Return to
FILE COPY
Clerk, Supreme Court of Appeals
of Virginia.

211 VA 802

Record No. 7418

In the
Supreme Court of Appeals of Virginia
at Richmond

EDWIN C. KELLAM, ET AL., ETC.,
ET AL.

v.

ALAMEDA BEST GALLAGHER, ET AL.

FROM THE CORPORATION COURT OF THE CITY OF NORFOLK

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 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.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7418

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 19th day of January, 1970.

EDWIN C. KELLAM AND BURTON THOMAS, SR., ADMINISTRATORS, c.t.a. UNDER THE WILL OF LUCY V. DOBSKI; HAROLD BEST; J. C. BEST; DONALD BEST; GERALDINE FOUTZ; BURTON THOMAS, SR.; AND JEAN BEST SODOROFF, Appellants,

against

ALAMEDA BEST GALLAGHER; FRANK BEST; ZELLA PETERS; JOSEPH V. ANDERSON, ADMINISTRATOR OF THE ESTATE OF CLARA BUCK, DECEASED; T. DAVID FITZGIBBON, JOHN JOSEPH BAECHER, HARRY P. MOORE, JR., THOMAS A. McANDREWS, AND JAMES J. GARA, BOARD OF TRUSTEES OF THE JAMES BARRY ROBINSON HOME FOR BOYS; MILTON O. THOMAS, MILLARD THOMAS, MARY THOMAS DUNLAP, MULVEAN THOMAS BARRY, ROBERT THOMAS SCHRADER, MAUDIE THOMAS, MAUDIE THOMAS TREMBLE, MILTON B. THOMAS, FRANCES WILD, JUDY KAY KOVALCHICK, NORMA BERNDT, ROBERTA V. THOMAS, AND PALMA J. THOMAS, HEIRS OF MARGARET BEST THOMAS; ZOLA MAY PAINTER BEST, ANNA KATHERINE BEST, WILLIAM GRIER BEST, SARAH ALICE ROBACKER, OLIVE ISABELLE KNIGHT, GLADYS BEST SCULLION, OLIVER BEST, HELEN BEST, CAROLA BEST CURTIS, DELORIS BEST, AND DARLENE BEST KYLOR, HEIRS OF IRWIN BEST; LOWELL

D. SCHULTZ, DONALD A. SCHULTZ, LUELLA SCHULTZ, CORABELLE SCHULTZ BUCKBEE, CAROLINE SCHULTZ CROMMETT, ROBERT I. SCHULTZ, SHERESE JOETTE SCHULTZ, MARY ANN SCHULTZ BUCKBEE, RICHARD LaDUE, EUGENE LaDUE, MARY K. LINDWALL BESSANT, MAY SCHULTZ, PEARL HALLER MABRY SALADO, GLENN HALLER, ELSIE MARGARET SCHULTZ ISOTOFF, MYRTLE SCHULTZ BECKER, LILLIAN A. SCHULTZ STEINBACHER, AND ROBERTA K. SCHULTZ KRIEGER, HEIRS OF SARA BEST SCHULTZ; EDWIN BEST, AND JASPER BEST,

Appellees.

From the Corporation Court of the City of Norfolk
H. Lawrence Bullock, Judge

Upon the petition of Edwin C. Kellam and Burton Thomas, Sr., administrators, c.t.a. under the will of Lucy V. Dobski; Harold Best; J. C. Best; Donald Best; Geraldine Foutz; Burton Thomas, Sr., (individually); and Jean Best Sodoroff, an appeal and *supersedeas* is awarded them from a decree entered by the Corporation Court of the City of Norfolk on the 30th day of July, 1969, in a certain chancery cause then therein depending, wherein Alameda Best Gallagher and others were plaintiffs and Edwin C. Kellam and another, administrators, etc., and others were defendants; upon the petitioners, Harold Best, J. C. Best, Donald Best, Geraldine Foutz, Burton Thomas, Sr., (individually) and Jean Best Sodoroff, or some one for them, entering into bond with sufficient security before the clerk of the said court below in the penalty of $12,000, with condition as the law directs, no bond being required of the administrators.

* * * * *

RECORD

* * * * *

page 40 }

ORDER

This cause came on this day to be heard upon the petition

filed by Alameda Best (Gallagher) et als, evidence was taken documentary and *ore tenus,* and was argued by counsel.

It appearing to the court that the administrators c.t.a. have compromised liabilities from them in the administration of this estate, and, in addition to compromising the same, the residuary legatees have concurred and consented in said compromises, the court being of the opinion that the various compromises and agreements have been and are in the best interest of the estate and have been entered into in good faith, all parties in interest being before this court by proper process, upon consideration whereof

It is Adjudged, Ordered and Decreed that the document in the handwriting of Joseph J. Lawler, p.d., which was prepared and executed on July 14, 1965 and is marked as exhibit "A" attached to the stipulation heretofore entered into evidence be and is hereby approved in this proceeding and is hereby held to be a binding contractual agreement in compromise of the claimed of James Barry Robinson Home for Boys and Jasper Best, et als, as set forth in the agreement, based upon a valid consideration, executed in good faith, entered into by all proper parties in interest, Joseph J. Lawler, p.d. representing the administrators C.T.A.; and the residuary legatees concurred in said agreements.

page 41 } Upon further consideration whereof, it is Adjudged, Ordered and Decreed that all the compromises in question are now hereby ratified and approved and Ordered to be enforced herewith, that the same shall be binding upon all parties in interest before this court and in the settlement of the accounts of the fiduciaries, said compromise agreements being again set forth in this decree as follows:

1. In accordance with the agreement of July 14, 1965:

a. That the Board of Trustees of the James Barry Robinson Home for Boys shall accept a reduction of $3,000.00 of its legacy to said home in the said will dated November 5, 1945.

b. That upon settlement of the accounts of the fiduciaries that the said Jasper Best, Frank Best, Clara Buck, Zella Best Peters, and Alameda Best Gallagher shall each receive 6 7/10% (6.7%) of the net distributable estate, less attorney's fees paid to Messrs. Doumar, Pincus, Anderson & Knight as hereinafter set forth. Said attorneys shall be paid a 33 1/3% (Thirty-three and one-third percent) of Seventy percent (70%) of Five Ten and one-half (5/10.5) of the adjusted

gross estate, as computed before the computation of their fee, as an expense of the estate and to be chargeable to the said estate as a cost of administration.

2. That Edwin Best, a one-half brother, shall be paid one-half of the amount to which an heir in paragraph 1(b) above (Jasper Best et al) would receive of the net distributable estate (less attorney's fees).

3. $10,300.00 is to be paid to the heirs of Irwin Best, the heirs of Sara Shultz, and the heirs of Maggie Best Thomas, as a group, $2,500.00 of said $10,300.00 to be paid from the assets of the estate at the time that the estate is distributed, and the balance of $7,800.00 is to be paid from the amount of the settlement of Jasper Best, Frank Best, Clara
page 42 } Buck, Zella Best Peters, and Alameda Best Gallagher, agreed to in the agreement of July 14, 1965 attached as exhibit "A" to the stipulation as aforesaid, and approved herewith, said payment to be made at the time that payment is made to Jasper Best, etal, as ordered herein.

It is further found as a fact and concluded by the court as a matter of law that these agreements were made in the spirit of compromise by all parties to such agreements as a settlement, and in an effort to expedite close of the estate and terminate litigation.

To all of which actions and findings of the court, all of the defendants, by counsel, duly object and except on the ground that the same are contrary to the law and the evidence and are without evidence to support them, and this cause is Ordered removed from the docket.

Enter July 30, 1969
H. Lawrence Bullock

page 43 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

The Respondent, Jean B. Sodorff, hereby gives notice of her intention to appeal the judgment rendered herein by the Corporation Court for the City of Norfolk, Virginia on July 30, 1969 to the Supreme Court of Appeals of Virginia, and makes the following assignments of error:

(1) That the judgment of the Corporation Court for the City of Norfolk, Virginia entered herein on July 30, 1969 was contrary to the law and the evidence, and was without evidence to support it;

(2) That the Corporation Court for the *for the* City of Norfolk, Virginia erred in granting specific enforcement of a consent decree which had been previously vacated by the Supreme Court of Appeals of Virginia.

Jean B. Sodorff

By: W. Stephen Moore
Counsel

* * * * *

Filed 8-8-69
Katherine V. Respess, Clerk
By: G. C. Thomas, D.C.

* * * * *

page 47 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Come now Edwin C. Kellam and Burton Thomas, Sr., Administrators c.t.a. of the Estate of Lucy V. Dobski (Best), Donald Best, Harold Best, J. C. Best, Geraldine Foutz and Mrs. Elwood Best, and give notice of appeal from a final order of the Court entered herein on July 30, 1969, and assign the following errors:

1. The Court erred in overruling the demurrer filed by the administrators and the residuary legatees and in entering the final order of July 30, 1969, as the Court did not have jurisdiction over the subject matter of this cause.

2. The Court erred in failing to sustain the demurrer of the administrators and residuary legatees on the ground that the statute of limitations had run against the claim asserted herein.

3. The Court erred in refusing to admit in evidence, or take judicial notice of, the petition for rehearing filed in the Supreme Court of Appeals of Virginia in the case of *Milton O. Thomas, et als, Appellants,* v. *Jasper Best, et als,* Record No. 6671.

4. The Court erred in not sustaining the plea of *res adjudicata* filed by the administrators and residuary legatees in this cause.

5. The Court erred in adjudging that the 1965 attempted

compromise was binding upon the administrators and upon the residuary legatees, the latter not being parties to the compromises.

page 48 } 6. The Court erred in directing the specific performance and enforcement of the 1965 attempted compromise.

7. The Court erred in holding that the attempted compromise agreement of 1965 is binding upon the administrators and the residuary legatees, despite the fact that the same was set aside by the Supreme Court of Appeals of Virginia.

8. The Court erred in holding that, while the non-consenting parties to the consent judgment of August 26, 1965 were not bound by said judgment, the same was binding upon the administrators and the residuary legatees.

Edwin C. Kellam and Burton Thomas, Sr.,
Administrators c.t.a. under the will of
Lucy V. Dobski (Best), Donald Best,
Harold Best, J. C. Best, Geraldine Foutz
and Mrs. Elwood Best

By Joseph J. Lawler
Counsel

* * * * *

Filed 9-20-69
Katherine V. Respess, Clerk
By: G. C. Thomas, D.C.

* * * * *

Exhibit No. X Initialed for Identification HLB 7-30-69 Judge

STIPULATION

The parties hereto agree and stipulate to the following facts which are agreed to be admitted into evidence without the requirement of further proof (subject to objection by all defendants, by counsel as to materiality or relevancy):

Lucy V. Dobski (Best) died on July 3, 1964 possessed of real and personal property. Burton Thomas Sr. and Edwin C. Kellam qualified as administrators c.t.a. under the will of Lucy V. Dobski (Best) entering into bond with surety in the amount of $250,000.00. An issue *devisavit vel non* was instituted by Jasper Best, Frank Best, Zella Best Peters, Clara Buck, and Alameda Best Gallagher to set aside the will

of Lucy V. Dobski (Best), and Edwin C. Kellam and Burton Thomas Sr., administrators c.t.a, had certain liabilities usually consequent in the administration of an estate.

On July 14, 1965, the attached agreement and proposed decree marked exhibit "A" was prepared in the handwriting of Joseph J. Lawler, p.d and signed by Robert G. Doumar, p.q., Montgomery Knight, Jr., p.q. and John Joseph Beecher, attorney for the James Barry Robinson Home for Boys. This agreement and proposed decree was submitted to the court and read and approved by the court in open court, all parties having understood that the same was subject to the approval of the court. The Court then requested that it be typed (because of the condition of the handwriting) and resubmitted to the court, to which action no one objected. Several days after July 14, 1965, Joseph J. Lawler called Robert G. Doumar by telephone requesting permission to insert into the decree a provision relating to the validity of the will, which was agreed to by Mr. Doumar, who stated that he did not object to the insertion in the decree that which in no way affected his clients or the compromise entered into, and then the decree of August 26, 1965 was entered. The exposure which resulted in the above agreement was evaluated in the light of the fact that counsel for Jasper Best, Frank Best, Zella Best Peters, Clara Buck, and Alameda Best Gallagher were prepared to prove on July 14, 1965 as follows:

a. That the purported will dated November 5, 1945 was signed by Lucy V. Dobski (Best) on November 5, 1945 (a copy of which is attached and marked exhibit "b").

b. That a very short time before the purported execution of the will of November 5, 1945, Lucy V. Dobski (Best) was hit over the head with a blunt instrument believed to have been a crow bar.

c. That in this instance she received a severely fractured skull with attendant neurological difficulties.

d. That her attending and treating physician was an eminent doctor in the City of Norfolk by the name of Dr. Albert V. Crosby, then a surgeon at DePaul Hospital.

e. That Dr. Crosby was alive and had been subpoenaed to testify in this court on July 14, 1965.

f. That Dr. Crosby's medical report had been submitted to counsel for the executors prior to July 14, 1965, the date of trial. (a copy of said report is attached herewith and marked as exhibit "C").

g. That Dr. Crosby was prepared to testify, consistent with a medical report dated March 20, 1965 as aforesaid that the testatrix was not mentally competent to comprehend the significance of any legal instrument submitted to her for

examination and execution from the time of her admission to the hospital as a result of this severe beating until at least several days after the depressed fracture of her *sukll* had been elevated on November 8, 1945.

h. That opposing counsel and Edwin C. Kellam, executor, had personally interviewed the doctor after having received the report of March 20, 1965.

i. That substantial concern was exhibited by the executors in relation to the exposure involved in that case set for trial on July 14, 1965, and, in particular, the weight of the testimony of Dr. Crosby in person was the subject of advice by counsel.

j. That the parties before the court in 1965 were urged to resolve their differences.

k. That the 1965 compromise resulted from an evaluation of the potential effect of Dr. Crosby's testimony, the makeup of the jury, and other factors.

l. That after the 1965 compromise agreements were entered into, and after counsel for Milton O. Thomas, et al had filed their intervening petition, Dr. Crosby died.

m. That counsel for Jasper Best, et al, never advised the counsel for Milton O. Thomas et al of the nature and extent of Dr. Crosby's testimony. Counsel for Milton O. Thomas, et al never took the deposition of Dr. Crosby, and, never knew of his participation in the case prior to the death of Dr. Crosby.

n. That after evaluating exposure, Burton Thomas Sr. and Edwin C. Kellam, administrators c.t.a. have agreed in compromise of the liability claimed by Edwin Best, a one-half brother, to pay the said Edwin Best one-half of the amount to which an heir in paragraph (7) (Jasper Best, et al.) of the petition heretofore filed, would receive of the net distributable estate (less attorney's fees).

After the 1965 family settlements and compromise agreements were entered into, the heirs of Sara Shultz, the heirs of Maggie Best Thomas, and the heirs of Irwin Best petitioned this court for an issue *devisavit vel non.* The issue *devisavit vel non* was set for trial on March 6, 1969. In evaluating the exposure therein, the executors knew and the residuary legatees were told by counsel that Dr. Crosby was dead, and were advised of probabilities of the outcome of the case when considering this factor, among others. In 1969, after evaluating exposure in the case set for trial on March 6, 1969, Burton Thomas Sr. and Edwin C. Kellam, administrators c.t.a. with the concurrence of the residuary legatees, (each of whom was then represented by counsel before the court, to-wit: Joseph J. Lawler representing J. C. Best, Harold Best, Don-

ald Best, and Mrs. *Geralding* Foutz, and Mrs. Elwood Best, and Mr. Stephen Moore representing Mrs. Jean Best Soderoff, the said Jean Best Soderoff being present in court, having come from Oregon) agreed and compromised the claims of the heirs of Irwin Best, the heirs of Sara Shultz, and the heirs of Maggie Best Thomas, wherein $10,300.00 would be paid to them as a group; but only as follows: $2,500.00 of said $10,300.00 to be paid from the assets of the estate as and when the estate is distributed, and the balance of $7,800.00 to be paid from the amount of the settlement of Jasper Best, Frank Best, Clara Buck, Zella Best Peters, and Alameda Best Gallagher, agreed to in paragraph (7) in the petition heretofore filed to the heirs of Irwin Best, the heirs of Sara Shultz, and the heirs of Maggie Best Thomas, as a group, when and if said compromise agreement with Jasper Best, et al, results in payment thereof to Jasper Best, et al, the $7,800.00 reduction to be ratably borne among Jasper Best, Frank Best, Clara Buck, Zella Best Peters, and Alameda Best Gallagher, this agreement having been made in the spirit of compromise by all parties as a settlement, and in an effort to expedite close of the estate and terminate litigation; certain beneficiaries hereunder being old and others having died. George Best deceased, was left $500.00 under the will of Lucy V. Dobski (Best) which was admitted to probate in 1965 and there are, have been, and will be at the time of distribution, funds available to pay the said $500.00 full legacy to the heirs of George Best who is now deceased.

Joseph Lawler represented to all parties represented by counsel who met in the courtroom of this court on July 14, 1965 the concurrence in the compromise agreement entered into of all of the heirs of Elwood Best. Edwin Kellam, administrator c.t.a represented to all parties represented by counsel who met in the courtroom of this court on July 14, 1965 the concurrence in the compromise agreement of all of the heirs of Elwood Best, the said Edwin C. Kellam having obtained their concurrence. The administrators c.t.a and their counsel have agreed that Edwin Best, a half-brother of Lucy V. Dobski (Best) would receive one-half the amount to which any one of the class of Jasper Best, Frank Best, Clara Buck, Zella Best Peters and Alameda Best Gallagher are entitled less attorney's fees.

On or about June 2, 1966, Stephen Moore, attorney at law, informed the administrators c.t.a of his representation of Mrs. Jean Best Soderoff, a residuary legatee.

On September 30, 1966 the said Stephen Moore, appeared in the Corporation Court of the City of Norfolk, Virginia as attorney of record observing on behalf of Mrs. Jean Best

Soderoff in the matter of *Milton O. Thomas* vs *Jasper Best,* et als. Mr. Moore thereafter appeared on other occasions, and was informed as to the progress of the proceedings, both in the lower court and in the Supreme Court of Appeals of Virginia after September 30, 1966. On March 6, 1969 the said Stephen Moore, representing Mrs. Jean Best Soderoff, appeared in the Corporation Court of the City of Norfolk, the said Jean Best Soderoff also being present in court, having come from Oregon.

July 30, 1969
Date

Joseph J. Lawler
Joseph J. Lawler, P.D.

W. Stephen Moore
Stephen Moore, P.D.

Montgomery Knight, Jr.
Montgomery Knight, Jr., P.Q.

Robert G. Doumar
Robert G. Doumar, P.Q.

Howard Legum
Howard Legum, P.Q.

John Joseph Baecher
John Joseph Baecher, P.Q.

Gordon Campbell
Gordon Campbell, P.Q.

* * * * *

page 3 }

* * * * *

Stenographic transcript of the testimony introduced and proceedings had upon the trial of the above-entitled cause in said Court on July 30, 1969, before the Honorable Lawrence Bullock, Judge of said Court.

APPEARANCES:

Messrs. Doumar, Pincus,
Anderson and Knight
(Mr. Montgomery Knight),
attorneys for Alameda Best
Gallagher.

page 4 } Mr. John Joseph Baecher,
attorney for James Barry
Robinson Home for Boys.

Mr. Gordon E. Campbell,
attorney for Irwin Best.

Messrs. Fine, Fine, Legum and Fine
(Mr. Howard I. Legum),
attorneys for intervening petitioners.

Messrs. Kellam and Kellam
(Mr. Joseph Lawler),
attorneys for the respondents.

page 5 }

* * * * *

Mr. Knight: If your Honor please, as you will recall, we appeared last week at the hearing on the demurrer, and at that time we indicated to the Court that there would be a possibility of a stipulation entered into which might obviate the taking of testimony by attorneys and perhaps shortcut the litigation substantially, and this stipulation has been prepared and submitted by counsel, and the only thing that needs to be done at the present time is that it needs to be executed and signed, and Mr. Gordon Campbell is page 6 } not here present. I know that the stipulation is all right with him, and I would think that it would be proper to perhaps contact his office and perhaps someone would come over, but we might need about two or three minutes to have the stipulation actually formally executed, at which time I will be prepared to proceed on with the case for the petitioners, your Honor.

The Court: Go right ahead, take the two or three minutes and see if you can get a little bit more stipulation.

Mr. Knight: Very well, sir.

The Court: You gentlemen can retire to the grand jury room where you can have a table.

Mr. Knight: Suppose we just wait for a minute?

Mr. Moore: Who else have we got?

Mr. Lawler: Howard Legum.

Mr. Legum: Right here.

Mr. Knight: You want to pass it over to Mr. Legum?

Mr. Moore: Yeah.

Mr. Legum: Joe, you want to sign this?

page 7 } (The reporter was first duly sworn.)

Mr. Knight: If your Honor please, we are prepared to proceed. The stipulation has been signed by all parties with the exception of Mr. Campbell's office, and he is sending someone over. So with the permission of other counsel and the Court I would be happy to proceed by way of opening statement.

The Court: That is all right. Mr. Campbell was here the other day and I understood from his attitude that he was only interested to the extent of approving whatever you gentlemen did.

Mr. Knight: That is correct. This is a mere formality and it is just for the purpose of the stipulation.

The Court: And he will sign it when his representative gets here, I understand, so you may proceed.

Mr. Knight: Yes. Thank you, your Honor.

May it please the Court, I represent the five heirs: Alameda Best Gallagher, Frank Best, Jasper Best, Zella Peters and Joseph Anderson, the administrator of the page 8 } estate of Clara Buck, deceased. Now also participating in this case, in the petition, is Mr. John Joseph Baecher, representing James Barry Robinson Home trustees, David Fitzgibbon, Harry B. Moore, Jr., Thomas E. McAndrews, and James J. Garra. I would like to stop at this point, your Honor, and your Honor is familiar with the 1965 agreement. James Barry Robinson Home for Boys is joining into this petition, I believe the evidence would show, for two reasons. Number one, they made an agreement in 1965 which they feel legally and morally bound by, and number two, the distribution of the estate will be expedited by joining in the petition.

In addition, Mr. Howard Legum represents the heirs of Margaret Best Thomas, the heirs of Irwin Best and the heirs of Sara Best Schultz, and you may recall that these heirs, after we had entered into our agreement in 1965, brought a separate action to have an issue *devisavit vel non* heard in relation to the will of Lucy V. Dobski Best.

In March of '69 these parties appeared before page 9 } the Court and entered into a compromise agreement wherein they would receive certain sums of money from the heirs of Jasper Best when and if the agreement of 1965 was upheld and the $2500 from the proponents of the will, the executors and the estate, Mr. Joseph Lawler, giving this group $10,300, the majority of it to come from our heirs.

In addition, as parties in this case, as defendants, Edwin C. Kellam and Burton Thomas, Sr. in 1965 as now are charged with the responsibility of protecting the *res* of the estate

and not mere *stakeholders* in this action. They had duties to perform and they have zealously performed those duties throughout the litigation. And in addition as defendants are Harold Best, J. C. Best, Jean Best Soderoff, Donald Best, Geraldine Foutz and Mrs. Elwood Best, the heirs of Elwood Best, deceased, who was the original residuary legatee under the terms of the will.

In addition, the heirs, devisees and successors in title of George Best, deceased, are made defendants by general description, are made parties in this particular case,

page 10 } and George Best was left $500 under the terms of the will and an order of publication has been duly entered and he is now properly before the Court. So at this time all parties are before the Court.

Simply stated, your Honor, we are here to have an agreement which was validly entered into in 1965 approved by the Court at this time because we have not been paid. It is as simple as that. We have not received the money that we contracted for and we would like for the Court at the proper time in these proceedings to enter an order of distribution in the estate for the 1965 agreement, plus the compromise, which would include the terms of the compromise which was made in 1969.

In other words, your Honor, the evidence will show that in the event the Court upholds the compromise agreement James Barry Robinson for Boys, Mr. Legum's client, our client and everyone will be satisfied, the estate will be distributed and the substantial sums will be paid to the residuary legatees.

I feel as though I must recapitulate much of

page 11 } the evidence. Much of it will be contained in the stipulation that has been entered into, but I feel it is my duty by way of opening statement to tell the Court generally what has occurred.

In 1965, on July the 14th, all parties represented by counsel met in the jury room and at that time a yellow piece of paper was prepared by Mr. Joseph Lawler wherein our clients would receive some money and we would give up our claim against the estate. This paper will be attached to the stipulation and as a part of our case. It is this yellow piece of paper, that document, this agreement that was prepared and signed by all counsel as officers of this Court and as representing the individuals involved that we are asking the Court to approve today that agreement in relation to the payment of certain sums which our clients would receive, and since that time our clients have given up a portion thereof.

Why was this money given up? I think it is imperative that the Court understand why. Briefly stated, this was a

case where we were attacking the will. The will was dated on November the 5th, 1945. It was signed—

page 12 } The Court: Let me ask counsel at this point. That sketch showing the decedent and how the estate came down are in your papers.

Mr. Knight: If your Honor please, we have—

The Court: I could better understand you as you go along if I can see them. There are so many people that I cannot carry them in mind. I studied that right diligently at one time.

Mr. Knight: With permission of the Court I would like to show the Court these two documents that I think counsel will have no objection to my showing to you, and I think they will end up into evidence.

The Court: This is what I want right here.

Mr. Knight: In any event—excuse me, your Honor, did you want to study that?

The Court: No, you can go ahead. I think I can keep up with you now.

Mr. Knight: In a nutshell, your Honor, you have before you a list of ten and a half individuals, or stocks

page 13 } of individuals who would share under the terms of the will. We represented 5 and these 5½ were the individuals who compromised their particular claims. We were the moveants in the particular situation under the original issue of *devisavit vel non.*

Now, as a factual recapitulation, the will which was dated November 5, 1945 was signed by Mrs. Best on November the 5th, 1945, and the evidence will reflect that in a very short time before the purported execution of the will Lucy Dobski Best was hit over the head by a blunt instrument believed to have been a crowbar, and at that particular time she received a severely fractured skull with attendant neurological difficulties. Her treating physician and her attending physician was a doctor by the name of Albert Crosby, who was a surgeon at De Paul Hospital. He was alive and was subpoenaed to testify in this Court on July the 14th. His report, a copy of which will be submitted in the stipulation, have been submitted to counsel for the executors prior to

page 14 } July 14th, 1965, the date of trial. Doctor Crosby was prepared to testify consistent with this medical report that the testatrix was not mentally competent to comprehend the significance of any legal instruments submitted to her for examination and execution from the time of her admission to the hospital as a result of the severe beating until at least several days until the depressed fracture of her skull had been elevated on November the 8th, 1945.

What happened, your Honor, she had been hit over the head with a crowbar causing a severe fracture of the skull. There was a pressure on the brain, and it was Doctor Crosby's opinion that until that fracture was elevated and relieved the pressure on the brain, that although she might be coherent in some respects she was in no condition to understand the significance of any particular legal instrument submitted to her, and the medical report will so reflect.

Opposing counsel, Mr. Lawler and Mr. Kellam were concerned about this. They went out and talked with the doctor after having received this report and he persisted in his opinion, and substantial concern was exhibited by
page 15 } the executors in relation to this exposure involved in that case set for trial on July the 14th, and the testimony of Doctor Crosby as to the weight of it was the subject of advice by counsel.

Now, this agreement resulted from an evaluation of the effect of Doctor Crosby's testimony, the makeup of the jury, if you recall that particular day, and other factors. After this agreement was entered into Doctor Crosby died, but before he died Mr. Legum's people came in with their petition.

Now, Mr. Legum came in and represented the heirs of Sara Schultz and Thomas Best and the heirs of the issue of *devisavit vel non* was set for March the 6th, 1969, but during that period after they petitioned the Court, and I might back up a minute because it was very difficult to determine what Doctor Crosby's participation in this case was because the medical reports were hard to find and it was difficult to even determine what hospital Mrs. Dobski Best was in. At the time that Sara Schultz, represented by the clients
page 16 } of Mr. Legum came into the case, there was a fundamental decision that had to be made by our clients, our five clients, Jasper Best, et als, all represented by me. That fundamental decision involved which route we are going to take at that particular point and time, and we turned to Mr. Lawler and said, Mr. Lawler, some other people have come in and we want our money, and Mr. Lawler says you cannot have it. What it amounted to is we are going to crawl in bed with the clients of Mr. Legum. We are going to Mr. Legum and we are going to say to him, Mr. Legum, we've got some good evidence here and we are going to get together with you and we are going to set aside the will and instead of getting sixty-six and two-thirds percent that we contracted for, we are going back into the Court with you and we are going to get one hundred percent, because Mr. Lawler had not paid us our money. That is alternative number one. Alternative number two was to cooperate in no regard to Mr.

Legum. We hope we did the right thing, and without belaboring the point, I would just like the point made
page 17 } clear at this particular time we continually took the position that we are bound under the terms of the compromise agreement entered into with Mr. Lawler. We never told Mr. Legum anything about our case. The day that Doctor Crosby died I called up Mr. Legum, and I said Doctor Crosby has died, and he exhibited surprise. In the meantime what could we have done? We could have perpetuated his testimony, but if we did we would have tipped Mr. Legum off. But I am not arguing the law now. I just want the Court to know, and I think Mr. Lawler will concede, at no time have we done anything contrary to the terms of our compromise agreement which was entered into in 1965 either by way of trying to get more than sixty-six and two-thirds percent of that which Mrs. Dobski would have received as our clients would have received had she died intestate, or by way of cooperation with Mr. Legum, and one look at the Pleadings between Mr. Legum and I all the way up and down will show there was no love affair between us insofar as this particular proceedings was concerned legally.

page 18 } Enough said on that. Now, in evaluating the exposure on March the 6th, 1969, your Honor, the executors knew that residuary legatees were told by counsel that Doctor Crosby was dead. They were advised of the probability of the outcome of the case when considering this factor among others, and in 1969, as I have told you before, it was agreed that Mr. Legum's clients would get $10,300 paid to them as a group, they had some things to argue about in the case, but their case wasn't as strong, of course, at that time with Doctor Crosby's death, and they agreed in compromise to receive $7800 from our funds, as stated before, and $2500 from the proponents. Now, at that time I think it is important to note that all of the residuary legatees were before the Court, and I mention that because I am not so sure that it is material that they be there, but they were there. They were there and the evidence will show that when we went in the jury room that it was told to us by Mr. Lawler and Mr. Kellam that the concurrence of the residuary legatees had been obtained or else we wouldn't have never gone through the agreement. But we were informed
page 19 } that the residuary legatees concurred in this particular agreement and that everybody was happy.

Now, in 1969 after evaluating the exposure, Burton Thomas, Sr. and Edwin Kellam, with concurrence of the residuary legatees, each of them was represented by counsel before the Court, to-wit: Joseph Lawler representing J. C.

Best, Harold Best and Elwood Best, Mr. Steven Moore representing Jean Best Soderoff being present in court, having come from Oregon, agreed and compromised the claims of Irwin Best, and now Jean Soderoff, one of the heirs of Irwin Best, the heirs of Sara Schultz and the heirs of Maggie Best Thomas wherein this $10,300 would be paid as aforesaid.

Now, may I say this at this particular time, your Honor. This compromise of March the 6th was conditioned upon our ability to uphold the compromise agreement of 1965, and I want it clearly understood this was the understanding between the parties. In other words if we obtained approval of our 1965 compromise agreement at a later time or at any time then these sums would be paid as aforesaid.

page 20 } Now, I want to talk just briefly about Mrs. Jean Best Soderoff, because this may come up. Our position is we contracted with the executors. That is all we have to do. In addition to get some additional insurance we in fairness went, in the best interest of the estate we contacted or we were given assurance that the residuary legatee, who in effect funds would be coming out of had concurred in this through Mr. Lawler and through Mr. Kellam. Now, Mrs. Jean Best Soderoff whose deposition may be read into evidence today, which we will oppose but it may be read into evidence, one of these residuary legatees, says that she didn't agree to the agreement. She didn't authorize that 1965 agreement. Well, as you listen to that deposition, if you hear it, your Honor, I would just like the Court to be prepared on a few factors. Number one, on September the 30th, 1966, this is over three years ago, Steven Moore appeared in the Corporation Court of the City of Norfolk as attorney of record, or observing on behalf of Mrs. Jean Best Soderoff in

page 21 } the matter of *Milton O. Thomas* versus *Jasper Best.* Mr. Moore thereafter appeared on other occasions, was informed as to the progress of the proceedings both in the lower court and the Supreme Court of Appeals of Virginia after September the 30th, 1966. I sent him briefs and everything. We have been in communication with him. On March the 6th, 1969 the said Steven Moore representing Mrs. Jean Best Soderoff appeared in the Corporation Court, said Jean Soderoff also being present in court having come from Oregon. So she was here in court on March the 6th, 1969. I think her deposition was taken last month, and I just ask you to remember those dates, when her deposition was taken when her deposition is read, if in fact it is. To make a long story short, I think that regardless of the evidence—

The Court: She was here in person on the earlier date that you mentioned?

Mr. Knight: She did not appear in person. She was not in the courtroom on that day, no, your Honor, in 1965.

The Court: Were there not some people from the state of Minnesota in the courtroom but had never become

page 22 } parties and did not let that knowledge be known that they were in court until after the decree was entered that day?

Mr. Knight: Yes, your Honor.

The Court: And aren't they the ones that appeared later through Mr. Legum?

Mr. Knight: Yes, your Honor.

The Court: All right.

Mr. Knight: All right, sir.

The Court: I am getting myself restored to my first base now.

Mr. Knight: All right, sir. So without belaboring the point by way of opening statement I would just like to reiterate that our clients, Mr. Legum's clients, Mr. Campbell's client, are all here today and we are asking for a judicial approval of the compromise agreement in 1965 pursuant to a Virginia statute which authorizes the Court to approve compromise entered into by fiduciaries and pursuant to the agreement itself which was entered into. Thank you, your Honor.

Mr. Lawler: If your Honor please, as mentioned by Mr. Knight, our representation in the matter is of the

page 23 } administrators and the residuary legatees, Mr. Harold Best and so forth, and at the outset I would like your Honor to take, if you will, please, sir, judicial notice of certain papers which have been filed in the suit referred to heretofore. That is the will contest case, and I will ask the Court to receive a certified copy of the Decree entered by the court on July 14, 1965. I think counsel have copies of those. They may be in this record, I don't know, but I want to make sure that they are in this record.

Mr. Knight: Are you introducing these into evidence now?

Mr. Lawler: No, I am asking the Court to take judicial notice of them which will put them in the record so there will be a record of this proceeding.

The Court: You don't want them marked as an exhibit?

Mr. Lawler: You can mark them as an exhibit, your Honor, but normally I understand—

The Court: This Decree of July 14, 1965, I will mark it as "A".

Mr. Lawler: All right, sir.

page 24 } (Marked in evidence by the Court as Exhibit A.)

Mr. Lawler: Now, I would also ask the Court to take judicial notice of the petition for rehearing filed by the present petitioners of Jasper Best, Frank Best, Zella Best Peters, Clara Buck and Alameda Best Gallagher in the Supreme Court of Appeals of Virginia in the appeal of that Decree which your Honor just marked as A.

Mr. Knight: If your Honor please, there is no authority for the taking of any judicial notice of any brief in any case, or any record. The only thing that would be proper would be judicial notice of a mandate, and also the decree of 1965 is really not proper to be taken judicial notice of, and we would oppose any such documents being either taken judicial notice of or entered into the record because of estoppel.

The Court: Let me ask you this. Apparently somebody is going to the Supreme Court again about it and I don't know who it is. Isn't that mandate of record on their order book in the Supreme Court, and what good does it do to

page 25 } have it before, and isn't it conceded that they referred it to this court in denying some petitioners to participate under the statute of being absent people who came in at a later time?

Mr. Knight: That is correct.

The Court: And that is the sole issue.

Mr. Knight: That is the sole issue, and all of these documents, I move that they be rejected.

The Court: I reject this Record Number 6671.

Mr. Lawler: All right, sir. May we be heard for the purpose of the record. We have filed in these proceedings, if your Honor please, a plea of *res judicata,* and in such case it would be proper to present to the Court and have the Court receive whatever pleadings or other items have been filed upon which that plea is grounded. Now, we say, and I am not going to argue now that question, but only the fact that the Court should take cognizance of these items so we can get it in the record.

In that petition for rehearing which I have

page 26 } handed to the Court, in that petition we say that the Court of Appeals adjudicated the very issue that these petitioners are asking the Court to adjudicate today, and in order to properly consider that plea of *res judicata,* I think it would be proper for the Court to take judicial notice of the fact that that was filed, and I will follow it up with the request that in the record in this case, not in the other case, that the record in this case that the Court also receive a certified copy of the mandate of the Supreme Court of Appeals entered on July 10, 1968, as well as a certified copy of the order denying the motion for rehearing, and

we would like to submit those to the Court so that it would be of record in this case and not only in the other case.

Mr. Knight: Excuse me, your Honor—

The Court: I will reject Record Number 6671 and note your exception on the face of it.

Mr. Lawler: All right, sir.

The Court: Have you anything to say about the actual record, this decree of the Supreme Court of Ap-
page 27 } peals?

Mr. Knight: Did I understand Mr. Lawler to say that this had been introduced into evidence in these proceedings or—

Mr. Lawler: No, I am asking the Court—I don't believe they are in now—I am asking the Court to receive that into evidence by way of judicial notice of the action of the Supreme Court of Appeals of Virginia so it will be part of the record in this case.

Mr. Knight: I respectfully note my objection and exception to the introduction of that into evidence, or I object to it on the grounds that, number one, we have moved to strike the dilatory plea of *res judicata* filed, and number two, we don't feel that that is material at all to the proceedings, your Honor.

The Court: Well, I don't see that you are going to be hurt. It will enable him to make up the record here for whoever wants it.

I will mark that and receive it as Exhibit B, and you except to that.

Mr. Knight: I respectfully note my exception.

The Court: This order of the Supreme Court
page 28 } dated the 10th day of June 1968 and have attached to it a further order dated the 6th of September 1968 of the Supreme Court which purports to deny the petition—

Mr. Lawler: Are they marked, if your Honor please?

The Court: I marked one Exhibit 1. I marked one Exhibit B and I marked the one exhibit just rejected, the Record 6671 and note your exception to that.

Mr. Lawler: All right, sir. And you have then rejected?

The Court: You have it in the record in the event you want to use it.

Mr. Lawler: Yes, sir. As I understand it, it has now been marked rejected, as I understand it?

The Court: That is right.

Mr. Lawler: All right, sir.

Next, if your Honor please, the factual situation—when I say "factual," I mean just that, not the conclusions that have been recited by counsel but the factual situation is pretty

much as Mr. Knight has recited, that with certain
page 29 } additions which we think are very material, and
that is number one, that the parties to the agreement in 1965 all understood, and it is so stipulated in this proceeding, that the compromise and settlement of 1965 was subject to the approval of the court. That agreement was ultimately disapproved by the court, and accordingly it is our view that when it did that it put an end to any agreement or settlement or compromise. And we further feel that what agreement or consent decree, as we talked about in these proceedings, in the consent decree that we cannot set aside a part of a consent decree. A consent decree is set aside all the way and not partially.

The only evidence in addition to the stipulation which we would offer this morning would be on the question of the concurrence of the residuary legatees to the compromise settlement of 1965, and the evidence there, in addition to what has been stipulated, would be that, as the will recites, the residual estate was left to Mr. Elwood Best. Mr. Elwood Best died some time ago and he left five children: Mr. J. C.
Best, who is here in court today, Mr. Harold Best
page 30 } who is in court today, another brother, Mr. Donald Best who lives in the state of Washington, as I recall, and two sisters, a Mrs. Geraldine Foutz and another sister, Mrs. Jean Best Soderoff.

The Court: Let me call your attention to this. I can't possibly sit here and listen to what you say and think of just where they come in.

Mr. Lawler: All right, sir.

The Court: I have got this diagram which shows eleven heirs at law across here. The deceased, if you could tell me what group they come under there—

Mr. Lawler: There are five people which I have mentioned, as your Honor sees.

The Court: What group do they come under?

Mr. Lawler: Right here.

The Court: Elwood Best's five children?

Mr. Lawler: Yes, sir. Maybe to clarify this situation, your Honor, we might go back now and see what the will did
and perhaps your Honor can be—
page 31 } The Court: Now, the will was ultimately in
consideration of all these things being adjusted, was decreed to be probated and was probated, wasn't it?

Mr. Lawler: Yes, sir, the will was probated.

The Court: And these agreements are in lieu of and take the place of a strict distribution according to the statute of distribution, does it not?

Mr. Lawler: Well, it substitutes when they were originally entered into. I am speaking now of the 1965 agreement. That agreement gave to the five persons represented by Mr. Knight, who were Jasper Best, Clara Buck, Frank Best, Alameda Best Gallagher, and who was the other one, Mr. Knight?

Mr. Knight: Zella Peters.

Mr. Lawler: Zella Peters, and Zella Peters is a niece who came in the place and stead of her father.

The Court: In other words she takes the place of one of the—

Mr. Lawler: Brothers.

The Court: Brothers.

Mr. Lawler: Of the deceased.

page 32 } The Court: Well, who are the protestants right now that aren't getting what they want?

Mr. Lawler: The people—those five people that Mr. Knight represents: Jasper Best—

The Court: Elwood Best?

Mr. Lawler: No, sir, the people who are contesting—

The Court: The people coming through Elwood Best?

Mr. Lawler: No, sir, the people who are saying that the compromise agreement of 1965 ought to be upheld are Jasper Best, Clara Buck, Frank Best, Zella Peters and Alameda Best Gallagher. They are the five people who say that the compromise agreement ought to be upheld in addition to the three people represented by Mr. Legum and James Barry Robinson Home, and Mr. Campbell's client Irwin Best.

Now, the people who are opposing the 1965 compromise agreement are the children of Elwood Best, who was the brother of the deceased, and who was the princi-

page 33 } pal legatee under the will. He died and his five children whom I have named, J. C. Best, Harold Best, Donald Best, Jean Best Soderoff, and Geraldine Best, those five, in addition to the administrator, c. t. a. of the estate are objecting.

The Court: Those that would stand in the place of their father Elwood Best, and they would be entitled to 1.55 of the estate then each; wouldn't they?

Mr. Lawler: If Mrs. Dobski had died intestate.

The Court: I may be wrong there because there is somebody that is half blood?

Mr. Lawler: Yes, sir, each one would be entitled to about 1.55 of the estate if Mrs. Dobski had died intestate. In other words Elwood Best's claim, so to speak, would have been entitled to 1.10½ of the total estate and that would have been divided five ways.

Mr. Knight: Right.

Mr. Lawler: That is my arithmetic on it. Now, what we contend in this proceeding, in addition to the plea
page 34 } of *res judicata,* is that when the Court of Appeals set it aside it set it aside all the way. That matter is covered generally in the stipulation.

The Court: Was that before the Court of Appeals?

Mr. Lawler: Yes, sir. It was before the Court of Appeals.

The Court: Was it not the sole question before the Court of Appeals because of the statute about the order of publication that I ignored and Mr. Fine and Mr. Legum said I was wrong and the court likewise said I was wrong and restored it for them to become parties to it?

Mr. Lawler: No, sir. Reading at Page 806, that was one of the grounds. The court also said this decree entered August '65 was erroneous for two reasons. It said such approval was beyond the scope of the suit which was brought. But in answer to your Honor's question as to whether or not the thing was set aside in whole or in part, we say, yes, that was raised in the Court of Appeals by Mr. Knight's petition for a rehearing when he asked the court to do it, and
page 35 } that is why we say it is vitally important that this brief and petition which he filed in that court be received and made part of the record in this case because I don't see how the court could properly pass upon that question without having the petition and the matters that are stated in there before the court to reach that conclusion upon.

The Court: You've got it in the record.

Mr. Lawler: All right, sir. Getting back to what we thought the evidence will be, our evidence will relate purely to the question of the consent or the concurrence of the residuary legatees, the heirs of Elwood Best, to the 1965 compromise.

The Court will recall at that time we met in this courtroom, and as a matter of fact none of the residuary legatees were present in court. They all lived out west and there were none here. The evidence would show that shortly after the death of Mrs. Dobski the residuary legatees met and discussed the question of her death and her will and they agreed that Mr. J. C. Best, the oldest son in the family, would act
page 36 } as the spokesman and the go-between the lawyers here and their family out in Montana, Idaho, Washington and Oregon.

The Court: Was it not a fact when these agreements were entered into, and particularly the final one, that everybody thought that the will was not a valid will and she would have died intestate but for the fact that you all agreed to probate it?

Mr. Lawler: Excuse me, I am sorry I didn't quite follow that.

The Court: Well, didn't everybody that are parties to the proceedings think that the will might become invalid because of the mental condition of the decedent at the time she signed it and that is the reason why the contract was entered into between these other parties?

Mr. Lawler: Oh, yes, sir, in 1965. That is included in the stipulation, that the executors and counsel knew what Doctor Crosby would testify to and it was a material consideration in reaching the agreement. It wasn't any question about that.

The Court: Why don't the parties live up to the
page 37 } agreement if they made it?

Mr. Lawler: Well, the reason they don't, your Honor, is that the Court of Appeals set it aside and said that was an agreement that you couldn't make. That is why. When the Court of Appeals set it aside—

The Court: Didn't you proceed then at the time the will was probated, even though you didn't physically do it, wasn't it deemed a re-execution at that very minute?

Mr. Lawler: A re-execution of the will?

The Court: I don't mean actually sign it, but wasn't it deemed to be what you were agreeing on? At the time that you agreed to probate the will?

Mr. Knight: In 1969?

Mr. Lawler: In 1969 are you speaking of, your Honor?

The Court: I mean at the time we should have tried the case whether it was a valid will or not. The parties in consideration of what had heretofore taken place agreed to probate the will. Then when it was very doubtful that it could stand the acid test—

page 38 } Mr. Lawler: I don't know when your Honor is talking about. In 1965 there was a material doubt in counsel's mind as to whether or not the will would be upheld. In 1969 when we all came back here, last spring, there wasn't any real doubt in my mind as to whether or not the proponents of the will were going to prevail. That is why we had five heirs and that is why we agreed that we will contribute $2500 or $500 apiece to get the thing over with right then. It wasn't any question in our mind in 1969.

The Court: Well, didn't you in lieu of trying the case then to determine its validity, wasn't it considered that the agreements that you had made heretofore will be what—

Mr. Lawler: No, sir, no, sir.

The Court: Why didn't you go ahead and try the case then?

Mr. Lawler: Well, the reason we didn't try the case, your Honor—

The Court: Somebody thought it was right weak from what you said to me this morning.

Mr. Lawler: No, we are talking about the 1965
page 39 } compromise. There was a question then in everybody's mind as to whether or not they could prevail; that is, whether the contestants of the will could prevail. There wasn't any question in our mind in 1969. We went about it entirely differently in 1969. We had put the evidence on. Three took the stand and testified.

The Court: Yes, they did. That was to prove there was a valid will executed, wasn't it?

Mr. Lawler: Yes, sir.

The Court: Then why didn't you approve that when the probability is that the party who was living then would give evidence that would destroy it?

Mr. Lawler: Well, it does not necessarily mean that Doctor Crosby was right. We had other evidence. We had other evidence that Doctor Crosby was wrong.

The Court: Wasn't the Doctor right close to the hand and to the brain of the person who executes a will?

Mr. Lawler: Well, we had another doctor who can say that Doctor Crosby was wrong. We feel, your Honor,
page 40 } that that agreement, your Honor, in 1965 was entered into and then the court came back and said that agreement you cannot make.

The Court: What I am getting at, and I can't get through to counsel—

Mr. Lawler: No, sir, I don't mean to avoid it. I am trying to answer it.

The Court: I agreed to probate the will. Didn't everybody understand that they were restored to their contractual rights in lieu of their rights as legatees?

Mr. Lawler: No, sir. If your Honor will—Mr. Knight said, and he made it clear, that the question of the $7800 which was to be paid by Mr. Knight's clients to Mr. Legum's clients would be paid if and when Mr. Knight was able to establish the compromise agreement of 1965, and I don't believe that Mr. Legum or Mr. Knight would dispute that, sir.

Mr. Knight: That is in the stipulation.

The Court: How many dollars are in controversy right now?

Mr. Lawler: I would say roughly, your Honor,
page 41 } roughly between forty and fifty thousand dollars.

The Court: And between how many people?

Mr. Lawler: On the one side there are five people, and I am afraid to say, your Honor, I don't know how many people there are because the heirs are clear. There are a number of

people represented by Mr. Legum and by Mr. Knight. Perhaps they could answer that question from their—

Mr. Legum: We represent three heirs, Judge, all of whom are dead, and they have a number of children. I would say at least forty.

Mr. Lawler: That is about right. He probably represents—

The Court: Who would lose in the forty to fifty thousand dollars if everybody agreed to the settlement?

Mr. Lawler: If they went ahead with the 1965 settlement, the people who would lose the forty thousand dollars would be the five children of Elwood Best who are the residuary legatees under the will.

page 42 } The Court: Haven't there been subsequent agreements whereby there would be a reopening up and those who had settled would make a contribution toward giving them some portion?

Mr. Lawler: Mr. Knight's clients made an agreement with Mr. Legum's clients that if Mr. Knight were able to recover anything under the 1965 agreement then Mr. Knight's clients would pay Mr. Legum's clients $7800.

Mr. Knight: But in addition—I don't mean to interrupt, your Honor—$2500 would be paid by the proponents of the will.

Mr. Lawler: That's right.

Mr. Knight: And the residuary legatees to Mr. Legum's clients will make a total settlement of $10,300.

Mr. Lawler: We are going to pay that. There isn't any question about that. The estate is going to pay Mr. Legum's clients $2500. There isn't any question about that, but we are not part of any agreement between Mr. Knight and Mr. Legum. We have an agreement with Mr. Legum that in consideration of his withdrawing his contest of the

page 43 } will we would pay them $2500, and that is what they did.

The Court: Well, the group number eight, Elwood Best and five children, are the ones who protest that they should have certain monies that they are being divested of, isn't it?

Mr. Lawler: Under the 1965—

The Court: Aren't they in the same relative position as all the other ten groups?

Mr. Lawler: Some of them are and some of them aren't. There are some surviving brothers of the deceased and the others are children.

The Court: Elwood Best—there is five children coming down under that irrespective of how they might be divided, but isn't Elwood Best by reason of the nature entitled to the same portion that the other ten and a half are?

Mr. Lawler: If there were no will we will agree. If she died intestate.

The Court: Well, isn't it equity and justice that they be recognized in this proceeding?

Mr. Lawler: Well, I would say this—

page 44 } The Court: And who ever is deemed to be getting the benefit of things as they are, wouldn't they have by the same law what is natural and equitable so they would all be alike?

Mr. Lawler: Your Honor, I think I would have to answer that this way. We must presume that what the law says is fair and equitable, and the law says that this agreement was set aside and could not be made.

The Court: All right, go ahead.

Mr. Lawler: And accordingly, getting back again to what we think the evidence would show, that the four residuary legatees which we represent agree that they concurred in the 1965 compromise. Mr. Steven Moore's client, one of the other child, the other child of Elwood Best, says that she didn't. The evidence would be that she had authorized her brother to speak for her and that the morning that this—

The Court: Mr. Moore represents one of the five groups?

Mr. Lawler: Yes, sir.

Mr. Moore: That's right.

page 45 } The Court: All right. Now go ahead.

Mr. Lawler: The evidence would show that on the morning of the hearing in 1965 when the compromise was originally reached we met here with Mr. Knight, Mr. Doumar and some of the other parties. None of the people from the west were here. That is, none of the residuary legatees were present. We discussed the compromise and the evidence would further show then Mr. Kellam, who was one of the administrators, telephoned Mr. J. C. Best who was then in Idaho and told him what was proposed. He acquainted him with the situation as it was seen here at that time and asked him if he concurred in the compromise and approve it.

The Court: That was J. C., you say?

Mr. Lawler: Mr. J. C. Best, right here, sir. And he advised—

The Court: He is the one who is listed as Jasper?

Mr. Lawler: No, sir. Jasper is J. O. Best. J. C. Best is one of Elwood Best's children.

The Court: Oh, I see.

page 46 } Mr. Knight: Jasper Best is one of my clients.

The Court: Go ahead.

Mr. Knight: I've got some letters from J. C., so I can understand the confusion.

Mr. Lawler: And it was advised that they concurred and thereupon the compromise settlement was entered into. At no time did counsel who represented the executors, at that time counsel who represented the executors did not represent the residuary legatees, and I have just been told by Mr. Moore that he is not going to raise the question of any lack of authority on behalf of Mr. J. C. Best to agree to that compromise, and accordingly it will not then be necessary for us to put on any evidence, and I think we pretty well stated our position, if your Honor please. Then if we don't put on any evidence it is all contained in the stipulation and the offer of proof which we made heretofore.

Mr. Moore: May I just say a few remarks to the Court?

The Court: You are Mr. Moore?

page 47 } Mr. Moore: Yes, sir. I am Steven Moore from Hampton. I represent one of the five residuary legatees. I would like to say to the Court that there is talk here about justice and what is being done. The decedent in this case, Mrs. Dobski, made a will in 1944, Judge, the will which is before the Court here, and has been before the Court on a number of occasions written, the evidence we believe would have shown, was written in the hand of Mr. Sidney Kellam, Judge Sidney Kellam.

The Court: No, it wasn't Sidney. It was Floyd.

Mr. Moore: I am sorry. Mr. Floyd Kellam. But in any event a very reputable attorney here.

The Court: I have read it at one time but I have forgotten it now. It was executed in the hospital.

Mr. Moore: Yes, sir. And thereafter Mrs. Dobski recovered. The will stayed in the offices of Kellam and Kellam. There are depositions before the Court at this time, or there were depositions in the last suit in 1969 that Judge Richard Kellam from time to time saw Mrs. Dobski, and

page 48 } she would come in and she knew that the will was there. I would like to say, Judge, there was never really any doubt on behalf of the administrators in this case that this was the valid will of Mrs. Dobski.

It developed that when she died in July of 1964—in fact the will was probated at that time, just the normal probate of it—some time after that it developed that Doctor Crosby would testify that perhaps she had been seriously injured and in his opinion she did not have testamentary capacity. One of the witnesses at that time could not, back in 1965 one of the attesting witnesses could not be located, but even in 1965 Mr. Lawler and Mr. Kellam believed that they had a close case but it was a close case because of what Doctor Crosby's testimony might be. Of course we don't know what

he would have said on cross-examination either, but at that time this agreement was entered into in order to try to protect the estate, and there is no question in my mind or in anybody's mind but that an agreement was entered into at that time, a compromise agreement.

page 49 } Then after that Mr. Knight remarks that I came into the case. I came in some time in 1966, and at the point I came in it was obvious that the matter was on its way to the Supreme Court of Appeals whether or not the agreement would be compromised, I mean would be accepted by the Supreme Court and so forth. So I more or less stayed along as an observer. I went to Richmond and heard argument in that matter, but I never participated that actively in the case at that stage.

Then in 19—after this was all sent back—

The Court: Since the suit was originally brought to test the validity, that it was *devisavit vel non?*

Mr. Moore: Yes, sir.

The Court: And the court considered that one issue, and what I had approved of was extra.

Mr. Moore: Extracurricular activity, yes, sir.

The Court: That is not the word to use. When it is not necessary. That is all right.

page 50 } Mr. Moore: Well, in any event that, of course, was sent back and another suit was brought by Mr. Legum's faction and so forth. At this time we had located through Mr. Lawler's diligence, we had been able to locate the missing attesting witness. We had both of them, and Doctor Crosby had died. So the entire posture of the suit had changed, and it became obvious at this time that we were going to be able to uphold Mrs. Dobski's will and affectuate her intent.

The Court: You brought something to my attention that is awfully interesting to me in this kind of litigation. You can deposit $13.50 at the Clerk's office in favor of somebody that has never been heard of for long ago and then I guarantee you that generally there they appear shortly to get that $13.50.

Mr. Moore: Well, they surely are here now.

The Court: In this kind of litigation. But more especially in condemnation cases.

Mr. Moore: Yes, sir. There is no doubt about that. It is like a magnet. But in any event, Judge, at that

page 51 } time we have the five residuary legatees before the Court, and we had a meeting in that jury room and it was a question of whether or not we would pay some nominal sum at that time and avoid a jury trial, the

necessity of putting on proof and so forth, and having to contest the matter so to speak. So that Mr. Lawler and I to our clients stated that in our opinion it was a good idea to pay a nominal sum to Mr. Legum's clients in order to dispose of the matter.

The Court: $2500.

Mr. Moore: $2500 out of a $200,000 estate approximately, and this was our agreement. At that time we came back out here. I think there was a deposition put on of one attesting witness, and the other lady came up. In any event, at that time the will was approved and probated by the Court.

Now, we are in here and as I understand this suit is simply a matter of Mr. Knight's group asking for specific performance of the 1965 settlement agreement which, as I said, there is no question that a settlement agreement was entered into back in 1965.

The Court: Well, is there any agreement of this
page 52 } subsequent agreement to probate the will would not have been agreed but for the fact that you readopted the 1965 agreement?

Mr. Moore: Absolutely not. That 1965 agreement was never readopted.

The Court: Well, isn't that incidental to the fact, the fact that they agreed to probate the will?

Mr. Moore: No, sir, they could have come in and said at that time we want to contest the probate of the will and they could have done that. The fact they stayed out was simply a decision made by them, and that was their decision. We had no—in fact in advising our clients we were put in the position of saying there is the possibility that this 1965 compromise agreement will be upheld or specific performance of that will be granted. However, since the Supreme Court of Appeals had set this aside for various and other reasons which we won't go in here today, we don't believe that will happen. In fact it was that strong in our clients. We didn't
believe that 1965 compromise agreement would be
page 53 } upheld by the court.

The Court: But the point is that you had entered into it and the court reversed my decree because these parties have been made parties and you still had an agreement and never said that that agreement was invalid. Did it?

Mr. Moore: I think the court said the agreement was unjust.

The Court: It was not before this Court.

Mr. Moore: I think the court said the agreement was unjust or unfair or one or the other.

The Court: Maybe it was both.

Mr. Moore: But in any event the agreement was incorporated in the decree and they set aside the decree and everything with it, and it is my understanding where a decree is vacated the parties return. They vacated everything and returned the parties to the *status quo*. In other words we were back at that point to go forward to determine whether there was a will or no will. Then it would have been a
page 54 } matter of actually renegotiating an agreement at least insofar as the residuary legatees of renegotiating an agreement including all of the ten and a half heirs and giving them the same thing. I don't think there is any doubt that they could have done that under the Culpepper case. If you had all the parties before the Court and they would have all entered into it that would have been all right. But since some of them were left out it wasn't fair. It was unfair. I don't remember the exact language.

In any event, I think the language they used was that it was an unfair agreement, and they set the decree aside.

Now, I don't know if we go on into the merits of this thing today, we would, of course, take the postion that it was an oral agreement entered into at that time, which was in 1965, and it is barred by the statute of limitations, the writing in this stipulation. When that is submitted I would like to make a few comments on that, but I would say to the Court that we take the position that the writing which will be offered at that time as an agreement is not in fact the com-
page 55 } promise agreement. The agreement itself was oral and an understanding between the parties and should be barred by the three-year statute of limitations.

The Court: Is everybody that could possibly have any interest in this case before me now?

Mr. Lawler: Yes, sir.

Mr. Knight: In that regard I would like to make a part of the record the order of publication which would bring in George Best who also seeks $500 under the terms of the will.

Mr. Moore: Yes, sir. I think that everybody is here now, but basically what is before the Court is a suit by five of the parties to the compromise agreement of 1965, or in effect asking for the five residuary legatees to give up forty or fifty thousand dollars to them today in accordance with the 1965 agreement, and of course the residuary legatees are resisting on any number of reasons.

The Court: I am bound to ask you gentlemen to excuse me just a minute.

Mr. Knight: Yes, your Honor.

page 56 } (Whereupon, the Court recessed. After recess the hearing continued as follows:)

Mr. Knight: If your Honor please, at this time I would like to make part of the record a notice on the hearing on the demurrer which I believe has not been filed.

Mr. Lawler: All right.

Mr. Knight: With the permission of the Court I would like to file this notice.

If your Honor please, at this time I would like to introduce into evidence the stipulation which has been prepared and which has been signed by all counsel in this case, dated July the 30th, 1969, together with the attached exhibits, Exhibit A being the yellow handwritten document executed by counsel as set forth in the stipulation, in the handwriting of Mr. Lawler. Exhibit B is a copy of the will, and Exhibit C being the letter of Doctor Albert V. Crosby. At this time I would move for the introduction into evidence of this Exhibit.

Mr. Moore: If it please the Court, although I have signed the stipulation as having seen it, I wish for the page 57 } record to note my objection to its admissibility on the ground first that it is irrelevant to this proceeding, the contents of it are irrelevant to this proceeding, the contents of it are irrelevant to this proceeding since we are all in agreement that agreement was entered into in 1965, and all of this, or the great bulk of the stipulation, if it please the Court, simply goes to show there was consideration for the 1965 compromise settlement or however you wish to characterize it, and since there is really no contest, we believe everybody acted in good faith back in 1965, that all of this, the balance of this is surplusage and really contains a great deal of conclusions and so forth which are really improper in the scope of this matter.

I would also like to call the Court's attention to the third paragraph of the stipulation, and in particular the language there where it says on July 14th, 1965 the attached agreement and proposed decree—

The Court: Whereabouts would that be?

Mr. Moore: I'm sorry. That is right on the first page of the stipulation, Judge, where the style of the case page 58 } is.

Mr. Campbell: The third paragraph, your Honor.

Mr. Moore: I am back over here. This third paragraph right here on July 16th, or July 14th, 1965, the attached agreement and proposed decree marked Exhibit A. I very strenuously object to that particular language on the ground that the language "agreement" contains a legal conclusion which we would submit is one of the issues before the Court today, if the Court reaches that, and we would submit that perhaps the language could be "The attached writing and

proposed decree," or something to that effect, and also contained in the next sentence the same thing: "This agreement and proposed decree." We would submit to the Court that a reading of this yellow paper attached there is what this is referring to, this yellow writing, and I would submit to the Court that what that yellow writing is a proposed decree and not in any stretch of the imagination a contract or agreement. It may be a memorandum of agreement or what the terms of this oral agreement was, but I would

page 59 } submit to the Court that that is not an agreement, and I object to that part in the stiuplation.

The Court: I am going to put it in the record over your protest, and I will mark it Exhibit X, the whole page.

Mr. Moore: Note my exception.

(Marked by the Court as Exhibit X.)

The Court: Has everybody had his say?

Mr. Lawler: Well, Judge, did you want to hear any evidence or do you want to argue it at this point?

Mr. Knight: Just a minute. I have got one further thing before we get to an argument. I left, Mr. Lawler, with you a list of the heirs.

Mr. Lawler: I think you gave it to the Judge.

The Court: I have a copy of what purported to be a diagram of all the heirs.

Mr. Knight: Yes, sir. If your Honor please, may I? This is a list of heirs of Lucy Dobski Best, who died on July the 3rd, 1964, which has been shown to all counsel and which I understand to be stipulated to be the heirs of Lucy V. Dobski Best.

page 60 } Mr. Lawler: Well, that is the names of the brothers and sisters of Lucy Dobski Best, as I understand. I don't believe we can properly say that that is a list of heirs. If we are going to refer to it as a list of heirs it seems to me you have got to put in there everybody. We stipulate that they are—they were the brothers and sisters of Lucy Best.

Mr. Knight: You stipulate that all parties are properly before the Court

Mr. Lawler: As far as I am concerned they are. Some of those people you've got in there are dead.

Mr. Knight: Right.

Mr. Lawler: Not a list of heirs.

Mr. Knight: By stipulation, I understand that Mr. Moore has just agreed, is that correct?

Mr. Moore: Yes.

The Court: All right.

Mr. Knight: And Mr. Lawler has agreed. Of course my clients agree. By stiuplation of counsel before the Court that all parties are properly before the Court, and we will ask that this list of heirs, I state, under Margaret

page 61 } Best Thomas, deceased, survived by heirs listed in the petition on July the 3rd, 1964, I do not specify them but I would like for this to be introduced into evidence at this time, your Honor.

The Court: I will mark this Exhibit List of Heirs.

Mr. Moore: If it please—

Mr. Knight: If you don't like the word "heirs,"—

Mr. Moore: If it please the Court, I object to the introduction of the document in evidence on the grounds that it is not relevant to this proceeding. As I understand this proceeding, Judge, this is a matter for specific performance of a contract, and those people aren't parties to the contract. They haven't got a thing to do with it.

The Court: I am going to put it in for your benefit and their too, because it is obvious that unless you accede to something that I am going to suggest in a few minutes somebody is going to appeal again.

Mr. Lawler: We will join in the objection and exception, if your Honor please.

page 62 } The Court: Very well. It is so recorded.

Mr. Lawler: All right. One further thing—excuse me, Mr. Knight.

Mr. Knight: If your Honor please, I believe that is all the evidence that the petitioners desire to enter at this time.

The Court: Have you on your side finished?

Mr. Lawler: Only one thing. I would like to ask Mr. Knight whether or not the red booklet that has been rejected by the Court as evidence was in fact the petition for rehearing which he filed in the Court of Appeals in the case which we have referred to? By lack of an answer I assume that he assents to it.

The Court: All right. Is that all now? You gentlemen take charge of that grand jury room and coldbloodedly now see what you can come up with before I come in with anything. You have heard a lot of questions asked from up here and you may see my hand or you may not. All of you six—I don't know the gentleman over to your left. Is he counsel too?

Mr. Moore: This gentleman right here is Mr.

page 63 } J. C. Best. He is one of the residuary legatees

The Court: Stay out of there because there will be a fuss. So the six of you retire in that grand jury room and I suggest it will be helpful to me if you come to an agreement that I can enter a decree here today.

Mr. Knight: If your Honor please, Mr. Campbell has got another appointment and did wish to make his views known before he departed, and he is vitally interested in the proceeding.

The Court: He will delegate to you complete authority that he will be pleased with what you come up with.

Mr. Campbell: I shall be pleased to do that. I don't know whether it is contemplated that the matter be argued at this point.

The Court: I am trying to avoid argument.

Mr. Campbell: I might say at this time it is not exactly in the form of argument but there is a statement of
page 64 } the position. I represent Irwin R. Best, and this has been a long arduous case, and I have been the beneficiary through the industry of Mr. Knight as representing parties of kindred interest to that of my client, and as a consequence I am not as familiar with the technical features that are involved in this case as I would be had I carried the responsibility because I have relied upon Mr. Knight to go forward on it. But in a capsule—

The Court: Well, whatever it is you are one of the group of the small blood quantity that are his, aren't you?

Mr. Campbell: I am of the half blood, but I profit proportionately, yes, sir.

The Court: Then whatever he does you share the benefit, or you share the detriment.

Mr. Campbell: That is correct, sir.

The Court: Now, the five of you get in there and see what you can come up with.

Mr. Campbell: All right, sir.

The Court: You get along, Mr. Campbell. You might make more out there than you can make in here.

page 65 } Mr. Campbell: That sounds ominous.

(Whereupon, the Court recessed. After recess the hearing proceeded as follows:)

Mr. Lawler: Your Honor, I have to report to the Court that we were unable to reach an agreement in this matter and accordingly we would have to proceed. There is only one point that I would want to make at this time, and, however, before the Court adjourns I would ask Mr. Knight through the Court whether or not this petition for rehearing is the one he had filed, and I really did not get a response, and accordingly I would like to ask the Court that Mr. Knight be called as a witness to testify as to the formal matter, as to whether that is the brief or petition for a rehearing which he filed in the Supreme Court of Appeals in that case. Mr. Knight?

Mr. Knight: If the Court desires to ask for the question I would be glad to answer it in open court.

The Court: I do not desire to ask you. He wants to put you on as a witness.

page 66 } Mr. Knight: Well, then I will stipulate that is a copy of the brief that was filed.

Mr. Lawler: All right, sir. In the Court of Appeals in the prior will case, as I understand it?

The Court: That is what I marked as an exhibit rejected and exception noted, as being Record Number 6671, Supreme Court of Appeals.

Mr. Lawler: I would now reoffer that, if your Honor please. We will now reoffer it. I assume your ruling is the same?

The Court: I don't see where it adds anything or helps either side.

Mr. Lawler: Yes, sir. There are material things that are stated in that brief which are contrary to the position these parties take now, Judge, so that is why I am saying that it is significant. Some of the things they say in that brief are different from the position which they take now, and that petition, rather, is different from the position they take now and it also supports our plea of *res judicata.*

page 67 } Mr. Knight: If your Honor please, as Mr. Lawler said he had something else he wanted to present, I would like to introduce into evidence Pages three through eleven of the proceedings which were held on March the 6th, 1969, and I woud like to have this marked as an exhibit, your Honor.

Mr. Lawler: We would object. I don't see the relevancy of it.

Mr. Knight: That was the agreement that was entered into in the Judge's chambers. It is just down verbatim.

Mr. Lawler: I still don't see the relevance of it.

The Court: What became of that diagram that you all—somebody put it up on my desk.

Mr. Knight: Oh, if your Honor please.

The Court: I am going to permit Pages three through eleven of this testimony introduced on March the 6th, 1969 in the record.

Mr. Lawler: Note our exception, if your Honor please.

The Court: What is next?

page 68 } Mr. Knight: If your Honor please, the only thing remaining would be argument of the case.

The Court: Wait one minute. Mr. Campbell wanted to make a statement.

Mr. Campbell: Yes, sir. If your Honor please, as I in-

dicated in open court a little earlier, I am the beneficiary of the industry of Mr. Knight, and therefore relying upon his talent and energy, I have not followed the successive steps in this case as closely as I otherwise would have.

The Court: Which one is yours?

Mr. Campbell: Irwin R. Best. He is a half-brother.

The Court: Irwin?

Mr. Campbell: R. Best.

The Court: Oh, yes. Irwin R. That would be number seven on this list, wouldn't it, Mr. Knight?

Mr. Knight: I believe so, your Honor.

The Court: And you represent him, Mr. Campbell?

Mr. Campbell: Yes, sir.

Mr. Knight: He was on a separate agreement.

page 69 } Mr. Campbell: For the purpose of addressing the Court at this time rather than participate in argument is to let the Court be aware of our interpretation of a factual situation that will be in issue.

Now, as I generally understand the situation at the time that this will was originally offered for probate, there was a serious question as to the testamentary capacity of the testatrix. We had available a competent physician who had so expressed an opinion. The strength of our position that was espoused by Mr. Knight and myself was such as resulted in the administrator and his counsel after considering the possibilities of litigation dictated that an agreement by way of compromise should be entered into to dispose of the issue involved. Now, it so happened that an agreement, a memorandum of which was prepared in the handwriting of Mr. Lawler, was entered which was considered by all parties represented by counsel to be a fair and equitable disposition of this case and the proper distribution of the funds represented by the estate.

page 70 } It so happens, however, that there were legatees or heirs who were non-residents of the state of Virginia that somehow or other did not figure in on the compromise entered into by counsel. Subsequently those heirs represented by Mr. Legum sought to intervene in the case.

The Court: Now, which one do they come under?

Mr. Campbell: Their names—

Mr. Legum: Your Honor, this is Margaret Best Thomas.

The Court: Wait one minute.

Mr. Legum: Or Maggie Thomas.

The Court: Who does she come through?

Mr. Legum: She was a sister—let me see if I can help the Court.

The Court: Maggie Best is the—

Mr. Knight: That is correct, sir.

The Court: You represent the five, do you?

Mr. Legum: I represent the children of them. Also Sara Best Schultz and Irwin Best; that is right. Three.

Mr. Campbell: So as a result of the attempted intervention by Mr. Legum's clients, which intervention was
page 71 } denied, this issue found its way to the Supreme Court.

The Supreme Court at that time had what was a proper order to be entered in an issue *devisavit vel non,* and also had before it this agreement that was entered into between counsel for the administrator and Mr. Knight and others involved excluding Mr. Legum's clients. So when he got to the Supreme Court they had this position. They said here are a group of heirs who have entered into a compromise, the general effect of which is to distribute among those contracting parties a portion of this estate, but by enforcing this agreement we exclude Mr. Legum's clients who are non-residents of the state. So to do that would not be fair and equitable because everyone should share proportionately in their rights in the estate and it is for that reason that, as I interpret the decision of the Supreme Court, there is reference made to it being unfair to all parties proved in an agreement that did not include all the parties in interest, but the Supreme Court said that it should be remanded for
page 72 } trial on the issue *devisavit vel non.*

Now, the Supreme Court did not, as I interpret the ruling of the court, say that a compromise by parties in interest was contrary to public policy. They did not say that it was not a binding contract or should not be a binding contract between the parties to that agreement, but it merely says this agreement between, we will say twenty people or ten people that excluded the interest of two *paople* is not fair to those two people. So they say it is not enforceable, not because it is improper between the ten who met and agreed, if you please, and so they say try and resolve their differences. Unfortunately that agreement did not include Mr. Legum's clients.

All right. Based upon that, I think the Supreme Court was entirely correct when it says that being in a category of relationship that would entitle Mr. Legum's clients to some participation in the estate, if this woman did not have testamentary capacity that they should have been considered. So the court protected those that were not included
page 73 } in the agreement of those who did so agree and sent it back for a trial on the issue *devisavit vel non.*

All right. When the case came on to be heard here what happens? What happens is, as I understand it, and I think the evidence would show, and I believe it will be conceded by counsel, there was a meeting and Mr. Legum says to my clients, we need money, we need to share in this estate. So Mr. Lawler representing the executor says I will pay you flatly $2500, and Mr. Knight says if we prevail on our suit to enforce the agreement we will pay you $7800, which meant that Mr. Legum would be getting $10,300 for those heirs that he represented that had not been protected in their original agreement. But there were changes in circumstances.

At the time that there was a meeting of the minds at a time when there was an agreement, if you please, between the parties in interest excluding his clients in which they said the issues are such that let us have a meeting, let us split up this fund and agree to what each shall get based upon the fact that at that time, at the time of that agreement
page 74 } we had available Doctor Crosby with no evidence sufficient to convince those people representing the estate that we would not prevail, the strength of our position through the testimony of Doctor Crosby was what brought about the agreement. Unfortunately Doctor Crosby died, so that was the strength of our contest of this will. The testimony that we had to establish that she lacked testamentary capacity had flown out the window, and by so doing it strengthened the position of the executor and the clients represented by Mr. Lawler. Well, the situation is now reversed. We don't have to give them anything because they can't prove the incompetency of the testatrix, so let us don't do anything about it.

All right. Faced with that dilemma, if you please, Mr. Knight says to Mr. Legum if we prevail on that contract we will share what we get with you by paying you $7800 and as a contribution to settle it so that a probate could go forward without contest. Mr. Lawler says we will pay you with no strings attached $2500, meaning that Mr. Legum's
page 75 } clients will get $10,300 if we should be fortunate enough to prevail ultimately in this case.

Now, as I understand the situation, the Supreme Court did not invalidate this agreement. It did not say that the parties concerned had not entered into a binding contract, but it said the contract cannot be enforced because—as to the parties in interest who were not included as possible beneficiaries of that contract. We are going to protect those. You cannot enter into an agreement that does not include others of the same class who would be shared in it.

Now, the position, as I understand it, taken by the defend-

ants in this case is that relying upon the Supreme Court ruling, and all the Supreme Court ruling was send it back for an issue *devisavit vel non,* and saying that the side agreement was not a proper issue to be tried, a proper matter to be heard on the issue of *devisavit vel non.* So now they are relying upon the Supreme Court ruling to vitiate, to abandon an agreement that was entered into in the utmost good faith.

Now, the position that we take in this is this:

page 76 } That the only part of this case that troubled the Supreme Court has been resolved by the agreement at the time that this case came on to be heard on probate on the issue of *devisavit vel non* that they had agreed upon that had all been cured by agreement of counsel of those parties that the Supreme Court undertook to protect. So they say now we have judicial sanction to violate our agreement with you; you don't have the strength that you had when we entered into this agreement. The Almighty has taken your witness away and we are not going to pay you in accordance to a contract that we entered into in the utmost good faith because death has occurred. Now that is the position taken in ths case in a nutshell, and I suggest to the Court that the proper position of Irwin R. Best that the contract entered into in the utmost good faith under circumstances sufficiently powerful to influence each side in all honesty and good faith to enter into a contract, and only by virtue of Doctor Crosby's death do we find ourselves confronted with the problem that we have of here now, and I suggest to

page 77 } the Court that upon a due consideration of this case that the contract that was so entered into and memorandum made in writing as to the agreement, which certainly takes it out of the parol evidence of oral contract should be enforced.

Mr. Legum: Your Honor, I concur in Mr. Campbell's motion and eloquent argument. I am just going to take a minute.

Your Honor will recall that when we filed our petition in behalf of non-resident parties who had not appeared, Mr. Campbell on behalf of the executors filed a demurrer and Mr. Knight filed a demurrer, and your Honor sustained it. That was the only thing that you ruled on.

The Court: I am going to listen to everybody.

Mr. Legum: I understand. And this agreement was not passed upon by your Honor, nor was the Supreme Court as far as I can see it, as far as between them is concerned.

Mr. Knight: If your Honor please, the schedule which you have before you, sir, I would like to borrow it for just one second, and I will be very brief.

page 78 } The Court: That is it. That is all right.

Mr. Knight: If your Honor please, Mr. Campbell has stated he was not too familiar with the factual situation, but—

The Court: Let me ask you one thing before you start.

Mr. Knight: Yes, sir.

The Court: Since it came back and the sole issue as an issue of *devisavit vel non* that was not had in accordance with the statute, but there was an agreement entered into in lieu of that, and the will was probated. That would dispense with the issue. What is wrong with that, anything?

Mr. Knight: This particular last case is what you are referring to?

The Court: Well, I mean why doesn't the parties want to live up to what they had agreed to when we probated the will?

Mr. Knight: Well, that is the whole point. Your Honor, they should under these circumstances, and I would like to refer the Court's attention, and this is the opinion of the Court. This is just some language in here that page 79 } I think supports—

The Court: You mean that I entered?

Mr. Knight: No, the opinion of the Supreme Court, and I am just going to briefly state it is stated that the approval —

The Court: There are a lot of things still that they don't mean and also go broader than the issue before them.

Mr. Knight: Well, they say that the approval and direction were beyond the scope of the issue of *devisavit vel non,* but the point is this. We now are asking for approval and direction in relation to the 1965 compromise agreement. We are asking for approval at the present time under the Virginia Code which provides for the compromise of the fiduciaries of the claims against the estate, and if your Honor please, the cases are legion. I am not going into the cases, but the cases hold that an executor is under a duty to protect the estate, the title of the estate, and it is Mr. Lawler's duty under the circumstances to defend the estate against our claim. And in the event that we had prevailed in our claim page 80 } there would have been a substantial change in the estate.

Now, according to the stipulation the residuary legatees concurred in this agreement in 1965. The Supreme Court in the last sentence stated that "We reverse the order entered on October the 19th vacating the decree entered on August the 26th, 1965, with the direction of the trial court to impanel a jury to determine the issue of *devisavit vel non* prayed for by Milton O. Thomas, Millard Thomas and Anna

Katherine Best," and this was done, and that is when we came down to the court on March the 6th and entered into the agreement that Mr. Campbell has very concisely and factually described.

The Court: In Billy Graham style.

Mr. Knight: Yes, sir. Well, the agreement, the yellow document that Mr. Lawler prepared when we went in the jury room—let us go back into the original now—does not contain the word "Proposed decree" or anything. It was an agreement and proposed decree, but at the time this handwriting was made it was intended to be the understanding
page 81 } between the parties. It was signed by myself, Mr. Lawler, Mr. Doumar and Mr. John Joseph Baecher, attorney for the James Barry Robinson Home for Boys. The signatures are right on that.

Now, in the paragraph over on the second page, the Board of Trustees of the James Barry Robinson Home for Boys shall accept a reduction of $3,000 in their legacy. Jasper Best, Frank Best, Clara Buck, Zella Best and Alameda Best Gallagher each shall receive 6.7 percent of the netable estate less attorneys fees to Doumar, Pincus, Anderson and Knight, and that goes on in Paragraph three, subject to the foregoing the remainder of the estate shall be distributed as directed by the will, and so forth, set forth in Paragraph Number two of this decree.

Now, this particular agreement was entered into at that time. Mr. Lawler wanted it made part of the decree. Fine. It was ultimately made a part of the decree that was ultimately entered into in August by the Court. Whatever Mr. Lawler did to protect his interest, to protect the estate, that was fine, but we had settled our differences with
page 82 } Mr. Lawler and he had obtained the concurrence through Mr. Kellam which we had knowledge of that the residuary legatees were in full accord with this agreement.

Now, the Supreme Court of Appeals in their decision were concerned about the problem, and I am not going to repeat it, that Mr. Campbell mentioned; namely, that these particular heirs who are now complaining were left out. When it came back Mr. Lawler could have taken an arbitrary position. Mr. Lawler could have said we are going to do exactly what the Supreme Court of Appeals told us and nothing else. We are not going to pay any money. We don't care what you do, we are not interested in it, you and Mr. Legum can go in the jury room by yourselves and discuss the matter and resolve your differences, but we are not going to talk settle-

ment, we are going to do what the Supreme Court of Appeals told us to do.

The Court: Why didn't they?

Mr. Lawler: We did.

Mr. Knight: There was some exposure, your Honor. There was some exposure in the case.

page 83 } The Court: He told them, and you and me it was *devisavit vel non.* Now why didn't they?

Mr. Knight: Right. He wanted to settle the case with Mr. Legum because Mr. Legum had some chance in relation to their case, perhaps small, but Mr. Legum had some testimony at that particular time, and he paid him $2500. There was an expert doctor that had been consulted by Mr. Legum, but the point is all throughout this proceeding, your Honor, from start to finish, there has been an evaluation of the exposure by counsel in this courtroom, and I submit to you that, your Honor, that this has been done not only in representing our clients but as officers of this Court in an attempt in some fashion at each stage of the proceedings to bring the case to a conclusion and to see that this matter does not go on forever.

Now, I realize problems have arisen, but at the present time we are again attempting to bring about an expeditious conclusion of this case. We are praying that the

page 84 } Court approve our petition that each of the compromise agreements which had been entered into be ordered into effect at this time being separate and apart from any issue *devisavit vel non,* and that upon a conclusion of this matter that the Court enter a proper order and that the matter be removed from the docket. Thank you, sir.

Mr. Lawler: If your Honor please, again I think we have to go back to the factual situation that existed, and there has been a stipulation which was entered into between the parties as to just what occurred, and the attention of the Court is invited particularly to the language on the first page of that stipulation and agreement in the third paragraph, which is a proposed agreement, the agreement and proposed decree was submitted to the court and approved and read to the court in open court, all parties having understood that the same was subject to the approval of the court.

All parties having understood that the same was subject to the approval of the court. On that date this

page 85 } Court did approve it, but that very agreement and proposed decree in substance was later disapproved by the court, by the Court of Appeals, which said we disapprove it. That decree is vacated.

The Court: Mr. Lawler, with all due respect of your continuity of thought, I don't care what you say about that decree. That decree was set aside the decree of this Court because I refused to let Mr. Legum come before this Court with his clients. I declined it because it was on an order of publication, and I thought that he had been derelict and I wouldn't let it in. Now, they set it aside because they say he had a right to file his petition, and I don't care what they said, and that is all they meant to say.

Mr. Lawler: Let us take the effect of what they said, Judge.

The Court: That is the total effect of it. They didn't have jurisdiction to say that the contract was void.

Mr. Lawler: Well, your Honor, I would disagree there.

page 86 } The Court: They only had jurisdiction of the issue to determine whether I was wrong or not in refusing Mr. Legum to come before the Court.

Mr. Lawler: Your Honor, if your Honor please, I have not been able to find—

The Court: I would adhere to that unless they told me so again.

Mr. Lawler: I have not been able to find a Virginia case which deals with this situation.

The Court: And you wouldn't find one.

Mr. Lawler: And I found one right next door, your Honor, that is right on the point. It is a North Carolina case.

The Court: In these cases there are people who never earned a cent of it in their life and now wants to fight. I tried to talk to them from a religious standpoint but I didn't succeed.

Mr. Lawler: Well, sir, if your Honor—

The Court: Some of them never saw the decedent.

page 87 } Mr. Lawler: I don't know of our clients who were in that situation. Certainly the residuary legatees aren't, that they knew the deceased very well. If your Honor please, the court says that the Court of Appeals did not have the jurisdiction to do anything than to let him come in, but they did it by setting aside the decree. Now, what was the legal effect of the setting aside of that decree?

The Court: So that they could come in.

Mr. Lawler: Here is a case right on it, Judge.

The Court: You may find an expression to that effect and isolate it in dissimilar circumstances.

Mr. Lawler: No, sir, in similar circumstances, Judge.

The Court: There isn't one similar to this in the world.

Mr. Lawler: All right. I invite the attention of the Court

to *Overton* vs. *Overton,* cited in 129 SE 2nd, 503, which is a 1963 North Carolina case, and the facts in this case are very similar to this, and if the Court will bear with me I would like to acquaint the Court with it.

page 88 } It seems that Ashley Overton and Dorothy Isabella Overton, his wife, married in 1929. Now, without having obtained a divorce, Overton married Annabelle Hollowell and had four children by her. He then died and left all of his estate to Annabelle, who was his second purported wife, and to the children by that marriage, and he left out his first wife entirely.

The first wife then filed in the Court of Pasquotank County, North Carolina, a dissent from the will saying that she was entitled to her statutory and dower share.

The Court: What was the bigamous marriage, the second one?

Mr. Lawler: Yes, sir, the second one was the bigamous marriage.

Now, at that time the wife of the bigamous marriage, which we will call Annabelle, Annabelle was said to be incompetent, and the Clerk appointed a guardian *ad litem* for her, and appointed a guardian *ad litem* for the children, and one of the children—

The Court: The second bigamous marriage

page 89 } now?

Mr. Lawler: Yes, the children of the bigamous marriage—appointed a guardian *ad litem* for the ones who were minors, and the one over twenty-one had independent counsel. Elijah Cherry, executor and trustee, and Sylvia, who is the oldest one, filed joint answers, and the guardians *ad litem* for each of the infants filed an answer. All of the answers denied the material allegations of the petition generally, and denied that Dorothy, who was the first wife, was the widow of the testator.

A consent judgment was entered by the Clerk on November 1, 1960 and was approved by the resident judge, Judge Morris. The consent judgment provided for the payment of $5500 and costs to petitioner—she was the first wife—in lieu of the year's support, dower and all other claims of petitioner against the estate.

The judgment was signed, indicating consent, by attorneys for the petitioner, attorneys for the executor-trustee and Sylvia, Elijah Cherry, executor and trustee, Ray Etheridge, and Gerald F. White, who were guardians *ad*

page 90 } *litem.* All of them signed the consent.

The Court: Right before the court?

Mr. Lawler: Right before the court, yes, sir, just like in this case.

Thereafter, Annabelle, which was the bigamous wife, moved to set aside the consent judgment alleging that she was not insane and had not consented to the judgment or authorized anyone to consent for her. The motion was heard by the judge who found as a fact that Annabelle had been an inmate of the State Hospital for the insane for a number of years but had been released and discharged five months before the consent judgment was entered, and had not consented to the entry of the judgment or authorized anyone to consent for her. The judge made an order decreeing that as to the movant Annabelle Overton, the judgment is null and void and of no effect, and allowing her to answer.

Annabelle's answer consisted of a denial that Dorothy is the widow of the testator, and a general denial of other material allegations.

page 91 } The case from that point on, they went ahead with the trial and the case, one part of the case turned on the question of the applicability of the statute of limitations. The court below found against the first wife. The Court of Appeals set it aside and sent it back, and here is the pertinent part so far as we are concerned after sending it back, and said the court applied the statute of limitations incorrectly, which is not material to our cause.

"The judgment below is vacated, and the cause is remanded that judgment be entered in accordance with the verdict and this opinion. When judgment is accordingly entered, respondents may appeal therefrom if so advised."

One thing more. Judge Morris set aside the consent judgment for cause—a lack of consent by Annabelle. The order purported to set the judgment aside only as to Annabelle. Petitioner contends that it is valid and binding as to the other consenting parties. In othe words, the other people to the compromise said, well, you set it aside as to

page 92 } Annabelle but they are still bound by us because they made a contract with us.

The court goes ahead to say:

"But this is not the correct interpretation of the law. 'Where parties solemnly consent that the judgment shall be entered on the record, it cannot be changed or altered, or set aside without the consent of the parties to it, unless it appears, upon proper allegation and proof and a finding of the court, that it was obtained by fraud or mutual mistake, or

that the consent was not in fact given, and the power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto, and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement of the parties and promulgates it as a judgment.'

"When a party to an action denies that he gave his consent to the judgment as entered, the proper procedure is by motion in the cause. And when the question is raised, the court, upon motion, will determine the question."

That was what was done in the Court of Ap-
page 93 } peals. They said it wasn't a right agreement. It wasn't a right judgment.

Now, reading again, "The findings of fact made by the trial court in making such determination, where there is some supporting evidence, are final and binding on this court when a purported consent judgment is void for want of consent of one of the parties, such party is not required to show a meritorious defense in order to vacate the void judgment. 'It is a general rule that in a case where a consent judgment may be set aside for cause, it must be set aside in its entirety.'

"The court has the power to set aside a consent judgment, as a whole, but not to eliminate from it that part which affects some of the parties only. The agreements of the parties are reciprocal, and each is the consideration for the other. If that which affects one party is taken out, what is left is not what was agreed to by the others. Respondents are entitled to an order setting aside the consent judgment in its entirety."

And that is exactly what occurred here.

Now, I don't see how the court can set this thing
page 94 } aside piecemeal. Part of it is binding upon us but not binding as to the other, and I submit to the court it cannot be done. Accordingly—

The Court: What caused you to agree to do what the court had said, the Supreme Court had said that we approved the will here?

Mr. Lawler: We did exactly what the Court of Appeals told us to do. We did exactly—

The Court: We had a jury to pass on the validity of the will.

Mr. Lawler: Well, the question of the jury wouldn't make any difference.

The Court: Why did you not go ahead and try it? There

was something between the parties somewhere. One side or the other was scared. There is no doubt about that. And I use "scared" just the way they use it down in the country.

Mr. Lawler: Well, I would say this, Judge. So far as we are concerned it made $500 apiece difference. That is the only difference it made. That was all it was worth to us.

page 95 } The Court: You are entitled to it. Why did you give it?

Mr. Lawler: Well, if your Honor please, because we thought that we would dispose of it right then and we put on the evidence.

The Court: That is exactly what I think. You thought that you were disposing of it right then.

Mr. Lawler: That's right, on the question of whether it was or was not the will. Now, of course what the Court does here, if the Court will look at the parties to this suit—

The Court: I am looking at it, and I don't understand it. Somebody probably would like to keep on with it for the next five years, I don't know.

Mr. Lawler: Of course we would like to dispose of it as quickly as we can, but we have got to dispose of it within the law.

The Court: I am going to help you when you get through.

Mr. Lawler: One further thing we would like to point out, if the Court please, whatever we call this decree

page 96 } that was entered into in 1965, the agreement, proposed agreement, these parties, the residuary legatees, were never parties to it.

The Court: On the day we proved this will somebody had to forego something which the others made up and so forth. It was a question of give and take, wasn't it?

Mr. Lawler: I would say so, yes, sir.

The Court: Who was giving and who was taking?

Mr. Lawler: Well, I think that is—I think that they both did, Judge.

The Court: What you did, you went and you readopted—whether you call it readoption or not, that is what you did do.

Mr. Lawler: Well, if your Honor please, that is in the teeth of what all counsel say happened. That is in the very teeth of that because the only agreement had was that the residuary legatees would pay to Mr. Legum's clients $2500. Mr. Legum and Mr. Knight made a side agreement that if Mr. Knight were to prevail—

The Court: Isn't the understanding between the

page 97 } parties, all parties, that was the finality of everything?

Mr. Lawler: We knew when we entered into that agreement that Mr. Knight was going to bring this suit. Mr. Legum knew it and I knew it. We all knew that. We all knew that. We all knew that that was why that agreement and why this stipulation which is in Court—

The Court: If I had known it I wouldn't have permitted the will to go the way I did.

Mr. Lawler: Well, of course—

The Court: I was given the impression that was the final thing. These agreements would be put in effect if we proved the will without any contest.

Mr. Lawler: Your Honor, that may have been the Court's impression, but I don't believe the record which Mr. Knight put into evidence would support that conclusion.

The Court: It may not.

Mr. Lawler: It was perfectly clear that the only thing Mr. Legum would get in addition to the $2500 was that if Mr. Knight prevailed in this suit today. Now, this isn't the situation where we went in there last night and made

page 98 } one agreement and we are coming back here and saying something different. We are doing just exactly what everyone contemplated would occur when we entered into the agreement in March of 1969. This is entirely consistent with that agreement, and accordingly we feel that that agreement, the first agreement, was subject to the approval of the Court. Mr. Knight recognizes that. He refers to the statute that the administrators or fiduciary can compromise any matter only with the consent and approval of the Court. The stipulation plainly states that that agreement and proposed decree were understood, that the same was subject to the approval of the Court. So as far as what this is, whether it is a yellow piece of paper or it is a separate agreement, we submit that it was all merged into one decree entered by the Court on August 26th, 1965, which was later set aside. It was all merged into that one decree. All the prior negotiations, conversations and everything, and accordingly, if your Honor please—

The Court: If that is the case then the ultimate

page 99 } question before either me or anybody else, if that is the case—

Mr. Lawler: I don't understand what the Court said.

The Court: Well, I mean to come right back to where I did to start with, with the determination of a bulldog, that the sole question before me that caused that decree to be entered was I had erroneously refused Mr. Legum's clients' admittance in the case. Now, I mean that with the determination of a bulldog. I want to square my jaws.

Mr. Lawler: Well, if your Honor please, that decree was entered before—

The Court: Then, by God, then if that is so the Supreme Court only passed on that one thing. That is all there is to it.

Mr. Lawler: I see, sir. That is our position in it, your Honor. We don't believe that it is now binding on these parties and accordingly we request that the Court so rule.

Mr. Campbell: If your Honor please, one sentence or so. If Mr. Legum had not petitioned for intervention in this case what would have been the result?

page 100 } The Court: It would have been—

Mr. Campbell: They would have paid us according to the agreement. It goes to the Supreme Court on an issue of your overruling or sustaining a demurrer. If what we are asking for today is what they would have paid had not Mr. Legum entered the picture. The position they are taking is we are fortified by a Supreme Court decision that was a pre-dictum. It went beyond the issues before the court, and they say we don't owe you now what we would have owed you if Mr. Legum had not come in.

The Court: Dictum was what I was trying to think of. I am growing old and senile.

Mr. Campbell: No, you are not either.

Mr. Knight: Your Honor, talking about the bulldog issue that you just mentioned. The question of the approval, even if it was approved in that particular decree, or tried to be approved because of the language of the decree, we have that same dictum that Mr. Campbell is referring to in the decision which said the court should not have ap-

page 101 } proved a compromise agreement or directed the decedents' estate to be distributed in accordance with an agreement so approved. Such approval and direction were beyond the scope of an issue *devisavit vel non.* That is the whole point.

The Court: I am going to rule right now that a decree can be entered in accordance with what you just finished saying a few minutes ago.

Mr. Lawler: Note our exceptions, if your Honor please.

The Court: You can dictate your exceptions to it.

Mr. Knight: When did you want that presented to the Court?

The Court: At the earliest possible moment. I am going to write a couple of things on it myself, I expect.

Mr. Knight: All right, sir.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

INDEX TO RECORD

	Page
Appeal and *Supersedeas* Awarded	1
Record	2
Order—July 30, 1969	2
Notices of Appeal and Assignments of Error	4, 5
Stipulation	6
Proceedings	11