't ask him?

A. It is not up to us to go ask him.

Q. Who is it up to?

page 231 } A. It was his duty to maintain the records so they could be audited. He was acting in a fiduciary capacity. As manager of the estate, he had complete control of all the affairs of the estate, which is entirely different from some individual running his own business.

Q. Are you telling us the legal situation?

A. No, sir.

Q. Let's confine ourselves to the facts in the case. You say what he should have done. Is he a bookkeeper?

A. He evidently had quite a bit of knowledge of bookkeeping.

Q. Is he experienced in double entry bookkeeping?

A. It doesn't make any difference whether he is experienced

in double entry bookkeeping or not. If you put all the transactions down, you could determine the right results.

Q. If he put all the transactions down, you are bound by what he put down, aren't you?

A. That's right.

Q. What he doesn't put down, you can't tell anything about. Is that right, or isn't it?

A. We found some evidence of things that weren't in the books.

Q. And a lot of things you couldn't find weren't there?

A. The records weren't complete.

page 232 } Q. So you couldn't make a complete record if the records weren't complete?

A. What do you mean by "complete record?"

Q. A complete record of all the transactions between the parties?

A. No, we couldn't use any more than we could find.

Q. Did you consult any of the tenants?

A. No.

Q. The tenants would be defrauded as much as the Bain estate, wouldn't they?

A. Not necessarily.

Q. Why wouldn't they?

A. If the tenant was credited his part of the crop and he was paid, he had no complaint.

Q. Isn't it right to assume, Mr. Lewis, that if the estate had been defrauded of forty some thousand dollars, that the tenant was defrauded of the same amount in his account?

A. I don't think so.

Q. Did you ever talk to any of them about it?

A. No.

Q. Did you ever consult any of the tenants to see whether they had been defrauded or not?

A. No.

Q. You consulted a tenant to see if it was error?

page 233 } A. We found errors.

Q. You found some errors in yours, didn't you?

A. Yes.

Q. That is common to human business. Did you have anything of importance with the tenants that amounted to anything?

A. Not real amounts.

Q. You couldn't tell whether the tenants had been defrauded or not, if you didn't go to them?

A. In some instances the only thing you could do is take

the books to the tenant, because there is no sales ticket to show what was charged.

Q. You couldn't tell any more than he could?

A. That is the point. I don't see any point of going to the tenants.

Q. Now in 1951 they didn't have any cash or material items or audits of supplies, and they were limited to ticket numbers. That is true, isn't it?

A. I don't know if I follow you.

Q. Didn't they have a ticket system beginning in 1952?

A. Apparently in 1950.

Q. Let's don't hedge about it. Didn't they have a specific ticket system in 1952?

A. Yes, sir, they had one in 1952.

Q. Could you look at one of those and tell
page 234 } whether it was cash or credit sale?

A. If it was written on there—Just what do you mean, "cash sale or credit sale?"

Q. Could you look and tell how much cash was advanced and how much was for supplies?

A. Yes. If it was written on the ticket, I could tell.

Q. If it weren't on the ticket, you couldn't tell to save your life, could you?

A. No. If you didn't have the ticket, you couldn't tell.

Q. Did every one of those tickets that dealt with tenants have a certain amount for service or charge or loans during the year?

A. Not all.

Q. Did some have it?

A. Yes.

Q. Did you charge Mr. Pulley with that?

A. No. That is charged to the tenant.

Q. I asked you if you charged it to Mr. Pulley?

A. No. That was charged to the tenant.

Mr. Parker: That was charged to the tenant.

Mr. Woodward: If you want to take the stand (to Mr. Parker), I will cross-examine you.

Q. I ask you again if you didn't charge Mr. Pulley with
the ten percent on the money?

page 235 } A. Charge Mr. Pulley with it?

Q. Yes, with the ten percent on the money that was advanced to the tenants?

A. No, the tenant was charged ten percent.

Herbert M. Lewis.

Q. And the tenants paid it, didn't they?
A. In most cases, yes.
Q. In those cases they didn't pay it, did Mr. Pulley get it?
A. You mean those cases the tenants didn't pay the account?
Q. Yes. Did you charge Mr. Pulley with it?
A. No.
Q. All right then Your accounts, you claim, are entirely accurate, don't you?
A. No, we didn't say that. We say that was our findings. No audit is entirely accurate to the last penny.
Q. Well, now, let's turn to page 18 of your audit.

Mr. Chappell: What audit?
Mr. Woodward: Of 1951.
Mr. Chappell: Bear with me just a minute, Your Honor.

Q. Now page 18, turn also to page 14 of your account. Now on the top of page 14 you say "Credit to farm income $66.62, January 12, 1951, for ½ of hogs sold by J. B. Britt" and "no credit or record of payment to J. B. Britt, and no record of deposit of the check." That is your statement, isn't it?
page 236
A. Yes.
Q. Let's turn to page 18, "Payments to tenants for their share of crops. J. B. Britt—hogs $66.63." They are corresponding items, aren't they?
A. Yes.
Q. Why did you raise some question on page 14 and say there is no record of it?
A. For the simple reason there is no record of the check for $133.25 deposited in the bank.
Q. Do you know whose check it was?
A. Yes, sir.
Q. Whose check was it?
A. H. B. Beale and Sons'.
Q. Who was it paid to?
A. D. H. Pulley.
Q. Whose tenant was J. B. Britt?
A. T. L. Bain estate.
Q. Do you know what Mr. Pulley did with the money?
A. No. I know he cashed the check, or he endorsed it.
Q. In order to get it cashed or run the business, he had to cash checks or charge it up to cash, didn't he?
A. Or use cash sales.

Q. Yes, in order to have money, and you charged him with $25,000 that way?

page 237 } A. Yes, sir.

Q. And he had to get money to cash checks in one of the ways enumerated?

A. Yes, by cashing or deducting from the deposit ticket, or drawing checks on the estate's bank account and cashing them.

Q. Have you ever seen the notes of accounts receivable that were in the safe?

A. Sure. I saw lots of those notes.

Q. What is it credited for?

A. Which note are you speaking of?

Q. Anyone you can think of?

A. You mean notes payable to the T. L. Bain estate?

Q. That's right.

A. They are included in the credits for collections on accounts. In fact, I don't remember any—

Q. You don't remember any notes at all, do you?

A. Not in that particular period.

Q. I understood you made some cursory examination of Mr. Toler's account?

A. Yes.

Q. Did you find it to be correct?

A. No, sir. We had some adjustments.

Q. You had a twenty-five-thousand-dollar adjustment for two years, didn't you?

page 238 } A. I don't remember the exact figure.

Q. That is approximate, isn't it?

A. That sounds about right.

Q. Is he a competent accountant?

A. As far as I know.

Q. Well, a twenty-five-thousand-dollar error, one way or another, is right much. isn't it?

A. He didn't have the information we had.

Q. It was their firm, wasn't it?

A. You mean the information was in theirs?

Q. Yes.

A. I don't know. I wasn't there at the time. I understood he was informed it wasn't there.

Q. Now I want you to look at the last page of Mr. Toler's account in Exhibit "E" for the year 1955—

Mr. Parker: That is not in evidence, Mr. Woodward.

Mr. Woodward: You have spoken about it all through this accounting.

Herbert M. Lewis.

Mr. Parker: I haven't put that in evidence.

The Court: There is a statement in evidence with reference to correction of that.

Mr. Parker: We want to know what he wants to offer.

Mr. Moyler: Just a minute. I think if they have referred to it to ask Mr. Hardy if their findings were substantially the same as theirs, with the exception of an adjustment, I think it would give us an opportunity to cross-examine the witness on the paper.

page 239

Mr. Woodward: If they take that position, and they want to withdraw that consideration, it is all right.

Mr. Parker: I have no objection, but in showing him the account, I think he should offer it.

Q. Now when did you say you made this audit?

Mr. Parker: Are you offering this, Mr. Woodward?

Mr. Woodward: No, I am not offering it.

Q. When did you say you made this audit?

A. We started on it sometime in the spring of '57, probably. I don't know the exact date.

Q. You audited the '55 accounts, didn't you?

A. No.

Q. Didn't touch that?

Mr. Parker: Let him finish.

Witness: The only thing I did was review what Mr. Toler had done, make adjustments based on facts we had found.

Q. What are we enjoined from, probative value from the facts you reviewed?

A. We reviewed the work papers, and we found additional evidence that actually reduced the amount of cash we accounted for by some $25,000, according to your figures.

Q. Now in making your examination, did you take into consideration notes in the safe credited on account for so much cash?

page 240

A. No, we didn't include notes as cash.

Q. Just as an item for your consideration, here is a note, T. R. Bain, dated January 25, 1955. I will ask you if that wasn't paid in 1957?

A. I think if you will refer to the adjustment in Mr. Toler's report that the adjustment includes all the notes that he had added in.

Q. Well, Mr. Toler took into consideration the notes and you took them out. Is that right?

A. You mean he had them in the total?

Q. He charged them to Mr. Pulley and you credited him with it. Is that right?

A. That is right. We found what the supplement is. The note had been paid, and what was on hand.

Q. So Mr. Toler's record, if he had made any worth considering, Mr. Toler's would be wrong to the extent of the note in the safe?

A. If he had seen those notes and they had been exhibited to him at the time of the examination, surely.

Q. Isn't that what an auditor is down there for, to see everything there is?

A. Sure, if he can find it, or if they can get it for him.

Q. If he can't find it, what?

page 241 } A. The only thing is, go on what you can find.

Q. So you charge him then?

A. If he is responsible for it, that is one of his responsibilities. It is one of his duties to account for cash and assets coming into his hands. If he doesn't account for it, he is liable for it, isn't he?

Q. Are you passing on a legal question?

Mr. Parker You asked the question.

Q. Let's go back to the record, the 1951 account. Now there is corn sales, first item on the page, credits to the accounts of Chester Gaskins and D. H. Pulley on November 14, 1951, for 4,576 pounds of corn, but no record of sale, and no charge to corn purchased or inventory of corn on hand. I understood you to say that inventory played no part in it?

A. It doesn't. There is no indication that it was charged to inventory.

Q. If inventory doesn't play any part in your account, what difference does it make?

A. Simply that these two accounts were credited. Chester Gaskins and D. H. Pulley were credited. No record to show that the T. L. Bain estate ever got the corn, and in a subsequent period these accounts were settled by the payment of cash. Then you got $138.91 not accounted for.

Q. Don't you recognize that reference to corn

page 242 } can be a reference to where the money came from and not a reference to a sale to the T. L. Bain estate?

Herbert M. Lewis.

A. What they credited the man's account with, he should have the account.

Q. Does it have to come from corn or peanuts or anything else in order to credit his account with it?

A. No, except the entry says it.

Q. Mr. Pulley credits himself with it, doesn't he. when he credits the account?

A. He didn't this.

Q. He credited the tenant?

A Sure, with half, and himself the other.

Q. If it was his corn, what do you expect him to do, give it to the Bain estate?

A. He credited himself with half and the tenant the other half.

Q. How do you know he didn't put the cash in the drawer?

A. I don't.

Q. Why could you charge him with it?

A. There is no record on the books he put the cash in the drawer.

Q. How do you know it went in the drawer?

A. I don't think anybody knows.

Q. You didn't ask Mr. Pulley, did you?

A. No.

page 243 } Q. Let's take the next item, the same thing. The same thing applies there, doesn't it?

A. Yes, the same kind of transaction.

Q. That is Mr. Pulley's tenant, isn't it?

A. Yes.

Q. And Mr. Pulley had a right to sell his corn, and indicate where the money came from, whether corn, peanuts, or what? Did he not?

A. What was the question again?

Q. He had a right to sell his own corn, didn't he?

A. Oh, sure.

Q. It could have gone to any purpose in the world, feeding, or sale or anything?

A. If the T. L. Bain estate got the corn, yes.

Q. It seems you made no inventory. How do you know whether he got it or not?

A. I don't think you could make an inventory for December 31, 1951 in 1957 anyway.

Q. You don't know whether it went in the hog or in a human being or whether it was wasted on the ground, or what, do you?

A. No, sir, except the T. L. Bain estate never got it.

Herbert M. Lewis.

Q. Now the same applies to Withers Wells and D. H. Pulley or E. H. Pulley, doesn't it? That's right, isn't it?

A. No, sir, because the peanut sales went to

page 244 } some outside party.

Q. What were they, Mr. Pulley's and Mr. Wells' peanuts?

A. Yes, sir.

Q. If they are credited in his account, Mr. Pulley was charged with it, wasn't he?

A. No, sir.

Q. If it is credited in the account with T. L. Bain estate, Mr. Pulley is charged with it?

A. Sure.

Q It is his peanuts, isn't it?

A. Certainly.

Q. What becomes of the check is no concern of the Bain estate, is it?

A. Yes, sir.

Q. How?

A. If he credits himself on the Bain estate books, then in order for him to account for the cash, he must put that check in the Bain estate bank account.

Q. How long has that been?

A. Always.

Q. That a man has got to deposit his check at a certain bank at a certain time and certain place?

A. If he credits himself on the books, if you don't put the check in the bank account, he is just producing income by writing the credit in the books.

page 245 } Q. It represents so much cash, so far as Mr. Pulley is concerned? It came from Mr. Pulley, didn't it?

A. Yes, it was his crop, credited to his account.

Q. Can you say the Bain estate didn't get it?

A. There is no record of it going in the bank.

Q. How about it going into the advance to the tenants?

A. You can't trace cash, what it is used for.

Q. Now on the hog sales. you have got the same thing with reference to the hog sales, George Wells and D. H. Pulley?

A. Yes, sir, the same transaction.

Q. William Harris and D. H. Pulley?

A. Except for the fact that I think we have a check for that. I can refer to those checks and tell you, if you want me to.

Q. They were Mr. Pulley's tenants, weren't they?

Herbert M. Lewis.

A. William Harris was, yes.
Q. And Charlie Harris was his tenant?
A. Yes, sir.
Q. He had a right to receive a check, didn't he?
A. Sure. If he never made an entry on the estate bank books, if no entry had ever been made on the estate books, he could do what he pleased with the checks. The minute he makes an entry on the estate's books, then that check must go in the estate's bank account, because later he page 246 } is paying himself with the estate's money to balance out his account.
Q. How about cash going in the drawer? That is better than the check, isn't it?
A. I don't think so.
Q. Do you know anything better than that?
A. Well, you can spend it easier.
Q. Can you say it didn't go into the cash drawer?
A. No, I don't think anybody can say it.
Q. Do you know whether these peanuts went for seed peanuts or went to the inventory? These peanuts, Withers Wells'?
A. Which ones are you referring to?
Q. Peanut sales on page 13 on your accounts for 1951?
A. You have two of them, Withers Wells. Which one are you referring to?
Q. Both of them.
A. I can look in this book here and see if it is marked seed peanuts.
Q. Would it have to be marked as seed peanuts to be used as seed peanuts?
A. No, but that is the only way you can identify it.
Q. Is there any compelling reason that you have to identify everything?
A. I can look in the books to see.
Q. You can look and see if it is for peanuts?

page 247 } The Court: Suppose we recess until 2 o'clock.

(The court then, at 12:45 p. m., took a recess until 2:00 p. m., at which time it re-convened; and Mr. Herbert M. Lewis resumed his seat as a witness.)

Examined By Mr. Woodward (Cont'd):
Q. Mr. Lewis, did you make an inventory of the crops on hand at the end of the year?
A. Did we take an inventory?

Herbert M. Lewis.

Q. Yes.

A. No, we couldn't take an inventory of the crop on hand in '51 in '57.

Q. Was there any record of inventory?

A. Of a crop?

Q. Yes.

A. I never saw any.

Q. Any record of inventory of peanuts at the end of any particular year?

A. Yes, sir. There was an inventory of seed peanuts. It was on the books.

Q. Any record of other peanuts on storage or held for future markets?

A. Yes, sir. We found some tickets and lists of those banks and the owners of the peanuts, peanuts in storage.

Q. Is that reflected in your account?

page 248 } A. The peanuts, in fact, didn't belong to the estate. They belonged to the millers. They were just stored for the millers.

Q. Let's confine our statement to the estate property.

A. You asked the question.

Q. I am talking about the Bain estate. Was there any crop on hand at the end of 1953?

A. There was also some inventory of seed peanuts. I think that was the practice, to save the seed from one crop to be planted the next year.

Q. Well, was Mr. Pulley given any credit for those?

A. He didn't have to be given credit for them.

Q. I didn't ask you that. I asked you was he?

A. How do you mean, "given credit?"

Q. Was he credited with the amount in the warehouse?

A. No, sir.

Q. You said you charged him up for everything because it was your duty to charge him. What were you referring to?

A. Cash, and not inventory.

Q. And as to the cash items. you can't tell whether they went into the drawer or didn't go into the drawer?

A. Yes, sir, that's right.

Q. Can you tell what money was used by Mr. Pulley belonging to the Bain estate that went to the purchase of any real estate of Mr. D. H. Pulley?

page 249 } A. You mean can I show any money of the Bain estate that went to buy real estate for D. H. Pulley?

Q. Yes.

Herbert M. Lewis.

A. No.

Q. It is alleged in this bill of complaint that four items of property were bought by Mr. Pulley with the Bain money. Did you find any evidence of this?

A. That he used Bain estate money to buy property? No, I didn't find any evidence of that.

Q. Did you ever try to reconcile the accounts of Mr. Pulley with the accounts of the Bain estate?

A. What do you mean?

Q. Let's put it this way. The records of Mr. Pulley with the records of Mr. Bain's estate, did you try to reconcile them?

A. No, I never had access to Mr. Pulley's records, personal records.

Q. Did you ask for access?

A. No, sir.

Q. You weren't interested, were you?

A. Sure we would have been interested.

Q. Why didn't you ask?

A. For the same reason we didn't ask for the other records.

Q. What was that reason?

A. We had been told that he was not to be contacted.

page 250 } Q. Who told you?

A. I think Mr. Parker had a letter from the doctor advising not to contact him.

Q. You were around Robert H. Pulley for some time, weren't you?

A. No, sir.

Q. Did you talk to Robert H. Pulley?

A. No, sir.

Q. How did you get any information at all by just going in and picking up the books without having outside aid from somebody who had information about him?

A. All the information was supposed to be recorded in there, and that is where we got it, right in the books and records written in Mr. Pulley's handwriting, and Mr. Robert Pulley's handwriting.

Q. Seeing it was in Mr. Robert Pulley's handwriting, why didn't you interview him?

A. Well, actually at the time of the auditing for '51, '52, '53 and '54, his handwriting didn't come in until '55.

Q. How long did you spend in there?

Herbert M. Lewis.

A. I don't know for sure. I went back and forth a number of times over a period of two or three months.

Q. Don't you know you could have found what Mr. Pulley's condition was at that time?

A. Sure. I could have gone and asked, I think.

page 251 } Q. Don't you think it was up to you rather than charge him $200,000, to ask some questions of Mr. Pulley?

A. If the records had been kept as they should have been and had supporting documents, it wouldn't be necessary to ask him.

Q. If they were kept like the Chase National Bank keeps theirs, there wouldn't have been anything for an auditor to do?

A. No, sir. You don't necessarily have to keep them like the Chase National Bank if all the transactions were recorded in the books; and if the money was distributed right, you wouldn't need any kind of books.

Q. Along that line, the testimony, I believe, they were cultivating about 1,700 acres for the Bain estate. You know if you have worked and were raised around Lawrenceville, it costs $40 to $50 per acre to finance a crop in this area per year, doesn't it?

A. It would probably cost more than that.

Q. Would it be fair to say $40 is an average?

A. You mean fertilizer?

Q. Everything.

A. I guess it would.

Q. Seventeen hundred multiplied by forty would give you seventy some odd thousand, wouldn't it?

A. I haven't figured it out. I suppose it

page 252 } would, but that would include fertilizer, which didn't recognize cash.

Q. Deducting fertilizer, it still represents substantial money. Where could Mr. Pulley find that without getting money from the checks that come in?

A. He could have written a check from the bank account. He could have put it in the bank and then have written a check.

Q. He could have done it your way, but if he did it another way, you are not prepared to say it is wrong, are you?

A. No, if all transactions were recorded.

Q. How do you know whether a check went in the bank or didn't go in the bank?

A. Nothing wrong with the bank's checking.

Herbert M. Lewis.

Q. If he went on, cashed it, and put it in the cash drawer, which he had to do, then he accounted for it, didn't he?

A. Not unless the disbursements were proper.

Q. Let's get down to this. It would take in excess of $50,000 to make a crop, wouldn't it?

A. I don't know. I haven't figured it out.

Q. Well, you seem to be pretty good at figuring against Mr. Pulley. How about figuring a little bit for him? Take 1,500 acres at $40, and that is $60,000, isn't it?

A. Yes, sir.

page 253 } Q. Now allowing for $15,000 for fertilizer, now, Mr. Lewis, you found cash for $2,200 for 1951. That is right, isn't it?

A. Yes, sir.

Q. All right, the rest of the cash had to come from the cash sales, didn't it?

A. Cash sales?

Q. Yes. What percentage sales from the business in the store was cash sales?

A. You mean for the year 1951?

Q. That's all. What percentage?

A. The books show total cash sales, $19,093.47, and charges of $74,981.57; total, $94,075.04. That is roughly around 20 percent.

Q. Would you be surprised to know that lots of days they didn't take any cash in the store at all?

A. No, sir. I saw that in the record too.

Q. That is a fact, isn't it?

A. That's what the book says.

Q. Now to the same questions which we have applied to the year 1951, apply equally to 1952 and 1953?

A. Which ones do you mean?

Q. All the questions we asked with reference to your accounting for 1951 would apply equally for 1952 and 1953?

A. You mean the methods I used?

page 254 } Q. Yes.

A. Yes, sir, generally the same.

Q. The way you made your charges and your credit?

A. Generally the same.

Q. You have alluded in your statement to your partner, Mr. Hardy, to Exhibit Number 13, in which you draw down a total for five years. Now inasmuch as Mr. Toler's books are not in the record, you want to delete that, don't you, with reference to what is in the audit of 1954 and 1955?

Herbert M. Lewis.

A. Fifty-four—we didn't audit '54 and '55 in detail, if that is what you mean.

Q. Well, if the Toler audit is not in the record, why then, 1954 and '55 ought not to be on that Exhibit 13?

Mr. Parker: If it please the court, that is a matter for the court to determine, and not the witness. If he wishes to object to introduction, he should have done so. It is a matter for the court to decide, and not the witness.

Mr. Woodward: Now you have not objected when I said something about the Toler record. I am trying to get it out of the record now.

The Court: I think he has a right to question him along that line.

Mr. Parker: The witness doesn't know whether it should be in or not.

The Court: I think the whole question should be for the court.

page 255 } Mr. Parker: I think he can ask the witness whether he wants—

Mr. Woodward: I am not going to consult what he wants.

Q. I am asking whether or not it shouldn't properly come out of your computations, since there is no record here of the Toler audit which has come out of your Exhibit Number 13? That is true, isn't it?

A. Well, if you just include the years we audited completely, the first three years is all we audited completely.

Q. That's all. Now Mr. Lewis, it is a fact that in six years. according to your best information, the Bains had a dividend of this property, or this operation, of about $278,000, is it not?

A. I don't have the figures.

Q. I believe you testified they made about $42,000 a year. Didn't you testify to that?

Mr. Parker: I beg your pardon. Don't misquote the witness.

A. No, I didn't say $42,000 a year. I said the average over five years unaccounted for is $42,000.

Mr. Woodward: I believe you did. I will stand corrected on that.

Herbert M. Lewis.

Q. Now what was the dividends for the Bain estate for the years 1951, '52 and '53? How much did they draw from the business, cash?

page 256 } Mr. Chappell: Do you need your work papers?
Mr. Woodward: He can take his audit and tell us.

The Court: Schedule 1 on page 11 was the year 1951.
Mr. Chappell: You have Exhibit Number 14?

Q. Payments to beneficiaries on your audit for 1951 shows that there was paid to the beneficiaries $23,084.55?
A. Yes, sir.
Q. And for the year 1952, $106,250.10?
A. Yes, sir.
Q. How much?
A. It is $106,250.10.
Q. And for the year 1953, page 10 in your audit, it shows payments to beneficiaries of $96,620.83?
A. Yes, sir.
Q. That includes sale of timber, doesn't it?
A. Yes, sir.
Q. Wouldn't it be fair to say that it averaged $24,000 a year?
A. I don't know. I am looking in my papers and finding out, if you want to know.

Mr. Woodward: Well, we will prove it otherwise.

RE-DIRECT EXAMINATION.

Examined By Mr. Chappell:
Q. Mr. Lewis, has any information been offered to you in the course of your work here in Ivor in prepara-
page 257 } tion of the audit, in preparation for the court, by Mr. Pulley or any representatives of his with reference to books, records, or otherwise?
A. No, sir.
Q. Some reference has been made by counsel for the defense in examining you to the question of notes that were referred to in the audit by A. M. Toler and Company. Did your report result in a greater amount or lesser amount of accountability on the part of Mr. Pulley?

Mr. Woodward: We object to that. The account is not

in. He said he spot-checked the Toler account. He said he did not make any audit for 1954 and 1955.

Mr. Chappell: I believe the point is already made to that extent. I run the risk of being repetitious, but I believe the record will show that the witness has already pointed out by not showing the notes in the account they reduced the total accountability by Mr. Pulley, and I merely want to show that the notes are not over or any larger thing.

The Court: I think it has been testified that it was. We don't have the Toler report here to show what it was in the beginning.

Mr. Chappell: It is coming in with the next witness, and we had to take it in the best order we could.

Q. Mr. Lewis, one final question. It is in the record by stipulation of counsel that the reports from your firm were delivered to counsel for Mr. Pulley last fall?

page 258 } A. Yes, sir.

Q. Since last fall anyone from Mr. Pulley, his counsel or any other representative, offered any additional information of any sort to you or approached you in any wise with the exception of Mr. Thedieck?

A. No, sir.

Q. And what did Mr. Thedieck contact you with respect to?

A. Getting the books, and he also asked for our copies of the deposit tickets.

Q. And did you make all that available to him?

A. Yes, sir.

Q. Do you recall when Mr. Thedieck approached you in that connection?

A. It was some time around the latter part of May. It must have been sometime after the 17th of May.

Q. Of this year?

A. Yes, sir.

RE-CROSS EXAMINATION.

Examined By Mr. Woodward:

Q. Your duty was to the Bain estate that was paying you, wasn't it?

A. They employed us, yes, sir.

Q. And seeing that neither Mr. Moyler nor I or the Pulleys employed you, we had no right to ask you any questions, did we?

page 259 } A. I don't know whether you had any legal right or not.

John Toler.

Q. We didn't pursue you, did we?
A. No, sir, you certainly didn't.
Q. And you didn't offer any information to us?
A. I don't think you asked any.

Mr. Woodward: You are so right.

(The witness was excused and withdrew from the witness stand.)

JOHN TOLER,
having been first duly sworn, was called as a witness for the complainants, and testified as follows:

Examined by Mr. Chappell:
Q. Will you please state your name and age?
A. John M. Toler, forty-one years old.
Q. Where do you live?
A. Bon Air, Virginia.
Q. What is your occupation?
A. Public accounting.
Q. Would you be good enough to state your qualifications and a bit of your background?
A. Well, I studied accounting at the University
page 260 } of Richmond, completed the requisite courses for admission to C. P. A. examination. I have not yet passed the examination. I have got a little better than twenty years experience in public accounting and auditing.
Q. With what firm are you associated or connected?
A. A. M. Toler and Company.
Q. And who was A. M. Toler?
A. He was my father.
Q. Your father is now deceased? Is that correct?
A. That is correct.
Q. At the request of Mr. Harry L. Bain and Marion Bain, who were the complainants in this suit, did you or your firm make an audit of the affairs pertaining to the properties of the Bain estate under the management of Douglas H. Pulley?
A. Yes, in late December, as I recall it, between Christmas and New Year's holiday, Mrs. Marion Bain came to our office.
Q. What year?
A. In 1955, and requested that we undertake an audit of this estate.

John Toler.

Q. When did your audit begin?
A. By that do you mean when we physically began?
Q. Yes.
A. Our first date on the job was on Monday, the 8th day of January, 1956, the second Monday in January.
page 261 } Q. What years did you cover by your audit?

Mr. Woodward: He hasn't said he audited yet.

Q. Did you audit?
A. Yes, we did.
Q. What years did you cover by the audit?

Mr. Woodward: At the very start this witness says "we." He should determine who "we" is, because he may have done the work, and somebody else may have done the work.

Mr. Chappell: If it please the court, I realize that counsel and everybody concerned—this case is tedious enough as it is. It seems to me it is a rather trifling proposition, harping on this question of "we."

The Court: I think you can ask who conducted the audit.

Mr. Chappell: I certainly will do that.

The Court: If he did it, "we" would be just talking about probably his company, while he did it entirely. I don't think "we" is of any importance, provided the witness tells who did the work.

Mr. Chappell: I will come to that and take that as the next question.

Q. Under whose supervision did this audit commence?
A. Under A. M. Toler's.
Q. Your father?
A. My father. That is correct.
Q. Who worked on this audit?
page 262 } A. Over the two-year period there were a total of four people involved. I actually supervised the audit field work. Mr. Hastings assisted me in the year 1955, and Mr. R. B. Zacharias for the year 1954.

Q. Just in some small detail, will you explain what your duties were in connection with this audit?

A. Well, I was delegated the responsibility for actually performing the field work with assistance and drawing together work papers to—from which we could draw conclusions.

John Toler.

Q. And how long did you work on this audit, approximately?

A. Well, I think our time sheet shows an average of fifty man-days time for each year. That was not all done in a hundred days of elapsed time. We began in January, 1956, and it was in the fall before we finished, because we did other things in the meantime.

Q. The fall of '56?

A. Fall of '56; that's right.

Q. What years were covered by your audit?

A. The years were covered, '54 and '55.

Q. Which of the two years did you begin?

A. We began with 1955.

Q. Where did you begin your audit? By that I mean in what physical location?

A. We went to Ivor, which is the headquarters
page 263 } for this operation.

Q. And you went to Ivor because that is where the books and records were?

A. That is where the material we would have to work with is located.

Q. You have been here through a greater portion of the last two days, have you not?

A. Yes, sir.

Q. You have seen these ledgers and day books introduced in evidence. Would you be good enough to state generally what books and records were available to you as your source of material in making the audit?

A. The same records, or similar type records, for the years involved with us were there at Ivor. The larger book, I think it has been referred to several times as the ledger type book, the smaller one as a day book. There were invoices, these types of invoices introduced. We had the same type our two years, in evidence. The bank statements were the basic records in the office at Ivor.

Q. Very briefly, without repeating unnecessarily any procedures outlined by Mr. Lewis, were or were not your auditing procedures similar to those he explained?

A. I didn't get here when Mr. Lewis was on the stand.

Q. Will you tell me what your general auditing procedures were?

page 264 } A. Well, in this type of engagement, to determine whether there has been a satisfactory accounting, it is purely and simply conversion of the recorded

transactions to cash, and then determine what has become of that cash.

Q. And these ledgers and day books to which you have referred were the source material in beginning your audit?

A. They were the basic source of all material that came up here.

Q. During the course of conducting the audit, did you have occasion to become familiar with the signature of Mr. Douglas Pulley?

A. I didn't see Mr. Pulley make it, but I was informed by the day manager that that was his writing.

Q. You saw it on the checks?

A. Yes, sir.

Q Were or were not the ledgers and day books to which you referred in Mr. Pulley's handwriting?

A. For the year 1954 they were.

Q. In 1955?

A. Around the 13th or 14th of May, the handwriting changed and was identified to us as Robert Pulley's.

Q. Who was Mr. Robert Pulley?

A. He is the son of Mr. Douglas Pulley.

Q. Was he in the office in Ivor when you arrived in January, 1956?

A. Yes, he was.

page 265 } Q. Did you have occasion to call upon him from time to time for information in working up this audit?

A. Every day we were there.

Q. Did you have occasion to inquire of Mr. Robert Pulley as to where the various books and records were located?

A. Yes. He showed us around in his office and showed us what we had to work with.

Q. Did you make any specific inquiry as to books and records from time to time as you went about your audit?

A. I take it you mean as to specific items in these records.

Q. Yes, sir.

A. We, as a matter of fact, after we got through the summary work and got down to figures we could work with, we went into great detail with Mr. Robert Pulley.

Q. Mr. Toler, when did you first submit any sort of written report as to the trustees of the Bain estate?

A. That was done in August. It is under date of August 24, 1956. It was a tentative report which showed generally our conclusion for the year 1955.

John Toler.

Q. I hand you a writing bearing that date and ask you if you can identify it.

Mr. Woodward: Is that the 24th?

Mr. Chappell: Yes.

page 266 } Mr. Woodward: Well, we object to it. There is no basis whatever to put it in, correspondence between you and your—

Mr. Chappell: Did you notice how that was written?

Mr. Woodward: Your Honor, he is introducing a letter to the Thomas L. Bain estate. That couldn't affect Mr. Pulley, which is not part of an audit or anything. Even if it were, it wouldn't bind Mr. Pulley.

Mr. Chappell: I believe an examination of this will reveal there was an audit made by their accountants to their employers August 24, 1956. It is precisely in the category of any accountant's report.

Mr. Woodward: Your Honor, there is no special law for accountants. Any letter Mr. Toler may have written to the trustee of the Thomas L. Bain estate is not evidence against Mr. Pulley. Mr. Pulley is the defendant. Whatever they may have written is not evidence in this case. It is the rankest sort of hearsay.

Mr. Chappell: I cannot help but believe Mr. Woodward is objecting without reading the letter, because this is precisely on the same par as auditors' reports entered here before.

The Court: If the letter is an amplification of the report, and if the letter is a report, would not the letter be admissible also?

Mr. Woodward: Your Honor, this is not part

page 267 } of a report. We have separate reports they have submitted. This is something else, extraneous to the matter.

The Court: It may be an amplification. Of course if it has no relevancy to the issue involved, it will not be admissible; but if it has an application, I think it is probably admissible.

Mr. Chappell: It is as relevant as anything that has been submitted heretofore. and it constitutes an interim report of these for the job for which they were employed, and the final report comes along in November of the same year.

Mr. Woodward: It couldn't have any more bearing than a letter written from Mr. Thedieck to Mr. Pulley would be

evidence in this case. It is the purest and rankest sort of hearsay.

The Court: If it is an amplification, I think it is permissible.

Mr. Woodward: It is not an amplification. It is a preliminary.

Mr. Chappell: It is a preliminary to the report.

The Court: I am of the opinion that it is admissible.

Mr. Woodward: We save the point, Your Honor.

Q. Referring to this letter of August 24, 1956, would you please identify it and tell the court what it is?

A. This is not a letter, actually. It is a report
page 268 } up to that point of our findings, and it was addressed to the trustees of the Bain estate. In the beginning, when we started this thing, they, the people naturally wanted to know what the progress of this work is.

Mr. Woodward: I hate to interrupt the witness, but this is signed not by this gentleman, but by A. M. Toler.

Mr. Chappell: Mr. A. M. Toler is now deceased, but was the head of the accounting firm when this gentleman was a member.

The Court: I feel it is admissible, and that whether it was signed by A. M. Toler, it is part of a matter in which the witness had a very active part. I think it is permissible.

Mr. Woodward: We save the point.

Witness: I wrote this, and my father signed it.

Mr. Chappell: I wish to have this report introduced as Plaintiff Exhibit—

The Court: Twenty-nine, I believe.

Mr. Woodward: Your Honor, they purported to give us reports of all the accountants' work. This is not part of it. They bring us something to consider today which we have not had access to before.

Mr. Chappell: If it please the court, we have made available to counsel for the defendant the final report submitted in every instance, and I believe if Mr. Woodward
will allow me to develop through this witness,
page 269 } he will find this is not the final report, and that is
the very reason why we didn't give it to him.

Mr. Woodwarl: That is why we are objecting to it now, because you didn't give it to us, and we are entitled to that for our consideration.

John Toler.

The Court: The objection is overruled.
Mr. Woodward: We save a point, Your Honor.

Q. Now Mr. Toler, so as to eliminate the tempest in a teapot about this Exhibit, did you make any other reports?
A. Yes, sir, we did.
Q. When did you submit your next report?
A. It was submitted under date of November 27, 1956, which was a report on the two years, 1954 and 1955.
Q. I hand you, Mr. Toler, a report, inside your firm's cover, and ask you if you would be good enough to identify that?
A. That is a copy of the report just referred to.

Mr. Chappell: I would be simply obliged if the court would admit this as Plaintiff Exhibit Number 30. This is the report.
The Court: This is for the year, '55?
Mr. Chappell: Fifty-four and '55.

Q. And this, I take it, reflects the report on your audit for the years '54 and '55?
A. That is the final conclusion for the two
page 270 } years. I would like to correct that a little bit.
At that time it was a final. It was later amended.
Q. That brings up my next inquiry. It is a writing on the letterhead of A. M. Toler and Company dated September 27, 1956. I will ask you to identify it, if you will.
A. This is a letter, copy of a letter, which was written correcting the unaccounted for balances on this final audit report written by us. This came about a year, well, right at a year after that final report arose. Two certified public accountants, Julian Irvin and Herbert Lewis, and I went down to Ivor, when they began some work. I was to help them get going on that, and at that time we discovered a number of invoices, payroll and income tax returns that had not been made out before.
Q. What was the net effect of finding that information?
A. We reduced the accountability figure shown on our report for the years we had worked. We had asked for those additional figures on a number of occasions and had always been told—

Mr. Woodward: We object to that.

Q. Who told you?
A. Mr. Robert Pulley.

Mr. Woodward: We object, Your Honor.
Mr. Chappell: If it please the court, it has been introduced in evidence the fact that Mr. Robert Pulley
page 271 } had taken over for his father during the latter part of the year 1955 and was there in 1956. Counsel all day yesterday and today have been badgering the witnesses for the complainants. Why didn't they see Mr. Robert Pulley or Mr. Douglas Pulley? Now I am trying to get the witness to tell us if he did see Mr. Robert Pulley, and counsel for the defendant don't want him to testify as to where he got his information.
The Court: I think the witness can testify what he did and where he got his information.
Mr. Woodward: Your Honor, there is no evidence of agency on the part of Mr. Robert Pulley to Mr. Douglas Pulley in relation to a statement that Mr. Robert Pulley made.
Mr. Chappell: May it please the court, I believe the evidence sustains the fact that Mr. Robert Pulley took over and maintained it.
The Court: I think you have enough evidence.
Mr. Woodward: We save the point, Your Honor.

Q. And what was it Mr. Robert Pulley said to you with reference to these vouchers you found on your subsequent trip?
A. We had been advised that those records were not available specifically on this letter, what I refer to as payroll paid in cash. At the time we were making our examination,
page 272 } there were gaps in the pay period as far as some employees were concerned. We knew they were paid. We had no knowledge how much. We had attempted to get copies of payroll tax returns so we could give the man credit for the full amount he paid. They showed up later, and we gave him credit for it.
Q. Have you ever made inquiry of Mr. Robert Pulley where other books had been available?
A. I don't know how many times, but many more than two or three.
Q. Was anyone present other than you when you made a request of Mr. Robert Pulley how to get in touch with Mr. Pulley?

John Toler.

A. Yes.
Q. Who?
A. On two occasions Mr. Jack Bain was present, and on another occasion, more than one, Mr. Oscar Hastings.

The Court: Where did you find those supplementary records?
Witness: Now as to these specific items, I don't know the exact physical location. On this particular Sunday I referred to, we were down to the store building in Ivor. There was no one there, as I recall, except one of the trustees, and we had the privilege of looking over anything on the premises, and that is the way these documents came to light. Which piece of bailing wire they were
page 273 } on, I don't know. I didn't go into detail, the detail of other accountants. They brought these payroll vouchers and copies to us to look at for the basis of making our adjustment.
The Court: Do you know whether there might be some other records that hadn't yet been discovered?
The Witness: I don't know, Judge. I know that we asked many times when we went over the results of our audit with Mr. Robert Pulley. We told him exactly what it looked like, and we asked him, offered to give him time to come up with these receipts, anything to give us something to hang our hats on, so to speak, to give him credit.

Q. And what was the result of the inquiry of Mr. Robert Pulley?
A. We were told that there was no further evidence.

Mr. Woodward: Same objection, Your Honor. We understand you overruled, and we excepted.
The Court: Yes.

Q. Now Mr. Toler, after receiving this information, I understand your ultimate figures of accountability as reflected in the report of November, 1956, were used accordingly?
A. That is correct.
Q. You doubtless have heard the testimony here, reference made to Plaintiff Exhibit Number 13, which purports to be a summary of the audit reports for the years 1951
page 274 } through 1955. Now would you refer to the figures shown for the years covered by your firm, namely, 1954 and 1955 on that summary?

A. Yes.

Q. Will you similarly refer to the figures as shown on your letter of September 27, 1957?

A. These figures, these same ones, Mr. Chappell, are not on the letter.

Q. Are they greater or lesser?

A. The figures on this letter with adjustment totaled up in that report only show the adjustment. They do not show the adjusted total. In this letter we merely quoted to the trustees the adjustment we came across and offered to change the original report themselves if they would be returned to us, and we presumed, since they were not returned, they were satisfied as they were.

Q. Could you give me what the adjusted totals were in view of your letter of September 27, 1957?

A. For the year 1954 the adjusted balance of cash to be accounted for would become $39,433.74.

Q. What year was that for?

A. For the year 1954. I am getting in '55 now. For the year 1955 the adjusted total would be $37,636.66.

Mr. Woodward: What is the figure you gave us?

Witness: It is $27,636.66. That is for 1955.

page 275 } Q. Nineteen-fifty-four was—

A. Was $39,433.34.

Mr. Woodward: Just a minute, Your Honor, before we go too far. I see a difference between the figure he just gave us and the figure on Exhibit 13.

Mr. Chappell: You are very perceptive, Mr. Woodward. That is what I am going to bring out now.

Q. Now tell me, Mr. Toler; since Mr. Woodward raises the point, what is that difference between the sums and the figures you just gave?

A. Well, when Mr. Hardy's firm discovered these additional invoices and things that were also notes receivable, they were not available to us. They made up their own computation of an adjustment to our figures. They then submitted the details, the invoices and what not. We made up our own computation of the adjustment. We didn't agree exactly that management should be given credit for these notes receivable on hand as of December 31, 1955. That is a variation.

John Toler.

Q. You kept them in your—
A. We kept them as a charge against management.
Q. But the summary was prepared by Hardy and Lewis?
A. They were eliminated.
Q. And therefore were reduced further for which Mr. Pulley was accountable. What was the amount?
page 276 } A. It is $5,074.93. It is shown on Exhibit A before you.
Q. Do you happen to have in your work papers the duplicate of the deposit slips?
A. Yes, sir, I think so.
Q. Which you obtained from the bank in connection with your audit?
A. Yes, sir.
Q. Could you get them for me without too much delay?
A. They are right over there.
Q. I am interested in the duplicate deposit slips for the years '54 and '55.

The Court: We will take a five-minutes interlude.

(The court then, at 2:55 p. m., took a recess until 3:00 p. m., at which time it reconvened, and the witness who was previously testifying resumed his seat as a witness.)

Q. Mr. Toler, we adjourned for you to locate these duplicate deposit slips, but before proceeding, I should like to have this letter of September 27, 1957, which amends the report, introduced as Plaintiff Exhibit 31.

Mr. Woodward: We object on the ground as stated before.

Q. Now returning to the duplicate deposit slip, have you located those?
A. Yes, sir.
Q. From whom did you obtain those slips?
A. They were obtained from the bank, Sussex and Surry. They prepared us copies of the deposit slips.
page 277 } Q. Who prepared these duplicate slips?
A. I am not certain. Somebody in the bank's employ.
Q. But you did not prepare them?
A. I did not, no, sir.

Mr. Chappell: I should like to introduce as Plaintiff Ex-

hibit Number 32 the deposit slips for the year 1954, and I wish to offer as Plaintiff—

The Court: This will be 32?

Mr. Chappell: Yes, sir, and duplicate slips for '55. Your witness, Mr. Woodward.

CROSS EXAMINATION.

Examined by Mr. Woodward:

Q. Mr. Toler, have you ever had any experience keeping a single entry set of books?

A. Yes, sir.

Q. For who?

A. For a contractor.

Q. For who?

A. Honestly I don't remember his name, but I did do a job like that in 1937, one summer, a building contractor in North Carolina.

Q. How old are you?

A. Forty-one.

page 278 } Q. Does that give you any internal control of a business when you have single entry bookkeeping?

A. It can, yes, sir.

Q. Did you keep internal control single entry bookkeeping?

A. I think so, yes, that is to say, the area with which I had charge of responsibility, yes.

Q. What area did you have?

A. Accounting for cash. primarily.

Q. Keeping that on books or in your head?

A. It was all recorded.

Q. Now you went down to the Bain store with Mr. Harry Lee Bain on Sundays lots of times, didn't you?

A. No, sir, I would not say a lot of times. I recall there were several, two or three perhaps at the outside, meetings with the trustees of the estate, and of course I went.

Q. What was there to be had opened to you?

A. We were told everything available was made to us.

Q. As far as your inquiry is concerned, nothing was ever denied. you, was it?

A. As we asked for it, we were told it was here or it was not here.

Q. What about invoices amounting to $25,000 that were found by Hardy and Irving, or Hardy and Lewis

page 279 } you didn't find?

A. We were given what was represented to us

as all available invoices for the two years audited. These particular invoices turned up later mixed up with the other invoices.

Q. Didn't you go through with all the invoices when you were making a record?

A. All that were given to us is pertaining to the years examined.

Q. Is your record made up entirely of what is given to you?

A. No, sir.

Q. Did you make an inquiry of your own as to where certain records were?

A. Yes, sir, we did.

Q. If they were upstairs and on a hay wire, there is no reason they should have withheld them, is there?

A. I wouldn't think so.

Q. But you didn't get them, did you?

A. No, sir.

Q. These other people that were a little more ingenious than you did get them?

A. No, sir, I wouldn't say that. My experience auditing doesn't lead me to believe I could go push people aside and make an independent search for something when

page 280 } they said they weren't there.

Q. These other people, it didn't appear they pushed people aside. Why didn't you?

A. A little different situation.

Q. What difference?

A. The difference was that we were, in the course of our work, we were to work with Mr. Robert Pulley. We were to ask him for any help we needed or any material or anything we needed to work with.

Q. Did you go up in the loft?

A. Yes, sir, we were in the loft.

Q. Seeing they were in the loft, you could have found them, couldn't you?

A. We looked casually at the record at the records that were there. We looked for those on the wire that were supposed to be for 1951. It did not affect the years 1954 and 1955, so we looked no further in those files. We had been advised that each of these wires, each year was filed separately.

Q. Would you hold an examination just casually up there?

A. No, sir, I would not say that.

Q. If the root and light of the whole thing was finding invoices, that was your examination, wasn't it?

A. No, sir. The people there knew that, or the members of the family, the auditors came to perform page 281 } actions on their business transaction with the estate's funds, and I would think they would make everything available to us, with no question.

Q. There certainly couldn't be no point withholding paid invoices from you, could there?

A. I would not think so.

Q. Now these accounts for which notes were given, they were shown on the accounts that they were closed by the notes, weren't they?

A. That is correct, sir.

Q. Why didn't you call for the notes?

A. We did.

Q. Seeing the notes were there, why did you charge them to Mr. Pulley?

A. Because it is an item of accountability.

Q. You had them already accounted for, didn't you? If they were there, that is accountability, isn't it?

A. No, sir. We didn't see the notes. They were not available to us. We knew the accounts were closed as of the end of the year '55. These notes we asked to see were not there.

Q. Mr. Toler, the books show that they were closed by notes. Now if you had asked for those notes, you would have found them in the safe, wouldn't you?

A. We did ask for them. As a matter of fact, page 282 } in January, '58, we went through that safe and didn't find those notes.

Q. I am going to hand you a note dated January the 22nd, 1955, signed by Edd Ricks and Gertrude Ricks, payable to Douglas H. Pulley, as agent for the heirs of Thomas L. Bain, deceased, in the amount of $836.65, and ask you if you had that note in your possession?

A. No, sir. Do you mind if I check with it?

Q. Not a bit in the world. I want you to check.

A. No, sir, I don't recall having seen this before. Had I examined it, I think I would have put some identification on it.

Q. This note represents paid in full, signed "John T. Faircloth," February 2, 1957, amount of $886.85, does it not?

A. When we asked for a rendering of an accounting, it

was not made available. If you will notice, this note is in the amount of $836.65, a note listed against the same person listed in our—of notes in the amount of $407.35. I am not certain it is the same note.

Q. It is the Thomas L. Bain estate, isn't it?

A. Yes.

Q. It is receipted for by them, isn't it?

A. I presume so.

Q. It is dated January 22, 1955, isn't it?

A. Yes, sir.

page 283 } Q. Mr. Pulley would be entitled to credit for it, wouldn't he?

A. Had he made it available to us, yes.

Q. Do you know any reason why he should withhold notes to the Bain estate not made available to you?

A. No, sir. I have asked myself that question a hundred times.

Mr. Woodward: I would like to introduce that in the record as Defendant Exhibit Number "A."

Mr. Parker: Mr. Woodward, just a minute. Before that we would like to object to it being introduced as evidence. We don't mind it being identified or introduced as a paper about which we are talking about, but he has testified that he doesn't know whose note it was or whether it was paid to the estate or not, that it would appear from the evidence he has no knowledge of it. Do you have somebody who can identify it?

Mr. Woodward: Yes. He is sitting in the courtroom.

Mr. Parker: Can we admit it subject to examination and cross examination?

The Court: I think Mr. Woodward has an exhibit for what it may be worth.

Mr. Parker: Very well.

The Court: Mr. Woodward, do you prefer the exhibit, Defendant Exhibit, to be "A," "B," "C"? The

page 284 } others are "1," "2," "3." This will be Defendant Exhibit "A."

Q. Now Mr. Toler, in your letter of September 27, 1957, addressed to the Trustees of the Thomas L. Bain estate, with reference to the audit for the years '54 and '55, you refer to additional credits discovered, payrolls paid in cash, the year 1954, $2,801.94 for 1954, and $3,025.36 for the year 1955; and I ask you if it isn't a fact that they were paid by check?

John Toler.

A. To my knowledge it is not a fact. We made a transcript of every check issued, and identified them back.

Q. Just refer to your books, pages 14, 15 and 16 and 17 books for 1954 and '55.

Mr. Chappell: You mean the ledger, Mr. Woodward?

Mr. Woodward: Yes.

Witness: What is that now?

Q. Four-fifteen, 416 and 417, all in separate items, and bring it down to that focus.

A. What am I supposed to see?

Q. For the year 1954, $2,801.94; 1955, $3,025.36. Separate items total that amount?

A. I can't look for that and say it will total it.

Q. We will wait for you.

A. I am not that good.

Mr. Chappell: Tell him what items which is going to add that up.

page 285 } Mr. Woodward: He has got the book.

Mr. Chappell: I know, but there are a lot of items. Which items are going to add that up?

Mr. Woodward: The payroll items, payroll paid in cash.

Q. Would you say it was paid in cash or paid in check?

A. Perhaps we don't follow each other there. We made an extract of these and broke them down by page of these various checks. I am speaking about known employees of this concern. They were checks issued for them, because we reconciled the bank account and proved the check was issued.

Q. We have here on your letter payrolls paid in cash. I ask you if it isn't reflected on pages 14, 15 and 16 as having been paid by check?

A. I can go back in my work in detail and find if—

Q. We will check it off for you. Now on pages 12 and 415 under title of "Bank of Sussex and Surry" for the year and in December for the month ending December 31st, does it not show that checks went to Clarence Newsom, D. H. Pulley, and Robert H. Pulley?

A. Yes, sir, that books shows that.

Q. Isn't that solid?

A. That is not what we are alluding to here.

John Toler.

Q. What are you alluding to?

A. This is a transcript of these records of pay-
page 286 } ments from the checks issued in here.

Q. Don't you run across these checks for salary?

A. We didn't run across this item. This adjustment to payroll here, Mr. Woodward, is not any makeup of specific items. It is a total payroll for tax purposes for the year. This is less what we had already given credit for. This is a balance for a difference. In other words he had paid a hundred in payroll. We had already given him credit for sixty because we had not seen the other forty. We see the other forty, so we gave him credit for it.

Q. Why didn't you see it to start with?

A. The records weren't there.

Q. Well, Mr. Toler, here is the record, and there is the record. What other records did you expect to get?

A. Mr. Woodward, this doesn't say a thing except that somebody got a check. If you notice the pick marks on it, examined the checks and put them all back, which is here to see, that the payee here and the payee on the check were the same. It doesn't state what for. This only states that the man got a check.

Q. Mr. Robert Pulley was right in the place when you were doing the work, wasn't he?

A. Yes, sir.

Q. Why didn't you ask him?

A. We went over those things with him.

page 287 } Q. Do you mean to tell me Mr. Robert Pulley couldn't tell you that it was salary?

A. I had a check here, for instance, to Clarence Newsome. We went over the listing of the recording of payments to Clarence Newsome just to determine what it was. That doesn't tell what that is.

Q. Didn't you ask Clarence Newsome? He was right there.

A. We had no contact with Clarence Newsome.

Q. He was working there every day, wasn't he?

A. We had no responsibility for asking him anything.

Q. Did you have responsibility to ask anybody?

A. Yes, sir. We did Robert Pulley.

Q. Was there any reason to keep concealed that he had a salary check?

A. I wouldn't think so. We gave it to him for him to identify the check.

Q. Now there was a difference between you and Mr. Hardy

and Lewis found of $25,000 in the credits that you were supposed to give represented by him that you found up stairs?

A. He found them subsequently and brought them to our attention and we immediately adjusted our figures to adopt that.

Q. You had no alternative, did you?

A. Mr. Woodward, we wished, and told Mr. Robert Pulley if he would come up with receipts for every bit page 288 } of it, we would give him credit. We didn't want to come up with any unaccounted business. We had to work with the tools we had.

Q. So if Mr. Robert Pulley didn't tell you about it, you didn't give him any credit?

A. We gave him a lot of credit he didn't tell us about.

Q. That was reflected by the books, wasn't it?

A. Some, yes; some, no.

Q. I notice in your accounts for the years 1954, from January 1, 1954 through December 31, 1955 on your Exhibit "D," page 1 and page 2—

A. I have a copy of the report.

Q. And on those two pages you have thrown out cash disbursements to the extent of $22,329.01?

A. Those two statements on the Exhibit, there is no cash disbursement involved on Exhibit B.

Mr. Moyler: He said "D."

Witness: I am sorry.

Q. You threw out cash disbursements excepted in the amount totaling $29,614.46?

A. That is correct.

Q. Why?

A. For several reasons, primarily because of no supporting invoices for the items; secondly, some of these items were disallowed as a deduction or as an accountability item because Mr. Robert Pulley stated to us what they page 289 } were, and they were not even estate business.

Q. Well, who authorized you to take them out or put them in?

A. We were paid, as a matter of fact, to audit the records, transactions, to determine whether there had been a complete accounting.

Q. Why didn't you put in the items that went to the Sussex and Surry Bank?

John Toler.

A. I don't follow you.

Q. There were two items in 1951, $659.30 and $450.00. Why didn't you give credit on those?

A. We had no way of knowing. That could have been a personal note payable to one of the managers of the estate. We didn't know it was an official figure.

Q. Where you had no way of knowing, you charged it to Mr. Pulley, didn't you?

A. There was no accounting for it. We had no alternative.

Q. Just answer the question. Why did you charge it to Mr. Pulley?

A. I still say we didn't know. We had no alternative.

Q. Now you talk about supporting invoices, Mr. Toler. Have you ever run a country store?

A. No, sir. I have spent right much time around one when I was a kid, though.

page 290 } Q. How long does the Federal Government require you to keep invoices?

A. You are speaking of tax-wise, I presume. There is a recent ruling, I think, by the Supreme Court, which doesn't put any light on it. In other words if they come back a hundred years later and don't have documents, it is too bad. There is no limit on the time you are required to keep supporting documents.

Q. How late is that ruling?

A. It is a fairly recent ruling that came out in the Tax Service in the year 1958.

Q. Well. I would have to question you on that.

Mr. Parker: You want a citation on that, Mr. Woodward?

Witness: I have it on file in my office. If you would like it, I will be glad to accommodate you.

Q. Now Mr. Toler, I noticed the majority of items you kicked out are payable to R. H. or D. H. Pulley?

A. That's correct. A lot of them are.

Q. Why?

A. These, as far as we know, are not salary checks. There are a number of things there that we could not determine, the authority for them. In other words R. H. or D. H. Pulley, was he alone? Was he paid personal bills? Or what was it? We don't know.

Q. Do you know, as a matter of fact, R. H. and

page 291 } D. H. Pulley did all the hauling for the Thomas L. Bain estate?

A. That is one of the things I wanted to add to what I just said. We consulted, referring to each particular check, with management, that is, with the trustees of this estate. It seems they were to receive all of the proceeds that the hauling charges that were made to, I believe, Lummis and Company for peanuts that were stored, handled and hauled. They were, in turn, to pay a different price to Mr. D. H. and R. H. Pulley for actual physical movement of these peanuts.

Q. Who do you mean by "they"?

A. The estate was to pay to the Pulleys. It seems that the withdrawal here amounts, I think they are a hundred per cent better of the total payments to the estate, and for that reason then, we did not feel that these disbursements were properly authorized.

Q. So consulting your feelings, you threw it out?

A. No, sir, not consulting my feelings. Individual items were discussed with Mr. R. H. Pulley.

Q. Did you check with the books of D. H. and R. H. Pulley?

A I had no access to them.

Q. Why didn't you have?

A. We made a statement we would like to see the records, but we didn't get them.

page 292 } Q. You mean Mr. R. H. Pulley refused to let you see his records?

A. Mr. Woodward, we were not auditing their records.

Q. Do you mean to say that Mr. Robert Pulley refused you access to his records?

A. He knew how vital they were to us, but he didn't offer them.

Q. How would he know how vital they were to you?

A. We had told Mr. Robert Pulley the results posed in here, and before we rendered the report, and told him it, we gave him all the opportunity in the world to make available any evidence that he might possibly have.

Q. And because Mr. Robert Pulley didn't come up on something in behalf of Mr. Douglas Pulley, you charged it to Mr. Douglas Pulley. Is that it?

A. Yes. What other alternative did we have?

Q. I don't know. I am asking you. You are the auditor.

A. Well, we had a responsibility to the trustees of this estate to tell them what we found, and that's what we found.

Q. And you had a responsibility to the man you were charging it with to verify the account, didn't you?

John Toler.

A. We had a definite responsibility to.

Q. But you didn't do it, did you?

A. Yes, sir.

page 293 } Q. What way did you verify it?

A. We gave him every opportunity, and discussed item for item, and gave him every opportunity to do something about it.

Q. Did you give him an opportunity to discuss frozen foods?

A. Mr. Robert Pulley told me himself they were personal purchases for his own deep freeze.

Q. Did you give him any credit for S. L. Ward and Company or H. P. Beale and Son?

A. He couldn't tell us what it was for.

Q. Why should he be able to tell you something that happened two or three years ahead of that?

A. Mr. Woodward, may I add something to that? In this same year, 1954, you will find a number of checks made payable to H. P. Beale and Son, comparatively small. all at fairly regular intervals, obviously for the purchase of meat for the store there at Ivor This is one check, one item, with no invoice to support it. We didn't know what it was for, and it was impossible. Mr. Woodward, for the record, since I have been sitting here, I happen to remember the name of this construction company, the Jackson Construction Company of Scotland Neck, North Carolina.

Q. Just for your information, I am going to hand you some checks payable from H. Pulley to H. P.

page 294 } Beale and Son totaling thousands of dollars and ask you what arrangements you made about them, just for identification and for your own enlightenment. I ask you to look at those checks totaling thousands and thousands of dollars and ask you have you ever seen those for transactions the other way around?

A. No, sir.

Q. Did you call to see whether they were tallied in with things you charged against Mr .Pulley?

A. Mr Pulley would be in the business of buying hams. He sells hams. He buys hams from H. P. Beale and Son. The reason—Let me go back to this check. In the store at Ivor they had no refrigeration facilities. They couldn't cool a soft drink. They carried a very cheap grade, what you call fat back. something you could hang from the rafters and sell a little at the time. They didn't have facilities for any other kind of meat. We could find no invoice for it,

so when we put it in here, let's have an accounting for it. That was the answer, we hadn't received none.

Q. So it was particularly a matter of attitude on your part?

A. No, it wasn't an attitude. It was an obligation to these people who employed us to determine what the affairs were.

page 295 } Q. Where you are making an audit, Mr. Toler, it is an obligation to get the correct answers, not an obligation one-sided, isn't it?

A. An obligation to both sides, and we intend to live up to it.

Q. If you had been as assiduously looking out for Mr. Pulley's part as you were Mr. Bain's part, it would be an entirely different picture, wouldn't it?

A. They had the opportunity to make those things available, if they so desired. We would have been happy to have done so.

Q. Did you ever discuss it with Mr. Douglas Pulley?

A. Mr. Robert Pulley requested that we not contact his father. For that reason we didn't.

Q. Now you have dealt with things that you should know. I don't notice in here any disbursements made for expenses of the estate, and things of that kind in your report?

A. Now which schedule are you referring to?

Q. Either one. Do you find anything for the expenses of the estate, its operation?

A. I don't follow you.

Q. I am trying to get it out of your report what were the expenses of the estate that you have referred to in your audit?

A. Those expenses, as long as they were properly authorized, they were none of our concern.

page 296 } Q. Well how can you possibly make an audit of anybody's business without taking the expenses from the income?

A. We are not trying in this audit—it was not an effort to determine the income expense. It was an attempt to determine how many dollars came in the possession of management, what did they do with it, how many should they have left over.

Q. Is it fair to say you don't know what went with expense or anything else of that nature?

A. No, sir, it would not be fair. I am pretty familiar with the expenses.

John Toler.

Q. Show it to us.

A. It is in these books and records that are in evidence. I have been over every one of them.

Q. Is it in your report?

A. The way this report is set up—and I assure you it is proper—there would be no place for expenses as such, because we are not arriving at income or expense. We are arriving at cash receipts.

Q. Isn't a man entitled to expenses he goes through with in operation of the business?

A. He is given credit for those expenses.

Q. Where is he given credit?

A. It isn't to write it down, expenses, credit.

Q. Show us where you gave us credit for dis-
page 297 } bursements for expenses.

A. Well, if you look on Exhibit B, for instance, in effect, the bottom item, cash deposited in bank, he is being given credit for those expenses.

Q. What page is that?

A. The second page. after "A," Exhibit B. These pages are not numbered except by exhibits and schedules, and they are all in sequence, statement of cash receipts for the year 1954. If you will note, look at this exhibit, Mr. Woodward. The top items represent the items that we could determine to be cash receipts which had to be accounted for. We have given in that statement full credit for every dollar that went into the bank account.

Q. Show it to me.

A. It is in the total right here. I had work to be accounted for, right here. This figure of $411,000 is determined to be total cash for that year. It has sheets on it. It has been entered as evidence.

Q. You tell me it is in the total, and I want to find where it is in the total.

A. It is credited. It is a reduction of the total of cash receipts right there; $358,000 went to the bank. That is a credit. The difference then is the amount of cash to be accounted for.

Q. How much of that cash to be accounted for
page 298 } went to expenses?

A. I don't know. Let me tell you why. The records are written, these records state in the expense side of these accounts to cash, or cash paid out is what it means, some of those we found checks for those items, a number of

places they recorded as checks. We couldn't find any canceled check for that item. For most of them, a good number of them, we couldn't find any shred of a document to say what that transaction was for. For that reason then we wind up with this balance of cash to be accounted for.

Q. So you leave it up to Mr. Pulley to show you what the labor bill was, or any other expense for that year?

A. I think that is pretty generally a common practice, when somebody else is handling your funds.

Q. Well, Mr. Toler, it is a common practice in my bailiwick for a man to make the accounting with justice for both sides. You say there were expenses but you don't show them. That is unjust in anybody's language, isn't it?

A. We go back to the fact that expenses are not involved in this. This is an attempt to show what has become of cash. If Mr. Pulley—I think it was testified by both Mr. Hardy and Mr. Lewis, and I will have to go along with that—it is obvious, by the letter admitted here amending these totals, any time they come along with receipts, cash, acceptable receipts, they will get full credit for it.

page 299 } Q. Who passes on the *bona fide* of these receipts?

A. We have to use our own discretion up to a point. Now in auditing, again I presume it is true in the practice of law, there are areas in which there can be no hard and fast rules. You have your experience and native intelligence to tell you what to accept. If it is a *bona fide* invoice from Beale and Sons for ham or something, all right; but when we get to these odd items, where there are no invoices, if he makes a note on a scrap of paper, "I paid John Brown ten dollars, we would give it serious consideration.

Q. And if he paid out of the cash drawer, what do you give him credit for?

A. If he has got any evidence at all, if he made a note at the time, on the 3rd day of June "I paid Sam Brown $5.00 for hams," we would seriously consider giving him credit for it; but those things should be the exception rather than the rule.

Q. Say if he brings in ten pieces of fatback, do you expect the farmer to bring an invoice with it?

A. I expect if the farmer doesn't, I think it is quite fitting to log what the disbursement is for. I think he should.

Q. If he gives a check for ten pieces of fatback, isn't that enough invoice?

John Toler.

A. If you gave him a check, he would have
page 300 } gotten credit for that.

Q. Well, all the checks there that you didn't give him credit for—

A. Because they were obviously—If you go back to this report and look at the few checks comparatively that we excepted, go look at the pile that were issued in these two years, Mr. Woodward. There are lots of them, and I probably shouldn't say this, but there are a lots of them. I heard one mentioned of two dollars to the electric cooperative yesterday. We saw check like that. We gave him credit for it, because it obviously went to a legitimate enterprise. It was indorsed by those people, but now we know you can buy electricity only from the person who is authorized to sell it, but H. P. Beale and Sons will sell to almost anybody that comes down the pike. They will sell to almost anybody. If we have no invoice to state that this was sold to T. L. Bain estate, it could be for personal obligations or something; and naturally if we are not shown something otherwise, we cannot give them credit.

Q. Mr. Toler, we know in the course of events it could have been passed in a poker game, but in the legitimate course of business, and the ordinary customary usage of business, a check issued to a reputable concern gets credit on the books, doesn't he?

A. Generally, yes.

page 301 } Q. You have no record of disbursement in cash whatever, have you?

A. Yes, we do have some. Cash that was reported to us as being—Let me re-state that. Mr. Robert Pulley identified certain items, and gave us a listing of them, and at our request marked those items right in these books. We gave him all the opportunity to do it. We later, in testing those, found there were a number paid by check, so then we couldn't give him credit for those.

Q. Suppose we summarize it this way; that you were the final arbiter of what you would give credit for and what you wouldn't?

A. In the capacity in which we were employed, we would reach our own conclusions. We were not the final arbiter what credit would be given. That is up to the trustees of the estate. We made our report to them. We discussed, before making decisions, we discussed it with Mr. Robert Pulley, who was the representative of management, and we could go no further than that.

John Toler.

Q. Is my statement wrong, that you were really the final arbiter?

A. No, sir, it is not correct. We were not the final arbiter.

Q. Did you discuss with the trustees as to what they wanted to allow him?

page 302 } A. Naturally we had to know certain things. For instance, we found an item of discount which was credit to the D. H. Pulley account, very substantial, better than $800. That type of thing we discussed it with the trustees of the estate. What should we do? Is there any basis for allowing it? We had to get that information from somebody as to what the terms of management were.

Q. So you were governed by what they told you?

A. Naturally. We had to be.

Q. You weren't governed by what Mr. Pulley had to say, one way or another, were you?

A. We had also discussed it with Mr. Pulley, and he told us that he didn't know.

Q. You are talking about Mr. Douglas Pulley?

A. No, sir, not Mr. Douglas Pulley.

The Court: Mr. Toler, in your examination of these books and the records, the books from day to day, did you determine any policy of bookkeeping that would show whether this bookkeeping was entirely accurate, or anything of that kind? What was your conclusion as to the type of bookkeeping that was kept?

Witness: My personal opinion of it would be this: that whoever actually did the physical writing in those records knew what he was about. This thing is fairly complicated. Most of the entries, we went through a number

page 303 } of accounts, and in a single entry system there is no control over the accuracy of these records; and you can count on one hand the number of actual errors that we found in any one year. In other words the records themselves, mechanically, were very well kept. We found that in comparison, comparing the result of our examination, income-tax-wise, with what had been reported, we couldn't vary it very much; no substantial charge was apparent.

The Court: Would a bookkeeping system of that kind disclose all the transactions in a business of that kind?

Witness: It would disclose them to this extent. Judge, we were able to determine that the price charged to the—even under the double entry—to the various people involved

in these accounts, were not always the same. We checked that thoroughly. We found that the prices charged to D. H. Pulley's farms were less, in most cases, than they were the tenants and the ordinary customers of the store. The items are labeled in there. The records are quite detailed, except for those items called tickets; but for many items in there are even labeled the name of the product, and it is quite easy to trace them back.

The Court: If there were cash payments, would that show up in a bookkeeping system of this kind?

Witness: That is one fault with this particular system. There is no individual account as cash. Now

page 304 } you can go through, as we have done, and prepare work papers. I can show you an example, if you would like to see it.

The Court: What I am meaning is this: would this account disclose payments made out of cash?

Witness: Out of the estate funds?

The Court: Out of the estate funds that were probably in the cash drawer?

Witness: Yes. Everything like that practically that is in there is labeled, but we found this. Where it is labeled cash, we could find a check sometimes for it. Where it is labeled check, so often we could find no canceled check, but we had to reconcile the bank account. In addition, we found no invoices. Then we come up with this. In other words there are charges and credits in there that were not supported.

The Court: In other words it was an incomplete bookkeeping system?

Witness: I wouldn't say that exactly. It is right detailed, Judge. I don't know what the basis for so many of these entries was, but a number were unsupported. I wouldn't say it was incomplete. It is incomplete in the sense that the supporting files are not available, or have not been available. I am referring to the records as a whole. Now the records themselves, I don't think I would incline to a system like that. However, for their purpose,

page 305 } they do very well. The only thing that is incomplete is the supporting details, in other words, the basis for so many entries.

Q. What record do you have of cash purchases?

A. Of cash purchases?

Q. Yes, right out of the drawer?

John Toler.

A. Apparently very little.

Mr. Woodward: Stand aside.

Mr. Chappell: While I have you here, Mr. Toler, I believe we overlooked one day book this morning, and this would cover the years '54 and '55. Judge, I believe the other day book ended with "23." To keep the sequence right, would you like to call this "23A," or the next numbered exhibit?

The Court: Suppose we make this 23A.

RE-DIRECT EXAMINATION.

Examined by Mr. Chappell:

Q. I hand you that and ask you if you can identify it, Mr. Toler?

A. It is what has been referred to as the day book we worked with in '54 and '55 audits.

(The witness was excused and withdrew from the witness stand.)

page 306 } Mr. Chappell: If it please the court, Mr. Toler is from Richmond, and he has been down here for the greater part of two days, and I wonder if we could excuse him from further attendance at this hearing.

Mr. Woodward: We don't have any say so one way or the other.

The Court: If counsel for the defendant also wishes to excuse him, the court will excuse him.

Mr. Woodward: That's all right with us.

The Court: The court will excuse him.

Mr Chappell: If it please the court, if I may, I would like to change my mind. I believe that the testimony of Mr. Hastings would largely be cumulative. I don't know about Your Honor, but I am getting a little tired of listening to these figures. With the consent of counsel, I would be delighted to excuse this witness and conclude for today.

Mr. Woodward: It is the first time I have concurred, Your Honor.

Mr. Chappell: There is only one other point, and I believe it would deal with two final witnesses, and I believe it will be very short. You recall we subpoenaed Mr. McKinney and Mr. Beale. We did that because we agreed to do that at the pretrial conference so that these gentlemen would have an

opportunity to cross examine, if they saw fit. The checks we introduced we feel will do for our purpose, and there is no purpose in having Mr. Beale and Mr. McKinney here, and we stand ready to stick with our agreement and will be glad to have them here if counsel for the defendant would like to have them. Otherwise I wouldn't like to trespass on their time, if it could be avoided.

page 307 }

The Court: How many witnesses do you have?

Mr. Chappell: They will be the last two.

Mr. Woodward: I think we would like to have them, Your Honor.

(The court then, at 4:02 p. m., September 9, 1958, adjourned until September 10, 1958.)

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THIRD DAY.

(The court convened at 10:00 a. m., September 10, 1958.)

Mr. Chappell: If it please the court, in line with what was suggested, we contacted Mr. McKinney and Mr. Beale. Mr. McKinney is here, but I don't believe Mr. Beale has arrived as yet.

CHARLES McKINNEY,

having been first duly sworn, was called as a witness for the complainants, and testfiied as follows:

Examined by Mr. Chappell:

Q. Will you please state your name and age?

A. Charles McKinney, forty-eight years old.

Q. Where do you live?

A. Suffolk, Virginia.

Q. What is your occupation?

A. I am vice-president and manager of the Lummis Company plant.

Q. What type of business is your company engaged in?

A. Shellers and cleaners and manufacturers of peanut products.

page 309 }

Q. I hand you herewith a paper which has been identified as Plaintiff Exhibit 27 and ask you if you can identify it.

A. Lummis Company check made payable to D. H. Pulley.

Q. And the amount?

A. It is $1,924.35.
Q. What is the date of it?
A. Dated October 23, I believe it is.
Q. What year?
A. It looks like October the 23rd.
Q. And the year?
A. Nineteen-fifty-three.
Q. Was that check returned to your office through the normal banking channels?
A. Yes, sir.
Q. And that check, until it was delivered to counsel for the complainants, constituted part of your original records?
A. Yes, sir.
Q. And that is the check delivered to D. H. Pulley by your company?
A. That's right.

CROSS EXAMINATION.

Examined by Mr. Woodward:

page 310 } Q. Mr. McKinney, did D. H. Pulley and R. H. Pulley do any work for your company?
A. They did. They are not doing it right now.
Q. In 1953 were they doing hauling for you?
A. Buying peanuts and hauling peanuts, yes, sir.
Q. Do you know what this check is for?
A. I cannot say whether it is for peanuts storage and commission. I assume it was for peanuts, because it was in October, the starting of the season.
Q. And they would necessarily haul for you?
A. Yes, sir.

Mr. Chappell: May it please the court, Mr. McKenney is away from his office, and with the consent of counsel for the defendant, I would like to have him excused.
The Court: He may be excused.
Mr. Chappell: I don't believe Mr. Beale has arrived yet.
The Court: We might as well suspend until Mr. Beale gets here.

(The court then, at 10:07 a. m., took a recess until 10:34 a. m., at which time it convened.)

Mr. Chappell: May it please the court, Mr. Beale is here. I would like to call Mr. Beale.

page 311 } HUBERT BEALE,

having been first duly sworn, was called as a witness for the complainants, and testified as follows:

Examined by Mr. Chappell:

Q. Will you please state your name and age?

A. Hubert Beale, forty-seven.

Q. Where do you live?

A. Six miles north of here.

Q. What is your occupation?

A. Meat packer.

Q. What is the name of your firm?

A. H. P. Beale and Sons.

Q. I hand you a paper which has been identified as Plaintiff Exhibit Number 28, and I ask you if you would identify that. please sir?

A. Yes, sir. That is our company check.

Q. To whom is it payable?

A. Mr. D. H. Pulley.

Q. And the date, sir?

A. November 16, 1953.

Q. And the amount?

A. It is $3,221.49.

page 312 } Q. Now is that the original check that was returned to your firm through the normal banking channels?

A. Yes, sir, it is.

Q. Is that the check that was delivered by your firm to counsel for the complainants as a part of your original records?

A. Yes, it is.

Mr. Chappell: Your witness, Mr. Woodward.

CROSS EXAMINATION.

Examined by Mr. Moyler:

Q. Mr. Beale, how long have you been knowing Mr. D. H. Pulley?

A. All my life.

Q. How long have you been having business dealings with him?

A. All my business life; my father before I was in the company.

Q. Has he sold your company hams or meat, or both, or has he bought them from you?

A. Yes, he has bought meats from us, and we have also bought cured meats from him.

Q. In the course of business transactions have you or not issued him just a few checks or many checks?

A. You mean for the purchase of live hogs?

page 313 } Q. Yes.

A. Yes, many times.

Q. Do you have a guess how many it would be over the years?

A. I wouldn't have the slightest guess. I wouldn't like to attempt.

Q. How were checks made payable?

A. To D. H. Pulley.

Q. Was he in the hauling business?

A. Yes, he was.

Q. Did he haul hams for you or hogs or anything else for you that you wanted to haul from time to time?

A. Well, he hauled his own hogs to our place of business, which is customary.

Q. Has Mr. Pulley been in the ham business curing hams for himself?

A. Yes, sir.

Q. Has he through the years bought a quantity of hams from you?

A. Yes, he has.

Q. Do you have an idea how many, on average?

A. I would say 1500 pieces each year.

Q. Pieces of fresh meat?

A. Cut out fresh ham. That is just a guess, but not too far.

page 314 } Q. The records show that Mr. Pulley had a stroke in 1955. Since that time has he not through his son, Mr. Robert Pulley, continued to buy hams from you?

A. Yes, sir.

Q. In approximately the same quantity and number, or more or less?

A. Just about the same quantity.

Q. How have your business relations been with them, satisfactory, or fair?

A. Very good.

Mr. Chappell: I make the same request to excuse this witness as I did Mr. McKinney.

The Court: Yes, Mr. McKinney, you may be excused.

Mr. Chappell: If it please the court, the *compainants* rest.

Arthur Shands.

Mr. Moyler: Judge, just a couple of minutes, please. Your Honor, please we would like the record to show that at this time we make a motion to dismiss the bill of complaint on the ground that the evidence does not disclose the accurateness that should be attained, a definite sum, an amount on which the court could give judgment, and that the plaintiff has not met the burden required by the law in establishing the case.

Mr. Chappell: If the court wishes to be heard, we will be glad to respond to that.

page 315 } The Court: Do you wish to argue that motion? I will overrule that motion.

Mr. Chappell: The reason I phrased it that way, I didn't want to infringe on the court.

Mr. Moyler: We except, Your Honor, and in due time we will attempt to argue it, with authorities.

Mr. Woodward: I would like to call Mr. Shands as an adverse witness.

Mr. Parker: If the court please, we invite him to establish him.

Mr. Chappell: I don't know whether the court reporter took that down, the rest of it. I want the record to show that both sides summonsed Mr. Shands.

The Court: It is a question whether he can be examined as an adverse witness.

Mr. Parker: Yes, sir.

The Court: Of course there is nothing before the court that would indicate he is an adverse witness.

Mr. Parker: That is just what I am getting at.

ARTHUR SHANDS,

having been first duly sworn, was called as a page 316 } witness for the defendant and testified as follows:

Examined by Mr. Woodward:

Q. You are Mr. Arthur Shands?

A. Yes, sir.

Mr. Parker: I object.

Mr. Woodward: What is the objection?

Mr. Parker: May I have a ruling of the court?

The Court: The ruling of the court is, Mr. Shands is not an expert witness as to anything, as it would appear from the record. He cannot be questioned as an adverse witness.

Arthur Shands.

Q. You are Mr. Arthur Shands?
A. Arthur D. Shands of Richmond, Virginia.
Q. What is your occupation?
A. Certified public accountant.
Q. How long have you been such?
A. I held a certificate since the latter part of 1943.
Q. Have you been practicing continuously since the latter part of 1943?
A. With the exception of about seven or eight months during 1947.
Q. Do you have any firm, or anything of that kind?
A. I am now connected with the firm of Shands and Donahue.
Q. Is that a partnership?
A. Yes, sir.
page 317 } Q. And before you engaged in your profession yourself with whom did you work?
A. Well, my prior partnership was Shands, Carter, Lewis and Parker, and then I practiced a while on my own; and for five years I was on the staff of Elkins and Durham, in the City of Richmond.
Q. Will you state whether or not you had occasion while you were working with the Elkins firm to examine the books of the Bain estate?
A. Yes, sir, I did.
Q. Over what period of time have you been familiar or had any connection with the auditing of the books of the estate of Thomas L. Bain?
A. Since 1943, the beginning of '43.
Q. And what other members of the Bain family have you done accounting work for?
A. Mr. Robert F. Bain, Senior, Mrs. Marion T. Bain, Jack P. Bain, Robert F. Bain, Junior, Mr Harry Lee Bain. Mrs Elizabeth Richardson, and a small piece of accounting work for Mr. Franklin Bain in Albany, Georgia.
Q. Over what period of time does that extend, Mr. Shands?
A. From '43 until—1943 until—I believe Mr. Robert Bain died in '47. Mrs. Marion Bain and Robert F., Junior discontinued my services, I believe it was for the year '54.
page 318 } Q. During the course of your accountancy work for these periods, did you have occasion from time to time to come in contact with the estate of Thomas L. Bain?
A. Yes, sir. If it please the court, I didn't finish answering Mr. Woodward's question just before that. Then I

had the estate of T. L. Bain, prepared the information from Mr. Pulley's reports for one more year, and did the work for Jack Bain for one more year, and Mr. Harry Lee and Mrs. Richardson. Then I was discontinued in doing any work for any of the Bains at that time, I think in '56, '56 or '57.

Q. Now in connection with your work for the parties, did you from 1943 to 1954 or '55 have occasion to examine or go over the books of the Thomas L. Bain estate from year to year?

A. Yes, sir. Of course I went over them in '43, and then when Mr. Robert Bain died, Robert Bain, Senior, in '46, and Mrs. Marion T. Bain and I were appointed administrator, I had occasion to go over the books at that time; and since then I, since '50, oh, since about 1950, I think, I have always gotten the information from Mr. Pulley in Ivor, and I looked at the books to the extent that I thought necessary.

Q. Mr. Shands, I hand you Plaintiff Exhibits 6 to 10, inclusive, for the years 1951 to 1955, inclusive, purporting to show in the first four sheets of each of the exhibits income report for the year 1951 and ask you to examine those for the moment.

page 319 } A. You want me to look over them one at a time?

Q. Have you seen those reports before. or reports similar or identical to them?

A. It seems to me I have. I can't say positively unless I check with the records in my file.

Q. Assuming they are the same as the original records—

A. I would say I believe them to be the same.

Q. Did you take those sheets and make up any reports for the Thomas L. Bain—

Mr. Parker: Ask what he did, please. This is your witness.

Mr. Woodward: Make your objection.

The Court: I think that is leading. If you ask what he did.

Q. What did you do with respect to the income tax reports of the Thomas L. Bain estate and the other Bain parties which you represented with respect to the other four sheets of the exhibits to which we have just alluded?

A. Mr. Woodward, to answer the first part of your ques-

tion, there was never an income tax return prepared for the estate of T. L. Bain, at any time in which I did the accounting work for the estate. Now this summary of information was prepared by me.

Q. Upon what was your summary based?

page 320 } A. Entirely—Strike that. It was based on Mr. Pulley's reports. Now I don't say entirely on his reports, because you will notice in the back here is a depreciation schedule, and we kept that running from year to year. Of course Mr. Pulley didn't report to me the amount of depreciable assets he had each year, but the additions, he reported the additions, and he reported sales; and of course the fully depreciated items we eliminated, or I eliminated from this schedule, and I certainly believe it to be an accounting of Mr. Pulley.

Q. Would you consider that or not as an account stated each year?

A. Yes, sir. It was not in exactly the form in which fiduciary accounts are filed, but I would certainly consider this as an *accounted stated.*

Q. In what period of the year did you do your work upon Mr. Pulley's report?

A. Along in January, February, and we had gone on into March; and I believe in one year in which the Bains had a tax case, I believe it was in April before we were able to complete the information.

Q. Now where did you do your work principally or partially upon Mr. Pulley's report?

A. Well, wholly in Richmond and in Ivor.

Q. At that time did you have access, or was access given to you to audit the records of the Thomas L. Bain estate?

page 321 } A. Mr. Pulley has given me everything I have asked of him. He has never refused, and never gave me the slightest idea he was withholding anything from me. If he had, I would have immediately withdrawn from the engagement.

Q. Now will you state whether or not the various parties interested in the Thomas L. Bain estate had knowledge of these reports and of your work?

A. Yes, sir.

Q. Was there ever any question raised by any member of the—any participants in the Thomas L. Bain estate, as to the authenticity of the accessible accounts?

A. Just one minute, Mr. Woodward. I have been ques-

tioned, I don't recall when, but several times, how did I arrive at that much income. I recall that distinctly.

Q. What explanation was given to that, Mr. Shands, when they asked that question?

A. It was prepared according to information which I obtained in Ivor.

Q. What was done with the preliminary rough sketch of your report, if you made such?

A. I made what we captioned as a tentative profit and loss statement, and I know Mr. Harry Lee Bain got a copy. No, beg pardon. I know I sent one to Mrs. Marion Bain. I think Mr. Pulley got a copy. I am not sure whether I sent him one or not. I know he got a final copy.

page 322 } Q. Now what corrections were made, if any, with respect to the report as rendered by Mr. Pulley?

A. I never knew of any.

Q. Did they ever make any objection or inquiries to any accounts Mr. Pulley rendered?

A. Not that I know of. Now the only time that I was ever present was not during this period at any meetings they had between the interested parties, and some of the interested parties with Mr. Pulley was before the period under which this suit is being maintained.

Q. Now after the rough sketch or draft had gone to Mrs. Marion Bain and Mr. Harry Lee Bain individually and as trustees, would you state whether or not this formal statement was made up pursuant to the original rough draft?

A. Yes, sir.

Q. Would you state whether or not a meeting was held with any members of the Bain family and Mr. Pulley each and every year to consider the report that was made?

A. I was informed—

Mr. Chappell: Beg pardon.

Q. By whom?

A. That a meeting was held.

Q. Who so informed you?

A. I think Mr. Harry Lee Bain.

Q. And do you know the purpose of that meeting?

page 323 } A. It was to go over the report and to—The meetings I attended, to determine how much money to pay Mr. Pulley and how much money

to distribute to the beneficiaries. Now that was before the period under suit.

Q. Now in the period which is evidenced by the statement which you have in your hand, would you state whether there was a disposition made in each year beginning with 1951 right down in '55?

A. I don't think I can do that through '55, but I can do it through a part of this period in which to compute the cost basis of the heirs' interest, the beneficiaries' interest in their business organization. It was necessary for me to obtain from Mr. Pulley the amount of distribution, and if you will notice in some of these reports—I don't know which one it is—the computation is made on the basis of their interest in this estate, based on the estate tax returns, the adjustment of the estate tax returns, and information contained in these reports, and information received from Mr. Pulley as to the cash distribution.

Q. Now where did all the information come from originally, Mr. Shands, as contained in the first four sheets of this report?

A. From Mr. Pulley.

Q. Do you know what the source of Mr. Pulley's information was?

A. Well—

page 324 } Mr. Parker: You are asking how Mr. Pulley got this?

Mr. Woodward: I asked the source of Mr. Pulley's accounting.

Witness: As an accountant, I consider that he took it from the books, and whenever I checked the total back to the books, it was the same as shown on a ledger.

Q. Now Mr. Shands, is it possible, I will ask you as an expert, is it possible to keep any real internal control of a business of that nature having to do with a lot of farmers and also their requirements and with sales over the counter to maintain any internal control over the books in a single entry bookkeeping?

A. I don't think so, but I want to continue on in the answer. Internal control involves more than books. I wouldn't consider that any place, any business that I know of would have adequate control with a single entry set of books. Now with internal control, it means checks, one person checking on another, such as cash receipts would come in; one would

receive the checks, the other would credit the accounts in the books. That is the thing that internal control, that I wanted to see down there for years.

Q. Would you state whether or not such subject matter was discussed with any of the interested parties?

A. Yes.

Q. Do you recall with whom or when?

page 325 } A. I recall Mr. Harry Lee Bain, Marion Bain and Elizabeth Richardson, and I think with Jack Bain.

Q. Now what was your suggestion to them with reference to a different form of bookkeeping system?

A. They needed a system of bookkeeping that would accurately record the results of their transactions and in which there would be some element of, maybe not complete control, but some element of internal control.

Q. And what was the reply of Mr. Harry Lee Bain?

A. Sometimes he didn't give a reply, and I recall once that he told me that it would cost too much.

Q. Did he ever draw any comparison between Mr. Pulley and anybody else with reference to the business at hand?

A. I didn't understand your question.

Q. Did Mr. Bain ever draw any comparison between Mr. Pulley and anybody else with reference to the business at hand as compared with other people to operate that business?

A. Yes, he told me one time he didn't know anybody that he could get to make as much money as Mr. Pulley would make, to make as much money for them.

Mr. Parker: You wanted to change that quickly, didn't you?

Witness: I just want there to be no misunderstanding on that point.

Mr. Parker: I understand.

page 326 } Mr. Woodward: You want to add anything to that?

Mr. Parker: No.

Q. Now, Mr. Shands, considering the net advances of seed and feed and supplies to the farmers, and the comparison thereof with the over-the-counter sales of that business, would it have been possible to have carried on the business without the use of a large amount of cash?

A. Yes, I think it would.

Q. How would—

A. I don't see any compulsion on that part, but he could have drawn checks. Now I know that in most tenants, in my experience, what little experience I have had with farmers, most tenants want cash money. They don't want checks. That has been my personal experience.

Q. Do you know whether or not that was the method that was pursued by Mr. Pulley in the operation of the business?

Mr. Parker: I think he can testify from what he knows from the books, but I don't believe it has been shown that he has been around him enough to know what the custom is.

The Court: He asked if he knows.

A. I must agree with Mr. Parker. I never saw him advance any cash.

Q. Was any appreciable business done over the counter in the commissary for the farmers?

A. When I was in there, I never saw a great
page 327 } deal of trade. I never saw many customers.

Q. If you can so indicate, would you state your estimate of the over-the-counter business done with the public as compared to the business that was done at the commissary with the farmers?

A. No, sir, I couldn't do that.

Q. And the books would not reflect that either, would they?

A. No. I never saw any segregation between cash and charge sales.

Q. Now will you tell the court whether or not your report that you made to show the information that was given to you from the commissary by Mr. Pulley was used as a basis of the computation of the income of the various parties and beneficiaries of the Thomas L. Bain estate, for whom you made tax returns?

A. Yes, sir. I don't know whether use was made of those that I did prepare tax returns for. It was sent for to be used for that, but for what purpose they used them, I don't know.

Q. Who sent them to them?

A. From our office, someone in our office.

Q. Was there ever a time in your experience with Mr. Pul-

ley in which you challenged the good faith of his transactions?

A. No, sir.

Q. Would it be possible, now, considering the
page 328 } type of books that was kept there, and the
customs and uses and practices obtained in the business from the time you first knew it in 1943 down through '55, would any ten accountants go in there and come up with the same figures as the others?

A. Frankly I don't think so. That is certainly my opinion, you would get ten different answers. Your Honor, I would like to state it is my understanding of the accountants, they don't have benefit of privileged communication. I have to testify to everything of which I have knowledge.

The Court: Yes.

Q. Mr. Shands, have you prepared, at the request of Mr. Moyler and me, income tax reports for—

Mr. Moyler: Excuse me. Do you have a copy of this? We would like to introduce this in evidence, and we want one and want counsel to have one and the court to have one.

(The witness produced papers which were distributed to the court and counsel for the complainants.)

Q. Mr. Shands, at the request of Mr. Moyler and at my request, did you make up a statement of the available cash of Douglas H. Pulley and his wife, as indicated by the Federal Income Tax returns for the years 1947 to 1955, inclusive—'56 inclusive?

A. Yes, sir. I would like to point out that I recognized that this statement has limitations in that it does not contain
any personal expenses. It does not contain any
page 329 } expenditures for investments or fixed assets. This
is what I consider not exactly, but near to be the cash that Mr. Pulley had available for use. Now in this statement it is prepared from my copy of the returns which I prepared for him, and it also contains profit from partnership, partnership in which he was a partner. They are the limitations which I see.

Q. Now will you show, will you read the available income for the respective years, for the years 1947 to 1956 inclusive, into the record?

Arthur Shands.

A. Mr. Woodward, you asked me for available income.
Q. Available cash?

Mr. Parker: If the court please, I have not objected to the introduction of this Exhibit, because I think it is very illuminating, but the comments of the witness on available cash, available income from Mr. D. H. Pulley for these years, has absolutely no bearing on the accounting insofar as Mr. Pulley and the estate was concerned. I didn't object to the introduction, because I think that is all right, but as to the income, that has no bearing on that.

Mr. Moyler: We think, Your Honor, it has a very pertinent bearing on the income. They have charged fraud in this bill of complaint, and that Mr. Pulley defrauded the Bain estate out of a considerable amount of money. One of the indicias of fraud is absence of assets of the per-
page 330 } son charged sufficient to do things and buy things that he has subsequently acquired, and that is one of the indicia of fraud oftentimes alleged; but if a person can show that he has acquired by legitimate and proper means property and assets of his own, that strongly rebuts any presumption of fraud, and the Court of Appeals has so decided; and we feel that it is proper for us to show that Mr. Pulley was a man of business talents and success in various fields of endeavor, and that these returns show the various sources of his income that he got from T. L. Bain Estate dividends, what he got from gains of sales, capital assets, sales of stock.

The Court: I think these papers are admissible, and I think that counsel may examine Mr. Shands with reference to them.

Q. Mr. Shands, I ask you again if you will read from your records which you have prepared for us for the years, statements, the amount of available cash for the respective years for the years 1947 and '56 inclusive; that is, the cash available for Mr. Pulley?

A. For the year 1947, $27,979.13; forty-eight, $21,306.38; forty-nine, $5,882.00 even; nineteen-fifty, $22,711.91; fifty-one, $36,016.11; fifty-two, $26,443.68; fifty-three, $39,119.83; fifty-four, $38,846.18; fifty-five, $68,786.12; fifty-six, $160,495.75. I would like to say by my reading the odd dollars and cents, it is merely the way it is calculated. I don't
page 331 } think I have as available cash down to that fine point, but it does show to me that he had substantial money flowing through his hands.

Arthur Shands.

Q. Now for each of those years would you read what was gotten from the Thomas L. Bain estate of his available cash?

A. These computations show for the year 1947, $3,000; for the year 1948, $3,100; for the year 1949, $3,600; for the year 1950, $4,350; for the year 1951, $4,987.45; nineteen-fifty-two, $4,691.16, and $1,975.28, the portion of his commissions which he reported as for sale on real estate of the estate of T. L. Bain; fifty-three, $4,800.36, and commission for sale of real estate T. L. Bain, $1,627.50; fifty-four, $5,089.05, and from sale of real estate, commission, $3,187.50; fifty-five, $3,979.76, and $1,956.50 commission on sale of T. L. Bain real estate; and 1956, nothing from the estate of T. L. Bain.

Mr. Woodward: I would like to introduce the other into the record.

The Court: This would be Defendant Exhibit Number 2.

Mr. Chappell: What is that called, Judge, Defendant Exhibit B?

The Court: Yes, Defendant Exhibit B.

Q. Now will you state whether reports of the income to the Federal Government to the State of Virginia were based upon the statements which you have rendered here by Mr. Pulley?

page 332 } A. No, sir. The reports, these statements were prepared from the manuscript copy of the tax return which I prepared for Mr. Pulley, both State and Federal.

Q. Were they filed in the taxpayer's office?

A. They were sent to him for filing. I didn't file any of them for him. However, I do know that one was filed. Back in '54 or '55 he forgot to sign one of them, and I had to fill out additional forms. I cautioned him he forgot to file them, because he had letters from the Internal Revenue stating he hadn't signed, and I prepared necessary forms for him to sign and he sent in. It was the year 1954, I think.

Q. Mr. Shands, will you state whether or not you also prepared tax returns for H. P. Beale and Sons?

A. Yes, sir. No, Mr. Woodward, I would like to make a slight correction. I prepared partnership, State and Federal partnership returns. With a partner, you know, they aren't taxed.

Arthur Shands.

CROSS EXAMINATION.

Examined By Mr. Parker:

Q. Mr. Shands, I am rather interested in this last exhibit which you brought out here. Can you take that exhibit—I have a copy up there—and tell me just what bearing does that have on any accounting by Mr. Pulley with page 333 } the Estate?

Mr. Moyler: We object to the question, because it raises legal questions—

Mr. Parker: From an accounting standpoint.

The Court: From the accounting standpoint, I think it is proper.

A. Well, Mr. Parker, the only thing I see there is the same amount of salary was shown on Mr. Pulley's report. and the same amount of commission. These were not based on T. L. Bain reports.

Q. This report doesn't have anything whatever to do or an attempt to show these reports in this Exhibit, anything about the amount of money received by Mr. Pulley for the T. L. Bain estate or the amount of money paid out by Mr. Pulley for the Bain estate, does it?

A. I don't think so.

Q. You know it doesn't.

A. Positively.

Q. So as far as accounting, Mr. Pulley and the Bain estate are concerned, your Exhibit Number B just has nothing to do with whether money received was accounted for or not?

A. The connection I see of it with this, it shows—

Mr. Parker: I believe Mr. Woodward is objecting to that, so I will withdraw the question. Now if the court please, we have seen this for the first time a few minutes page 334 } ago. Can we have a slight recess?

Mr. Woodward: It is all right, as far as we are concerned.

(The court then, at 11:30 a. m., took a recess until 11:45 a. m., at which time it reconvened.)

Examined By Mr. Parker (Cont'd):

Q. Mr. Shands, these income tax data that you have don't show or attempt to show in any way where Mr. Pulley ob-

tained the money which he used in buying the property from which this income came, does it?

A. I don't know, Mr. Parker, whether it does or not.

Q. Will you look at it and tell?

A. I don't know whether this money, what he bought the property with. I believe in the account he had the money available.

Q. But do those reports show where he got the money to buy his various stocks and bonds?

A. No, sir.

Q. Doesn't show at all?

A. It shows where it was available.

Q. But it doesn't purport to show where it came from?

A. Yes, sir, up above.

Q. To buy the original stocks and bonds that he has?

A. Well, some of these stocks were bought during the period under—I have the returns here.

page 335 } Q. No, sir, but can you tell me right there where the money came from to buy any single stock or any single farm, the income from which is reported on that return?

A. No, sir, because I didn't prepare it with that object in mind.

Q. All you reported was income?

A. For what I figured the approximate available cash.

Q. So you don't know whether it came from the money that he should have paid the Bain estate or from other sources? You have no idea? You can't tell from those sheets, can you?

A. Mr. Parker, I have never had anybody knowingly to report to me income he didn't receive.

Q. I wasn't talking about income. I was talking about money to buy that property, from which the income came?

Mr. Moyler: Your Honor, he doesn't know exactly.

Mr. Parker: Well why doesn't he say so?

A. I have not made a net worth computation.

Q. Are you doing the accounting for Mr. Pulley now?

A. Yes, sir, and ever since about '46, and did before then, when I was with Mr. Elkins. We have made no change.

Q. Will you prepare and submit to the court a statement of the net worth in the first year you represented him in 1947, and also at the end of 1955?

A. I don't have such a statement as that, Mr. Parker.

Q. But you could get it from Mr. Pulley, couldn't you?

Arthur Shands.

A. I don't think so. Those net worth state-
page 336 } ments are laborious, tedious work-out affairs, and
I get something I hope to settle with the Internal Revenue to make the best deal I can.

Q. Let's put it this way. A statement of the balance sheet of Mr. Pulley of December, 1955, would not be hard to trace, would it?

A. I think it would.

Q. It would?

A. Yes, sir.

Q. You mean a statement of his assets and liabilities would be hard to strike?

A. Yes, sir. I think it would take—Well, I hate to estimate, but I know it would take over a month. I am confident of that.

Q. And you have never attempted at all to carry his net worth at the time you started working for him—with him—and the net worth now?

A. No, sir. I have never been called upon to do it, never engaged, never been paid to do it.

Q. What is this item at the bottom of this sheet, or each of these sheets called available cash for the year 1947, and then continued?

A. It is the result of the computation in this statement, and I consider it available cash, approximately, not exactly.

Q. Does it have anything whatever to do with
page 337 } his income tax return?

A. Oh I think so. The cash had to flow to give him this income.

Q. Do you show on his income tax return when you file that form the available cash?

A. No, sir.

Q. Then it doesn't have anything to do with the return, does it?

A. It is prepared from the return.

Q. But it has nothing to do with the return itself?

A. To answer you, Mr. Parker, we don't file this with the tax return. We don't use it with the preparation of the return. This is based on the returns which I prepared.

Q. I think it is very interesting. Will you look at your 1955 sheet?

A. Yes, sir.

Q. And tell us how much stock—that is stocks and bonds, I assume—you have got it listed as stocks. What is the total amount that was sold that year?

Arthur Shands.

A. I can't tell from this statement, but I can from the tax return.

Q. Well, don't you have an item up here called gain on sale of stocks?

A. Yes, sir.

Q. Isn't that $15,651?

page 338 } A. Yes, sir.

Q. Don't you have an item down here called cost of stock sold?

A. Yes, sir.

Q. Isn't that $13,046?

A. Yes, sir.

Q. Wouldn't that tell you the amount of stocks sold during that year?

A. No, sir. It will tell you what he received for the stock. If you add the two together—

Q. I didn't ask you what stock. I asked you what in the amount—

Mr. Woodward: We object to the counsel cutting the witness off. The stenographer can't possibly get it.

Mr. Parker: You are a past master of that, and I will give him a chance to answer.

A. And I will answer as soon as I can, $48,608.38.

Q. That is what it showed in '55. Let's see. The cash available jumped up that year too, didn't it, from $38,000 in '54 to $68,000 in '55. Now let's look in '56. He sold an amount of stock. What amount did he sell in 1956?

A. He sold $77,256.21.

Q. And how much timber did he sell in amount that year?

A. He sold $45,034.95. That is not exactly the

page 339 } sales price, because the expenses were deducted.

Q. That is close enough.

A. In round figures.

Q. And $160,000 in cash, isn't it?

A. It was cash available to him indicated by this statement, cash available to him during the year. I don't mean to indicate he had all that at one time, one place, but it was during the year.

Q. You state it was indicated by the statement, but you have no reason to doubt the statement?

A. No, I have no reason to doubt the return.

Q. I notice in 1955 you have an item of $3,071 interest at 4

percent. How much capital would it take to get that amount of interest?

A. I didn't get that.

Q. About $75,000 at 4 percent?

A. In '55?

Q. Yes. Four times seventy-five would be $3,000. That's about right, isn't it, interest received that year?

A. Yes, $75,000 at 4 percent would be $3,000. You haven't asked me this question. I hate to volunteer it, but at 6 percent it would be only $50,000.

Q. You get 6 percent around here?

A. I don't know, but I think he gets 6 percent.

page 340 } Q. Now if you refer, Mr. Shands, to the exhibits that you first testified from, I believe you testified that these pages and the other, the first four pages were information obtained from Mr. Pulley. Is that correct? Each one of the exhibits?

A. I am not familiar with the exhibit.

Mr. Chappell: Plaintiff Exhibits 6 through 10.

Q. The first five pages of Exhibit Number 6, I believe you say you got from Mr. Pulley?

A. Mr. Parker, I want to answer your question, but I didn't get any of these from Mr. Pulley. What I got from Mr. Pulley is those statements in my file. I don't mean to be facetious about it.

Q. Did you make up those first five pages yourself?

A. No, sir.

Q. Well, did you get copies, four or five?

A. Five, you counted.

Q. Well, did you get copies similar from Mr. Pulley?

A. I think I did, but I would have to compare these from ones I got, to tell whether they are copies.

Q. Didn't you testify when handed Exhibits—

A. I think it is. I—

Q. And it is on those first five pages that you base the balance of those sheets in '51 prepared by you. Isn't that what you testified to?

page 341 } A. I didn't compare these statements from those. I prepared them from what Mr. Pulley gave me.

Q. Did Mr. Pulley give you anything different from copies of those first five pages?

Arthur Shands.

A. I am forced to say I don't know. I think this is the same, but I don't know.

Q. Then if he gave you anything different from that, where is it?

A. In my files. I don't know whether it is different or not; but I can't testify under oath that these are the accounts, the report from which I prepared my statement. Now I can't do that, Mr. Parker, and I will be glad—

Q. You have testified that those reports constitute an accounting?

A. I testified that the reports that Mr. Pulley gave me constituted the basis for my preparation.

Q. Are those reports any different from those?

A. I don't know.

Q. Will you get them and find out? Don't you know?

A. No, sir, I don't know.

Q. Then look in your files and look.

A. It will take a while to do this.

Mr. Moyler: Where are your files?

Witness: In my car.

Mr. Moyler: I don't want to make any statement here that my friend can in the least conclude or infer that
page 342 } I am trying to explain to the witness what I mean to say, but as I see it, the point has been raised by Mr. Parker as to whether or not these figures in these statements are the same figures that Mr. Pulley turned over to Mr. Shands as a basis for working up these other data, and I understood the witness to say he assumed it was the same data. Now predicated upon the assumption it is the same data, I don't see why we can't go ahead.

Mr. Parker: I am perfectly willing to admit it is the same.

Mr. Moyler: And if it develops that it is not?

Mr. Parker: I am perfectly willing to admit we assume they are to be the same.

Witness: I think these are the same.

The Court: You have a right to call for the original.

Mr. Parker: Yes, sir, but counsel for the defendant presumes it is the same.

Witness: I think so, Mr. Parker, but I don't know.

Mr. Moyler: The exhibits there are matters of record the plaintiff furnished us with. I assume those you introduced in evidence are the same that we have.

Mr. Chappell: They are indeed, but they are not those that Mr. Shands is talking about.

Arthur Shands.

Mr. Moyler: I have the thought the witness wants to safeguard always, that if he looks at—

page 343 } The Court: He just didn't want to swear that they were the same.

Witness: No, sir, I don't want to swear to it.

The Court: But he said he thought they were the same.

Witness: They certainly appear to be the same.

Q. Now the last part of that last batch of sheets for '51, sheets prepared by you in your office, are they not?

A. Well, again, Mr. Parker, they certainly appear to be.

Q. Mr. Shands, I believe you have testified that they were copies of sheets prepared by you and sent to the Bains, or one of the beneficiaries for the purpose of attaching to the income tax returns?

A. I think I testified, and I am sure I testified I sent copies, but I don't know that these are the same.

Q. Can you look at them and tell?

A. They appear to be. They appear to be done by the Bain stationery where we had the work done. They appear to be.

Q. You are certainly unfamiliar with things that you have just testified as being the reports that you submitted to the Bains and Mr. Pulley, and do you consider that as an accounting between the Bains and Mr. Pulley? You are unfamiliar with them. Now why are you so unfamiliar, when you testified before when you said they are it? You testified from those to your attorney that these were the ones, or similar ones?

page 344 } A. I said they appeared to be. I think they are.

Q. So you don't know whether anything was sent?

A. Yes, sir, I know what was sent, but whether these are the ones sent, I don't know.

Q. Do you deny they are?

A. I don't deny and don't say.

Q. It has been testified they were received by Harry Lee Bain. If he says they were received from you by him, do you deny that?

A. I have no basis on which to deny. I presume they are, if he said so.

Q. For what purpose did you prepare the sheets, copies of which are attached to each of those exhibits relative to the income and distribution in the Bain estate for each one of those years?

A. Mr. Parker, I don't understand your question.

Arthur Shands.

Q. For what purpose did you prepare those sheets?

Mr. Woodward: What sheets are you talking about?
Mr. Parker: The ones he prepared.
Witness: We prepared them for furnishing to be attached to the copies of returns which we prepared. We prepared them to send to the beneficiaries, which we did not prepare the returns. We also sent one to Mr. Pulley, and we kept several in the office, and whenever it was necessary in the course of my accounting work to try to arrive at a basis,
page 345 } at a cost basis of the property, which I don't know whether you recall, Mr. Parker, that Mr. Heberle of your firm and I handled the case. It was necessary to go back to these figures and try and prepare on.

Q. In other words that goes back to the cost of the property when you sell for capital gain and capital loss, and it goes back to depreciation, doesn't it?
A. It goes back to sale of property, but it does not go into the depreciation schedule.
Q. The depreciation schedule was made up from the record you had?
A. From year to year.
Q. In other words when all that was prepared in connection with the filing of the income tax returns of the individuals in the Bain estate?
A. Yes, sir, but I made different uses of it after it was. It is a retained copy.
Q. Your different uses were similar to the ones you were talking about to Mr. Heberle in my office?
A. Yes, sir.
Q. That is, you had some discussion about income tax returns and you referred back to the figures at that time. Is that correct?
A. No, I referred back in order to make computations.
Q. It was in connection with tax matters?
A. Yes, sir.
page 346 } Q. Now leaving those for the time being, you made a statement a short while ago that you didn't think there could be any internal control in so-called single entry bookkeeping. Am I quoting you correctly, sir?
A. Yes, sir.
Q. Is there anything about a single entry system that would in any way prevent the person keeping that system from mak-

ing accurate entries in books reflecting each transaction that took place?

A. Mr. Parker,—

Q. Will you answer my question?

A. Are you speaking of Bain, or a hypothetical question?

Q. I am talking about a single entry bookkeeping system.

A. Not Mr. Pulley's books, T. L. Bain's.

Q. I will come to that in a minute.

A. Let me see if I understand your question. Is anything in a single entry set of books that would prevent internal control?

Q. No, sir.

A. Well, that is the way I understood it.

Q. Prevents a person keeping those books from keeping accurate entries of every transaction that took place?

A. The human error.

Q. That applies in double entry or any other system of bookkeeping, doesn't it?

page 347 } A. Yes, sir, but double entry, when you make one wrong very probably you will throw yourself out of balance, and in single entry you will never get out of balance.

Q. There you also get the human error, do you not?

A. You get the human error, up pops off balance. You look for it, and I think most accountants will agree with me that a double entry set of books is the only set to keep.

Q. Is there anything in the single entry book—and now we will refer to the books that were kept by Mr. Pulley—is there anything in that that would keep him, if he had advanced ten dollars to a farmer for expenses, from writing down in that book cash advanced to Mr. "X," ten dollars? Is there anything in that system that would keep him from doing that?

A. Anything that would keep Mr. Pulley from writing down ten dollars?

Q. Cash advanced to Mr. "X," ten dollars?

A. No, no more than would keep him from doing anything else.

Q. Correct, sir. Now is there anything, if Mr. X brought in ten hogs and he purchased them and paid for those hogs, is there anything, say, to keep him from putting down there, purchased, in this book, in these books that he is keeping, paid to Mr. "Y" ten dollars or twenty dollars for hogs purchased? Is there anything that would keep him from doing that?

Arthur Shands.

A. I will have to answer *you* question, Mr.
page 348 } Parker. Mr. Pulley—

Q. I didn't ask you what he did. I asked you, is there anything that kept him from doing it?

Mr. Woodward: He has a right to answer in his own way.

Witness: Mr. Pulley as being an accountant, he has told me, "I am just a poor bookkeeper. I am no bookkeeper at all." Now if he doesn't understand the fundamental principle, that would prevent him—

Q. Mr. Shands, let's not argue the case. (To the court I would like that statement be disregarded, what Mr. Pulley told him. (To the witness) Now go ahead and answer my question.

The Court: I think that statement as to what Mr. Pulley told him should be stricken.

Witness: It was my information that Mr. Pulley was a very poor bookkeeper, and being a poor bookkeeper—

Mr. Parker: Wait a minute, Mr. Shands. I am making an objection, Your Honor. Information about Mr. Pulley being a poor bookkeeper has nothing to do, does not have anything to do with the evidence in this case.

Mr. Moyler: Your Honor, this man was working for Mr. Pulley—the T. L. Bain estate at the time he did this work; and he stated that they put another system in there, and I don't think Mr. Parker has a right to confine this witness' testimony to what Mr. Pulley did or didn't do, any more than
he did with regard to the system invoked and the
page 349 } information brought home to management and
employer in regard to it.

Mr. Parker: May I suggest, Your Honor, that first the witness is volunteering this statement because my question was, was there anything in this system of the way that the books were kept there that prevented a person keeping the books from entering in the books the fact that he had paid twenty dollars to Mr. Y for the purchase of hogs. That is the only question I asked him.

The Court: I think that question should be answered.

Witness: If he means could he write, Mr. Pulley could write. We know that.

Q. And there is nothing peculiar in his books that would keep him from making that entry?

A. No more so than would keep any other bookkeeper from making an improper entry, if they are not good bookkeepers.

Q. Nothing peculiar to the system to keep him from doing it, no block on that system to keep him from making that entry, as I just said, is there?

A. No, sir.

Q. Now you said. Mr. Shands, that your experience as a farmer—I suppose you are experienced as a farmer?

A. Right, as a country boy.

Q. So am I; and you say that most of the tenants want cash?

page 350 } A. I testified both of mine wanted cash, those I used to have.

Q. Do you know how far this bank is in Ivor from the Bain store?

A. Yes, sir.

Q. How far?

A. A hundred yards, I reckon.

Q. So it wouldn't take much in effort if he were paid in check to go down and get his cash, would it?

A. If the bank were open.

Q. Now you have stated that—One other thing too. I think the evidence shows here that cash was kept on hand at the store at the time. He could have paid in the very check there that he got right there if the bank wasn't open, and cashed it in the store?

A. Yes, sir.

Q. So he could have been paid by check, and he could have gotten the cash too, at the same time, in most cases?

A. Yes, sir.

Q. Now you made a statement that I was a little interested in about the fact that in your belief that if you had ten accountants down there and studied the books and records, and so forth and so on, from 1943, I believe it was—maybe you said '51; I am not sure—that they would come up with ten different answers?

page 351 } A. Yes, sir.

Q. That is largely true of any corporation or business venture of any material size?

A. Yes, sir.

Q. You say that you attended one of the meetings. The evidence shows that after Mr. Bain received those Exhibits from which you have testified, being Exhibits 6, 7, 8, 9, 10, that they had a meeting at the first of the year to discuss the filing of the income tax returns and the general statements

that were sent to him by your firm, including the top five sheets in the '51 Exhibit, and you belive to be copies of the next four or five sheets, that they had that meeting about once a year, after receiving those sheets. Did you say you attended one of those meetings?

A. Not during that period, not during the period '51 through '55.

Q. Actually prior to that time the only time you had a meeting with them was when you were one of the administrators of Mr. Bain's estate?

A. Yes, sir.

Q. That was in connection with Mr. Robert Bain's estate?

A. Yes, sir. I thought that I brought that out in my testimony.

Q. So you have never attended one of these lit-
page 352 } tle friendly meetings down there?

A. No, sir.

Q. Now Mr. Shands, I am very much interested in your statement that this batch of papers constitutes an accounting, or settlement of accounts between the parties. I want to know were there any other papers in addition to those shown on Exhibits 6 to 10 sent to these parties by your office at the time you said this consisted of a settlement of accounts between the parties. Were there any other papers sent to them?

A. No, sir. My letter of transmittal just transmitted the tax return or the information which we prepared.

Q. So the top of that first sheet, Exhibit Number 6, is headed what?

A. Income report, 1951.

Q. Right. And those sheets then are all of the sheets that you said are sufficient to constitute an accounting between the parties. Is that correct?

Mr. Parker: Don't prompt your witness.

A. We consider there to be an accounting between the parties. It was certainly my understanding that was the accounting. It is not in the form I would liked to have had.

Q. Now what did you do in connection with those figures
insofar as—Well, what was your auditing pro-
page 353 } cedure relative to this so-called accounting be-
tween the parties?

A. My auditing procedure, if it may be called such—

Q. I wonder too. Go ahead.

A. —was to spot check a few things, see if they agreed

with the books, also usually a question as to when was a certain depreciable asset acquired and when was certain depreciable capital property sold, and their payment to Internal Revenue. I don't know whether that constituted half of the payment or whether it constituted whole payment, whether to submit half the payment as wages which should have been deducted from salary, Social Security represents half or whole.

Q. Everything we talked about was income tax matters up until now?

A. The information is basic.

Q. For income tax records?

A. Mr. Parker, as an accountant, we don't prepare income tax returns unless we have reason to believe that it is based on true figures, or the best of figures. If we have any idea they are wrong, we don't prepare tax returns just to be preparing them, and come up with some other income.

Q. You have prepared income tax returns, have you not, by statement furnished you by your clients, as you say, from the statements furnished by your clients?

A. I didn't say that.

page 354 } Q. You don't make an audit of his statement to you. You simply take his statement and prepare the form?

A. And if I see anything wrong in that, I ask questions and get it correct and proceed from that point.

Q. If you know it is wrong?

A. If it appears to be wrong.

Q. But if it appears to be all right. then you took Mr. Pulley's statement and figures and proceeded on that basis?

A. Yes, sir.

Q. Then did you check Mr. Pulley by checking his tenants' accounts?

A. No, sir.

Q. Did you check Mr. Pulley's cash receipts that have been shown here by getting the bank deposits to see whether everything that had been, that figure, had been deposited in the bank?

A. No, sir.

Q. Did you check all of the disbursements that he said he made there to see that each one was disbursed in accordance with his statement that they had been disbursed, check the checks against them to see if they would total up?

A. No, sir.

Q. I assume that you checked the bank balance which you show, I believe, on page 5?

A. No, sir.

page 355 } Q. You didn't check that?

A. No, sir, I didn't check that. I followed the same procedure, if I may amplify. I followed the same procedure that the predecessor who did this work used.

Q. For income tax purposes?

A. Yes, whatever purpose he may have had for it.

Q. How can you say, as an accountant, Mr. Shands, that without checking any single one of the things or making any verification of the matters I have just been talking about, that that was an accounting or auditing of the affairs of Mr. Pulley?

A. It appears to me that this, that he represents this as his account of stewartship for the year.

Q. I see, but you have made no attempt to check the accuracy of any of those things. You took them at a hundred percent?

A. I did what was apparently satisfactory with the client. I did what I was called upon to do.

Q. What as to fixable income tax?

A. Well, it goes without saying that the figures, I must not think they are wrong, or I wouldn't use them.

Q. Correctly. They may be entirely correct from an income tax standpoint and reflects everything, but does that mean that the income that he reports was actually taken and put in the bank to the credit of the estate?

page 356 } A. No, sir. I don't know where it was put.

Q. And you don't know even that that bank balance was there, do you? You can't verify that?

A. I certainly don't intend to convey the impression that I do.

Mr. Parker: I think that is all.

RE-DIRECT EXAMINATION.

Examined By Mr. Woodward:

Q. Mr. Shands, is the system that you found at the T. L. Bain store the same system that has been in vogue ever since Mr. Bain lived, or back in 1943?

A. There was a change.

Mr. Parker: I didn't catch that question.

Q. Was the same system in vogue as was in vogue in 1943 in subsequent years?

A. Mr. Woodward, there was a change. I wouldn't say in system, but there was a change in booking of tickets rather than writing everything, and date.

Q. You mean using ticket numbers instead of various items?

A. Yes.

Q. That is the only change that resulted?

A. That is the only change I can recall.

Q. Now Mr. Shands, was this system of keeping books a system to be balanced, or was it just a series of memorandums?

page 357 } A. A series of memorandums. I refer to them as memorandum accounts.

Q. Now in Mr. Toler's report he makes a statement that, he made a statement to His Honor just before he got off the stand that he considered the books pretty accurate. I noticed in his statement of November 27, 1956, that, as you have variance with that statement, I ask in making Mr. Toler's report whether—

Mr. Parker: In making Mr. Toler's report?

Mr. Woodward: —in making Mr. Toler's report does it show that other than the fact cash was traced in the Bain estate, any credits to which Mr. Pulley is entitled?

Witness: I didn't make a careful examination of the report, but just from a cursory review, it appeared to me that all it did was bring money in the bank.

Q. You have heard what these gentlemen have done, Hardy and Lewis, A. M. Toler, or A. M. Toler's father. Having heard their testimony, would such be—Based on what they had to say, would such be considered adequate auditing of any business?

Mr. Parker: If Your Honor please, we don't know whether he was in court. He said he hadn't examined the audit of Mr. Toler's report except very casually.

The Court: He can state whether he audited it.

Mr. Parker: Yes, sir, but he also said he had

page 358 } not examined that audit except very casually.

Mr. Woodward: He said a cursory examination.

Arthur Shands.

The Court: I think he can testify what he knows about the examination, and he can give his professional opinion.

Q. On your examination of Mr. Toler's report, this examination that you have made, does Mr. Toler give Mr. Pulley credit where credit is due, or does he trace just money in the hand of the Bain estate?

A. It appears to me that he just traced money in the hands of the Bain estate.

RE-CROSS EXAMINATION.

Examined by Mr. Parker:

Q. And you haven't examined it enough to trace it out of the hands of the Bain estate, have you?

A. No, sir.

Q. So you don't know anything about it?

A. I know what I have seen.

Q. And the same is true of Mr. Hardy's audit; or have you seen that at all?

A. Just glanced through it.

Q. As a matter of fact, on these sheets that you have gotten here and have been filed as exhibits—you have been looking at them—in some instances I believe you told me

page 359 } in Richmond, this one instance, so far as you can remember, you didn't come to Ivor in connection with the matter, didn't you, but these were sent to you and you made them in Richmond?

A. No, sir. I think you are mistaken. I did not say that. I don't recall telling you that; but if I did, I was mistaken, and I didn't intend to tell you that.

Q. But you did come down on most of them?

A. They were used in other engagements along with this one.

Q. In other words you had other clients in Wakefield, and so on?

A. Yes. I think when I was with Mr. Elkins, it proved unsatisfactory. He sent the information out there because it means a series of phone calls, or letters, or a trip down there, and I would much rather pick it up in Ivor.

RE-DIRECT EXAMINATION.

Examined by Mr. Woodward:

Q. Can you state whether an account made up by auditors

or by certified public accountants, or by anybody else, which is limited in its scope can ever give a true picture of the standing of the parties?

A. I don't think so.

The Court: I think that we just as well adjourn for lunch.

(The court then, at 12:30 p. m., adjourned until page 360 } 1:45 p. m., at which time it re-convened.)

Mr. Moyler: Your Honor, I have two letters from doctors in regard to Mr. Pulley's condition. We would like to introduce them in evidence.

Mr. Parker: If the court please, we have no objection at all.

The Court: We will mark those Exhibits "C" and "D."

Mr. Moyler: The defendant introduces a letter from Doctor E. M. Babb, Ivor, September 6, 1958, addressed to the Honorable William Old, respecting the physical condition and condition of general health of Mr. Douglas H. Pulley, the defendant, and ask that it be received and marked as Exhibit C; and I will also introduce a letter from Doctor F. Ivan Steele, Windsor, Virginia, dated September 4, 1958, regarding the same subject matter, and ask that it be filed as Exhibit D.

FRANK P. PULLEY,

having been first duly sworn, was called as a witness for the defendant, and testified as follows:

Examined by Mr. Woodward:

Q. You are Mr. Frank P. Pulley, Junior, page 361 } brother of Douglas H. Pulley?

A. Yes, sir.

Q. And you are an attorney-at-law residing at Waverly?

A. Yes, sir.

Q. Mr. Pulley, who was your father?

A. Frank P. Pulley, Senior.

Q. And was he seized and possessed of any land at the time of his death?

A. Yes, sir.

Q. By what name was it called, the farm?

A. I think we call it Cedar Lawn Farm. It was his home place, Boykin Farm, sometimes called.

Q. And near what place is it?

Frank P. Pulley.

A. Two miles out of Ivor. Well, he had some other farms too.

Q. Did your father leave the home place to any particular one of his children?

A. No, sir.

Q. How many children were there?

A. There were eight of us at the time of his death.

Q. Now who acquired the home place?

A. Those eight children.

Q. And who acquired it from them?

A. Douglas. My brother Douglas bought it from us.

Q. And do you recall approximately when he
page 362 } bought it from the heirs of your father?

A. I think it was about in 1928, around that, to '30. I forgot exactly.

Q. Do you know how or in what manner he arranged to pay for it?

A. Well, I got a note for my share, and I think the other children got notes for their share.

Q. In the course of the years, were these notes paid off by your brother?

A. Yes, sir.

Q. How many acres are in the home place?

A. At that time it was over 500 acres. I don't know exactly.

Q. Do you know whether he subsequently sold any parts of it?

A. No, he had not sold any part of it.

Q. How many acres were cleared in that piece of land?

A. About 160 or 165 acres, I think.

Q. Has he cultivated that land ever since he got it?

A. Yes, sir.

Q. Now the bill of complaint in this cause alleges that it involved parcels 1, 2, 3 and 4; and it is alleged that your brother, Douglas Pulley used the Bain estate money for the purchase of this property. Do you know of any particular piece of property that he bought within these
page 363 } four pieces, and the origin of the money that he bought it with?

A. I think so. The home place, Douglas purchased that before Mr. Thomas Bain died.

Q. Which place?

A. The home place, Cedar Lawn.

Q. Go ahead.

A. Douglas and my brother Thomas owned, and had

owned for a number of years, two farms; and in November, 1946, he and Thomas had a partition deal in which one of the farms, 180 3/4 acres was allotted to Douglas, and the other farm to the brother, Thomas.

Q. Now which parcel is that; what is that known as?

A. Well, we always knew it as the Boykin Tract, and sometimes they called it the Clayton Tract, but it is the Boykin Tract.

Q. I hand you the bill of complaint and ask you if the parcels we are now talking about are described in either one of the four descriptions attached in the bill of complaint?

A. No, neither one of them. That is not in there.

Q. Then that left him with the parcel that he and Thomas owned together?

A. That's right.

Q. And he divided that?

A. That's right; no money of any kind.

page 364 } Q. Now there is a parcel shown as Parcel 2 of 250 acres adjoining the property of Thomas Drew and Clayton Francis, being the same property conveyed to Douglas H. Pulley by deed of Harry L. Bain, July 2, 1948. Do you know anything about the Drew farm?

A. Yes, sir, I do.

Q. Will you explain that transaction to His Honor?

A. That was purchased. The deed was dated July 2, 1948. It was recorded August 31, 1948, Deed Book 95, page 373. In consideration alleged in that deed, it was 250 acres. It was $23,000, purchased back from the Bain estate.

Q. Do you know the origin of the money which went to pay the Bain estate for that particular piece of property?

A. Yes, sir.

Q. How did it arise?

A. I examined Thomas, Douglas' books, check books, and in October, 1946, Douglas, Thomas and I owned what was then called the Ivor Ham Company.

Q. And where was that located?

A. That was located in Ivor.

Q. And who is Thomas?

A. That is one of my brothers.

Q. All right. Go ahead.

A We owned one-third each. Sometime in the page 365 } middle of the summer, June or July of 1943, we negotiated—

Q. In '43 or '48?

A. I purchased it in 1943.

Frank P. Pulley.

Q. Sometime in June or July?

A. Negotiated a sale in 1946, June or July, 1946. That sale was consummated and the money was divided. The price was paid and divided in October, the 1st of October, 1946, each of us receiving one-third of the purchase money. I received $29,817.85; Douglas received the same amount, and Thomas, of course, the same amount.

Q. Now do you know what Douglas did with that money?

A. Went down there and looked at his deposit books, and I found that he had added enough to that $29,817.85 to make it $30,000, and had deposited that in a savings account in the Bank of Windsor.

Mr. Parker: If the court please, I dislike intensely to say anything concerning my friend, Mr. Frank Pulley; but he is testifying from records which I don't think would be the best evidence of this. There is no way in the world for us to check the fact these deposits were made or kept there. or anything of that sort.

The Court: He is stating what he knows of his own knowledge.

Mr. Parker: Aren't the records the best evidence?

page 366 } The Court: I think probably the records would be the best evidence, but I don't think it would be necessary. If you want to bring in all those records, I imagine that would be in the county, wouldn't it?

Witness: That was in Southampton.

The Court: You could bring the records in.

Mr. Parker: No, I wasn't talking about those records. Of course I understood that Mr. Pulley is a lawyer, and a very able one, and I know that he can testify as to whether the deed was recorded or not, but when he testifies that the savings account had been there, and had been asked to—

The Court: I think he can testify as to his knowledge along that line. He is speaking about the affairs of his brother, which he speaks as having knowledge of. He is not testifying from something—he is testifying from something that was known to him at the time.

Mr. Parker: He is testifying as to what the records of the bank show.

The Court: He is testifying what he knew was in the bank. He is not testifying from the bank records.

Mr. Parker: Yes, sir. He said he saw his savings book.

The Court: If he saw the savings book, he saw it.

Frank P. Pulley.

Mr. Parker: If I saw a contract, I saw it; but I don't believe the evidence of seeing the contract would be the best evidence.

The Court. I overrule your objection.

page 367 } Mr. Parker: We save the point.

Witness: That $30,000 deposited in the savings account, the Bank of Windsor, I checked on in his account and I found that some eight or ten months after that he withdrew $10,000 of that $30,000, and the records show that he purchased—and I went to see him and he told me the same thing—that he purchased Smithfield Packing Company debentures, or preferred stock, or whichever you want to call it, in that amount, and used that $10,000 for that. Sometime in the early part of August, 1948, he withdrew the remaining $20,000 and put it in a checking account, and he had some with that in there. His balance showed some $26,000 or $28,000. At that time he gave Bain a check for $23,000, $20,000 of which came from that savings account, plus the interest that he drew interest on, and plus what he had in the bank prior to that date.

Q. I thought there was a parcel number 1, 93.35 acres situated near Crumpler's Crossing joining the Norfolk and Western Railroad, which was conveyed to him by you in, on September 19, 1950. Could you tell us what was the consideration for that?

A. Yes, sir. I examined the records to be sure I had the dates right. This was a transaction of my own, and recorded over here in Deed Book 99, page 414. There is a

page 368 } deed from me and my wife to Douglas H. Pulley, conveying 93.35 acres located in Southampton County, across 460 from the Drew Farm. That deed was dated September 19, 1950, recorded September 22, 1950, and the consideration was $7,000.

Mr. Parker: Was that seven?

Witness: Yes.

Q. Do you know the origin of the purchase price?

A. I went to look at his book, his check. He sent me his individual check for $7,000.

Q. Do you recall what bank that was drawn on?

A. Yes, sir. That was on the Bank of Sussex and Surry.

Q. Did that pay the purchase price in full?

A. That paid the purchase price in full. At that time he had a balance, in accordance with his check book, of some a

little over $8,000, and the check was deducted from it and left the balance.

The Court: What year was that?
Witness: That was 1950.

Q. Now there is another parcel, a lot joining the Norfolk and Western Railway and the county road, being the same property conveyed to D. H. Pulley by Junius H. Pulley by special commission. Do you know the consideration of that piece of property?

A. Yes, sir. I had a title examination of the records here, and that deed was recorded in Deed Book 100 of page 369 } page 115, which Junius H. Pulley had special commission to convey to D. H. Pulley, what was known as the Nevin property there across from Thomas Bain's store across the street, right opposite it.

Q. Does it consist of a store and a lot?

A. It consists of a lot and store business in Ivor, lot and store building and a small cottage house, in consideration for $700.

Q. Do you know how it was paid for?

A. It appeared from his books that he gave a check for that amount.

Q. What bank?

A. That was likewise the Bank of Sussex and Surry.

The Court: What was the date of that transaction?
Witness: The date of that transaction was December 21, 1950.

Q. Now there is another lot shown as parcel 3 adjoining the Norfolk and Western Railroad and the Smithfield and Jerusalem road, approximately conveyed one acre to Douglas Pulley by Shelley Doel, Junior. Do you know the purchase price of that?

A. Yes, sir. The purchase price of that was $1,350. The deed was dated April 26, 1947. The check records show that he paid that—I think that payment was made between the 1st and the 9th of May, 1947.

page 370 } Q. Do you know the origin of the $7,000 and the $1,300? Do you know the origin of it?

A. No, sir. except that I know that he had his bank, his bank book showed that he had a balance going along down

over a period of time up to that time sufficient to pay the check.

Q. You mean as to both checks?

A. Both checks, yes, sir.

Q. Now all of these transactions which are mentioned as parcels 1 through 4 took place prior to 1951?

A. Yes, sir.

Mr. Woodward: Take the witness.

CROSS EXAMINATION.

Examined by Mr. Parker:

Q. Mr. Pulley, I am not going to ask you many questions. I understand you have not been too well. Is that correct?

A. Well, I am feeling somewhat better today.

Q. Good. That is fine. I have a brother. I am very close to him, and he has right many investments. I believe you explained that Douglas H Pulley is your brother?

A That's right

Q. Now I wouldn't know, if my life depended on it, where my brother got the money to buy his first investment. Do you mean to say you do know where Mr. Douglas H. Pulley got those bank balances from to pay that $7,000 check and to buy his interest in the Ivor Ham Company, and do various things? Do you know of your own knowledge where he got all that money from?

page 371

A. I didn't say I knew of my own knowledge where he got that money, except in the case of the purchase with the $22,000.

Q. And that came from the Ivor Ham Company?

A. Yes, sir.

Q. And do you know when he got that money to buy the Ivor Company?

A. He bought his interest in that eight or ten years before that time.

Q. But you don't know where the money came from?

A. No, sir.

Q. You know enough about your brother's affairs, like I would mine, that I know where he got the money to buy all these things. You are not saying that, are you?

A. No, sir, with the exception of the $20,000. I know where that came from.

Q. That's right. You know where that came from, but

the other and where he got it, the Ivor Ham, you don't know where that came from, do you?

A. I didn't say I knew where he got it.

page 372 } Q. You don't know anything about where he got that money to buy the $100,000 worth of stock he sold last year. you don't know. I believe you were originally an attorney in this case before you suffered a heart attack, were you not?

A. Yes.

Q. In this case?

A. No, I don't know that I was actually an attorney in this case. I went to Richmond.

Q. You came to my office for a conference as an attorney at that time, did you not?

A. Yes, to see what I should report, and I think I told you I came to report.

RE-DIRECT EXAMINATION.

Examined by Mr. Woodward:

Q. Mr. Pulley, what income did Mr. Douglas Pulley receive from his partnership during the seven years previous to his partnership, if you have the record there to show?

A. Give me those other papers there. In 1944 there were three of us received, each of us, received dividends of $1,-344.20.

Q. From where?

A. From the dividends from the operation of

page 373 } Ivor Ham Company.

Q. And do you know how much you received in 1945, 1946, 1947?

A. That '46, that was in the other check.

Mr. Parker: I think the information is already in that income tax information, if you want to look at it.

Witness: In 1945 I received and he received a like amount, $878.

Q. How much did you receive in '46?

A. In '46, that is in that division of that $29,000.

Q. That is, he drew $29,817.85 like you did?

A. Yes.

Q. Do you know how much his interest cost him originally in Ivor Ham Company?

A. No, sir, I don't. He bought an interest, his interest

in it when they first built the Ivor Ham Company, and that was ten or twelve years before 1953.

Q. And was it operated successfully at the time he sold it?

A. Oh yes.

Q. Now since the sale of the Ivor Ham Company, would you say whether or not your brother has continued in the sale and disposition of meats?

A. Yes. I think all three of us did individually.

Q. He put up the best ham, didn't he?

page 374 } A. Well, I guess so.

Mr. Woodward: Take the witness.

Mr. Parker: No more questions.

CHARLES G. THEDIECK,

having been first duly sworn. was called as a witness for the defendant, and testified as follows:

Examined by Mr. Woodward:

Q. You are Mr. Charles G. Thedieck, certified public accountant?

A. Yes, sir.

Q. How long have you been doing public accounting?

A. All my life. I started out accounting work when I was seventeen years old in 1912.

Q. How long have you been a certified public accountant?

A. Since 1931.

Q. As a whole, have you worked for a firm with national recognition?

A. Ernst and Ernst.

Q. What large enterprises in this area have you

page 375 } also worked for?

A. Planters Nut and Chocolate Company.

Q. What position did you hold there?

A. Comptroller.

Q. In what states are you certified as a public accountand?

A. In North Carolina and Virginia.

Q. Will you tell us some of the concerns that you have audited for of some notability?

A. P. H. Hedding and Company, Brown-Williams Tobacco Company, Fulton Robinson Hotels, Hunt Ridge Lumber Company, Planters Nut and Chocolate Company, Portsmouth

Paving Company, South Truck Line. I have more of them if you want them, Circle Food.

Q. Where are they located?

A. San Francisco.

Q. Now Mr. Thedieck, did you at my request, and at the request of Mr. Moyler, examine the records of the Thomas L. Bain estate in Ivor dealing with the years 1951 to 1956?

A. Yes, sir.

Q. Were any specific instructions given to you other than to get the true facts, as far as you could?

A. No, sir.

Q. Did you have access to anybody else's work records?

A. Well, Hardy and Lewis offered me their
page 376 } records, but I didn't use them.

Q. Why?

A. Well, I felt that it was better to make my own audit. that I would not likely be influenced by what anybody else did.

Q. When you made the audit, did you have access to the records there, or were you required to get the records from someone else?

A. Well, they brought the records there. I didn't get them the first day, and then I think several days later they brought them, and Mr. Hardy told me that some of the records were yet in Hopewell, and some were at Mr. Toler's office in Richmond.

Q. Well, now you eventually got the records that were available in order to make your audit?

A. Yes, sir.

Q. Now Mr. Thedieck, will you describe to His Honor the nature and character of the records that were kept for the years 1951 to 1956, explaining any differences in the measure of their keep or the way in which they were kept in respect of years?

A. Well, for the year 1951, the entries were made in a customer ledger in detail; that is, it was for merchandise purchase or cash advance, it was ear-marked so you could
identify what it was; but for 1952 and the sub-
page 377 } sequent years, their method was to charge to
these customers' accounts by ticket. The ticket there would be included in any cash advanced plus merchandise. The aggregate amount would be on the ticket, but not detailed in the ledger account you could identify unless you had that ticket. Now Mr. Hardy volunteered the information, and he said that all the tickets were not there,

that they couldn't find them either; so on that basis I could not make the same amount of the ledger account that I made for 1951.

Q. Did you find the entries on the ledger by ticket number rather than by specific item?

A. That is right.

Q. Was there any substantial difference in the amount of business that was done in the various years?

A. Well, I didn't go into that part of it.

Q. Now will you state whether or not you verified the bank account for 1951?

A. No, I accepted the bank account as shown by the books. All the accountants that worked on the thing seem to have made those verifications, and for the last year, 1956, I reconciled that bank account with the bank statement. I didn't verify the account in the end one, that is, the entries for balance January 1, 1951, or December 31, 1951, or December 31, 1952, '53, '54 or '55.

Q. Well, the sum total was verified and recon-
page 378 } ciled?

A. Yes, sir.

Q. And that includes from '51 through '55 or '56?

A. Fifty-six.

Q. Now Mr. Thedieck, what was the nature of the record that they kept there with reference to whether it was by memory or single entry or double entry? Just what was the nature of the record?

Mr. Parker: Just a minute, Mr. Thedieck. If it please the court, I would like I believe at this time to interpose an objection to that part of Mr. Thedieck's report, and also that part of his testimony which deals with the year 1956. So far as we are concerned the year 1956 is not under discussion here. No allegation has been made about it in the complaint, no request for this court to consider.

Mr. Woodward: We think we are on firm ground, Your Honor.

Mr. Parker: After all we object to anything pertaining to the year 1956 on the further ground that the evidence also shows that as far as the year 1956 is concerned, it wasn't even under D. H. Pulley's management and he had nothing to do with it.

The Court: It may be relevant as a matter of comparison. It is not involved, of course; but as a comparison, I see a relevancy.

Charles G. Thedieck.

Mr. Parker: We still object because it is en-
page 379 } tirely under a different management. It is not
a comparison as to D. H. Pulley.

The Court: It may be a comparison as to the business, the province of the business.

Mr. Parker: We object on a matter of principle. Actually I think it would be very beneficial to our case, but we are confusing the issue.

Mr. Woodward: We will withdraw any question with reference to 1956.

Q. Now Mr. Thedieck, an examination of the books from '51 to '55, inclusive, what did you find was the amount that was paid out by Douglas Pulley to the beneficiaries of the Thomas L. Bain estate?

Mr. Parker: If Your Honor please, I know Mr. Thedieck is testifying from what appears to be a report. Is that a report, Mr. Woodward?

Mr. Woodward: This is a copy of the report.

Mr. Parker: If it seems that he is testifying from a report, the report should be offered in evidence.

Mr. Woodward: We offer the report which is now before Your Honor as Defendant Exhibit "E."

Mr. Parker: Now I would just like for the record to show that I object to that exhibit because, if the court will remember, Mr. Woodward objected to an entry of the document
that he hadn't seen the other day until just be-
page 380 } fore the day, or the day it was introduced; and so
I would like now to object to this report on the ground that counsel for the defendant did not make this report available to counsel for the complainants until the afternoon of the first day of the trial, and then only on request by counsel for the complainants; and having made that objection, sir, and put that in the record, I would like to withdraw it and simply say that I do object to that part of the report for 1956 and would like to save the point on that.

The Court: Yes, I understand the part involving the year 1956 is withdrawn, and the objection is overruled.

Mr. Parker: Yes, sir. I save a point. The objection is overruled, and I save a point on that.

Q. Mr. Thedieck, look at page 2 of Exhibit E in the case and tell us what amount was paid by the Thomas L. Bain

estate to Douglas Pulley and distributed to the heirs of the Thomas L. Bain estate in 1951 to 1955. inclusive?

A. You mean from the operation of the Thomas L. Bain estate, not including the real estate?

Q. Not including the real estate.

A. The heirs got $159,444.55.

Mr. Parker: What page are you looking at?

Mr. Woodward: Pages 6 and 7.

Q. Now as to the real estate, how much did the heirs receive for the years 1951 to 1955 which passed

page 381 } through the Thomas L. Bain estate?

A. Sale of real estate and timber—

Mr. Parker: What page is that?

Mr. Thedieck: Pages 15 and 16.

Q. How much did you say?

A. It is $376,761.71.

Q. Then the two of them together paid them over a half million dollars in five years?

A. That's right.

Q. Now going back to the audit as you made it, was it made from the books, or was it made from hearsay?

A. It was made from the books.

Q. In your examination of the records, Mr. Thedieck, did you find any evidence of defalcation, misappropriation, or anything showing a deviation of the Estate's money to anybody else?

A. No, sir.

Q. Now you have mentioned that the beneficiaries received, I think you said $149,000?

A. I said $159,000.

Q. In these five years?

Mr. Parker: Mr. Woodward, I call attention to the fact I think that is an error.

Mr. Woodward: Maybe it does include '56 in that?

Witness: The heirs got nothing from the

page 382 } books in 1956.

Mr. Parker: I beg your pardon.

Witness: That's all right, Mr. Parker. All of us make a mistake.

Charles G. Thedieck.

Mr. Parker: So I have found out. I will see if I can help you.

Q. Now the other gentlemen, Hardy and Lewis, and Mr. Toler charged Mr. Pulley up with items which did not have any supporting invoices, they say, but which were paid by check. Did you check over those items?

A. No, sir.

Q. Is there any reason to doubt in your mind that checks payable to the trade vendors or vendees were spurious in any way?

A. No, sir.

Q. Now in the accounting field, when you run across checks which had been paid to a payee extraneous to the business, and it is apparent on its face to some outside party, it is customary to demand an invoice rather than the check?

A. Well, I wouldn't say that in all cases it is customary to demand an invoice. If a check is made payable to the vendor, and it is apparently in the usual course of ordinary business, the fact that the invoice is not there is not an indication at all that the payment is spurious.

Q. Is it a usual practice to accept such?

page 383 } A. With me it is.

Q. Now Mr. Pulley—or Mr. Thedieck—mention has been made about charging ten per cent to the account of various parties and dividing it up by 110 per cent to find out this, that and the other on these other accounts. If it is charged on the ticket or on the account and it came into the estate, would it possibly affect Mr. Pulley?

A. No, sir.

Q. Why not?

A. Because it is already charged to the customer. In numbers of instances on the ledger the advance is on the account; and then, in addition, another charge is on the account for that ten per cent of service charge.

Q. Does the estate get the payment on the full equity?

A. When the customer pays the account, the estate gets the full payment.

Q. Now you mentioned the fact that all of the tickets were not there. What did you find to be the custom with reference to the tickets after the customer paid the account?

A. I talked with Mr. Pulley and asked him about that, what was their custom, and he said that in a number of cases the customer would request the tickets after he paid

the account and they would give them to him and he would tear them up, the customer would. and in other cases that if they had no use for the ticket after the account
page 384 } was paid, they would destroy it.

Q. Did you find any instances in which tickets were available and which were not debit or credit?

A. I didn't check into that.

Q. What difference did you find between the accounting as you found it, irrespective of anybody else, and the bank balance that Mr. Pulley had in the bank for the year 1951?

A. I accepted that figure that was on the books as being correct, that the balance of January 1, 1951, that was the starting point. Then I used all the figures that the books showed as being the balance at the end of a year until the year ended December 31, 1956; and I reconciled that bank balance as shown by the books with the bank statement, and there was a little discrepancy, I think, of fifteen dollars and some odd pennies.

Q. And that applies over the entire period?

A. Yes, sir, except the balance as shown by the books was right at the end of each year.

Q. Now Mr. Thedieck, in employing you to make this audit, were you limited to any special purpose or any particular reason, or were you given *carte blanche* authority to find out the figure?

A. I was just told to go up there and make an audit of the books, with no particular purpose in mind except to see just what the picture was with reference to the
page 385 } cash they had on hand.

Q. And did you find that?

A. Yes, sir.

Q. As represented in this audit?

A. Yes, sir.

Q. Mr. Thedieck, in your experience as an accountant, is there anything unusual about making cash purchases in country stores?

A. Not only in country stores but in all small retail grocery stores, a number of purchases is made in cash over the counter. In a number of cases you go in a country store, they have a barter system. A man will come in and trade a few eggs and take home canned goods or something. A store of this type, and one and similar ones, they are informal in their transactions, and they don't carry records indicating all the transactions. In other words, to get a real picture of the thing, let's say this: A man starts

off business in the beginning of the year and he has a box and he has a certain sum of money in it, and most small merchants feel this is satisfactory. I put in this box all I take in, and take out to pay expenses and purchase merchandise, which is the same thing. If I got more money in the box at the end of the year than I had at the beginning, I made that much. If I have less, I must have lost that much, allowing for any personal expenses that might page 386 } come up; and country merchants and small retail stores are noted for carrying their money that way.

Q. In the purchase of farm produce. when an average farmer brings produce in to get a piece of money, is it usual, or have you known it to be that a farmer would bring in his produce, what he was selling, and bring in an invoice?

A. I would say it would be most unusual if the farmer did bring in an invoice with what he was selling.

Q. While you are running tenants like they were run here—I believe there were seventeen farms—is there anything unusual in having cash transactions with tenants and letting them pick it up?

A. I beg your pardon.

Q. Where you have seventeen different farms, like they have here, is there anything unusual about having advances in cash to the tenants?

A. No, sir.

Q. Now with reference to the Hardy and Lewis accounting, and the accounting of A. M. Toler, would you consider them complete audits so as to give the complete picture, or would you consider them a partial view of a situation for a special purpose?

A. Well, in the absence of complete records, I would say it was partial.

Mr. Woodward: Take the witness.

page 387 } (The court then, at 2:41 p. m., September 10, 1958, took a recess until 2:50 p. m., at which time it re-convened.)

CROSS EXAMINATION.

Examined by Mr. Parker:

Q. Mr. Thedieck, I was interested in some of your statements some while ago as to what you would do about your

accounting so far, and when you said that you didn't see any necessity of checking checks in payment of matters or asking for invoices to—when the name of the payee was stated on that check, I believe you stated that, that you were willing to accept that at face value?

A. Yes, but let me tell you this. You will appreciate the fact that all matters relative to them—I think Mr. Hardy and Mr. Lewis will tell you the same thing—they all of necessity must be amplified. The records at that place were not completed. It was admitted by Mr. Hardy to me—

Q. I want to confine your testimony to what you said, not Mr. Hardy and Mr. Lewis, just what you know.

A. I know, but if you do not have the complete record there, then you do the next best thing you can. When I found, after I had gone through 1951, the records were not

page 388 } there, it was impossible to find them, that it was impossible to analyze their records from 1952 forward, the next best approach to follow was, what was the difference between the cash at the beginning and end of any year and then add back to it any distribution that those heirs got.

Q. Now may I caution you, please sir, just to confine your answers to my questions, not argue the case?

A. I am not arguing the case. What I tried to do here—

Mr. Parker: If the court please, I asked a simple question.

A. I will answer you, but Mr. Parker, I don't mean any reflection on you—

Mr. Parker: I don't mind if you do.

Witness: I don't because I don't want you to cast a reflection on me, because I would resent it, and I imagine you would too, but when you have no records that you can audit, then it is necessary for you to do the best you can. Now if you will—

Mr. Parker: If the court please, may I ask him to answer my question?

The Court: What was your question?

Mr. Parker: My question was a very simple one, and I will repeat it. I understood him to say on direct examination that he did not look through that list of checks which were not supported by invoices, that he accepted those checks

Charles G. Thedieck.

page 389 } on face value because of the general type of the business, and therefore he didn't feel it was necessary to support them by invoice.

The Court: And he was trying to explain, from the condition of the records, why that was necessary.

Mr. Parker: I asked him if he said that.

The Court: Yes, and he said yes.

Mr. Parker: I was going to ask him another question.

The Court: All right. Go ahead and answer the question.

Q. You did say that, didn't you?

A. I think I did.

Q. Right, sir Now would you have said that if you had known that those checks were drawn on a bank account in which the person drawing those checks had his own personal funds mixed up with the funds of an estate?

A. There was no indication in those books that Mr. Pulley's personal funds were mixed in that estate. Mr. Pulley had an account with the estate where he bought merchandise from him for himself and for his tenants, and then paid the estate for the merchandise and for what the tenants got. Mr. Pulley's relation in that respect was just like any other tenant's or any other purchaser of merchandise.

Q. Well, he had some of his own funds in there, didn't he?

A. He may have had a credit balance in his account.

page 390 } Q. He had some of his own funds in that bank account, didn't he, to which he was entitled?

A. No. If he credited his account with funds that he had gotten from cash or from merchandise or anything he sold pending the final settlement, he had relinquished his funds to the estate; and when he paid himself off, paid his account out, the estate paid him or he paid the account whatever the balance was due.

Q. But all during that time some of those funds belonged to him personally, didn't they?

A. He had a credit balance. He was in the same position as if he had deposited the money in a bank. The money is to his credit at the bank, but in the possession of the bank. It is to his credit and withdrawn. He was in the same position here.

Q. That's right here, so part of the money was his and part was the estate's?

A. No, but not—I think you—I want to make sure that you

don't convey the impression that that money was in the estate, was, in like character the money was in his pocket.

Q. I don't know where he carried it. It might have been in his pocket. Apparently he did, or in the bank?

A. Before we get a little bit excited—

Mr. Parker: I am not excited.

Witness: I tell you, I believe that—

page 391 } Mr. Parker: You go right ahead, and I will sit down and wait until you finish testifying.

Witness: I just want to say this to you. I believe that everybody here is interested in doing what is right. All of us are. Now when Mr. Pulley's net increase in cash on December 31, 1951 was $4,178.58, but he made a non-operating expenditure, that is item—

Mr. Parker: If Your Honor please—

Witness: Wait just a minute.

Mr. Parker: He had opportunity to explain this in detail on direct examination. I think we should keep this a little more responsive to my questions on cross examination.

Witness: I will try.

The Court: Of course we all realize that sometimes an answer to a question requires a certain amount of amplification.

Mr. Parker: Yes, sir, but when he starts on the report, something I haven't said—

Witness: Yes, sir, but what I am trying to bring out to the court—

Q. Mr. Thedieck, you have testified as to the custom concerning small country merchants and small stores and so forth and so on, taking out of the cash drawer what is left over; if there isn't anything left over at the end of the year, you lost that amount and so forth. What

page 392 } sort of stores are you talking about, little country stores?

A. Little grocery stores that handle everything on the basis of cash. I happen to be born in that situation. My father and mother kept one like that.

Q. How much cash did you have flowing through your mother's and father's store?

A. I would say in a year's time their sales might have mounted to as much as $100,000 or $150,000.

Q. If the evidence would show that this estate is worth

approximately $1,500,000, was your father's estate similar to that?

A. What was that?

Q. If the evidence in this case would show that this estate is worth approximately $1,500,000, was your father's estate similar to that?

A. No, sir.

Q. It was a very small amount, wasn't it?

A. I would say it was worth $150,000 or $200,000.

Mr. Woodward: We move that the question and answer be stricken on the ground that it has been testified that the amount of real estate is not in excess of $150,000, and further, we don't know what the estate is. We know that $387,000 worth of timber was sold off of it.

Mr. Parker: I ask if the evidence would show, and I am sure, Your Honor, that it would show that.

page 393 } The Court: Well, go ahead.

Q. So conducting a million and a half dollars corporation is a right big operation, isn't it?

A. If it was all moving back and forth in trade, but it isn't a big operation where you have $100,000 cash to operate some farms and a country store with. That isn't any bigger than the one my father had, on that basis.

Q. So you don't think the administration of farms and properties valued at $1,500,000, you think that is a little country store operation. Is that right?

A. I didn't say that. I said what they had for this man to operate with was $100,000 in cash. Of course he had farm land and stuff, but—

Q. The cash roll brought into the audit by Mr. Hardy and so forth, this account here was around three or $400,000 a year. Do you call that a small operation?

A. Well, it isn't an excessive or large operation.

Q. It is small to you then?

A. Well, it all depends on what experience you have had. I have had contact with two million several thousand a year. The relative handling of funds back and forth isn't as important as accounting for it.

Q. Now let's get back to your customer of a small country store. Have you audited any of them, any of the small country stores?

page 394 } A. Well yes, several.

Q. And will you give me the names of some

of those that you audited that were acting as trustees for somebody else?

A. I have made an audit for none that were trustees.

Q. You haven't audited any in a fiduciary capacity?

A. Oh, yes.

Q. I mean of stores?

A. No, sir.

Q. This is the first time you have been brought into something like this?

A. Yes.

Q. Now I believe you said that you didn't try to reconcile the tickets back to the books. Is that right, these tickets that had set cash and this and that?

A. Number of them were not there. I talked to Mr. Hardy about that.

Q. And so you just didn't try to reconcile any of them?

A. Well, if you couldn't reconcile all, what was the use of wasting your time on a few, or a half or seventy-five per cent?

Q. So, as a matter of fact, you didn't even check those tickets after the year 1951, did you?

A. I didn't check the tickets for 1951. They had no tickets for 1951. I didn't check them for '52 or '53.

page 395 } Q. Didn't check them at all?

A. No.

Q. I am interested in this audit report. Incidentally I notice that you start off in this audit report by saying "we." I will not object to that, I want to tell you now.

A. Well, he word "we" I think is used by accountants in the sense of—

Q. I am not objecting to that. Did you have anybody else with you?

A. No, I didn't.

Q. Please tell us, or tell the court, rather, what auditing procedure did you follow?

A. You have no procedure to audit, because you had nothing but memorandums. All I could do was take the memorandums, which was in the shape of books, and build up a record from them, as far as I could.

Q. All right, sir. Now let me ask you a few questions. When did you first get these books and records?

A. I forgot the exact date. I don't remember. Somewhere around the 1st of May, I think.

Q. If I say it was after the middle of May, would you say that was wrong?

A. You may be right. I don't recall. I can tell from my time sheet and audit.

Q. You didn't bring them with you?

page 396 } A. No.

Q. I believe you said Mr. Hardy and Mr. Lewis made them available to you, didn't you?

A. Yes. There was no lack of cooperation on anybody's part.

Q. If they say they made those books available to you after the middle of May, you would accept that, wouldn't you?

A. I would think so. I don't think they would deliberately say something that wasn't so. I knew his father long before he was born.

Q. I observe here that your report that you have filed and turned in is dated June 6, 1958. Is that correct?

A. That is right.

Q. And so the work you did on this case auditing, or whatever you call it, was done from the time you got those books to the time of this report. Is that correct?

A. Well, it took some time to compile the information, make the schedules, write the report, type it, and check it in my office. That is close enough.

Q. You did that before June the 6th though?

A. That is right, three weeks. I can tell you.

Q. Three weeks? You came up with the report that you filed here which purports to cover not only the five years about which Mr. Toler and Messrs. Hardy and Lewis have testified, but the sixth year, and you have com-

page 397 } piled all of within three weeks time? Is that correct, sir?

A. What I am trying to say to you, and if you will read the very first, probably the second paragraph in the letter, it tells you that the data for the years subsequent to 1951 were not available, and that they were dispensed with; so that is what I am trying to tell you, Mr. Parker, to try to get this over to you about this record, and what I think is the most feasible way to show what transpired. If you would let me do it, I think it would save the court and you and everybody else at least some time. Whether you want to accept it—Now look.

Q. I ask you a simple question.

A. I am sorry.

Q. Now prior to getting up this report that you have filed

here—and spent three weeks time on it—did you confer with Mr. Hardy and Mr. Lewis?

A. No, I did not.

Q. Did they confer with you at the time you were getting books and records?

A. He offered to get me anything. He would lend me anything he had. He offered to loan me his work papers.

Q. Did you confer with him?

A. No, just a casual conversation. It is the first time I had ever met him.

Q. I will change my question. You had a

page 398 } conversation?

A. Yes. "Good morning. If you want my records, we will be happy to have you use them."

Q. And Mr. Toler?

A. I never saw him at all.

Q. Did Mr. Hardy or Mr. Lewis give you any background of the case?

A. I think about the only thing that they talked to me, said to me—I am trying to refresh my memory now. A lot of tickets were lost. They couldn't find them, and I believe, I may be wrong. If you don't have all, a few won't do you any good. I believe that is what I said.

Q. I believe now you have just said, you just finished telling me that this report of yours did, no—"You say the detailing was, so far as 1951 is concerned, as shown on your report, but that you did not except by checking your cash balances at the beginning of the year and ending of the year, and so forth, attempt to make any detailed examination of the subsequent years?" Is that correct?

A. That is exactly right.

Q. Then there is no way at all to check the details of your work except for the year 1951. Isn't that correct?

A. That is right.

Q. Now let's talk about the year 1951, and what did you do? Let's take the steps that you did, I mean what you actually did; or maybe I can ask you what you

page 399 } did?

A. Analyzed the customer account form of the account for the year 1951 with relevancy to what was currency transactions. I wanted to try to establish what actual currency money flowed through there. That's all. I never made an examination of the checks, or anything like that.

Q. Didn't check or verify the checks, disbursements?

A. No. It was indicated in the ledger account, advanced

by check, or whatever it may be, and I accepted that as being all right.

Q. But didn't you in making an audit—

A. We were not making an audit, Mr. Parker. I am trying to tell you right off the bat that we were trying to reconcile some figures to show the position, and nobody—

Q. Exactly. Some figures to show Mr. Pulley was clear of this estate?

A. No, I didn't. You ought not to do that.

Mr. Woodward: There is no indication that he was sent for any particular purpose but to—

Mr. Parker: I withdraw my question.

Mr. Chappell: May I say you recall these same type of questions were asked by the other counsel, of the witnesses.

Witness: I know I am highly nervous, but I have been in two wars, and I have been injured in both of them. I am liable to be excitable. If you had spent six or eight months in a hospital getting over some wounds, page 400 } you would get excitable too. I want to explain that I am trying not to get excited.

Mr. Chappell: We want to say that counsel is not trying to infer anything improper about your work, or anything.

Mr. Parker: I am sure of it.

Q. You say you didn't check the amounts disbursed by the check. Did you check the receipts as to the deposits in the bank?

A. I accepted what the books said that was deposited in the bank.

Q. In other words you didn't check to find if the books said whether they were actually in the bank or not?

A. If you reconciled with the bank, they were probably more likely in there.

Q. Just answer the question.

A. Yes, but you have to amplify that.

Q. And did you go through 1951 and analyze all of those customer accounts and tenants' accounts?

A. Yes, sir. I think there is a list of them here. On page 10, starting with page 10, there is a detail of cash receipts of each customer and for each farm. There is an accounting here that was received in the estate from each farm, page 10 all the way through.

Q. Well, then you did analyze those accounts, but this is

just for 1951?

page 401 } A. That's right. You don't do that for the subsequent years, Mr. Parker.

Q. And did you match the invoices against the disbursements?

A. No, sir. I did not match the invoices against the disbursements.

Q. You didn't try to do that?

A. No, sir. It wasn't practical. They weren't all there.

Q. You didn't match up invoices that were there, did you?

A. No, I didn't match any of them.

Q. Fine. Thank you, sir. And I believe you said you did not analyze the deposit slips to see that the money the books said went in the bank actually went in the bank from time to time?

A. That's right.

Q. Now you say in paragraphs 2, 3 and 4—they are not numbered, but they are on the first page of your letter—I believe you said that right much of that was on information. Is that correct? I believe on the third paragraph "we are informed."

A. I talked to Mr. Pulley, Mr. Robert Pulley, but I talked to him about it to try to find out just how they handled the transaction.

page 402 } Q. And so you got the information that you referred to in those paragraphs from Mr. Pulley?

A. That's right.

Q. Now Mr. Woodward has made much of the fact that the balance in each year has just increased since 1951, and therefore it shows that this is going on fine, and he said it has increased, and all you have got to do is look back and you see that in 1957 there was $153,000, which was $73,000 more than it was the preceding year. Now will you please refer to page 54 and '5 and tell me what the increase was between the cash on hand on December 31, 1951 and December 31, 1955, which is the period under discussion?

Mr. Woodward: I think it is fair to show what is discussed and add to it.

Mr. Parker: You didn't do that the other day.

Mr. Woodward: You didn't call my attention to it.

Witness: Did you say you want the balance at the end of the year?

Charles G. Thedieck.

Q. No. To give you the background, you were here; you heard him. Mr. Woodward said we are just increasing all along the balance in the bank. I want you to tell us what the balance of the bank in the year '51 was, and what it was in '55.

A. The balance on December 31, 1951 was $107,696.64, and December 31, 1955, $77,563.41.

page 403 } Q. Now that was a decrease, wasn't it?

A. That was a decrease that year, because in the year ended December 31, 1954 they distributed $126,000.

Q. Yes, I know that. So actually those balances don't mean anything insofar as the accounting between the parties is concerned, do they?

A. No, but—

Q. And they don't show anything, do they?

A. Yes, they do. If you take—You want that information, don't you, before I go into it?

Q. I always want information.

A. If the cash increase is $4,178.58 net in the year 1951, and they had spent in distribution to the partners or to the heirs, as you call them, and for bonuses and so forth that were not truly expenses, then in that year they must have had a cash increase or cash income of $31,318.13 for that year. The same thing would be true of the others, but that isn't the picture of the operation of the farm, because the tenant had gotten his out before this was taken.

Q. And the distribution would have been enormous for that year?

A. In 1951 this distribution was $103,000.

Q. That is all I am trying to say, Mr. Thedieck, and I believe you agree with me; and this thing that Mr. Woodward said the other day, the fact that this balance has

page 404 } been steadily increased until it showed $153,000 to the end of 1956 hasn't got anything to do with whether or not the money received all during that time was properly accounted for with that. The single balance hasn't got anything to do with it, has it?

A. It wasn't possible. They didn't have the details of the rendered cash, but it also didn't show that the man took it either.

Q. No, I am simply saying that this really doesn't have any bearing on whether or not all money received was properly accounted for?

A. We know the money wasn't properly accounted for. They didn't have anybody there to maintain those records.

Charles G. Thedieck,

Q. Now to go back and answer my question, Mr. Thedieck, when you first—Schedule 2—no, wait a minute. Refer to a schedule at the bottom of page 2, and you showed there, I believe, the earned income and the cash at the beginning of the year, and I believe you showed in most instances a rather enormous percentage return on the cash invested at the beginning of the year. Now you say cash invested at the beginning of the year. I take it you mean the cash balance in the bank?

A. That's right.

Q. That has absolutely no relationship with the total appraised value of the estate being handled, does it?

page 405 } A. It has nothing to do with the value.

Q. Or whether it was the proper return on the total amount of money invested?

A. That's right.

Q. That is correct, sir. Now if, as I told you, the evidence will show that the estate is valued at $1,500,000, look at '51 and tell me quickly what percentage of return would have been had in that year?

Mr. Moyler: Your Honor, please, I don't know whether it is proper to object to that question or not, but—

The Court: I think it could be very easily calculated from the income.

Mr. Parker: I would like for him to do it for the benefit of the court.

Mr. Moyler: What I was getting ready to say, I imagine on the $1,500,000 investment, it would be, in the course of time, the sale of the timber, it would involve the profit from the real estate in contrast with the profits from the operation of the business, and I didn't know but whether or not—the question would be clear to me what my friend, Mr. Parker had in mind with regard to it—

Mr. Parker: I am just going by his own schedule here. I just wanted to break that to him a little more realistically with the figures here, and then ask him some questions along that line.

page 406 } Witness: There is no occasion, Mr. Parker, to show what the investment was in the farm.

Q. If the evidence will show and I assure you it will—that the estate was valued at $1,500,000, what percentage of return would you have in 1951?

A. About one per cent.

Charles G. Thedieck.

Q. About two per cent, wouldn't it?
A. You said a million and what?
Q. A million, five hundred thousand?
A. Well—
Q. You would have two per cent, wouldn't you? Two times $1,500,000 is $30,000?
A. Yes, sir, that's right.
Q. For 1951?
A. That's right.
Q. Now if we take 1955, where you have got a small one there, about $9,000, and reduce that, you would get about 6-tenths of one per cent, wouldn't you?
A. This man made $9,000 in1955, when every other farmer in this area—and I made plenty of tax returns in this area—didn't make anything, lost money.
Q. Yes, but your statement would show 6-tenths of one per cent instead of nine?
A. But this man, you had the capital investment and he was using this as a revolving fund, and he didn't
page 407 } use the million to take and produce and furnish tenants. He used $100,000. You can't compare that like you would on a commercial enterprise, and you know it too.
Q. Let me put it this way. If he had distributed at the end of one of those years all the money he had in the bank, and then would have made $39,000, his percentage on investment would have been what?
A. You have to have some working capital, Mr. Parker. You put it in there to revolve over to make the profit.
Q. Isn't it true that this schedule has nothing whatever to do with the balance on deposit?
A. Certainly it does not.
Q. Why was it put there?
A. It shows this man, on the basis of what he got, is an efficient farmer.
Q. But it has nothing to do with accounting?
A. Certainly not.
Q. Mr. Thedieck, we have your report on that, as I said, for two days, and I am not sure I know too much about it; but I believe you said that the information contained on the schedules, well, certainly beginning with page 9 and running through to page 14, was taken from the books. Is that correct?
A. That is right.

Charles G. Thedieck.

Q. And on page—You mean the books of the
page 408 } Bain estate?
A. That's right.

Q. And they are the ones that have been introduced covering those years. Is that correct?

A. Yes.

Q. Now on page 13 there is reported and carried over to 14 a schedule of cash disbursements which I believe you say that they have taken from the books which you examined. Are you prepared to say that you accurately transcribed in your report from the books and the records available to you the proper information on pages 13 and 14?

A. As far as I know.

Q. I notice on page 14 you show $186,419.87 for advances to tenants and to farmers of the estate, and so forth by checks.

A. That is what the books show.

Q. That is correct, and they are added in as disbursements, are they not?

A. That is right.

Q. And then you have added in those shown on pages 13 and 14 as cash and currency?

A. Yes, sir. That is correct.

Q. You are sure, as far as you know, your report is correct in that regard?

A. As far as I know.

Q. Now take page 13, your second item there,
page 409 } "William Boykin," you have listed as a currency
disbursement of $1,001.22?

A. Yes, charged to that fellow.

Q. Now suppose I can show you on the books that you took this from, and the records, that instead of being $1,001.22, most of that has already been added in to the $186,000 over here and it should be only four hundred and eighty-three?

A. What I meant was, Mr. Parker, if the books showed it, it showed it was currency cash, currency expenditure. I didn't go any further than that.

Mr. Woodward: Talk a little louder, please. I can't hear you.

Witness: The ledger account shows the currency of disbursement. I accepted the ledger as being correct. I checked it back again, traced it back and checked.

Charles G. Thedieck.

Q. So you don't know whether that was a currency disbursement or part check or part cash?

A. That's right, but the ledger showed it was currency, I think.

Q. Yes, but you did not do enough checking to find out whether you put that disbursement in twice or not, did you?

A. Certainly not. I didn't check it any further. I checked the ledger remark, that it was a currency thing.

Q. Now in your fourth item I show you part page 410 } of that was in your $186,000?

A. That is correct.

Q. And the fifth item?

A. Like I told you, all of them, this was derived from the ledger, and if the ledger account shows it was paid in currency, no attempt was made to trace checks back against the ledger to see whether they had been marked down if the amount was paid by check and erroneously listed as paid in currency; or it could have been paid by currency and listed as paid by check.

Q. What I am getting at, Mr. Thedieck, is this. You have given credit here on the disbursement side all the checks, $186,000; and so if I can show you—which I assure you I will be able to show from the books and records—that in addition to that credit of $186,000, those checks, that a great many of the checks are included in this currency, the surplus amounted to a total of $10,000 or more in this one report, then that would be an error in the accuracy of this report, wouldn't it?

A. That's right, yes, sir.

Q. And that is an error of $10,000, money that Mr. Pulley hadn't accounted for in one issue in one year?

A. Yes, but also when you want to be perfectly fair about it, I told you I took it from the ledger, as was stated. At the same time, any check that was listed as a check page 411 } and paid by currency, you also allow for that, didn't you?

Q. We did not allow twice, and I am going to show by Mr. Hardy.

A. What I am trying to ask you is, if Mr. Pulley had listed on advance to a tenant paid by check, when in fact it was paid by currency, you also adjust that too. You are not going to take all the adjustment just one way? Are you going to take the audit as if it is your audit?

Q. No, sir, but we do not list as deduction or as an amount of money accounted for amount paid out in currency which

actually were paid out in checks and then take the same amount again, the the total of checks?

A. That's right.

Q. And you said you did in this case because you didn't go back to check these checks against these currency accounts to find out whether they were currency or checks. Isn't that what you said?

A. That's right.

Q. And in that way—

A. If the ledger should—

Q. You took what the ledger showed?

A. That's right.

Q. And you didn't attempt to go back to the records and find out if there was an error or not; and if I
page 412 } can show you that there is a ten-thousand-dollar error, that is a ten-thousand-dollar difference between what it should show and what it does show?

A. If it was in currency—

Q. You have listed a great many receipts on pages 10 and 11. They were likewise—

Mr. Woodward: Your Honor, please, it is apparent the machine is not picking up what Mr. Thedieck has to say, and it is also apparent he has lost his voice to some extent.

Mr. Parker: If Your Honor please, I have just a short matter. I don't see why we should run for the convenience of the tape recorded. I am anxious to get through with it.

Q. Now in your cash receipts—we'll have a television next time—appearing on pages 10 and 11, they were likewise taken from the books and the ledger. If I could show you where there are several errors in those figures, would you say that that likewise would show that this report is inadequate and in error?

A. I would like to see them.

Q. I show you that Wilson Patterson, on page 11; I show you G. C. Powell, Jr., on page 11, G. M. Ramsey, on page 11; Edd Ricks, on page 11.

A. I would like to look at the ledger account.

Q. Yes, sir. Look at the ledger, please sir. Mr. Thedieck, maybe I can hear you. Look at page 193 and see
page 413 } if you can find Mr. Ramsey there. Can you help us with this? Maybe you can locate this for us.

Junius W. Pulley.

(The parties to the trial assembled around the witness and view an open book.)

Q. Now I refer you to Mr. Ramsey's item which shows a cash receipt in your report for 1951 in the amount of $77.30.
A. I charged him with $177.60.
Q. You show on your report J. A. Ramsey, $77.30, on page 11?
A. Yes.
Q. Will you read what the book says?
A. What I did was charge Mr.—In error I charged Mr. Pulley with $77.30. That really belongs to 1952. That is what happened there. Then he is charged with $77.30 too much.
Q. That is an error. You put an item in 1952 of $77.30 in your 1951 account, didn't you?
A. That's right.
Q. Let's look again on page 351. Now let's see. Now you got listed for Mr. Ricks $501.73 as received in 1951 on this report?
A. Yes, that was an error.
Q. That was an error that should be in 1952, according to the books?
page 414 } A. That's right.
Q. So obviously in the short time we have had to look over your account and found out the matters of these errors, we have found several errors in your cash receipts?
A. That's right.
Q. Several errors in duplication in your cash disbursement, including currency and checks?
A. You might have. I think you did.
Q. And to the ten-thousand-dollar item, I will prove that tomorrow?
A. All right.

Mr. Parker: I think that is all.
Mr. Woodward: I will reserve further examination.

(The witness was excused.)

JUNIUS W. PULLEY,
having been first duly sworn, was called as a witness for the defendant, and testified as follows:

Junius W. Pulley.

Examined by Mr. Woodward:

Q. You are Mr. Junius W. Pulley, residing at Courtland; you are an attorney-at-law and have been prac-
page 415 } ticing in this county for over forty years?

A. Yes, sir, forty-five, to be exact.

Q. Mr. Pulley, you are a brother of Douglas H. Pulley, are you not?

A. Yes, sir.

Q. Is he older or younger than you?

A. Younger.

Q. Do you know anything about the nature and character of the home place and other places he bought, with relevance to productivity?

A. Yes, sir. I was born and raised on the home place, lived there and worked there for my father until I was some seventeen or eighteen years old, except when I was in school during that time; and it had been between 400 and 500 acres of land. My father was a good farmer, and he kept the farm in a high state of cultivation. My brother, Douglas bought it sometime in 1930 or '31, and he increased its productivity. He himself was a good farmer and raised quite a number of cattle, hogs and peanuts, corn, soja beans, and so forth. I went there frequently. I should say I averaged going there once every two weeks, probably more, and observed the condition of the farm and the general prosperity. I knew too that he owned two or three more farms during those, well, say, between, before 1940, I reckon; and they too were good farms. In fact, farm land that he had, and
page 416 } I address my remarks here to the home place more than to the other, because the others were good, I knew, but inherently the home place intrinsically was as valuable for the growing of crops and farm produce as any land in Southampton County.

Q. Mr. Pulley, with your background and knowledge of the land in controversy, and take the other land in Southampton County, would you say that its operations would be continually profitable?

A. Yes, sir.

Q. Was he ever limited at any time to what he got from the Thomas L. Bain estate, or Thomas L. Bain as to his earnings?

A. Mr. Woodward, he made a great deal of money in his own efforts, in his own undertakings. I know that; and he was, as I say, very prosperous, made good profits.

Junius W. Pulley.

Mr. Woodward: That is all.

CROSS EXAMINATION.

Examined by Mr. Chappell:

Q. Mr. Pulley, I will just ask you a couple of questions. You pointed out, of course, that you were Mr. Douglas Pulley's brother?

A. Yes, sir.

page 417 } Q. You wouldn't have any knowledge concerning funds with which he purchased any properties which would be the source of this income to which you have testified that he already had, irrespective of the Thomas L. Bain estate. Is that correct?

A. Well, I couldn't segregate any money that he had, as far as that is concerned. I do know this, that he was making a handsome living on the farm that he had, judging from the crops that he raised and the nature of the farm land. I know too that he—Well, for example, to show what a business man he was, he bought one farm from the Bains' estate according to their appraisement for $23,000 and sold it—that was about 1950, as I remember—and sold the timber off in two or three years for $45,000.

Q. Am I to understand now that he bought a farm from the Bains, for whom he was working at that time, for $23,000 and sold the timber off in a couple of years for more than he paid for it?

A. And according to the appraisal selected by the Bains themselves. Incidentally, I might remark that I don't think he knew much about the value of timber, and evidently the appraiser might not either.

Q. Let me ask you this final question, Mr. Pulley. You at one time were counsel for your brother in this suit, were you not?

page 418 } A. No, sir, I was not. I did go to see Mr. Parker and you on one occasion, and as soon as I found out, I told you, if you remember, you asked me some questions about some things to do as a matter of law, but as soon as you did, I wrote you back and told you that the matter had progressed to the state where I, as his brother, did not feel justified in representing him, and I wanted you to understand that I was not his counsel and that Mr. Woodward and Mr. Moyler had been employed as his counsel.

Q. And you completely withdrew from any transactions at that time?

Junius W. Pulley.

A. As a lawyer, yes, sir; but as a brother, I am still in it.

Mr. Chappell: I understand that, not as a lawyer. That's all.

Mr. Woodward: We might as well go home.

Mr. Parker: Is that your case? We could either put on or finish with a little rebuttal we have, if the court will give us time to *martial* our forces within an hour tomorrow morning; so do I understand from the court that we will adjourn now on the statement that we have only our rebuttal witnesses and they will call Mr. Thedieck for what they want?

The Court: That's right. You have no more witnesses except Mr. Thedieck?

page 419 } Mr. Woodward: As far as I know, that is our position, but I don't want to be bound.

(The court then, at 4:45 p. m., September 10, 1958, adjourned until 9:30 a. m., September 11, 1958.)

page 420 } FOURTH DAY.

(The court convened at 9:30 a. m., September 11, 1958.)

Mr. Charles G. Thedieck was recalled as a witness for the defendant.)

Mr. Parker: We are through. I said I might have one more question, but I don't have any more, Mr. Woodward.

Mr. Woodward: That is all. You can come down.

(Mr. Thedieck withdrew from the witness stand.)

Mr. Woodward: Your Honor, please, we would at this time like to ask the opposing side if they will give us the figures for the profits made by the Bain estate from operation of the farms and store at Ivor for the year 1957, and the distribution that was made.

Mr. Parker: If the Court please, I think that would be only confusing the issue. We have nothing to do with 1957. It is under new management, and '56, I will admit it was under Mr. Robert Pulley's management; but 1957, it is under entirely new management, and there is nothing in this suit involving after December 31, 1955, and I think it would be

very useless. We have nothing to hide, but it would be useless. It could have nothing to do with this case.

The Court: Only as to the question whether by comparison, under new management whether the profits and distribution to the beneficiaries would be greater than

page 421 } under this operation.

Mr. Parker: I don't think that would have anything to do with it, because, Your Honor would have to try whether they had a good year or not.

The Court: Of course a great many issues would come in there.

Mr. Parker: And in addition to that, we are not concerned with profits. Mr. Thedieck admitted that the earnings had nothing to do with his audit.

The Court: It seems to me that where there is a charge that there has been taken out of the business twice as much as the business made during those years, and that probably would be an average for the five years being under consideration, maybe more than twice as much.

Mr. Parker: It could be.

The Court: It seems to me that the operation under entirely new management and probably new bookkeeping system, the results of that would be, would certainly be relevant, it seems to me, as to whether that is true, or just a bookkeeping proposition.

Mr. Parker: I still don't see it, Your Honor. Because they made or may not have made a single profit in any one of these years, we are not talking about profit. We are talking about money received and not accounted for, and whether there was a nickel profit, it has nothing to do

page 422 } with it. I think it would confuse the issue.

Mr. Woodward: Do you refuse it?

Mr. Parker: I don't think we have it.

The Court: You do not have it with you?

Mr. Parker: We can go to Richmond to get it.

The Court: I don't think it would be necessary to do that.

Mr. Woodward: I would also like to inquire from counsel for the other side whether they will tell us whether they are paying everything by check, or part of it now by cash and check.

The Court: I don't believe that method of bookkeeping under new management would be material.

Mr. Parker: I don't see it to save my life.

The Court: To this matter.

Mr. Woodward: The question is, the pattern of handling the affairs in which the auditors are critical of Mr. Pulley

for having advanced money to tenants in cash for the purpose of paying labor. He said the proper way of doing it is by check. What I want to know, whether these gentlemen followed through by paying with check or cash, and for that, I would like to see their analysis for 1957.

Mr. Parker: If it please the court, the matter of thinking has no bearing on this. We have the auditor here who is auditor for 1957 accounts. We are going to put page 423 } him on the stand for rebuttal of some matters. The question for 1957 will be relevant. I am sure if he wants to question him and you allow the answers, I am sure all the cash will be accounted for.

The Court: That he would have a system of bookkeeping different from the one in 1956, and followed in due years?

Mr. Parker: I don't know there is or not, since this is a decision rather than an examination of the witness. I know Mr. Bain has a system he has been keeping for thirty years, and has no trouble with that; but whether or not it is the same as this system here, and we are going to talk about the system when we put Mr. Lewis back on the stand.

The Court: Suppose we go ahead.

Mr. Parker: All right, sir.

Mr. Woodward: All right, sir. We are subject to the court's examination in surrebuttal.

H. L. BAIN,

having been first duly sworn, was called as a witness for the complainants, and testified as follows:

Examined by Mr. Parker:

Q. Mr. Bain, at my request, have you given page 424 } any consideration to, and can you make an estimate of the appraised value of the properties, including the store, which were involved in the T. L. Bain estate between the years 1951 and 1955?

Mr. Woodward: Your Honor, please, what Mr. Bain's idea of appraisal is not evidence.

The Court: I think you could put in the appraised value for tax purposes. I think you could do that.

Mr. Parker: I think the owner, or part owner, if Your Honor please, of property, would have a pretty good idea; but if you want me to qualify this witness as to his general knowledge as to the values of farms and things in Southampton County, I will do that.

H. L. Bain.

The Court: I believe that the appraised value for tax purposes would certainly be admissible, but of course there has been a great deal of inflation in values over the years.

Mr. Parker: I am talking about what the property will sell for.

The Court: That is an inflation situation. It would sell for approximately four or five times as much as it would in '36, but that has little to do with the amount of income from it.

Mr. Parker: Income would be inflationary too, that the returns have gone up along with—

The Court: What would be the purpose of the appraised value of the property, what it would pay for?

page 425 } What would be the purpose?

Mr. Parker: Just to tie in the previous evidence that Mr. Thedieck has introduced here, and the percentage of earnings.

The Could: Would it be to raise a valuation because of the appraised value that the infinite value of the property would be less than it should have been?

Mr. Parker: No, sir.

The Court: Just what would be the purpose of this, if this has nothing to do with it? What would be the purpose of the appraised value, and how would the appraised value be arrived at?

Mr. Parker: By opinion only.

Mr. Moyler: That would open the door to calling other witnesses and having their opinion.

The Court: I don't see that it would be material. Is there no appraised value?

Mr. Parker: No, sir, but it says here, if you look in the Exhibit, look on page 2 at that tabulation at the bottom of the page. that is the one.

The Court: Yes.

Mr. Parker: At the bottom of the page, I asked Mr. Thedieck what that had to do with this accounting, and whether he had accounted it.

The Court: You are speaking of the cash

page 426 } statements he had?

Mr. Parker: That is right, but you see the percentage of income he had there.

The Court: I think it was clearly expressed that was not the percentage of return from the total value of the farms, but just of the returns from actual cash that was on hand at the beginning of each year.

H. L. Bain.

Mr. Parker: And had nothing to do with that auditing at all. I just didn't want the court to be confused on this return here. I will withdraw the question.

The Court: The percentage of return is based entirely upon the cash at the beginning of the year, and the return on that cash, but it doesn't reflect the value of the farm properties at all.

Mr. Parker: Or the percentage return on that value.

The Court: Not at all. It wasn't intended, and it doesn't, in the court's mind.

Q. I have two questions for you, Mr. Bain. It has been testified in this case that—Mr. Shands, I believe it was, or somebody—anyhow, talked to you about the system of the books down there, and suggested that you have the books changed to another system, and you said no, you didn't want to do it because it was too expensive. Is that true?

A. I didn't mention too expensive. I stated
page 427 } to Mr. Shands that we had thought about changing, and talked to Mr. Pulley, and Mr. Pulley said that the system he used was the only system he knew anything about and he just couldn't carry the two entry system but he could carry this accurately, and we continued with that. So far as telling Mr. Shands it was too expensive, I didn't.

The Court: Do you know what year that conversation took place, Mr. Bain?

Witness: No.

The Court: Was it '51 or '52, when the trust agreement had been made?

Witness: No, it wasn't. My recollection was it was after '50, but to say what year, what time it was, I am unable to say. Mr. Shands made our reports.

Q. What sort of reports?

A. Our personal income tax, and this income information up through '55.

The Court: Mr. Bain, you were familiar with the type of bookkeeping used by Mr. Pulley, were you not?

Witness: Yes, sir, used the same at my place exactly.

The Court: You used the same one-entry system?

Witness: Yes, sir.

H. L. Bain.

The Court: And your business is very much the same type of business?

Witness: Yes, sir, similar.

page 428 } CROSS EXAMINATION.

Examined by Mr. Woodward:

Q. Mr. Bain, taking into consideration farm subsidies, allotments, land measurements, and supervision of tenants, the purchase of materials and the maintenance of the flow of supply of materials, seed and fertilizer, and maintenance of machinery, a man operating a farm of 100 acres has almost a job within itself, doesn't he?

A. I don't think so.

Q. Well, would it be fair to say that 100 acres is a one-man job?

A. I wouldn't think so.

Q. Well, how many acres do you think a man can actually look after and give it adequate supervision?

A. Well, I see no reason why a man couldn't supervise as much as the Thomas L. Bain estate. He had other people on it.

Q. Have any difficulty with the supply of farm labor?

A. I couldn't tell you.

Q. Well, in your operations did you have?

A. Well, we have had very little operations.

Q. Ever have a tenant to quit after the crop was planted?

Mr. Parker: Is this proper cross examination at this time? We have asked him only one question, page 429 } and this has gone into a new subject.

The Court: I think he is making his own witness by pursuing your line.

Mr. Parker: Are you calling him as your witness?

The Court: The court understands any examination outside of direct examination would make the witness the defendant's witness.

Mr. Parker: May the record show, then, that the defendant is adopting this witness as his own along this line of questioning. You are taking him as your witness, and you are bound by him.

Q. Mr. Bain, what would be the fair average profit from an acre of land cultivated in Southampton County per annum, net profit?

H. L. Bain.

A. I have never figured or made any estimate of it.

Q. Well, you operated seventeen farms yourself, and you are interested in these seventeen farms, and between them it is close to 4,000 acres of land. You mean to tell me you don't know the average per acre?

Mr. Parker: I think the witness has answered that question, but I don't think he has a right to ask this question.

The Court: I think he has a right to ask a question calling for an answer on the operation of a business.

Mr. Parker: But he is cross examining him.

page 430 } The Court: Then if he goes out of the field of direct examination, the witness is his witness. You may proceed, Mr. Woodward.

Q. You say you have no idea what the average profit per acre is?

A. I do not.

Q. Would it be a fair assumption that it would be thirty dollars? Would thirty dollars be a fair assumption?

A. I have no idea, Mr. Woodward.

Q. How many men assist you in the operation of your farms?

A. I have two people. I don't have anything to do with the management of the farm?

Q. Did you ever register any complaint about how Mr. Pulley was managing the farm?

A. We left the management of the farms entirely to Mr. Pulley.

Q. Do you know the source of the income that is reflected in the audit for the year 1956 with reference to the sale of corn?

A. No, sir.

Q. Do you know whether, as a matter of fact—

Mr. Chappell: Pardon me, Mr. Woodward. I was confused with the year '56. Which audit are you talking about?

Mr. Woodward: Take any you want.

page 431 } Mr. Chappell: There was no inquiry as to the audit for '56. That is why I was making the inquiry.

Q. Would you say, Mr. Bain, that 1955 was an average, over or below average in yield and prices of crops?

H. L. Bain.

A. I haven't got the figures before me. I would have to look at my records.

Q. The report made up by Mr. Thedieck shows that all the corn on hand in the year'55 was sold in the year 1956. Now do you know the amount of corn that was sold?

A. I do not.

Q. Do you know how many tenants of the Thomas L. Bain estate were on fourths, how many tenants of Thomas L. Bain?

A. How many tenants of Thomas L. Bain?

Q. Yes, on one-fourth of the crop?

A. I don't know which. Some were on a fourth, and some were on a half, but I don't know how much of each.

Q. Any on thirds?

A. I don't know that either, a fourth or a half.

Q. It could be and you don't know?

A. I never heard anything but a fourth or a half.

Q. So to the one-fourth tenants, the Bain estate would get one-fourth—

Mr. Parker: Ask him what he would get.

Mr. Woodward: I will conduct my examination.

Q. I ask you, what do you mean by one-fourth tenants?

page 432 } A. The land owner gets one-fourth and furnishes one-fourth of the fertilizer, and the tenant gets three-fourths and pays for three-fourths of the fertilizer.

Q. Where lies the difference between the one-fourth tenant and the one-half tenant?

A. Well, one gets one-fourth, and one gets one-half.

Q. Why?

A. Because of the way they are operated.

Q. What is the difference in the way they are operated?

A. I just told you the man operating on half, the general custom is for the tenant to get one-half of the proceeds, and the land owner pays for all the fertilizer, and the crop is divided in half.

Q. Actually you had *cropers,* not tenants. That's right, isn't it?

A. I don't know what you call them. We call them tenants. I don't know what you might call them.

Mr. Woodward: For your information, it is a very nice distinction, Mr. Bain. That's all.

(The witness was excused.)

HERBERT H. LEWIS,

page 433 } having been previously sworn, was recalled as a witness for the complainants, and testified as follows:

Examined By Mr. Chappell:

Q. Mr. Lewis, there has been some testimony concerning the system in operation by Mr. Pulley in managing the farms and the entries of the Thomas L. Bain estate. I ask you, sir, whether or not this system is workable?

A. Certainly.

Mr. Woodward: What did you say?

Witness: Certainly it is workable. Any kind of system is workable.

Q. Why do you say the system is workable?

A. It doesn't make any difference about the system. If you make the entries properly, it doesn't make any difference whether it is single entry or double.

Q. Is there anything in the system that blocks the entries to properly reflect the true affairs of the business?

A. It couldn't be.

The Court: I think you testified verbatim on it.

Mr. Chappell: I didn't want to be repetitious, and I certainly won't pursue this any more. In view of yesterday's testimony, I did want to bring this back to the attention of the court.

The Court: I think the testimony has been quite elaborate on different types of bookkeeping.

Mr. Chappell: Very well, sir. Thank you.

page 434 } Q. Mr. Lewis, so as to clarify one portion of Mr. Thedieck's testimony yesterday—and I use "clarify" because there is no conflict, I am sure—when you and Mr. Hardy met with Mr. Thedieck, very briefly the conversation Mr. Thedieck testified to yesterday, did you or did you not offer him all the books, records and documents that were available to you?

A. All the books, records and documents, including the copies of the deposit tickets that we had previously had the bank prepare for us, and our work papers.

Herbert H. Lewis.

Q. And where were those made available?

A. At the Bain estate in Ivor, except the work papers. We retained the work papers in our possession, and Mr. Thedieck was told he could get them any time he wanted to.

Q. Now Mr. Lewis, it has been testified by witnesses for the defendant that their information is covered by their respective reports. By that I mean Mr. Shands and Mr. Thedieck, was obtained from the books—and by the books I mean these ledgers and day books which have been introduced in evidence. In your opinion as a certified public accountant, is it proper to make a proper audit of the affairs that are in question in this suit without examining the invoices, sales tickets, canceled checks, and other items, the great bulk of which these are in these boxes which I presented to the court yesterday?

page 435 } A. You mean is it possible to make an audit without comparing these various documents with these various invoices?

Q. Yes.

A. No, sir. That is what you do in making the audit, compare the documents with the records. If you just take the figures off of the books, you haven't made an audit.

Q. Mr. Lewis, can you make an audit if some of the invoices and those kinds of papers are missing and can't be found? Can you make an audit?

A. Yes, sir. You will have items that are not supported by proper documents.

Q. I mean, can you tell, under circumstances of that kind, whether money was diverted from the business to the personal use of the manager? Could you tell that, and how much money was diverted?

A. Yes, sir. You might not be able to determine all of it, because it is possible that funds came into the hands of the management that were never recorded anywhere. Of course you couldn't determine that; or you would also have transactions that are not supported by proper documents, or like these canceled checks we had that we didn't have any invoice for.

The Court: Did you find any evidence in the record that would indicate that funds of the estate were di-

page 436 } verted to Mr. Pulley?

Witness: You find records of deposits going into the bank, but you don't find any records of them being recorded in the books.

Herbert H. Lewis.

The Court: It is the question of lack of material in the records to support a real accounting, isn't it?

Witness: Yes, sir. You have lack of records to support some of the transactions.

The Court: You didn't find anything from the records that would indicate an affirmative withdrawal of money from the estate to be used by Mr. Pulley, did you?

Witness: Yes, sir.

The Court: You found affirmative?

Witness: Yes, sir. The check of Lewis and Company, $1,-935. It is recorded in the books. True they were the sale of Mr. Pulley's peanuts, but the check was not deposited in the estate's account. He later paid his account in full with a check from the estate's bank account.

Mr. Woodward: State of what? What was the last part? I didn't get it.

Witness: With the estate's check, from the estate's bank account. He had credited himself with the sale of his peanuts, which is true. The check was not deposited in the estate's bank account; so at the end of the year he pays his account in full from the estate's funds, including
page 437 } an item that had never gone in the bank.

The Court: Well, would you exclude the possibility that this check was cashed and used and the cash used *in* advance itself to tenants?

Witness: That is rather a dim possibility, I think, Your Honor, because the check shows that it was deposited in a bank in Windsor.

The Court: In cash, wasn't it?

Witness: No, sir. Nothing shows that it was cash. It was *indorced* by Mr. Pulley.

The Court: Was there anything which shows that it was not?

Witness: No, sir. You couldn't tell from the check.

The Court: Do you know whether that money was converted to cash or not converted to cash and used in the business of the estate?

Witness: No, I can't say positively it wasn't, but it is a remote possibility, because why would he cash the check in Windsor when his own bank is two hundred yards away, and the other is eleven miles?

The Court: If anybody knows, could anybody tell at this time?

Witness: The answer is the same.

Herbert H. Lewis.

Q. Mr. Lewis, in line with the inquiry of the court as to whether or not your audit had been complete and
page 438 } could be complete, what is the purpose of an audit?

A. To determine that the books are correct, to examine the entries and see if they are correct.

Q. In your experience as a certified public accountant, is the fact of some vouchers or some supporting documents missing such a factor to prevent making a complete audit or accounting?

A. No, sir. You seldom make an audit that you don't find something missing.

Q. And you make that report as a part of the statement of the account?

A. Certainly.

Q. Now with reference also to the court's suggestion and inquiry to you a few moments ago as to the necessity of making cash advances, and also in view of a line of questioning directed by counsel for the defendant as to the necessity of certain funds to keep the farms and business operating during the year, my notes show, and subject to being corrected by a later reading of the transcript, that the figure of $60,000 was used by me day before yesterday in examining you as to the approximate figure necessary in keeping the operation going per year, and I refer you to Plaintiff Exhibit 14, which is the audit report for the year, the year 1951, and refer you to Schedule 1, and ask you if your report has taken into consideration any items that properly could
page 439 } be considered as being part of the funds necessary to keep the business going and keep the farm operating?

Mr. Woodward: Your Honor, please, there is no rebuttal to that. It is a mere re-hash of what he had the opportunity to go into.

The Court: I think he has testified to that from the record he has.

Mr. Chappell: There is one point in mind. It will take just a few questions, if I may. I don't believe this was pinned down, at the risk of being repetitious.

Q. On Schedule 1 would you point out the items that you reflect where you considered that in appropriate credit to these expenses?

A. Yes, sir. On page 10, payment made in cash, $25,177.52.

However, all of that did not go to tenants, if you will refer to Schedule 7.

Q. What is the amount of the tenants?

The Court: What page is that on?

Witness: Page 18, sir. Now the middle of the schedule you will note cash advances to tenants and customers, $21,-084.67 in cash.

Q. Then I refer you to Schedule 1 and ask you if you find any other entries of a similar nature?

Mr. Woodward: Your Honor, he has been over
page 440 } all that before.

Mr. Chappell: This is my last question along this line, Your Honor.

The Court: All right. Proceed.

A. Schedule 1, there is an item annexed to tenants and customers, $55,952.71.

Q. Well now, roughly, what do all these figures add up?

A. Approximately $82,000.

Q. Now with reference to Mr. Thedieck's report, which I believe is Defendant Exhibit E—

Mr. Parker: Will you excuse us just a minute?

The Court: Yes.

Q. (Cont'd.)—page 13—and if the court and counsel will excuse me, I will have to look over the witness' shoulder, schedule entitled "Detailed Cash Disbursement"; in the time that this report had been made available to us in the course of this trial, at my request have you reviewed this schedule?

A. Yes.

Q. Yesterday during examination of Mr. Thedieck, Mr. Thedieck quite candidly conceded that if items shown on that schedule to have been currency turned out in fact to have been checks, the net effect would be that that much error would be in this particular schedule; and I ask you if in your examination of the books and records you found
page 441 } any items entered on the books as cash or currency which in fact were checks?

A. Yes, sir, a number of them.

Q. Will you give us the number of such errors, the number of them?

Herbert H. Lewis.

A. Yes. In analyzing the checks and checking them back to the various accounts, we found 225 items aggregating $10,063.93 that were entered in the books as cash payments that were actually paid by check.

Q. Now does your report, which has been filed as Plaintiff Exhibit 14, reflect it?

A. Yes.

Q. I refer you to page 3 of your 1951 report, which is Plaintiff Exhibit 14, and ask you to point out to the court where this matter appeared?

A. It is in the narrative part of the report. Many charges shown as cash were not made in currency, but were paid by check. We found charges in excess of $10,000 marked cash that were actually paid by check.

Q. And that was for the year 1951 only?

A. That's right.

Q. And in view of the fact that it has been suggested that you and your firm were employed for one particular purpose, and that was apparently to run up the charges against Mr. Pulley, if today anyone would come forth with page 442 } an explanation of these items to which you have referred, vouchers or otherwise, would you give appropriate credit?

Mr. Woodward: We object to that. It is not up to him to give credit or debit.

The Court: I would like to know how anybody could give any explanation if the records were not complete. How could anybody do that?

Mr. Chappell: Judge, I think you have hit the nail right on the head, and that is a fundamental part of the case. We will get to this in the course of argument, and I will defer to that at this point; but the point I was trying to make to the court is that these gentlemen were not employed for any purpose of running up a charge against anybody.

The Court: I think we all understand that. I think we all have a very high regard for each of the public accountants that were here, and I think we understand what they were doing and what they intended to do. I don't think anybody intended to be unfair, or anything like that, on either side.

Mr. Chappell: Thank you, sir. Your witness, Mr. Woodward.

Mr. Woodward: Will you bear with us just a minute, Your Honor? Your Honor, this may not be germane, but I want to put it in the record, nevertheless. We object to it.

On Schedule 6 of the unidentified checks deposited
page 443} for the year ended December 31, 1956—

Mr. Parker: We object to that, if the court please, since 1956.

Mr. Chappell: If it please the court, no report by counsel for the complainants, or any of the complainants' witnesses, touch the year 1956.

The Court: The year '56, hasn't been introduced in the evidence.

Mr. Woodward: That's right, Your Honor, and I want to make it part of the record, notwithstanding the rule in reference to 1956.

Mr. Chappell: Just a minute, Mr. Woodward. I would like to point out to the court a complete fact. I believe this is a report from examination made of the year 1956 by accountants for the complainants. and furnished voluntarily to counsel for the defendant. It has never been introduced as an exhibit, has no part of this case, and is no more pertinent to this case than anything of the many others that have been passed between counsel, and I object to its admission in evidence.

The Court: Objection sustained.

Mr. Woodward: Subject to Your Honor's ruling, I want to make it part of the record, subject to objection.

Mr. Parker: Judge, in a matter of this sort it is not a jury trial. In a matter of this sort is it permissible,
page 444 } when you have said it is about to come in, is it permissible to make it a part of the record? I am ignorant. I just don't know.

The Court: I don't think it is part of the records as prepared by the defendant, and has never been offered by the defendant and never been verified.

Mr. Woodward: I understand that, Your Honor. I understand you excluded it in the evidence, and make it on the record.

Mr. Parker: I am just asking for information.

The Court: He may make it part of the record, not for consideration before this court, but as an objection to my ruling on that, for the effect in the Court of Appeals, I think he could do that. I think he can also make any paper, whether this court rules it out, for consideration by the Court of Appeals, and let the Court of Appeals determine whether this court was in error in excluding it. I think he can always do that.

Herbert H. Lewis.

CROSS EXAMINATION.

Examined By Mr. Woodward:

Q. Mr. Lewis, I notice in Schedule 6 of your 1956 account that you have—I will enumerate them to you—checks of the ALCO Products Company, which is American

page 445 } Locomotive Company; Branch *Cable* and Company, brokerage house; Craig Systems; Dime Stores, Incorporated; Home Telephone and Telegraph Company; Lowe's, Incorporated; North State Power Company; New York Central Railroad Company, National Airline Division; Norfolk and Western Railroad Company again, there are patent items that would not be connected with the former account?

A. That's right.

Q. So that was Mr. Pulley's money, presumably, wasn't it?

A. Apparently it was. Since you brought out the other day, and I testified to, the estate owned no stock, and they are apparently dividend checks.

Q. You not only put it in, but you charged him with it in this account?

A. May I see the report?

Mr. Woodward: Yes, you can see the report.

Mr. Chappell: If Your Honor please, you understood, of course, that our objection runs through this whole line.

The Court: I understand that.

Mr. Woodward: We understand that perfectly.

Witness: I am glad you brought that up, Mr. Woodward. I would like to explain it. I don't think but one copy of this report here, I don't know whether we have ours or not.

The Court: May I have a copy?

Mr. Chappell: Yes, sir, Judge.

page 446 } Witness: The Schedule is page 14, Your Honor, the last one in the report. That schedule contains a number of items, small ones, most of them small; some of them amount to as much as $240. The total, $4,290.75. If you will refer to page 6 of the narrative comment, you will find the last sentence states these checks totaling $4,290.75 have not been included in the total cash to be accounted for, and I don't think you will find that item shown in Exhibit 8. If my memory serves me correctly, it is not included in that total. At least I don't see it.

H. L. Bain.

Q. The whole net result of it is, you entered items which, patently, on the face, were cash in the cash drawer?

A. I don't know whether they were cash in the cash drawer or not. They went in the bank account in the estate bank as deposits.

Q. Mr. Pulley was credited rather than charged?

A. Well, he wasn't charged.

Q. If he wasn't charged, he should have been credited, shouldn't he?

A. We would be crediting something we shouldn't be crediting him for.

Q. If he put $15.00 in the drawer of his money, he should be credited with it, shouldn't he?

A. Well, if he put $15.00 in there—

Mr. Parker: Let him answer the question.

page 447 } Witness: What was the question?

Q. If he put $15.00 out of his own pocket in the cash drawer, he is entitled to credit, isn't he?

A. If he puts a check in there and takes $15.00 out for the fifteen-dollar check, you have the same answer.

Q. Exactly. But if he puts it in there as an application to his account, he is supposed to be entitled to credit for it, isn't he?

A. That's right.

Q. All right. You don't know whether it was put in there for cash or whether it was put in there for credit, do you?

A. No, I don't. I don't think anybody else knows.

Q. That's just what I wanted to know, but you had him charged up with it, nevertheless?

A. No, I didn't charge him with $4,200.

Mr. Woodward: It is on the books anyway. That's all.

Mr. Chappell: Judge, I fear that the damage is done now, as far as Mr. Woodward is concerned, in handling our witness. I will take this back anyway. That is all, Mr. Lewis.

(The witness was excused and withdrew from the witness stand.)

page 448 } H. L. BAIN,

having been first duly sworn, was recalled as a witness for the complainants, and testified as follows:

Examined By Mr. Parker:

Q. Mr. Bain, did Mr. Guy Bain have any interest in this estate prior to his death?

A. Yes, sir.

Q. When did Mr. Guy Bain die?

A. January 18, 1953.

Q. Was an appraisal of the property of Thomas L. Bain estate made at the time of his death for tax purposes?

A. Yes, sir.

Q. What was the amount of appraisal showing the value of the Thomas L. Bain estate for '53, according to the appraisal made for estate tax purposes?

A. A little over a million and a half, $1,500,000 and some odd cents. I can give you the exact figure, if you want it.

Mr. Woodward: Without waiving our objection, Your Honor.

CROSS EXAMINATION.

Examined By Mr. Woodward:

page 449 } Q. Mr. Bain, what was the value of it when Mr. Thomas L. Bain died?

A. I gave that in my direct testimony. What do you want it again for?

Q. Did you give it in your direct testimony? I believe you said the land was $150,000?

A. I gave you real estate. I didn't say what was the personal property. I don't have that.

Q. Real estate is land, isn't it?

A. I say real estate. I gave you real estate.

Q. I believe you did. Now Mr. Bain, in that connection, is the appraisal of the Thomas L. Bain estate, as made for the purpose of taxation concerning Mr. Guy Bain's demise, does that estate encompass, as appraised, the personal property that belonged to the Thomas L. Bain estate?

A. That was the whole property owned by T. L. Bain estate, personal and real estate.

Q. And that includes timber lands and things of that kind?

A. I said this estate owned all real estate and all property owned by the T. L. Bain estate.

Q. What percentage of the valuation was segregated to arable land, if such was done?

A. I don't know.

H. L. Bain.

Mr. Chappell: That concludes our case.
page 450 } Mr. Parker: That concludes our rebuttal.

(The witness was excused and withdrew from the witness stand.)

Mr. Woodward: Your Honor, please, at this time we would like to move for a decree of dismissal of the complainants' case on the grounds assigned at the time of the original motion at the conclusion of the complainants' direct testimony, the alternative that the complainant be required to surcharge and falsify by specific items such as he charged that Mr. Pulley is charged with in a blanket situation that they gave us here. Also at this time I believe the court can well hand out a decree now of dismissal, but in the event that they do not use a surcharge and falsify, we would like to confer with a responsible party or interested parties as to what their views might be about it; or maybe we can get some information out of Mr. Douglas Pulley, depending on his condition at this time.

Mr. Chappell: If it please the court, I think the court can well appreciate that this case is one of considerable importance to both sides. It has been a case that has been tedious. There has been lots of testimony, and a lot of exhibits. I know that the court has taken in everything that has been said, but I feel fairly certain that the court would like to have an opportunity to at least a bit more maturely consider some of the exhibits that have been presented, both for
page 451 } the complainants and the defendant. That being the case, I would suggest both to the court and to opposing counsel that the transcript of these proceedings be prepared, be made available to the court and to counsel; and indeed as Mr. Woodward has suggested, he may be able to take this up with his client and come forward with an explanation on a number of items; and if he does that, resolves that much of the problem—In any event, speaking for myself, I do not believe that after almost four days of trial that I could intelligently take all this material, summarize it, and present to the court this morning an argument tied in with the law; and mind you, sir, we haven't had the law presented to the court yet, so as to present a full picture to the court; and that mere suggestion—I do not want to cast an undue burden on the court—but I believe that would be helpful.

The Court: I think the court is more familiar with the testimony at this time than the court would ever be in the

future. The court has undertaken to pay a very strict attention to this testimony. I don't believe that I could get a more accurate mental picture of the testimony if I read over the entire transcript at some future time. I believe that the matter should be argued from the standpoint of whether the allegations of the bill of complaint have been su-
page 452 } stained, the burden of the complainants has been carried. That would go—suppose we adjourn for about ten minutes and then we resume with argument on the question of the evidence with reference to the charges in the bill of complaint?

(The court then, at 10:35 a. m., September 11, 1958, took a recess until 10:45 a. m., September 11, 1958, at which time it re-convened.)

Mr. Chappell: May it please the court, with the indulgence of the court, I point out that I would like to restrict my comments very briefly to some citation of authorities and to vital points of law that I think are in issue here. It is not to say that I don't think there are a number of other points of law involved which are collateral matters, but these two are fundamental points of law that, in order not to burden the court—I am sure you can't write them down in the order presented—I am going to restrict myself and then allow my partner to present some of the facts we have presented. Briefly, I think, two fundamental things which should be brought to the attention of the court.

First of all, is this a fiduciary relationship? Has that been established? It has been alleged in the bill—and in fact it is conceded in the answer—there is no question about the fiduciary relationship existing between Mr. Pulley, the defendant—
The Court: Is it sufficient a fiduciary rela-
page 453 } tionship governed by laws which are set down with reference to accountability of the administrator or some person exercising a public function?

Mr. Chappell: Indeed not. The degree of accountability, however, of a fiduciary in this particular instance, is no less. The only difference as to administrators and executors, is that there is certainly a statute on it, and not so in the case at bar. It is the classic example of the fiduciary who is required to account. Your Honor will recall that when we argued the demurrer that a number of authorities were cited by counsel for both sides. Not a single authority cited by complainants as to fiduciary relationship and the type, not a single one was refuted, and I will tell you why.

The Court: Isn't it a fact that each, that every agency has a fiduciary quality about it?

Mr. Chappell: No, sir.

The Court: If that agency involves the handling of money or assets?

Mr. Chappell: I would answer your question, no, sir. It may be that the way you put it is not sufficient and all inclusive, and I might answer yes, sir, if it were phrased in another way, but if I may, let me read you one thing. In Lyle's Notes on Equity Jurisprudence, which have been cited by counsel for both sides—so it must be pretty good
page 454 } authority—the particular illustration of a transaction that requires an account, a fiduciary relationship, and I will read to you page 274 from Lyle: "The typical illustration of a bailiff, though the term is of a wider significance, is the agent, or steward, or superintendent, or manager, or by whatever designation known, who has charge of landed estates, with power and duty of making contracts with tenants, collecting rents, purchasing machinery, selling farm products, making repairs, paying taxes and other charges and at stated intervals rendering an account of his stewardship, and paying over a net balance to his principal." That is precisely, precisely what is presented here. Now I must confess that this is a rather unusual situation we have here. You don't find them any more.

The Court: Would the practice over a period of twenty years acquiesced in by the beneficiaries have an effect upon the methods used by the agent or fiduciary?

Mr. Chappell: I submit not, sir; and if I may, I should like to have an opportunity to submit authorities on that, but taking that one step further—and his is my second point and I will stop—as a necessary corollary of the fiduciary relationship, and make no mistake, sir. There is a fiduciary relationship here. It is conceded in the answer, and as a part of the evidence.

The Court: The court is of the opinion it is a
page 455 } fiduciary relationship.

Mr. Chappell: Then the next point is this, and this again is re-hashing the old memoranda of law. These cases will sound familiar. In the case of Simmons against Simmons—and I will not give the citation—an 1880 case, the court said this: "Where the fiduciary character"—and he is referring to the situation presented in that case—the court said in that particular instance it is "Where the fiduciary character of the employment imposed upon the person employed, the duty—mind you, not just a whim—"the duty of keeping accounts and preserving vouchers"—keeping ac-

counts and preserving vouchers—"It is well settled that equity has jurisdiction in such a case." And that is not just an obscure statement, but I will read you another. In Zetelle against Myers, another Virginia case, 1869, the agency in that case, speaking of MacKenzie against Johnston, as in the one now before us, was of a fiduciary character.

The Court: May I digress and say that's the reason I did not answer you, and say, isn't every agency a fiduciary relationship?

Mr. Chappell: Not every one. Some of them are indeed. That is the way a fiduciary relationship comes about, the agency; but the reverse is not true. The agency in that case, as in the one now before us, was of a fiduciary char-
page 456 } acter involving trust and confidence, and making it necessary for the agent to keep accounts and preserve vouchers—keeping accounts and preserving vouchers. In the same case the court said further, where the agency partakes of the fiduciary character, the jurisdiction of this court attaches, and the court will ordain a decree for account. And in the case of Thornton against Thornton, which is an 1878 Virginia case: "The fiduciary character of the employment imposes upon the person employed the duty of keeping accounts and preserving vouchers; and according to the old law, which I trust will continue to be the law of this court, a bill for an account in equity may be filed and sustained." I would like to call the courts' particular attention to one case, Vilwig against B & O Railroad. In the Vilwig case, which was decided in 1884—it is a right interesting case—interesting from a factual standpoint in tying in with the facts in this case—it was so interesting that I took the time to withdraw and excerpt of it from the Supreme Court of Appeals of Virginia, and I have with me, and the reason I did it was this. Vilwig was a bondsman for an agent of the B and O Railroad up in Winchester, as I recall. That was back in the days when we had the B and O right down in that section. The agent was, by reason of his fiduciary relationship, obligated, and the court cited its authority to render an account, but not only to render an account but to
page 457 } keep these accounts and preserve the vouchers. When the railroad didn't get an account, they sent their own auditors down and their own auditors, just as in this particular case, went in and, as best they could with what was available, they came up with a figure right down to the very penny as best they could determine. There wasn't any suggestions, just because some of the vouchers weren't there, that they couldn't make an audit, right down to the very penny, namely, $1,140.39. Counsel for the defendant

argued: "You can't come in and ask for an account. You already know what it is. In fact, your own auditors have been in there and done it. You've got to proceed at law, or you've got to obtain some other records." It is interesting to observe that in that particular case the evidence was presented in precisely the same manner as the evidence was presented in this case. The accountant for the railroad was put on the stand, and he testified as to what his examination of the books and records had shown, the measure of accountability, and the ultimate judgment was in that amount. In the Vilwig case they pointed out again—and I say again, if it please the court—to press home that this is not an isolated statement, about a duty to keep accounts and preserve vouchers. It is a fundamental duty of a fiduciary.

The Court: Could the benficiary waive that duty?

Mr. Chappell: I submit to the court that they
page 458 } could not. Possibly I have been presumptuous
in thinking that we would have an opportunity to submit briefs on whatever point the court may feel should be covered. I should like to have the opportunity.

The Court: Why could not the beneficiaries waive?

Mr. Chappell: I will tell you why, the very reason. The very reason for the duty to keep accounts and preserve vouchers is because this person who is a fiduciary is operating in a capacity in which the law calls upon the highest duty that the law knows, and if it should be possible for the beneficiaries to waive this duty which is imposed, which is for their benefit, the whole purpose of the duty would be disposed of because in many, if not most instances, in most cases the beneficiaries for whose protection that duty is set up by law, are the very people who need that protection so strongly, and who would be in all probability would waive it unwittingly, without having the foggiest notion of what they have done.

The Court: I agree that in a fiduciary, such as that of an executor or administrators of a deceased person that—of course the law is definite and explicit as to the accountability there, but you don't consider this to be such a fiduciary as that, do you?

Mr. Chappell: Not for a moment. I suggest this is a
fiduciary such as an executor or administrator,
page 459 } but not for a moment do I concede that there is
any diminution of duty to preserve accounts and to preserve vouchers, not for a moment. If it please the court, I am reading from Volume 4 of Pomeroy, Equity Jurisprudence, the fourth edition, section 1448, at page 3436, and it reads this way. "The right of the party defrauded is not affected by the lapse of time or, generally speaking, by any-

thing done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed." The basic problem on ignorance is because what is culpable negligence on the part of the defrauded party in claiming such fraud is incapable of the exact definition. "Such negligence is not imputed where the relation between the parties is one of trust and confidence." If it please the court, therefore I think that there are two fundamental points that over-ride any others that may be suggested to the court by counsel for the complainants or the defendant. Is there a fiduciary relationship? And secondly, the duty which, by operation of law, devolves upon that fiduciary to keep his accounts and preserve vouchers. I might add that if the court desires citations of authorities on the question of waiver. I respectfully request an opportunity to prepare and submit a brief on that point, and on any other point which the court thinks should be covered.

Mr. Parker: Your Honor, may it please the court, I am not going to make a discussion of the legal principles, because I have left that to Mr. Chappell. I would like to comment on just one point which seems to be concerning the court, and this is whether the parties could waive the right of a fiduciary to render an accounting, and whether they did do so by their action. Mr. Chappell is going to submit authorities on it, and the statement that he read from, Pomeroy, definitely states that no such waiver is to be imputed to the beneficiaries by a simple lapse of time. Now I don't think there is any doubt about the fact that these beneficiaries could come in at any time and have agreed with Mr. Pulley on an amount very near and say, "Look. We understand that we are not getting an accounting, and we understand that this is what is on us. Therefore we have agreed that we are now settling our accounts." They were suing in July, but I think they could possibly have agreed during the period from '43 right on up to '55. I think they could have come in and said that. "We agree to that." But there is not one single shred of evidence supporting that. Mr. Bain said there was never an agreement that the accounts had been settled, and that is not contradicted. Mr. Shands said that he thought that those sheets that he presented and were admitted, that they were only for income tax purposes. He thought they were settlements of accounts, but if he thought so, that was in his own brain, and there was certainly no meeting of the minds between Mr. Pulley and the beneficiaries that that was the agreement of the settlement of the account; but if there was, there is no

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evidence of that, because the only party on one side to agree to it was Mr. Bain and the other trustee, and they did not agree to it. He so stated, and it has not been contradicted. The only other party could agree to it was Mr. Douglas Pulley. There has been no evidence of the fact. He said that he said he understood it to be, and they didn't even put Mr. Robert Pulley on, although he was here and was manager one year, three-fourths of this period, and was working with his father for several years before that. They didn't even put Mr. Robert Pulley on to even say, so as to raise an issue of fact for Your Honor, that there was an agreed settlement during this time, so we could think unquestionably, not unquestionably, but that the beneficiary could have agreed during this time that anything was a settlement of the account; but there is not one shred of evidence to show there was such an agreement. Now in absence of such an agreement, then, we do not think there was a waiver of the duty of the fiduciary to keep an account, and to account is imputed to the beneficiary. Now before covering the facts generally, which I am going to do, there is one other point I want to raise and bring out, because it seems to bother Your Honor somewhat; and

page 462 } that is, isn't it going to be hard for Mr. Pulley or anybody else to account for these things that we show now by evidence of not being accounted for?

The Court: The records are not available, and they can't be.

Mr. Parker: That is correct. The records are not available, but if he had kept the records correctly, they would have shown. Now that is what this whole case is. There is nothing wrong with the system.

The Court: Didn't the beneficiary know he was not an expert bookkeeper?

Mr. Parker: That does not make any difference. This is —The bookkeeper knew what he was doing, and the system is all right. If he had put the entries in the books, and if his deposits had coincided with the entries that were in the books, rather than not coinsiding with them, then these amounts would have been allowed by the auditors that we sent down there to look at them, they have so testified. They said that if they were in the books, with the exception of some few of those checks that they saw that didn't have vouchers to support, they didn't allow them; and there might be some question on that as to whether the court would say, "Well, now, those checks there were made to a certain person."

The Court: Wouldn't it be incredible that he had made payments to third parties unless it was a possible mistake?

Mr. Parker: I don't think it would be incredi-
page 463 } ble, no, sir. He may have paid some of his own bills that way. It is entirely possible. It doesn't show, but that possibility is something. You remember that Mr. Shands and Mr. Thedieck both said that if they had, when they ran across checks payable to specific persons, that they accepted that *is* being proper payments. Mr. Hardy and Mr. Lewis said that they couldn't accept that without proper vouchers, and that the duty was on the fiduciary to obtain those vouchers at the time, or if later, when the audit was coming up and they were presented with a copy of it for them to obtain those vouchers. They could have done it in the last nine months. If they could have supported those checks, and they were proper, they could have gotten vouchers from those business houses, and so forth; but none of that has been done, but he should have done that at the time. But that is not the big item. The big item is the cash that was not accounted for, that the books showed came in but weren't deposited in the bank, and there was no accounting for it at all. It would have been very simple for Mr. Pulley, or anybody else, when they start talking about these little accounts, get a receipt from a farmer when he buys hogs? No, you don't, but it would be very simple, with his books setting right there, if he paid a farmer $25.00 for his hogs, to enter into that book cash paid to Mr. "X," $25.00 for hogs purchased today; and if that had been in there, that would have been com-
page 464 } pletely approved by an order, even though there wasn't a receipt from Mr. "X" showing that he had received a check for $25.00. That is not the kind of voucher and things. There is nothing in there that takes care of this shortage of cash that we know and which the bank accounts show he received. The books show it, but there is nothing in there to take care of the way that was paid out; so we don't know whether he paid it out. You ask how he can explain it now. He can go back, but I don't know how he can; but we haven't the slightest idea whether he paid it for the estate or whether he paid it for his own personal use.

The Court: Where would the burden lie to show that he paid it for his own use?

Mr. Parker: The burden would lie upon him to show that he paid it to the estate. That is the crux of this situation.

The Court: There are two things—the measure of the burden upon the plaintiff, whether by preponderance of evidence, whether by clear and cogent proof, whether by proof beyond a reasonable doubt, in a matter of this kind.

Mr. Parker: We can take it as a minimum, for there is

no evidence that he paid it to the estate. We don't know what he did with it.

The Court: Isn't it the burden on the plaintiff to show he diverted it from the estate?

page 465 } Mr. Parker: No, sir. The burden is upon him as a fiduciary to account for the money that we know he got from the estate. Now what he did with the money that he didn't use for the estate, we don't know. We haven't the slightest idea. All we know, he got a certain amount of money, which is uncontradicted, and that he did not pay that money out for the estate. Now whether he hid the money, whether he spent it to buy automobiles, whether he spent it to buy that Ivor Supply, whether he spent it to buy a farm, whether he threw it in the river, we don't know.

The Court: Isn't it the burden on the plaintiff to show, isn't there a strong burden upon the plaintiff, where the question is the diversion of money to his own use, isn't there a strong burden upon the plaintiff to show that?

Mr. Parker: No, sir.

The Court: You think it can be shown by a simple accounting?

Mr. Parker: No, sir. We don't know what he did with it. We put in our complaint that we thought that he used it to buy these farms and various things. That is not a necessary part of our complaint at all.

The Court: It is certainly not sustained by the evidence?

Mr. Parker: No, sir. We didn't trace any money, as that is not a necessary part of our complaint at all, so therefore I am perfectly willing to concede to Your Honor

page 466 } that that part of the complaint can be wiped out as not being established. I am perfectly willing to do that. As a matter of fact, we didn't even put on any evidence to prove that. It is in the complaint, but it is not a necessary part of the complaint at all; and as Your Honor knows, many things are put in the complaint before the date of the trial that are not necessary, and we are perfectly willing to wipe out that portion; but that leaves us with exactly the minimum part of the case and the essential part of the case; and it is most crucially compelling that we do not have to show what happened to that money. If we could have shown what happened to the money that he got and didn't pay to the estate, then the thing would have been very helpful. We could say, "You got $500,000 and you gave $300,000 back to us and there is $200,000 and bring us a deposit slip" and there you are, but that duty is not upon us. Our duty is simply to show to the court that he got money for the estate and then say, "Mr. Pulley, account to us for it" and then his

duty is to show what he did with that money. Then it switches, what he did with the money. We can't possibly have that information, because he kept the books; but we did find out how much money came in to the estate, by his own figures; and then it is up to him to show where it was spent for the estate, and that is what he has failed to do; and the mere fact that at this moment he can't go back and page 467 } reach up and say, "I know where that $500.00 went. I know where that $1,000.00." You say that is impossible. I agree with you that it probably in most instances is most impossible at this present moment, but that doesn't relieve him from the obligation to have put that thing down in books so the auditors could know where it went. So therefore when you ask me what happened to the money, the evidence is completely silent on it.

The Court: And you don't have any of the indicia of fraud?

Mr. Parker: We don't have to have indicia of fraud, sir. This doesn't have to be fraud, and, as a matter of fact, we haven't introduced any evidence of fraud, actual fraud.

The Court: How could there be a diversion of fiduciary funds without there being fraud?

Mr. Parker: It is a legal fraud. We are not saying actual fraud. It is a legal fraud because he didn't say what happened to that money and couldn't tell us what happened to that money, never has anywhere along. I will read this and see if this will straighten it out. There is Mr. Lyle again: "There are several striking contrasts between other bills of account and the true bill for an account. For instance, in the former the burden is ordinarily on the plaintiff to establish the amount due,"—That would be us—"Where- page 468 } as, in the latter the burden is uniformly on the defendant to present the account and to sustain its correctness by proper evidence. Again, the main purpose of the former, ordinarily, is to recover money due from the defendant to the plaintiff in the nature of a debt due that is, money sought to be recovered is the defendant's money, until actual payment—and the accounting is merely an ancillary proceeding by which to ascertain the amount due."—Understand, the money wasn't the plaintiff's money, and the accounting was ancillary to determine the amount due from the money. "Whereas, in the latter the accounting and the striking of the true balance are the principal objects sought, and the decree for payment follows, incidentally, to prevent multiplicity of suits. Furthermore, in the latter, the money to be paid in settlement of the balance due is, and always has been, rightly the money of the plaintiff and never rightly the de-

fendant's." So in this case we are here saying all we want is an accounting and to strike a balance, and as Mr. Lyle says, that the duty is on the defendant to render such accounting and to show that balance. Then he said to avoid multiplicity of suits, instead of having to take that account and filing another suit on it, he said, to avoid multiplicity of suits, rendered judgment on that accounting, as is found in this case.

The Court: Now in accounting, is it an equit-
page 469 } able remedy?

Mr. Parker: Yes, sir.

The Court: And it is governed by the principles of equitable jurisprudence?

Mr. Parker: That's right, sir. Now just briefly, I think Your Honor is—he certainly has been very patient and very observing in the presentation of the evidence in this matter, and I am not going to take too much time to review that; but I have written down last night some notes which I hope I can read this morning.

The Court: Let me ask you a question. If I should decide that the defendant is liable on this accounting, there wouldn't be any way to arrive at an amount, except by these statements here?

Mr. Parker: Yes there would, sir.

The Court: What evidence would there be other than the fact that—

Mr. Parker: Have you got the summary there?

The Court I see the summary here.

Mr. Parker: No, sir, I do not have the sheet of summary.

The Court: I would have to take it from the book. What I am questioning is liability. Under accounting we have certain accountings that have ben made that would be very fruitless to go into detail with reference to these accounts.

We must come to a question as to the duty of the
page 470 } defendant, and as to whether there may have been an estoppel. This is an estoppel remedy, and if there is an estoppel which would work against the plaintiff due to their acquiescence in this method of settlement, that it is a question to come up in any equity procedure, it seems to me. That is a question of law, and what we have discussed here is not the details of accounting but the question of the duty, the responsibility of the defendant, and whether through years of acquiescence in the method of the conduct of that fiduciary relationship or agency the complainants have by their actions thrown the defendant off guard as to these technical requirements of bookkeeping; and therefore under equitable principles, would be estopped to assert this

account. Now that is the real issue that is involved in this case, it seems to me.

Mr. Parker: There was a question of whether or not the plaintiff was estopped from coming in at the end of Mr. Pulley's tenure of office, the change of management, and say, "All right, we would like for you to give us an accounting, so that we can start off with new management."

The Court: Is it equity—and this is equity—for men absolutely conversant with the type of work, type of business operated by Mr. Pulley, to acquiesce for twenty years in the method which he used and then come in after the termination of that and by accounting, technical accountancy,
page 471 } bring forth a so-called showing whether they are estopped to assert that?

Mr. Parker: That is the matter we would like to argue, the authorities on that, but I can't see any of the elements of estoppel here, unless the people have to come in and say every year, "You have got to have an accounting at this time." We keep referring to this system, single entry. You didn't call it that, but you said "system." There is nothing wrong with the system. Mr. Bain has been using the same system, the single entry bookkeeping system. Mr. Lewis testified that he knows of many businesses that are being run on a single entry system at this time, and there is nothing wrong with the system. The only thing was wrong with it, he didn't enter them on the books, if they were there to enter, and therefore he didn't account for the money. So there is nothing wrong with that, and our people couldn't know that. There is nothing wrong with the system. They couldn't know that during all this time, unless the court is going to take the position that in failing to require an audit each year, they were guilty of negligence, and are now estopped to come in and ask for an accounting.

The Court: Do you believe it would be possible for a man like Mr. Harry Bain, operating exactly the same type of business that this was, familiar with the extent of it, that he could go for twenty years without having any suspicion whatsoever of money being diverted by the final
page 472 } payments made each year?

Mr. Parker: Certainly he could, yes, sir, unless he went down there. What created this suspicion? The 1943 audit, when somebody told him that something was wrong in the store, the way things were being run in 1943? All right. Let's find out about it. And Mr. Shands, who testified, said his firm and he did the work, went down there and made the audit, and he found out everything was all right. At first they came up with $5,000 that they couldn't

account for back over the period of years, and so they went down and conferred about that and come up and said they only had a hundred or so dollars off and so we think it is all right. And Mr. Bain and his brother said "Okay. We realize that we have heard that there might be something wrong in the store, so we will have this audit," and we got it; and of all things in the world, that is the very thing that kept them from going. "Mr. Pulley is the greatest man in the world. He wouldn't do anything wrong for anything, and therefore we are not going." He was not suspicious at all, nothing to create a suspicion.

The Court: And yet he knew and adopted the method of bookkeeping?

Mr Parker: They didn't know he wasn't putting his entries down. They knew the method of bookkeeping, yes, sir. Mr. Bain is using that in his own store now, page 473 } and many of them do use it.

The Court: And the usual custom of entering each of the business in the books?

Mr. Parker: That's right, sir; and if they, every time that was done, it would be perfectly okay, and would be properly accounted for, but he didn't do it; and there was no way in the world for Mr. Bain or any member of the family to have any suspicion unless he just wanted to distrust Mr. Pulley and say, "No, I am going to have you checked on every year." But if it is negligence on the part of the beneficiary of a trust to ask for an accounting because he doesn't do it every year, then we are going to open the door wide to all of the fiduciaries, who get by without the expense of having to forfeit bond, because it would be like putting a statute of limitations on a special number of accounts, unless you ask for it in that one year. There is nothing in this record that would show there was any reason for Mr. Bain or his associates to be suspicious of Mr. Pulley, and therefore require an audit, except that one time in 1943, when they did require and got it. I don't see the elements of estoppel, or anything of that sort in this picture in the slightest, not unless the court is going to arbitrarily impose a statute of limitations, saying just because you didn't get it, you can't come in now and ask for it. I see no elements of page 474 } estoppel, sir. Now the way we see this situation, there are really seven facts which the court will probably have to find: 1. Does a fiduciary relationship exist? 2. Has the fiduciary accounted? 3. If not, then what is the result. 4. Has an audit been made? 5. What are the results of that audit? 6. Should there be a judgment in favor of the complainants against the defendant? 7. If so,

how much. Now that is the way it seems to us to go. Unless we get thrown out on some matter of law, we would like to have an opportunity to argue any matters that would be involved to Your Honor. Now insofar as the first question is concerned, Mr. Chappell has stated—and I think I can state without fear of contradiction—that there is no question of fiduciary relationship of Mr. Pulley to the Bains, as Mr. Chappell said. It was practically conceded in the answer, but there has been no evidence at all which would show anything at all, except that he was the trusted person, as the bailiff of the property, or the manager of the property belonging to the Bains. Therefore there is a fiduciary relationship; and as to the matter of accounting is concerned, it is just as strict as it is on any type of fiduciary, because once a fiduciary relationship is created, then he has got to account—not under the same rules and regulations as an administrator, or something of that sort—as accurately as any other fiduciary. Now the next question is, has the fiduciary

page 475 } accounted? There is absolutely no proof that the fiduciary, Mr. Pulley, has accounted to the parties in this case. Then any proof—Mr. Shands stated that he worked—Let's go for the years '51 and '55—that he worked during these years on information furnished him by Mr. Pulley in order to get up the income tax returns for the beneficiaries of the Bain estate. He said that he was employed for that purpose. What purpose To get up information for the income tax returns. Nothing that he did could in any way be characterized as a part information to the settlement of the account. He stated to Your Honor, and my questions, "Did you do the various things that an auditor does in making up his audit?" And I enumerated. Did he check with the bank to find out whether the money had been put there or not? "No, sir, I didn't check that. I took just what the books showed." Did he check with any of the other things? I went through four lists, and he said no to all of them. All he did was to take some figures that Mr. Pulley sent him to be used to help the Bains prepare their income tax returns. Then he volunteered the information that he thought that that was a settlement of the accounts between the two. I don't know. It could have been. If the parties agreed to it, certainly it could have, if the parties agreed to it; but there was no, there is no evidence that the parties at all agreed; and to the contrary,

page 476 } there is only one of the principals that was involved with Mr. Bain; and Mr. Bain said that he had no idea that it was a settlement of account, and never

agreed to it, that the only thing, he thought it was for the purpose of getting up his income tax returns.

The Court: What would you say is the legal significance of a payment and a distribution to the beneficiaries of the amount purporting to be the profits of the enterprise at each year?

Mr. Parker: No, sir. That was not what it purported to be. It was purported to be the income as figured out for tax returns.

The Court: I am not speaking of that report by Mr. Shands. I am speaking of the significance of Mr. Pulley each year making distributions to each of the beneficiaries for what were purported to be the profits of this enterprise. Did not those yearly distributions of profits of income, did not that purport to be a distribution of the profits of that enterprise? Now it may not be in the approved forms of accountancy, but each year did not he make a distribution which was understood by Mr. Pulley, and by all of the parties to be profit for the operation of that year?

Mr. Parker: The information obtained from those sheets was something—To answer your question, and to those sheets, those sheets were obviously for the purpose of preparing the income tax.

page 477 } The Court: I am not concerned about those sheets. I am concerned about the fact that each year Mr. Pulley made a distribution to the beneficiaries of this estate for an amount which was understood by Mr. Pulley and by the beneficiaries as being the amount of profit for that year. I am not speaking of the matter being—

Mr. Parker: May it please the court, the fact that those were paid at that time, there is no evidence that the accounts were settled.

The Court: That might have been. They were accepted.

Mr. Parker: They were accepted as the amount made for that past year, but the payment, you don't know where the money came from in payment, or whether any money was left in the bank after those payments were made. No settlement of accounts was made. It might have been a question of robbing Peter to pay Paul. Just because he paid those accounts that were stated there, doesn't mean that there was money in the bank that should have been in the bank.

The Court: Was it not explicitly understood by all the parties that those payments did constitute all the profits for that year?

Mr. Parker: All the profit to be reported for income tax purposes on the income tax was actually made, but that didn't prove the bank balance was right after they made the

payments. That is what I am trying to get at.
page 478 } The Court: Wasn't there some duty upon the beneficiaries to attack it at that time?

Mr. Parker: That is a real issue in this matter. That is exactly what I am getting to. Now he sent them a check to pay, like you say. Now is it my duty, because I have a trusted servant that comes in here and says, "I have been handling your affairs this year. You made $5,000. Here is my check for $5,000. Is it my duty, then and there, to go up to him and say, "Let me see your books. Let me see what my $5,000 is. I am willing to trust you for that, and I will take a check for that, but let me see your books and see whether you got all the money you are supposed to be handling for me in the bank now." Is it my duty to do that?

The Court: If you don't do it, don't you owe some duty to the fiduciary, under that type of operation? I am not talking about a type of fiduciary acting under the forms of law. This was a fiduciary by agreement, by the parties, brought about by contract, and not by any rule of law.

Mr. Parker: That's right.

The Court: Not by corporation statute?

Mr. Parker: That's right; but if the court feels that it was then the duty, upon receiving these—and they were paid—no reason to think that there was anything wrong at all, everything was running smoothly, if the court thinks that by receiving that check it simply said, "This
page 479 } is your share of the money you earned last year," didn't say whether the money was all there or anything else, if you think there was a duty upon the beneficiary then to say, "Sure I have got the check for my share. I brought it over to say okay—

The Court: "I think you owe me twice as much as you paid me."

Mr. Parker: No, sir, they didn't think that. They thought that all the money in the estate that should have been in the estate was there. The very fact that he filed these sheets and paid those checks lulled them into a further sense of trusting.

The Court: And they lulled the fiduciary into a sense of security by not making any objection.

Mr. Parker: How could they make any objection, Your Honor, unless you are going to say that each year you got to go down there and say, "Let me see your books to see whether the money that should have been in the bank was there." If that is the ruling of this court, there is no use to go any further, because they did not do it.

The Court: They did not do it, and after termination of twenty years of the handling of this estate, then the matter was brought to the attention, after all records of this kind had been turned over to the estate, and out of the estate they come back on a pure question of accountancy.

Mr. Parker: May I comment on that a little bit? Just this. You remember when the first accountant was employed in this case? It was right after January 1, 1956. For what years? Not to go back in the distant past, but to go back to the preceding year, 1955.

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The Court: Fifty-four and '55.

Mr. Parker: Yes, sir, and '54. He first did 1955, by his own testimony. Was that back twenty years, if they had the supporting vouchers, or anything of that sort? That was three weeks after the end of the year. Does that go back twenty years and say we can't find these things because "you are too late coming in here"? And "We can't think of these things, because you are too late coming here. Sorry." That was immediately afterwards. Now what does the pattern show? As a matter of fact, if you look at your list, there was as much or more unaccounted for in '55 as there was in the previous years. That was not way back. That was immediately, with Mr. Robert Pulley right on the grounds and he had been in the store operating it three-fourths of that year, and had been with his father for ten years. Now did they wait too long for the 1955 audit? They couldn't have very well have done it any quicker, because they had it two weeks after the end of the year; and yet I think if you look there, you will find there is $29,000 not accounted for in the year 1955, and that is not way back there, and he has had that audit for nine months. He never made one. We had to go to the expense of making one. He had Mr. Toler's audit longer than that, and yet he has not yet come up with a single explanation or a single piece of accounting that would in any wise clear things. If that isn't a dereliction of duty, and doesn't show clearly that we are entitled to that amount for that year, then I don't know what does. If we could have had any more proper accounting than two weeks after the closing of the year, then I don't know how we could. Then it was only after that year—let's carry the picture on—and Mr. Toler found out that things weren't right, then he went on to 1954.

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The Court: He found out that he had made a twenty-five-thousand-dollar mistake, because certain records and invoices were not present there.

Mr. Parker: That is right, in the preceding year, in the preceding year. I hardly see how anybody can come in and say, "You waited too long to make me produce my vouchers and account for these items." You would have to do it every month, every day, if you did that. You would have to have an audit down there every day, because they would say, "No, that happened last week and I lost them and you are too late in asking for them." And I can't to save my life see how that would in any wise affect the complainants' rights. There was nothing to make them suspicious of Mr. Pulley, and it was only the audit of '55 page 482 } that they did, as a matter of fact, when they were changing management like any business would do, did they then find out that there was anything that would justify them going back any further than that. That is the story. It is uncontradicted. Now as far as our own audits are concerned, Mr. Toler and Mr. Hardy and Lewis, there has been absolutely no contradiction of any item or any conclusion in that report. The only excuse is, well, it is too long ago. It was too much trouble for Mr. Pulley to enter those things on the books, and you don't take a voucher from a farmer when you give him five dollars for the hog, or you don't take a voucher for this, because you don't do that in country stores. This might have been a country store, but there is nothing that would have prevented the entry on the books, whether he had vouchers or not, or what happened to that money, and where he did enter them. Mr. Lewis said he gave him credit for them. You will see in that 1951 report where $19,000 cash passed at times. That came from books, because the books said we advanced so much cash to Mr. so-and-so. We didn't have vouchers for them, but the shortage that he didn't put in the books, that was taken out, leaving out that little column about proper vouchers; but if I may point out to Your Honor on that summary here, this column here is the one about not proper vouchers. That is the column that is not accounted for one way or other. Now is there any conflict? They have page 483 } not shown any errors in Mr. Hardy's report, Mr. Lewis' report, Mr. Toler's—no errors. Now is there any conflict between any other thing that has been submitted? Mr. Thedieck admitted that he didn't do anything except take the books that he in his statement—he doesn't call them audit; he calls it a report—and he admits he didn't even make any checks, and that after 1951 he just gave up. And so all he is going to do is take the figures he saw on the books and follow up his report accordingly, but in addition to that, Mr. Thedieck on the stand admitted

that he made a ten-thousand-dollar error when he balanced the account for that year. He admitted that he credited Mr. Pulley twice for the same thing to an extent of in excess of $10,000. Well, that is one report, one schedule of one report for five years in question. Now that is the only thing we have got to go on. The report that we have here, which is showed to be without error, and then the audit which is showed to be without error, and then the reports of others, which Mr. Thedieck says he didn't do the audit, and admits he didn't do the auditing proceeding, and admits he didn't do anything from '51, and admits he has got a ten-thousand-dollar error in just one schedule. We haven't had that report nine months like they have ours. I am sure they have had time to go through ours with a fine tooth comb looking for errors. They had it for nine months. We page 484 } had that for only forty-eight hours and we found a ten-thousand-dollar error. I don't know how many more we could have found if we had had longer. Now Mr. Shands has said it would be impossible to audit the accounts because of the failure to put down the proper entries, and so forth and because of the bad way of keeping books. Mr. Shands audited that account in 1943—exactly the same type of books, exactly the same bookkeeping as a continuation. He audited that account in 1943 and came up with an audit, which there is no conflict since by his partner, Mr. Elkins, I think it was. It may have been Mr. Durham. Mr. Shands said he did right much of the work, came up and he made an audit then; so I don't know why he has changed his mind now and said he can't make an audit now. He certainly made it then, and came up and said everything was all right, after they had finally gotten through. Why he says he can't make it now, why he says it is hard, why he says it is impossible—It is hard, very hard. Mr. Hardy and Mr. Lewis spent fifty man-days on it each year, and that is no child play, for experts like they are; but they made the audit, and it has not been shown to be wrong in one single dollar. Now normally I think that we would say that at this point that here is an account. First of all, after establishing the fiduciary relationship and having received no account, the court would probably refer to a master and say, page 485 } "You furnish an account." But that was not done, and we have brought that in, and that is in line with the case Mr. Chappell was reading, that railroad case, where the same thing happened; and the railroad, instead of waiting for them to render an account, sent their auditors in and said, "You haven't rendered an account. We are going to render an account and submit it to the

court," which they did. And the Supreme Court approved that course of procedure. So in this case what are the results of the evidence that we think is before the court at the present time? For the convenience of the court, we have simply taken figures which have been obtained and shown in Mr. Toler's audit and in Mr. Hardy's and Mr. Lewis' audit, and we have listed them down here in column form, beginning with the year 1951 and ending with the year 1955; and we have listed the ones, first, the cash not accounted for, which is just completely the cash as shown to have come in, but we don't know what happened. We can't tell. Nobody can tell. Mr. Pulley was charged with the duty of telling us. He couldn't tell us for the year 1951, but worse than that, he couldn't tell us for the year 1955, which was just after the year closed. He couldn't tell anything about it. So that column is the larger column, and is the column to the left; and we think if those are bound to be due, don't see anything in the evidence that says that they should be cut
page 486 } down or should be not due, then we think it is due from the close of each year, when they are due, and down to the present time. Now the improper second column, the improper or no supporting vouchers, I must admit that the court, if it so desires, can find there is evidence to support the fact that some accountants have said that they would accept as a proper accounting the checks themselves, when payable to firms, and not require those firms to send back vouchers or invoices or something of that sort, so there might be, if the court wishes, to find enough conflict in the evidence as to what is proper accounting on those items for the court to say, "I believe you have accounted for those enough, and therefore he is not liable for those," that would be the second column; and that would be, if the court so found, then rule that the total, which is the third column, would be confined to the first column; and we submit that that is what does follow in this case, because the evidence is uncontradicted. Now something has been said about the years prior to 1951. We have been asked by counsel for the defendant from time to time to waive our rights prior to 1951, and—

Mr. Woodward: I beg to differ at this point. We haven't asked you to waive anything. We asked you what you would claim.

Mr. Parker: You asked in Chesterfield if we would limit them or give up them, any rights that we have
page 487 } prior to '51: and if the court would remember, I said I didn't think they had a right to put us on terms, and that I wasn't going to agree to anything. Now we

haven't introduced any evidence prior to 1951. Testimony will show that these audits were extremely expensive, and that involved an enormous amount of time and money, and that we haven't gone back to 1951. The evidence further shows—but here again I think the court would be fairly entitled to say that the evidence we have wasn't sufficient to establish anything back to 1951, because the only evidence is that Mr. Lewis examined the books, only cash ledger book, back to 1951, and that they seemed to have been kept in the same manner and that about the same amount of cash flow was going through the estate during those years as during '51 and '55, and that he would, under those circumstances, expect to find about the same amount of property owing by Mr. Pulley to the estate and not accounted for; but I am frank to say that I would consider that to be properly sufficient proof on which to base a judgment for the years prior to 1951. It may be sufficient for the court to say to Mr. Pulley, "We want you to account for those years prior to '51," but I don't think there is enough evidence in the case at the present time. Now if Your Honor please, I believe that is about all my notes that I have in connection with the facts, and we submit, sir, that two things.

page 488 } This was a fiduciary relationship. He has not accounted. He should account, and in absence of any other figures, the figures shown here on the summary taken from the reports which are in evidence are controlling and that the court should enter judgment for the complainants in, we say, the total shown in the third column, but certainly in the amount of the total shown in the first column of Exhibit 13.

(The court then, 11:50 a. m., September 11, 1958, took a recess until 12:07 p. m., September 11, 1958, at which time it reconvened.)

Mr. Parker: If the court please, I don't want to mislead the court, and my attention was called to one fact which I would like to state to the court, I didn't know it myself. The court asked about these sheets that were submitted in 1951 through 1955, and the attached statements there, as to whether or not when they were paid that money that wasn't a settlement of account. I think I explained that that didn't mean that he had accounted for all the money, or anything of that sort; but I want to further point out to you, this is not a distribution.

The Court: Those, in my mind, do not constitute an accounting. My question to you was not based on those papers,

but was based on the fact that a distribution was made each year for what purported to be at each year a distribution of the profits.

page 489 } Mr. Parker: No, sir, not of all of the profits. The evidence doesn't show that. At least I don't believe it does. It doesn't show that. It was a partnership, and they didn't take all that. This is taxable income only, and they show nothing. A distribution was made each year, and not of all of the profits, and the evidence will not show of all the profits.

Mr. Moyler: If it please the court, I don't care to take long to undertake to further expound upon the case, or explain it to Your Honor. We have all been at it seriously for about three or four days here, and we have presented to Your Honor the evidence on direct and cross examination as made up by pleadings, with the results that we have found. It is significant, however, that the bill of complaint is predicated upon fraud, and the basis of that fraud, it calls for an accounting; and I presume that the complainants thought, in good faith, that the defendant—but I don't think there was any justification for it—had converted to his use certain unspecified and undetermined, and as yet unspecified and undetermined amounts; but factually, as the matter progressed and as it was submitted to the court that Mr. Pulley was a capable businessman in his own right, not only for the Bains, but personally, and as the evidence developed and showed the extent of available assets and funds which he had, that he made by his different business

page 490 } investments, it appeared that Mr. Pulley—and it appears that Mr. Pulley had at all times when he purchased any of the property—sufficient funds with which to purchase it of his own money, and that was clearly demonstrated, as Your Honor remarked just now, by the testimony, and no proof was substantiated of the allegation that he had converted the Bain money into land of his own purchases. I think that that is a clear fact, that it was unquestionably shown from the income records which he had, shown that available cash for each year from '47 straight on through, and the fact that testimony of Mr. Frank P. Pulley, Junior about the purchase of this property. So I think that probably if I had been in the same position as the complainants, that with the type of report that had been gotten for them and maybe they suspicioned that things had not been like they wanted, and that perhaps Mr. Pulley had acquired some property of considerable size and dimensions and that then this suit resulted, which is full of generalities, is full of innuendos and general conclusions,

and it was duly and seasonably answered, and I submit to the court that the proof has fallen short of specifying a definite sum ascertained. We know the evidence; Your Honor has commented on certain aspects of it, which I will not undertake to comment on in detail again, but we know that the accountants could not testify as to where this item went and where that item went, and this

page 491 } and that and the other, as brought out by the evidence, which is fresh in the minds of all of us, and therefore the proof fell down on the allegations submitted. Now all of these audit reports—and as Your Honor stated—I think all of the auditors and accountants who testified seem to be men of the highest integrity, which counsel for the defendant have no dispute or reason to motivate any idea of their untrustworthiness, and so forth; but in the foreword of all these accounts you see predicated—here is the one for 1951, for instance. That has about nine pages of typewritten explanatory comments on the audit for one year, and page 1 it says, "Due to the lack of adequate records, recording of cash receipts and disbursements, it was necessary for us to examine all the transactions in detail," and they come on to say later "all available records;" and it shows the system, which was the same system which was invoked since the time of T. L. Bain. I presume Mr. Pulley was a young man when he started working there, the one who had come on through all these years. Mr. Parker said something about an audit having been made in '43, when it was thought that something was wrong, and that Davis and Elkins made it, and that Mr. Shands was working for them at that time; but it was found that although it appeared from the accounts of Davis and Elkins that maybe something was wrong at that time, it was clarified and explained. They had the initiative and the inquisitiveness in 1943

page 492 } to look into it, and they were charged again with the type of system in vogue since 1936, and they affirmed, or re-affirmed, that same system of bookkeeping in '43, and acquiesced in it; and if they had any suspicion in 1943 that there could have been anything wrong, they were doubly charged with a higher degree of care to look into the matter, or anything that they wanted to look into it for, and to keep a closer surveillance over the matter since '43 than if they didn't have an audit in '43. I think that appears obvious; but they went ahead and lulled Mr. Pulley into the belief that the system was satisfactory, that they were satisfied with the records, satisfied with the management. They stated that they didn't know anybody that could make any more money for them than Mr. Pulley, and

when the matter was brought to their attention for the need of a new bookkeeping system—I believe the record states Mr. Shands mentioned it to them several times—they said no, they didn't want to get a new bookkeeper, and they wanted to go along with the same system they had. Mr. Pulley was obviously not a C. P. A. These gentlemen have worked an unending amount of time. They have come in here with a list of papers. A country business operated by the T. L. Bain estate is not, as Mr. Woodward so forcibly brought out on cross examination of the witnesses, is not the same type of business as one operated like page 493 } VEPCO, Planters Nut and Chocolate Company, or like some concern who has qualified C. P. A.'s with all *they* money they want to spend and all the systems they want to invoke. It is not run that sort of way. It was run like it had been and like it suited Mr. Bain and like it suited the suceeding heirs and the trustees; and when they became trustees, they were not only beneficiaries, but they themselves were trustees, and as such, they had an interest in the matter from a fiduciary standpoint. They had an interest in it personally, and they certainly appeared at these meetings. They certainly were there when the funds were reported as to how much they had in the bank and how much was made. It was discussed. It was voted themselves from the information that was given to them from time to time as to what it would pay; and during the years, testimony shows that when they sold capital assets, they divided them. They didn't even wait until the end of the year, but they divided their proceeds then, and they evidently were satisfied that there would be sufficient funds in hand to run their business, and on the basis it had been before distributions were made from the earnings of the operated business of the commissary store and farms; and I say they had knowledge and notice each time they met as to what was doing, and they ratified and approved the transaction and accepted their dividend checks—distribution checks. He (their auditor) says on page 2 "no record of cash receipts dispage 494 } bursements was maintained." "We were unable to locate any sales tickets," not to mention the evidence in support of these things; and the evidence shows that in 1952, beginning in 1952, they had what they called a ticket system, whereby certain charges would be made to tenant "X" or customer "X," the ticket put in his files. When his account was paid or settled he was given tickets, credit on the books, account credited by ticket so much, and the ticket itself and the system itself, as exemplified by the tickets, could not and did not show the composite

items represented by the total. The tickets had been given to the customer that were entered as a credit, and so that was the system that was had; and that is why Mr. Thedieck told you in honesty and integrity that it was impossible to make a detailed analysis of it, because the record, because the system wasn't adequate and it couldn't be done; and if it couldn't be done—and there is no other system—and there is no evidence in the record at all that Mr. Pulley was objecting to any new system that might be installed, or was not willing to go ahead with it.

Mr. Parker: I don't like to call you, but there is evidence that he said he did not want to change the system.

The Court: He said he didn't know anything about it.

Mr. Parker: And Mr. Bain said he didn't know anything about it and didn't want to change the system.

page 495 } The Court: He said that Mr. Pulley said he didn't know any system except it.

Mr. Parker: And didn't want to change it.

Mr. Moyler: As far as he was concerned, he didn't know anything about it; but I say Mr. Pulley was the employee of the Bains, and it was up to him to keep the system that they provided, or else get rid of him and let somebody keep the system that they did want. It was not a question of the tail wagging the dog. They were the employer, and they were the ones who turned over the system to Mr. Pulley to start with, and that was the system in vogue; and when they mentioned about it, Mr. Pulley said, "I don't know anything about that type of system." They had to do one of two things: go ahead with the system they had, or get somebody else to keep it, or send him off to business school and teach him to keep it—one or the other. And what did they do? They went on with this system that they had, and that is what happened with the whole situation. Now, if Your Honor cares to go through these, there is no need of my going in all these forewords to each audit and all these reports and stating time after time and time after time it appears, "in all available reports," "from available records," and "no records were kept of this" and we "couldn't adequately determine," and "from what records are available," we analyze thus and so and we determined. Now

page 496 } their theories may be fine for the classroom, and fine to rationalize about, but we are dealing with the practical affairs between a principal and an agent, between an employer and an employee, an actual system; not what is idealistic, but what was actually in existence at that particular place, with full knowledge of the parties. I want to just call attention—which is somewhat

repetitious—as counsel for the complainants has stated, in that some of these authorities have been given to Your Honor before, but in American Jurisprudence, page 286, we find this statement: "But an account stated cannot be opened by a bill in equity unless fraud, mistake, or palpable errors are affirmatively shown; and where parties have settled their accounts and struck a balance which has been adjusted by cash or with a security for its payment at a future day, it is incumbent upon the party complaining of fraud or mistake to allege it specifically and to establish the allegation by proof. Thus, one who seeks to have a court of equity open a settled account, after a lapse of several years, on the ground of fraud must state in his bill the particular act of fraud, and how, when and in what manner it was perpetrated. If a mistake is alleged, this must be stated with precision, and made apparent, "and I say that the statement isn't here," so that the court may rectify, with a feeling of certainty, that it is not committing another and perhaps greater mistake. There must also be distinct averment as to the page 497 } time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery was, so that the court may clearly see whether the discovery might not have been made before. "And in the case of *Goldsmith against Latz,* in 96 Virginia, page 680, is this very significant statement: "Unexplained acquiescence for more than a year in the correctness of an account rendered raises a presumption that the account is correct, and throws a burden of proving errors on the parties denying its correctness." Story's Equity Pleading, 10th Edition, section 21: "Where a bill seeks a general account upon a charge of fraud, it is not sufficient to make such charge in general terms; but it should point out and state particular actual fraud. So in a bill to open a settled account, it is not sufficient to allege generally that it is erroneous, but the specific errors should be pointed out. Nor if the plaintiff fails to support his equity on the different items alleged can the bill be sustained against a *demurer* upon a vague charge of voluminous accounts between the parties." And I also have *refered* to and counsel have seen—an opinion by Chief Justice Marshall in 4 Cranch's Report, page 305. I won't undertake to pronounce the case, *Chappendelaine* v. *Dechenaux.* "The bill in this case is brought to set aside a stated account on suggestion of fraud; or if to be not set aside, to correct its errors and obtain a settlement of transactions subsequent to the account. The stated account page 498 } is pleaded in bar of so much of the bill as requires that the subject should be again opened;

and the particular errors assigned are denied in the answer." By Chief Justice Marshall: "That the plea in bar must be sustained, except so far as it may be in the powers of representatives of *Chappendelaine* to show clearly that errors had been committed, is a proposition about which no member of the court has doubted for an instant." That was the real Supreme Court of the United States, the distinguished Chief Justice. Continuing: "No practice could be more dangerous than that of opening accounts which the parties themselves have adjusted on suggestion supported by doubtful or by only probable testimony." Another case which was earlier cited by us is the Virginia case of *Cavanaugh against Cavanaugh,* 98 Virginia, page 649. It is interesting and it is submitted that it is somewhat analagous to the case which we have here. I am quoting from the opinion of the court. That is 98, Virginia, page 649. "There is a mass of irrelevant, inconclusive, and, in some respects, contradictory evidence presented in the record, which it would be idle to discuss. We think it fully sustains the opinion of the commissioner, that it is impossible to ascertain at present the true condition of accounts between the estate of James and Joseph Cavanaugh. In this view the Circuit Court concurred and its decree states, quote, 'that by reason of the lapse of time, the death of the parties, the loss of the evidence, the loose business methods of the parties, and the page 499 } obscurity and uncertainty thence ensuing, an accurate or fair settlement of the controverted accounts between Joseph and James Cavanaugh is now impossible." We submit that that is true here and the court continues, "and the court, being further of the opinion that the staleness of the demands now set up by Joseph Cavanaugh, administrator, against James Cavanaugh, and the fact that the same was never asserted by said Cavanaugh in his life time, or before the decree in these causes at the October Term, 1898, precludes the idea that he ever intended to assert such claim. We are of the opinion that the decree of the Circuit Court is in harmony with the well settled law of this State." And I quote another case, *Harrison against Gibson,* which is an old Virginia case in 23 Grattan, page 212: "If from the delay which has taken place, it is manifest that if no correct account can be rendered; that any conclusion to which the court can arrive must be at best conjectural, and that the original transactions have become so obscured by time and the loss of evidence, and the death of parties"—and in this instance I might say the equivalent of death, so far as the mental capacity of Mr. Pulley, his physical capacity to defend this action in this case are concerned—"as

to render it difficult to do justice, the court will not relieve the plaintiffs." Now, sir, I have written down a lot of things that our friends have mentioned here and the court has stated that this is not a case that is similar to that of an administrator of an estate accountable to the

page 500 } court. I don't have authorities before me to quote, but I think I understand the law pertaining to that situation, which could not be any stronger than it could in this case, and that is that even an administrator is not held to such a technically high degree of care as to preclude anyone from being willing to serve as an administrator of an estate; but he is held to, generally, the same degree of care, duty and responsibility that the average person would have and be held to in the discharge of his own personal affairs. I believe that is about the general substance of the law covering it. Now if a man ran his business like his boss wanted him to run it, then he has accounted for his business in the same manner that the boss wanted it accounted for. Now the evidence as to the cash transactions in that business has been that the customers wanted, or received, or wanted the money in cash. It was paid in cash through the years. A good percentage of it over the counter, a good percentage of it, or large part of it, an undetermined amount, was deposited in the drawer in cash. Lots of times they would come in when the bank was closed, and we know—and the court will take judicial notice of the fact—that the bank is not open always; and the tenants usually come to town to shop after the day's work is over, and they want the money. They don't have the credit. They want to make purchases they can't get, and so as a matter of custom and practical expediency—that is the

page 501 } system which was invoked and maintained in that store, and maybe, as far as we know, now is being maintained there—but it is a custom that Mr. Pulley worked with. Now then, he has accounted, and he has been lulled into the belief that the system which he had was satisfactory; and we say that he has discharged his duties and that there has been no specific ascertainment of a definite amount that has been determined that is due by him to these parties, and that consequently the case should be dismissed. If it please the court, I think that I have covered essentially what I wanted to say about it. The court has commented on the evidence; the other parties have mentioned it here. I believe that is all, and Mr. Woodward will conclude with what we have to say; but in summarization, here is a man that has been going there for twenty years and running that business. He made reports. He made distribution which

they accepted, which they acknowledged, which they knew about; and on information that was given to them, they had at all times the opportunity to go, seek in to, and inquire; and Mr. Harry L. Bain, an outstanding business man in Southampton, in the county, and a man of prominence, one of the trustees, engaged in a similar business to that of the Bain estate in his own right, and possibly with his brother and sister similarly situated, ran an estate—on the witness stand, and Mr. Bain was of course interested

page 502 } in what returns he got from his part of this estate, as were the other members of the Bain family—and he attended these meetings and he received his part, and he knows about what land they have got, and he knows about what the value of the land is, and he knew the system that he had, and he knew that they were the circumstances and conditions that were carried on and had been carried on for years; and we say that he as one of the trustees, and one of the others, is typical of those parties that were interested in the management, the control of the thing—and accepted the distribution and payments made to him with the knowledge that they were distributions, that the money was there available to make them with, and that they had been paid as part of the earnings from the business, or as a part of the sale of the property.

The Court: Gentlemen, suppose we adjourn until—for lunch—say, a quarter to 2:00, but we don't want to curtail the argument in this matter; and then Mr. Woodward can continue, and Mr. Chappell and Mr. Parker can.

(The court then, at 12:35 a. m., September 11, 1958, took a recess until 1:45 p. m., September 11, 1958, at which time it re-convened.)

Mr. Woodward: Your Honor, please, after hearing the whole case, and argument of these gentlemen, I reached an inescapable conclusion—that there is nothing in

page 503 } this case upon which the court can grasp and hold that has been proven by clear, convincing, and cogent testimony that could form a basis of any decree by the complainants; and on that we submit the case.

Mr. Chappell: Your Honor, that surely puts me on a turn, with a short argument like that; and I will try to respond in kind, but not quite so short. If it please the court, I would like to comment upon certain matters alluded to by Mr. Moyler; and first of all, I realize that such things are repetitious. This suit for account is not predicated upon fraud,

but, rather, predicated upon the duty to account. That beginning point is fundamental.

The Court: You concede there is no evidence of diversion?

Mr. Chappell: Precisely. We are seeking at this time—and the very substance of our bill is directed to the account—the establishment of the fiduciary relationship, the following duty to keep and preserve vouchers; and there is one point which disturbs me enough that—I know it is repetitious, but I want to mention it again to the court. On a question of the burden of proof—burden of proof—this true bill of account is distinguished from ordinary bills of account in just that particular, that the burden of proof is on the fiduciary, the defendant here, to come forward and show how the money is to be accounted for.

The Court: Unless there is some other element
page 504 } in the case, we would—

Mr. Chappell: —would dispense with it, as you suggested, with estoppel, waiver, or what have you; and the reason which we would like to submit my authority—I don't believe I have got them—but aside from that, that's the way the matter would ordinarily proceed. That's the fundamental feature of this bill. Mr. Moyler has mentioned in his citation, made reference to 1 American *Jrisprudence,* page 286, in speaking of accounts stated. As we mentioned to the court, when this matter of accounts stated first came up, we don't think it is appropriate in a suit of this sort. There is no debtor and creditor relationship here, and that is of prime importance in any account stated. In fact, Mr. Moyler had gone ahead in that 1 American Jurisprudence and had read from page 273, instead of page 286. If he had, he would have found that page: "An account stated is predicated upon transactions between the parties of such a nature as to create the relation of debtor and creditor prior to the statement of the account." There is no debtor-creditor relationship here—the Goldsmith case, to which Mr. Moyler referred, a debtor-creditor situation. The point I am making is this. You Honor, I believe, indicated that you are of the opinion that there was in fact a fiduciary relationship. I don't believe there is any question on that, as a beginning
fact. I believe further there has been an indica-
page 505 } tion from the court that these annual statements
which have been referred to here, do not amount to accounting. You made inquiry about payment by check and acceptance of payment by check, and things of that sort; but taking that as your next step, then it seems to me that once a fiduciary relationship has been established, the next

duty, to keep and preserve vouchers comes into play, and then the burden of proof always comes into play; but, Your Honor has suggested one factor which seems to me—I won't use the word "trouble"— but certainly it is a matter that you questioned us on, and that is the proposition of estoppel, condonation, waiver, whatever you want to call it. I respectfully submit if that is the focal point of this case in the mind of the court, counsel will request an opportunity to submit authorities on that one, or on any points that the court feels it should have authorities on, in view of the fact that it feels it has evidence at its finger tips. I emphasize that for the very simple reason that in the year '55—to which Mr. Parker has referred—under no stretch of the imagination, whether it be called estoppel, waiver, laches, or what have you, could it be said that beginning an account within two weeks after the very year that it was being audited, amount to too long a passage of time. Therefore, to keep an argument limited, as I promised I would do, we believe that

page 506 } we have made out a case, we believe that the fiduciary relationship has been clearly established, that the following duties pass to this fiduciary, that these duties have not been performed, namely, to keep his records and preserve his vouchers, that if the court feels that there has been a question of waiver or estoppel or laches, or whatever you want to call it, that counsel be allowed to submit briefs on that point, or such other points as you may desire; but that except for that—and mind you, I am not going to say it is a valid point—but except for that, there can be but one way to read this evidence that has been presented here, and that is the result of a grant of relief requested by the complainants. There has been a number of suggestions that there is no certainty, that there is nothing the court can grasp and hold. I submit that Plaintiff Exhibit 13, which is adequately supported by the other exhibits in the report, give a great deal for the court to grasp and hold on, that the summary with the computation, and broken down not so as to confuse the court with one big lump sum, but broken down so as to show first the cash unaccounted for. Next, the checks unsupported by vouchers, if the court should see fit to eliminate those all together: and then the four figures presented in summary form. They have not been accounted for. We believe that that is sufficiently definite information to enable this court to act, and therefore we

page 507 } respectfully request relief that we have prayed for in our bill.

The Court: This is a suit for accounting by the beneficiaries of the estate of Thomas L. Bain against

Douglas H. Pulley, who was the agent and manager of the beneficiaries. This agency began in the year 1936, upon the death of Thomas L. Bain. The question involved the management of a store and seventeen farms by Mr. Pulley, acting pursuant to contract entered into with the beneficiaries of the estate of Thomas L. Bain in 1936. That contract gave very broad discretion to Mr. Pulley, who had been employed by Thomas L. Bain in this business for a period of about ten years prior to Mr. Bain's death. The contract entered into in 1936, while it provided for accounts to be made—and it was explicit on that point—it gave a great deal of discretion, almost complete discretion in Mr. Pulley in the matters involving the operation of the estate. He had full control in the sale of farm machinery and various things that were about to become obsolete, and this contract was unquestionably a contract based upon trust and confidence. It was a great deal of trust and confidence that was reposed in Mr. Pulley. During the period of twenty years this matter was handled almost identically in the manner in which it had been handled by Mr. Bain prior to his death, and it appears from the evidence that the method of handling these farms and this store, which was in the nature of a commissary for the operation of the farms by the tenants, this operation

page 508 } was not the type of operation that a manufacturing industry might undertake, but was rather peculiar to the particular business at hand; that is, the management of large numbers of farms, and operating through a store or commissary. The type of business was not unknown to the beneficiaries. Numbers of the beneficiaries operated businesses for themselves, virtually upon the same basis.

Mr. Pulley was not an expert bookkeeper; nor was he trained in the arts of accountancy. He was not a C. P. A., and he did not pretend to be. If one man was to conduct this matter, and had the qualities of an expert accountant, he probably would have lacked the qualities of handling properties of this kind, or that type of business in dealing with the intricacies involved in all the matters regarding the tenants and the operation of the property. The method of operating the properties was clearly known by the beneficiaries. There seems to have been absolutely no disposition on the part of Mr. Pulley to withhold any facts regarding the handling of this property. As a matter of fact, some time around 1950, Mr. Bain, one of the beneficiaries, was told that the accounting operation was not to be—lacked a lot to be desired; but he did not insist on a change in the prac-

tices of accountancy, and tended to permit the operation in exactly the same way.

Now this suit is a suit for an account. It is predicated upon the theory that an audit of these books discloses
page 509 } that there are certain failures to account for all of the funds that came into the hand of Mr. Pulley in these books. The books were audited by the Toler Company and by Mr. Lewis and Mr. Hardy in the same way that they would audit the books of a highly industrialized company or corporation, using the most improved double entry method to bookkeeping. In the report of these accountants—and the court would wish to express its high opinion of all of the accountants on both sides that testified in this case—it is a question of approach, rather than a question of anybody wishing to do something that didn't reflect exactly what did happen; but there is no—in the accounts upon which this suit is based—there is no allowance for the bookkeeping methods which were practiced, certainly with the acquiescence of the beneficiaries. It is to be noted that when the first accountant, Mr. Toler, made his audit, he discovered later that it was, that certain records or invoices that have been later discovered changed that to the extent of $25,000. The court is of the opinion that under the state of the records, as disclosed by the evidence, it would be utterly impossible to get a completely accurate picture of every transaction; but it is to be noted, however, that each year during the twenty years a distribution was made to the beneficiaries of this estate; and it is certainly to be presumed that these yearly distributions were intended to be distri-
butions of the profits for that year; and it is to
page 510 } be assumed also that these distributions were accepted by the beneficiaries as a distribution for that year. It is further to be noted that there is a complete absence of even the slightest indicia or badges of fraud, not any. I think the letter written by Mr. Douglas H. Pulley after his unfortunate stroke and illness, when he realized that he could no longer handle his affairs, and the complete absence in all of the evidence of any disposition on the part of Mr. Pulley to do away with any books or records of any kind, certainly no man having a consciousness of having diverted funds to his own use would have written such a letter as Mr. Pulley wrote when he announced his retirement. Surely no man with a knowledge of having diverted funds to his own use would have left the records just as they were. The court propounded questions to certain of the accountants as to whether they discovered anything that

would indicate any attempt to, in any way, doctor up the books. There was none.

So we come down to the essential issue in this case, and that is this; that whether an accountancy, an audit which discloses at the most that certain evidence of what was done is missing from the records, and whether in equity the court should enter judgment for the amount of those so-called discrepancies. The court is of the opinion that if there had been any such large discrepancies or diversions of actual funds during these years, that surely a man with

page 511 } the experience and knowledge of Mr. Bain would have certainly detected it in the amount that he received in his dividends and distributions; and yet for a period of twenty years not one single suspicion, no suspicion was aroused whatsoever by the amount actually paid out to the beneficiaries, and yet we are asked to enter judgment against this agent for an amount double the amount, in some cases more than double the amount which was actually paid out as profit. It is incredible, to me, that a person with the knowledge that Mr. Bain had in that type of operation, would have been absolutely free from suspicion. Either he was very negligent in failing to grasp what was happening, or there would be an unconscionable reaping of rewards or profits that were not made, simply because of a failure in bookkeeping. The court is of the opinion that the beneficiaries, having accepted the distributions as made, having acquiesced in the method of bookkeeping and the method in which the business was conducted, they cannot, in equity, ask for recovery from the agent at this time. Accordingly, decree will be entered dismissing the bill.

page 512 } The undersigned counsel for all parties in the cause Marion T. Bain et al. *v.* Douglas Holden Pulley do certify that the foregoing is a true and correct transcript of the oral testimony and other incidents of trial in said cause.

HARVEY CHAPPELL, JR.
ALEX PARKER
of counsel for complainants.

EDWARD MOYLER
THOS. L. WOODWARD
of counsel for defendant.

page 513 } I, William Old, Judge Designate of the Circuit Court of Southampton County, who presided over the trial of Marion T. Bain et als. *v.* Douglas Holden Pulley,

in said Court, do certify that the foregoing is a true and correct transcript of the evidence adduced, of the exhibits offered in evidence, of the objections to the evidenc, or any part thereof, offered, admitted, rejected or stricken out, and other incidents of the trial of said cause. All the exhibits offered by plaintiff and defendant have been initialed by me for the purpose of identification and making them a part of the record.

I further certify that this certificate has been tendered to and signed by me this date, within sixty days of the entry of final judgment in this cause, and that reasonable notice has been given to the Attorneys for the defendant of the time and place at which such certificate has been tendered.

Given under my hand this 6 day of November, 1958.

WILLIAM OLD
Judge Designate of the Circuit
Court of Southampton County).

page 514 } I, Harvey B. McLemore, Jr., Clerk of the Circuit Court of Southampton County, do certify that the foregoing is a true and correct transcript and report of the testimony and all other incidents of the trial of the cause of Marion T. Bain et als. *v.* Douglas Holden Pulley, and that the original thereof, together with the original exhibits therein referred to, duly initialed and authenticated by the Judge who presided over the trial of the said cause, were lodged and filed with me as Clerk of said Court, this 7th day of November, 1958.

HARVEY B. McLEMORE, JR.
Clerk of the Circuit Court of
Southampton County.

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official 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 printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§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 references 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 opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, 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. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three 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 the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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