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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 4959

In the Supreme Court of Appeals of Virginia at Richmond

SAMUEL R. HUBBARD, JR.

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF ORANGE COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4959

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 10th day of October, 1958.

SAMUEL R. HUBBARD, JR., Plaintiff in Error,

against

COMMONWEALTH OF VIRGINIA, Defendant in Error.

From the Circuit Court of Orange County

Upon the petition of Samuel R. Hubbard, Jr., a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Orange County on the 26th day of March, 1958, in a prosecution by the Commonwealth against the said petitioner for a felony; but said *supersedeas*, however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

RECORD

* * * * *

page 3 } Commonwealth of Virginia,

v.

Samuel R. Hubbard, Jr.

Indictment-Felony-Issuing and Uttering Bad Check and Grand Larceny.

Commonwealth of Virginia,
County of Orange, to-wit:

In the Circuit Court of the County of Orange:

First Count: The Grand Jurors of the Commonwealth of Virginia in and for the body of the County of Orange, and now attending the said Court at its November Term, 1957, upon their oaths present that Samuel R. Hubbard, Jr. heretofore, to-wit: on or about the 18th day of September, 1957, in said County of Orange, Virginia, unlawfully and feloniously did make and draw a check, draft or order for the payment of money in the amount of $3,150.00 upon the Savings Bank and Trust Company of Richmond, Virginia, payable to the order of Reynolds Pontiac, with the intent to defraud, he, the said Samuel R. Hubbard, Jr., knowing at the time of such making and drawing of said instrument that the maker or drawer had not sufficient funds in or credit with said bank for the payment of said instrument, against the peace and dignity of the Commonwealth.

Second Count: And the Grand Jurors aforesaid, upon their oaths aforesaid, further do present that the said Samuel R. Hubbard, Jr., heretofore, to-wit: on or about the 18th day of September, 1957, in the said County of Orange, Virginia, unlawfully and feloniously did utter and deliver unto Chester Reynolds for Reynolds Pontiac a check, draft or order for the payment of money in the amount of $3,-150.00 upon the Savings Bank and Trust Company of Richmond, Virginia, drawn by Samuel R. Hubbard, Jr., payable to the order of Reynolds Pontiac, with the intent to defraud, he, the said Samuel R. Hubbard, Jr., knowing at the time of said uttering and delivering of said instrument that the

maker or drawer had not sufficient funds in or credit with said bank for the payment of said instrument, against the peace and dignity of the Commonwealth.

Third Count: And the Grand Jurors aforesaid, upon their oaths aforesaid, further do present that the said page 4} Samuel R. Hubbard, Jr., heretofore, to-wit: on or about the 18th day of September, 1957, in the said County of Orange, Virginia, one 1957 Pontiac station-wagon automobile of the value of $3,150.00 the property of Reynolds Pontiac unlawfully and feloniously did steal, take, and carry away, against the pece and dignity of the Commonwealth.

(on back)

A true bill.

W. H. KITE, Foreman.

11/25/57.
1/28/58 Arraigned
Plea not Guilty
Waived trial by jury.

• • • • •

page 18} March 26, 1958.

Virginia,

In the Circuit Court of Orange County.

Commonwealth of Virginia,

v.

Samuel R. Hubbard, Jr.

ORDER (Indictment #1).

This day again came the attorney for the Commonwealth, and this day again came the attorney for the accused and the accused Samuel R. Hubbard, Jr. appeared personally in open court pursuant to his recognizance.

And the accused having been arraigned on the 28th day of January, 1958 upon the indictment (#1) returned against

him on the 25th day of November, 1957 by a lawfully empaneled grand jury in and for the County of Orange, Virginia, charging him with a felony, to-wit: making and drawing a bad check—Count No. 1; uttering and delivering a bad check—Count No. 2; grand larceny—Count No. 3, and upon his arraignment on the said 28th day of January, 1958 the accused pleaded not guilty to all counts of said Indictment #1, and in person waived trial by jury, with the concurrence of the attorney for the Commonwealth and of the court entered of record.

Whereupon this 26th day of March, 1958 the court, having heard all the evidence presented by the Commonwealth and all the evidence presented by the accused, and arguments and recommendations of counsel, is of the opinion the accused Samuel R. Hubbard, Jr. is guilty on all three counts, as charged in Indictment #1, and doth accordingly so find.

Thereupon the court inquired of the accused if he had anything further he wished to say or knew of any reason why the sentence of the court should not be pronounced, and the accused replied in the negative.

Thereupon the court doth sentence the accused Samuel R. Hubbard, Jr. to confinement in the penitentiary for one year for making and drawing a bad check, as charged page 19 } in Count No. 1 of the indictment; and one year in the penitentiary for uttering and delivering a bad check, as charged in Count No. 2 of the indictment; and one year in the penitentiary for grand larceny, as charged in Count No. 3 of the indictment, and said sentences are to run consecutively.

To which verdict and sentence of the court, counsel for the defendant excepted, as contrary to the law and the evidence.

Whereupon, the defendant by counsel having indicated an intention to appeal the judgment of the court to the Supreme Court of Appeals of Virginia, on motion of the defendant it is ordered that the execution of the sentence herein imposed shall be, and is, hereby suspended for a period of sixty-days from the entry of this order, in order to give counsel time to perfect an appeal.

The accused was released upon his continuing bond for his appearance in this court on the 26th day of May, 1958.

The accused was personally present throughout the entire proceedings.

Enter:

C. CHAMPION BOWLES, Judge.

page 20 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To the Clerk of the Circuit Court of Orange County:

Counsel for Samuel R. Hubbard, Jr., the defendant in the above-styled case in the Circuit Court of Orange County, Virginia, hereby gives notice of appeal from the order entered in this case on March 26, 1958, and sets forth the following assignments of error:

1. That the Court failed to strike the Commonwealth's evidence and find for the defendant on the ground that the Commonwealth's evidence was insufficient to support a verdict of guilty.
2. That the verdict was contrary to the law and the evidence in that the evidence did not warrant a finding of guilty under Section 18-180, Code of Virginia, or under Section 6-129, Code of Virginia, 1950, as amended.
3. The verdict is invalid in that the three counts upon which the defendant was found guilty are all larceny counts involving one transaction and the Court found the defendant guilty and sentenced the defendant three times for the same larceny transaction.
4. That the Court did not require the Commonwealth to elect as to which of the larceny counts the Commonwealth would proceed under.

WHITE, WHITE AND ROBERTS
By JAMES A. HANDRIDGE
Counsel for Samuel R. Hubbard, Jr.

page 21 }

* * * * *

Filed 23 May 1958 Circuit Court of Orange County, Virginia.

H. C. DeJARNETTE, Clerk.

* * * * *

page 2 }

* * * * *

CHESTER A. REYNOLDS, JR.,
a witness for the Commonwealth, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Higginbotham:

Q. You are C. A. Reynolds?

A. Junior, yes, sir.

Q. Junior, and are you part owner of Reynolds Pontiac?

A. Yes, sir.

Q. You are general manager there and have charge of it?

A. Yes, sir.

Q. State what the occurrence was between you and Samuel R. Hubbard back in September of this past year?

A. On the 18th day of September Mr. Hubbard called me in regard to purchasing a couple of new Pontiacs; he saw my brother the day before, which there was no transac-
page 3 } tion made, because my brother at that time told him we didn't sell new automobiles to used car dealers; he called me on the 18th and I agreed to sell him the automobiles over the phone and he asked me to have them ready that afternoon around 2 o'clock, which I had them ready. He came up and purchased the automobiles from me on the agreed price and—

Q. What time did he get here?

A. I think it was somewhere around 2 o'clock.

Q. How long did you talk before the actual sale was consummated?

A. Oh, a matter of about five minutes, something like that, five or ten minutes.

Q. What did he say as to his business?

A. He said that he had a very good business and he dealt in late model automobiles and that was the kind of cars that he wanted, new automobiles that had been slightly used.

Q. Did you know this man before?

A. No, sir, I didn't know him before.

Q. Did you know of his business establishment?

A. Yes, sir, I had seen it in Richmond and it looked like a very progressive lot to me on the occasions I had been down there, he had late model cars sitting there.

Chester A. Reynolds, Jr.

Q. What other statements did he make to you about his business?

page 4 } A. Well, he said he was buying new cars and he needed a couple of new Pontiacs, and that he always kept late model cars on his lot, around twenty.

Q. He said that he needed new Pontiacs?

A. Yes, sir.

Q. Did he say anything about what his condition of business was?

A. He said his condition of business was very, very good, he gave me a very good picture of his business.

Q. What influence did that have on you as to making the transactions?

A. Well, it influenced me very much, that the man was all right, I didn't have any reason to believe him otherwise, and he also made the statement that he had a $20,000 floor-plan with the Bank & Trust Company in Richmond.

Q. Was that the Savings Bank & Trust Company in Richmond and they were taking care of him because of his numerous automobiles, that it just took a whole lot of money, so he had made arrangements with them for a $20,000 floor-plan.

Q. What else did he say?

A. He also said, he would have to have the titles to the cars when he took them on down there that day, the day that he gave me the checks, and he did also say that the check would be good by the time it got to Richmond, but

page 5 } he would have to have the titles to the automobiles to present them to the bank so that he could floor-plan the car and they would loan him money on the cars.

Q. All right, so what then happened?

A. Well, I think it was the next day he called me up—

Q. No, before that, tell about the completing of the transaction.

A. Well, the transaction was made, he gave me the checks, gave me the checks on the automobiles.

Q. How many automobiles were involved?

A. Two cars.

Q. Did both of them belong to your Company?

A. No, one belonged to my company and the other belonged to Earl Lonergan.

Q. How much did he give you a check for for the car that belonged to the Company?

A. I have the checks here somewhere. The car that belonged to the Company was a '57 Pontiac Station Wagon.

Chester A. Reynolds, Jr.

Q. What was the purchase price?
A. This is the one to Mr. Lonergan. The one to the Company was $3150.00.
Q. Is this the check that he gave you on that occasion?
A. Yes, sir.
Q. All right, what happened to this check?
A. Well the check was just no good, the account
page 6 } was closed, it was marked "Account Closed."

Mr. Higginbotham: We offer this check in evidence, your Honor.
The Court: What is the date of that check?
Mr. Higginbotham: September 18, 1957.
The Court: That will be Commonwealth's Exhibit 1.

Q. Is that the date he was there at your place?
A. Yes, sir.
Q. Was that the date the transaction was closed?
A. Yes, sir.

By The Court:
Q. Did you deliver title on that date?
A. Yes, sir.

By Mr. Higginbotham:
Q. You delivered the automobile and the title?
A. The automobile and the title, yes, sir.
Q. The transaction as to the Lonergan car was identical with the one involving your automobile?
A. Yes, sir.
Q. Was Mr. Lonergan present at that time?
A. Yes, sir.
Q. Do you know whether Mr. Hubbard told Mr. Lonergan about this check?
page 7 } A. Mr. Lonergan didn't see Mr. Hubbard at all, I transacted the business for Mr. Lonergan, because he was helping me at that time.
Q. What did you do the next day or what was done the day following this transaction?
A. The day following the transaction, I think it was the day following, I got a phone call from Mr. Hubbard stating that his floor plan had not been completed yet and to please hold the check. Well, I got supicious at that time and went to Richmond.
Q. What happened there?

A. Well, I found out his account was closed, I went on the following Monday.

Q. The 18th was on what day, do you recall, Mr. Reynolds?

A. I think it was Wednesday or Thursday.

Mr. Higginbotham: May we inquire of the Court—

The Court: Yes, the 18th of September, 1957, was on Wednesday.

Q. What happened between Wednesday and Monday?

A. Between Wednesday and Monday. I think Mr. Hubbard called me a couple of times, I think—I cannot remember exactly, but he stated to me to please don't send the checks in because his floor plan had not been completed, his page 8 } $20,000 floor-plan, which he had told me before was in effect; and then I went to Richmond on Monday and found the check down there. I first had Mr. Early of the Citizens National Bank to call up—

Q. You had deposited the check, is that right?

A. Oh, yes, I deposited the check, it will show the date I deposited it; but, before I went to Richmond I went up to Mr. Early at the Citizens National Bank and asked him what he thought of the situation and he said—

Mr. Wicker: Now, I object—

The Court: The objection is sustained. Don't try to repeat what Mr. Early told you. You can testify to what you did.

A. I cannot tell what I found out?

The Court: You cannot tell what somebody told you.

Q. Go ahead.

A. Any way, I went to Richmond on Monday and stayed down there a couple of days, but there was no way of recovering the money.

Q. Did you talk to Mr. Hubbard?

A. Yes, sir, I talked with Mr. Hubbard.

Q. What did he say?

A. In fact I stayed at his place practically all day, he kept telling me "Don't worry! Don't worry! I am go-
page 9 } ing to get the money for you. Don't do anything. Don't get the law down here. You will ruin my business. Just hang around." I did hang around.

Chester A. Reynolds, Jr.

Q. Have you been paid as of this date?
A. No, sir.
Q. Do you know what happened to the two cars that came from your place?
A. I don't know what happened to the cars, I do know that the titles were at this bank and the loan was made on the titles to these cars to Mr. Hubbard.
Q. Why was there not sufficient funds there to take care of these checks?
A. I don't know, sir, why.
Q. Do you know whether or not there were other checks outstanding that descended on the bank when this money was deposited?
A. No, sir, I don't know.
Q. All right, Mr. Reynolds, is there anything else you wish to tell the Court about this matter?
A. Well, as I understand the $5500.00 was paid on these two titles.
Q. He borrowed $5500.00 on them?
A. That is what I think was brought out at Mr. Bell's hearing.
Q. You mean Mr. Brown's hearing?
page 10 } A. Mr. Brown, yes, sir, Asa Brown.
Q. Was it brought out there what happened to the $5500?
A. No, sir.
Q. Now, at what Bank did he borrow money on these titles?
A. This Bank right here, the very same bank.
Q. The Savings Bank & Trust Company?
A. Yes, sir.
Q. Is there anything else, Mr. Reynolds?
A. No, sir.
Q. Did you see him make that check out?
A. Yes, sir, I saw him sign it, my bookkeeper made it out.
Q. Had it been signed before you were told there were not sufficient funds there?
A. It was signed before he told me about the floor plan.
Q. Or anything about it wouldn't be all right?
A. That is right.

By The Court:
Q. Did he ever tell you there wouldn't be sufficient funds to cover the check?
A. No, sir.

Chester A. Reynolds, Jr.

Q. As I understand it he told you that the money would be there when the check got there?

page 11 } A. Yes, sir, that is correct.

Q. Is that your testimony?

A. Yes, sir.

The Court: All right, sir.

Mr. Higginbotham: Your witness.

CROSS EXAMINATION.

By Mr. Wicker:

Q. Mr. Reynolds, it was your understanding from what Mr. Hubbard told you, was it not, that he had to have the titles to the cars to take them to Richmond and to floor plan the cars with the Bank in order to make the checks good, did you not?

A. That is correct.

Q. In other words, you knew they were not good then, but he needed to do something to make them good?

A. I didn't know that, it was my understanding he had to have the titles to keep his floor plan good.

Q. How was he to make the check good?

A. I don't know.

Q. Didn't he tell you that he would have to have the titles so that the money would be there for you by the time the checks got there? Isn't that what he said to you?

A. He told me that he would have to have the titles in order to keep his floor plan.

Q. Do you deny that he said substantially this:

page 12 } "I will have to have the titles so that the money will be there for you by the time the checks get there?"

A. I think he did say that.

Q. Were these new cars?

A. No, sir.

Q. They weren't?

A. No, sir.

Q. They were used cars?

A. Yes, sir.

Q. To what extent had they been used?

A. I think Mr. Lonergan's car had about three or four thousand miles on it, and the station wagon had about five or six thousand.

Chester A. Reynolds, Jr.

Q. The station wagon had five or six thousand?
A. I think so.
Q. Had that been a Company car?
A. Yes, sir.
Q. Now, let's talk about some of these dates just a little bit. When did Mr. Hubbard first contact you again after the transaction?
A. After the transaction, I think it was by telephone the next day, I am not sure.
Q. All right, did he talk to you again—The next day would have been Thursday?
A. Yes, sir.
page 13 } Q. Did he talk to you again on Friday?
A. Yes, I think so; I know he called me a couple of times.
Q. Did he talk with you again on Monday by telephone?
A. By telephone? No, I don't think so, I think you might have the record there of the telephone calls. I cannot remember whether he talked with me or not.
Q. When did you deposit the check, sir?
A. September 23rd.
Q. In other words you received the check on Wednesday?
A. That is right.
Q. And you didn't deposit the check until September 23rd, the following Monday?
A. That is right.
Q. What did you do, did you deposit the check here in Orange?
A. The Citizens National Bank, yes, sir.
Q. On Monday before you went to Richmond as you have testified?
A. Yes, sir.
Q. Did you know at that time that it was not good?
A. Yes, sir, I found out by telephone it was not good after I deposited it.
Q. All right, sir, I believe you testified that you saw Mr. Hubbard on that day?
page 14 } A. Yes, sir.
Q. And spent a good part of the day out at his lot?
A. Yes, sir.
Q. As a matter of fact there were a considerable number of new cars on his lot, as he told you, weren't there?
A. Yes, sir, it was a very progressive looking lot.

Chester A. Reynolds, Jr.

Q. As a matter of fact you knew the lot had been there for sometime, didn't you?

A. Yes, sir—Yes, sir, that is correct.

Q. On Monday you say you deposited the check, when was it returned to you?

A. I got the check from the Bank in Richmond.

Q. On that day?

A. The next day, I think it was, in fact, I waited for it to come in down at the Bank.

Q. Did you ever make any demand in writing to Mr. Hubbard that he make the check good?

A. Did I make any demand to Mr. Hubbard in writing?

Q. Yes, sir.

A. No, sir, I didn't.

Q. He never denied that he owed you the money, did he?

A. He never denied that he owed me the money, I think he owes me the money.

Q. But he never denied it?

A. No, sir, he never denied it.

page 15 } Mr. Wicker: I have no further questions.

By The Court:

Q. Why did you wait from Wednesday until Monday to deposit this check?

A. Because he called me and asked me to wait because his floor plan, that he was supposed to have had, something had happened to it, it hadn't come through. He told me he had the floor plan, your Honor, and then called me the next day and said something had happened, that the floor plan didn't go through.

Q. Did you agree to hold it?

A. No, sir, I didn't agree to hold it.

Q. Did he tell you something about the floor plan arrangement when he called you after the delivery of the cars, in addition to what he had told you at the time of the delivery of the check?

A. Well, at the time of the delivery of the check I understood his floor plan was there, it was already there, and then I was called later stating the fact that something had happened about his floor plan, that it hadn't gone through.

The Court: All right, sir.

Chester A. Reynolds, Jr.

RE-DIRECT EXAMINATION.

By Mr. Higginbotham:

Q. Mr. Reynolds, you didn't actually hold the
page 16 } check Monday, you deposited this check on Thursday, didn't you?

The Court: He testified he deposited it on Monday the 23rd.

A. I think it states right here, it is stamped by the Citizens National Bank. Would that be when it was deposited or would that be—I could find out the exact day it was deposited, sir.

Q. You say you went to Richmond on the following Monday?

A. Yes, sir.

Q. The check was there then?

A. The check hadn't come to the Bank, I had to wait until Tuesday for it to get down there.

Mr. Higginbotham: I think that is all.

RE-CROSS EXAMINATION.

By Mr. Wicker:

Q. As a matter of fact he asked you to hold the check until he called you, did he not?

A. No, sir.

Q. You are certain that he called you Thursday?

A. I am not positive, I think so, I think it was Thursday; I know he called me a couple of times.

Q. He didn't talk to you until Friday, as a matter of fact, two days later, did he?

A. May be so.

Q. And you were still holding the check?
page 17 } A. As far as holding the check, you will find on our deposits we probably don't deposit until on Monday.

By The Court:

Q. How was that, Mr. Reynolds?

A. We usually make our deposit on Monday.

Q. You make your weekly deposits on Monday?

A. Yes, sir.
Q. Of all checks?
A. Yes, sir.

By Mr. Wicker:
Q. Did you deposit other checks on Monday of that week?
A. Yes, sir.

Mr. Wicker: No further questions.

The witness stood aside.

GERALD L. WHARTON,
another witness for the Commonwealth, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Higginbotham:
Q. State your name?
A. Gerald L. Wharton.
Q. Mr. Wharton, what is your occupation?
A. Assistant Cashier and Manager of the Installment Loan Department of the Savings Bank & Trust Com-
page 18 } pany.
Q. The Savings Bank & Trust Company?
A. That is correct.
Q. What is your age?
A. Thirty-two.
Q. How long have you been with this Bank?
A. Three years.
Q. How long have you known Mr. Hubbard?
A. Possibly eight years, eight to ten years.
Q. How well, have you known him?
A. I have known him through another bank, the Central Bank, which I was connected with for six years prior to my going with the Savings Bank & Trust Company. I have known him as an automobile dealer, automobile salesman and most recently as manager in his own right of the Hubbard Used Car Sales.
Q. Did he carry an account at your Bank in September of this past year?
A. There was an account opened for Hubbard Used Car Sales on September 13, 1957.

Gerald L. Wharton.

Q. Who signed the checks drawn on that account?
A. Mr. Hubbard.
Q. Samuel R. Hubbard, Jr?
A. Yes, sir.
Q. So then he did have an account at your Bank?
A. That is correct.
page 19 } Q. When was that account opened?
A. September 13, 1957.
Q. When was it closed?
A. September 23rd, ten days later.
Q. Did you keep photostatic copies of the checks drawn on that account?
A. No, sir.
Q. Do you have ledger sheets showing all deposits?
A. Yes, I have true copies of the originals, I have the originals which we will have to retain for bank records, but I also have true copies.
Q. Did you know about these two cars in question?
A. Yes, sir.
Q. When did you first know about them?
A. When they were presented to us for floor planning.
Q. On what day?
A. May I look at my records?
Q. Yes, please.
A. September 18th.
Q. What time of day?
A. That I do not know.
Q. Did you ever work for Mr. Hubbard?
A. No.
Q. Did you ever work with him?
A. No, sir.
page 20 } Q. Has he ever worked for you?
A. No, sir.
Q. All right, sir, on September 18th, these two cars or titles to these two cars were presented to your Bank?
A. That is right.
Q. Did you see the cars?
A. Yes, I made an inspection of the automobiles, that is accepted practice with us.
Q. What time of day was it when you made this inspection?
A. I saw the two automobiles on Mr. Hubbard's lot, as I recall it was in the afternoon or night. As I recall they had just come in.

Gerald L. Wharton.

Q. How late does your bank stay open?
A. On Fridays we stay open until six.
Q. This was on Friday?
A. I am not certain what day of the week it was.
Q. How late do you stay open on week days, other than Friday?
A. We close the Bank at two.
Q. Any way that is the day you viewed these two cars?
A. I think I saw them in the afternoon or night.
Q. When was this deposit made?
A. On the 18th of September.
Q. Was that deposit made that night?
page 21 } A. No, it was made on the 18th, it would have been during banking hours, between nine and two, if the 18th was a week day.
Q. I am just trying to clear up, Mr. Wharton, if these cars were gotten from Mr. Reynolds on the 18th—
A. What day was the 18th?
Q. It would have been on Wednesday, I think. They couldn't have been viewed by you before the 18th.
A. They could have been viewed by me on the night of the 17th.
Q. If they were not taken from Mr. Reynolds place until the 18th?
A. If they were taken from there on the 18th, I don't know.
Q. Do you have the deposit slip?
A. Yes.
Q. All right, what was the amount of the loan made on those two cars?
A. $5500.00.
Q. Does the statement there show a deposit of $5500.00?
A. Yes, sir. May I look at the original of this deposit ticket? The original says the 19th. I hold the original deposit ticket in my hand, which says the 19th of September.
Q. What is this $82.50 discount?
page 22 } A. That would have been the charges made by the Bank for making the loan, it was perhaps set up on a 90 day term; those were the Bank's charges made from the loan.
Q. Did you ever get repaid this $5500.00 loan?
A. No, we didn't. It has now been paid, it had to be paid by disposing of the collateral.
Q. When were you paid?
A. When the automobiles were sold.

Gerald L. Wharton.

Q. When was that?
A. October 21st in one instance, and October 30th in another.
Q. What did those cars bring?
A. We sold them for the unpaid balance.
Q. All right, they were still sold, what did they bring?
A. $2500.00 in each instance.
Q. How much?
$2500.00.
Q. They brought less than what you had loaned upon them?
A. We had to take trade-ins in order to expedite the sale of these vehicles.
Q. What trades did you take?
A. In one instance we took a '53 Pontiac; we were later able to sell that automobile and make up the deficiency.
Q. What per cent of the value of the car did
page 23 } you loan on these cars?
A. We have a guide book, which is generally accepted, I don't know what the yard stick is, but it should have been eighty or ninety per cent of the invoice price. In this instance we were dealing with the factory, we were dealing with the individual so there would have been no invoice price, that was based generally on what we felt the retail value of the car to be.
Q. You say he had been dealing with you over a year?
A. Yes, sir, approximately.
Q. Did he have a bank account then?
A. No, sir, the Bank account was not opened until September 13th, prior to that we had taken one or two sales of Mr. Hubbards when customers of the bank had come in and asked us to handle the paper.
Q. So then Mr. Hubbard had been dealing with you for 12 months?
A. Not as far as a checking account was concerned. He had channelled automobile sales to us through sales to customers.
Q. What did the first deposit on this account represent?
A. The first one represented the floor plan of two automobiles. I cannot go on record as to what they were, but I be-
lieve they were two Plymouths. The account was
page 24 } credited by $3284.02.
Q. When was that?
A. September 13th, $3284.02.
Q. When was that amount depleted?

Gerald L. Wharton.

Mr. Wicker: Excuse me just a moment. If Your Honor please the witness is testifying from some document, presumably to refresh his memory. In any event we think it was for that purpose and I wonder if I might have a couple of minutes to inspect them.

The Court: You may let him inspect them.

Note: Here the records were handed to counsel for the defendant for his inspection.

Q. Now, that $3284.02, that was deposited on September was depleted and there was an overdraft on September 17, 1957 of $406.23, wasn't it?

A. No, sir, that is not correct. It would have over drawn the account had we paid all the checks, we were forced to return those checks on that date.

Q. That was on September 17th?

A. That is right.

Q. Then on September 18th, there was a deposit of $450.00 in the Bank?

A. That is correct.

Q. Then on September 18th, again, there was
page 25 } this of $5417.50, representing the proceeds from these two cars?

A. Yes, sir.

Q. Now, how did it happen that these checks for $1700.00 and $2300.00 came in before this deposit?

A. They came in on the same day the deposit was made. If you will notice there is "c. c." by that, that means certified check. They were presented at our counter for certifications and certified and charged to the account on that day.

Q. How could they be certified if the money wasn't there?

A. The money was there on the same day.

Q. If that was the 18th—

A. I believe we have a conflict of dates there. You see the girls in the bookkeeping Department didn't set the date on the machine to go on the 19th prior to the time that $450.00 was put in there. That is the only explanation I can come up with.

Q. This $111.50 check did that come in before that deposit was made?

A. Well in Bank posting you have your checks assorted alphabetically and your deposits assorted alphabetically, so that the posting is done simulataneously.

Gerald L. Wharton.

Q. How did it happen that all of these checks came in on the 18th?

A. That I cannot answer except they were pre-
page 26 } sented for payment.

Q. They were presented for payment—

A. They were presented on the 18th according to this ledger card.

Q. This deposit was not made until the 19th?

A. They were presented on the 19th, I believe there was an error there in posting.

Q. How did these checks happen to come in so fast? If he hadn't gotten the money from Mr. Reynolds' cars none of these checks would have been paid?

A. No, they would have been returned.

Q. You had returned two on the 17th?

A. That is true. He had deposited $450.00 on the 18th.

Mr. Higginbotham: Your Honor, we would wish to offer a copy of the ledger sheet in evidence of the Savings Bank & Trust Company, showing that this account of Hubbard Used Car Sales was opened on September 13, 1957, and was closed on September 23, 1957, and have it marked Commonwealth's Exhibit Number 2.

The Court: All right, sir.

Q. How as this account closed out, Mr. Wharton?

A. I called Mr. Hubbard at his place of business and had talked to him several times about checks being presented, prior
to funds being in the Bank and he and I agreed on
page 27 } mutual consent that I would have to close the ac-
count. He said, "Well, if you have to do so, do so." Which I did and sent him a check for his balance.

Q. Was this check presented to your Bank for payment?

A. Yes, I am sure it was.

Q. What day was it presented?

A. On the 23rd.

Q. Did you know it was going to be presented on the 23rd?

A. No, I have no way of knowing when a check will be presented and I had no way of knowing that check would be presented on the 23rd.

Q. Suppose this check had been presented on the 23rd and there was a balance in the account of $596.43 what would have happened?

Gerald L. Wharton.

A. The check would have been returned for insufficient funds.

Q. Did Mr. Hubbard make an statement to you when this account was closed that he had this check outstanding?

A. No, sir. I was aware of checks coming into the Bank, which we were unable to pay and in fact talked with the President of the Bank and we concluded that we would have to close the account.

Q. You knew what the mode of practice is in financing cars, did you not?

page 28 } A. Sir, when we finance cars, we inspect the collateral, we make our loan according to our evaluation of the collateral; what happens to the settlement is between the dealer and the other person.

Q. You didn't give any consideration to the fact that there might be checks outstanding for these cars?

A. Not when I had the titles.

Q. But if you had known these checks were outstanding, would you have made these loans?

A. If it had constituted a lien on the collateral I would not have, but otherwise I would have.

Q. Mr. Wharton, do you have some copies of these deposit slips here?

A. Yes, sir.

Note: Here the witness produces certain papers.

Q. Now, I hand you a deposit slip dated September 13, 1957, of Hubbard Used Car Sales, showing a deposit of $3284.02, there was a floor plan of $350.00, was there not?

A. That TN would have been Trust Note, yes, that is correct.

Q. Do you know what happened to that $1,000 taken out in cash, which is shown on that deposit slip?

A. No, Mr. Hubbard would have evidently received that.

Q. Do you know what automobile this repre-

page 29 } sented?

A. I cannot say definitely, I believe it was two Plymouths, because during the time we had this floor plan arrangement we only floor planned six cars.

Q. Do you know whether they were the cars gotten from Fork Union?

A. No, sir.

Q. From Mr. Asa Brown?

Gerald L. Wharton.

A. Yes, sir, I know Mr. Brown; I believe they were.

Mr. Higginbotham: We would like to present this deposit slip in evidence marked Commonwealth's Exhibit No. 3.
The Court: All right, sir.

Q. I hand you a deposit slip dated September 18th for this business, Hubbard Used Car Sales, in the amount of $450.00. Can you tell us whether that represented cash?
A. Yes, it would be, it is opposite currency, that would have been a cash deposit made by Mr. Hubbard.
Q. There is an error in his account, that red shown there, did you all actually pay that check?
A. He was never overdrawn, we sent the check back.
Q. Would you have advised him when the check was returned?
A. We would have, that is automatic procedure.
Q. Why does this overdraft appear on the account?
A. Because the bookkeeper posted that not reapage 30 } alizing there would not be sufficient funds in the account to pay the check; when it showed up red, she then took the check out and returned it. You will notice that there is a service charge of $4.00, that would be for returning those two checks.

Mr. Higginbotham: We would like to have this deposit slip marked Commonwealth's Exhibit 4.

Q. This deposit slip, which is referred to here, as having occurred on the 19th of September, Samuel A. Hubbard, Hubbard Used Car Sales, amounting to $5500.00, you say that was for the two automobiles described as Reynolds' automobiles?
A. It was for two Pontiac automobiles.

Mr. Higginbotham: We offer this as Commonwealth's Exhibit number 5.
The Court: All right, sir.

By The Court:
Q. On refreshing your memory you think that deposit was made on the 18th or 19th?
A. Your Honor, the ledger sheet shows a posting date on the 18th, but the original deposit slip, which I have here, shows the 19th. I feel that the deposit was made on the 19th.

Gerald L. Wharton.

We have had that come up numerous times and we have written numerous memorandums on it to the bookkeeping department but they don't seem to have had much effect.

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By Mr. Higginbotham:

Q. You are telling the Court that these checks that came in on the 16th and the check came in on the 17th, and then you are telling the Court that these checks which show on the 18th actually came in on the 19th?

A. I tell the Court that September 18th, if that had been changed to read the 19th, then all these checks would have to have been shown in the same manner on the 19th; that was an error in posting where your machine is set up on the 18th and the bookkeeper did not change the date on the machine. It would indicate also that these checks came in on the 19th, and that they were sorted alphabetically by the bookkeeping department and posted simultaneously with the deposit, debits against credits.

Q. You don't know what these certified checks were for?

A. No, sir.

Q. This deposit here that you have referred to on September 13th, being the proceeds from two Plymouth automobiles, do you know what reduced that amount down to a figure of approximately zero?

A. Well, it was reduced—

Q. Actually below zero.

A. It was reduced to $53.77 by the checks in the other column.

page 32

Q. And if the overdrafts had been paid it would have reduced it below zero?

A. That is true, if we had paid those checks that we returned.

Q. Let me ask you this: Was the check given to Mr. Asa Brown presented to your Bank for payment?

A. I have no knowledge of that. I don't know. Mr. Michael in our bookkeeping department may have known of it.

Q. Mr. Wharton, is there any other evidence you can give that would give light on this transaction?

A. No, sir, I don't believe so.

Q. Did Mr. Hubbard ever tell you why he didn't have the money to pay this check?

A. I had discussed Mr. Hubbard's finances with him from time to time because of the relation of the Hubbard Used Car

Gerald L. Wharton.

Sales with the Bank and he had always had a progressive business there, as far as we were concerned; he was advertising a lot on the radio; he had an excellent location for the type business that he conducted.

Q. Did you know about his transaction with Mr. Saunders?

A. No, sir, I don't know Mr. Saunders.

Q. Did you know about his transaction with Mr. Pollard?

A. Is Mr. Pollard in Beaverdam?

Q. Yes.

A. I later learned of it through having to get page 33 } some automobiles.

Q. Did you know of his transaction with Mr. Clements?

A. No, sir.

Q. Did you know about his transaction with Mr. Asa Brown?

A. Through the same way as this one. I was subpoenaed to testify.

By The Court:

Q. Mr. Wharton, Mr. Reynolds has testified that on the 18th of September, 1957, when these titles and cars were delivered to the defendant that the defendant stated to him that he had a floor plan arrangement with the bank entitling him to $20,000.00. Did he on the 18th or prior to that time have such a plan?

A. He approached us on it, your Honor, prior to the 13th of September, at which time I told him that the only way we could consider it was for him to open an account and let us have first choice of his retail collateral. He stated that he would be agreeable to opening an account and letting us place the proceeds from the floor plan to his credit and then give us first choice of his retail paper when the cars were sold.

It took me two or three days to talk to our President regarding the arrangement and on September 13th, when to my knowledge the $20,000 line of credit was ap- page 34 } proved, provided that we would check each automobile and have the title to the collateral ready to secure our loan, which we were relying on heavily; they were all supposed to be '57 model new cars. It has been testified here that these Pontiacs had some mileage on them, which I failed to pick up, I didn't realize that until I heard the testimony here this morning.

Gerald L. Wharton.

Q. I am still not clear as to whether or not on September 18, 1957, he had such a floor plan arrangement with your Bank?

A. Yes, sir, I will say he did have on the 18th. It was a question of two or three days from the 13th, when it would be approved, I had to get the President's consent.

By Mr. Higginbotham:

Q. Then the President of the Bank did know about this?

A. Yes, I had discussed it with him.

Q. If I called the President this morning and he said he didn't know about it, then he is wrong?

A. I believe if we could talk to him that I could convince him that he is. He and I did discuss it. I am an Assistant Cashier, a Junior Officer, and have no authority to make floor plans.

Mr. Wicker: If your Honor please, I think this is somewhat irregular. Mr. Higginbotham, do you want to call him?

If your Honor please, I suggest that we try page 35 } the case in the Court Room.

The Court: Yes, we are going to try it in the Court Room.

Mr. Higginbotham: That is all.

CROSS EXAMINATION.

By Mr. Wicker:

Q. Mr. Wharton, this $20,000 floor plan, that has been discussed, doesn't that mean in effect that the Bank will finance automobiles for a dealer up to $20,000.00 worth?

A. Yes.

Q. Provided they have the titles as security?

A. That is correct, provided, the titles and the automobiles themselves are acceptable to the Bank.

By the Court:

Q. Let me get this straight: What difference is there as to how much it would be if you got the collateral? What is the significance of having any ceiling on it?

A. I think the significance would be a matter of policing the number of units the bank has as collateral. The Bank would have to make a check on the lot to see if they were

Gerald L. Wharton.

there and in good order, anti-freezed and winterized and have not been sold.

Your Honor, we are a small bank, we are conservative in our policies.

The Court: All right, sir.

page 36 } By Mr. Wicker:

Q. In other words, various banks will have various ceilings for a particular dealer?

A. That is correct. It is not inconceivable that some dealers could have a $100,000.00 line.

Q. That doesn't mean you have a $20,000 credit at the Bank, it means you could floor plan up to $20,000?

A. That is correct.

Q. Do I understand from your direct testimony that after having testified that these particular cars were floor planned on the 18th, that after refreshing your memory from the deposit slip that you would correct that to the 19th?

A. I believe so. The deposit slip is dated the 19th, and that is in the handwriting of our teller, and it is due to the error in the girl not changing the date on the posting machine. We have had things like that occur numerous times.

Q. Did you become aware of this particular check, that is the subject of this trial, on Monday, the 23rd, the day the account was closed?

A. You are speaking of the check that was produced here?

Q. Yes.

A. I cannot say that I was aware of it.

Q. Would you have been the normal person to have been aware of it?

A. No, it would have gone to our Bookkeeping
page 37 } Department. I handle installment loans and checks
would not come to me unless they call me to ask if a deposit was made or something like that.

Q. You have mentioned the fact that Mr. Hubbard had had transactions with you all before this?

A. Yes.

Q. Was he obligated to the Bank at the time that this new arrangement was to go into effect? Do you recall?

A. I believe we had handled automobiles for Mr. Hubbard prior to the floor plan agreement, I think on one or two

occasions, that we had loaned him money in order to buy automobiles, which he later resold and paid the bank off.

Mr. Wicker: I have no further questions.

RE-DIRECT EXAMINATION.

By Mr. Higginbotham:

Q. Mr. Wharton, I am just curious about how on the 18th, when he was overdrawn or had $500.00 in Bank, how it was that these certified checks came in on the same day. You cannot certify a check until the money is deposited, can you?

A. That is true. I would surmise there, I can only surmise, that these checks were presented prior to the 18th and people were calling the Bank to find out if they were good and when they were came in and presented the checks to be certified.

page 38 } Q. You do not know whether Mr. Hubbard had these checks certified?

A. I don't know who presented them, no, sir.

Mr. Higginbotham: That is all.

RE-CROSS EXAMINATION.

By Mr. Wicker:

Q. Didn't you previously testify that the deposit showing here as the 18th was in all probability the 19th?

A. That is correct.

Q. And that was an error on the machine showing the 18th?

A. That is true.

Q. And if the error was on the machine showing the deposit for the 18th, when it should have been the 19th, then the presentation of the checks should have also been the 19th?

A. It would follow that they were.

Q. The error would apply to the date the checks were presented, as well as the deposit?

A. That is true.

Mr. Wicker: That is all.

Gerald L. Wharton.

RE-DIRECT EXAMINATION.

By Mr. Higginbotham:

Q. How many girls do you have working in the posting department?

A. We have four—four bookkeepers.

page 39 } Q. And they don't set the machine but once as to the date during the day?

A. That is true.

Q. So, if the date were wrong on this, unless that was the first account, it would have been wrong all day?

A. It would have certainly been wrong on some other accounts, I am sure.

Q. It would have been caught before the day was over?

A. Yes.

Q. And then you would go back and correct the ones that had already been posted, wouldn't you?

A. Yes, sir.

Q. This was not corrected?

A. After an account has been once posted and gone to its seat in the ledger, they don't have any way of checking that.

Q. If the girl made an error as to the date and discovered it. she would go back and correct all those errors, wouldn't she?

A. A prudent bookkeeper would, sir.

Mr. Higginbotham: That is all.

RE-CROSS EXAMINATION.

By Mr. Wicker:

Q. I gather you have had similar errors before?

A. We have had.

page 40 } By the Court:

Q. Mr. Wharton, I would like to have cleared up about the mechanics of this floor plan. As I understand it, the dealer brings you the title to an automobile, then you, or someone for the bank, inspects and sees the car and puts a value on it, and then you make or give credit to the dealer for your appraised value of the automobile, and do you hold the title?

A. Yes, sir.

Gerald L. Wharton.

Q. You hold the title?

A. We have a lien recorded and it is mailed back to the bank by the Division of Motor Vehicles with a lien in the Bank's favor.

Q. A lien is put on the title?

A. Yes, sir.

Q. Then you hold that, is that true?

A. Yes, sir.

Q. When the dealer sells that automobile what happens?

A. When the dealer sells the automobile that is the effective control the bank has, we hold the title and the title cannot be conveyed without the certificate showing our lien, our lien would have to be paid and satisfied before that particular unit could be sold. The dealer brings the customer in the bank and as soon as credit is approved we get the title out of the vault, and have the purchaser sign that,

page 41 } that is notarized and we get a new lien in the name of the purchaser.

Q. Have you had any experience where you lend the money on the title and you haven't seen the car?

A. We do frequently with our retail sales, where the customer comes into the Bank and makes arrangements for the loan. We call the dealer and have the lien put on the car in the show room. We don't inspect then, we have a credit statement and the financial stability of the customer. We don't go up and check physically every car we finance retail; we do wholesale.

Q. Wouldn't it be possible for this dealer to deliver to you the title and deliver the car represented by that title to another purchaser, and the purchaser not be able to get his title? Is that possible?

A. Your inquiry is now—

Q. That you could have the title but the dealer could sell the car to someone else?

A. Well, sir, there would only be one title, so I don't see how the car could be sold again.

Q. Suppose this: Suppose you had the title to an automobile, and the automobile was sold to someone else, and that someone else went to another bank and financed it and he wouldn't have the title because he was financing it, but he would have the car. Couldn't that happen?

page 42 } A. I don't believe so, because there is only one certificate of title, or only supposed to be one,

issued with each vehicle, and I think the title would have to be delivered when the sale is made.

The Court: I think Mr. Wicker and I are familiar with a case in which that happened.

Q. That is possible you could look at some car and unless you checked the motor number you might get the wrong title?

A. Yes, unless you checked the motor number.

Q. Do you do that?

A. On floor plan automobiles, yes.

Q. You go and actually check the motor number against the number on the title?

A. We actually check them. I have a book that designates where these motors numbers and serial numbers are on the body. The reason for that, it is not so much that the dealer is dishonest, but when the dealer handles so many automobiles, and handles one through our bank and one through another bank mixups have *occured.* We don't tell the dealer that is why we are checking the numbers, but that verifies it is the same car.

Q. And all of the Banks operate the same as yours about this floor plan?

A. The general practice is that, some of them
page 43 } do not check the cars as thoroughly as we, because
they are larger. We are not in the thing in such a volume basis that we don't have the time to do that, we usually have the car brought down to the drive in window or make arrangements to see the automobile to see that the car is in good shape, has not been wrecked and the car is as reputed by the title for collateral purposes. We are supposed to check the mileage, that is why I said I was in error as to the mileage on these Pontiacs.

RE-DIRECT EXAMINATION.

By Mr. Higginbotham:

Q. Let me have a copy of Mr. Hubbard's financial statement, do you have it there?

A. Yes, sir.

Q. What does his financial statement show?

A. That is in the bank, I do not have it with me.

Q. What did it show?

A. I could not say from memory, I see a lot of financial statements.

Q. Was it favorable?

A. Yes, it was, from a standpoint of inventory, and he had a Cadilac automobile, he was paying or buying a home and had a boat. What he had was not favorable as far as liquidity was concerned, but that sattement plus the fact that we had ample collateral and that we had a normal risk in prudent banking practice.

page 44 } As far as this floor plan agreement was concerned, the Bank would never have gone into that except that we were given first choice on his retail sales. The Bank does not particular want to floor plan cars, because there is not much profit in that, the profit comes in on the retail sales contracts.

Mr. Higginbotham: All right, sir.

The Witness stood aside.

ASA BROWN,

another witness for the Commonwealth, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Higginbotham:

Q. State your name, age and occupation.

A. Asa Douglas Brown, Fork Union, forty-five.

Q. In September of this past year you were in the automobile business in Fork Union, were you not?

A. That is right.

Q. You were the Dodge—

A. Chrysler-Plymouth.

Q. The Chrysler-Plymouth Dealer?

A. Yes, sir.

Q. Did you have an transaction or did your firm have an transaction with Mr. Hubbard in September?

A. Yes, sir.

Q. If so, state what it was?

page 45 } A. Yes, sir, I think it was on September 12th or 13th, I believe it was the 12th, Mr. Hubbard called me on the phone and wanted to know if I had any

Asa Brown.

cars on hand that I would like to dispose of. I told him, yes, sir, that at the time I was long on '57—

Q. You mean you had some?

A. Yes, sir, and the '58 models were coming out and I would like to dispose of a few, and Mr. Hubbard came that afternoon. I had to go away and he and my salesman got together and he sold him three new Plymouth automobiles.

Q. What price did he get?

A. I think it was $6,229.15.

Q. That was the cost of the automobiles plus what?

A. $154.00.

Q. That was a right good premium for a new automobile, wasn't it?

A. At that time.

Q. Then what happened?

A. He gave my sales manager a check to the best of my knowledge and asked him to hold the check until, I think it was the following Monday or Tuesday, and that he could come up and bring the money or call us and the check would be good.

Q. All right, sir.

A. It turned out after three or four telephone conversations that I finally went to Richmond on September 18th to see Mr. Hubbard about them. At that time he gave me another check, I think it was on Wednesday, saying it would be good on Friday. I held it until Friday and deposited it in the Bank and it came back "account closed."

page 46

Q. What bank was it drawn on?

A. Savings Bank, I believe.

Q. Was the second check the same amount as the first?

A. The same amount.

Q. Did you ever get any part of the $6,200?

A. No, sir.

Q. Do you know what happened to your two cars—three cars?

A. One of them I went down to the Division of Motor Vehicles and there wasn't any lien on it, and so I went to Mr. Hubbard and bought it back at the same thing he paid me for it, and I have it setting in the back yard at home now, I cannot get a title to it.

Q. Did you pay him for it?

A. Yes, sir. I have a notarized bill of sale, but I cannot secure a title to it.

Asa Brown.

Q. Why?
A. Because the Bank has the title to it. We had that case in Court.
Q. So then actually you lost four cars?
A. Yes, sir.

page 47 } By the Court:
Q. Do you mean by paying him the same he paid you for it, that he received credit for it?
A. That is right.

By Mr. Higginbotham:
Q. You didn't pay him cash?
A. Oh, no, it was already my car.
Q. So actually you lost two cars?
A. I have lost three, if I cannot get a title.
Q. If you get a title you have lost two?
A. I have lost two, but as time goes on it is depreciating in value every day.
Q. What happened to the other two cars?
A. That I cannot tell you, the last I saw of them they were sitting on Mr. Hubbard's used car lot.
Q. Do you know whether they were floor planned?
A. Yes, at the Savings Bank.

By the Court:
Q. You bought a car that you cannot get title to?
A. That is right.
Q. Because the bank holds the title?
A. That is right.

By Mr. Higginbotham:
Q. When did you present that check for payment? The last check?
page 48 } A. The last check. Let's see, I think it was given me on the 18th, which was on Wednesday, I deposited it on Friday and it came back, I think the following Tuesday, I am not sure, I cannot remember those dates.
Q. Had you ever had any dealings with Mr. Hubbard before?
A. No, sir.
Q. Do you know why your check was not paid?
A. Insufficient funds.

Asa Brown.

Q. Let me see, that third car, the Bank had made a loan on it, is that the way they got the title?
A. That is what I understand now, yes, sir.
Q. You say you never dealt with Mr. Hubbard before?
A. No, sir.

Mr. Higginbotham: All right, thank you.

By the Court:
Q. Can you be sure or reasonably sure that it was on the 18th of September that you went to see Mr. Hubbard and got another check?
A. Yes, sir, I am reasonably sure.
Q. What did you say that Mr. Hubbard told you then about the new check he had given you?
A. That he didn't have enough money, that he lacked $1,600.00, I think, of having $6,200.00 in the Bank, but he would have it in there by the following Friday and to go
page 49 } ahead and deposit the check.
Q. Which would have been the 20th, Wednesday was the 18th?
A. Yes, I am sure it was the 18th. I don't remember the day of the week, but I think it was Wednesday.
Q. It has been established that the 18th was on Wednesday. All right, sir.

CROSS EXAMINATION.

By Mr. Wicker:
Q. As a matter of fact you never deposited the first check, did you Mr. Brown?
A. No, sir.
Q. You understood it was not good and as a matter of fact he told you that he didn't have an account at that bank?
A. That is right, he told me he was set up for $20,000.
Q. And that he didn't have an account in that bank?
A. No, he didn't tell me he didn't have an account, but he said that the check would not be good.
Q. You held that check for several days and then came back down there and asked him for another check?
A. That is right. I didn't ask him for another check I told him I wanted my money.

Asa Brown.

Q. Your cars were still on the lot at that time, weren't they?

A. Yes, sir.

page 50 } Q. And you saw them there when you went back?

A. Yes, sir.

Q. You didn't ask him for them back then, did you?

A. No, sir.

Q. As a matter of fact it was not insufficient funds but account closed, that was marked on your check when it came back, isn't that right?

A. That is right.

Q. And when you went down and bought the Plymouth you simply credited—

Q. That is right.

Q. That amount against your purchase of that car?

A. That is right.

Mr. Wicker: I have no further questions.

By the Court:

Q. When you bought this other car back, did you make any inquiry about the title?

A. Yes, sir, I check with the Motor Vehicle Division.

Q. Then you knew there was a lien on the title when you bought it back?

A. I knew there was not a lien on the title; the title didn't show any lien.

Q. Do you mean the bank's lien was not shown?

A. No, sir, I checked for all three. I found a lien on two, one there was no lien and that is the one I brought

page 51 } back.

Q. Where do you say the title is?

A. Now? He states it is in the Central Bank.

Q. The Central Bank?

A. Yes, sir.

Q. That is not the Savings Bank?

A. That is right, that is what I understand.

Q. Did Mr. Hubbard sign that title?

A. You see I never got the title. I bought it from his brother, who was running the lot at the time and he said that Samuel took care of all the titles and would mail the title to me the next day.

C. A. Reynolds.

The Court: All right.

By Mr. Wicker:
Q. As a matter of fact you didn't see Mr. Hubbard the day you went there, did you?
A. No, sir, I saw his brother.
Q. And you just told you wanted that car?
A. I told him I wanted that car back, there was no liens against it.

Mr. Wicker: That is all.

RE-DIRECT EXAMINATION.

By Mr. Higginbotham:
Q. Were there liens on the other two?
A. Yes, sir, through Mr. Wharton's bank.

page 52 } C. A. REYNOLDS,
recalled as a witness for the Commonwealth, was examined and testified as follows:

DIRECT EXAMINATION.

By the Court:
Q. Mr. Reynolds, these two cars that were purchased, one of them was purchased for $3,150.00?
A. Yes, sir.
Q. What was the other purchased for?
A. $2,800.00.
Q. How did the price that you received for those two cars compare with the fair market value, retail?
A. I was very happy to sell the cars at that price.
Q. Was that an excessive price, would you say?
A. Yes, sir, for a used automobile at that time.
Q. How much excessive?
A. I would say about $500.00.
Q. For the two or each?
A. For the two.
Q. Is the fair market value of a used car in Richmond and Orange about the same?
A. I think it is about the same, I go down there right often.

C. A. Reynolds.

Q. Didn't it raise your *suspiscions* as to his giving you a good price?
A. I was very happy to sell them at that price.

page 53 } By the Court:
Q. Who fixed the price?
A. I fixed the price.
Q. Now, you say it was excessive?
A. I wouldn't say it was excessive, I was happy to sell them at that price.
Q. You just told Mr. Higginbotham that it was excessive, didn't you?
A. No, sir, I sold the two automobiles at what I thought was a fair profit at that time of the year.
Q. Didn't you say it was excessive?
A. I might have, but I didn't mean it that way.

The Court: Read that back, Mr. Cunningham.

Note: Here the Reporter read back the question and answer appearing on page 52 lines 13 and 14.

A. I think it was a fair profit at that time.
Q. You want to change your statement?
A. Yes, sir, I think it was a fair profit at that time.

By Mr. Higginbotham:
Q. Mr. Reynolds, in fixing the price of a car do you always price them higher expecting to come down?
A. Yes, sir.
Q. This man, did he ask you to come down?
A. Not at all.
page 54 } Q. He bought them at whatever you priced them to him for?
A. Yes, sir.

Mr. Higginbotham: That is all.

CROSS EXAMINATION.

By Mr. Wicker:
Q. Do you floor plan your cars?
A. No, sir, I floor plan new cars, of course.
Q. That is what I meant?

C. A. Reynolds.

A. Yes, sir.
Q. In the Blue Book there are three listings relative to a particular model car, are there not?
A. Yes, sir.
Q. Loan value?
A. Yes, sir.
Q. Wholesale?
A. Yes, sir.
Q. And retail?
A. Yes, sir.
Q. How close is the loan value to the retail value. I beg your pardon, how close is the loan value in the Blue Book, that you all use, to the wholesale price?
A. Pretty close.
Q. Pretty close?
A. Pretty close.
page 55 } Q. Is it as much as the wholesale price?
A. The wholesale price is usually higher, a little bit higher, than the loan value.
Q. You have heard it testified here that the bank lent $5,-500.00 on these two cars?
A. Yes, sir.
Q. That would be the loan value, would it not?
A. I would have to check back at that time. I can tell you pretty close. Let me think one minute. $5,300.00, I think, would be the loan value on the two automobiles.
Q. Do you have a Blue Book?
A. No, sir, I don't.
Q. Do you have one available?
A. Yes, sir.
Q. Could you have one later on here today?
A. Yes, sir.
Q. Covering that period of time?
A. I think I could find one.
Q. You had gotten $5,900.00 for them, approximately?
A. I got a check for that.
Q. And the Bank lent $5,500.00 on them?
A. Yes, sir.

Mr. Wicker: I have no further questions.

The witness stood aside.

page 56 } F. A. CLEMENTS,

another witness for the Commonwealth, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Higginbotham:

Q. State your name please.

A. F. A. Clements, Glouchester, Court House, Virginia.

Q. What is your occupation?

A. We are Oldsmobile Dealers.

Q. Mr. Clements, do you know Samuel R. Hubbard, Jr.?

A. Yes, sir, I know him.

Q. When did you first know him?

A. September 5, 1957.

Q. September 5, 1957, what was the occasion for your knowing him?

A. Well, he called me from Richmond and told me he had talked to a friend of mine, Mr. Settle, the Oldsmobile Dealer in West Point, about an Oldsmobile Station Wagon, and that Mr. Settle didn't have one, but had told him that he thought I did. I told him that I had one and would be very glad to sell it to him. That was about noon and I say about 3:30 he came in the shop from Richmond. I wasn't even looking for him.

Q. He wasn't long getting there?

A. Not too long.

Q. What happened?

A. He liked the wagon very much, enough to page 57 } give me a *a* check for it for $3,076.00, and told me he would send back for the wagon the next day and give me a certified check or the cash.

Q. He gave you a check that day?

A. He gave me a check for $3,076.00, it was a new Oldsmobile Station Wagon, the new models were coming out the first of November and it was hard to move, in fact it was the first new car that I ever sold to a used car dealer.

Q. Did you get any profit on the deal?

A. $100.00 above my cost.

Q. Did that include servicing it?

A. That including everything.

Q. What happened the next day?

A. Well, the next day, I believe it was the next day, he called me. I wouldn't be too sure whether it was the next day, but he called me and told me that his mother was very ill in Charlottesville or Farmville and he couldn't come down,

F. A. Clements.

and he would be down in a few days and get the car. That conversation went on for about twice a week for three or four weeks, he just kept stalling me.

Q. Then what happened?

A. Well, he never did show up, so my son and I got in the car and went up to his used car lot.

Q. What happened to the station wagon?

A. I still had the station wagon on the floor.

page 58 } By the Court:

Q. How about the title?

A. I gave him the title.

Q. You had given him the title?

A. He said to give him the title when he gave me the check; that was the sad part of it.

By Mr. Higginbotham:

Q. So what happened?

A. We went up to the lot and he told me that he had just put a check in the mail to me that day and to go on back home and it would be there. I said, "What about cancelling that check and give me another one right now." He said "No," that is when I got *suspiscious.*

A few days later my son went to Richmond with the check he had given us and took it to the bank and the account had been closed in June.

Q. It had been closed in June?

A. Yes, sir. Then he went down to the Motor Vehicle Division to find out if he had put a lien on the wagon, and I think, I am not too sure whether he found the title that day or not, but he did see Hubbard that day.

Q. What eventually happened to the title and the station wagon?

A. Well, the title to the station wagon, the Virginia Bank —May I ask my son a question? Was it the Vir-
page 59 } ginia Bank & Trust Company—

The Court: No, don't ask you son, you just tell us what you know about it.

A. He gave me a check on the Virginia Bank & Trust Company, and I think it was the Virginia Bank that held the title, not the one he gave me the check on but it was another

Bank up there. I think it was the Virginia Commerce or something like that.

Q. What happened to the station wagon?

A. Well the Bank sent down and got it, a lawyer typed out a receipt and told me to make them sign a receipt for it when they come, so they got the wagon.

By the Court:

Q. You turned the station wagon over to them?

A. Over to the Bank? Yes, sir, I couldn't get out of it; they had title to it, your Honor.

The Court: I am not trying that, go ahead.

By Mr. Higginbotham:

Q. That check has been paid, I suppose?

A. What check?

Q. Mr. Hubbard's check?

A. Been paid?

Q. Yes. Have you received payment?

A. No, I haven't received any payment. No, I haven't received a cent of payment, not a cent at all.

page 60 } Q. Did Mr. Hubbard ever give you any explanation as to why he hadn't paid it?

A. I cannot say that he did, every time he would call me up he was going to mail me a check the next day or be down with the cash the next day and that went on for two or three weeks.

Q. Did he tell you whether or not that first check was not any good?

A. I don't remember whether he did or not. He said this: He would leave the wagon and be back the next day with a certified check or the cash, but he had to have the title because he was going to floor plan it.

Q. He was going to floor plan it?

A. Yes, sir.

Q. Is there anything else Mr—

A. I believe that was about the gist of the conversation. I had three sons that were witnesses to what he said there in the shop when he bought the wagon. We had sold good used cars to used car dealers for the last ten or fifteen years and never had any trouble before. I have had them give me checks and ask me to hold them a couple of days, but, of course, I knew them.

F. A. Clements.

Mr. Higginbotham: All right, sir.

By the Court:

Q. Where is your place of business?

page 61 } A. Glouchester Court House, Virginia.

CROSS EXAMINATION.

By Mr. Wicker:

Q. In other words you have had used car dealers enter into the same sort of agreement with you before this?

A. Similar, yes, sir.

Q. In which they would present you with a check and say for you to hold it?

A. I never had but one do that and I had sold him lots of cars and had confidence in him; we usually know who we are dealing with, and we always give a title when they give us a check even though they asked us to hold it for a few days.

Q. Isn't it true that a few days after the transaction Mr. Warren from Central Bank talked with you?

A. I don't remember his name but some gentleman from the Bank called me and asked me if I had a station wagon, I imagine it was a week or ten days.

Q. A few days after the transaction?

A. Not a few days, but a week or ten days.

Q. Were you still holding Mr. Hubbard's check at that time?

A. Yes, sir.

Q. Do you still have it?

A. The Commonwealth does.

Q. How long did you hold it before you took it

page 62 } into Richmond?

A. I think I got the check on the 5th and I think we took it into Richmond somewhere around the 23rd.

Q. You held it over two weeks?

A. Yes, sir.

Q. And you were holding it because he asked you to?

A. That was the reason I didn't try to put the check in the Bank, I was trying to give him a break as long as he told me he didn't have any money in the Bank.

Q. And he told you he didn't have any money in the Bank?

A. Yes, sir.

Mr. Wicker: That is all.

The witness stood aside.

LESLIE POLLARD,
another witness for the Commonwealth, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Higginbotham:
Q. State your name please.
A. Leslie Pollard.
Q. What is your occupation?
A. Automobile dealer.
Q. And where are you located?
A. Beaverdam, Virginia.
Q. When did you first know Mr. Samuel R.
page 63 } Hubbard, Jr?
A. August 15 of '57.
Q. Under what circumstances did you come to know him?
A. He came up to Beaverdam and asked me about *bying* some units and offered me $100.00 over invoice on them and I agreed to sell him one at this time and he gave me a check on the Tri-County Bank, Incorporated at Beaverdam and told me to hold it that he didn't have any money there, but he would be back with cash money or a certified check to pay for it.
Q. Did he take the title?
A. He took the title, he told me to give him the title so he could set it up on floor plan so he could get the money.
Q. All right, what happened?
A. The next day he called me and told me he didn't have the floor plan set up yet.
Q. What did he mean he hadn't gotten his floor plan?
A. He told me the Savings Bank & Trust Company was setting him on a $20,000 floor plan. Five or six days later, we had said something about a second unit, he said to bring the second unit down and he would pay for it, and I gave him the title on the second unit and it was the same thing. Then, he called me to bring the units down that the Bank was ready to check them and set them up on floor plan. So I took the cars down, so, I took the cars down and he gave

Leslie Pollard.

me a car to drive back that night in. Then, when
page 64 } I went back down again he told me that he still
hadn't gotten his floor plan straightened out, but he would pay me for one unit plus a used unit, which I took for $300.00. So, he gave me a check for the unit less $300.00, and after he gave me that check he told me that check wasn't any good, to hold it, and he would call me in a day or two and let me know when to cash it.

Q. Was that after he gave you the check?

A. After he had given me the check. Two or three days later he called me to run the check through, it was all right, and I ran the check through and it came back "account closed."

Q. What Bank was that?

A. Savings Bank & Trust.

Q. What date was it?

A. That he gave me the check?

Q. Yes, and the date it was returned unpaid?

A. It was returned the 24th day of September, and I don't recall the date he gave me the check, but I would say it was somewhere around a week prior to this.

Q. That was the check for the one car?

A. For the one car.

Q. Less the $300.00?

A. Less the $300.00, that is right. The other car I have never gotten a check on the other one. I bought two more cars from him, one I bought he had a little equity in, I gave
him $1166.00 credit on the $4665.33 for the two
page 65 } units.

Q. So you are short how much?

A. I am short $3489.33.

Q. Have you ever been paid that?

A. No, sir.

Q. Did he ever give you any explanation as to why he didn't pay it?

A. He said he didn't have the money and if I would let him alone and not force him I would finally get my money.

Q. Did he ever tell you what he did with the money he got from those cars, Mr. Pollard?

A. No, sir.

Q. Did he ever tell you what he did with the money he got from the cars he got from Mr. Clements?

A. No, sir.

Leslie Pollard.

Q. Did he tell you what he did with the money he got from the cars he got from Mr. Brown?
A. No, sir.
Q. Did he ever tell you what he did with the money he got from the cars he got from Mr. Reynolds?
A. No, sir.
Q. He just said that he wanted to be left alone?
A. That is right.

Mr. Higginbotham: All right, sir.

CROSS EXAMINATION.

By Mr. Wicker:
page 66 } Q. In other words, there were two of your cars that you had transactions with Mr. Hubbard on?
A. Yes, sir, two of mine.
Q. And on one of those cars Mr. Hubbard gave you a check and told you it was no good at the time he gave it to you?
A. Yes, sir.
Q. And told you to hold it?
A. Yes, sir.
Q. The second car, he didn't give you a check on that, you just gave him the title?
A. That is right.
Q. And subsequent to that you were negotiating to purchase a couple of cars from him, in which he had some equity, and there was another $300.00 transaction involved in there. In fact you extended credit to him, did you not?
A. I reckon I did, I didn't get the money.

Mr. Wicker: I have no further questions.

RE-DIRECT EXAMINATION.

By Mr. Higginbotham:
Q. You won't extend any more credit to him, will you?
A. I don't think so.

Mr. Higginbotham: All right, Mr. Pollard.

Q. Mr. Pollard, let me ask you one other question. There are five other dealers, other than Mr. Reynolds,
page 67 } here today that have testified. Do you know how many other dealers he caught the same way—

E. B. Saunders.

Mr. Wicker: I object to that question.

The Court: As to the particulars of these transactions you can show that, but I believe it would be objectionable in that form.

The witness stood aside.

E. B. SAUNDERS,

another witness for the Commonwealth, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Higginbotham:

Q. State your name, age, residence and occupation.

A. E. B. Saunders, Lovingston, Automobile Dealer.

Q. And your age?

A. Thirty-nine.

Q. How long have you been in the automobile business, Mr. Saunders?

A. Well, I would say around ten years.

Q. In your capacity as automobile dealer have you had occasion to come in contact with Mr. Hubbard in a business manner or transaction?

A. Yes, sir.

Q. State the circumstances and when.

page 68 } A. I had had several transactions with Mr. Hubbard, and on this particular occasion he gave me a check for $6700. and I deposited his check, that was on the First & Merchants Bank in Richmond.

Q. Did he tell you whether the check was good or bad or to hold it?

A. No, sir.

Q. No representation was made as to that?

A. No, sir, not on this transaction, and I deposited this check, I sent it direct, I didn't deposit it through my bank.

Q. What do you mean?

A. Well, I didn't make any record, I just sent the check straight in to his bank and his check came back "insufficient funds."

Q. When was that?

A. July.

Q. 1957?

A. Yes, sir.

E. B. Saunders.

Q. What happened then?

A. Then Mr. Hubbard—I called him and he brought me a check on the Universal CIT Corporation for $4500.00 and he gave me two titles on '56 Model Fords, one a two-door sedan and one station wagon to hold as collateral for the balance, which was approximately $2700.00. So I held those page 69 } titles as collateral and I had several telephone conversations with Mr. Hubbard and he told me the thing could be cleared up in a short while. It went on for several weeks and I went to Richmond to take possession of these cars I had the title to, and he told me that these cars were over in Petersburg, and I told him that I would go over and get them, and finally he admitted the cars didn't exist that they were wrecked cars.

Q. Did that end your transactions with him?

A. Yes, sir.

Q. Have you been paid your $2700.00?

A. No, sir.

Q. Is that in the form of a note or an open account?

A. No, I still have the $6700.00 check.

Q. But you have received a credit on it?

A. Yes, sir.

By The Court:

Q. What happened to the CIT check?

A. That was a check written, that was to me, he brought me the check for $4500.00.

Q. That was good, wasn't it?

A. Yes, sir.

Mr. Higginbotham: All right, sir.

CROSS EXAMINATION.

By Mr. Wicker:

Q. Now, about how long had you been doing page 70 } business with Mr. Hubbard before this particular transaction you are talking about?

A. I would say about two months.

Q. Are you sure it had not been nine months?

A. No, sir, it hadn't been that long.

Q I will ask you again to refresh your memory and ask you if you hadn't been having transactions with him over a period of about nine months?

E. B. Saunders.

Mr. Higginbotham: He has answered the question.

A. No, sir.

The Court: I think he answered the question. Go ahead.

Q. Do you deny that you have testified in a trial in the Circuit Court of Fluvanna County, Virginia to the effect that you had had numerous transactions with him over a period of nine months?

A. I couldn't have, because I met Mr. Hubbard in the late Spring of 1957, I think that our first transaction was may be in the latter part of May. I don't have my records with me, but I could substantiate it with those.

Q. Do you deny that you so testified previously?

A. I don't have any recollection of testifying that I had known Mr. Hubbard for nine months.

page 71 } Q. As a matter of fact you have testified that this transaction was in July. Are you certain it was not in August?

A. I am positive it was the 23rd of July.

Q. Do you deny that you have previously testified under oath in the Circuit Court of Fluvanna County that this particular transaction, you are referring to in your testimony today, was in the middle of August?

A. It was strung out over a period, I mean into August because I have a Bank statement that his account was closed out on the 30th of July.

Mr. Higginbotham: There is a statute which prohibits this type of cross examination, but we have no real objection to it.

Q. About how many transactions did you have with him?

A. I would say three or four, roughly, may be five or six, I don't think it would be as many as six, though.

Q. It would not be as many as a dozen or in the neighborhood of a dozen?

A. Different transactions?

Q. Yes, sir.

A. No, sir, it would not be that many. Let me get this straight: May be you misunderstand me. A transaction that is one transaction at a time, you are not speaking of vehicles?

E. B. Saunders.

Q. I will rephrase the question and ask you as
page 72 } to vehicles?
A. Yes, I would say it is more than a dozen and not as many as fifteen.

Q. The previous transactions you had had, you had had previous transactions with him, had you not?

A. Yes, sir.

Q. In which he had given you a check and he would ask you to hold it and told you it was not good at the time?

A. The check he gave me, I impressed on him that I had to pay for these automobiles, and he always told me these checks were good and told me "I will never let you down."

Q. What do you mean they were good or that he would make them good?

A. He just said they were good.

Q. You deny that on other transactions when he gave you the checks that he told you they weren't good, but that he would make them good?

A. No, he never told me to hold any checks. He said these checks will be good when they come in.

Q. Did you ever hold any checks of Mr. Hubbard?

A. No, I don't know as I did, I always deposited them in regular channells.

Q. Do you deny he has given you checks and you have held them for him upon his request.

A. On may; be one occasion I did. I didn't
page 73 } hold it any specified time, I just deposited the
check, may be it was two days later that I deposited the check in Bank, it wasn't any specified time.

Q. Did he on this occasion call you and say I don't have the money, don't put it in right now?

A. No—No.

Q. Do you deny that you have testified to that effect previously in the Circuit Court of Fluvanna County?

A. I don't believe I have ever testified to that effect, no, sir.

Q. Up until this particular transaction with him were your transactions with him satisfactory?

A. No. No, they were not, because the next to the last one I had with him I deposited his check along with the title, they were sent into his Bank and they were authorized to hold those titles and clear the titles when the check was paid.

Q. Do you deny that as to previous transaction with him you have stated that they have been very satisfactory?

E. B. Saunders.

A. I don't get that.

Q. Do you deny you have previously testified under oath in the Circuit Court of Fluvanna County that your transactions with Mr. Hubbard, previous to the one we are talking about today, had been satisfactory?

A. Yes, I will say that they were satisfactory page 74 } until the last one, yes, sir.

Q. Do you have the check with you that you deposited?

A. I do not.

Q. Where is it?

A. My attorney has it.

Q. Of the $6700.00 you have been paid $4500.00 is that correct?

A. I don't know whether it is $6700.00, it is probably some odd dollars and cents, but I have been paid $4500.00, and I have these two titles that my attorney has too.

Q. Do you know when you deposited that check?

A. No, I couldn't name any date, but it was in the latter part of July.

Mr. Wicker: That is all.

Witness stood aside.

Mr. Higginbotham: We rest, your Honor.

The Court: The Commonwealth rests, the first witness for the defense.

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page 104 }

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The Court: Gentlemen, I have heard the evidence, and, of course, this motion is to test the sufficiency of the page 105 } evidence as applied to the law as understood by the Court in an indictment of this kind.

The Court is of opinion that at this stage of the case that the motion to strike the evidence should be overruled.

Mr. Wicker: I respectfully except to your Honor's ruling on the grounds stated in the argument.

That is the case, Judge.

The Court: You do not desire to introduce any witnesses?
Mr. Wicker: No, sir.

Note: Thereupon, the Court heard further argument of counsel on the merits of the case and rendered the following decision:

The Court: Gentlemen, I am not going into any discourse about the law or the facts in this case, but I think that I should like to just state briefly some of the impressions I have as to the law and the facts.

First of all, this statute, which is known to the bench and the bar as "The Bad Check Law" has been on the statute books now for some many years; it has received
page 106 } amendments from time to time, as experience may have taught or practice has proven was necessary. The statute has been troublesome, both from a standpoint of enforcement and from a standpoint of interpretation at times, but as the statute is now drawn it seems to be greatly improved over what it has been in former days.

Now, to start off with, when a check is given and there is not sufficient funds or no such account, if that is given for a present consideration the statute affords the prosecution a presumption of intent to defraud. That is true because intent is something that is always difficult to prove; it is something that is easily alleged but difficult to prove, so that a presumption is afforded where it is given for a present consideration.

Now, then, where it is not given for a present consideration then we find that the intent to defraud must exist and must be proven. That is the case that we have before us now.

Now, let's examine that and see if the Commonwealth has shown the intent to defraud, because this evidence shows that it was not given, while it was for a present
page 107 } consideration, that there was some delay in the check—although it was not a post-dated check—there was supposed to be some delay in payment by getting the titles to the automobiles and establishing this floor financial plan.

Now then, when we consider the evidence of the Commonwealth, and there being none offered by the defendant, we find out that this situation prevailed: That the earliest we have from the evidence is that in July—July 23rd—that this

defendant, who is an automobile dealer in Richmond went to Mr. A. B. Saunders, a dealer in Lovington and there he secured titles and gave checks, which developed to be not bona-fide checks. That was on July 23rd. Then, we find that on August 15 of 1957, that the defendant goes to Mr. Pollard, a dealer at Beaverdam, and there, while it is not exactly the same situation, but the pattern is that he obtained the titles to these cars and gave checks, which were not redeemable.

Then, we take September 5th, he goes to Glouchester to Mr. Clements, and there the same pattern, or substantially the same pattern exists.

page 108 } Then on September 12th or 13th he goes to Fork Union to Mr. Brown and there the same pattern exists; and then we find that on September 18, 1957, he comes to Mr. Reynolds in Orange County, which is the present case; so that within less than thirty days—no a little over thirty days—this evidence reveals that the defendant was circulating these checks and as a result was acquiring titles to automobiles and possession of the automobiles, and yet everyone of these dealers had the same experience when they undertook to collect their checks.

I do take this view of such a transaction. I know well that when we try criminal cases, setting as Judge and Jury, and we always instruct the jury that if they have an abiding conviction of the truth of the charge, that then they are satisfied beyond a reasonable doubt. That applied in this case, as to whether this defenadnt intended to defraud, this Court has no doubt whatever that he so intended. I think it is obvious; I think it was the pattern; I think it was the design; everything here is present that goes to make up fraud

page 109 } and this Court determines that he did actually intend to defraud.

Now, these cases that have been cited, that is the Turner case—*Turner* v. *Brenner*, The Court of Appeals has never held, in the opinion of this Court, that where there is an actual proof of intent to defraud, that just because there is not an immediate present consideration that the statute is not applicable. The Court has never held that just because a check may be post dated, which is not the case here, but in principle it is the same, because you may argue that is an extension of credit, the Court has never held even on a post dated check, where actual fraud is shown, that the statute is not applicable. On the other hand I think it is.

Now the best treatment that I have seen on this recently is in Virginia Law Review, 14 Law Review 145-150. I think you gentlemen have read that. The conclusion of that article has

this to say, and this is the sum and substance of the Virginia Statute, which we are considering:

page 110 } "In conclusion, it is submitted that the statute is inapplicable, when the payee is told at the time a check, whether post-dated or not, is given that the drawer does not have sufficient funds at present to cover it. Nor does the statute seem applicable in the absence of an actual intent to defraud, when a post dated check is given, even though no express statement is made by the drawer as to the lack of funds. The statute does seem applicable, however, when a post dated check is given with an actual intent to defraud."

That is a very good article.

As I view the case, I am going all the way in this to apply what I think is the proper law to the facts, and welcome anything that the Supreme Court may give me on the law of bad checks.

I find the defendant guilty on all three counts in the indictment and the judgment of the Court is that he serve one year on each count.

Stand up Mr. Hubbard. Mr. Hubbard do you have anything to say before the Court proceeds to pronounce sentence upon you?

page 111 } The Accused: Not guilty, sir, of the bad check.

The Court: The Court, Mr. Hubbard, has listened very patiently to this case this morning, and has followed the evidence, and as has been pointed out in the summation of the case that the Court is satisfied beyond a reasonable doubt that you set out with purpose and deliberate design to cheat and defraud the people whom you dealt with, particularly the prosecuting witness in this case. So, the Court finds you guilty on each of the counts in the indictment and fixes your punishment at one year in the penitentiary on each count, the sentences to run consecutively.

The prisoner will be remanded.

Mr. Wicker: I respectfully except to the ruling of the Court.

Note: Thereupon, upon motion of the defendant, execu-

tion of the sentence was suspended for a period of sixty days for the purpose of perfecting an appeal, and the accused was released on bond; and,

Thereupon Court was adjourned.

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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