Return to
FILE COPY
Clerk, Supreme Court of Appeals
Richmond, Va.

202 VA 807

Record No. 5247

In the Supreme Court of Appeals of Virginia at Richmond

ESTHER W. TALBERT BREWER

v.

THE FIRST NATIONAL BANK OF DANVILLE, Committee of the Estate of Emma L. Winiker, et al.

FROM THE CORPORATION COURT OF DANVILLE

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. 5247

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 10th day of October, 1960.

ESTHER W. TALBERT BREWER, Appellant,

against

THE FIRST NATIONAL BANK OF DANVILLE, COMMITTEE OF THE ESTATE OF EMMA L. WINIKER, ET AL., Appellees.

From the Corporation Court of Danville

Upon the petition of Esther W. Talbert Brewer an appeal and *supersedeas* is awarded her from a decree entered by the Corporation Court of Danville on the 14th day of April, 1960, in a certain chancery cause then therein depending wherein First National Bank of Danville, Committee of the estate of Emma L. Winiker, was plaintiff and Winiker Lumber Company, Incorporated, the petitioner and others were defendants; upon the petitioner, or some one for her, entering into bond with sufficient security before the clerk of the said corporation court in the penalty of three thousand dollars, with condition as the law directs.

RECORD

* * * * *

page 21 }

* * * * *

Filed in Clerk's Office, Corporation Court, Danville, Virginia March 9th 1960.

Attest:

MARGARET EDMUNDS, Deputy Clerk.

REPORT OF COMMISSIONER IN CHANCERY.

To the Honorable A. M. Aiken, Judge of said Court:

Your undersigned Commissioner in Chancery begs to report that pursuant to a Decree of Reference entered in the above styled cause pending in your Honor's Court on October 21, 1959, your Commissioner gave notice to the parties in said cause that on November 12, 1959, at 10:00 A. M. at the offices of T. Ryland Dodson, Attorney, 513 Masonic Temple, Danville, Virginia, he would proceed to execute said Decree, and two continuances becoming necessary, notices of said continuances were sent to the parties, all of said notices being filed herewith; and the proceedings were held on January 4, 1960, at said time and place, wherein the witnesses produced by the parties were examined touching the matters of inquiry before me, reducing their examination to writing in the form of depositions, which are returned herewith and made a part of this report, and thereupon, upon due consideration of all, of which your Commissioner submits the following report:

1. Are any of the parties defendant liable to the complainant for the weekly payments in the amount of Forty Dollars ($40.00) as set out in the agreement referred to in the Bill of Complaint, and if so, in what proportions, and from what date?

During the year 1939, Emma L. Winiker became the sole owner of Winiker Lumber Company by virtue of her husband's death. For several years prior to 1939, S. F. (Bud) Winiker, a son, and Earl S. Talbert, a son-in-law and husband

of Esther Winiker Talbert, actively participated
page 22 } in the operation of the business. Earl S. Talbert
continued with the business until his death on February 8, 1955, and S. F. Winiker has continued until the present time.

In 1940, Emma L. Winiker had the business incorporated. She accepted 250 shares of $100.00 par value stock and a $20,000.00 note bearing 6% interest secured by a deed of trust on the real estate for the business. In 1946, Mrs. Esther W. Talbert purchased 25 shares of stock from Emma L. Winiker for a cash consideration of $2,500.00 and S. F. Winiker purchased 25 shares for $2,500.00. During the period from 1951 to January 17, 1955, the matter of Earl S. Talbert and S. F. Winiker purchasing the remaining 200 shares from Emma L. Winiker was discussed. On January 27, 1955, Emma L. Winiker transferred 100 shares of Winiker Lumber Company stock to Earl S. Talbert and another 100 shares to S. F. Winiker. On January 26, 1955, S. F. Winiker executed a $10,000.00 demand note bearing 6% interest and payable monthly to Emma L. Winiker and on the same date Esther W. Talbert executed a like note. On January 17, 1955, the following agreement was executed:

"This agreement, made this the 17th day of January, 1955, by and between E. S. Talbert, and/or his wife, Esther Winiker Talbert, one party of the first part, and S. F. Winiker, the other party of the first part, and Emma L. Winiker, party of the second part. TO WIT:

"The parties of the first part, their heirs or successors, hereby acknowledge the guidance and the many considerations bestowed upon them and feel that they will never be able to repay the party of the second part for her many indulgences.

"Therefore, the parties of the first part agree among themselves, that, in consideration of the above mentioned feelings of gratitude, they, as operators of the Winiker Lumber Company, Inc., will list the party of the second part on the payroll of the Corporation's books and pay to her a salary of at least $40.00 per week, regardless of whether or not she retains stock in the Corporation, as long as the party of the second part lives."

After the above instruments were executed, Emma L. Winiker no longer had an interest in the business, but had an income of $100.00 per month for interest on the $20,000.00

note, $100.00 per month for interest on the two (2)
page 23 } $10,000.00 notes, and $40.00 per week according to
the agreement. Emma L. Winiker had been receiving $40.00 per week from the Corporation since it was incorporated in 1940.

On February 8, 1955, Earl S. Talbert died and left his property to his wife, Esther W. Talbert. Mrs. Talbert testified that the value of the 100 shares owned by her husband was $90,000.00, but the official appraisal was only $60,000.00.

During the next several months there was considerable negotiation with reference to the sale of one of the one-half (1/2) interest in the business to the other, Esther W. Talbert being the owner of one-half (1/2) of the stock and S. F. Winiker being the owner of the other half. On March 18, 1955, S. F. Winiker wrote a letter to Mrs. Talbert's Agent (Brewer Exhibit 1) in which an offer was solicited and stated further, "Bearing in mind the obligation of the Corporation towards Mrs. Emma L. Winiker, a former stockholder and the holder of a certain note secured by a deed of trust." By letter of April 18, 1955, to S. F. Winiker (Exhibit A) the 125 shares owned by the Talberts were offered for sale for $60,300.00. This offer was accepted and S. F. Winiker became the sole stockholder of Winiker Lumber Company on April 21, 1955.

The Corporation continued to pay the $40.00 each week until May 1959 when they were stopped because the Internal Revenue Department ruled that the so-called salary to Emma L. Winiker could not be considered as a business expense. In July 1959, the assets of Winiker Lumber Company were sold for $161,355.08 plus the assumption of the $20,000.00 debt of the Corporation. However, S. F. Winiker agreed to be responsible for any uncollectable accounts receivable, which were indicated to be approximately $23,500.00.

Both S. F. Winiker and Esther W. Talbert Brewer admit that Emma L. Winiker should continue to receive the $40.00
per week. They disagree, however, on the question
page 24 } of whom should make the payment. S. F. Winiker
contends that it should be paid equally by himself and Esther W. Talbert Brewer and Mrs. Brewer contends that it should be an obligation of the Corporation.

Your Commissioner is of the opinion that the agreement of January 17, 1955, was between the Talberts and S. F. Winiker as individuals and not the Corporation. Therefore, the obligation on the agreement was the obligation of Earl S. Talbert, Esther W. Talbert and S. F. Winiker. The 200 shares of stock were transferred to the individuals and

they were to receive the benefits therefrom. This was a bilateral contract by which Emma L. Winiker transferred 200 shares of stock to the individual in consideration of the individuals promising to pay $40.00 per week to her as long as she lived. The Corporation received nothing and promised nothing. It is true that everyone expected the $40.00 to be paid out of a particular fund, but this, in no way, reduced the liability of the individuals, nor placed liability on the Corporation.

However, circumstances changed quickly. On February 8, 1955, Earl S. Talbert died and his 100 shares passed to his widow, Esther W. Talbert. Then on April 21, 1955, Esther W. Talbert sold her 125 shares of stock in Winiker Lumber Company to S. F. Winiker and he became the sole stockholder of the Corporation. Your Commissioner is of the opinion that although the individuals are liable under the contract of January 17, 1955, the liability was intended to be an incident to the ownership of the stock. Apparently, one of the reasons the individuals agreed to pay the $40.00 per week was because Emma L. Winiker had sold them the stock at only a small portion of its true value Therefore, when S. F. Winiker purchased the stock of Esther W. Talbert on April 21, 1955, he became liable for the entire $40.00 per week. Your Commissioner is satisfied that S. F. Winiker accepted this liability and will continue to be liable. He may possibly get page 25 } someone else to be liable just as Esther W. Talbert got him to be fully liable on the obligation, or in the event S. F. Winiker predeceases his Mother, his heirs or beneficiaries of the stock or its proceeds are liable. The parties to the contract apparently considered the possibility of death or transfer of the stock as the words "their heirs or successors" were used.

However, the transfer of the stock does not relieve the original parties from liability, except in the case of death. But as between S. F. Winiker and Esther W. Talbert Brewer, your Commissioner is of the opinion that Mrs. Brewer will be further liable to pay the $40.00 per week only if S. F. Winiker becomes worthless financially or in the event of his death, the stock becomes worthless and/or the proceeds therefrom are depleted.

Therefore, it is your Commissioner's opinion that S. F. Winiker is liable for the entire $40.00 per week and has been since April 21, 1955. Payments have been made thru May 3, 1959.

2. Would the answer to the preceding question be changed by the death of either Esther W. Talbert Brewer or S. F.

Winiker, or by the dissolution of Winiker Lumber Company, Incorporated, and if so, how?

(a) The death of Esther W. Talbert Brewer would not change the preceding answer.

(b) In the event of the death of S. F. Winiker, Esther W. Talbert Brewer would be liable to pay $40.00 per week as stated above, only if the stock becomes worthless and/or the proceeds therefrom are depleted. In other words, the heirs or devisees should not be involuntarily saddled with the obligation personally.

(c) The dissolution of the Corporation would not change the preceding answers.

3. No other matter has been requested and your Commissioner knows of no other matter which should be reported.

page 26 } Respectfully submitted,

T. RYLAND DODSON
Commissioner in Chancery.

* * * * *

page 29 }

* * * * *

Filed in Clerk's Office, Corporation Court, Danville, Virginia, March 19th 1960.

Attest:

MARGARET EDMUNDS, Deputy Clerk.

EXCEPTIONS OF THE DEFENDANT, ESTHER W. TALBERT BREWER, TO COMMISSIONER'S REPORT.

The defendant, Esther W. Talbert Brewer, in the above captioned cause, does hereby except to the report of the Commissioner in Chancery, T. Ryland Dodson, filed in this cause, upon the following ground:

1. That while the Commissioner has found and reported that the agreement of January 17, 1955 was binding upon the personal estates of S. F. Winiker and Esther W. Talbert

Brewer to pay to Emma L. Winiker the sum of $40.00 per week, and that the obligation of the defendant, Esther W. Talbert Brewer, was assumed by the defendant, S. F. Winiker, when he purchased the stock certificates of said Esther W. Talbert Brewer, said Commissioner has found that the said S. F. Winiker and the assets of Winiker Lumber Company, Incorporated are primarily liable for the payments under the contract of January 17, 1955, but that in the event that the said S. F. Winiker should predecease Emma L. Winiker then his estate would be liable for the performance of said contract only to the extent of said assets which he owns in Winiker Lumber Company, Incorporated, and it is page 30 } the contention of this defendant that the entire estate of the said S. F. Winiker, after his death, should be liable for such payments.

2. Exception is taken to the finding of the Commissioner that the agreement of January 17, 1955 did not bind Winiker Lumber Company, Incorporated, on the ground that the parties who entered into the agreement intended to bind the Corporation and they were the sole stock holders and directors of the said Corporation and did acquiesce in the performance of the contract by the Corporation.

ESTHER W. TALBERT BREWER
By Counsel.

CARTER & CARTER
Counsel for the Defendant,
Esther W. Talbert Brewer
By JOHN W. CARTER
533 Main St., Danville, Va.

* * * * *

page 41 }

* * * * *

FINAL DECREE.

This cause came on this day to be heard upon the papers formerly read therein, the report of T. Ryland Dodson, one of the Commissioners in Chancery of this Court, made and filed in the Clerk's Office thereof on March 7, 1960, pursuant to a decree entered in this cause on October 21, 1959, with depositions filed therewith, the respective exceptions duly filed to said report by plaintiff, The First National Bank of

Danville, Committee of the Estate of Emma L. Winiker, by defendants Winiker Lumber Company, Incorporated, and S. F. Winiker, by defendant Esther W. Talbert Brewer, and by defendants Marie W. Snibbe and Virginia W. Hetherington, and was argued by counsel;

On consideration whereof, the Court doth hereby sustain the exceptions taken to said Commissioner's report by plaintiff, The First National Bank of Danville, Committee of the Estate of Emma L. Winiker, by defendants Winiker Lumber Company, Incorporated, and S. F. Winiker, and by defendants Marie W. Snibbe and Virginia W. Hetherington, and doth overrule the exceptions taken to said report by defendant Esther W. Talbert Brewer; and

It appearing that a proper interpretation of the agreement dated January 17, 1955, signed by E. S. Talbert, page 42 } Esther Winiker Talbert (Brewer), S. F. Winiker and Emma L. Winiker, submitted to the Court for construction by declaratory judgment so requires, it is ADJUDGED, ORDERED and DECREED that said agreement imposes no obligation whatever upon defendant Winiker Lumber Company, Incorporated, for payment of $40.00 a week to Emma L. Winiker, or any part thereof, and that said agreement creates and imposes a legal and binding joint and several obligation upon Esther W. Talbert Brewer and S. F. Winiker to make said payments of $40.00 a week to Emma L. Winiker for her lifetime.

It is further ADJUDGED, ORDERED and DECREED that said obligation for payment of the sum of $40.00 a week to Emma L. Winiker for her lifetime has no relationship to the ownership of the issued and outstanding stock of Winiker Lumber Company, Incorporated, and that said liability was not intended to be an incident to said ownership; and that as between the said Emma L. Winiker, obligee, and the said Esther W. Talbert Brewer and S. F. Winiker, obligors, the said Emma L. Winiker or her duty appointed representative has the right to require either the said Esther W. Talbert Brewer or the said S. F. Winiker to pay and satisfy in full said weekly amount of $40.00 for her lifetime; and that defendant Esther W. Talbert Brewer has failed to prove, as claimed, that defendant S. F. Winiker assumed and undertook to pay and discharge any part of said obligation imposed upon defendant Esther W. Talbert Brewer under said agreement of January 17, 1955, and that as between them each is obligated and liable to pay and satisfy one-half of the $40.00 weekly payment to Emma L. Winiker for her lifetime.

It appearing from said Commissioner's report and the depositions filed therewith that said weekly payment of $40.00

to Emma L. Winiker was paid and satisfied by Winiker Lumber Company, Incorporated, through May 3, 1959, with no payments or parts thereof having been made from said date, that the total amount of said weekly payments now in arrears at the date of this decree is $1,960.00, and

page 43 } that said amount is owing and due by the said Esther W. Talbert Brewer and the said S. F. Winiker to the said Emma L. Winiker, the Court doth ADJUDGE, ORDER and DECREE that said amount be paid promptly to her by said defendants.

It is further ADJUDGED, ORDERED and DECREED that said defendants Esther W. Talbert Brewer and S. F. Winiker shall comply with the obligation and liability imposed upon them under said agreement of January 17, 1955, by paying and satisfying the $40.00 weekly payments to Emma L. Winiker as they become due from week to week until the date of her death.

Defendant Esther W. Talbert Brewer, by counsel, excepts to all of the provisions of the foregoing decree.

The Court doth fix and allow out of the Estate of Emma L. Winiker the sum of $250.00 as a fee to W. Bascom Jordan for his services in the institution and prosecution of this cause, which said fee shall be paid by The First National Bank of Danville, Committee of the Estate of Emma L. Winiker, out of her said estate.

And it appearing that nothing further remains to be accomplished in this cause, it is ORDERED and DIRECTED that defendants Esther W. Talbert Brewer and S. F. Winiker pay the costs thereof, and upon such payment the same shall be dismissed from the docket.

Enter 4/14/60.

A. M. A.

* * * * *

page 44 }

* * * * *

Filed in Clerk's Office, Corporation Court, Danville, Virginia, May 6th 1960.

Attest:

MARGARET EDMUNDS, Deputy Clerk.

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

NOTICE OF APPEAL.

Notice is hereby given to all parties to this cause that the defendant, Esther W. Talbert (Brewer), intends to appeal from the final decree in this cause, and that said defendant will apply for a certificate awarding an appeal to the Supreme Court of Appeals of Virginia, assigning as errors of the Chancellor the following:

ASSIGNMENT OF ERROR.

1. That the Chancellor erred in finding that Winiker Lumber Company, Incorporated, is not obligated to pay to Emma L. Winiker the sum of Forty and 00/100 ($40.00) Dollars per week for life, it being the contention of this defendant that the corporation, through its stockholders, directors and officers, contracted to pay said Emma L. Winiker Forty and 00/100 ($40.00) Dollars per week, which contract was for proper consideration and duly ratified;

2. That the Chancellor erred in finding that this defendant is jointly obligated with the defendant, S. F. page 45 } Winiker, to pay to Emma L. Winiker the sum of Forty and 00/100 ($40.00) Dollars per week for life, it being the contention of this defendant that if there was any personal obligation upon the defendant, Esther W. Talbert (Brewer), to pay any part of such Forty and 00/100 ($40.00) Dollars per week to Emma L. Winiker, the said S. F. Winiker, for good and valuable consideration, has assumed the entire primary liability of this defendant to Emma L. Winiker.

ESTHER W. TALBERT BREWER
By Counsel.

CARTER & CARTER,
Counsel for Esther W.
Talbert (Brewer)
By JOHN W. CARTER.

* * * * *

Landon C. Horne.

DEPOSITIONS.

The depositions of Landon C. Horne and others taken before me, T. Ryland Dodson, Commissioner in Chancery of the Corporation Court of Danville, Virginia, on January 4, 1960, at 10:00 A. M., pursuant to notice, to be read as evidence in the above styled cause.

* * * * *

Dep.
page 2 } The witness,

LANDON C. HORNE,
being first duly sworn, deposes and says:

Examined by Mr. Jordan:
Q. You are Mr. Landon C. Horne?
A. I am; yes, sir.
Q. What is your position with The First National Bank of Danville?
A. Sr. Vice-President and Trust Officer.
Q. Mr. Horne, did The First National Bank in July of 1959, qualify as Committee of the Estate of Mrs. Emma L. Winiker?
A. Yes, sir.
Q. Do you have the date of that qualification?
A. On the 28th of July, 1959.
Q. Since that date, has your bank acted in that capacity?
A. It has.
Q. Did you find among the papers of Mrs. Winiker an agreement between herself and certain of her children?
A. Yes, sir.

* * * * *

Dep.
page 3 }

* * * * *

Mr. Bass:
Q. Mr. Horne, among the assets which you have as Com-

mittee, do you have a note of Mr. St. Clair Winiker and a note of Mrs. Esther Talbert Brewer?

Dep. page 4 } A. Yes.

Q. Would you give us the dates and amounts of those notes?

A. The note of Mr. Winiker is dated January 26, 1955; face amount, $10,000.00.

Q. How is it payable?

A. Payable on demand; interest at 6 per cent, interest being payable monthly. The other one is Mrs. Esther W. Talbert, April 26, 1955; face amount, $10,000.00; interest at 6 per cent, payable monthly.

Q. Has anything been paid on the principal of those notes?

A. No, not on the principal; interest is current.

Q. Do you also have a deed of trust note of the Winiker Lumber Company, Incorporated?

A. We do.

Q. And what are the facts about that note?

A. Dated July 10, 1940; face amount of that, $20,000.00; payable six months from date; interest at 6 per cent, payable monthly; that is secured by deed of trust on the property which is owned by the Winiker Lumber Company; it is a first lien.

Q. Has any payment been made on the principal of that note?

A. Not on the principal; interest is current.

Mr. Meade:

* * * * *

Dep. page 6 }

* * * * *

Q. What is the total evaluation of the Estate which you took over?

A. That is approximately $64,000.00.

Q. That does not include the value of the residence?

A. No, sir.

* * * * *

Dep. page 7 }

Esther W. Talbert Brewer.

* * * * *

The witness,

ESTHER W. TALBERT BREWER,
being first duly sworn, deposes and says:

Examined by Mr. Jordan:

Q. Mrs. Brewer, your first husband was Earl S. Talbert?

A. Yes.

Q. The agreement in evidence here is dated January 17, 1955. Is that his signature to that agreement?

A. Yes, the signature as a stockholder.

Q. Mrs. Brewer, did Mr. Talbert die soon after he signed that agreement?

A. He did; he died February 8.

Q. February 8, 1955?

A. That is right.

Q. Did you subsequently sell all of your interest in the Winiker Lumber Company?

A. I did.

Q. Could you give us some idea about when that was? Not necessarily exactly.

A. Within three months, I would say; I believe it was three months.

Dep. page 8 } Q. Within three months you sold all your interest in Winiker Lumber Company?

A. All my interest and all my obligations, and everything, when I sold out.

Q. Now, Mrs. Brewer, who are the children of Mrs. Emma Winiker?

A. First, Mrs. Marie Snibbe, and of course, Mrs. Walter Brewer, and S. F. Winiker, and Virginia Hetherington.

Q. They are all the children of Mrs. Winiker?

A. That is right.

Q. And they are all living?

A. That is right.

Q. Mrs. Brewer, do you know of your knowledge who actually prepared the agreement in evidence here?

A. Yes.

Q. Who did?

A. My brother.

Q. Will you tell us, please, why you signed that agreement?

A. I believe I can. When my mother sold out to my brother and my husband, they had had charge of the business since

the death of my father. The agreement was that it was always intended that my brother and my husband—

* * * * *

Dep.
page 9 }

* * * * *

A. They would have, of course, the business, and the $20,000.00 deed of trust would belong to my two sisters; and that if the business prospered, that increase would belong to my husband and to my brother. She decided to sell the business to them in January, 1955. She called my brother on the telephone, as well as I can remember, and told him what she wanted to do; and so, he proceeded to get the papers in order; and among them, of course, was this agreement. She said that—we agreed to pay her 6 per cent on these notes that we had made—$10,000.00 a piece—her lifetime, after which they would be ours. The interest on the deed of trust at 6 per cent would be paid by the Winiker Lumber Company her lifetime. Then, that would be paid principally to my sisters. It was also agreed that she would receive from the Winiker Lumber Company a salary of $40.00 a week for her lifetime; and he brought in this agreement, which we all signed as interested in the Winiker Lumber Company, and as stockholders of the Winiker Lumber Company, to agree to pay her from the Winiker Lumber Company

Dep.
page 10 }

$40.00 a week for her lifetime—that is why I signed it.

Q. For her lifetime, did I understand you to say?

A. Yes, for her lifetime.

* * * * *

Mr. Meade:

Q. Mrs. Brewer, what year did your father die?

A. 1939.

Q. Were you married to Mr. Talbert at that time?

A. Yes.

Q. Was he working at Winiker Lumber Company?

A. Yes.

Q. After your father's death, I believe that you said that

Esther W. Talbert Brewer.

your brother and your husband managed Winiker Lumber Company?

A. That is right.

Q. Your father had left all his estate to your mother, had he not?

A. That is correct.

Dep. page 11 } Q. In reply to a question by Mr. Jordan, you stated that your brother had drafted this contract under construction here. Isn't it a fact that he and your husband collaborated together and worked up that agreement?

A. I don't believe so. My husband wasn't very well. He may have approved it, but I am sure Bud worded it.

Q. Didn't you first say that Mr. Winiker, your brother, drew the contract up, and then you later said that your mother called your brother and your husband to draw up the contract. Didn't you say that on direct examination?

A. I don't believe so. I believe I told you she decided to sell the business—let them have the business—decided to go on and sell it to them; and she called my brother, I believe that night, because I happened to be up there with her, and she called him after I left the house, and told him she decided to go on and sell the business, and for him to do whatever was necessary.

Q. Didn't your husband, Mr. Talbert, die suddenly?

A. Yes, I would say so. He hadn't been at all well. It was a shock. He did die suddenly.

Q. Wasn't he up and about at the time this contract was signed?

A. Yes, he was.

Q. Do you know anything about a prior contract dealing with the purchase and sale of this stock?

A. There had been a little agreement or understanding about it.

Dep. page 12 } Q. Wasn't the terms of that informal agreement, the former agreement, the same they were at the time you actually bought the stock?

A. I just don't remember about that.

* * * * *

Q. At the time that the larger portion of the stock of Winiker Lumber Company was bought by your brother and your husband in January, 1955, your husband and your brother owned some stock in the company, did they not?

Esther W. Talbert Brewer.

A. Actually the stock was in my name—the 25 shares—that is all we had.

Q. Then, at the time of the purchase in January, 1955, was all the balance of the stock that was owned by Mrs. Winiker, there was outstanding a certificate for 25 shares in your name, and there was outstanding a certificate for 25 shares in the name of your brother?

A. That is right.

Q. When were those certificates issued to you and to your brother?

A. You know I just have to guess at the time, if that is all right.

Dep. page 13 } Q. Could it have been at the time the charter was obtained and all the stock was issued?

A. No, it was after the death of my father.

Q. Your father owned the business as an individual?

A. Yes, he did. I am not sure, I think it was 1945. My mother then sold to Bud and I—it was 25 shares—I think, I am not sure about the date, but it was back a right good while.

Q. Mrs. Brewer, at the time that you acquired the 25 shares of stock, what was the consideration for that stock?

A. $2,500.00.

Q. And that money was actually paid to your mother?

A. Yes.

Q. I don't recall whether it was paid, or whether you gave a note and afterwards paid the note?

A. It was paid to her.

Q. Paid in cash?

A. Yes.

Q. Do you know whether your brother paid in cash for his 25 shares?

A. Yes, as far as I know.

* * * * *

Dep. page 14 }

* * * * *

Q. When did you sell your stock to your brother?

A. About three months, I reckon; you see, when I sold out my interest, it was all sold at the same time. I am not quite sure about the exact date. It was in a matter of months after my husband died, I sold my interest to him. My husband

Esther W. Talbert Brewer.

died February 8, 1955; and I can't give you the exact date—within three months after that.

Q. At the time of your husband's death, did he own 100 shares in Winiker Lumber Company?

A. Yes.

Q. And you owned 25 shares?

A. That is right.

Q. Did you receive under his will his 100 shares?

A. That is right.

Dep. page 15 } Q. And all of his estate?

A. The boys were left a small amount, but other than that, I got everything.

Q. But you did get the 100 shares of stock?

A. Yes.

Q. For what consideration in cash or notes did you sell this 125 shares of Winiker Lumber Company stock to your brother?

A. I don't have the exact figures, but it was somewhere in the neighborhood of $53,000.00, plus what my husband owed at the factory. In other words, he had a car, and he took that over; and it was plus that; approximately—

Q. Approximately $60,000.00?

A. Approximately $60,000.00 I would say; I could get it, but I don't have it with me.

Q. Mrs. Brewer, did your mother execute a will after your father's death to your knowledge?

A. Yes.

* * * * *

Dep. page 16 }

* * * * *

Q. Did she execute a codicil to this will?

A. She did.

* * * * *

Dep. page 17 }

* * * * *

Esther W. Talbert Brewer.

Q. Do you remember the approximate date when your brother told you, if he did tell you, that he wouldn't be further personally responsible for those payments under the contract?

A. The last payment was made, I believe, the very last week of April. I would say the last Friday in April of 1959, was when he brought that in, and said he would no longer be responsible.

Q. He brought you the check or—

A. He brought it to my mother. I believe he turned it over to my mother that week.

Q. But you found out about it?

A. He talked to me about it. I was there, and said he would no longer be responsible.

Q. Did you know at that time and thereafter that the Internal Revenue Department had checked his records, and had thrown out the payment of $40.00 a week to Mrs. Winiker by Winiker Lumber Company, and that he declined to further make payment of $40.00 a week?

Dep. page 18

Mr. Carter: For the benefit of the Court and the Commissioner, we have no objection to this line of testimony going into the record in that it may have bearing upon the notifications and intentions of Mr. S. F. Winiker. We do not feel, however, that any *ex parte* determination by a representative of the Bureau of Internal Revenue has any effect upon the merits of this case.

* * * * *

Q. Since that day or that night that he told you he would not be further responsible for the $40.00 a week up to the present date, has he demanded of you or asked that you refund to him any part of any tax, which he may have been required to pay on account of this transaction?

A. You mean ask me personally to do it?

Q. Yes.

A. No.

Dep. page 19

Mr. Jordan:

Q. Mrs. Brewer, I show you here a 1959 calendar, and ask you if you can give us from that calender the exact date of the last payment of $40.00 to your mother?

Esther W. Talbert Brewer.

A. As well as I remember, it was paid down through the 30th of April, as near as I can recall. I am pretty sure that is correct. He usually paid on Friday. I am sure the records from the Winiker Lumber Company would show it, but I am going to give that date, because I feel sure that is it.

Mr. Carter:

Q. Mrs. Brewer, in 1955, when this agreement dated January 17, 1955, was made between you, Mr. Talbert, Mr. Winiker and your mother, who were the then stockholders in the corporation?

A. It would be my mother, my brother and I, right at that time.

Q. Right at that particular time?

A. Yes, sir.

Q. And this transaction envisaged a sale of the stock to whom?

A. She sold the 200 shares to my brother and Earl S. Talbert, my husband.

Dep.
page 20 } Commissioner in Chancery:

Q. Who did she intend to sell the stock to?

A. To my husband and to my brother.

Mr. Carter:

Q. As I understand it, at the time the agreement was drawn, 25 shares of this stock was registered in your name?

A. That is right.

Q. 25 shares were registered in your brother's name, Mr. S. F. Winiker?

A. That is right.

Q. And 200 shares were registered in the name of your mother, Mrs. Emma L. Winiker?

A. Emma L. Winiker.

Q. This agreement was made collateral to agreement to transfer the 200 shares of Mrs. Emma L. Winiker, 100 shares to Earl Talbert and 100 to Mr. S. F. Winiker, is that correct?

A. Yes.

Q. Who constituted the officers of the corporation at that time?

A. Emma L. Winiker.

Q. What was her title?

A. President.

Esther W. Talbert Brewer.

S. F. Winiker.

Dep. page 21 } Q. What was his title?

A. I believe Vice-President is correct. Earl S. Talbert, Secretary and Treasurer.

Q. Who constituted the Board of Directors at that time?

A. My mother, Mrs. Emma L. Winiker, and S. F. Winiker and Earl S. Talbert.

Q. Subsequent to the sale of your mother's stock, the stockholders, of course, were you, your brother and your husband, is that correct?

A. Yes.

Q. Who were the officers of the corporation, after the sale of the stock?

A. S. F. Winiker, Earl S. Talbert, and I just don't remember how that was worked out. Everything happened so fast after that. We never got it actually straightened out as it should have been before my husband died.

Q. In other words, you had no stockholders meeting before your husband's death?

A. No.

Q. I believe he died shortly thereafter?

A. He did.

Q. Has this $40.00 per week been paid ever since the date of this agreement?

A. It was paid every week up until, I would say, April 30 of this year, by Winiker Lumber Company.

Dep. page 22 } Q. Something more than four years?

A. Something around three or four years.

Q. And it was paid by the corporation?

A. That is right.

Q. I believe that you have testified that shortly after Mr. Talbert's death you negotiated with your brother concerning the sale of your stock?

A. That is right.

Q. Which I believe at that time amounted to 125 shares?

A. Yes.

Q. Did you make a buy or sell agreement with your brother?

A. What do you mean buy or sell? We did discuss my buying it, as far as that goes, but he said that, of course, he was interested in buying mine, but he felt like if I bought from him that it would be worth a whole lot more, than if he buy from me. In other words, he would not offer me as much for my stock as he would ask me, if I were going to buy from him.

Esther W. Talbert Brewer.

Q. In other words, he would not make a buy or sell agreement with you?

A. That is right.

Q. At the time of your husband's death, did you undertake to make an appraisal of the corporation and determine its net value?

Dep. page 23 } A. It was necessary in order to get the evaluation for the estate, you see.

Q. How did you go about getting this evaluation for the estate?

A. The Trust Department of Security Bank appointed a lumberman out of town, Mr. Edmunds from South Boston, because they felt like he being a good lumberman, was well qualified to estimate the value of the business, and that is why he was selected; A. T. Gunn, Claude H. Martin, Jr. I believe they are them.

Q. They were the appraisers?

A. Yes.

Q. I believe at that time the corporation owned the real estate on which the Winiker Lumber Company has its offices now?

A. That is right.

Q. What net value did the appraisal show on the corporation's worth?

A. Mr. Edmunds really seems he was more familiar, of course, the others listened more or less to what he had to say, they appraised the amount of stock you might say that my husband had at that time at around $90,000.00—that was his 100 shares—that did not include mine, of course; that was the appraisal of his estate, and he appraised it at around $90,000.00.

Q. That was their estimate of the book value?

Dep. page 24 } A. That is what he appraised it at; that was changed later, when I sold, you see.

Q. What was the sale price for the full 125 shares, which you sold to your brother?

A. I believe we stated it was around $53,000.00, that is in round figures.

Q. And he assumed some indebtedness?

A. Plus some indebtedness.

Q. So, that the sales price—that is the cash consideration plus the indebtedness—was approximately what?

A. Approximately around $60,000.00.

Q. Mrs. Brewer, at the time you and your brother dis-

cussed the sale of your 125 shares of stock, was the matter of the obligation—the payment—of $40.00 per week taken into consideration?

A. That was part of the sale price. In other words, when my mother—what she was concerned about, of course, was the income that she might have for her lifetime; and since she received 6 per cent on the $20,000.00 which was $100.00 a month—I pay her $50.00 a month, my brother pays her $50.00 a month—and then she was—

Q. Is that upon the two $10,000.00 notes?

A. Two $10,000.00 notes; and we to pay her the 6 per cent her lifetime on that, plus $40.00 check, salary or compensation from Winiker Lumber Company, her lifetime; that was discussed; it was taken into consideration.

Dep. page 25 } Q. Discussed with whom?

A. Down at the bank when my affairs were being settled. My brother wrote a letter to Mr. Carter asking that consideration be given to the obligation, which the Winiker Lumber Company owed to my mother; and it was taken into consideration in the sale price that he made to me.

Q. Mrs. Brewer, there were two obligations actually, one of which I think is admitted, which is the note secured by deed of trust?

A. That is right.

Q. Was it deemed that the $40.00 per week was an additional obligation owed by the Company?

* * * * *

Dep. page 26 }

* * * * *

Q. Mrs. Brewer, I hand to you a letter over the signature of S. F. Winiker, addressed to W. H. Carter, dated March 18, 1955. Would you file a copy of this letter as Brewer Exhibit 1?

Dep. page 27 } A. Yes.

Q. Now, Mrs. Brewer, at any time during the negotiations for the sale of your stock to Mr. Winiker, did you or your agents in your presence have any conversation with Mr. Winiker concerning this payment of

Esther W. Talbert Brewer.

$40.00 per week to your mother for the Winiker Lumber Company?

A. It was discussed there. You know I am a little hazy in regard to what was said or done. I know it was brought up at a meeting, and was taken into consideration.

Q. Was this brought up in his presence?

A. I don't remember whether he was there or not. I can not actually say.

* * * * *

Q. I hand you herewith a typewritten Agreement dated January 10, 1951, which purports to be signed by Mrs. Emma L. Winiker party of the first part, Earl S. Talbert, Esther W. Talbert, party of the second part, and S. F. Winiker, party of the second part. First, I ask you whether that is the signature of your mother, your husband, yourself and your brother?

A. That is right, it is.

Q. Do you remember signing that Agreement?

A. Yes.

Dep. page 28 } Q. Now, I asked you and ask you again whether or not—is it not true that with reference to this Agreement, as well as to the Agreement of January 17, 1955, if you didn't sign as a party to both Agreements?

A. It was. We signed it as stockholders as that certainly, I guess, it would be a party.

Q. But that is your signature?

A. Why, yes.

Q. And you did sign the Agreement of January 17, 1955?

A. I did.

Q. That Agreement dated January 10, 1951, states that the parties of the second part, that includes you and your husband and your brother, had already exercised an option theretofore given to you by your mother, and had purchased 25 shares each, leaving a balance of 200 shares in the name of your mother and still covered by the option?

A. Yes.

Q. Is it not true that long prior to this date of January 10, 1951, your mother had given you and your husband and your brother the option to buy that stock she had at $100.00 par value per share?

A. As well as I remember, in discussing the business after

Esther W. Talbert Brewer.

my father died, that if my brother and my husband took over and run the business, that the business would be theirs; and that the deed of trust, of course, she would leave to my sisters; that was because if they increased the value of the business, that would belong to them, and so that I would say it was discussed from after my father died.

Dep. page 29

Q. In 1946, you actually acquired 25 shares in your name?
A. Yes.
Q. At $100.00 a share?
A. Yes.
Q. And your brother acquired 25 shares in his name?
A. Yes.
Q. At the price of $100.00 per share?
A. Yes.
Q. I ask you to file this Agreement of January 10, 1951, signed by the parties as indicated, as Brewer Exhibit 2.
A. Yes.

By Mr. Meade:

Q. Was it your mother's plan and scheme of distribution of her estate at her death to leave to your other two sisters one-half of the $20,000.00 note secured by deed of trust on the Winiker Lumber Company?
A. One-half each.
Q. And to leave to your brother and either you or your husband a one-half each of the 200 shares of stock which she held?
A. Yes.

Dep. page 30

Q. This stock having a par value of $20,000.00?
A. Yes.
Q. Which was the same as the value of the note?
A. Yes.
Q. Did your mother have prepared and execute a will to that effect?
A. She did.
Q. When the 200 shares were sold in 1955, by your mother to your husband and your brother, your mother took a note from each of them for $10,000.00 each. Did she revise her will or make a codicil to her will in order to take care of the change which had been made in the type of property she owned?
A. Yes.
Q. Mrs. Brewer, at the time that this Agreement of Jan-

uary 10, 1951, and at the time of the Agreement of January 17, 1955, both of which were signed by the same parties, namely: Mrs. Emma L. Winiker, Esther W. Talbert, S. F. Winiker and Earl S. Talbert, did either Mrs. Winiker, your mother, or you and your husband or Mr. S. F. Winiker, your brother, have counsel? Were you represented by counsel in those transactions? Attorneys?

A. No, we just discussed it.

Q. You discussed it and did the negotiations among yourselves?

A. That is right.

Dep. page 31 } Q. Without the advice of counsel?

A. Yes.

Q. As a matter of fact, counsel—attorneys—did not come into the picture until after Mr. Talbert's death, did they?

A. No.

By Mr. Bass:

Q. Mrs. Brewer, how old is your mother now?

A. She is 84 now.

Q. So, at the time of this Agreement which was five years ago, she was about 79 years old?

A. Yes.

Q. What was the condition of her health in January, 1955, at the time of this Agreement?

A. As I remember her health was all right. She was up and about looking after her own business, and she was all right.

Q. Has her health declined considerably during the last year or two?

A. During the last year or two it has, yes.

Q. At the present time she is, of course, physically and mentally incapable of looking after her affairs?

A. That is correct.

Q. As I understand, the Agreement in January, 1955, for the sale of Mrs. Winiker's stock, it was to be for

Dep. page 32 } $10,000.00 each 100 shares?

A. Yes.

Q. Was it a part of the consideration for the sale of the stock that the $40.00 per week would be paid to her?

Was it a part of the consideration for the sale of the stock by Mrs. Winiker that the $40.00 per week would be paid to her?

Esther W. Talbert Brewer.

A. As I understand it, yes, it was a part.

Q. That was all discussed at the same time?

A. Yes, the Winiker Lumber Company would pay her $40.00 a week her lifetime as part of the consideration of the sale of the stock. That was part of what she was to get.

Q. Under this Agreement who was to see that these payments of $40.00 per week were made?

A. It was the business, the Winiker Lumber Company; that was the Agreement, that the Winiker Lumber Company be responsible for those payments.

Q. Why is it that the Winiker Lumber Company was not a party to this Agreement?

A. The only thing I can account for it was my brother is not a lawyer, and it was just supposed to be made between us. We never realized it would come up as a hearing. It was made just between us, so that we would have the understanding, and it was not made—no doubt if it had been made by a lawyer, it probably would have been. We signed it as stockholders of Winiker Lumber Company; that was certainly the intent.

Dep. page 33

* * * * *

Q. After this Agreement for the sale of the stock was entered into by Mrs. Winiker and the other parties listed on the written Agreement of January 17, 1955, to whom was the stock transferred by Mrs. Winiker?

A. It was transferred to my brother and to my husband.

Q. Was it transferred about the date of January 17, 1955?

A. Yes, it was right in there.

Q. Prior to the sale and transfer of the stock by Mrs. Winiker, did Mrs. Winiker receive any dividends on her stock?

A. She certainly did.

Q. Do you know how much that amounted to each year?

A. I can't give it to you accurately, because the records would show it at the factory, but they were divided equally, so far as I know, I believe equally between my mother, my husband and my brother.

Dep. page 34

Q. You mean the dividends?

A. Yes, whatever they declared.

Q. Why did your husband and brother receive equal dividends with your mother?

A. This was the way they worked it at the factory. They paid themselves or my mother you might say paid themselves

a small salary. Then, at the end of the year they said if the business made a profit, that this profit, not all of it, but whatever they decided on, would be divided equally among the three. They called it a bonus or dividend or something.

Q. Was that equal distribution of the bonus made regardless of the number of shares that the three people held?

A. Yes.

Q. Then, you say in addition to that your brother and your husband drew a salary from the corporation during the year?

A. Of course.

Q. Do you know how much salary they drew?

A. I am sorry I just can't give you that accurately. I will be glad to do it. I will bring my income tax returns down here and show it to you, but I don't remember.

Q. Going back to the time of your father's death, was this a thriving prosperous business at the time of your father's death?

Dep. page 35 } A. Actually no, because at that time we were sort of in a depression, and things had not gone too well with the factory at that time. In fact he had not completed paying for his part of the factory that he had bought out, and things were not too prosperous at that time.

* * * * *

Dep. page 36 } Q. In this total Agreement which you all made with your mother for the purchase of this stock, did you all figure out how much income she would receive on the total and from this Agreement of $40.00 per week? That is in connection with the Agreement, did you all figure out how much income your mother would receive?

A. She was to receive that $40.00 her lifetime, and with the 6 per cent on the $20,000.00, which was $100.00 and then the $100.00 which she would receive from Bud and I, which was $50.00 a piece, we were figuring 6 per cent, and the $40.00 and a little other income would be sufficient for her lifetime.

Q. Did she at the same time make the codicil to the will whereby she provided that these $10,000.00 notes would go to you all at her death?

A. Yes.

Q. So that it was figured and determined how much income

she would need and receive from these various sources at the time the sale was made?

A. Yes, sir.

* * * * *

Dep.
page 37 }

* * * * *

Q. Mrs. Brewer, prior to the Agreement of 1955, was your mother drawing any salary on a weekly or monthly basis from Winiker Lumber Company?

A. She has drawn a salary of $40.00 a week for years and years, so far as I know.

Q. Does that antedate the Agreement of 1955? Did she draw this $40.00 per week prior to the Agreement of 1955?

A. Oh, Yes.

* * * * *

Q. Now, was your mother actively engaged in this business at any time?

A. Well, mama I would say in a way no. She would at times sign checks; she would go down there; of course, mama was not familiar with the business; and she would go down there and call herself checking on the boys. Then, of course, when they had their meetings, they always met, and she naturally was at these stockholder's meetings, but they would discuss business with her, and she kept a pretty close watch on them.

Dep.
page 38 }

Q. Did she keep the books there or give business advice or anything of that sort?

A. No. I would say she gave business advice.

Q. Was this comprehensive business advice, or just her ideas about the business in general?

A. Well, they would talk to her about it, and they would discuss—maybe something would come up, they would talk with her about it. Mama was a right good business woman.

* * * * *

Dep.
page 45 } S. F. WINIKER,
being first duly sworn, deposes and says:

DIRECT EXAMINATION.

By Mr. Jordan:

Q. Did you as President of Winiker Lumber Company, Incorporated enter into an Agreement dated July 31, 1959, for the sale of the principal assets of that business?

A. I did.

Q. Was there a subsequent amendment to that agreement dated in August, I believe, of 1959?

A. Yes, I believe so.

Q. What is the status of the transfer of the assets pursuant to that agreement as of this date?

A. Let me get that straight.

Q. Has the sale for all intents and purposes been completed pursuant to the Agreement?

A. Yes, the sale has been completed so far as the people taking over the assets of the corporation and paying me so much per month.

Q. Then, very briefly, Mr. Winiker, as far as I am concerned, what was the method of consideration for this sale?

A. The physical assets, of course, the land, buildings, trucks, equipment, inventory, accounts receivable, notes payable—

* * * * *

Dep.
page 46 }

* * * * *

Q. How much cash was paid?

A. Total $8,000.00 was paid in cash.

Q. Approximately what was the total consideration?

A. $161,000.00 and something; I don't have it; it is in the Agreement possibly. $161,355.08.

Q. Sales price of the business was $161,355.08?

A. That is right.

Q. Of which amount you received $8,000.00 in cash?

A. Yes, sir.

Q. The balance of that figure is represented by notes?

S. F. Winiker.

A. Notes.
Q. To whom are the notes payable?
A. To Winiker Lumber Company.
Q. What are the monthly payments provided for those notes?
A. $416.67 a piece, or $1250.01.

* * * * *

Dep.
page 47 }

* * * * *

Q. Payable over 15 years?
A. Yes, approximately 15; it wasn't worked over the yearly basis.
Q. Was the rate of interest 6 per cent?
A. 6 per cent.
I would like to make a statement on this. That included guaranteeing all the accounts on the books or notes receivable I know one account of $20,000.00 is gone broke already. We have another account somewhere around $3500.00 that we are not too sure about. What that will leave, I don't know; that has to come off.

By Mr. Meade:

* * * * *

Dep.
page 52 }

* * * * *

Q. Did your father leave your mother all his estate?
A. Yes.
Q. After your father's death, did you and Mr. Talbert manage and continue the business of Winiker Lumber Company?
A. Yes.
Q. Did you undertake such management at the request of your mother?
A. Yes.

S. F. Winiker.

* * * * *

Dep.
page 53 }

* * * * *

Q. You and Mr. Talbert managed the business for your mother, and after you incorporated how much stock was issued to her?

A. 250 shares of stock.

Q. At the time of the issurance of that stock, was there a dead of trust given by the corporation to her?

A. At the time of incorporation a deed of trust was given to her.

Q. Is that the deed of trust about which we have been talking today to secure a $20,000.00 note?

A. That is right.

Q. Did you and Mr. Talbert continue the management of this business up until 1946, when you and Mrs. Talbert acquired some stock in the corporation?

A. Yes.

Q. Was your mother an officer during that time?

A. She was the President, yes.

Q. Did she have any duties she performed at the office? Did she come to the office at any time or during any periods of time?

Dep.
page 54 }

A. She might come down once a month saying she came to check on us.

Q. But did she have a regular job, or did she come regularly?

A. No.

Q. Was she on the payroll after the business was incorporated?

A. Yes.

Q. What was her weekly or monthly pay?

A. $40.00 a week.

Q. Did those payments continue throughout the beginning of the corporation up until the time the 200 shares were sold by her to you and Mr. Talbert?

A. Yes.

* * * * *

Q. In 1946, how many shares of stock did you acquire?

S. F. Winiker.

A. 25.
Q. How much did you pay for them?
A. $2,500.00.
Q. How many shares did your sister, Mrs. Esther W. Talbert, acquire?
A. 25.
Q. How much did she pay for them?
A. $2,500.00.

* * * * *

Dep.
page 55 }

* * * * *

Q. Then after 1946, the stockholders of the company were your mother, Mrs. Emma L. Winiker, your sister, Mrs. Esther W. Talbert, and yourself?
A. Right.
Q. And did the officers continue as they had been? Did your mother continue as President?
A. Yes.
Q. Who was Vice-President?
A. I was.
Q. Who was Secretary-Treasurer?
A. Talbert was Secretary, and I don't know, it seems vague in my mind now, because at times he signed as Secretary and Treasurer; to start off with I think my mother was President and Treasurer, but I have forgotten the time that happened, or when it happened.
Q. I hand you a signed copy of an agreement, which has been filed as Brewer Exhibit 2. Do you remember that agreement and when it was signed?
A. Well, it was dated the 10th of January, which I assume that is the correct date, signed by my mother, Earl Talbert, Esther W. Talbert and S. F. Winiker, my signature, and it looks like the signature of the others.
Q. Was the contract of January 17, 1955, signed by the same parties, executed pursuant to the option given in this agreement, which you have in your hand marked Brewer Exhibit 2?

Dep.
page 56 }

A. Yes, it was.
Q. At the beginning of the Winiker Lumber

Company, when the $20,000.00 note was signed, who was that note signed by, do you remember? The $20,000.00 note?

A. Signed by me, I believe I signed as Vice-President, and Earl Talbert signed it as Secretary, I think.

Q. Was it a note of the Winiker Lumber Company?

A. Winiker Lumber Company, Incorporated.

* * * * *

Dep.
page 58 }

* * * * *

Q. Mr. Winiker, after you and Mr. Talbert acquired the 200 shares of stock under the contract of January 17, 1955, was your mother carried on the payroll and the records of the corporation until Mr. Talbert's death and thereafter up until the present time?

A. Up until the latter part of April, 1959.

Q. What happened the latter part of April, 1959?

A. That was right after the Internal Revenue moved in.

Q. Did they check your records and assess you with any taxes of any kind?

A. Yes, sir.

Q. With reference to Winiker Lumber Company, Incorporated, first, was the—did a representative of the Internal Revenue Service check your books and confer with you about the deduction which you had made on account of weekly salary paid to your mother over the last several years, and which you had shown as a business deduction or operating expense?

Dep.
page 59 }

A. Yes, sir.

Q. Did he disallow those deductions?

A. $2,080.00 a year for three years.

* * * * *

Dep.
page 63 }

Q. Are you accepting that report, and are you going to pay the tax, or what are you doing with it?

A. I was advised to accept the report of the corporation, but not to accept the personal one, and I have objected to it through the Richmond office.

S. F. Winiker.

* * * * *

Q. Mr. Winiker, you have heard Mrs. Brewer state that stock in the Winiker Lumber Company owned and left by her husband was appraised at $90,000.00, and that Mr. Edmunds, who is in the lumber business, was one of the three appraisers, and the other two appraisers more or less conformed to his opinions and ideas, as he was a lumberman. Did Mr. Edmunds or any of the so called appraisers come to your office and ask the right to look at your books and records or any financial statements?

Dep. page 64

A. I don't recall any such requests. I do recall seeing Mr. Edmunds down there one time, and saying, "How do you do, Mr. Edmunds," and that is about the extent of our conversation, if you want to call that conversation.

* * * * *

Dep. page 67

* * * * *

Mr. Carter:

* * * * *

Dep. page 68

* * * * *

Q. Who is presently stockholder of Winiker Lumber Company, Incorporated?

A. Well, I have got some stock in my wife's name, I think $5,000.00. When I say $5,000.00, we had our stock changed from $100.00 a share to $1.00 a share some time ago; In other words reducing the price per share from $100.00 to $1.00; so, I have $45,000.00 and she has $5,000.00.

Q. 50,000 shares outstanding?

A. Right.

Q. Does this represent the initial 250 shares that was issued initially?

A. Sometime I believe it was in 1956 or 1957, after buying

the Talbert interest we took in at that time their interest as treasury stock. Then we had the treasury stock in 1958 canceled. So, this represents the total amount of stock in the company.

Dep. page 69 } Q. Let me see if I understand this. At the time you bought in the Talbert interest, Mrs. Talbert had 25 shares, which she bought from her mother, 100 shares which devolved to her by inheritance from Mr. Talbert, you at that time had 125 shares. The corporation in effect purchased the 125 shares belonging to Mrs. Brewer and this was retired as treasury stock?

A. Yes.

Q. And about 1958 this 125 shares was canceled. Is that correct?

A. I think that is the date.

Q. And then you issued some 5,000 shares for the—

A. No. We had a stock par value change.

Q. You changed the par value, and you issued new certificates?

A. That is right.

Q. But those new certificates represented the 125 shares you initially had?

A. Right.

Q. Of those 5,000 shares issued in Mrs. Winiker's name, did she give money consideration for them, or was that simply a gift from you to her?

A. At one time she inherited some money and done certain things with it, and I felt like to repay her I should give her some stock.

Dep. page 70 } Q. Was there a binding contract between the two of you?

A. No.

Q. You felt like it was a moral contract to her?

A. Yes.

Q. So, you issued some 5,000 shares to her?

A. Yes.

Q. Are there any creditors of the corporation other than the Estate of Mrs. Winiker today, who were creditors of the corporation in 1955, when you purchased the stock interest of, when the two stock interests were purchased by you and Mr. Talbert from your mother? Are there any creditors who existed at the time the stock was bought from your mother by you and Mr. Talbert, who are now existing, other than her estate?

A. You are asking me if there are any creditors besides my

mother's estate against the corporation, is that right?

Q. Yes, if there are any creditors to whom you owed money in 1955, who have not been fully paid for those obligations, who were owed in 1955, except your mother's estate?

A. At this time due to the events that have taken place, there are no creditors at all of Winiker Lumber Company, Incorporated, at this time.

Dep.
page 71 }

* * * * *

Q. In 1955 I believe that your mother called you after she had given some consideration to selling the remaining 200 shares in the company to you and Earl Talbert. Is that correct?

A. I don't remember any such call right now.

Q. Did you discuss it with her? Did you approach her? Did she approach you?

A. We three approached her prior to the actual deal, of course.

Q. Who initiated the deal is what I am trying to determine?

A. The man who first brought it up is not living today.

Q. I take it you mean Mr. Talbert?

A. Mr. Talbert.

Dep. Q. Who proposed the terms of the agreement?
page 72 } A. What terms are you speaking of?

Q. In other words, what you would pay per share for the stock?

A. I don't know that anybody proposed anything, because we already had it down one time in writing as to what we would pay for the stock. You are talking about the deal with my mother, or the deal with the others.

Q. I am talking about the deal with your mother?

A. We already had it down once in writing.

Q. This deal about the $40.00 a week was put into the contract in 1955, or into the agreement which was collateral to the sale of the stock in 1955. Whose idea was that that the $40.00 per week be paid to your mother out of the corporation?

A. Mr. Carter, you are asking somewhat of an embarrassing question, because I didn't write it down; Earl Talbert didn't write it down; and I don't recall who brought it up first.

S. F. Winiker.

I remember there was some discussion; I hate to refer to him, because he is not here. If I remember correctly, he told me that Mrs. Hazelwood—he had talked to Jimmy Whitehurst, and that they were paying at that time Mrs. Hazelwood so much salary per week. I might have said maybe we can do that for mother to get her to sell the stock to us. I might have said that, I don't know, or he might have suggested that. I don't recall now.

Dep. page 73

Q. In any event between the three of you, that is Mr. and Mrs. Talbert and you, it was determined by agreement that there would be paid to your mother this $40.00 per week out of the corporate treasury?

In other words, you all determined that?

A. Out of the corporate treasury, no. We agreed to put her on the payroll.

Q. In other words, it was agreed between the three of you that Mrs. Winiker would be placed on the payroll at the rate of $40.00 per week?

A. That is right.

Q. And this was something in addition to the option price that had been quoted to you, or in the agreement of January 10, 1951. Is that correct?

A. No option that we ever talked about included any such agreement as to a payment per share or $40.00 a week. The only option we had was to buy the stock at so much. It was not a part of it, no.

At the time we had the option. In order to get her to close the option, then this offer was made that we would put her on the payroll, or books.

Q. In other words, you were—had knowledge that it was necessary in order to get her to transfer the balance of the stock that you would have to put her on the payroll at the same time?

Dep. page 74

A. She was already on the payroll.

Q. But you would have to keep her on the payroll?

A. That is right.

Q. You did not feel that this was a legal bond, but that you had to do that to induce her to transfer the stock without having to force the terms of the option?

A. You are putting in there such as legal that I felt like legally we couldn't do it. No such thought entered my mind; don't think it entered Talbert's mind, or Mrs. Talbert's mind or anybody else's mind. We were not trying to do anything

shady, legally or morally, or otherwise. We were just trying to do something to induce my mother to sell us the stock.

Q. Mr. Winiker, I think you misconstrued my question. My question was I was simply asking if you all did not make this extra inducement to Mrs. Winiker to induce her to transfer the stock, even though you felt that legally you could enforce the option; actually you felt that rather than having to enforce it legally, it would be easier to induce Mrs. Winiker to carry out the terms of the option by simply stating you would put her on the payroll?

Dep. page 75 } A. I only speak for myself right here. No thought entered my mind about forcing my mother to sell that stock, legally or otherwise, at that time.

Q. I understand that, but you felt that may be she would not be happy with the option that she had given theretofore of permitting you all to buy at par value, unless there was some added inducement?

A. No, sir, that was not considered so far as I know. Just to be frank with you, Mr. Carter, and I still hate to bring this up, because this man was a very good friend of mine. Earl Talbott prior to any talk to my mother was the first one to say he wanted to get the stock in our names. I don't think he was talking about doing it in a substandard fashion or anything. He was open and above board with it, and we were talking down at the plant during that, and he said, "I think we should try to get that stock in our names if we can," and that is what started the whole thing, right there. I hate to keep on talking about somebody like that, that is gone. In fact, one day he worked up a price on a deal, and told me that the stock—he said, "Look like half interest in this place should be worth $33,000.00 or $34,000.00." I didn't ask him in writing; I guess I should have; I would probably be a lot better off, had I done so.

Dep. page 76 } Q. Mr. Winiker, just for the record, I would like to get one thing clear. I am not trying to embarrass you. I am not trying to make any implications that there was anything improper about the transaction of the purchase of your mother's stock. I am simply trying to determine the consideration paid for the stock, and the circumstances surrounding the transaction.

Now, Mr. Winiker, I understand that the Bureau of Internal Revenue determined for its purposes that this payment was not a valid business deduction of the corporation, and

for that reason disallowed the payments to your mother for a period of three years, and that this finding of the Bureau of Internal Revenue was not contested by the corporation. In other words, you accepted that finding of the Bureau of Internal Revenue?

A. You mean I just laid down and let them run over me like that?

Q. Yes.

A. Well, if you go to one party, an attorney, and he says you better go to your accountant, and then you go to the accountant, and meet with the people, and they come back with your delinquency, what are you going to do. After consulting my attorney and accountant and after meeting with the Internal Revenue officials, we decided not to further contest the matter.

Dep. page 77 } Q. Now, Mr. Winiker, let me ask you this. There were other items which were in dispute other than this matter concerning the payments by your corporation to your mother, were there not?

A. In dispute?

Q. Yes, sir.

A. There were items such as for the automobile you are running; we are going to charge you so much a month for using that because when you go to lunch, that is a personal thing; so, they charged me $50.00 per month for that. The depreciation on some items they said you can't take that fast depreciation; you will have to slow down on that. There is an item of $2,080.00 for three years that, I am inclined to think Mr. Horne's idea about the tax is pretty close to correct, because they show it 30 per cent tax rate; tax rate used 30 per cent; so that would be about right, I think.

Q. Mr. Winiker, were there any disputed items that the Government allowed you? Items that they at first disallowed and consequently allowed to you, even though they were in dispute?

A. I don't recall any items they disallowed and allowed me, no.

Q. Did you compromise this with them or did you pay them privately the computation that had been made by the Bureau of Internal Revenue?

Dep. page 78 } A. So far as compromising, we didn't make no compromise or anything. We did go in there and find some things probably we had not claimed on the returns that they had made allowances for; but so far as compro-

S. F. Winiker.

mising, I don't know he said if you do this year to that, if that is what you mean. For instance here is some contributions it shows in here, and it showed a carry over from one year. Then they showed additional contributions. Here it is, if you want to see it; I don't know.

* * * * *

Dep.
page 79 }

* * * * *

Mr. Bass:

* * * * *

Dep.
page 81 }

* * * * *

Q. Yes. You mentioned your salary. I was interested in how much the bonus amounted to.

Dep. page 82 } A. One or two years we paid $4,000.00 a piece in bonuses. Some years $3,000.00 prior to those.

Q. You think it was $4,000.00 in 1954 prior to the sale of the stock?

A. I believe so. 1951, 1952, 1953 and 1954, $4,000.00 is what we paid my mother in bonuses.

Q. You and Mr. Talbert received the same amount?

A. Yes, sir.

* * * * *

Mr. Meade:

* * * * *

Dep.
page 83 } Q. Are you represented by an accountant before the Internal Revenue Department?

A. No, Mr. Meade, not right now, because as you know, there is a certain amount in there around $1,700.00 or $1,-

800.00, maybe $2,000.00, by the time they finish with it. I don't know that I could get anybody to go down to Richmond, certainly not an attorney; they don't want to fool with anything that small. If it was $100,000.00 they were talking about, I could get an attorney right now. I don't have anybody going down there. I have been talking to Lee Manning from time to time, when it comes up.

Q. You are going to have a hearing down there, and you are going to appear for yourself?

A. Yes, he said I could do as well for myself, as anyone appearing with me.

* * * * *

Dep.
page 84 }

* * * * *

Mr. Carter:

Q. When you paid this sixty some odd thousand dollars that was not entirely for the stock purchase, was it?

A. A check was given to the parties involved, $60,310.00 in round figures—that doesn't give you the exact figures.

Q. But part of that was for purchase of furniture, was it not?

Dep. page 85 } A. I received back from the estate it looks like $5,910.00.

Q. What was that for?

A. Account of E. S. Talbert and 1954 Ford Sedan paid for by the company.

Q. That was paid by the corporation, not you?

A. All this was paid that way. The company's check went in to pay that $60,300.00.

Q. You bought some furniture from Mrs. Talbert at that time, did you not?

A. Not at that time, no.

Q. Did you pay for it at that time in that same transaction.

A. No, that was some other deal prior to that.

* * * * *

The witness,

ESTHER W. TALBERT BREWER,
being recalled, testified as follows:

Examined by Mr. Carter:

Q. Mrs. Brewer, at the time that you negotiated with your brother about the sale of your interest in the stock in the Winiker corporation, did you have any conversation with him about this $40.00 per week that was being paid by the corporation to your mother?

Dep. page 86

A. I met with Bud down in the factory, I would say within three months after Earl died, and we discussed—

Q. Was this before or after the sale was consumated?

A. It would be before.

Q. When you speak of Bud, you are speaking of Mr. Winiker?

A. Yes.

And we discussed him buying my interest in the factory. I might say I was not qualified to run a lumber company, and I did not feel that we could work together; so, I figured up what I felt like would be right—what I thought he could pay me for the company—what would be right; and he asked me to take into consideration the moneys that he would pay to my mother. In other words, it would take into consideration in buying from me the $40.00 a week, which the company would pay.

Q. Was that specifically discussed?

A. It was. It was brought up for me to take that into consideration. It was taken into consideration, when he purchased the factory, and the fact that you can see the difference from what he got and what I got out of it, because I was—owned—50 per cent of it—that is my husband's estate and mine together comprised 50 per cent; and it was discussed at that time and when we—I—sold out to him at that time, I would say.

Dep. page 87

I asked him about me buying out his interest; and he felt like that he could not pay me as much as he would turn around and have to ask me for it. In other words, I would have to pay him more, if I bought from him than if he were buying mine. I don't know whether that is clear or not, but he—when I sold out he assumed the obligation, I mean he bought everything, and he did assume this $40.00 a week obligation to my mother, and the factory continued to pay it; there was no question about who would pay it, and who would assume the responsibility; and it most certainly was brought up.

Q. Now, Mrs. Brewer, at the time that Mr. Edmunds, Mr.

Esther W. Talbert Brewer.

Martin and Mr. Gunn appraised your interest in this business to determine the book value of it, were you able to obtain for them the facts as to the accounts receivable, the accounts payable of the corporation?

A. I did have some papers to show that, yes.

Q. Where did you obtain these papers?

A. I obtained them from the factory.

Q. You went over the books yourself?

A. I did not go over them; I got the information.

Dep. page 88 }

Q. Was the information in your judgment accurate?

A. Yes.

Q. Did this give them a picture of the accounts receivable and the accounts payable of the corporation at that time?

A. Yes.

Q. Did they take that factor into consideration along with the physical assets of the corporation in determining the net worth?

A. Yes.

Q. I believe they determined the book value or net worth of your stock somewhere in the neighborhood of $90,000.00?

* * * * *

Dep. page 89 }

* * * * *

Mr. Meade:

* * * * *

Dep. page 91 }

* * * * *

Q. To whom was the check of Mr. Winiker in payment of the stock made? To you individually or to the Estate?

A. No, to the Estate—the Bank was handling it.

Q. Did you or the bank as Executor or Administratrix of the will, I guess, I don't know which it was—did you or the bank have any writing of any kind or description between you

and the bank or the bank and Mr. Winiker as to the sale or purchase of this stock?

A. We have that letter that Mr. Winiker wrote to the bank.

Q. Outside of that letter do you have anything else?

A. Not to my knowledge; they have all the papers; they may have something.

Q. That letter has been filed as an exhibit?

A. That letter has been filed; not to my knowledge was there any other written—

Q. There was no written contract between you two—or between him and the bank?

A. Not to my knowledge; I don't believe so.

Q. There are no further letters so far as you know?

A. I don't think so.

Dep. page 92 } Q. Did Mr. Winiker and your husband talk over with you prior to the purchase of your mother's stock, acquiring that stock or obtaining it or buying it from your mother? In other words, were you in on the conversation with them about buying the stock?

A. I am sure I was in on some of it, because we had talked on and off about it for quite some time.

Q. And both Mr. Winiker and Mr. Talbert had been managing and directors of the business from the time of your father's death up until the time you bought the stock?

A. Yes.

Q. They had devoted their full time to it?

A. That is right; yes, they did.

Q. And all three of you thought that you were entitled to, or had a right to buy the stock at a price agreed on?

A. Yes, because my mother had said all the stock as far as she was concerned, that was the way she wanted it.

Q. You had a written option from January 10, 1951 at $100.00 a share, and that option stated that you had theretofore, I believe in 1946, bought some of the stock at that price?

A. That is correct.

Q. So, as time went on, you three had discussed the possible acquisition of this balance of her stock?

A. Yes.

Dep. page 93 } Q. This agreement here of January 7, 1955, do you remember discussing the contents of that agreement before you actually signed it? That is the one about paying the $40.00 a week?

A. I do not remember discussing it.

Q. Do you remember your husband telling you about the plan?

Esther W. Talbert Brewer.

A. I know that Bud, Mr. Winiker rather, brought this up. He had written this agreement. It had, I am sure that it had been decided upon what was to be done, but as to the wording of it, I had nothing to do with that.

Q. You don't know whose language it is?

A. I am sure Bud, or Mr. Winiker, wrote it.

Q. When they brought it to your home you read it?

A. That is right.

Q. It met with your full approval?

A. Yes.

Q. You knew that it made no difference whether your husband got the stock or whether you took it initially, sooner or later it would be your stock, if he died first. You expressed confidence in that agreement and signed it for the purpose of making that consent to payment to your mother of $40.00 a week during her lifetime.

A. The concession was it states in here that this $40.00 a week would be paid by the Winiker Lumber Company.

Q. Where does it say that?

Dep. page 94 } A. They, as operators of the Winiker Lumber Company, Incorporated, will list the party of the second part on the payroll of the corporation's books and pay to her at least $40.00 a week, regardless of whether or not she retains stock in the corporation, as long as the party of the second part lives.

Q. The Winiker Lumber Company didn't sign that agreement, did they?

A. I know it was meant to bind the Winiker Lumber Company.

Q. The stock wasn't transferred until eleven days after January 17, 1955; it was transferred out of your mother to Mr. Talbert and Mr. Winiker about eleven days after this so called agreement was signed by you and your husband and Mr. Winiker and your mother. During that—preceding January 28, 1955, was there any kind of written agreement or contract of any kind for the sale to Mr. Talbert and Mr. Winiker of this 200 shares of stock owned by your mother?

A. Any kind of written agreement?

Q. Written agreement? Was there anything in writing about that?

A. Not to my knowledge.

Q. This agreement of January 17, 1955, doesn't mention that. I am asking you was there anything in writing in regard to the sale of your mother's stock to your husband and

Esther W. Talbert Brewer.

your brother?

Dep. page 95 } A. To my knowledge nothing in writing; it was an oral agreement in which they decided.

Q. What they did was to give the money—their notes—to cover the purchase price, and your mother signed a certificate over transferring the 200 shares—100 shares to Mr. Talbert and 100 to Mr. Winiker. Is that right?

A. Yes.

Mr. Bass:

Q. You stated there wasn't any written agreement, Mrs. Brewer, but at the time that agreement of January 17, was entered into, was there an oral agreement and understanding between you all and your mother regarding the sale of this stock?

A. Yes.

Q. Was it a part of that agreement that she was to get the $40.00 a week, as set forth in the written agreement of January 17, 1955?

A. That is right, from the Winiker Lumber Company.

Q. Was it also agreed between you all that she would not receive cash, but a note from each—two notes for $10,000.00 each?

A. Yes.

Q. On which only the interest would be paid to her as long as she lived?

Dep. page 96 } A. That is correct.

Q. Was she also to receive the $40.00 per week under this written agreement as long as she would live?

A. That is right, from the Winiker Lumber Company; I want that put in there.

Q. So, you all had figured out how much income she would receive from the 6 per cent interest on the notes and from the $40.00 per week?

A. Yes.

Q. Were you all trying to provide a reasonable amount for her to live on?

A. That is right.

Q. Under the terms of your mother's will, to which I believe a codicil was written about that time, upon her death the $10,000.00 notes are to go to you all respectively?

A. Yes.

Q. And an equal $10,000.00 amount on the deed of trust

note would go to your sisters, Mrs. Hetherington and Mrs. Snibbe?

A. That is right.

Q. For the purpose of equalizing those $10,000.00 notes?

A. Yes.

Mr. Carter:

Dep. page 97 } Q. Mrs. Brewer, as I understand it, your mother did not expect you or Mr. Winiker to pay these $10,000.00 notes, but simply pay the interest thereon?

A. No, she just wanted the interest.

Q. Then, this was not a cash transaction at book value?

A. No.

Q. At this time, or at the time that Mr. Winiker and your husband were in the process of purchasing the stock from your mother, this agreement which bears date on January 17, 1955, was this agreement made contemporaneously with the meeting of the—about the purchase of the stock, or was it made prior or subsequent to that date? Was the agreement between your mother and the two men at about the same time or at some other time?

A. Yes, it was in the process of while they were negotiating.

Q. When you signed this contract, for whose benefit did you intend the contract? Who was to benefit from it?

A. She would benefit by $40.00 a week, if that is what you mean.

Q. At the time that you were undertaking to establish the value for the two blocks of stock, some of which you had purchased from your mother, some years prior to that, and one of which had been bequeathed to you by your husband, did you have any difficulty in obtaining the financial condition of the corporation?

Dep. page 98 } A. I never had any occasion to go about getting it. The only thing—I will be quite frank with you—my brother seemed to resent me coming down or knowing too much about the company business; and that is the reason I went down and took it on myself to get this information for myself, instead of asking him for it.

Q. In what way did he evidence this resentment about you looking into the corporate affairs?

A. For one thing he didn't appreciate the fact, and made a remark about Mr. Edmunds, and Mr. Edmunds explained to him while he was down there he was down there as an

appraiser, and Mr. Edmunds' feelings I think were a little hurt about it. He did not give me any cooperation whatsoever in getting information in regard to the appraisal of the business.

Q. Did you ask for any information?

A. Yes.

Q. Was it denied to you?

A. It was.

Q. Was this before Mr. Edmunds went down to appraise the property?

A. No, it was afterwards, when we needed it.

Q. Did you need these figures for any purpose other than to determine the book value of the stock?

A. No. For appraisal purposes.

Dep. page 99 } Q. Did you need the book value of this stock for any purpose other than sale of the stock?

A. We needed it for the appraisal of the estate. I mean the amount of his estate. Yes, we needed to appraise the estate.

Q. When was it you asked Mr. Winiker for these figures?

A. I can't give you the date on it, because I don't remember.

Q. Approximately how long after your husband's death?

A. It was within a few weeks, because when they appraised the estate, we had to go down to the factory; and I wanted this information, and it was refused.

Q. Point blank?

A. Yes.

Q. Without condition?

A. No, I just went down there and got it.

Mr. Meade:

Q. Mrs. Brewer, did you say when you went down there with Mr. Edmunds and the other gentlemen—went down to the plant—that you did not ask for the information that time, but you asked for it on a later date?

A. The men who went down there—

Q. Did you go with them?

A. I was with them. I actually cannot recall everything that was said or done, but we went down there

Dep. page 100 } for the purpose of getting an appraisal and trying to get the information which was necessary for the appraisal of my husband's estate.

Q. But you said you didn't ask for it on that occasion?

A. I am not sure I asked for it.

Esther W. Talbert Brewer.

Q. Do you think Mr. Edmunds asked for it?

A. Evidently they did, because they went down there for that purpose.

Q. They could look at the land and consider the plant?

A. And they walked over the premises.

Q. And you went down another time later and asked for records?

A. Yes, and they were refused.

Q. Do you remember the date?

A. I don't remember the date; it was during the time we were negotiating. I don't remember just what date that was. I know this—that the inventory was refused me; and I had to hire two men to go down there and take inventory themselves for that information.

Q. Who?

A. It was Mr. Arey and an assistant.

Q. You say that Mr. Winiker made some sort of remark to Mr. Edmunds. Just tell us what remark he made?

A. I wish I could remember. Mr. Carter might, because he came back up to the bank and told us about it. I know he was upset about it at the time.

Dep. page 101 } Q. After your husband died, Mrs. Brewer, did I understand you to say Mr. Winiker wouldn't let you take any part in the business down there?

A. He told me he would not have me down there. I went down, and I hate for this to go into the record, if it might go off, because we had some argument; and it was not pleasant; and I mentioned having my son come down and to have my son look after my part of the business. He told me he would not have him down there; and he told me he didn't want me down there; and I told him he couldn't keep me, since I was owner of the stock, away from the business.

Q. Didn't you have a stockholders meeting down there on February 21, 1955, at 11 o'clock?

A. That may have been the day we had the argument, I don't know.

Q. Didn't you attend that meeting, and isn't it a fact that the minutes show that S. F. Winiker was named President and manager, Greenhow P. Winiker, Vice-President and Treasurer, and Esther W. Talbert, Secretary and did you not at that meeting fix the salaries of the President at $12,000.00 per year, and the salary of the Secretary at $6,000.00 per year?

Esther W. Talbert Brewer.

Dep. page 102 } A. Well, if you want the truth of the matter, I will just have to tell it. We did not have any such meeting. Those minutes were written up by my brother, and he told me about it, and I don't know—

Q. Didn't you sign them. Your name—isn't that your signature?

A. When I sold out the business, or rather the—

Q. Isn't that your signature?

A. It is my signature, but I want to make an explanation. When the bank negotiated the deal, I guess you would call it that, when I sold out my interest to Bud, we had had no such meeting; and my brother brought these minutes up, and asked me to sign them; and I asked Mr. Carter about signing them; and he said to go ahead and sign them; that it would be all right.

Q. You signed the minutes under the advice of Mr. Carter?

A. Yes.

Q. Which Mr. Carter?

A. Mr. William Carter.

Q. Mrs. Brewer, didn't you receive a salary for the time that you were Secretary down there?

A. For two or three months.

Q. Did you receive a salary at the rate of $6,000.00 a year, that would be $500.00 a month?

A. For several months.

Q. And you received a salary as Secretary?

A. Yes.

* * * * *

Dep. page 105 }

* * * * *

Mr. Carter: Counsel stipulate that the date of the check whereby Mr. Winiker paid for the stock of Mrs. Earl Talbert (now Brewer) was April 21, 1955.

Mr. Meade:

Q. Mrs. Brewer, the minutes which were presented to you showing the date of February 21, 1955, were read by you before you signed them, were they not?

A. I don't even remember reading them, if you want to know the truth.

Q. So, you signed them, and in there your salary was fixed at $6,000.00?

Dep. page 106 } A. Yes.

Q. You did receive a salary from the date of your husband's death to April 21, didn't you?

A. I did not receive the salary from that month he died, but I got it for two or three months.

Q. You got from $1,000.00 to $1,500.00 for the three months?

* * * * *

Dep. page 107 }

* * * * *

The witness,

LUCILLE COLEY PHELPS,

being first duly sworn, deposes and says:

Examined by Mr. Carter:

Q. Mrs. Phelps, will you state your full name, please mam?

A. Lucille Coley Phelps.

Q. Where do you reside, Mrs. Phelps?

Dep. page 108 } A. 601 South Hampton.

Q. Mrs. Phelps, have you ever been employed by the Winiker Lumber Company?

A. For almost 14 years.

* * * * *

Q. I believe that since 1946, your connection with Winiker Lumber Company and the successor corporation has been uninterrupted. Is that correct?

A. Yes, sir.

Q. Mrs. Phelps, do you recall any conversation between Mrs. Brewer and Mr. S. F. Winiker concerning the sale of the stock in the Winiker Lumber Company belonging to Mrs. Brewer.

Lucille Coley Phelps.

A. Well, there were several discussions on it, as to the value of the corporation.

Q. Where were these discussions held?

A. Some of them, the ones I remember, were in the office.

Q. Of the Winiker Lumber Company?

Dep. page 109 } A. Of the Winiker Lumber Company, yes.

Q. There were several conversations between the two parties as to the value of the stock and the sales price of it?

A. Yes, sir.

Q. In the conversations concerning the value of the stock, was there any conversation between the two parties about any obligation which the Winiker Lumber Company may have owed to the elderly Mrs. Winiker?

A. Well, at one time Mr. Winiker and Mrs. Talbert were discussing the value of the corporation; and Mr. Winiker told Mrs. Talbert she would have to take into consideration the fact that he would still have to pay his mother's salary, and at her death, he would have to be obligated to pay the estate $20,000.00 deed of trust.

Q. Was this statement made in connection with trying to determine a fair price for the stock of Mrs. Brewer at that time?

A. As far as I know, it was, sir.

Mr. Meade:

Q. In these conversations that you—was there any particular figure that was mentioned as to what part of the consideration would be considered as covering the contract you speak of?

Dep. page 110 } A. I wouldn't say the figures were mentioned, but when it was stated the weekly salary, it had been the same thing for several years.

Q. Did you also hear them discussing the overall value of the stock Mr. Winiker was proposing to buy?

A. No, sir.

* * * * *

Dep. page 111 }

* * * * *

The witness,

ESTHER W. TALBERT BREWER,
being recalled, testified as follows:

Examined by Mr. Meade:

Q. Mrs. Brewer, I think I recall correctly that you testified the other day before the Commissioner that Mr. Edmunds, who was named as an appraiser with two other appraisers of your husband's estate, had appraised your Winiker Lumber Company stock belonging to your husband's estate at $90,000.00?

A. Yes, I could clarify that a little, if I may.

Q. You may.

A. He said that in appraising the lumber company that if somebody was wanting a lumber company, that it would be of more value, than if they wanted the plant for some other use. If they wanted to buy the buildings and all and use it for some other purpose. I did originally say that he had said $90,000.00; and then later on when he found out what I sold it for, he apologized for being so far off, but we really did put that down.

Dep. page 112

Q. The records show your testimony that he had given you an appraisal of $90,000.00 on the stock?

A. He did and then—

Q. The bank did have a formal inventory and appraisement made, did it not?

A. Yes, they did.

Q. Do you know what Mr. Edmunds and his two associates appraised the stock at for purposes of the estate?

A. It was changed after we talked about it, and it was sold.

Q. Didn't he appraise it at $60,000.00?

A. Not to my knowledge.

Q. Didn't he appraise the stock at $600.00 a share?

A. After I sold it, they asked the estate—I don't remember about that, Mr. Meade.

Q. I just want to get the record straight, due to the fact that as of this morning when we started to continue this hearing, the record shows from you that Mr. Edmunds had appraised the stock for the estate at $90,000.00; and I ask you did you know that he actually appraised it at $60,000.00?

Dep. page 113

A. Originally, when he first was talking about it, he said $90,000.00. I know later on that when he found out what we were going to pay for it, it was changed, but originally, I mean at the very beginning, he did say $90,000.00.

Esther W. Talbert Brewer.

Mr. Meade: Now, if the Commissioner please, I refer to Accounts Current Book 49, pages 62 and 63, in which it appears that shortly after the qualification of Security Bank and Trust Company as Executor of the E. S. Talbert Estate, that an inventory and appraisement was made, and is now duly filed, and that this inventory and appraisement shows 100 shares of Winiker Lumber Company stock to be appraised at $600.00 a share, or $60,000.00. My memorandum shows that the date of that inventory and appraisement was February 15, 1955. I would like for the Commissioner to verify the date. I may be in error there.

Q. Mrs. Brewer, you did have advice and counsel of Mr. William Carter, Vice-President, Security Bank and Trust Company, in dealing with Mr. Winiker, your brother, for the sale of this stock. Did you not?

A. Yes.

Q. Did he not advise you to accept Mr. Winiker's offer, which I recall you said amounted to approximately $60,000.00 for your stock?

Dep. page 114 } A. Yes.

Q. And did he not tell you that in his opinion that was a fair value for your stock?

A. No, sir, he never did. He always said that he did not feel like it was enough, but he did not feel that Bud and I would get along; and rather than tear my nerves all to pieces, it would be better for me to accept that, and get out, rather than to continue.

Q. And you think that Mr. Carter was advising you to sell this stock at an inadequate price?

A. We agreed it was. It was not what I could get out of it.

Q. Do you think you can prove that by him?

A. I am sure he would substantiate what I have to say.

Q. Going back to this agreement of January 17, 1955, which is the subject of this suit, did I understand you to testify the other day that the provision for the payment of $40.00 per week to your mother for her lifetime was a part of the consideration, payable to her at the time for her sale and assigning of the 200 shares of stock to your husband and to your brother?

A. Mr. Meade, let me say I don't know if I quite understand or not. This is the way I understand it. That in addition to the notes which she would receive from my brother

Esther W. Talbert Brewer.

Dep. page 115 } and I, she would receive $40.00 a week from the Winiker Lumber Company for her lifetime, and that was part of the sale price.

Q. So, this agreement of January 17, 1955, was intended as a legal and binding obligation and not a voluntary matter as between you and your husband and your brother and your mother. Is that right? You intended it to be a binding and legal obligation of the parties who signed it?

A. On the Winiker Lumber Company, yes, on the Winiker Lumber Company.

Q. If it was intended to be a binding obligation on the Winiker Lumber Company, why didn't the Winiker Lumber Company sign it?

A. Mr. Meade, my brother wrote up that, and I am sure he certainly intended it for the Winiker Lumber Company. I don't know why he didn't write Winiker Lumber Company down there; and to me, I am not familiar with the procedure, and it was just something that he had written up, of course, to be somewhat between the parties concerned, binding the Winiker Lumber Company, and the Winiker Lumber Company did accept it; they paid that $40.00 a week, and there wasn't ever any question about it until April 30, when he refused to pay it any more.

Q. You read the contract before you signed it, didn't you?

A. Why certainly I did.

Dep. page 116 } Q. You saw the Winiker Lumber Company didn't sign it, didn't you?

A. I didn't understand it wasn't the Winiker Lumber Company. It was fully understood the Winiker Lumber Company would be responsible.

Q. How much experience have you had in your life as a business woman?

A. Very little.

Q. Didn't you work for Security Bank and Trust Company, or Danville Loan and Savings?

A. I worked for Security Bank.

Q. How long did you work for them?

A. About a year and one-half, but my duties had nothing to do with anything like that.

Q. After your husband's death, didn't you go down to the plant several times when you were put on the payroll and stay down there in the office for the purpose of doing what you could to cooperate with your brother in the management of that business?

A. I did go down there some, yes, sir.

Esther W. Talbert Brewer.

Mr. Carter:

* * * * *

Dep.
page 117 }

* * * * *

Q. Why did you sell, even though you deemed the sales price inadequate?

A. Because I felt like that it would be so unpleasant, that it would be a whole lot better for me to take less, and get out, and not be worried, than to try to remain under unpleasant circumstances.

Dep.
page 118 }

Q. Mrs. Brewer, you testified at the last hearing about what was paid to you by your brother, and what the consideration included; also what salary you had drawn from the business prior to selling your interest to your brother. Could you, or have you, had an opportunity to refresh your mind and examine your records as to these matters?

A. Yes, I have them with me.

Q. Now, Mrs. Brewer, just exactly what consideration was paid to you by your brother at the time that you sold your stock?

A. You mean this full amount?

Q. Yes.

A. $60,310.00.

Q. What was the $60,310.00 for? What did that include?

A. That included the 25 shares that was in my name, and the 100 shares that was in my husband's name; the $1,041.44 that was for furniture.

Q. What furniture was that?

A. That was some Biggs furniture—dining room furniture.

Q. To whom did you sell the furniture?

A. I sold it to my brother.

Dep.
page 119 }

Q. What disposition did the bank make of that money?

A. They gave me a check for it. May I add. You asked me about the $60,000.00, that also shows included in there $5,910.00 for Earl's indebtedness to the

factory. The bank gave me a check for this amount of the furniture.

Q. Have you also checked your tax record to see what was paid to you by the corporation between the time of the death of your husband and the sale of the stock?

A. I have checked my tax record, which I have, and it is $1,000.00.

Q. $1,000.00 even?

A. Yes.

* * * * *

Dep.
page 120 }

* * * * *

The witness,

S. F. WINIKER,

being recalled, testified as follows:

Examined by Mr. Meade:

* * * * *

Dep.
page 121 }

* * * * *

Q. Getting back to the agreement of January 17, 1955, do you know where this agreement was typed?

A. It was typed down at the office—Winiker Lumber Company office.

Q. Do you know who typed it?

A. I don't believe that I can say for sure, but I am pretty positive that I did. I think I did.

Q. And do you know at whose direction it was typed?

A. Well, there was discussion between Earl Talbert and I before I typed it.

Q. Was he in your presence when you typed it?

A. He was in the office. He may not have been looking over my shoulder.

S. F. Winiker.

Q. Was it discussed before it was typed?

Dep. page 122 } A. Verbally, yes, up at my mother's house when Talbert and his wife and I were there.

Q. Why did not Winiker Lumber Company execute this agreement?

A. Well, the Winiker Lumber Company was not getting my mother's stock. We were getting it, and it was our obligation, not the company's. The stock was for—

Q. Why did you put the provision in there for placing your mother on the payroll at $40.00 a week?

A. We told her in our discussion that we would continue to pay her $40.00 a week as long as she lived; and I think she should get it; and we said we will put you on the payroll down there and deduct it as a business expense. We had heard other folks were doing that; so, we thought we would do it too; and of course, we did that as long as we could; and the idea was that we—our agreement was we were to pay her her lifetime and as long as Talbert and I operated that business; of course, we no longer operate it now; and in the meantime the Internal Revenue Department came back and disallowed this as a corporate expense, which we had hoped we could carry on that way; then, when they disallowed that, I considered that we had guaranteed this to my mother;

Dep. page 123} and I thought this particular amount of money should come out of our personal funds. Of course, I might add to that, with the Internal Revenue stepping in, we can't carry out the shouldering of this obligation by putting it off on the corporation, because the company is no longer a corporation. I can't operate the corporation, because my sales contract prevents me to do so under penalty; because I think we started off with and we mentioned that at the house, we would carry it on the company's books, if we could. We started out that way; and it was the desire and intent to carry it on the company books as long as we could; and if we couldn't another proposition would come up. I don't know how in the world, we had no idea about what was going to happen and when. We had no idea this particular situation would ever come up. We assumed we could charge it up as a business expense, but since it can't be done, so, then somebody is due to pay it; and I think it is up to us to shoulder it together. I am certainly willing to pay my part.

Mr. Carter:

Q. Mr. Winiker, if this was not the corporation's contract,

why did the corporation continue to pay this salary to your mother?

A. We were paying it as long as we could deduct it as a business expense; and that was our intention to do, so long as it was a business expense we would do it that way.

Dep. page 124 } Q. You discussed this with Mrs. Talbert, that it would be an obligation on the corporation so long as it could be deducted as a business item?

A. That way you phrased it never came up. We never considered that any other questions would come up which would alter that. We had no idea, at least I had no idea, Talbert was near death at the time, and we said that we would pay, and we would carry it on the books of the company. I don't know that a proviso was put in there as long as we can or anything about it, at all.

Q. Then it never occurred to you, Mr. Winiker, that it would not be a deductible item as a business expense?

A. At that time no.

Q. In that it never occurred to you all then that it was not a deductible item, you all did not consider this a condition to the agreement made of the payment to your mother of the $40.00 per week?

A. Individually yes.

Q. Your answer is individually yes. In other words, you had some individual reservation yourself which was not communicated to the other two parties who had signed the agreement. Is that correct?

Dep. page 125 } A. We individually considered that a part of our agreement. I mean an agreement with my mother to buy the stock. Is that what you are asking. We were—since 1940 my mother was put on the books of the corporation, receiving $40.00 a week. She was an officer and principal stockholder. We ran the business. If she sold us her stock, then she would be no longer any officer or entitled to receive a salary, bonus or dividend. Although the notes that we gave her for the stock bore interest, we thought that we should pay our mother the $40.00 a week as long as possible for her lifetime as long as we ran the business. My sister was in on this transaction from the very beginning, and upon Earl Talbert's death, she received his 100 shares of stock, and already had 25. We continued to pay her until it was called a halt by the Internal Revenue Department, but I considered my mother had been expecting—

was expecting—to receive the $40.00 per week as long as she lived from the Winiker Lumber Company, as long as we ran the business. I am certainly agreeable to pay my part of that obligation. We guaranteed it individually. Winiker Lumber Company at the time that we discussed was only brought into the picture by saying we would put, list, her on the payroll. We didn't say that Winiker Lumber Company was going to pay this out of its own pocket all the time. We just said we would list her on the payroll, and that was the agreement, and that thought came back to me just this morning as to exactly how that thing came about.

Dep. page 126

Q. Mr. Winiker, I believe that the agreement dated January 17, 1955, which is the agreement in controversy here, states that these parties as the operators of Winiker Lumber Company will list the party of the second part, your mother, on the corporation's books, and pay her a salary of at least $40.00 per week so long as she shall live. Is that the agreement you made between yourselves?

A. That is exactly right.

Q. And at that time you gave no consideration, did not even think that the Bureau of Internal Revenue would disallow this as a business expense. Is that correct?

A. Right.

Q. You do in fact own the stock of the Winiker Lumber Company today. Do you not?

A. Yes.

Q. The Winiker Lumber Company today does have assets, does it not?

A. Some, yes.

Q. The Winiker Lumber Company was a going business when you elected to sell the physical assets of the business, is that correct?

Dep. page 127

A. Yes.

Q. And you yourself contracted on behalf of the Winiker Lumber Company not to engage in the lumber company again. Is that correct?

A. That was a stipulation in the sales agreement.

Q. And the Winiker Lumber Company is drawing interest upon the notes that it holds for the sale of its physical assets. Is that correct?

A. Yes.

Esther W. Talbert Brewer.

* * * * *

Dep.
page 128 }

* * * * *

The witness,

ESTHER W. TALBERT BREWER,
being recalled, testified as follows:

Examined by Mr. Carter:

Q. Mrs. Brewer, do you recall the occasion on which you and your husband and your brother discussed this matter of paying a salary to your mother?

A. Yes.

Q. How was the salary to be paid? In other words, who was the payor of the salary?

A. Winiker Lumber Company was to pay that salary her lifetime.

Q. Did you brother at that time express any intention that this would be only a moral bond upon the corporation or that it would be payable only so long as it could be taken off as a tax deduction?

A. Nothing was said about that whatsoever; it was to be paid to her her lifetime; nothing was said about as long as they could, to my knowledge; I have no recollection of that being brought up whatsoever.

Q. Was this to be a binding obligation, or was it a purely moral obligation between the parties?

A. It was a binding obligation between the Winiker Lumber Company and my mother. That is the way I always understood it; I was never told any different.

Dep.
page 129 }

Q. At that time were the parties who signed the agreement the sole stockholders, the directors and the officers of Winiker Lumber Company?

A. Yes.

Q. Now, Mrs. Brewer, in determining at what price you would sell your stock to your brother, did you take into consideration this obligation of the corporation?

A. Absolutely it was taken into consideration.

Esther W. Talbert Brewer.

Q. Was that one of the factors that induced you to sell it as low as you did?

A. Yes, we discussed this at the factory, and Bud enumerated just why he would pay me say just $53,000.00 in round figures, plus what Earl owed; and he went through it all; that he would have to take this $20,000.00 deed of trust, the $40.00 a week obligation to mama, and then, of course, that was the main things, but he went over, of course, about the worth of the business; he did also include in that the factory received $5,000.00 at my husband's death; and that would be considered in there too.

Q. What was that? Was that life insurance?

A. Life insurance.

Dep. page 130 } It is just as clear in my mind as it could possibly be that he did accept this obligation to pay my mother that $40.00 a week; it was settled on by the Winiker Lumber Company; and I never heard one other thing about it until he came up there and said he was not—he refused to pay it any more after April 30—this year; I meant to say 1959.

Q. Which of the two of you all first brought up the subject of considering this $40.00 a week obligation in determining the value of your stock? In other words, who brought that up?

A. I just don't remember; I know he brought it up, when he made me this offer of that; then he brought it up to tell me why he would pay that, and I would say he was the first one to bring it up.

Q. Did he tell you at that time that this would be binding on the corporation only so long as the Bureau of Internal Revenue allowed it as a business deduction?

A. No, no that was not brought into it.

* * * * *

Dep. page 131 }

* * * * *

Mr. Meade:

Q. Mrs. Brewer, at the time that your mother transferred the 200 shares of stock to your husband and your brother, and no longer was a stockholder, officer or director of Winiker Lumber Company, did you think that Winiker Lumber Com-

Esther W. Talbert Brewer.

pany could place your mother's name on the payroll, pay her $40.00 a week, and properly and legally deduct those payments as business expenses?

A. I certainly did, I had no knowledge that it couldn't be done.

Q. Now, the second question. This stock, 100 shares to each your husband and your brother, was acquired in the winter of 1955. This agreement is dated January 17, 1955?

A. Yes.

Dep. page 132 } Q. As I understand the situation, neither you nor your husband nor your brother agreed with your mother that you would not sell your shares of Winiker Lumber Company, which you held, each of you, in the company? There was no agreement to that effect, was there?

A. You know that we couldn't sell it.

Q. That is why you didn't bind yourself not to sell your stock after you acquired all her stock?

A. No.

Q. Let us assume that in 1956, one year after you, your husband and your brother became the sole stockholders of Winiker Lumber Company, you had an opportunity to sell your stock at a very good price, and you sold all that stock to a third party, who took over the Winiker Lumber Company and its operation. Now, if that had happened, what would have happened to your mother?

* * * * *

Dep. page 133 }

* * * * *

A. I will just try to answer. In regard to this agreement I still say it is an agreement of the Winiker Lumber Company. I think the people involved would have to have been informed as to the obligation of the Winiker Lumber Company; and that they would have to take over, if I were going to sell out my interest or my stock, because you see this after all was stock we sold, but that was an additional obligation of the Winiker Lumber Company, that would have to be taken care of. I don't know whether that answers your question or not.

Q. Then, you don't consider that you, your husband and

your brother after selling all their interest in Winiker Lumber Company would be responsible personally to your mother under the agreement?

Dep. page 134 } A. Well, we made that additional agreement, when it was sold—my brother and I made that agreement, when I sold out; I don't know what agreement he made with the people.

Q. Are you talking about the agreement of January 17, 1955?

A. At that time it was discussed; and my brother took it over—took over that responsibility to pay it.

Q. You still are talking about your sale to your brother, but I am talking about—

A. I am sure you said 1955. I guess you meant 1956.

Q. Your husband and your brother bought your mother's stock, 200 shares, we will say on January 17, 1955; and several years before your husband's death, all three of you had an opportunity to make a good sale, and you sold all your stock. Would you consider that you and your husband and your brother would continue to be responsible, or would be responsible, personally to your mother for the payment of $40.00 a week during her lifetime?

A. It was not personally; it was always my understanding that the Winiker Lumber Company—he took it over, and that was part of the agreement—that is the only thing I know to tell you. He took over everything and assumed the full responsibility of it, and released me of any responsibility.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

Page

Appeal and *Supersedeas* Awarded 1
Record 2
Report of Commissioner in Chancery 2
Exceptions to Commissioner's Report 6
Final Decree—April 14, 1960 7
Notice of Appeal and Assignments of Error 10
Depositions:
Landon C. Horne 11
Esther W. Talbert Brewer 13, 42, 53, 61
S. F. Winiker 29, 57
Lucille Coley Phelps 51