

**College of William & Mary Law School**  
**William & Mary Law School Scholarship Repository**

---

Virginia Bar Notes

1948–1962: Dudley W. Woodbridge (Acting Dean  
1948-1950)

---

1968

## 1968 Virginia Bar Exam (June)

Virginia Board of Bar Examiners

---

### Repository Citation

Virginia Board of Bar Examiners, "1968 Virginia Bar Exam (June)" (1968). *Virginia Bar Notes*. 13.  
<https://scholarship.law.wm.edu/vabarnotes/13>

Copyright c 1968 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.  
<https://scholarship.law.wm.edu/vabarnotes>



1. A truck owned and operated by William Hill was involved in a collision in the City of Richmond with a car owned and operated by Thomas Ravine. Ravine called upon Hill to pay him \$10,000 damages for personal injuries and for damage to his automobile. Hill and Ravine conferred at 2 P.M. on May 15, 1968, for the purpose of comprising Ravine's claim and effecting a settlement. During their discussion Hill said to Ravine: "I recognize that the collision was my fault because I ran through a red light at the intersection where the collision occurred." Although the parties conferred for over an hour in an effort to effect a compromise and settlement they could not agree. Thereupon Ravine sued Hill in the Circuit Court of the City of Richmond to recover damages for his injuries and for damage to his automobile. During the trial of the action Ravine, who was the first witness to take the stand, offered to testify that between the hours of 2p.m. and 3 p.m. on May 15, 1968, Hill stated: "I recognize that the collision was my fault because I ran through a red light at the intersection where the collision occurred." Counsel for Hill objected to Ravine testifying that Hill made the statement on the ground that the statement was made during negotiations for compromise and settlement, and that the evidence was therefore not admissible. How should the Court rule on the objection?

The objection should be overruled. The mere offer to make a settlement would not be received as an admission of the party making the offer. However, an express admission of liability made by one of the parties during negotiations for a compromise is an independent fact pertinent to the issue in question and is, therefore, admissible. Brickell v. Shawn, 175 Va.323; City of Richmond v. A.H.Ewings Sons, Inc., 201 Va.862; Hendrickson v. Meredith, 161 Va.193. (EVIDENCE)

2. Hannibal Richman entered into a written contract at 3 p.m. on March 20, 1968, with Gilder Lily by the terms of which Richman agreed to purchase from Lily all of the materials to be used in constructing a swimming pool and bathhouse on Richman's estate known as "Sunset Hill". In addition to providing for the date of delivery, the purchase price to be paid and the quantity and quality of the materials to be furnished, the written contract contained the following provision:

"This contract constitutes the entire agreement between the parties hereto, it being expressly understood that there are no representations, commitments or statements by the parties except as provided herein."

All of the materials, meeting the specifications required by the contract, were delivered by Lily to "Sunset Hill" by the date specified in the contract, and five days after delivery Lily presented Richman with a bill and demanded payment. Richman refused payment, claiming that he would pay the bill only after Lily had constructed the pool and the bathhouse as he agreed to do on the morning of March 20, whereupon Lily sued Richman to recover the value of the materials delivered. In his grounds of defense Richman stated that he did not owe for the materials furnished, as Lily had not constructed the pool and bathhouse as he had orally contracted to do on the morning of March 20, 1968. During the trial of the action Richman offered to prove that he entered into an oral contract with Lily the morning of March 20, 1968, by the terms of which Lily agreed to construct the pool and bathhouse at "Sunset Hill", Lily agreed to complete the construction by May 25, 1968, and Richman agreed to pay for all materials furnished for the construction of the pool and bathhouse ten days after completion of construction. Richman also offered to prove that Lily had not commenced construction nor had he made any attempt to complete the construction by the date agreed upon. Counsel for Lily objected to this evidence on the ground that this evidence would violate the parol evidence rule. How should the Court rule on the objection?

(CONTRACTS) The objection should be overruled. Where it is apparent the written contract is not a complete integration of all prior and contemporaneous negotiations, parol evidence is admissible to supply those things omitted if the part omitted is not inconsistent with or contrary to the written contract. The term to be proved by parol evidence must be independent of and in addition to the written terms so that no merger has taken place. In this case, there was no term in the contract pertaining to the construction of the pool or the time of payment.



The terms to be proven by parol evidence are, therefore, independent of and in addition to the written terms. The parol evidence is admissible to prove these terms. Durham v. Pool Equipment Co. 205 Va.441.

3. Sally Wheel commenced an action in the Circuit Court of Campbell County, Va., against Joe Motorist to recover damages for personal injuries growing out of an automobile collision. Motorist filed grounds of defense denying the averments of negligence contained in the motion for judgment and he also filed a plea of contributory negligence in which he set out the particulars thereof, but the plea contained no request for a reply thereto. Sally Wheel filed no written response to the plea of contributory negligence. Thirty days after the plea was filed, Motorist filed a written motion for summary judgment. How should the Court rule on the motion?

(CIVIL PROCEDURE) The motion should be denied. As Motorist's plea did not contain express words requesting a reply, no written response was necessary. The allegations in the plea are to be taken as denied or avoided. Rule 3:11, Rules of Supreme Court of Appeals of Virginia.

4. Moonlight Construction Co.Inc. commenced an action at law in the Circuit Court of Roanoke County, Va., against Thomas Ashton to recover damages for breach of a written contract. During the pendency of the action and before trial, Thomas Ashton died, and his son, Jerry Ashton, was appointed and qualified as administrator of his estate. Plaintiff, fearing that the action will abate because of the death of the defendant, consults its attorney and inquires whether the action may be prosecuted to a conclusion or whether a new action must be commenced.

What should plaintiff's attorney advise, and what action should be taken by plaintiff's attorney?

(CIVIL PROCEDURE) The attorney should advise the plaintiff to prosecute the action to conclusion, substituting Jerry Ashton as the successor in interest to Thomas Ashton. The attorney should make a motion to the court to substitute Jerry Ashton as the successor in interest to Thomas. If Jerry does not consent to the motion; the attorney should then file his motion with the clerk's office and the procedure would then proceed so if the motion were an original motion for judgment against the successor. Rule 3:17, Rules of Supreme Court of Appeals of Virginia.

5. In an action tried in the Circuit Court of Orange County, Va., defendant moved to strike plaintiff's evidence at the conclusion thereof, assigning grounds therefor, which motion the court overruled and the defendant's exception was noted. Thereupon defendant proceeded to introduce evidence in his own behalf, and at the conclusion thereof defendant again moved to strike plaintiff's evidence, assigning the same grounds therefor. The latter motion was overruled and the defendant's exception was noted. The jury hearing the case reported to the court that it could not agree upon a verdict. Whereupon the jury was discharged. Promptly after discharge of the jury, the defendant again moved the court to strike the plaintiff's evidence, and enter judgment for defendant, assigning the same grounds he had assigned in support of the two previous motions.

May the Court entertain the motion to strike after the jury has been discharged? (CIVIL PROCEDURE) The court may entertain the motion to strike the evidence after the discharge of the jury. "If the court overrules a motion to strike the evidence and there is a hung jury, the moving party may renew the motion immediately after the discharge of the jury, and, if the court is of opinion that it erred in denying the motion, it may enter judgment in favor of the moving party." Rule 1:11, Rules of Supreme Court of Appeals of Virginia.

6. White Trucking Lines, Inc., commenced an action in the U.S.District Court for the Western District of Virginia against Red Streak Trucking Lines, Inc., for the purpose of setting aside a contract between the parties upon the ground of fraud. The complaint filed by plaintiff did not contain an averment of the acts of fraud alleged to have been practiced by defendant but merely charged that: "The contract was entered into by plaintiff as a result of fraud practiced by defendant." The



defendant desired to challenge the sufficiency of the complaint.

(a) How may he do this, and (b) How should the Court rule on the challenge?

(FEDERAL PROCEDURE) (a) The defendant can challenge the sufficiency of the complaint by a motion to dismiss on the grounds that the complaint fails to state a claim upon which relief can be granted. Rule 12(b), Federal Rules of Civil Procedure.

(b) The court should grant the defendant's motion. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake should be stated with particularity". Rule 9(b), Federal Rules of Civil Procedure.

7. During the trial of a criminal prosecution in the Circuit Court of Roanoke County, Va., the Commonwealth offered evidence to prove the commission of the offense but did not offer evidence to prove that the offense had been committed in Roanoke County. After the attorney for the Commonwealth had rested his case, the accused moved the Court to strike the evidence of the Commonwealth on the ground that the evidence was insufficient to identify the accused as the party who committed the offense. The motion was overruled and the exception of the accused was noted. The accused offered no evidence in his own behalf. A verdict of guilty was returned by the jury. The accused thereupon moved to set aside the verdict on the ground that the Commonwealth failed to prove that the offense had been committed in Roanoke County. How should the Court rule on the motion?

(CRIMINAL PROCEDURE) The motion should be denied. Questions of venue must be raised in the trial court and before verdict in cases tried by a jury and before judgment in cases tried by the court sitting without a jury. Rule 1:8, Rules of Supreme Court of Appeals of Virginia.

8. Alfred Thomas, who resided in the City of Richmond, was the owner of a tract of land in Alleghany County, Va., where he spent each spring vacation. When he went to Alleghany County in May of 1968, he found that his neighbor, Paul Word, had been continually walking across the tract in order to catch a passenger bus on U.S. Route 60 which daily took him to Covington where he was employed. Thomas told Word that he must stop walking across the tract, but Word replied that he would not do so, and would continue his customary route as long as he retained his job in Covington. Thomas, through you as his attorney, thereupon filed against Word in the Circuit Court of Alleghany County a sworn bill of complaint alleging the foregoing facts and praying that the court enjoin Word from further trespassing across the property of Thomas. Word has filed an answer to the bill in which he admits its allegations, but further recites in his answer that he is partially crippled by arthritis, that his customary route across the property of Thomas is shorter than walking over his own land to reach the highway to catch the passenger bus, and that he has followed the route over Thomas' land on the advice of his doctor. His answer then prays that the bill of Thomas be dismissed. You properly advise Thomas that you believe the defense asserted by Word is not good. Thomas then asks you by what procedural methods, if any, he might obtain the injunction against Word without being required to incur the expense and delay resulting from extended litigation.

What should your answer be?

(CIVIL PROCEDURE, EQUITY) The proper procedural method by which the sufficiency of a defensive pleading may be challenged is by a motion to strike out the pleading. If the motion is granted, the court may allow the defendant to amend his pleading. If the amended pleading is also found to be insufficient, the defendant may be examined upon interrogatories and committed until he answers them, or, upon motion of the plaintiff, the court may strike out the answer and take the bill as confessed in which case the injunction would be granted. #8-122, Code of Virginia; Thomasson v. Walker, 168 Va. 247; Stinson v. Board of Supervisors, 153 Va. 362; Lyle's Equity Pleading and Practice, §§228-231.

9. On May 1, 1968, John Good obtained a judgment for \$5,000 against Sam Park in the Circuit Court of Appomattox County, which judgment the Clerk promptly recorded on the judgment lien docket. The judgment did not contain a provision staying its effect pending any appeal that might be sought by Park. On June 3rd, Park filed with the Circuit Court an appropriate notice of appeal and assignments of error, and



delivered a copy thereof to Good. Park now comes to see you and says that he has just been served with a subpoena in chancery having an attached bill of complaint by which Good has commenced a creditor's suit against Park to obtain a sale of timber land owned by Park in Appomattox County in satisfaction of the lien of the judgment of May 1st. Park asks you what procedural steps he should take in an effort to prevent a sale of his timber land in the creditor's suit.

What should your answer be?

(CIVIL PROCEDURE) The trial court had control over the judgment for 21 days after the date of entry. After this time, however, the trial court would no longer have jurisdiction. Therefore, the proper procedural action would be to apply for a writ of supersedeas from the Supreme Court of Appeals. The writ would operate to stay all further proceedings on the judgment and maintain it at the status quo pending the outcome of the appeal. Aetna Casualty Co. v. Supervisors, 160 Va. 11; Rule 3:21, Rules of the Supreme Court of Appeals of Virginia.

10. In January, 1952 Conrad, a Florida resident, duly obtained a judgment in Florida against Dabney, a West Virginia resident, for damages for personal injuries sustained by Conrad and arising out of an accident in Florida. Conrad duly docketed the judgment in Florida. The applicable Florida statute provided that a judgment, if docketed, is enforceable for 15 years from the date of judgment and cannot thereafter be enforced, whereas the corresponding period in Virginia is 20 years. Dabney moved to Roanoke, Va., in 1965. Conrad, having failed to enforce the judgment in Florida, brought an action against Dabney on the judgment in the Hustings Court of the City of Roanoke, Va., on June 20, 1968.

Dabney consults you as to whether he has any defense to this action.

How ought you to advise him?

(CONFLICTS) Dabney has a defense to the action. Since the 15 year statute of limitations has run on the Florida judgment, the action would not be allowed in Florida. Since the laws of the jurisdiction in which the judgment was rendered bar any action on the judgment, the action would also be barred in Virginia. #8-22, Code of Virginia.

2 June 1968.

1. During the morning of May 14, 1968, Henry Frost went to a retail art shop of which Sam Pope was the proprietor. He saw displayed for sale several oil paintings, one of which was that of a reclining girl painted by a noted French artist. Frost feeling that the portrait would be much to the liking of his friend George Neal, and although he had never bought any paintings for Neal, took it upon himself to ask Pope the purchase price. When Pope replied that the price was \$400, Frost said "I am here on behalf of my good friend George Neal, and he has authorized me to say that he will purchase this portrait at that price. You can consider it a sale, and on tomorrow George will come by and pick up the portrait and pay you the \$400. Frost then left the art shop. Later in the day Hubert Kennedy went to the art shop and became charmed by the portrait of the reclining girl. He asked Pope what the purchase price was, and Pope, seeing a chance to improve on the price he had quoted to Frost, replied that the price was \$475. Kennedy thereupon wrote out his check for \$475 payable to Pope, delivered it, and left the art shop with the painting in his possession. When Kennedy was out of sight, Pope telephoned Frost and told him to forget the sale to Neal, that he had just sold the portrait to Kennedy. During the evening of the same day, Frost told Neal of the arrangements he had made with Pope for Neal's purchase of the portrait of the reclining girl, but did not tell Neal of the deal Pope had later had with Kennedy. Neal expressed his delight, and the next morning he went to the art shop, tendered Pope his check for \$400, and asked for the painting. Pope then told him that he had sold the painting to Kennedy the day before. Shortly thereafter Neal brought an action against Pope in the Law and Equity Court of the City of Richmond seeking damages of \$500 for breach of contract. In his motion for judgment, Neal alleged the foregoing facts. Pope has demurred to the motion for judgment. How should the Court rule on the demurrer?



(SALES, AGENCY) The court should sustain the demurrer. Until affirmance, the relation of Pope to Neal is similar to that of an offeror to an offeree. Before such time, therefore, Pope is free to withdraw either because he discovers that Neal has not authorized the transaction or for any other reason. Refusal to perform the obligations of a purported contract constitutes a withdrawal.

To constitute ratification, the affirmance of a transaction must occur before the other party has manifested his withdrawal from it either to the purported principal or to the agent, and before the offer or agreement has otherwise terminated or been discharged. Pope's telephone call to Frost was sufficient to constitute a withdrawal. Restatement of Agency, #88.

2. Paul North, although nineteen years of age, had all the appearance of an adult. He went to a jewelry store owned and operated by Harold East, and expressed his admiration of a diamond brooch displayed for sale at a price of \$400. On being satisfied that the price was reasonable, North agreed with East to buy the brooch at the listed price, and to make full payment and take delivery during the following week. Shortly after North left the store, East learned from another customer that North was only nineteen years of age, and that his credit was poor. He now asks your advice on whether he is bound by his agreement with North.

What should your advice be?

(CONTRACTS; SALES; INFANCY) As a general rule an infant's contract or obligation is voidable, not void, and subject to be affirmed or disaffirmed by the infant after his arrival at age. The rule applies even though the other party deals in ignorance of the infancy, and on the fraudulent representation of the infant that he is of age. But the defense of infancy is a personal privilege and cannot be interposed by a stranger or the other contracting party.

Mr. East should therefore be advised that his contract with North is binding, although voidable by North at his option. Since full payment is to be tendered on delivery he need not concern himself unduly with the poor credit of his purchaser. If at some future date prior to reaching his majority he decided to void the contract the ring must be returned before East will be forced to refund the purchase price to North. For it has with more reason been held by courts of equity that equitable relief will not be given to an infant unless he himself does equity by restoring what he has received. 23 Va. 478, 2 Williston #232, 238 3rd Ed., 9 Michie Juris. 717.

3. In April of 1968, Ideal Packaging Corp. purchased all the assets of Eastern Suppliers, Inc. The contract of sale provided, among other things, "Ideal hereby assumes all the rights and liabilities of Eastern with respect to unfilled orders for the purchase of materials contracted to be sold by Eastern." James Spencer, unknown to Ideal, had been a salesman for Eastern in the Richmond area and, at the time of the sale of its assets by Eastern, had procured purchase orders for the sale of \$41,000 of Eastern's merchandise, which purchase orders had been accepted by Eastern. In his arrangement with Eastern, Spencer was entitled to receive a commission of 10% on each sale. Within one month after the transfer of assets, Ideal filled all the purchase orders which had been obtained by Spencer. Spencer, who had lost his job as salesman when the assets were transferred by Eastern, requested of the sales manager of Ideal that he be paid commissions totalling \$4,100. Such payment was refused. Shortly thereafter, Spencer brought an action against Ideal in the Law and Equity Court of the City of Richmond to recover damages of \$4,100 for breach of contract, and in his motion for judgment alleged the foregoing facts. In its grounds of defense Ideal alleged that Spencer was not entitled to recover for breach of contract on the grounds (1) Spencer was not a party to the contract for sale of assets; (2) Spencer was nowhere mentioned or referred to in such contract; and (3) Spencer contributed no consideration to such contract.

Assuming that Ideal's three grounds are correct statements of fact, is Spencer entitled to recover for breach of contract?

(CONTRACTS) Yes. One does not have to be a formal party to a contract nor be mentioned therein to have a right to sue thereon, nor does the promise have to be for the sole benefit of the third party who attempts to sue, if it is the intention of the formal parties to the contract to make it for his direct or substantial benefit.



The contract is clear and unambiguous. Whatever the responsibilities of the vendor were "with respect to unfilled orders", that is what the defendant assumed the totality of the vendor's responsibilities. That one of the responsibilities of vendor "with respect to unfilled orders" was to pay the plaintiff who had taken or supervised the taking of the orders seems clear. That responsibility the defendant unconditionally assumed. When it did so, it did something directly and substantially for the plaintiff's benefit, and the plaintiff was entitled to sue the defendant on that contract of assumption. This being so Spencer should be entitled to recover for breach of contract. 162 F 2d 870.

4. Douglas Fox was a widower who resided in Hanover County. Because of ill health he moved into a nursing home in Richmond in March of 1965. Realizing that he would probably not be able to return to Hanover County, on April 2, 1965, Fox executed and delivered to his son Pete a valid deed which, so far as material, provided:

"I hereby grant and convey to my son Pete Fox in fee simple my farm in Hanover County, Va., containing 183 acres, but if my son Pete dies without issue surviving him, then such farm shall become the property of my son Clyde Fox in fee simple."

The deed was promptly recorded. Pete Fox had worked on the farm with his father and continued to live there after his father moved to the nursing home in Richmond. Clyde Fox had not lived on the farm in Hanover County for a number of years and was employed as a real estate salesman in the City of Richmond. Clyde Fox died intestate and without issue in 1967, survived by his widow Bertha. In May of 1968, Pete Fox decided to give up farming and, for a valuable consideration, executed and delivered a deed to David Black, which deed recited a conveyance of the farm to Black for life. Bertha Fox now consults you and asks what rights, if any, she, Pete Fox and David Black have in the farm. How should you advise her?

(FUTURE INTERESTS) I would advise her that Pete Fox had a reversion in fee subject to executory limitation; that David Black had a life estate subject to a condition subsequent; and that she had a shifting executory interest in fee simple subject to defeasance if Pete dies survived by issue. Further that if Pete dies without issue she would take the property in fee simple. Restatement of Future Interests #108 Illustration 2 I.

5. Cassius Smith died in 1962 leaving a holographic will which was duly probated, and which provided:

"This is my last will. I hereby devise and bequeath to my sister Shirley Ball all of my property of every kind and description. She may deal with and dispose of my property in any way she might desire, but if at her death any of my property may remain, it shall pass absolutely and in fee simple to my brother Hubert.

(s) Cassius Smith"

In May of 1968, Shirley died intestate. By the time of her death she had disposed of all property left her by Cassius except 475 shares of the common stock of General Motors Corporation. A controversy has now arisen between Hubert Smith and Sammy Ball, the only son and sole heir and distributee of Shirley. Both Hubert and Sammy claim prior right to the 475 shares of common stock. Which should prevail?

(PROPERTY, WILLS) Sammy Ball prevails. Since the decision in May v. Joyney decided in 1871 Virginia courts have consistently held that where a person is given property with absolute dominion over it, as in this instance, which is followed by a gift over to another "if there is anything left" or like phrase, a fee simple in real estate and an absolute estate in personalty passes to the first taker. 201 Va.355, 185 Va. 82, 184 Va. 821.

6. Sarah Tower was a widow who resided in the City of Fredericksburg. On June 12, 1968, while walking across a business street intersection in Fredericksburg, Sarah Tower was instantly killed when struck by a motor vehicle. Sarah Tower left no will, and her sole heir and distributee was her son, Ted Tower. Frank South now comes to see you and says that he is the brother of Sarah Tower and has lived with her for fourteen years; that on Christmas day in 1967, Sarah Tower delivered to him, and he



locked in a trunk in his bedroom, a small gold statue of the Virgin Mary, that at the time she delivered the statue to him Sarah Tower said "You have been more than a brother to me while you have lived here and to show my appreciation, I make you a gift of this little statue which once belonged to our grandmother"; and that Ted Tower is demanding that Frank South deliver over the small statue to him. He then asks you whether he must surrender possession of the statue to Ted Tower.

What should your answer be?

(PERSONAL PROPERTY) Code of Virginia, section 55-3 provides the following: "No gift of any goods or chattels shall be valid unless by deed or will, or unless actual possession shall have come to and remained with the donee or some person claiming under him. If the donor and the donee reside together at the time of the gift, possession at the place of their residence shall not be a sufficient possession within the meaning of this section."

The gift must therefore fail since both the decedent and South shared the same place of residence and the gift was not conveyed under color of deed.

7. When Defendant's car stalled at night in the northbound lane of a two-lane highway in Shenandoah County, Va., he sent for help to the nearby Zero Filling Station. He left his lights burning and turned on his signal light. Good Samaritan and Ever Do Well came on the scene and, without any request from the Defendant, offered to push his car onto the shoulder of the road. As they got behind the car to push it by hand, the truck of Zero Filling Station came up from the rear. The driver stopped so suddenly to avoid a collision that equipment and supplies on the truck fell off and injured Good Samaritan. Zero Filling Station settled the resulting claim of Good Samaritan for \$10,000 and brought a suit in a proper Virginia court against Defendant for contribution of \$5,000. In its complaint Zero alleged the above facts. Defendant demurred to the complaint.

How should the Court rule on the demurrer?

(TORTS) The Court should sustain the demurrer. Before contribution may be had there must be a cause of action by the injured person against the alleged joint tortfeasor from whom contribution is sought. The evidence does not show that Mrs. Bartlett breached any duty owed the claimants and therefore, as a matter of law, she was not guilty of actionable negligence as far as the claimants are concerned.

202 Va.527; 207 Va.789.

8. Henry Jones, the 18-year-old son of John Jones, lived with his parents at their home in Roanoke. Henry borrowed from his father the family automobile to take his date to a water-skiing exhibition at Smith Mountain Lake in nearby Bedford County. As they approached their destination, the automobile driven by Henry Jones collided in Bedford County with one driven by William Smith. Both cars were completely demolished. John Jones instituted an action against William Smith in the Circuit Court of Bedford County for the damage to the former's automobile. William Smith in a proper counterclaim sought to recover for his property damage.

(a) If the accident was proximately caused by the concurring negligence of the two drivers, may John Jones recover from William Smith?

(b) If the sole proximate cause of the accident was the negligence of Henry Jones, may William Smith recover from John Jones?

(TORTS)(a) No. Concurrent negligence arises where the injury is proximately caused by the concurrent wrongful act of two or more persons acting independently. If the parties are guilty of concurring negligence there can be no recovery.

149 Va.740; 2 Michie Juris Auto #47; Bailment #6.

(b) No. The use by one person of the car of another, for the pleasure, convenience or business of the party so using it, does not render the owner liable for injuries or damages resulting from the negligent use thereof. In the instant case the father was not in the car at the time of the accident, nor was it being driven on any business of his, but, on the contrary, it was being driven by the son for his own pleasure and accommodation, with the permission of his father. 170 Va.55



9. Plaintiff Administrator brought an action in the Circuit Court of Patrick County, Va., for the alleged wrongful death of his decedent who had been a guest in an automobile operated by the Defendant in Patrick County. The evidence showed that Defendant's driving ability was impaired by his intoxication, and that, although Plaintiff's decedent observed Defendant's careless operation of the car, he continued to ride with Defendant after having had a reasonable opportunity to get out of the automobile. It was also shown that Plaintiff's decedent was a person of low mentality who was capable of performing only the simplest of tasks, could not be trusted around machinery, and lacked initiative. There was no evidence, however, that he was insane or that a guardian had ever been appointed to care for his person or for his property.

Defendant moved to strike Plaintiff's evidence and to enter summary judgment on the ground that the evidence showed as a matter of law that Plaintiff's decedent was guilty of contributory negligence which barred his recovery. In overruling the motion the trial court observed that Plaintiff had sought to show that his decedent was of low mentality and not able to recognize danger as it existed. The trial court concluded, therefore, that whether or not Decedent was guilty of contributory negligence was a jury question.

On appeal Defendant assigned as error the action of the trial court in overruling his motion for summary judgment.

How ought the Court of Appeals to rule on the assignment of error?

(TORTS) The verdict of the jury should be set aside; the judgment appealed from should be reversed, and final judgment should be entered for the defendant.

It has been held consistently in the Virginia courts that a guest may be guilty of contributory negligence if he knows or reasonably should know that his driver had been drinking intoxicating liquor to an extent likely to effect the manner of driving and voluntarily continues as a passenger after a reasonable opportunity to leave the automobile has presented itself.

Unless the actor is a child or an insane person, the standard of conduct to which he must conform for his own protection is that of a reasonable man under like circumstances. There was no showing here that plaintiff's decedent was insane. Mental deficiency which falls short of insanity, however, does not excuse conduct which is otherwise contributory negligence. 208 Va.291; Restatement of Torts #464.

10. In her motion for judgment in the Circuit Court of Grayson County, Va., Plaintiff alleged that she ordered a meal in Defendant's restaurant in Grayson County on March 1, 1968; that the Defendant impliedly warranted that the food served her was wholesome; that she was served food that was not wholesome; and that as a result of eating it she became ill from food poisoning. Defendant demurred to the motion for judgment on the ground that the facts alleged did not entitle Plaintiff to recover. How ought the Court to rule on the demurrer?

(SALES) The court should overrule the defendant's demurrer. The transaction between a restaurant keeper and his patron is a sale, implying a warranty that the food is wholesome and fit for human consumption, for the breach of which the restaurant-keeper is liable for consequential damages. 207 Va.100; Va.Code 8.2-314.

Section 3 June 1968.

1. Sam Jones and Jack Smith borrowed \$1,000 from Quick Finance Co. and gave in return their joint promise to repay the loan in 90 days. When the debt became due, Jones and Smith defaulted. After much harassment, Quick Finance Co. obtained \$250 from Jones in return for a written release of Jones from any further obligation to Quick Finance Co. It then attempted to collect \$750 from Smith. When Smith refused to pay more than \$500, Quick Finance Co. threatened to notify Smith's employer of this indebtedness. Finally yielding to this pressure, Smith paid Quick Finance Co. \$750.

Smith now consults you and asks if he is entitled to recover from Jones \$250 or any part of the money Smith paid Quick Finance Co. How ought you to advise Smith? (CREDITORS RIGHTS) Smith is entitled to recover \$250 from the Quick Finance Co. or Jones. A creditor may compound or compromise with any joint contractor or co-obligor, and release him from all liability on his contract or obligation, without impairing the contract or obligation as to the other joint contractors or co-



obligors. When such compounding or compromise is made, the contract or obligation shall be credited with a full share of the party released. Therefore Quick Finance Co.'s acceptance of \$250 from Jones acted as a full settlement of one half of the total outstanding obligations due them. This being the case Smith was only obligated for \$500 to Quick and is entitled to recover \$250 from them. Further Smith may enforce his right of contribution against Jones. Va. Code 11-10; 11-11; 11-13.

2. On June 1, 1967, Adolph granted Zelda a one-year written option to buy Adolph's farm in Roanoke County, Va., for \$20,000. For the option Zelda paid Adolph \$500, to be applied against the purchase price if she exercised the option. Zelda promptly recorded the option. On April 1, 1968, Adolph died intestate survived by his son, Sam, and his daughter, Dora. After Adolph's death, and within one year from the date of the option, Zelda notified Adolph's Administrator that she elected to exercise the option and requested the Administrator to execute a deed to Zelda, which he did.

Five years before Adolph's death, Happy Finance Co. obtained a \$500 judgment against son, Sam, which it duly docketed in Roanoke County on June 10, 1963. The Success National Bank obtained a \$12,000 judgment against daughter, Dora, in 1964, which it duly docketed in Roanoke County on October 10, 1964.

At the time of his death, Adolph owed Cassius \$3,000 secured by a vendor's lien on the farm which Cassius conveyed to him in 1960, said deed having been promptly recorded. He also was indebted to Citizens Bank for \$7,000 secured by a deed of trust on his farm, the deed of trust having been duly recorded August 1, 1963. Quick Cash Loan Co. had obtained a judgment against Adolph for \$4,000 which had been properly docketed in Roanoke County on Feb. 13, 1964.

Which of the foregoing debts, if any, must be satisfied to pass an unencumbered title to Zelda?

(CREDITOR'S RIGHTS) When any deceased person shall have bona fide sold any land and shall have given a written contract to the purchaser to convey the same and the written contract has been duly recorded in the county or corporation wherein the land is situated, his executor or administrator may, upon the payment of the price or the balance thereof remaining unpaid and a full compliance with the conditions of the written contract, execute a deed to the purchaser conveying such real estate as shall be specified in such written contract and such deed shall convey the title as fully as if it had been executed by the deceased obligor. Cassius's \$3,000 vendor's lien, the Citizen Bank's deed of trust for \$7,000, and the \$4,000 judgment lien obtained by Quick Cash Loan Co. must be satisfied to pass unencumbered title to Zelda. Va. Code #64-138.

3. H and W, residents of Shenandoah County, Va., had been married for three years when W confessed to H that recently she had committed adultery. He promptly took her to her father's home and told him that they were separating because he believed her pregnant by another man. The next day H and W consulted Lawyer and had him prepare a separation agreement which was never actually executed. Four days after she had confessed her adultery, H and W resumed marital relations. He continued to be suspicious that his wife was pregnant by another man and had her examined by two physicians to ascertain whether she was pregnant. The reports were inconclusive. About two weeks after they had resumed their marital relations, H left W intending never to return. He brought a suit for divorce from her in the Circuit Court of Shenandoah County on the ground of adultery and she filed an answer setting forth condonation and a crossbill in which she prayed for a divorce on the ground that he had willfully deserted her. How ought the Chancellor to decide the case on the above facts: (FAMILY LAW) When the suit is for divorce for adultery, the divorce shall not be granted if it appears that the parties voluntarily cohabited after the knowledge of the fact of adultery, or that it occurred more than 5 years before the institution of the suit, or that it was committed by procurement or connivance of the plaintiff.

In the present case it appears without contradiction that the husband knew of his infidelity and that after this knowledge of the fact of adultery on her part he resumed voluntary cohabitation with her. Thus the Chancellor should decide that the husband's condonation of the wife's adulterous acts bar his rights to a --



divorce on the ground of adultery. Further he should find that the husband willfully deserted his wife without just cause. Va. Code 20-94; 206 Va. 535.

4. On February 1, 1966, Contractor entered into a written contract with Owner for the construction of a home for the latter in Tazewell County, Va., for \$30,000. On the same date Contractor, as principal, and American, as surety, executed a performance bond payable to Owner conditioned upon the faithful performance by Contractor of its obligations under the contract with Owner. Also, as collateral security for the faithful performance of its contract with Owner, Contractor assigned to Trust Co., as Trustee, 100 shares of the common stock of XYZ Corporation, which then had a market value of \$5,000. Contractor became insolvent and ceased work on the home on Sept. 15, 1966. Owner completed construction on October 20, 1967, at a cost of \$35,000. Owner then instituted an action against American on its bond in the Circuit Court of Tazewell County for \$5,000. American defended on the ground that it was released from liability on the bond because Owner had failed to proceed against the stock of XYZ Corporation, which was worth \$5,000 at the time of Contractor's default but which was worthless because of the insolvency of XYZ Corporation when suit was instituted against American.

How ought the Court to rule on this defense?

(CREDITOR'S RIGHTS) The court should rule against the defense. Mere inaction on Owner's part does not relieve the surety of its obligation to perform under the terms of the bond. Owner was under no obligation to exhaust remedies against the Contractor before resorting to American. 203 Va. 802.

5. Debtor owed a number of people money. One of them, Vigilant, pressed him for payment and threatened legal action. Thereupon, Debtor wrote Vigilant: "Austin owes me more than I owe you, and if you won't sue me now I will pay you out of that money as soon as I get it." Vigilant accepted and relied on Debtor's written promise but while he waited to receive the money, Wideawake, another creditor of Debtor, obtained from Debtor a written assignment of the whole amount owed by Austin. Vigilant claims that Debtor's letter constituted an equitable assignment to him of enough of the Austin debt to satisfy his claim. Is this correct?

(EQUITY) No. A mere promise or agreement to pay a debt out of a designated fund, when received, does not give an equitable lien upon the fund, nor operate as an equitable assignment of it. Something more is necessary. To constitute an equitable assignment there must be an assignment or transfer of the fund or some definite portion of it, so that the person owing the debt or holding the fund on which the order's drawn can safely pay the order, and is compellable to do so, though forbidden by the drawer. Here the letter to Vigilant failed to satisfy these criteria. 206 Va. 673; 94 Va. 741.

6. Cantrell was the trustee in a deed of trust on Blackacre executed by Blackford, which secured South the payment of a note made by Blackford for \$10,000. No examination was made of the title to Blackacre. One day Cantrell noticed in the Clerk's Office a judgment in favor of Sharpe against Blackford for \$5,000 which had been docketed before the deed of trust was executed. Blackford was in financial difficulty and it was questionable whether his property would be sufficient to satisfy his debts. Knowing all these facts, Cantrell approached Sharpe and offered to buy the judgment at a substantial discount. After some discussion, Sharpe sold and assigned to Cantrell the judgment for \$3,500 cash, which Cantrell paid from his own funds. Shortly after this, South requested Cantrell to foreclose the deed of trust. The sale was advertised and conducted in strict accordance with the terms of the deed of trust, and Blackacre was sold to Purchaser for \$7,500 net, cash, out of which Cantrell paid to himself \$5,750, the then principal and interest of the Sharpe judgment, and tendered the remainder to South on the note secured by the deed of trust. But South having just learned of the Sharpe judgment and its assignment to Cantrell, demanded payment of the entire net of \$7,500. Is he entitled to it?

(EQUITY) No. Cantrell is only entitled to \$3,500 and South to the remaining \$4,000. Cantrell will not be allowed to take advantage of his fiduciary relationship with South. Therefore he may not recover more than he paid for its purchase.



7. Barrister was guardian for Ward. Borrower approached Barrister and said, "These banks won't make me a 5 year loan at 6% interest (the then legal rate). If you can get me a 5 year loan at 6%, I will secure it by a first lien on real estate worth double the loan, pay you a fee of \$500 and all costs attending the execution and recordation of the deed of trust." Barrister, as guardian, having on hand uninvested funds belonging to Ward made the loan as guardian and collected the \$500 fee for himself. Ward learned of the transaction and contended that Barrister pay to the guardianship this \$500. Is this contention sound?

(EQUITY) Yes. Nothing in the law of fiduciary trusts is better settled than that the trustee shall not be allowed to advantage himself in dealings with the trust estate. He should not be allowed to serve himself under the pretense of serving his cestui que trust. This rule is founded on true principles. That is, that the trustee has no right to derive any benefit or advantage from the trust fund out of all his skill and labor in the management of the trust must be directed to the advancement of the interest of his cestui que trust, and the other is that the trustee will not be permitted to create in himself an interest opposite to that of the party for whom he acts. 154 Va. 751.

8. The third clause of a will provides: "I bequeath to my son, John, \$5,000 to be paid out of the money owed me by William Jones."

The testator in his lifetime collected and spent the money owed him but he had had other stocks and bonds worth \$20,000 more than his debts.

What rights, if any, has John in this surplus?

(WILLS) John has the right to collect the entire \$5,000. The legacy here is a demonstrative legacy and as such the legatee will be permitted to receive the \$5,000 out of the general assets of the estate. 20 Michie 383.

9. Thomas Smith, aged 20, was killed in a motor accident. Among his effects was found the following paper, all in his handwriting.

"I, Thomas Smith, unmarried, make and declare this to be my will. I give my automobile to my only brother, \$1,000 to my only sister, and my house and lot I bought to my widowed mother. Given under my hand this 13th day of May, 1968.  
Thomas Smith."

At the time of his death, Thomas owned an automobile, had \$1,500 in the bank and owned a residence in Roanoke. What are the respective rights, if any, in the property of: (A) The brother; (B) The sister; (C) The mother?

(WILLS) Section 64-49 of the Code of Virginia states, "No person of unsound mind or under the age of 21 years shall be capable of making a will, except that minors 18 years of age or upwards may by will dispose of personal estate."

- (a) Under the above section of the code the brother would take the automobile (personalty), under the terms of the will.
- (b) The sister would take the \$1,000 bequeathed in the will. Here again we are dealing with personalty and the code section presents no obstacle.
- (c) The devise of the house and lot to the mother would fail since the testator was under the age of 21. Section 64-1, however, provides that realty will descend and pass to the father and mother or survivor, where there no children, if the person having title to such real estate shall die intestate. With respect to the real estate the decedent is presumed to have died intestate and therefore the realty will pass to the mother.



10. Ike and Pike agreed to go in the clothing business together, so each put up \$10,000 and they opened up a store. At first each devoted all his time to the business but later on Ike acquired other interests and only came to the store on Saturdays or unusually busy days. Pike has just died and his widow asks you the following questions:

- (1) Who is entitled to settle up the business if it is not continued?
  - (2) She would like to take Pike's place and continue the business but Ike won't agree to it. Can she force him to do so?
  - (3) If the business is closed out, will Pike's executor be allowed to collect any pay for Pike's services to the business? How ought you to answer her?
- (BUSINESS ASSOCIATIONS; PARTNERSHIP) Ike. Section 50-37 of the Code of Virginia expressly provides, "Unless otherwise agreed the partners who have not wrongfully dissolved the partnership, or the legal representative of the last surviving partner, not bankrupt, have the right to wind up the partnership affairs; provided, however, that any partner, his legal representative, or his assignee, upon cause shown, may obtain winding up by the court."
- (2) No. One of the chief characteristics of a partnership relation is that it is created only by the voluntary contract of the parties. A partnership relation does not arise by operation of law and no new partner can be introduced into a partnership except by consent of the members. 40 Am.Jur. #17 Partnership.
- (3) No. In the absence of a contract, express or implied, there is no entitlement allowed for compensation beyond the partner's share of the profits for services rendered by him to the partnership business. 4 Am.Jur. #120 Partnership.

4 June 1968.

1. Tom, Dick and Harry were good friends and frequent drinking companions. One night, after a few rounds of highballs, they went from Alexandria to Washington in Tom's car. While in Washington they imbibed several drinks and then started back home. Dick insisted that Tom was too drunk to drive but Harry said, "you are just chicken, Tom can drive better drunk than you can sober, let him alone. On the return journey the car struck a utility pole in Alexandria and Dick was killed. Tom was indicted for involuntary manslaughter. On the trial Tom's attorney asked for an instruction to the effect that if Dick knew of Tom's condition, or by reasonable observation ought to have known it, then he was guilty of contributory negligence in continuing to ride with him, and the jury should find Tom not guilty.

Ought this instruction to have been granted?

(CRIMINAL LAW) The instruction should not have been given as contributory negligence is not a defense to a criminal action. "Contributory negligence has no place in a case of involuntary manslaughter. This case is one of the State against the defendant, and not one of a party seeking damages in a civil action. The conduct of the decedent may have a material bearing on the degree of the defendant's guilt, but if the criminal negligence of the latter is found to be the cause of the death, the defendant is criminally responsible, whether the decedent's failure to use due care contributed to the injury or not." Bell v. Commonwealth, 170 Va.597.

2. Pedestrian was walking along a dark street one night when Footpad stepped from behind a tree, pointed a pistol at him and said, "Give me \$10 or take what this gun can give you." Pedestrian replied, "I haven't but fifty cents on me, you can have that." Footpad then said, "Hand it over and also that sporty tie clip you are wearing, it ought to be worth a hundred dollars." Pursuant to the demand, Pedestrian handed over the fifty cents and the tie clip, and Footpad fled but was later arrested.

Of what offense, if any, was he guilty, assuming that the tie clip was costume jewelry and only worth a few cents?

(CRIMINAL LAW) Footpad was guilty of robbery. Robbery is defined as the felonious taking of money or goods of value from the person of another or in his presence, against his will, by force or putting him in fear. Consequently, robbery contains all of the elements of petit larceny and assault, both of which Footpad committed. Since Footpad is guilty of robbery, the other offenses merge with the robbery offense. 46 Am.Jur. 139.



3. On March 24<sup>th</sup> 1967 Lucky, a Virginia citizen, was indicted in North Carolina for driving an automobile while intoxicated. Lucky was prosecuted on the indictment in the April, 1967, criminal term by the Superior Court of Albemarle County, N.C., but when the jury failed to agree upon a verdict, the judge declared a mistrial and ordered the case continued until the next term. At the August, 1967, term, the Commonwealth's Attorney requested the Court to enter a nolle prosequi with leave to reopen the case, which procedure Lucky's attorney vigorously opposed. Although the Commonwealth's Attorney offered no particular justification for the nolle prosequi order, the Court granted the State's motion over defendant's objection. According to the Constitution of North Carolina, when a Commonwealth's Attorney does not desire to proceed further with a prosecution, he may take a nolle prosequi with leave, which allows him to have the case restored at any future time for trial. While the prosecution against the accused is so suspended, the Constitutional provision allows him to go "whithersoever he will" without bond or restriction.

Lucky now consults you and wants to know if he has been deprived of any constitutional right, and, if so, what right. How should you advise him?  
(CONSTITUTIONAL LAW) I would advise him that he had been deprived of his right to a speedy trial as guaranteed by the Sixth Amendment to the Constitution of the U. S. The Sixth Amendment is made applicable to the states by the Fourteenth amendment. The fact that he is at liberty to go where he desires does not remove the threat of criminal prosecution that is hanging over his head. "By indefinitely prolonging this oppression...the criminal procedure condoned...by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the U. S. "  
Klopper v. North Carolina 18 L.Ed.2d. 1.

4. Marilyn Easy, somewhat intoxicated after a day of drinking while working as a barmaid in Joe's Bar in Norfolk, Va., called Cari-U Taxicab Co. and requested a cab to take her home. Pursuant to this request, Cari-U sent its cab and driver, Will Triet, to take her to her home. During the course of the drive, Will made an amorous advance to Marilyn, which she rejected. Will, who was not a person easily defeated in the quest of an objective, struck Marilyn several times in the hope that this would make her realize the opportunity that she was passing up. Upon realizing that he had been overzealous and that Marilyn was injured because of his blows, he took her to Norfolk General Hospital, where she was admitted and treated.

Marilyn brought an action to recover damages from Cari-U Taxicab Co. and Will Triet on account of injuries received as the result of the attack made upon her by Will. Cari-U filed grounds of defense denying its liability and, together with a supporting affidavit, denied that Will in committing the assault was either acting as an employee of the defendant Cari-U or acting within the scope and course of his employment and that therefore Cari-U was not liable for Will's conduct.

At the conclusion of the plaintiff's evidence, which showed the foregoing facts of Will's attack upon her and her damage, Cari-U moved to strike the plaintiff's evidence and enter summary judgment for it alone.

How ought the Court rule on Cari-U's motion?

(AGENCY) The motion should be denied. The Cari-U Co. would be liable for the assault by its employee upon a passenger under the special liability imposed upon common carriers. "It is firmly established that a passenger is entitled to recover damages for mistreatment on the part of an employee of a common carrier not only where the assault was in the line of the employee's duty, but also where it was merely that of an individual and entirely disconnected with the performance of the employee's duties, if it occurred on the carriers vehicle or during the existence of the carrier-passenger relationship." Simpson v. Taxicab Corp., 203 Va.592.

5. Harried, a director of Alpha, Inc., a Virginia corporation, consults you and advises that a group of unhappy shareholders of Alpha, Inc., has caused a meeting of shareholders to be called for July 3rd expressly for the purpose of ousting him from the board of directors. Harried advises that there is just one class of shareholders of Alpha, Inc.; that he and the other four directors of Alpha, Inc., were elected six months ago for a two-year term; and that he is sure there is no reason



for the shareholders to be dissatisfied with his performance as a director

Harried asks you if there is any chance that the shareholders of Alpha, Inc., at such a meeting can prevent him from serving the remaining eighteen months of his term as a director, if he can show at the meeting that he has performed well and has done nothing to deserve being ousted. How should you advise him?

(CORPORATIONS) I would advise him that his best course of action would be to attempt to persuade the stockholders not to vote against him. The stockholders have the right, however, to remove Harried from his office, with or without cause. "At a meeting called expressly for that purpose, any director may be removed, with or without cause, by a vote of stockholders holding a majority of the shares entitled to vote at an election of directors of the class or classes by which such directors were elected.." #13.1-42 Code of Virginia.

6. Leonard, a director of Omega, Inc., a Virginia corporation, consults you and advises that recently the board of directors of Omega, Inc., declared a dividend, which upon payment, rendered Omega insolvent. Although no member of the Omega board of directors actually checked any financial records or statements and none of them asked any of the officers about the state of the corporation's finances, each of the directors believed that the company was in good financial shape and that the dividend would increase the sale value of the stock of Omega, Inc. Although Leonard thought the corporation was in good financial shape, he voted against declaring the dividend as he preferred to use such sum for funded reserves, and his vote was so noted in the minutes of the meeting.

Leonard asks you if the creditors of Omega, Inc., have any right to recover from him or any of the other directors for all or any part of the dividend paid.

How should you advise him?

(CORPORATION) I would tell Leonard that he is not liable to the creditors for the dividend so declared as he dissented from the vote and had his dissenting vote recorded in the minutes of the meeting. The other directors who voted for the dividend would be jointly and severally liable to the creditors for the amount of the dividend. They would be entitled to contributions from the stockholders who received the dividends in the proportion of the dividend received by each stockholder.

If the directors had relied in good faith on the financial statement of the corporation represented to them to be correct by the president or other officer of the corporation having charge of the books of account, the directors would not have been liable. #13.1-44, Code of Virginia.

7. George Gottrocks had grown very fond of his chauffeur's son, Tom Timid, and was impressed with Tom's intelligence and his desire for an education. One day he called his chauffeur, Nere Timid, into his study and presented him with a check for \$10,000 payable to the order of "Nere Timid, Trustee". George Gottrocks told Nere Timid that the check was for his son's first year's tuition at Gold Coast University. Nere Timid thanked George Gottrocks graciously and departed. That night, Nere Timid purchased around-the-world tickets on a cruise ship for himself and his mistress and paid for them by the check given him by George Gottrocks by endorsing and delivering the same to World Cruise, Inc. George Gottrocks learned of this within several days and he called his attorney and asked if there was not some way he could properly instruct his bank to refuse to honor this check inasmuch as it had been payable to Nere Timid as trustee. How should the attorney advise him? (TRUSTS, NEGOTIABLE INSTRUMENTS) Gottrocks is liable on the check and cannot refuse payment when it is presented by World Cruise, Inc. World Cruise Inc. is a holder in due course of the check. There was not sufficient notice to World Cruise to put them on notice that Timid was in breach of his fiduciary relationship. The mere indication on the face of the instrument that Timid was a fiduciary was not sufficient notice. Since the instrument was payable to "Nere Timid, Trustee", it was payable to Timid and could be negotiated by him. Gottrocks, therefore, could not refuse to honor the check when presented by World Cruise, Inc. His cause of action would lie against Timid for breach of his fiduciary capacity. ##8.3-304(2), 8.3-304(4e), 8.3-117, Code of Virginia.



8. Fred Fraud presents to Woebegon Manufacturing Co. a fraudulent bill for 1,000 widgets that he contends were delivered by him to Woebegon's Florida subsidiary. Relying on the apparent authenticity of the statement, Woebegon delivers to Fred its promissory demand note payable to Bearer for \$500. Fred, who has been hounded by many of his creditors, delivers the note to Shabby Suit Co. as payment for several sets of formal attire, which he had purchased for use at the annual widget convention at the Homestead the previous summer. Shabby Suit Co., in turn, discounts the note to Claude Fraud, Fred's brother, who had full knowledge of the fraudulent transaction with Woebegon. Claude presents the note to Woebegon and demands payment, Woebegon having in the meantime learned of Fred's fraudulent misrepresentation. Is Woebegon liable to Claude on the note?

(NEGOTIABLE INSTRUMENTS) Woebegon is liable to Claude on the note. When Fred transferred the instrument to Shabby Suit Co., which took the note in good faith, for value, and without notice of Fred's fraud, it became a holder in due course of the instrument. When the company transferred the note to Claude, the transfer vested in Claude all of the rights the company had to enforce the note. Claude was not a party to the original fraud, even though he knew of it, and thus by taking the note from a holder in due course, he cuts off any defense that Woebegon might have. #8.3-291, Code of Virginia.

9. Alvin Applicant, a resident of Virginia, applied in Virginia for a policy of life insurance on his life and as beneficiary listed Alma Applicant, his wife. In another section of the application, he stated that he was married to Alma and the marriage ceremony was performed in Bristol, Va., in 1961.

Unknown to Alvin, Alma had married Traveler in 1959, but Traveler had deserted her several weeks after the marriage and neither Traveler nor Alma had ever filed for a divorce. Alma and Alvin subsequently met, and a marriage ceremony was performed in Bristol in 1961, and thereafter they lived together as husband and wife in that City.

Pursuant to, and relying on Alvin's application, Insurance Company issued a policy of insurance on his life with Alma as his beneficiary. Thereafter, Alvin was killed in an accident and Alma applied for the proceeds of the insurance policy. Insurance Company then learned for the first time of Alma's prior marriage and denied coverage, and Alma filed an action at law against it.

At the trial of the case, the above facts were proven and, in addition, Alma testified that she had never told Alvin of her previous marriage and that Alvin knew nothing of it. Insurance Co. called several of its officers and actuaries who testified that they would not have insured Alvin had he revealed that he was living with Alma out of wedlock because this was material to the risk and increased the possibility of violent or premature death. At the conclusion of all the evidence, Insurance Co. moved the court to strike plaintiff's evidence and enter summary judgment in its behalf. How should the court rule?

(INSURANCE) The court should rule in favor of the insurance company and enter summary judgment for it. A misrepresentation in an application for insurance will not bar recovery unless it is proven that the misrepresentation was material to the risk. In this case, the misrepresentation that the plaintiff was decedent's wife was material to the risk, as the insurance company would not have issued the policy if they had known that plaintiff and decedent were not legally man and wife. Therefore, the policy was void. #38.1-336, Code of Virginia; Chitwood v. Prudential Ins. Co., 206 Va. 314; Hawkeye Security Ins. Co. v. Govt. Employees Ins. Co. 207 Va. 944.

10. In 1968, nine individuals, all of whom are residents of the State of Virginia, decided to form a corporation naming themselves as the only stockholders. One of the more astute individuals of the group has pointed out that since the corporation could expect a yearly income, which all nine contemplate being distributed to them, the net income of the corporation might be subjected to double taxation in that a corporate income tax might be imposed upon the income earned by the corporation and another tax imposed upon the individuals on the dividends from this income being distributed to them as stockholders. The group consults you and asks if



they can form this corporation so that the double taxation can be legally avoided.

How should you advise them?

(TAX) As the corporation is a small corporation (less than ten stockholders), it can, with the consent of all of the stockholders file an election under Subchapter S of the Internal Revenue Code. While this election is in effect, the corporation is not subject to the corporate income tax, the accumulated earning tax, or the personal holding company tax; and the corporate income, whether distributed or not, is taxed to the shareholders. Subchapter S, Internal Revenue Code.



1 Dec.1968.

1. Witness Wilson testified on behalf of plaintiff in an action for breach of a sales contract. While testifying, Wilson stated that he could not remember a certain sequence of events with exact dates and times as to deliveries. Upon inquiry by plaintiff's counsel, he stated that he believed his memory could be refreshed if he could look at certain notes which he had in a folder. When he started to testify, defense counsel objected and it was shown that the notes to which he had referred were a list of dates, times, and places of deliveries. On being questioned out of the presence of the jury, Wilson admitted that the information contained in the notes was obtained from various records over none of which he had custody or control and the actual memorandum to which he referred was not written by him but was, in fact, written by a secretary in a plant where he worked, but he stated that after consulting this memorandum, he remembered the dates, times, places, and also the details of his handling of the deliveries referred to.

How should the Court rule on defendant's objection?

(EVIDENCE) The court should overrule the objection. The testimony is present memory refreshed rather than past memory recollected. If a witness is unable to recall a fact about which he is questioned, and is asked to look at a writing containing an account of the fact, he may then be able to say "I now remember the fact"; and from there proceed to testify from an independent recollection. This is termed **refreshing** the recollection, and any writing which stimulates and revives a recollection may be used to refresh the memory. It is of no import who prepared the writing or whether or not the writing itself would be admissible into evidence. He, however, must speak from his own recollection thus refreshed, and not from the source of the refreshment. Cross-examination is, of course, always available to expose any improper practice or suspicious circumstances. 52 Va.527; 139 Va.748; Nash, Evid #27.

2. As the result of falling from a hotel window, Cain was killed on March 17, 1968, and was survived by his widow and their daughter. The daughter was a sixteen-year-old invalid, confined to an institution at considerable monthly expense because of an incurable disease. Although Cain ostensibly lived with his wife and used a portion of his wages to help support the family, he was a heavy drinker and periodically stayed for weeks at a time with his secretary at her apartment, and three times within the last two years, his wife had sworn out a warrant charging him with physical assault.

On November 20, 1968, in the Circuit Court of Albermarle County, Cain's administrator brought an action at law against Waldorf Hotel Corporation under the Virginia Wrongful Death Act seeking a recovery for Cain's wrongful death. During the trial, Mrs. Cain testified that the family had sustained a great personal loss because of Cain's death and testified in detail as to the invalid daughter's situation as stated above. Defense counsel objected to the testimony about the daughter. Defendant offered evidence as to the above-described habits and activities of Cain, to which testimony plaintiff's counsel objected.

How should the Court rule on:

(a) Defendant's objection to Mrs. Cain's testimony concerning the daughter?

(b) Plaintiff's objection to defendant's proffered evidence?

(EVIDENCE)(a) Evidence of extraordinary support costs for defendant children in a wrongful death action are inadmissible. The details of the condition of dependency cannot be shown. The court should therefore sustain the objection.

(b) The court should overrule the objection. Evidence that the husband and wife were living apart at the time of death and desertion and adultery are admissible on the issue of quantum of damages since the wife introduced evidence as to the loss sustained. 199 Va. 817; 197 Va. 112.



3. A judgment was entered by the Circuit Court of Greene County, Va., against Bowling Green Construction Corporation on June 3, 1968. Within sixty days thereafter counsel for the Company filed in the Clerk's Office notice of appeal and assignments of error. The Trial Judge signed the transcript of the evidence and other incidents of the trial within sixty days of the final judgment order, after timely notice had been given to opposing counsel that the transcript would be submitted to the Trial Judge for signature. On Sept. 25, 1968, counsel for Bowling Green Construction Corporation filed with the Clerk of the Trial Court a written designation of the portions of the record that the Company desired printed, and on Sept. 27, 1968, counsel for the appellant notified the Clerk of the Trial Court to transmit the record to the Clerk of the Supreme Court of Appeals in Richmond. The Clerk transmitted the record pursuant to this request and it was received in the Clerk's Office, in Richmond, on Sept. 30, 1968. Counsel for appellee in the Appellate Court moved to dismiss the appeal. How should the Court rule on the motion? (VIRGINIA APPELLATE PROCEDURE) The court should sustain the motion to dismiss. Rule 5:1, #6(a) provides that, "not less than twenty days before the record is transmitted (to the clerk or a justice of the appellate court), counsel for appellant shall file with the clerk (of the trial court) a designation of the parts of the record he wishes printed."

Rule 5:1 #7 imposes a duty upon the clerk of the trial court to transmit the record only on request of appellant's counsel after twenty days or at the request of both counsel within less time.

In the case at bar the record was not designated for printing 20 days prior to the time required and therefore the court must dismiss the action. Rule 5:1 ##6,7.

4. On Dec. 1, 1968, plaintiff Frazier instituted an action at law in the Circuit Court of Albemarle County against defendant Truck Corporation by a motion for judgment, the body of which alleged:

1. That plaintiff purchased from defendant on January 1, 1968 at a price of \$8,000, payable \$500 per month, a Bull Pup truck, which defendant knew was to be used in plaintiff's business of hauling trailers for long distances, and defendant expressly warranted to the plaintiff that the truck was free of all defects in material and workmanship.
2. That after three months' use, the truck proved to be defective in material and workmanship and would not perform as specified and defendant refused to remedy the said defect, so that the truck was useless for plaintiff's business.
3. That there was no specific provision in the sales contract for repossession of the vehicle for non-payment.
4. That because plaintiff refused to pay \$500 per month, subsequent to March 1, 1968, the defendant did wrongfully and by force take the truck from the plaintiff's premises on June 1, 1968.
5. That plaintiff had been damaged in the sum of \$25,000 because of defendant's breach of its express warranty and because of defendant's wrongful repossession of the said truck.

What is the proper pleading which defendant's counsel should file?

(CIVIL PROCEDURE) Defendant's counsel should demur to the complaint. Causes of action in tort and contract should not be joined in the same notice of motion or declaration. They are not of the same nature. Plaintiff should be made to separate his causes of action. 186 Va.85; 205 Va. 579.

5. Defendant rented to plaintiff a house and garage in Norfolk, Va., with the responsibility of maintaining the premises remaining with the defendant. As a result of the negligent maintenance by the defendant of the furnace, located in the garage, an explosion occurred on Feb. 1, 1966, and plaintiff's automobile and certain personal effects were destroyed or damaged and plaintiff, who was in the garage at the time of the explosion, sustained personal injuries.

On January 25, 1968, plaintiff instituted an action at law in the Circuit Court of the City of Norfolk seeking a recovery for personal injuries sustained as a



result of the explosion. After issue was joined, a trial on the merits on March 30, 1968, resulted in a jury finding the defendant liable and rendering a verdict for the plaintiff in the sum of \$10,000, in which judgment for the plaintiff was entered.

On June 30, 1968, plaintiff instituted an action at law against the defendant in the Circuit Court of the City of Norfolk seeking a recovery of damages in the sum of \$4,000 for the destruction of his automobile, \$400 for loss of use of his automobile, \$500 for damage to certain of his clothes, and \$2,000 for damages to his home machine shop and tools, alleging that such damages resulted from the said explosion, it being admitted that these damages were existent and ascertainable at the time plaintiff instituted and tried the prior action. The motion for judgment also alleged the judgment previously obtained and pleaded the same as a prior finding of liability on the defendant so that the issue of liability was res adjudicata and that plaintiff was therefore entitled to a trial on the issue of damages only.

Defendant filed responsive pleadings setting forth the following alternative contentions:

- (a) Plaintiff's second cause of action should be dismissed since has but one cause of action for all damages sustained as a result of the explosion, and having failed to allege and prove property damages in existence at the time of the first cause of action, he is precluded from later instituting a cause of action for the same.
- (b) If the court should hold that plaintiff is entitled to proceed with the second cause of action, all issues, including the issue of liability, should be litigated; otherwise, defendant would be deprived of a fair trial.

How should the Court rule on each of defendant's contentions?

(CIVIL PROCEDURE)(a) A single tort injury, resulting in damage to both person and property, gives rise to two distinct causes of action and recovery in one is no bar to an action subsequently commenced for the other. Although this is the minority rule it is the rule in the state of Virginia.

(b) The defendant is estopped from denying liability since that issue was settled at the first trial and is now res judicata. The plaintiff is therefore entitled to a trial on the issue of damages alone. 189 Va. 1; Va.8-24.

6. Plaintiff, a lifetime resident of Richmond, Va., was injured in an automobile accident occurring in Richmond on Nov. 1, 1967, when his automobile was in a collision with one driven by defendant, a citizen of North Carolina.

Plaintiff brought an action on January 5, 1968, in the Law and Equity Court of the City of Richmond seeking a recovery of \$25,000 for personal injuries. After issue was joined, the case was set for trial for April 5, 1968, and on the morning of trial, plaintiff's counsel moved the Court for entry of an order of nonsuit. Defendant's counsel objected, stating that the case had been set for trial for several months and defendant had come from North Carolina at considerable trouble and expense, that an expert witness had been engaged and brought to court at considerable expense, that one of the key eyewitnesses to the accident was leaving the country the next day, and that he, defendant's counsel, had received no prior notice of plaintiff's motion for a nonsuit. Plaintiff's counsel stated that he had not prepared fully for trial and simply did not want to try the case on that date. Over defendant's objection, the Court entered an order of nonsuit.

On June 10, 1968, plaintiff's counsel filed a motion for judgment in the Hustings Court, Part II, of the City of Richmond, another court having civil jurisdiction, and a complaint in the U.S. District Court for the Eastern District of Virginia, Richmond Division, each action being for the same personal injury and seeking a recovery for the same amount of \$25,000. Defendant's counsel filed a motion to dismiss in each court on the ground that the prior nonsuit order was a final order and plaintiff could not reinstitute the action and that, in any event, plaintiff could not institute a subsequent action in either the Hustings Court, Part II, of the City of Richmond or the U. S. District Court.

(a) Did the Court err in entering the nonsuit order of April 5, 1968?

(b) Should the action instituted in the Hustings Court, Part II, of the City of Richmond be dismissed?



- (c) Should the action instituted in the U. S. District Court be dismissed?  
(CIVIL PROCEDURE-Jurisdiction-Federal Jurisdiction)(a) No. The plaintiff may take a nonsuit for any reason. By suffering a nonsuit, plaintiff ends his present suit without prejudice to his right to bring another; and it is not a final judgment.
- (b) Yes. #8-220 of the Virginia Code provides that after nonsuit no new proceeding on the same cause of action shall be had in any court other than that in which the nonsuit was taken.
- (c) No. A State statute cannot limit the jurisdiction of the courts of the United States. Thus a federal court is not bound by the procedural aspects of Virginia's nonsuit statute. Va.8-220; 90 Va.348; 203 F2d 287.

7. Layne, a citizen of Tennessee, instituted an action at law against Mack, a citizen of Virginia, in the U.S. District Court for the Eastern District of Virginia seeking a recovery of damages for personal injuries in the sum of \$20,000 allegedly sustained as a result of a breach of implied warranty of fitness of a defective lawnmower purchased by Layne from Mack, a retail merchant. Mack filed his answer to the complaint, admitting jurisdiction but denying liability, and at the same time filed a third party complaint against Noland, a citizen of Virginia, alleging that Noland manufactured the lawnmower and that if plaintiff is entitled to a recovery for breach of implied warranty, then Noland should be held liable to Mack for any recovery by the plaintiff against Mack.

Noland filed a motion to dismiss the third-party complaint on the grounds (a) that any action for personal injury because of an alleged breach of warranty for which Noland would be responsible must be brought directly against Noland by Layne, and (b) that in any event, the Federal court lacked jurisdiction insofar as the third-party complaint of Mack against Noland was concerned.

How should the Court rule on each ground of the motion to dismiss?  
(FEDERAL PROCEDURE) The Court should overrule the motion to dismiss. There is no diversity between the third party plaintiff and the third party defendant. But since the second action is ancillary to the first action there is no need for jurisdictional requirement. FRCP 14; Moore 14.25

8. Defendant Duffy was convicted of grand larceny in the Corporation Court of the City of Norfolk on an indictment that read, in part, as follows:

"....That defendant Duffy, then residing at 900 Wesley St., Portsmouth, Va., did on the evening of March 15, 1968, break into and unlawfully and feloniously enter Ronald's Clothing Store, located at 400 Main St., Norfolk, Va., and did then and there unlawfully and feloniously steal, take, and carry away three suits of clothing of the value of \$100 each, all against the peace and dignity of the Commonwealth."

Duffy had been arrested on the evening of March 16, with the allegedly stolen goods in his possession. The evidence, in part, at the trial was that Tom Citizen had seen a person, whom he could not identify, loitering around the store building at 10:00 p.m. on March 15 and Carl Aware had seen a person resembling defendant placing bundles in an automobile parked in front of the store at 5:00 a.m. on March 16. It was also shown that Duffy had been living and still lived at 900 Willow Road, Virginia Beach, Virginia.

Duffy moved to set aside the conviction because of alleged defects and fatal variances in the indictment on the following grounds, all of which had been properly raised during the trial;

(a) That the indictment did not specifically aver that the offense was committed "within the jurisdiction of the court."

(b) That the indictment did not sufficiently identify him as the accused as the alleged residence was conclusively shown to be in error.

(c) That the only evidence of any offense being committed showed that the same was committed on March 16, if at all, and therefore, he could not be convicted on the indictment alleging an offense on March 15.

How should the Court rule on each of these contentions?



(CRIMINAL PROCEDURE)(a) The motion should be overruled. The recitation of the location of the offense in the indictment clearly shows that the offense was committed "within the jurisdiction of the court."

(b) This is a completely immaterial omission, where the defendant has been otherwise properly identified. In the case at bar the defendant was arrested with the allegedly stolen goods in his possession.

(c) Under section 19.1-172, an indictment is invalid for failing to state or imperfectly stating the time of the offense only when time is the essence of the offense. Such was not the case here, and in a felony case the Commonwealth may prove the commission of a crime charged on a date different from that alleged in the indictment. 185 Va. 26; 140 Va. 475; 207 Va. 230.

9. Homer Friend commenced a suit in equity in the Circuit Court of Albemarle County, Virginia, against Thomas Belt and Vance Pippin. Belt demurred to the original bill and he also filed a cross bill against Friend and Pippin seeking affirmative relief. Pippin filed a written motion, supported by affidavit, that Friend's suit be dismissed as to him on the ground that he was not a proper party to the original bill. A decree was entered sustaining Belt's demurrer to the original bill, and Friend did not request leave to amend his original bill. By its decree the court also dismissed Friend's suit against Pippin on the ground that he was not a proper party to the suit. Shortly after that decree was entered Friend presented a decree to the court for dismissal of Belt's cross bill and Pippin presented a decree for dismissal of Belt's cross bill against him.

1. Should the Court enter the decree submitted by Friend?

2. Should the Court enter the decree submitted by Pippin?

(CIVIL PROCEDURE-EQUITY) 1. No. The cross bill sought affirmative relief and is not defensive in character, therefore the court should refuse to enter the decree submitted by Friend.

2. Yes. Pippin never was a proper party to the cross bill. Thus, where the original bill is dismissed as to a particular party on the ground that he is not a proper party. The dismissal of the cross-bill as to him necessarily follows, since the latter bill can be maintained only against a proper party to the original bill.  
Lile on Equity #153, P.88.

10. Herb Foster is a resident of Bristol, Va., and his first cousin Jim Foster is a resident of Kingsport, Tennessee. During Christmas vacation in 1964, Jim was visiting Herb in Bristol. When Jim was ready to drive back to Kingsport, he asked Herb whether he could have an old rocking chair that had belonged to their joint grandfather, and which chair was in the possession of, and owned by Herb. Herb replied that he would let Jim have the chair, but that he wished it returned when requested. Jim did not understand what Herb had told him, and believed that Herb was making him a gift of the chair. Jim put the rocking chair in the rear of his automobile and drove off to Kingsport where he kept the chair in his living room. In June of 1965, Herb wrote a letter to Jim asking him to return the rocking chair. Jim replied that he refused to do so, and claimed that the chair was his. When Jim came to Bristol in November of 1968, Herb had him duly served with a notice and a motion for judgment in detinue to compel return of the rocking chair. The statute of limitations on an action to recover possession of personal property is 5 years in Virginia, while the period of limitation in Tennessee is 3 years. Jim pleads the Tennessee limitation of 3 years in defense of the action. Is this a good defense. (CONFLICTS-STATUTE OF LIMITATIONS) Yes. With reference to the conflicts aspect of the case the same law is applicable to personalty as to realty. The law of the state in which real estate is located determines whether title thereto has been acquired by adverse possession. Similarly, the acquisition of title to personalty by adverse possession is governed by the law of the state in which the property is situated. In this case the three year statute of limitation in Tennessee is controlling. Rest.Conflicts 259; 13 Va.57,61,63,65; 3 Am.Jr.2d Adv.Poss #5; 6 Lawyers Ed.495.