216 Va. 548

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
MAR 14 1975
RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 740991

TYLER GILMAN CORPORATION,

Appellant,

v.

A. SIMPSON WILLIAMS, JR., EXECUTOR OF THE ESTATE OF ARNETTE T. GILMAN,

Appellee.

APPENDIX

TABLE OF CONTENTS

App. Page

Complaint—Filed October 24, 1969 1

Petition To Intervene And Enforce Payment Of A Certain Promissory Note Made By Defendant Tyler Gilman Corporation—Filed February 11, 1974 7

Answer Of Defendant Tyler Gilman Corporation To Petition To Intervene And Enforce Payment Of A. Simpson Williams, Jr., Executor Of Arnette T. Gilman—Filed February 19, 1974 8

Article IV Of Last Will And Testament Of Eugene J. Gilman (Holographic) —Dated July 10, 1963 9

Decree—Entered January 4, 1972 10

Plaintiff's Exhibit 1—Filed April 23, 1974 11

Plaintiff's Exhibit 5—Filed April 23, 1974 12

Order—Entered June 10, 1974 13

Notice Of Appeal And Assignments Of Error—Filed July 9, 1974 14

Reporter's Transcript Of Proceedings Of April 23, 1974:

C. B. Drinkard, Jr.:

Direct Examination 16

Cross-Examination 24

Redirect Examination 24

Alma D. Hanscom:

Direct Examination 25

* * *

COMPLAINT

Filed October 24, 1969

Amended Bill Of Complaint For Aid And Direction In Administration Of Estate Of Decedent And For An Accounting Between Certain Defendants

* * *

Complainant, as Executor of the Estate of Eugene Judson Gilman, deceased, shows unto the Court the following:

I. *Aid and Direction*

1. The last will and testament, dated July 18, 1963 (with codicil dated February 18, 1965) was admitted to probate by the Clerk of this Court on March 1, 1968, and on the same day your complainant qualified as Executor of the decedent's estate and gave bond, with security, as required by law. A photo copy of said will is attached hereto as Exhibit "A," as a part hereof, and is to be read herewith; and

2. That following the probate and qualification hereinbefore mentioned, your complainant entered upon the administration of said decedent's estate and has proceeded with said administration up to the date of the filing of this bill. Due, however, to certain language and phraseology used by decedent in the writing of his will, which language and phraseology raise questions with doubtful answers, your complainant is of the opinion and so avers that he should proceed no further with the administration of said estate without the aid and direction of the Court in finding and establishing the proper interpretation of decedent's intent as expressed by him in his last will and testament; and

3. The questions with doubtful answers raised by the language and phraseology of decedent's will as to which your complainant seeks the aid and direction of the Court are as follows:

A. In Article II of his will, decedent made the following disposition of certain of his property:

> "I give, devise and bequeath to my wife, Eileen Gilman, my house located at 8810 Michaux Lane in Henrico County, together with

> all improvements, furnishing and fixtures together with all my personal belongings, insurance and savings bonds."

and in Ref: II of his codicil to his will, decedent modified the aforementioned disposition as follows:

> "Since the house known as 8810 Michaux Lane has now been sold and the money placed in the Tyler Gilman Corporation, I direct that at my death the house known as 310 Tarrytown Drive be sold at once, and that from its proceeds that $20,000.00 (Twenty thousand dollars) be withdrawn from the Tyler Gilman Corp. and given to my wife, Eileen Gilman for the purpose of acquiring a place to live."

The questions here presented are:

(1) Whether or not the "improvements, furnishing and fixtures" referred to in Article II of decedent's will, as aforesaid, as being located in decedent's residence at 8810 Michaux Lane, Henrico County, Virginia, pass to his wife named is said Article of his will notwithstanding the fact that no mention of same is made in Ref: II of decedent's codicil to his said will and the fact that at the time of his death decedent had disposed of his residence at 8810 Michaux Lane.

(2) The extent, if any, to which the $20,000.00 amount mentioned in Ref: II of decedent's codicil to his will is an asset of decedent's estate in which your complainant should be interested and, if said amount or any portion thereof is such, whether or not Tyler Gilman Corporation, owner of the record title to decedent's residence at 310 Tarrytown Drive, Henrico County, Virginia, at the time of decedent's death, which residence has now been sold, is now legally obligated, by virtue of Ref: II of decedent's codicil to his will to pay over to your complainant from the proceeds of said property said sum or any portion thereof for distribution by him pursuant to decedent's will; and

(3) Of what personal property did decedent die seized and possessed and whether or not all or only a part of same was intended to be bequeathed by the foregoing Article of decedent's will.

B. In Article III of his will, decedent made the following direction

and request concerning Audio Fidelity Corporation, the corporation of which he was President and Board Member at the time of his death:

> "I direct that Elvin E. Cordle be made President of Audio Fidelity Corporation for as long as he so desires. Should any of my children become active in the work of Audio Fidelity they too may become President of the Corporation at the discretion of Elvin E. Cordle and the board of directors. It is my request that the Corporation remain in operation."

The question here presented is the extent, if any, to which your complainant need be concerned with any of the provisions contained in the aforementioned Article of decedent's will; and

C. In Articles IV and V of his will, decedent made the following disposition of the stock owned by him at the time of his death in Audio Fidelity Corporation and Tyler Gilman Corporation:

IV

> "I direct that my wife, Eileen, become custodian of my stock owned in Audio Fidelity Corporation and Tyler Gilman Corporation. She shall receive all interest from the above mentioned stock, as long as she lives. At her death all of the above mentioned stock shall be divided equally between my three children, Tyler, Elizabeth and Tommy."

V

> "Out of the interest of the above mentioned stock I direct that Eileen fulfill my monthly support to my three children according to a previously signed agreement with my first wife."

The questions here presented are:

(1) The name and manner in which decedent's shares of stock in said corporations should be registered during and after the lifetime of decedent's wife.

(2) What person and under what conditions, if any, should have physical possession or custody, during the lifetime of decedent's wife, of said shares of stock.

(3) What person and under what controls, if any, shall have the right to vote said shares of stock during the lifetime of decedent's wife.

(4) The definition to be assigned to the word "interest" as used by decedent in the aforementioned Articles of his will and if the word "interest" as used by the decedent in his will, is found to mean or include dividends in the ordinary sense, how, under the circumstances, the amount, frequency and payment of said dividends is to be determined.

(5) The definition to be assigned to the term "monthly support" as used by decedent in Article V of his will and if the term "monthly support" as used by decedent in his will, is found to be a charge against certain assets of decedent's estate, the extent to which, if any, of such charge and the extent to which your complainant should be concerned with the collection and payment of same pursuant to decedent's will. Photo copy of a conformed copy of the agreement providing for child support which is referred to by the decedent is hereto attached as Exhibit "B," as a part hereof, and is to be read herewith; and

(6) The extent to which, if any, the answers to questions presented above as (2) and (3) are affected or determined by the second sentence included in Ref: VII of decedent's codicil to his will, as follows:

> "Also, any major changes in the Audio Fidelity Corp. by Elvin Cordle must be with the approval of A. Simpson Williams."

D. In Article VI of his will, decedent makes the following direction concerning a specific asset of his estate:

> "I hereby direct that my boat, 'Ty Tom Be' be sold to settle any outstanding debts and to cover any taxes involved in the transfer of my estate,"

and in Article VIII of his will, decedent makes the following disposition of certain specific assets of his estate:

> "I direct that the stock in Bell & Howell Company and California Electric Company together with $1,000.00 left from the sale of my boat 'Ty Tom Be' be given to Hanover Avenue Christian Church in Richmond, Virginia."

The questions here presented are:

(1) Whether or not in the event the sales proceeds derived from the sale of decedent's boat, which has now been sold, exceed costs of administration, outstanding debts, succession taxes and the above mentioned $1,000.00 bequest made by the decedent in Article VIII of his will, as to any such overage the decedent will be deemed to have died intestate because of his having not included in his will a residuary clause.

(2) Whether or not the California Electric Company stock referred to in Article VIII of decedent's will was adeemed since at the time of his death decedent owned no stock in any company named California Electric Company but did own 15 shares of stock in Southern California Edison Company (par value $8/3 common) with which company California Electric Power Company was merged on January 1, 1964.

II. *Accounting*

4. That in the administration of this Estate he has learned that decedent, prior to his death, entered into certain business transactions with the defendant Reba F. Tyler and with the defendants Audio Fidelity Corporation and Tyler Gilman Corporation and that the defendant Reba F. Tyler during the same period of time had entered into certain business transactions with decedent and with the defendant Tyler Gilman Corporation, with the result that an accounting between the parties to such transactions should be had so as to enable him to proceed with the administration of decedent's estate. The business transactions to which reference herein is made are as follows:

A. Those between decedent and the defendant Reba F. Tyler arising out of the purchase of the property at 310 Tarrytown Drive, Henrico County, Virginia; and

B. Those between decedent and the defendant Tyler Gilman Corporation—

1. Arising out of the purchase of the property at 6521 West Broad Street, Henrico County, Virginia.

2. Arising out of the purchase of the property at 310 Tarrytown Drive, Henrico County, Virginia.

3. Resulting in certain cash advances from time to time being made by Tyler Gilman Corporation to decedent.

4. Resulting in certain cash advances from time to time being made by decedent to or for the account of Tyler Gilman Corporation.

5. Arising out of the rental by decedent of the property at 310 Tarrytown Drive, Henrico County, Virginia.

C. Those between decedent and the defendant Audio Fidelity Corporation arising out of the purchase by Audio Fidelity Corporation of certain items of tangible property being used by and in the possession of the decedent at the time of his death; and

D. Those between the defendant Reba F. Tyler and the defendant Tyler Gilman Corporation arising out of the purchase of the property at 310 Tarrytown Drive, Henrico County, Virginia.

5. The parties interested in the determination of the answers to the foregoing questions are named as defendants in the caption.

6. That your complainant is of the opinion and so avers that he cannot with safety to himself or to the rights and interests of the other parties hereto complete his duties as such executor and make distribution of said estate without the advice and direction of this Court as to the proper construction of decedent's will and as to his conduct under the aforementioned provisions of said will and an accounting between the parties hereinabove named.

WHEREFORE, your complainant prays as follows:

A. That the Court will hear evidence and argument and make such orders and decrees as may be necessary and proper determining the proper construction of decedent's will and directing your complainant, as Executor of the estate of said decedent, as to what action he shall take with respect to the questions raised herein; and

B. That the defendants be ordered to set forth their several interpretations of the aforementioned provisions of decedent's will and submit the same to this Court; and

C. That an accounting be had between decedent and the defendants Reba F. Tyler, Tyler Gilman Corporation and Audio Fidelity Corporation and between the defendants Reba F. Tyler and Tyler Gilman Corporation; and

D. That the sums to be allowed out of said estate to the several parties hereto for their expenses and counsel fees may be fixed by the Court.

* * *

PETITION TO INTERVENE AND ENFORCE PAYMENT OF A CERTAIN PROMISSORY NOTE MADE BY DEFENDANT TYLER GILMAN CORPORATION

Filed February 11, 1974

Petitioner, A. Simpson Williams, Jr., also the plaintiff herein, respectfully represents as follows:

1. That on November 28, 1972, in the Circuit Court of the City of Richmond, Division I, he qualified as Executor of the estate of Arnette T. Gilman, deceased, and

2. That at the time of her death on November 16, 1972, the said Arnette T. Gilman was the owner and holder of a certain promissory note in writing dated October 9, 1961, made by the defendant Tyler Gilman Corporation for valuable consideration and by said corporation delivered to the said Arnette T. Gilman; that said note was made payable to the said Arnette T. Gilman on demand in the amount of Forty Thousand ($40,000.00) Dollars, and on its face states that same bears "interest at 6%." A copy of said note is attached to this petition as Exhibit "A" and is to be read herewith; and

3. That the note referred to in the preceding paragraph of this petition constitutes a material asset of the above named decedent's estate and that on August 10, 1973, petitioner made formal demand upon the defendant Tyler Gilman Corporation for its payment. A copy of petitioner's demand letter written on said date and sent certified mail to Mr. Theodore Carney, President of the defendant Tyler Gilman Corporation, and to John W. Edmonds, III, Esquire, counsel, is hereto attached as Exhibit "B" and is to be read herewith; and

4. That although interest payments due on the promissory note hereinabove referred to were regularly made by the defendant Tyler Gilman Corporation from the date of said note to October, 1972, no interest payments have been made by said defendant corporation subsequent to September 1, 1972, and that said defendant corporation has refused to make any further payments of interest and has also refused to pay the principal amount of said note or any part thereof, with the result that the full principal amount of said note together with interest at the rate of six (6%) per cent from September 1, 1972, are both unpaid.

WHEREFORE, petitioner asks that he be allowed to intervene in this suit and at such time as petitioner has become a party to this suit he demands judgment against the defendant Tyler Gilman Corporation on its promissory note hereinabove referred to in the amount of $40,000.00 together with interest at the rate of six (6%) per cent on said sum from September 1, 1972, plus petitioner's costs incurred in filing this petition and a reasonable attorney's fee as provided for in said note.

* * *

ANSWER OF DEFENDANT TYLER GILMAN CORPORATION TO PETITION TO INTERVENE AND ENFORCE PAYMENT OF A. SIMPSON WILLIAMS, JR., EXECUTOR OF ARNETTE T. GILMAN

Filed February 19, 1974

The defendant Tyler Gilman Corporation in answer to the petition to intervene and enforce payment of the petitioner A. Simpson Williams, Jr., as Executor of the Estate of Arnette T. Gilman, deceased, states as follows:

1. It believes the allegations of paragraph 1 of the petition to be true.

2. It admits that it has been exhibiting a certain document purporting to be a note in the amount of $40,000.00 dated October 9, 1961, payable to Arnette T. Gilman on order and signed.

"Tyler Gilman Corp.
Eugene J. Gilman."

It further alleges that the said note does not set forth a capacity in which Eugene J. Gilman signed the note, whether it was personal or representative, and alleges that Eugene J. Gilman did not reportedly act as an officer of Tyler Gilman Corporation in signing such note. It further alleges that the minutes of the directors and stockholders of Tyler Gilman Corporation make no reference to this note and did not confer upon Eugene J. Gilman the authority to sign the note in question.

3. The defendant Tyler Gilman Corporation admits that the petitioner has made demands upon it for payment and that it has denied payment properly therefor on the ground that, among other matters, the claim is barred by the applicable statute of limitations.

4. The defendant Tyler Gilman Corporation admits that interest payments were paid to October, 1972, from the funds of Tyler Gilman Corporation, and alleges specifically the last three such payments were made by Arnette T. Gilman, deceased, as an authorized signatory of the corporation.

5. The defendant Tyler Gilman Corporation denies any allegations not expressly admitted herein.

6. The defendant Tyler Gilman Corporation states that the claim asserted by the petitioner is barred by the statute of limitations and has been barred as such since October 9, 1966.

* * *

ARTICLE IV OF LAST WILL AND TESTAMENT OF EUGENE J. GILMAN (Holographic)

Dated July 10, 1963

* * *

IV

I direct that my wife, Eileen, become custodian of my stock owned in Audio Fidelity Corporation and Tyler Gilman Corporation. She shall receive all interest from the above mentioned stock, as long as she lives. At her death all of the above mentioned stock shall be divided equally between my three children, Tyler, Elizabeth and Tommy.

* * *

DECREE

Entered January 4, 1972

* * *

7. *As to the third question framed in subparagraph C of paragraph 3 of the Amended Bill of Complaint*—that during the lifetime of Eileen C. DeMattos she will be entitled to vote those shares of stock of Audio Fidelity Corporation and Tyler Gilman Corporation which are voting stock; further that it shall be the duty of the said Eileen C. DeMattos to so exercise her right to vote said stock as to promote her own interests as life tenant and the interests of the testator's three children, as remaindermen, provided that the said Eileen C. DeMattos shall be required to so vote the shares of voting stock of Audio Fidelity Corporation and Tyler Gilman Corporation so as to cause dividends to be declared to the extent possible to cover the specified monthly payments to Rene H. McBride for the support and maintenance of the testator's three infant children; further that the "prudent man" rule controls the voting of these stocks held by the said Eileen C. DeMattos, just as it does the manner of investment and reinvestment.

PLAINTIFF'S EXHIBIT 1

Filed April 23, 1974

[LETTERHEAD OMITTED]

November 7, 1969

The Board of Directors
and Stockholders
Tyler Gilman Corporation

The accompanying balance sheet of Tyler Gilman Corporation, as of August 31, 1969, and the related statements of income and retained earnings for the fiscal year then ended were not audited by us, and we express no opinion on them.

Dalton, Holt, Bruner & Drinkard
Certified Public Accountants

Liabilities And Stockholders' Equity

Current Liabilities:		
Accounts payable	$ 1,202	
Note payable, A. T. Gilman	40,000	
Loans payable, other	31,022	
Mortgage payable, amount due currently	2,494	
Payroll taxes payable	32	
Accrued expenses	590	
Income taxes payable	1,667	
Total Current Liabilities		$ 77,007
Long-Term Liabilities: (Note 2)		
Mortgage payable, United Virginia Bank/State Planters	$25,649	
Less: Amount due currently	2,494	
Total Long-Term Liabilities		23,155
Total Liabilities		$100,162
Stockholders' Equity:		
Capital stock, $100 par value:		
Authorized, 950 shares		
Issued and outstanding, 805 shares	$80,500	
Retained earnings	5,664	
Total Stockholders' Equity		86,164
		$186,326

PLAINTIFF'S EXHIBIT 5

Filed April 23, 1974

$40,000.00 Oct. 9, 1961

Tyler Gilman Corp. after date ..... promise to pay Arnette T. Gilman or order without offset Forty thousand and 00/100 Dollars Negotiable and payable at .....
Value Received. The makers and endorsers of this note hereby waive the benefit of their homestead exemptions as to this debt, and agree to pay the costs of collection hereof together with attorneys fee in case payment hereof is not made at maturity.

Tyler Gilman Corp.
Eugene J. Gilman
Pres.

Interest at 6%
No. ..... Due on demand

ORDER

Entered June 10, 1974

On April 23, 1974, came A. Simpson Williams, Jr., Esquire, plaintiff herein and also Executor of the Estate of Arnette T. Gilman, deceased, in his capacity as Executor of the Estate of Arnette T. Gilman, Deceased, and John W. Edmonds, III, Esquire, counsel of record for the defendant, Tyler Gilman Corporation, after due notice, on the petition of said Executor to intervene and enforce payment of a certain promissory note made by the defendant, Tyler Gilman Corporation, the answer of the defendant, Tyler Gilman Corporation, filed in response to said petition, which answer, among other things, includes a plea of the Statute of Limitations; and upon the testimony of witnesses taken on behalf of petitioner, and was argued by counsel.

Thereupon the Court considered the question of enforceability of the promissory note mentioned in the petition and it is hereby ADJUDGED, ORDERED and DECREED that the enforcement of said note by the petitioner is not barred by the Statute of Limitations in that the financial statement of Dalton, Holt, Bruner & Drinkard, signed by C. B. Drinkard, Jr., Certified Public Accountant (who also at such time was a director of the corporation) constitutes a new promise in writing within the meaning of § 8-25 of the Code of Virginia, and that the promissory note in writing dated October 9, 1961, made by the defendant Tyler Gilman Corporation for valuable consideration in the amount of Forty Thousand ($40,000.00) Dollars together with interest at the rate of six (6%) percent and by said corporation delivered to petitioner's decedent is a valid obligation of the defendant Tyler Gilman Corporation, legally enforceable against said corporation and judgment on said note in the principal amount of Forty Thousand ($40,000.00) Dollars is hereby granted in favor of petitioner and against defendant Tyler Gilman Corporation.

And it is further ADJUDGED, ORDERED and DECREED that petitioner, in accordance with the terms and provisions of said note, is also entitled to interest on the principal amount of said note at the rate of six (6%) percent per annum from September 1, 1972, to the date of entry hereof and judgment for said amount is hereby granted in favor of petitioner and against defendant Tyler Gilman Corporation.

To all of which actions of the Court in disallowing the plea of the Statute of Limitations and the granting of judgment for the princi-

pal amount and accrued interest due on said promissory note the defendant Tyler Gilman Corporation, by counsel, objects and excepts, on the ground that the financial statement of November 7, 1969, was not an acknowledgment in writing from which the promise of payment might be implied, that there was no evidence that it was communicated to Arnette T. Gilman, the payee and holder of the note, and that there was no evidence that the person signing such writing had any authority on behalf of the corporation to make any acknowledgment in writing on which a promise of payment may be implied.

The defendant Tyler Gilman Corporation having indicated its intention to appeal, it is hereby ORDERED that the transcript of such evidence shall become a part of the record filed in the office of the Clerk of this Court within sixty (60) days after filing of this order.

Enter: 6-10-74

/s/ John Wingo Knowles
Judge

* * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Filed July 9, 1974

Notice of Appeal

Tyler Gilman Corporation hereby gives notice of its intention to appeal from the final order of judgment entered as to it on June 10, 1974 in favor of and on the petition of A. Simpson Williams, Jr., as Executor of the Estate of Arnette T. Gilman.

Assignments of Error

Tyler Gilman Corporation assigns as error the following:

1. The promissory note of October 9, 1961, which was payable on demand, was barred by the statute of limitations, to-wit § 8-13 of the Code of Virginia.

2. The financial statement of Dalton, Holt, Bruner and Drinkard of November 7, 1969 (Exhibit 1), signed by C. B. Drinkard, Jr., as a partner in such firm, did not constitute a new promise in writing within the meaning of § 8-25 of the Code of Virginia in that it did not

constitute an acknowledgment from which a promise to pay might be implied.

3. The financial statement of Dalton, Holt, Bruner and Drinkard of November 7, 1969 (Exhibit 1), signed by C. B. Drinkard, Jr., as a partner in such firm, did not constitute a new promise in writing within the meaning of § 8-25 of the Code of Virginia in that it was not addressed to the payee and holder of the note, and there was no evidence that it was communicated to Arnette T. Gilman, the payee and holder of the note.

4. The financial statement of Dalton, Holt, Bruner and Drinkard, of November 7, 1969 (Exhibit 1), signed by C. B. Drinkard, Jr., as a partner in such firm, did not constitute a new promise in writing within the meaning of § 8-25 in that it was not signed by anyone purporting to act on behalf of Tyler Gilman Corporation.

5. The financial statement of Dalton, Holt, Bruner and Drinkard, of November 7, 1969 (Exhibit 1), did not constitute a new promise in writing within the meaning of § 8-25 of the Code of Virginia in that there was no evidence that the party signing this writing had any authority on behalf of Tyler Gilman Corporation to make any acknowledgment in writing from which a promise of payment might be implied.

The transcript of the evidence will be filed hereafter with the Clerk of the Circuit Court of Henrico County.

Tyler Gilman Corporation

* * *

REPORTER'S TRANSCRIPT OF PROCEEDINGS OF APRIL 23, 1974

[6] * * *

C. B. Drinkard, Jr.,

a witness called on behalf of the plaintiff, first being duly sworn, testified as follows:

Direct Examination

By Mr. Williams:

Q Mr. Drinkard, you have testified in the principal case before this Court, have you not? A Yes.

Q And you were the accountant for the Tyler Gilman Corporation? A (The witness nods affirmatively.)

Q For what period of time? A Well, I guess from its inception, from its beginning, until sometime in 1972, when the books were moved—well, really and truly, I guess, oh, almost early '73, when the books were moved to Louisville, Kentucky.

Q Were you also accountant for Audio Fidelity Corporation? A Yes, sir.

Q What was the relationship of those two corporations during that period of time? A The stockholders were similar. Mrs. Arnette T. Gilman and her son, Eugene J., owned all of the stock in Tyler Gilman, and they owned, between them, con-[7]trolling stock in Audio Fidelity. The function of Tyler Gilman really was as a real estate holding operating corporation. It owned and leased to Audio Fidelity the real estate that was occupied by Audio Fidelity for offices and warehouse. There was also some additional space that was leased to other people.

Q Mr. Drinkard, were you also Mrs. Arnette T. Gilman's accountant? A Yes.

Q And how long did you serve her as an accountant? A From about 1960 until her death in 1972.

Q Were you personally cognizant of the note which is the question of this hearing this morning? A Yes, sir.

Q Did you ever have occasion to discuss this note with Mrs. Gilman? A Yes.

Mr. Edmonds: Your Honor, I don't know the relevancy of this.

The Court: Do you want to explain it, Mr. Williams? He says he doesn't understand the relevancy of any testimony Mr. Drinkard might have [8] had with Mrs. Gilman about the note. I wondered if you wanted to explain the relevancy, if any, or the materiality.

Mr. Williams: Well, if Your Honor please, I think it all ties in to a composite here. I agree with Mr. Edmonds—initially there may be a lack of relevancy; but I think that when the full picture is before the Court, it will definitely be tied in.

The Court: (To Mr. Edmonds) Is that satisfactory?

Mr. Edmonds: Your Honor, I would like to maintain a state of continued objection to relevancy. I don't want to repeat it.

The Court: Let's do it this way, and if, in the event it turns out that it is not relevant, we will strike it. Your objection is well taken. But we can't tell until we get a little further.

Mr. Edmonds: I appreciate that.

Mr. Williams: At that point, let me be real specific with Mr. Drinkard.

Q Mr. Drinkard, did you have any discussion with Mrs. Gilman concerning the payment of her by [9] the corporation of either the full amount set forth in this note or any part of that amount? A Yes, sir, on a number of occasions after her son's death, and, I would say three or four occasions at a minimum, she told me that she would like to get some of her money back, preferably all, but at least some of her money back that was represented by this note. And I conveyed this request to the other members of the Executive Committee that was functioning for both corporations at that time.

Q Were you a member of the Executive Committee at that time? A Yes.

Q What was the conclusion reached in connection with Mrs. Gilman's request? A The conclusion was that between the two cor-

porations, cash was so short that unless she made demand that she was suffering from not having the money, that it would not be repaid.

Q Was there any suggestion made about any other member of the Executive Committee at that time that the corporation's liability on the note was questionable? A No, definitely not.

Q And can you recall approximately when such a discussion was held the last time? [10] A Mr. Williams, I have to take just two or three minutes to say what I do remember. When I would visit Mrs. Gilman on specific occasions, and one such specific occasion would be in March of every year when I got the information for her tax return, this was a subject which almost invariably came up.

The Executive Committee of these organizations met every month, so that the most recent time that I could be sure that it did come up would be at April or May of 1971. The reason that I do not say April or May of 1972 is because the whole organization was going through so much change at that time, I may not have brought it up and discussed it.

Q Well now, do you have in your office at the present time any records that pertain to the Tyler Gilman Corporation? A Yes, sir.

Q Is the existence of this note as a corporate obligation evidenced on any of those records?

Mr. Edmonds: Your Honor, I believe the records themselves are the best evidence.

The Court: (To Mr. Williams) Does he have them with him?

Mr. Williams: Right, sir.

[11] By Mr. Williams: (Continuing)

Q Mr. Drinkard, would you tell us what records you have? A Well, what records I have are copies of the tax returns filed by Tyler Gilman and copies of my firm's work papers used in extracting information from the records of Tyler Gilman, in preparation of those tax returns.

In addition, I have a copy of a set of financial statements which were issued by Tyler Gilman Corporation for the fiscal year August 31, 1969.

Q. Would you take them up individually? I would like to know what, if any, reference to this note is made on these various documents.

The Court: Do you want to look at them first, Mr. Edmonds?

Mr. Edmonds: Yes, sir, I do.

Mr. Williams: Just hand them to Mr. Edmonds first, Mr. Drinkard, and you might point out to him.

Witnessed Drinkard: I have to apologize for the appearance of these statements, because they were made fresh off the Xerox machine last night from my office copy.

I have the balance sheet for Tyler [12] Gilman Corporation, prepared as of August 31, 1969, which reflects under current liabilities, note payable, A. T. Gilman, $40,000.00. (Handing document to Mr. Edmonds)

Mr. Edmonds: Your Honor, I think I am going to object to that. It is just a financial statement of the corporation; it is not a promise within the Statute.

The Court: For what it is worth, I will let it in. He is arguing a question of law.

Mr. Edmonds: I appreciate that, Your Honor.

The Court: So I will let it in just as part, I guess, of his entire story.

Mr. Williams: I would like to offer this as an exhibit, Your Honor.

Note: Photocopy of financial statement prepared as of August 31, 1969, is introduced in evidence as *Plaintiff's Exhibit Number 1.*

Q Do you have other documents, Mr. Drinkard? A Yes, sir.

[13] Note: The witness hands papers to the Sergeant, who, in turn, hands same to the Court.

By The Witness: (Continuing)

A I have a copy of the tax returns for the fiscal years ended 1969, '70, '71 and '72, and the balance sheet of each of these tax returns filed by the corporation reflects an obligation of seventy-three thousand or so odd dollars for mortgages, notes and so forth, which my

work papers can reconcile as including the $40,000.00 note to Mrs. Gilman.

Witness Drinkard: (Handing papers to Mr. Edmonds) There is '69, '70, '71 and '72.

Mr. Edmonds: Your Honor, I would like to restate the same objection, plus, in this case it does not even identify it as relating to the note which is the subject matter of this action.

The Court: I understood him to say the work papers were the combination of the two.

Mr. Edmonds: But I am looking only at the tax returns.

The Court: (To Witness Drinkard) Do you have the work papers to go with them?

Witness Drinkard: May I hold on long [14] enough to do that, sir? (Referring to a file)

The Court: Oh, you can reconcile them?

Witness Drinkard: I think I can do that.

The Court: In the event you can pin it down, I will overrule his objection on the same ground.

Witness Drinkard: I have some copies of work papers. If necessary, I can obtain more for the year ended August 31, 1968. That would have been the beginning of the fiscal year for which I have the first tax return here. I have work papers which reflect the analysis of notes payable, notes and mortgages payable, and which show $40,000.00, and in a later year, this amount to the officer will be identified as the amount due specifically on the work papers as the amount due Mrs. Gilman. That is for the fiscal year ending August 31, 1968. (Handing another paper to Mr. Edmonds)

Mr. Edmonds: Same objection.

The Court: Well, I will overrule the objection and let it in.

Mr. Edmonds: I have a continuing objection to that, excepting.

[15] The Court: As you object, now you except.

Witness Drinkard: For the year ended August 31, 1969, I have a similar set of work papers, showing the $40,000.00 due to Mrs. Gilman. I have an analysis of the interest expense showing the interest paid to Mrs. Gilman. The interest expense will tie in to the amount of interest expense shown on it, claimed as a deduction on a tax return.

I am sorry that I am not actually prepared with written material, but for the Court's information, the balance sheet of the tax return for 1969 shows $73,516.00 as mortgage notes, bonds payable and so forth in less than one year, that consists of the $31,021.49 which represents the amount shown on the books of the corporation concerning the house on Tarrytown Road, Your Honor, which you were very familiar with, sir.

The Court: Yes, sir, quite familiar.

Witness Drinkard: The $40,000.00 note due to Mrs. Gilman and the current year's payments on the mortgage of $25,000.00, those current-year payments would be about $2600.00—those three figures added together would add and reconcile to [16] the $73,516.00.

I regret that I do not have a written analysis of that. I can present it to the Court later. I can mail it or anything.

The Court: Well, Mr. Edmonds ought to have a look at anything that comes in, especially over his objection.

Witness Drinkard: I will be happy to—

The Court: If your papers show it there, then there is no sense to analyze it.

Witness Drinkard: I will be happy to make six copies and send it to anyone—everything.

Mr. Edmonds: Mine goes basically to what complies to the Statute.

The Court: We will see what he has got and make a determination.

Witness Drinkard: These are papers that tie in, as I mentioned, to the tabs run. (Handing papers to Mr. Edmonds)

And without boring the Court, this same sort of thing obtains for the years '68, '69, '70, '71 and '72, and I have copies of my work papers for those years. I can go through each one of them, if you would like.

[17] The Court: Mr. Drinkard, let's face it—The Court is an umpire; it can't coach. It is up to the attorneys.

By Mr. Williams: (Continuing)

Q Mr. Drinkard, do you know, of your own knowledge, how Tyler Gilman Corporation paid interest on this note, or, if it paid interest on the note? A Yes, sir. It paid interest by check, and I just showed Mr. Edmonds one analysis of those checks that were issued during the fiscal year that ended August 31, 1969, and they were paid generally each month at the rate of $200.00 a month. Sometimes they would get behind and pay catch-up amounts like $600.00 at one time, but generally they were paid, particularly from 1969 forward, at the rate of $200.00 a month.

Q Do you know who in the organization, that is, what employee of Tyler Gilman Corporation, was charged with the responsibility of preparing these interest checks? A Yes, sir. Mrs. Alma Hanscom, and she was Alma Vance before her marriage to Mr. Hanscom.

Note: Mr. Williams hands papers to Mr. Edmonds.

[18] Mr. Edmonds: Mr. Williams, are these the same ones I gave you?

Mr. Williams: Yes, they are the ones you gave me.

Note: Mr. Edmonds returns the papers to Mr. Williams.

Q Mr. Drinkard, I hand you what purports to be a series of checks, and I would like you to state whether or not you can identify the handwriting on those checks.

Mr. Edmonds: Your Honor, I have the same objection as to relevancy, because I don't think it is any question payments were made.

The Court: The books show that. But what you are saying, in effect, is, that admitting everything they say is true, it still doesn't come under 8-25. I understand your objection, but the only way we can do it—it is other ways that vouch the record, if I sustain it.

Mr. Edmonds: I want to maintain my record and not impede the hearing.

[19] The Court: You don't have to impede it. If anything is offered to which you do not object, so indicate.

A Mr. Williams, I do recognize this as Mrs. Hanscom's handwriting.

Q When you state that, are you saying that Mrs. Hanscom is the party who made the check out except for signature? A Yes. The signature is that of Arnette Tyler Gilman—Arnette T. Gilman.

Q And she signed on behalf of the corporation, did she not? A Yes, sir. She was an officer. She was at that time, I think, President of the corporation.

Q Those checks are for what months and what year? A They are for January, February—they are dated January the 3rd, February the 1st, March the 1st, April the 4th, May the 1st, June the 1st, July the 1st, August the 1st and September the 1st of 1972.

Mr. Williams: If Your Honor please, I would like to offer those in evidence as exhibits, also.

[20] The Court: All right. We will make that group Plaintiff's Exhibit No. 2.

Note: A group of checks are introduced in evidence as *Plaintiff's Exhibit No. 2.*

The Court: (To Mr. Edmonds) He hasn't offered the tax returns yet, not the way the record shows. (Nodding toward Mr. Williams) If he wants to offer them, then he has got to make his offer.

Mr. Edmonds: What number is that?

The Court: (To Mr. Williams) If you want the copies of the tax returns introduced—

Mr. Williams: I would like to do so, yes, sir. I think Mr. Edmonds has seen them.

The Court: He has seen them.

Mr. Edmonds: I have seen them.

The Court: I will make them No. 3.

Note: Copies of tax returns are introduced in evidence as *Plaintiff's Exhibit No. 3.*

Mr. Williams: I have no further questions of Mr. Drinkard.

The Court: Very well.—Mr. Edmonds.

[21] Cross-Examination

By Mr. Edmonds:

Q Mr. Drinkard, I have one question: You said you conveyed the request of Mrs. Gilman to the Executive Committee of both corporations. Roughly, who were these people? A They weren't so rough. Mr. Elvin Cordle, Mr. Jim Hanscom, and myself.

Mr. Edmonds: I don't think I have any further questions, Your Honor.

Mr. Williams: I would just like to ask one question.

Redirect Examination

By Mr. Williams:

Q What positions did Mr. Cordle and Mr. Hanscom hold at this particular time insofar as being officers and Directors of Tyler Gilman Corporation were concerned? A Mr. Cordle was Vice-President, I think. I would have to get a copy of the work papers to be positive, [22] but I believe he was Vice-President. I think Mr. Hanscom was—I am not sure, but I think he was a Director of the corporation.

Q Was Mr. Cordle a Director? A Yes.

Mr. Williams: I have no further questions of Mr. Drinkard.

The Court: Well now, did I understand Mr. Drinkard to say that his work papers supported these? (Denoting papers)

Mr. Williams: Yes, sir.

The Court: Are you going to offer the work papers, too?

Mr. Williams: I would like to offer those, Your Honor. They were seen by Mr. Edmonds.

The Court: I haven't read them over, but on the schedule, all is a total amount. I will make those No. 4.

Note: Copies of work papers are introduced in evidence as *Plaintiff's Exhibit No. 4.*

The Court: Is there anything further of Mr. Drinkard?

[23] Mr. Williams: No, sir.

Witness Stood Aside.

Mr. Williams: I would like to ask Mrs. Hanscom to take the stand.

Alma D. Hanscom

a witness called on behalf of the plaintiff, first being duly sworn, testified as follows:

Direct Examination

By Mr. Williams:

Q Mrs. Hanscom, would you state your name, address, and occupation, please? A My name is Alma D. Hanscom, 1021 Horsepen Road, and I was Secretary and Bookkeeper at Audio Fidelity, and also for Tyler Gilman Corporation until April of '73.

The Court: Mrs. Hanscom, do you an E at the end of your name?

[24] Witness Hanscom: No. H-a-n-s-c-o-m.

The Court: C-o-m, and no B?

Witness Hanscom: That is right.

The Court: All right. I put a B in it.

Q Mrs. Hanscom, when did you first start to work for Tyler Gilman or Audio Fidelity? A I started for Audio Fidelity in October of 1967, as Mr. Gilman's secretary, and worked for him until his death. Then I worked for Mr. Cordle.

And then when the accounting function, most of it, was moved to Mr. Drinkard's office and our accountant left, I transferred into that department, which had limited bookkeeping work.

Q You were personally acquainted then with both Mr. Gilman and his mother, Mrs. Arnette T. Gilman? A Yes, sir.

Q What knowledge do you have, Mrs. Hanscom, of the note which is the issue in this hearing this morning? A The first knowledge I had of it was from Mr. Gilman. Shortly after I went to work there, one of the duties that I was assigned was to remind the Bookkeep-

ing Department to pay Mrs. Gilman's interest checks [25] regularly, and he told me at that time about this note.

Mr. Williams: (To the Court) May I have the checks that have been introduced in evidence? (Taking an exhibit from the Bench)

Q Mrs. Hanscom, I offer you a series of checks, and ask that you identify them for the Court, please. A Yes, sir. These are the interest checks that I wrote the first of each month to Mrs. Arnette Gilman.

The Court: For the record, they are, as a group, Plaintiff's Exhibit 2, or Petitioner's Exhibit 2, it ought to be, but we will use plaintiff.

By The Witness: (Continuing)

A The last one, September the 1st, 1972, was not written by me; this was written after Mr. Carney picked up the books. But the ones prior to that are written by me.

Q Well now, tell the Court, Mrs. Hanscom, with reference to those checks—I don't think we need go back of those—mechanically how were these checks prepared [26] and delivered to Mrs. Gilman and so forth? A Well, I had certain checks to write the first of each month, and this was one of them. Mrs. Gilman, I believe, was the only person authorized to sign checks, and she came in on the first of each month and signed all the checks that were due, including these.

Q Then did she take her own check and leave the rest for you to pay the bills and so forth? A Yes, she did. Yes, sir.

Q Do you recognize the signature on those checks on behalf of the Tyler Gilman Corporation as being that of Mrs. Arnette T. Gilman? A Yes.

Q How was the amount of each of these checks arrived at? A It was a figure that was given to me, when I started keeping the books, by Mr. Hassell. It was the figure that I should write to her each month, which was 6 percent on $40,000.00.

Mr. Williams: I have no further questions of Mrs. Hanscom, Your Honor.

The Court: Is there any cross-examination, Mr. Edmonds?

Mr. Edmonds: No questions.

[27] The Court: There are no further questions.

Thank you, Mrs. Hanscom.

Witness Stood Aside.

The Court: All right. Is there any further evidence?

Mr. Williams: I have no further testimony, Your Honor.

The Court: Mr. Edmonds.

Mr. Edmonds: No testimony, Your Honor.

The Court: All right. Is there any argument, Mr. Williams?

Mr. Williams: Yes, sir.

Mr. Pascal: My name is James Pascal, and I would like to close for Mr. Williams.

May it please the Court, at the outset I would like to reserve a few minutes to respond to the argument of Mr. Edmonds.

The Court: I have to be upstairs at 10:00. I hope you will get through by then.

Mr. Pascal: The facts in the case, [28] Your Honor, are, for the most part, undisputed. I believe they have been stated in a manner that will make the issue clear and the resolution fairly simple.

It will be seen that there are several facts that are germane: October 9, 1961, Arnette Tyler Gilman, the decedent, loaned to Tyler Gilman Corporation $40,000.00 and took, in return, a demand note in like amount.

The Court: Let me interrupt you right there.

(To counsel) Is there any question about the photostatic copy that is attached to the Petition is the note, because the note itself was never introduced. Do you all stipulate that that is the note or what?

Mr. Edmonds: That is all I have been furnished, Your Honor, and I have no question of it.

Mr. Williams: Mr. Drinkard has the note, Your Honor, in his safe.

The Court: If you all agree that Exhibit A attached to the Petition is a correct copy of the note, he can utilize that in lieu of the original.

[29] Mr. Edmonds: My case depends on that note itself, Your Honor.

The Court: Let's make that Plaintiff's No. 5, the photocopy.

Note: A photocopy of a note is introduced in evidence as *Plaintiff's Exhibit No. 5.*

The Court: (To Mr. Pascal) Go ahead.

Mr. Pascal: The second fact that bears emphasis is that the amount of the note remained unpaid from the date of its issue, but the corporation debtor did make its monthly payments of interest up to, and including September 1, 1972.

Next, we know from the testimony that the debt and each payment of interest was acknowledged and carried on the financial records of the corporation, and, moreover, it should be emphasized that this particular debt was emphasized with particularity. It wasn't in with a general inclusion of a debt. For example, the financial statement of 1969, that was introduced into evidence, under current liabilities it described notes payable, A. T. Gilman, $40,000.00. It certainly could not be identified any more clearly [30] than it was.

Next, I think we should observe that on certain of the checks that have been introduced into evidence, there are certain notations. The checks of March, April and August of 1972 bear these notations. For example, the check dated March 1, 1972, states on the bottom clearly "for interest—February." The check dated April 4, it states on the bottom "for interest—March," and so on. The checks in July and August also bear notations. These are the most important facts in this case.

Bearing these in mind, I think the issue is quite clear. Unquestionably, the normal Statute of Limitations has run on this note. Virginia Code Section 8.3-122 provides that the Statute—the cause of action accrues on a demand instrument on its date, if it is dated. Virginia Code Section 8-13 seems to provide a five-year Statute of Limitations. Nevertheless, Virginia Code Section 8-25 provides, in essence, that if the original Statute of Limitations has run but there is an acknowledgment in writing from which a promise of payment may be implied, a cause of action arises under the new promise, notwith-[31]standing the fact that the Statute of Limitations has run on the original obligation.

The requirements of Section 8-25 are basically threefold: Firstly, we must have a promise made by the debtor or an acknowledgment made by the debtor. Secondly, we must have that acknowledgment made to the creditor. And thirdly, that acknowledgment must be sufficient for the Court to imply a promise to pay.

I think if we just take these requirements one at a time, the Court will see that we clearly fall within the ambient of 8-25. First, the cases decided under 8-25 has established that acknowledgment must be made by the debtor to the creditor, and this is the question of to whom the acknowledgment must be made. I think we have clearly satisfied this requirement.

Firstly, we have the notations on the checks. Those are the corporation's checks. The entry on that check was made by an employee of the corporation. The check was signed by an officer of the corporation. It is clearly an acknowledgment to the creditor of the debt.

Next, we have the financial statements to which I referred earlier, that one being [32] August 31, 1969, on which the corporation clearly carried the debt as a continuing liability.

Now, this acknowledgment—I think it is properly styled an acknowledgment—may have been made to a great number of other people, being financial statements—concerned lenders and a lot of people. But it was also clearly made to the President, to the Directors, to the shareholders, any one of those classes of which Arnette Tyler Gilman was a member. It was the corporation's way of officially acknowledging the existence of a debt, not only to other shareholders, officers, Directors, et cetera, but the creditor, Arnette Tyler Gilman, the one who prepared it, was clearly known. This acknowledgment would be conveyed to the creditor.

It is certainly reasonable to infer that one does not acknowledge a debt or an obligation upon which the Statute of Limitations has run if one does not intend to pay it and to communicate this intention to the creditor, thereby assuring the creditor that the debt still is a valid and subsisting obligation. This is really the whole point of Section 8-25, and it certainly seems that it was accomplished by the financial acknowledgment.

[33] The second requirement which should engage our attention is what I call by whom the acknowledgment must have been made—by the debtor. Once again, we have these two independent points, fully satisfying this requirement. We have the financial statement, clearly

prepared at the direction of the debtor, having its accountant prepare the statement, and we have the checks, once again prepared by an employee of the corporation, the check being that of the corporation, signed by an officer. I don't really think there is any question that the first two requirements are fully satisfied.

The third requirement, and the one presenting the only real issue here, is the sufficiency of the acknowledgment. And not unexpectedly, this is the requirement that has generated most of the case law under this Statute.

Again, we come to the fact that we have two acknowledgments: We have the financial statements and the checks. The point of this requirement is simply that the acknowledgment not be equivocal, vague, so indeterminate, expressing—For example, in the case of Nesbit versus Galleher, reported in 174 Virginia, the Court said—and I [34] am quoting from page 148—"A distinct unqualified acknowledgment would have the same effect as a promise because from such an acknowledgment, the law implies a promise to pay."

It is a very common-sense oriented requirement. Since the law is going to say, you don't have to have a full promise; all you need is an acknowledgment, let's be real sure about what that acknowledgment is. Let's know for certain exactly that to which it refers.

Once again, we come to the financials. We certainly cannot say that there is anything equivocal about that acknowledgment. The second entry under current liabilities, note payable, A. T. Gilman, $40,000.00 —that is hardly a doubting expression. There is nothing contingent about it.

I move on to the fourth one, the notations on the checks, those of March, April, July and August, 1972. The notations present an interesting point in this case. I think the greatest illumination comes from the case of Bickers versus Pinnell, reported at 199 Virginia, 444. It is a 1957 case, and the most recent to be decided by our Supreme Court under this Statute. I would like for a minute to describe the facts of [35] Bickers, because I think—

The Court: That is the one where the daughter came in and alleged that she had loaned her father $4500.00, and he had told her on several occasions that he had executed a note, but he never had delivered it to her that she could recall.

Then they filed a claim against the estate for $4500.00, and the Commissioner of Accounts allowed it, and the widow and the Executor

excepted to the allowance of the claim, and payment was barred by 8-13, and the evidence did not establish 8-25, and so she was barred. She said her father asked her if she wanted him to pay the note, and paid $90.00 twice a year for interest, and checks read, interest on $4500.00 at 4 percent, August, $150.00, and interest, then February, 1951, interest on $4500.00, 2-1-52 at 4 percent, and so on and so forth. It was a little more on the checks.

And then he wrote a letter to the bank—I guess it was the one that had been helping him—and he acknowledged his actual indebtedness to his daughter. That was another difference.

Mr. Pascal: If I could—I fully agree with His Honor stating Bickers.

The Court: Let's face it: I read all [36] the cases they cited in the memorandum, and I looked for some others, too.

Mr. Pascal: I think we have an analogy between Bickers and this case. In Bickers, we had the letter, to which His Honor referred, being written to the prospective Executor. In this case, we have the financial statements. Certainly, the same purpose and notice in both instances is the acknowledgment. In Bickers was the letter, and in our case, the financial statements—certainly the same purpose and notice in both instances the acknowledgment. Well, in our case, the financial statement is made to one charged with the responsibility of acting with respect to that debt. I don't think the analogy could be any closer.

We have the financial statement prepared for officers, for Directors, for shareholders or creditors, all of whom, or any one of those are identical. And the same obtained in Bickers.

The second point we have are the notations. Now, in our case, we have a few less notations than we had in Bickers. In Bickers, the checks did state the full amount of the obligation. We obviously are not dealing with the point system here. You don't get X number of [37] points if you have the principal amount of the obligation of X number of points if you give the date of that obligation.

The Court: It might be if there were more than one obligation you would get X points. Suppose there had been three or four loans by Mrs. Gilman to the corporation?

Mr. Pascal: That would have been an entirely different case, Your Honor.

The Court: That is what I am asking about. But you do get points for the identification of the debt.

Mr. Pascal: In this case, I don't think we have to be concerned with adding it up to come to a final tally and say, this meets 8-25; only do we need to be certain that these acknowledgments met that debt.

I would like to quote from the case of Coles versus Martin. I have to admit I have xeroxed the case, but it doesn't give the citation. It is 99 Virginia, 232. It appears, "Where there is a promise to pay, not specifying any amount, but which can be made certain as to the amount, extrinsic evidence may be received to ascertain the amount due. It is sufficient if the true [38] amount is capable of being made certain."

Now, what do we have here? We have got checks for $200.00, and we know we have got a debt of $40,000.00. At 6 percent interest, that is $2400.00 a year. Payable monthly, that is $200.00 a month. There is no other evidence of indebtedness on a note for $40,000.00. I don't see any evidence of the corporation disbursing interest checks to anybody else in the amount of $200.00. It would certainly seem to me that we have sufficient evidence to let us ascertain the amount of the debt.

The Court: What about Edmonds' approach, that you are trying, if you utilize those checks alone, to embrace the rule to the effect that payment of interest by check is sufficient to constitute a new acknowledgment of the duty or promise to pay, and he says that Quackenbush is the rule.

Mr. Pascal: I would fully agree with him if it were not for the acknowledgment. I would fully agree that the mere payment of interest is not sufficient to invoke Section 8-25. We have never maintained that it is. It is not the payment of that check. If those checks bore absolutely no notations and we did not have financial statements [39] acknowledging this debt and the specificity of the financial documents that have been introduced in evidence, I think it is safe to say we wouldn't be here. We have never maintained that the payment of interest is sufficient.

The Court: What advantage is that to the corporation in a financial statement?

Mr. Pascal: Your Honor, I am not trying to estop the debtor. I think the question of advantage only comes up when you are talking about an estoppel.

May I presume that you are speaking about the language from the Layman case?

The Court: Yes.

Mr. Pascal: I think that language is in there—and I think it talks about estoppel. But I don't think estoppel or the showing of advantage is an element of damage, in viewing the elements of 8-25.

The Court: When you look at the totality of the circumstances, the mere financial statement alone does not represent anything to anybody other than the fact that they have a series of notes, to-wit, a note payable to A. T. Gilman, $40,000.00. And then again, it would [40] seem to me that you have got to go possibly beyond the note and beyond the checks, do you not?

Mr. Pascal: All right. Judge, while I still maintain that I don't think the showing of advantage from acknowledgment has to be shown, I can speak to that. Firstly, we have the corporation deducting the interest payment to that note. That is an advanage.

The Court: Now, you're getting smart.

Mr. Pascal: Secondly we have advantage by acknowledging that debt. During the life of the creditor, that debt was not called. It was not enforced. It was a continuing promise. As long as she can be sure it was recognized that this was a valid and subsisting debt, even though it was not called, it was a continuing debt and would be called. The corporation is saying, we are going to be in a bind if she calls this. That is an advantage. She didn't call the note. The corporation acknowledges the indebtedness. Even if His Honor requires showing of advantage, I think those two points are certainly sufficient.

The Court: Thank you.

Mr. Edmonds, do you want to reply?

Mr. Edmonds: Your Honor, let me try [41] basically to respond. There is not one bit of evidence as to the action of the Directors of this on the Executive Committee. I took down the language that they sent the message to her that the note would not be repaid when she asked for money unless she needed the money.

The Court: Let me see if I can find it. (Referring to notes). The

response was that unless she was suffering so that she had to have the money, it would not be repaid.

Mr. Edmonds: It didn't say at this time.

The Court: There was no mention of disclaimer of note. He said nobody disclaimed the obligation; it would be paid.

Mr. Edmonds: Let's come back to the third element that he talked about: Can the acknowledgment be made? It cannot be acknowledged by a stranger; it has got to be Mrs. Gilman or her agent. I don't believe there was any evidence at all that the financial statement was delivered to Mrs. Gilman or to anybody on her behalf. As to whom the acknowledgment must be, the Statute is fairly specific that it must be by the debtor or by its agent. I don't think there is any showing that the C.P.A. is an agent of the [42] corporation. I got a little bit bothered on that point. In Sanitation Citation 9 Fletcher 42, Title 89, on the agency point it says that an agent must be a person who is authorized to extend payment of debt.

Other than financial statements by an independent auditor, which had it on there and was not delivered, all we have are the checks signed by Mrs. Gilman, which, in this day and time, we can argue that she had a common interest in making an acknowledgment to herself.

I think in the Quackenbush case—These were just checks. They were part payment; they were not payment. Quackenbush had interest on them. I think the main difference is, Your Honor, that they did not have the month, which is a very narrow distinction.

As for the interest being on the tax returns, again these tax returns were not to be given to Mrs. Gilman. There is no showing they were sent to her. The rule in Virginia is that part payment, or payment of interest, does not comply with the Statute. We do not have an acknowledgment rule that part payment of annual rental payments is statutory unless you deduct it [43] on your income tax return.

I think basically we have a note with five years. We have payments. We have a financial statement which was not delivered to Mrs. Gilman; we have these tax returns which were not delivered to Mrs. Gilman; and it is just something that nothing was done about.

The Court: All right. Thank you.

(To Mr. Pascal) Do you want to respond?

Mr. Pascal: Your Honor, if I could just be given about two minutes, please.

The Court: Sure.

Mr. Pascal: First, may I approach the Bench and look at the financial statement?

The Court: You can have all of them. Here is No. 1. (Handing papers to Mr. Pascal)

Mr. Pascal: The first thing, Mr. Edmonds' observation that there is no evidence that the financial statements were ever delivered to Mrs. Gilman, I call your attention to the fact that the cover letter on the financial statement states, to Board of Directors and stockholders, Mrs. Gilman being a member of both classes.

Secondly, I think this Court can take [44] judicial notice that the financial statements were generally delivered to officers and Directors of the corporations, and that they do maintain an interest in their contents.

As far as the agency status of the accountant goes, if he is retained to specifically prepare the financial statements, certainly his finding that there is a debt does bind the corporation. I don't have any trouble with that issue at all.

Now, the observation that the tax return was not given to Arnette Tyler Gilman— so what? That is not an acknowledgment to the creditor upon which we are relying. That was observed by me in response to His Honor's question about what advantage was there. And the question is advantage. It is completely removed from the question to whom the acknowledgment was made.

Thank you. That is all.

The Court: You still have to look at the totality of the circumstances, if that is a good word. In other words, the basic question is simply—(To Mr. Pascal) You can sit down.

Mr. Pascal: Could I add—

The Court: Oh, I thought you were [45] through.

Mr. Pascal: I thought I was, too, Your Honor. Could I have one more?

The Court: Yes, go ahead.

Mr. Pascal: Also, in the Bickers case, in commenting on Quackenbush, the Court said there was no competent evidence showing the amount of the debt. I am quoting from page 452 now.

The amount of the debt certainly was of competent evidence, showing the amount of the debt, the interest rate. We have competent evidence showing the interest rate, not for the interest period, but showing the amount. We have that. Also, every basis that was available to the Court in Bickers and in Quackenbush is available here.

Mr. Edmonds: Your Honor, that is the difference. The checks in the Bickers case had the amount of the interest rate. This case here has the month; Quackenbush does not have the month.

The Court: Yes. I distinctly remember those. It seems to me that you have a situation—I am going to more or less adapt the idea that the C.P.A., in preparing the balance sheet or profit and loss statement, or what have you, and in pre-[46]paring the tax returns, acts as possibly in a different situation than that of Mr. Drinkard. But here he was an officer.

Mr. Edmonds: He was a Director.

The Court: He was a Director and a member of the Executive Committee. It seems to me that Mrs. Gilman, in view of her stock ownership, was in a position where necessarily the profit and loss, or balance sheet would be a matter which I am sure would be taken up at Directors meetings, or what have you. I think it was all communicated to her.

And when you add it all up, it would look to me like the corporation had, for years, recognized and actually acknowledged the debt to her.

If you take Mr. Drinkard's work sheets and tie them back into the income tax returns, then it becomes obvious that the $40,000.00 is a part of the seventy, plus or minus a thousand, set up as mortgage payments, so on and so forth, due within less than a year. I don't see how the corporation should now be allowed—and I follow the idea more of estoppel rather than the specific acknowledgment to the creditor or an agent of the creditor, because I do find that, as a matter of fact, it is bound to have been an acknowledgment to Mrs. Gilman from the [47] balance sheet.

We don't have who executed the tax return on behalf of the corporation. She may or may not have. If she was the only one who was

authorized to sign checks, she may have had an additional duty. We don't have that evidence.

But it would seem to me, from taking all the logical inferences and putting them together, that the corporation, as of, let us say, 1969, without question, and as of 1972, it would seem to me that they admitted here, we have this debt to Mrs. Gilman and we are making payments on it.

(To Mr. Edmonds) I just do not feel that it would be equitable, based on this evidence, to sustain that motion that the Statute of Limitations bars the debt, and I will so hold it that your plea of the Statute of Limitations is denied, and note your objection. If the Supreme Court says I am wrong, well, it won't be the first time.

Thank you for coming down. Just give me a sketch of an Order when you get around to it.

The Sergeant: Court now stands recessed.

* * *