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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 4960

In the Supreme Court of Appeals of Virginia at Richmond

WILLIAM J. GLASGOW

v.

SETH PEATROSS

FROM THE CIRCUIT COURT OF CAROLINE 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. 4960

VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 19th day of November, 1958.

WILLIAM J. GLASGOW, Plaintiff in Error,

against

SETH PEATROSS, Defendant in Error.

From the Circuit Court of Caroline County

Upon the petition of William J. Glasgow a writ of error is awarded him by one of the Justices of the Supreme Court of Appeals on November 19, 1958, to a judgment rendered by the Circuit Court of Caroline County on the 23rd day of June, 1958, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Seth Peatross was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

page 3 }

* * * * *

MOTION FOR JUDGMENT.

Plaintiff moves the court for judgment against the defendant Seth Peatross in the sum of Fifteen Hundred Dollars ($1,500.00) plus interest at 6% per annum from March 4, 1957, on account of the following:

On March 4, 1957, the plaintiff lent the defendant the sum of $1,500.00. The plaintiff has made repeated demands upon the defendant for payment of said sum, which the defendant has refused to pay.

WILLIAM J. GLASGOW.

* * * * *

(on back)

We the Jury on issue joined find for the defendant Seth Peatross.

MACK A. WRIGHT, Foreman.

* * * * *

page 6 }

* * * * *

ANSWER.

The answer of Seth Peatross to a notice of motion filed against him in the Circuit Court of Caroline County, Virginia, by William J. Glasgow, answers and says.

1. This defendant denies each and every allegation as set forth in said notice of motion.

2. This defendant denies that he did on March 4th 1957 or at any other time borrow any money from the plaintiff or that the plaintiff has at any time made a loan to him.

Therefore, the plaintiff is not entitled to recover anything from the defendant in this proceedings.

This defendant reserves the right to amend this his said answer at any time he may be advised.

SETH PEATROSS
By Counsel.

Filed 10/19/57.

T. E. C.

* * * * *

page 7 }

* * * * *

MOTION TO STRIKE.

The plaintiff, in accordance with Rule 3:14 of the Rules of the Supreme Court of Appeals of Virginia, moves to strike the answer filed by the defendant to the motion for judgment filed by the plaintiff on the grounds that the defendant's answer is not accompanied by an affidavit in compliance with Section 8-511 of the Code of Virginia of 1950.

WILLIAM J. GLASGOW
By JAMES M. MINOR, JR.
Counsel.

Filed 10-24-57.

D. F. T.

* * * * *

page 8 }

* * * * *

ORDER.

This day came the defendant by counsel and asks leave of court to file his affidavit to the answer heretofore filed in the Clerk's Office of this Court in the above styled cause on the 17th day of October, 1957, which said affidavit was inadvert-

ently omitted, and the Court being of the opinion that it is proper that said affidavit should be filed since the Court has not heard the motion made by the plaintiff to strike said answer as provided by Rule 3-14 of the Supreme Court of Appeals of Virginia; it is ordered that said affidavit be and the same is hereby accordingly filed.

Enter:

LEON M. BAZILE, Judge.

October 31, 1957.

* * * * *

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* * * * *

AFFIDAVIT.

State of Virginia,
County of Caroline, to-wit:

Frank B. Beazley, Attorney and Agent for Seth Peatross this day personally appeared before me, Mae Brooks, a Notary Public in and for the County aforesaid, in the State of Virginia, and made oath that the facts and allegations as set forth in the answer filed in the above styled cause on the 17th day of October, 1957, are true to the best of his knowledge and belief and that the said Seth Peatross is not indebted to the plaintiff in any sum whatsoever as alleged in said notice of motion.

Given under my hand this 25th day of October, 1957.
My commission expires on the 7th day of September, 1958.

MAE BROOKS
Notary Public.

I hereby certify that a copy of the foregoing affidavit was this 31st day of October, 1957, mailed to James M. Minor, Jr. Attorney at Law, 1226 Mutual Building, Richmond, 19, Virginia, Counsel for the Plaintiff.

Given under my hand this 31st day of October, 1957.

FRANK B. BEAZLEY,
Attorney at Law,
Bowling Green, Virginia.

Filed Oct. 31, '57.

L. M. B.

page 10 } INSTRUCTION NO. 1.

The Court instructs the jury that in determining what was the real contract between the parties in this case, they shall consider not only any writing offered in evidence, but all evidence which has been offered by either party. They may also consider the situation of the parties with reference to each other, and to the subject matter, and may also consider the subsequent dealings of the parties with each other.

Given 6/23/58.

J. D. B., JR.

page 11 } INSTRUCTION NO. 2.

The Court instructs the jury that you are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining the weight to be given to the testimony of any witness, you may consider the appearance and demeanor of the witness on the stand; his manner of testifying; his apparent intelligence or lack of intelligence; his interest or lack of interest in the result of the case; his relationship, if any, to the parties; his feeling or bias, if such has been shown by the evidence; his opportunity for knowing the truth; any prior inconsistent statement made by such witness, if such has been shown by the evidence; and all other surrounding circumstances appearing at the trial. From all these things you are to determine which witnesses are more worthy of credit and to give credit accordingly.

Given 6/23/58.

J. D. B., JR.

page 12 } INSTRUCTION NO. 3.

The Court instructs the jury if you believe by a preponderance of the evidence that the plaintiff made a loan of $1,500.00 to the defendant, for which he has never been repaid, then you must find for the plaintiff in the amount sued for.

Given 6/23/58.

J. D. B., JR.

page 13 } INSTRUCTION NO. 4.

The Court instructs the jury that even if you believe from the evidence that there was an agreement between Mr. Glasgow and Mr. Peatross wherein Mr. Peatross agreed to furnish room and board for Mr. Glasgow, if you further believe that Mr. Glasgow did not breach his agreement, then you must find for the plaintiff, Mr. Glasgow, in the amount he sued for.

Given 6/23/58.

J. D. B., JR.

page 14 } INSTRUCTION NO. A.

The Court instructs the Jury that if you believe from a preponderance of the evidence in this case that the plaintiff and defendant entered into a verbal agreement by which the defendant would make certain repairs and additions to his home and thereafter furnish the plaintiff room and board for a specified sum per month and that the plaintiff advanced the defendant the sum of $15,00.00 and after said repairs were made the plaintiff refused to move into the defendant's home; then the Court tells you that the plaintiff breached his contract, unless the jury further believe that Mr. Peatross later agreed that Mr. Glasgow could stay with Mrs. Barlow and Mr. Glasgow agreed he would stay with Mrs. Barlow in which event the court tells you Mr. Glasgow did not breach his contract.

And if you further believe from a preponderance of the evidence that Mr. Glasgow breached his contract, then the plaintiff is not entitled to recover his $1,500.00 in full and Mr.

Peatross is entitled to the sum of $1,500.00 less a reasonable value of room and board only for a fifteen month period.

Given 6/23/58.

J. D. B., JR.

page 15 } We the jury find a verdict in favor of the defendant Mr. Peatross.

MACK A. WRIGHT.

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* * * * *

This day came the parties by their attorneys and the issue having been joined thereupon came a jury, who were selected and summoned in a manner prescribed by law, to-wit: Mack A. Wright, Joseph T. Farrish, Willie C. Taylor, Sr., William L. Kay, H. Marshall Shaddock, James E. Finch and Percy C. Butler, who were sworn according to law. Whereupon the court and jury proceeded to hear the evidence. After the jury heard the evidence and argument of counsel and was instructed by the court, it withdrew to its room to consider its verdict. After some time the jury returned to the court having found a verdict in the following words: "We the jury on the issue joined find for the defendant Seth Peatross.

MACK A. WRIGHT
Foreman."

Whereupon the attorney for the plaintiff moved the court to set aside the verdict as contrary to law and evidence. The court overruled said motion and the attorney for the plaintiff excepted thereto.

JOHN D. BUTZNER, JR., Judge.

June 23, 1958.

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* * * * *

MOTION TO SET ASIDE VERDICT AND ENTER FINAL JUDGMENT.

The plaintiff moves the Court to set aside the verdict found by the jury in this case on June 23, 1958, and enter final judgment for the plaintiff for the following reasons:

1. The verbal agreement upon which the defendant relies as his sole defense to this action brought by the plaintiff is within the Statute of Frauds, because it is an "agreement not to be performed within a year."
2. By virtue of paragraph 1. hereof, the defendant is precluded from establishing the aforementioned verbal agreement as a defense, and, therefore, has no defense to this action.
3. The only legally sufficient evidence before the Court is that the plaintiff lent the defendant the sum of $1,500.00, which has not been repaid.

WILLIAM J. GLASGOW
By JAMES M. MINOR, JR.
Counsel.

Filed 7/9/58.

J. D. B., JR.

* * * * *

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* * * * *

MEMORANDUM.

James M. Minor, Jr.
Minor & Wright
1226 Mutual Building
Richmond 19, Virginia
Counsel for the Plaintiff

Filed 7/9/58.

J. D. B., JR.

* * * * *

page 19 } The issue raised is whether the defendant, Seth Peatross, is legally entitled to rely upon the following alleged oral agreement between the parties hereto as his defense to this action brought by the plaintiff: a verbal agreement by which the defendant would furnish the plaintiff room and board for fifteen months at the rate of $100.00 per month.

Section 11-2 of the 1950 Code of Virginia, being this state's Statute of Frauds, provides as follows:

"When written evidence required to maintain action.—No action shall be brought in any of the following cases:

"(7) Upon any agreement that is not to be performed within a year;

"Unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged thereby, or his agent; but the consideration need not be set forth or expressed in writing, and it may be proved (where a consideration is necessary) by other evidence. (Code 1919, §5561.)"

From this section of the Code, we can readily see that if either the plaintiff or the defendant had brought an action to enforce the provisions of the alleged verbal agreement which the defendant relies upon as his defense herein, this agreement would clearly be within the Statute of page 20 } Frauds, and a plea of the Statute of Frauds by the party against whom the action was brought would be properly sustained.

The next question which arises is whether the foregoing Code section also applies to a situation such as we have in this case, wherein the defendant seeks to enforce the provisions of a verbal agreement by way of defense. It appears, at first blush, that this section (§11-2) applies only to situations wherein an original action is brought by a party to enforce the provisions of an agreement.

A thorough examination of the case-law in this state did not turn up a single case in Virginia which is on point. However, there is a great deal of law in other jurisdictions on this point.

This case of *Wujciak et al.* v. *Wujciak,* 55 A. (2d) 164 (New Jersey, 1947), states that although the Statute of Frauds expressly forbids only the bringing of an action on an oral contract, it also precludes the use of such contract as a defense. The related New Jersey statute in this case is Section

25:1-5, Revised Statutes of New Jersey, which reads as follows:

"Promises or Agreements Not Binding Unless in Writing. *No action shall be brought* (italics added) upon any of the following agreements or promises unless the agreements or promises, upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized: E. An agreement that is not to be performed within one year from the making thereof."

page 21 } It will be noticed that the New Jersey statute is strikingly similar to our Virginia statute in that it commences the same way as our statute ("No action shall be brought * * *").

The foregoing case of *Wujciak et al.* v. *Wujciak* cites 37 C. J. S. Section 225, page 726, which says: "The Statute of Frauds, according to the weight of authority, also precludes the use of an unenforceable contract within the Statute, as the grounds of defense to an action, and this is, of course, true in states where the effect of non-compliance with the Statute is to render the oral contract void for all purposes. In some states, however, the operation of the Statute is confined to a prohibition of actions on oral contracts, leaving them valid for all other purposes, and under this rule, oral contracts may be used as the basis of a defense, except where the result will be an indirect enforcement of the contract."

Peck v. *McCormick Harvesting Machine Co.,* tried in the Supreme Court of Illinois, April 16, 1902, was a case in which there was a verbal contract with a harvesting machine company to serve it as exclusive sales agent on commission within a particular territory for a period of five years. The court held: "Since it could not be performed by either party within one year, it is within the Statute of Frauds; and page 22 } hence damages for the company's breach thereof could not be had by way of recoupment by a surety *in defense* (italics added) to an action on a note made by the agent to the company for stock purchased at the time the contract was claimed to have been made."

The applicable Illinois statute in the above case provides:

"1. Writing—How signed.

"Section 1. Be it enacted by the people of the State of Illinois represented in the General Assembly: that *no action*

shall be brought (italics added), whereby to charge any executor or administrator upon any special promise to answer any debt or damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person upon any agreement that is not to be performed in the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Revised Statutes (of Illinois), 1874, p. 540.

A contract on which the legislature says no action can be maintained cannot be used to defeat a claim otherwise legal. *Di Blasi* v. *Di Blasi, et al.*, 1959 A. 477 (Conn. 1932). This case goes on to say that, "Proof of this oral agreement is therefore an essential part of the defenses alleged, and the situation falls within the rule, that a contract upon which the legislature says no action can be maintained, cannot be used to defeat a claim otherwise legal and just."

page 23 } The Connecticut Statute of Frauds, which was in force at the time of the *Di Blasi* case, was Chapter 318, Section 5982, General Statutes of Connecticut, Revision of 1930. It provides as follows:

"No civil action shall be maintained upon any agreement, whereby to charge any executor or administrator, upon a special promise to answer damages out of his own estate, * * *; or upon any agreement that is not to be performed within one year from the making thereof, unless such agreement, or some memorandum thereof, be made in writing, and signed by the party to be charged therewith or his agent."

A leading case in the United States is *Citizens State Bank* v. *Jones,* 103 Kansas 297 (circa 1912). Here the plaintiff sued upon a certificate of deposit for $2,000.00 issued by the bank, dated October 28, 1912. As a defense the bank claimed the right to credit the certificate with the amount of two notes made by her husband. When the certificates were presented for payment, one certificate was paid in full, but the bank would not pay more than $300.00, refusing further payment until the notes had been satisfied. The defendant offered testimony of the president and another officer of the bank to the effect that when the second note was sought to be made, Mr. Jones told the bank if it would make the loan, his wife's money on deposit could be held as security.

The court (at p. 299) held: "* * *; but it requires some stretch of the imagination to find the slightest
page 24 } basis for any authority to pledge the moneys represented by her certificates of deposit as security for the notes of the man * * * Aside from this, the promise relied upon, even if shown to have been made by the plaintiff, was oral, and the sixth section of the Statuate of Frauds prohibits the bank from relying upon such a promise. There is no merit in the contention that the Statute of Frauds applies only to the plaintiff in an action. While the statute reads, 'No action shall be brought whereby to charge a party upon any special promise to answer for the debt, default, or miscarriage of another person; * * * unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing * * *,' it applies with equal force to a defendant who sets up his claim by way of answer or cross-petition."

The case of *Taylor, et ux.* v. *Gill,* 211 S. W. (2d) 363, is a Texas case decided in 1948. The court stated: "Courts do not make contracts for litigants. Where parties intentionally make oral agreement which is unenforceable under Statute of Frauds, court cannot order execution of writing, though parties erroneously supposed that oral agreement was legally binding."

(Same case) "In suit to cancel contract for sale of realty to defendant and quiet plaintiff's title thereto,
page 25 } plaintiff's collateral oral agreement to comply with the specifications for veterans' loans and convey realty to the defendants when such a loan to them was fully consummated, was not available as a defense, since court would have been without the power to force such an agreement."

The Texas Statute of Frauds applicable and in force in the above case was Volume 12, Title 65, Article 3995, Vernon's Civil Statutes of the State of Texas. This Statute provides:

"No action shall be brought in any court in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith or by some person by him thereunto lawfully authorized:

* * * * *

"5. Upon any agreement which is not to be performed within the space of one year from the making thereof."

Where an owner makes a parol contract for the care of his stock for three years for a part of the increase and within a few months thereafter takes possession of the stock, he cannot rely on the contract to prevent the recovery of the reasonable value of the pasturage furnished. *Crenshaw* v. *Bishop,* 143 S. W. (2d) 284 (Texas).

In conclusion, it is earnestly submitted that if the defendant Peatross is permitted to set up the aforementioned
page 26 } alleged verbal agreement as his defense to the action brought by the plaintiff, it will be in *direct* conflict with the Statute of Frauds. The Statute of Frauds, having been enacted some three hundred years ago, has for its purpose the prevention of the perpetration of fraud and perjury upon a court by way of oral testimony as to the terms of an oral contract. In the case before this court the defendant Peatross is seeking to enforce, by indirect means, an oral agreement which he could not, by direct means, have enforced. It follows, from a thorough analysis of the case law of the various jurisdictions of the United States, that such an attempt by the defendant should properly be denied.

Respectfully submitted this 7th day of July, 1958,

JAMES M. MINOR, JR.

JAMES M. MINOR, JR.
MINOR & WRIGHT
1226 Mutual Building
Richmond, Virginia
Counsel for the Plaintiff.

CERTIFICATION.

I certify that I have mailed a true copy of the foregoing memorandum to Frank B. Beazley, Esq., Bowling Green, Virginia, counsel for the defendant.

GIVEN under my hand this 7th day of July, 1958.

JAMES M. MINOR, JR.

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* * * * *

ORDER.

This day came the plaintiff by counsel and likewise the defendant by counsel, and the plaintiff having this day filed his motion to set aside the verdict in writing for the following reasons:

The plaintiff moves the Court to set aside the verdict found by the jury in this case on June 23, 1958, and enter final judgment for the plaintiff for the following reasons:

1. The verbal agreement upon which the defendant relies as his sole defense to this action brought by the plaintiff is within the Statute of Frauds, because it is an "agreement not to be performed within a year."
2. By virtue of paragraph 1. hereof, the defendant is precluded from establishing the aforementioned verbal agreement as a defense, and, therefore, has no defense to this action.
3. Th only legally sufficient evidence before the Court is that the plaintiff lent the defendant the sum of $1,500.00 which has not been repaid.

And the Court having heard argument of Counsel for both the plaintiff and defendant, and being of the opinion that said motion should be overruled, the Court doth accordingly overrule same.

Enter.

JOHN D. BUTZNER, JR., Judge.

July 9, 1958.

I ask for this.

FRANK B. BEAZLEY
Atty. for def.

I object to the entry of this order and except thereto.

JAMES M. MINOR, p. q.

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NOTICE.

To: Frank B. Beazley, Esq.
Counsel for the defendant
Bowling Green, Virginia.

You are hereby notified that on Wednesday, August 20, 1958, I shall tender to The Honorable Leon M. Bazile, Judge of the Circuit Court of Caroline County, at his home at Elmont, Virginia, a transcript of the oral testimony in the above case, which was tried in the Circuit Court of Caroline County on June 23, 1958, in accordance with Rule 5:1 of the Rules of the Supreme Court of Appeals of Virginia.

WILLIAM J. GLASGOW
By JAMES M. MINOR, JR.
Of Counsel.

MINOR & WRIGHT, p. q.
1226 Mutual Building
Richmond, Virginia.

CERTIFICATION.

I hereby certify that a true copy of the above notice was delivered by hand to the office of Frank B. Beazley, counsel for the defendant, at his office in Bowling Green, Virginia, on this 19th day of August, 1958.

JAMES M. MINOR, JR.

Filed 8/19/58.

T. E. CAMPBELL, Clerk.

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* * * * *

ASSIGNMENTS OF ERROR.

The plaintiff charges that the Court erred in the following respects:

1. In overruling on June 23, 1958, the plaintiff's motion to set aside the verdict as contrary to the law and the evidence, because:

(a) The verdict of the jury was inconsistent with the instructions given by the Court, because said instructions charged the jury to return a verdict for the plaintiff.

(b) The defendant's Instruction "A" in the second paragraph contained an erroneous statement of the law, because it incorrectly set forth what portion of the amount sued for the defendant was entitled to retain in the event his defense was believed by the jury.

(c) The second paragraph of defendant's Instruction "A," as drawn and given by the Court, tended to confuse the jury and prevent them from rendering a proper verdict.

2. In overruling on June 23, 1958, the plaintiff's motion to set aside the verdict as contrary to the law and the evidence, and in overruling on July 9, 1958, the plaintiff's written motion to set aside the verdict, for the following:

(a) The Court misdirected the jury in giving defendant's Instruction "A," because this instruction was based on the defendant's evidence that there was a verbal agree-
page 30 } ment between the parties, which was not to be performed within a year, said verbal agreement being within the Statute of Frauds and, therefore, unenforceable. Because said verbal agreement was the defendant's sole defense, and this defense was invalid, the jury must have found for the plaintiff in the amount sued for.

WILLIAM J. GLASGOW
By JAMES M. MINOR, JR.
Of Counsel.

Filed Aug. 22, 1958.

T. E. CAMPBELL, Clerk.

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NOTICE OF APPEAL.

To T. E. Campbell, Clerk of the Circuit Court of Caroline County:

William J. Glasgow.

Counsel for William J. Glasgow, plaintiff in the above-styled action in the Circuit Court of Caroline County, hereby gives notice of appeal from the final judgment in favor of the defendant, Seth Peatross, entered in this action on the 23rd day of June, 1958, against him.

WILLIAM J. GLASGOW
By JAMES M. MINOR, JR.
Of Counsel.

Filed Aug. 22, 1958.

T. E. CAMPBELL, Clerk.

* * * * *

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STIPULATION OF COUNSEL.

It is stipulated by counsel that the transcript and incidents of trial shall include the argument of counsel for the plaintiff and argument of counsel for the defendant, as well as the comments and opinion of the trial judge, all of which occurred on July 9, 1958, in the Circuit Court of Caroline County, at Bowling Green, Virginia.

It is agreed that counsel for the plaintiff shall have the Court Reporter transcribe the aforesaid argument of counsel and comments and opinion of the trial judge and deliver to the judge by the 1st day of September, 1958.

James M. Minor, Jr., p. q. Frank B. Beazley, p. d.

Filed 8/25/58.

J. D. B., JR.

* * * * *

page 34 } WILLIAM J. GLASGOW,
being first duly sworn, testified as follows:

William J. Glasgow.

DIRECT EXAMINATION.

By Mr. Minor:

Q. What is your name?

A. William J. Glasgow.

Q. Mr. Glasgow, where do you live?

A. With Mrs. Barlow now.

Q. Where does Mrs. Barlow live?

A. I can't answer. I don't know exactly where she lives. I know where, but I cannot say what section.

Q. Where does she receive her mail?

A. From Doswell.

Q. In Caroline County?

A. Yes.

Q. How old are you?

A. Ninety-four years; ninety-five the 4th of October.

Q. Do you know Seth Peatross?

A. I do.

Q. How long have you known him?

A. Fifty years or more.

Q. You brought this suit in this court against Mr. Peatross, did you not?

A. I did.

page 35 } Q. Tell the court and jury why this suit was brought.

A. Starting from the beginning?

By Mr. Minor: Yes.

A. Your Honor, I am very deaf, and I have not heard one word said by anybody. I lived at 3817 Seminary Avenue. My wife died and I decided—I sold my house—I decided I wanted to come up in Caroline. I drove up to see Mr. Peatross. I had known him for fifty years. He had always been very, very nice to me. I asked him if he would board me. He said his wife had been in the hospital and she couldn't wait on me. He says, "I haven't got a bathroom nor a toilet, only outside. I have been trying for two or three years to get money together to put on a bathroom and another room and a bath." I said, "The devil;" I said, "if you want an extra thousand dollars, I will loan it to you." I had thought that was the end of it. Mr. Peatross made a special trip to Richmond and found me in Mr. Fussell's office. He said he had found a boarding house for me at Mrs. Barlow's. That was the middle of the week. Saturday morning I got

William J. Glasgow.

a truck and put my furniture on it and came up to Mr. Peatross's.

Q. When was this, what month and year?

A. It was last year. I came to Peatross's in January, and when I came up there, I said to Mr. Peatross, I says, "Where does Mrs. Barlow live?" He said, "You unload here, and I will carry you over to Mrs. Barlow's." I unloaded my furniture there, and he took me over to Mrs. Barlow's. Mrs. Barlow has made me very com-
page 36 } fortable.

He began work on his house. I said to Mrs. Barlow after two or three weeks, "Mrs. Barlow, in a little while I will be moving again." She said, "Why?" I said, "I am going over to Mr. Peatross's and live." The next time I saw him, I said, "See here, Seth, you have got me between the devil and the deep blue sea. She said, 'If you were not going to stay here permanently, I would not have taken you in.'" He said, "If you want to stay where you are, it is all right. If you want to come to my house, it is all right." I thought it was all settled.

Instead of wanting $1,000.00, he wanted $1,500.00. If he had wanted $2,500.00, he would have got it just as easy. I thought my money was safe.

The house was finished in three to six months, and he never notified me that the rooms were ready for me. I thought everything was settled. He used to carry me to Sunday School every other Sunday.

Q. Did he ever tell you what terms there would be if you came over there?

A. Never got to that. I don't know today. He never told me what charge—never got that far. And I said to Peatross, "You don't know how long you are going to live, and I don't know how long I am going to live. Don't you think you should sign a note for me?" "No,
page 37 } siree, you got to board it out." He told me he wasn't going to. What will become of my money if I would die or if he should die? Now it is up to the court and Mr. Peatross what they are going to do.

Q. You did not claim any interest, did you?

A. No. My word is my bond.

Q. Can you identify this paper?

A. Certainly can.

Q. What is it?

A. It is a check for $1,500.00.

Q. Who is it made payable to?

William J. Glasgow.

A. Seth Peatross.
Q. Did you give him this check?
A. I gave him this check.
Q. Whose signature is on the check?
A. Mr. Peatross's.
Q. Did this check come back to you?
A. It certainly did.
Q. Have you made demand?
A. No. Asked for a note.
Q. Did he give you the note?
A. No.
Q. Did you make demand on him?
A. This is up to you. When I turned it over to you, I am out of it.

By Mr. Minor: I would like this cancelled check introduced as evidence.

page 38 } (Thereupon the court marked the check as "Plaintiff's Exhibit 1.")

Q. When he wouldn't give you a note you wanted the money, is that right?
A. Yes. If he wouldn't give me a note, I wanted my money. I don't want a note now; I want my money.

By Mr. Minor: Your witness.

CROSS EXAMINATION.

By Mr. Beasley:
Q. You said you never made any demands on Mr. Peatross for this money.
A. I asked him for a note.
Q. Did you authorize your attorney to institute this action?
A. I did.
Q. In this action, you state that you have made repeated demands on Mr. Peatross for the money, and he refused.
A. Never made demands.
Q. Then this is incorrect.
A. That is absolutely incorrect.
Q. You also stated interest from the 4th day of March, is that also incorrect?
A. I said no interest. I mean what I said. He has been

William J. Glasgow.

nice, found me a boarding house. I still have furniture over at his house now.

Q. You have been a friend of Mr. Peatross.

A. Mr. Peatross, was very very nice to me on all
page 39 } occasions.

Q. Didn't you go to his home with Mr. Jones December of 1956?

A. It might have been in December or January. The dates I never paid no attention to.

Q. At that time, weren't you living with Mr. Jones?

A. I was living with Mr. Jones, yes.

Q. Wasn't it necessary for you to move from Mr. Jones's home about that time?

A. Mr. Jones didn't have room for me. I moved, yes.

Q. And you went to Mr. Peatross and asked him to take you in.

A. He told me he didn't have a bathroom and didn't have a toilet except outdoors. That didn't suit me, and he said that he had been trying for several years to put it on. I said, "The devil, if you need a extra thousand dollars, I will loan it to you." I had already looked into getting some rooms in Richmond, and Mr. Peatross made a special trip and told me he had found a boarding house.

Q. On the first visit, didn't you make an agreement where he would fix a place for you?

A. I deny that.

Q. When telling you for the first time he was going to add on a bathroom and a bath for you—

A. I never knew that at all. He never told me.

Q. You didn't expect to live with him.

A. I expected to board with him, if he hadn't told me I
could take my choice to stay with Mrs. Barlow or
page 40 } come with him.

Q. You knew he was making room for you, didn't you?

A. I didn't know. He told me he was making it for himself.

Q. You knew that until he made the repairs, you couldn't live at his home comfortably, didn't you?

A. He told me he had been wanting to do it for two or three years.

Q. You knew that Mr. Peatross was a retired federal employee with a good pension, didn't you?

A. No.

Q. Owns his own home without a mortgage?

William J. Glasgow.

A. No. How would I know it? Why should I know that?

Q. You visited him enough to know something about him, didn't you?

A. Hunting and fishing. He was very, very nice; always took care of me nice. He was nice to people I took up there.

Q. It is true then that you gave him this $1,500.00 to be applied on the house for you.

A. Not for me, but for himself.

Q. You were expecting it to be applied to the rent.

A. I didn't make any agreement whatever with him.

Q. Did you tell him that Mrs. Barlow was charging you $100.00 a month and that was what you were going to pay him?

A. No. I might have told him I was paying $100.00 to Mrs. Barlow. I pay Mrs. Barlow $100.00 a month.

page 41 } Q. Do you remember the first visit you talked to Mr. Peatross in the presence of his wife?

A. I do not recollect.

Q. Do you recall that on a visit on Sunday you talked to him?

A. Yes.

Q. You went quite frequently on Sunday, didn't you?

A. Two or three years.

Q. Didn't Mr. Peatross tell you that he was getting you a place to stay until he completed his house?

A. Yes, but when I stayed, he said I could stay where I was. Up to today, he never told me the rooms were ready for me to move in.

Q. Didn't he come to you and tell you that the rooms were ready, and you said you couldn't leave Mrs. Barlow?

A. Never told me.

Q. You put your furniture at his house.

A. Yes. I expected to, but he told me to take my choice. I thought I was doing him a special favor to stay at Mrs. Barlow's.

Q. Although you expected to go back there and stay with him, because you told Mrs. Barlow.

A. Yes, but when he told me to take my choice, I stayed where I was.

page 42 } Q. Did you expect Mr. Peatross to make a considerable improvement in his home for you and then you not pay for it?

A. Not for me. He told me he had been trying two or three years.

William J. Glasgow.

Q. Do you know how many bedrooms were in his home at that time?

A. No.

Q. Would you be surprised to know there were two, and the third was put on for you?

A. No, sir. He told me he wanted an extra room and a bathroom.

Q. Isn't it true that you designated the size of the bath tub; you wanted a five-foot tub?

A. I deny that.

Q. Didn't you ask Mr. Peatross to put the bath in next to your room?

A. No. I had absolutely nothing to do with the architecture.

Q. You didn't know Mrs. Barlow until Mr. Peatross took you there, did you?

A. No.

Q. He carried you there until he could get ready for you, didn't he?

A. No.

Q. Why?

A. At first I expected to go back and board with him, but when I told him that Mrs. Barlow would not have
page 43 } taken me in if she had known I was not going to be a permanent boarder, and he told me to take my choice. I thought it was all settled until I asked him to give me a note, not money, but a note. He refused to give me a note, and I turned it over to Mr. Minor.

Q. He did tell you to come and live with him, he was ready for you, didn't he?

A. No.

Q. I thought you just said he said you could take your choice.

A. That was before he got the money.

Q. Are you sure?

A. I am sure of that.

Q. I am asking you to refresh your memory, and ask you if that wasn't after he had gotten the money from you.

A. I won't be sure about the dates. I am not going to tell a lie under any circumstances. I am not sure about whether it was before or after he got the money, but anyway, all I want is my money and attorney's fees added.

Q. Would you expect someone to spend three or four thousand dollars for your benefit and then lose that?

A. No. I don't want anybody to lose anything for me.

William J. Glasgow.

Mr. Peatross told me he wanted that for himself. He said his wife had been in the hospital, and she couldn't wait on me.

Q. His wife was able at the time he got the money from you, wasn't she?

A. I don't know how sick or how well she was.

page 44 } By Mr. Beazley: That is all.

RE-DIRECT EXAMINATION.

By Mr. Minor:

Q. You recall when I was examining you a few minutes ago and you stated, I believe, that after you had been there two or three weeks—

A. I had been at Mrs. Barlow two or three weeks.

Q. You told her you were going over to Mr. Peatross's when he finished his house.

A. Yes.

Q. When did you come to Mrs. Barlow's first?

A. (no answer).

Q. What month and year?

A. I think it was in January.

Q. Of what year?

A. That piece of paper was written about the first of January.

Q. Did you move into Mrs. Barlow's the same year you wrote Mr. Peatross the check?

A. I did.

Q. This check is dated March 7, 1957.

A. In January, 1957.

Q. And you told her two or three weeks after January, 1957.

A. Yes.

page 45 } Q. Right after that you talked to Mr. Peatross.

A. Yes, I told Mr. Peatross he put me between the devil and the deep blue sea.

Q. That was two or three weeks after you moved there?

A. Yes.

Q. Then it would be after you talked to Mr. Peatross that you gave him the money.

A. Yes.

By Mr. Minor: Your witness.

Pearl Edwards Barlow.

Witness stood aside.

PEARL EDWARDS BARLOW,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Minor:
Q. Will you please state your full name, please.
A. Pearl Edwards Barlow.
Q. Where do you live?
A. Doswell. It is really Dawn.
Q. Are you married?
A. I am a widow.
Q. How long has your husband been dead?
A. Two years in January.
Q. This past January?
A. This past January.
Q. Do you know William J. Glasgow?
A. I didn't know him until he came to my home
page 46 } to board..
Q. He has lived with you how long?
A. January 5, 1957.
Q. How did he come to live with you?
A. I was over at my son's. Mr. Peatross's daughter, my daughter-in-law, was over there talking about making money. She said, "Mrs. Barlow, would you like—"

By Mr. Beazley: I object.
By Judge Butzner: Objection sustained.

(Answer continued) She asked if I wanted a boarder—

By Mr. Beazley: I object.
By Judge Butzner: Objection sustained. Please do not testify as to what your daughter-in-law said.

By Mr. Minor:
Q. Were you told by Mr. Peatross's daughter that he—

By Mr. Beazley: I object.
By Judge Butzner: Objection sustained. Rephrase your question.

Pearl Edwards Barlow.

By Mr. Minor:

Q. Did you go to see Mr. Peatross?

A. Yes. I went to see Mr. Peatross; I didn't know Mr. Glasgow. I said, "I understand that you have a boarder." "No." he said, "I didn't have any where for him." He didn't have a bath. "If I could get my house fixed up. If you want to take him, I will just let it drop." He went to see Mr. Glasgow the next day. Mrs. Peatross called and said. "Mr. Glasgow is at our house. Are you ready for him?" I said, "I didn't expect him so early." They brought page 47 } him over and introduced him to me.

Q. When Mr. Glasgow got to your house what arrangements did you make with him about board?

A. I let Mr. Peatross make the arrangements about the board. I can't hear you.

Q. The first day was a Saturday in January, 1957. Did he ask you any questions?

A. Yes, what I was going to charge him. I told him I would like to wait and see how we got along, and then I would tell him.

Q. Why didn't you tell him?

A. I hadn't thought much about it. I wanted a little time to think it over.

Q. When Mr. Glasgow came there, were you living down stairs?

A. Yes. I knew he was old and would be more convenient down stairs; the bath was down stairs. I didn't move my furniture; I wanted to be sure we got along. Then I got rid of my furniture and put his in the room, and I went up stairs.

Q. Have you been up stairs ever since?

A. Ever since.

Q. And he has been there about eighteen months.

A. That is right.

Q. Do you know anything about when Mr. Peatross came over and said, "Come live with me."?

A. No. He came over one morning. He said, "I want Mr. Glasgow satisfied. If he would rather stay here page 48 } with you, stay."

Q. Was Mrs. Peatross present when you were talking?

A. No.

Q. Tell just what transpired between you and Mr. Peatross.

A. Mr. Peatross came and took Mr. Glasgow to Sunday school and sometimes he had him to stay to eat.

Pearl Edwards Barlow.

Q. When was this?
A. It must have been a couple months or more.
Q. In the spring?
A. In the spring.
Q. A couple of months?
A. Yes.
Q. After Mr. Glasgow had been there two or three weeks did he talk to you?
A. Yes.
Q. What did he tell you?
A. He said, "Just as soon as the room is finished, I am going to move over there." I told him, "If I had known that, I would not have taken you. I got rid of my furniture. I thought it was a permanent home."
Q. Have you had any trouble with Mr. Glasgow since he has been there?
A. He is easy to get along with.
Q. Mrs. Barlow, the Saturday evening Mr. Glasgow was brought over by Mr. Peatross. did Mr. Peatross say anything to you about how long Mr. Glasgow would be there?
page 49 } A. No, sir.
Q. Did he say anything about moving over to Mr. Peatross's after a while?
A. No.

By Mr. Minor: Your witness.

CROSS EXAMINATION.

By Mr. Beazley:
Q. Mrs. Barlow, did you visit in Mr. Peatross's house?
A. Yes, sir.
Q. Did you visit there in the year 1956?
A. I remember. I think that was the time I was there.
Q. How far is it from your house?
A. Ten or twelve miles.
Q. You go there often. Do you know anything about the building?
A. Through my son. His daughter married my son.
Q. Isn't it true that Mr. Peatross didn't do any building, make any additions or enlarge his house until Mr. Glasgow came to live with you?
A. Mr. Peatross never told me. I heard through my son he was going to build.

Seth Peatross.

Q. You knew he was building while Mr. Glasgow was with you, didn't you?
A. He had cinder blocks before Mr. Glasgow came.
Q. How long?
A. Some time.
page 50 } Q. Mr. Glasgow told you that he was going to move to Mr. Peatross's as soon as Mr. Peatross got his house completed, which you said was a surprise to you.
A. I told Mr. Peatross the day he was took, "Mr. Peatross, if you want him, you take him. I don't want him just for a few months."
Q. You didn't hear any arrangements.
A. I didn't hear any arrangements whatsoever.
Q. He paid you $100.00 per month for board.
A. He paid me $100.00 every first of the month.

By Mr. Beazley: That's all.

Witness stood aside.

SETH PEATROSS,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Minor:
Q. Mr. Seth Peatross, is that correct?
A. That is right.
Q. You are the defendant in the action before us, is that right?
A. That is right.
Q. I just want to ask you one or two questions. Mr. Peatross, did you in March of 1957 get a check from Mr. Glasgow for $1,500.00?
A. Yes.
Q. Is that the check?
A. Yes.
page 51 } Q. Is this your endorsement?
A. Yes, sir.
Q. Have you paid any portion of this check back to Mr. Glasgow?
A. No, sir.
Q. Back in the fall of 1957, you received a letter from me,

telling you that this matter had been turned over to me for collection, did you not?

A. Yes, sir.

Q. You did not respond, did you?

A. No, sir.

Q. I believe I wrote you again a little later.

A. Yes, sir.

Q. You didn't respond to that letter either, did you?

A. No.

Q. There never has been any question in your mind but that Mr. Glasgow wanted his money.

A. He didn't say he wanted his money.

Q. I wrote you.

A. He said he wanted a note.

Q. I told you he wanted his money.

A. No answer.

By Mr. Minor: No further questions. We asked for interest. We waive claim for interest. We do not ask for interest. That is plaintiff's case.

Witness stood aside.

page 52 } DR. B. R. WELLFORD,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Beazley:

Q. Are you Dr. B. R. Wellford?

A. Yes, sir.

Q. Where do you live?

A. Richmond.

Q. Are you acquainted with Mr. Seth Peatross?

A. Yes.

Q. Do you know Mr. Glasgow?

A. I had the pleasure only once.

Q. Did you two get together hunting on Mr. Peatross's place during 1956 and 1957?

A. Yes.

Q. Did you have any contract with him, or license?

By Mr. Minor: Objection.

By Judge Butzner: Overruled. Answer the question.

Mrs. Seth Peatross.

A. Yes. Mr. Peatross has allowed us to hunt on his place many years with other hunters. In 1956, we had a contract with Mr. Peatross for a given sum of money to have exclusive hunting rights for the season.

Q. Did he ask you to nullify the hunting rights for 1957?

By Mr. Minor: I object.

By Judge Butzner: What do you have to say to that?

By Mr. Minor: It's hearsay evidence.

By Judge Butzner: Objection is sustained.

By Mr. Beazley: Step down and you may be excused.

page 53 } MRS. SETH PEATROSS,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Beazley:

Q. Are you Mrs. Seth Peatross?

A. I am.

Q. Are you the wife of the defendant in this suit?

A. Yes.

Q. I direct your attention to the latter part of 1956. Do you know Mr. Glasgow?

A. Yes.

Q. How long?

A. For years. I couldn't tell you.

Q. He visited in your home prior to 1956, did he not?

A. Father's home and with us too.

Q. Did he have any conversation with your husband in your presence in the fall of 1956?

A. I do not think so.

Q. Did he come to your home with Mr. Jones?

A. Yes.

Q. What date?

A. Last year.

Q. 1957?

A. Yes, sir.

Q. Did you hear any conversation? Did you have any conversation with Glasgow, or did you hear any con-
page 54 } versation?

A. Mr. Peatross was not at home. I told him where Mr. Peatross was.

Q. Did you have any other conversation?

A. No.

Mrs. Seth Peatross.

Q. Did he go to see Mr. Peatross?
A. Yes, sir.
Q. Did you see him any more that day?
A. No, sir.
Q. When did you see him again?
A. On the following Saturday. By 1:30 he was there with all his furniture. My husband said, "We don't have room, but we will put your things in the garage and the nice things on the porch and back yard." A colored man unloaded it.

By Mr. Minor: I object.
By Judge Butzner: Sustained.

By Mr. Beazley:
Q. What happened then? He brought the furniture.
A. Unloaded it.
Q. Did you have any conversation with Mr. Glasgow at that particular time, or your husband in your presence?
A. Yes, that Mrs. Barlow would take him, and we would take him that afternoon. I called Mrs. Barlow. She said, "Yes, bring him over."
Q. Mrs. Peatross, had you previously made any effort to add to your house, make any repairs, or build on?
A. No.
page 55 } Q. Did you make any effort after that?
A. Yes.
Q. What?
A. Put on a bedroom, large room, and bath, so it would be convenient. We decided the front room would be cooler for him.
Q. You said Mr. Peatross took him to Mrs. Barlow's.
A. Mr. Peatross and I took him.
Q. Did you have any conversation?
A. He didn't know Mrs. Barlow. We didn't have any discussion about her or anyone else; just general talk.
Q. Was anything said about him living with Mrs. Barlow?

By Mr. Minor: I object. He is leading the witness.
By Judge Butzner: Sustained.

By Mr. Beazley:
Q. What was said?
A. I don't know.
Q. What was said in the presence of Mrs. Barlow?

Mrs. Seth Peatross.

By Mr. Minor: I object.
By Judge Butzner: Overruled.

By Mr. Beazley:
Q. Was he present?
A. Yes.
Q. What was said in your presence?
A. I don't know.
Q. Why did you take him over there?
A. I called her. We were going to take him to look. He moved on Saturday. I called her and asked, "Do
page 56 } you want him to come now?" She said, "OK," and we took him over.
Q. What was the conversation?
A. She said if he got sick she would not wait on him.
Q. What happened then?
A. We left Mr. Glasgow.
Q. When did Mr. Glasgow see and talk to you again?
A. The next day, carried him to church. I think he came on home and ate lunch with us.
Q. Did you have any conversation with him?
A. When I did see him he wanted to know when we were going to have the house finished; what I was going to put in the house.
Q. After you started the house, did Mr. Glasgow come over or not?
A. Yes, several times.
Q. Did he observe the rooms?
A. Yes, sir.
Q. Please state whether he gave you any instructions about what was to go in it?
A. Yes. He told Mr. Mims to put copper wire in the porches. "I want the best put in here, and send me the bill."
Q. When you fixed it, what kind of wire did you have put in?
A. Aluminum. I prefer aluminum wire.
Q. When did you learn for the first time Mr. Glasgow was not going to live with you?
A. In September. I didn't go with them to church.
Q. In going back and forth to church, did you go with them?
A. Not every Sunday.
page 57 } Q. During the time you were with them, did you have any discussion about the house at any time?

Mrs. Seth Peatross.

A. No.

Q. Was your daughter present at any of the times during the time Mr. Glasgow was there?

A. Yes, at home several times. One time in her prescence he said, "When I get over here I'm going to buy you the biggest television you can carry and a car. She is going to have a car and she is going to drive me around."

Q. Why was the room built?

A. For Mr. Glasgow. He wanted to come. He said, "Let's go down to see Mr. Long."

Q. Were you present?

A. Yes. He wanted a bathroom. We didn't need another bedroom.

Q. How many bedrooms did you have at that time?

A. Two.

Q. How many were living at your house?

A. My husband and I.

By Mr. Beazley: Your witness.

CROSS EXAMINATION.

By Mr. Minor:

Q. How has your health been in recent years?

A. Since I had an operation, better health than in twenty years.

page 58 } Q. When was this operation?

A. Two years ago this past August. I don't think I felt better.

Q. In 1956?

A. Yes.

Q. In the fall of 1956, two or three months before that you had been in the hospital, hadn't you?

A. Yes.

Q. Do you know Mrs. Barlow very well?

A. Yes.

Q. Did you visit back and forth in her home?

A. I have been to her home.

Q. Do you remember when you carried Mr. Glasgow over to Mrs. Barlow's?

A. Yes, on Saturday.

Q. You didn't suggest to Mrs. Barlow at that time that later Mr. Peatross would take him, did you?

A. I thought that was the understanding.

Q. You didn't tell her, did you?

Mrs. Seth Peatross.

A. That was the understanding.

Q. But you do not know whether she knew it or not, did you?

A. I thought she did.

Q. After Mr. Glasgow had been there several months, didn't you tell Mrs. Barlow that you were glad that Mr. Glasgow wasn't coming over, because you were not able to take care of him?

A. I did not.

page 59 } Q. If she said that, it would not be true, would it?

A. I know that.

Q. You had some cinder blocks over at your house for sometime before Mr. Glasgow came to see Mr. Peatross about this board business, didn't you?

A. Yes.

Q. How long had you had them?

A. I don't know.

Q. Did you have them long before the fall of 1956?

A. We propped up some houses with them.

Q. When you built this room, you used them didn't you?

A. I am not sure.

Q. You had been planning to put a bathroom in ever since you had been there—

A. Thirty-three years.

Q. And just got to the place where you thought you could.

A. Yes.

Q. You would have put the bathroom in in the near future any way, wouldn't you?

A. Yes.

Q. Are you using your new room?

A. Yes.

Q. The room you were going to give him is your living room now, isn't it?

A. Front bedroom.

page 60 } Q. How many children do you have?

A. Four.

Q. Do they live near you?

A. My son is in Richmond. I have a daughter on either side of me and another daughter in Tennessee.

Q. When the last time your daughter in Tennessee came to see you, did she use that room?

A. She used the back room.

Q. You use that when you have company, don't you?

Mrs. Seth Peatross.

A. Occasionally.
Q. You use that room, do you not?
A. Yes.
Q. When your son comes up from Richmond, you use it don't you?
A. Yes.
Q. I believe you told me he came up and visited in 1956. You don't know what conversation took place, because you were not present, were you?
A. No.
Q. You do not know what arrangements were made, do you?
A. Only what he told me.
Q. I believe you stated that when you took him over to Mrs. Barlow's, he came and asked you where Mrs. Barlow lived.
A. I did not.
Q. Mrs. Barlow knew he was coming, but didn't know when.
A. She had been over during the middle of the
page 61 } week.
Q. Did you hear any of the conversation?
A. No.
Q. For the most part, what you know is what your husband has told you, isn't that true?
A. Yes.
Q. And I believe the day you took Mr. Glasgow to Mrs. Barlow's there was no conversation.
A. No.
Q. When Mrs. Barlow took Mr. Glasgow in, did you know where she slept before he came there?
A. I really don't know.
Q. She had a down stairs bed room, didn't you?
A. She put him in a down stairs bed room.
Q. Where does she sleep now?
A. I do not know.
Q. Where is her bathroom; that is down stairs, isn't it?
A. Yes.
Q. He has been there since January 5, 1957, about eighteen months, has he not?
A. That is right.

By Mr. Minor: That's all.

Mrs. Sanford.

RE-DIRECT EXAMINATION.

By Mr. Beazley:
Q. Is some of Mr. Glasgow's furniture still at your home?
A. Yes.

By Mr. Beazley: That's all.

page 62 } RE-CROSS EXAMINATION.

By Mr. Minor:
Q. For the most part, most of it has been moved down to Mrs. Barlow's, has it not?
A. Her son said Mr. Glasgow wanted his bed. He took what he wanted. He said, "Here is a lawn mower you can have. All this is going over there, but it's all coming back to your house. Anything in the garage—anything you don't want throw it down the hillside."
Q. That was the following week after he moved there, wasn't it?
A. Not too long after.
Q. The following week.
A. Pretty soon.
Q. You hadn't started the room, had you?
A. Had talked with the contractor; had not started it.

By Mr. Minor: That's all.

RE-RE-DIRECT EXAMINATION.

By Mr. Beazley:
Q. You didn't talk to the contractor until after Mr. Glasgow came out and saw you, did you?
A. Yes, that is right.

By Mr. Beazley: That's all.
Witness stood aside.

page 63 } MRS. SANFORD,
being first duly sworn, testified as follows:

Mrs. Sanford.

DIRECT EXAMINATION.

By Mr. Beazley:

Q. Are you related to the defendant?

A. Yes.

Q. What relation?

A. His daughter.

Q. Were you at his home during the winter months of last year?

A. Yes.

Q. Were you there when Mr. Glasgow came there?

A. Yes.

Q. Did you hear any conversation between Glasgow, your father and mother?

A. No.

Q. Did you have any conversation with Mr. Glasgow?

A. No.

Q. Did you hear any conversation?

A. He told me the first Saturday he wanted to give Daddy $1500.00 to make an addition to the house so he could have some place to call home.

Q. What month was that?

A. That was in January.

Q. Who was present when that statement was made?

A. My mother and I.

Q. Tell us again.

page 64 } A. He was going to give Daddy $1500.00 to make an addition to the house so that he could come there and live with us.

Q. Did you hear any further conversation?

A. No, sir.

Q. Were you there when he got his furniture?

A. Yes.

Q. Did you have any conversation with him then?

A. When he took it away, he said, "I don't know how long I will be gone."

Q. He was coming back when the building was completed?

A. Yes, sir.

Q. Had any work been started on the addition to the house before Mr. Glasgow came up there on that Saturday?

A. No, sir.

By Mr. Beazley: That is all.

Mrs. Sanford.

CROSS EXAMINATION.

By Mr. Minor:

Q. Do you live with them?

A. No, sir.

Q. Where do you live?

A. Presently in New Jersey.

Q. In the winter of 1956, where did you live?

A. In the house next to them.

Q. I believe you stated first of all that you were not present when negotiations took place between Mr. Glasgow and Mr. Peatross?

A. Yes, sir.

page 65 } Q. And you did not hear any conversation.

A. Not any conversation.

Q. You said that Mr. Glasgow said that he was going to give your father $1500.00 to build an addition on the house. Did he tell you how he intended to be repaid?

A. If you give someone something, I do not see any reason to pay it back.

Q. You took it as a gift?

A. Yes.

Q. Mr. Peatross was to do nothing?

A. I do not know.

Q. You did not know anything about the arrangements made between the two of them.

A. No, sir.

Q. When Mr. Glasgow came to get his bed that was the following week after he came, wasn't it?

A. A week or ten days.

Q. And at that time Mr. Peatross had not started a room, had he?

A. No.

Q. The house had just the two bed rooms, is that right?

A. That is right.

Q. And he and his wife occupy one.

A. Yes.

Q. Who occupies the other one?

A. No one.

page 66 } Q. In other words, you could have taken him without adding the room.

A. I don't think so. The other room was to be his.

Q. The bath was to be added before, wasn't it?

A. Yes.

Q. They are using the room, are they not?

Seth Peatross.

A. His room is still there.
Q. The room that was put on there is being used by Mr. and Mrs. Peatross, isn't that right?
A. Yes.
Q. And they are, of course, using the bath facilities.
A. That is right.

Mr. Minor: No further questions.

Witness stood aside.

SETH PEATROSS,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Beazley:
Q. Mr. Peatross, tell exactly what took place between you and Mr. Glasgow beginning back in December of 1956.
A. In 1956?
Q. Or on the first time he came to see you.
A. A gentleman named Mr. Jones called me.
Q. Now don't tell what Mr. Jones said.
A. Mr. Jones called and said he was going to bring Mr. Glasgow to see me.
page 67 } Q. Did he bring him?
A. Yes, sir. First thing, soon as I went around the corner of the house Mr. Glasgow came around the other, and inquired if I was there. He overtook me up the road. He said, "I thought you were going to be at home." I said, "Well, here I am." He said. "I've got to go somewhere and have got to go today." I said, "Mr. Glasgow, I am not able to take you. We don't have but one extra bedroom. We just don't have room." He said, "I will get a contractor to put the room up." I said, "Come on and spend the night, and I will take you back to Richmond Sunday night if we can't find you a place." He said. "I want a home for the rest of my days." I told him that we would furnish him a home there, but I didn't want to take him up there when I knew he had been used to a heated house and a heated place. I knew my place was not as comfortable as his place in Richmond. I knew I couldn't take him with the house pulled to pieces. I didn't want Mr. Glasgow, and at his age, with porches pulled off and windows off. You couldn't heat it with windows off. I told him I would take him until Saturday and spend the night Friday

Seth Peatross.

night, and I would take him back to Richmond. Mr. Glasgow said, "I've got to find a place to stay today. Mr. Jones said I can't stay at my house." On the following Wednesday I went to Richmond. I didn't know where Mr. Jones lived. I had promised I would help him as much as I could, and I went on down to Richmond. I didn't know where to locate Mr. Jones. I knew the lawyer he was dealing with. I called Mr. Fussell.

page 68 } Q. After you found him in Mr. Fussell's office, what took place?

A. I told him I would accept his proposition to help me on the room. I would come for him on Sunday. On Saturday here come the truck with all the furniture. He put it in the garage and on the porch. He had a lawn mower he said, "That is yours, I do not have any use for it." My wife called Mrs. Barlow, and we went on over to Mrs. Barlow's.

Q. Had you had any conversation with Mrs. Barlow prior to that time?

A. Yes.

Q. You had a prior conversation. Now go ahead, what happened.

A. She had talked about putting him upstairs. I said, "Oh, no you're not going to put him upstairs, an old man like that."

Q. What happened?

A. We left him. He wanted to go to St. Paul's Church and from January 6 to September 2 I hauled him there. That is when he told me he was not coming back to my house.

Q. How far is it from Mrs. Barlow's?

A. Eight miles.

Q. How far is it from Mrs. Barlow's to the church?

A. Twelve miles.

Q. What is the total distance you drove?

A. Sometimes he would come by my house. He bought a gallon of whiskey. He said Mrs. Barlow wouldn't let him bring whiskey in the house. He left it there. If I

page 69 } go to Mrs. Barlow's, to the church and come back by my house, forty-three miles I had to drive.

Q. How long did you do this?

A. From the 6th of January to the first of September.

Q. After you left him there on Saturday and you said you went back the following Sunday and took him to church, where did you take him?

A. To my house.

Seth Peatross.

Q. Was there any conversation?
A. I don't remember.
Q. Was there any further conversation about building?
A. He instructed me to put in a five and a half or six foot bath tub. He said the one at Mrs. Barlow's was four and a half feet and was too short. He made arrangements to put it in. The carpenter told me five feet was all you would want.
Q. Had you made any preparation, what preparation, if any, had you made towards building prior to Mr. Glasgow's coming to your place?
A. Had a saw mill, had a lot of lumber cut. I had intended to put on a small room. I also pulled the weatherboard off and put on new shingles.
Q. Who did you fix it for?
A. Mr. Glasgow. I didn't have to fix it for anybody else.
Q. Did you get any money from Mr. Glasgow and under what conditions?
A. He gave me $1500.00. I said, "Look here." page 70 } I told him, "If you want to stay at Mrs. Barlow's, stay there. I want you to be satisfied." I told him, "I don't want one cent of money." He said, "If I let you have the $1500.00, that will be a damn good way to get away from over there."
Q. At the time you got the $1500.00 from him, did you know whether he was going to live with you?
A. I thought he was going to live with me. He said that was for fifteen months board.
Q. Mr. Peatross, did you fix the house as agreed?
A. Yes, sir, I did.
Q. Did you notify him when it was ready?
A. Yes, sir. He notified me that his mail would be coming there and take care of it.
Q. Did any come there?
A. No.
Q. When did you learn he was not coming there?
A. September 1, 1957, or Sunday.
Q. Had you completed the house?
A. Yes, he was notified in May.
Q. When you notified him, what reply did he make?
A. He didn't make any.
Q. Are you willing to take Mr. Glasgow there for fifteen months?
A. Yes, any day he is willing to come, and I will do the best I can for him without any animosity. He is free to come

Seth Peatross.

any day he wants to come.

page 71 } Q. Where is Mr. Glasgow's furniture now?

A. At Mrs. Barlow's.

Q. All of it?

A. Some of it is sitting at the house on the porch.

Q. Mr. Peatross, did you tell Mrs. Barlow on a Saturday that you went over there to see her that you wanted her to take Mr. Glasgow permanently?

Mr. Minor: I object.

Judge Butzner: Objection sustained.

A. I didn't tell her that I expected her to keep him permanently.

Q. What was your purpose in going over there?

A. To take Mr. Glasgow?

Q. For what purpose?

A. She wanted me to go to Richmond to get Mr. Glasgow to come up there.

Mr. Beazley: That's all.

CROSS EXAMINATION.

By Mr. Minor:

Q. Mr. Peatross, at the time that Mr. Glasgow came up to see you on Friday night, you had an extra bedroom, didn't you?

A. Yes, sir.

Q. And only you and your wife lived at your house?

A. Yes, sir.

Q. At the time you had only outdoor facilities?

A. Yes, sir.

page 72 } Q. Did you have central heating?

A. No, sir.

Q. You testified that you had planned to put on a room and bath, but a room that was not as big.

A. Yes, sir.

Q. Have you been using the bathroom?

A. Yes, sir.

Q. I believe your wife said that you had been living in the house for thirty-four years.

A. Yes, sir.

Q. And you had planned, but never been able to put a bathroom on, isn't that correct?

Seth Peatross.

A. Yes, sir. We left a place for a bathroom.

Q. You had already before Mr. Glasgow came up there, hacked the lumber to put the addition on the house, isn't that true?

A. Yes, sir.

Q. And you had planned to put it on there before Mr. Glasgow came up there, hadn't you?

A. Yes, a small one. All I wanted was a small room, the water works to be down in the basement.

Q. I believe you took the weatherboard off your house and put shingles on that made the house more comfortable, didn't it?

A. Yes.

Q. Wouldn't it be fair to say that benefits came just as much to you and your wife?

A. Yes, sir.

page 73 } Q. Mr. Glasgow has always been particularly generous, hasn't he?

A. Never been very generous. He never done me a favor in his life.

Q. Never done you any wrong?

A. Yes.

Q. What did he do?

A. Sued me.

Q. Did he tell you you could have money on the porch?

A. He gave me the lawn mower and came back and got it.

Q. When you came to Richmond to get him had you already talked to Mrs. Barlow?

A. She said she would take him.

Q. You had gotten word to Mrs. Barlow that Mr. Glasgow wanted a place to board?

A. She said she would take him. I told her all I wanted her to do was to keep him three or four months. Her daughter in law was there, and she knows that is what I told her.

Q. Did you at any time tell Mrs. Barlow that she was going to keep him permanently?

A. No.

Q. And if she said that you told her that she would not be telling the truth, would she?

A. No answer.

Q. As I understand it, when you came to Richmond, you said that you accepted his proposition?

A. That is right.

page 74 } Q. In exchange for $1.500.00 you would board him at the rate of $100.00 per month for fifteen months?

Seth Peatross.

A. That was not made then before he gave me the money.

Q. And he has not been over to your place since that agreement was made, has he?

A. No.

Q. You know that he denied that he made any agreement with you, don't you?

A. I don't know.

Q. You heard what he said didn't you? Speaking of the bath tub, Mr. Glasgow told you to put a five and a half or six foot bath tub in the place, and when you found out that it would be too much trouble, you put in a smaller one, didn't you?

A. Yes.

Q. Then you didn't feel you should follow his instructions to put a five and a half foot tub in, did you?

A. No, sir.

Q. He told you after he had been there for some time that you had him in the middle of the devil and the deep blue sea, didn't he?

A. He told me. We took him to Richmond. He gave us $30.00. We told him we would get a lock fixed. He gave me $30.00 the following week to get the lock. He said, "You have got me between the hawk and the buzzard there."

Q. You were the hawk and Mrs. Barlow was the buzzard?

A. I don't know who was the hawk and buzzard.

page 75 } Q. Then he stayed on at Mrs. Barlow's?

A. That is right. He got his furniture and took it to Mrs. Barlow's.

Q. And as far as you know he is well satisfied there?

A. I don't know.

Q. I believe you said you took him to Sunday School and that you didn't feel you were obligated to take him?

A. I don't see where I am obligated to drive forty miles.

Q. You didn't feel obligated, but you didn't mind?

A. Yes, when he would go.

Q. Did you go every Sunday?

A. Every other Sunday.

Q. And until this matter was brought up, you didn't charge him?

A. No, I have never told him I would charge him.

Q. Then you didn't mind?

A. It's forty miles and forty-three to come back by the house to pick up a bottle of whiskey.

Q. You stated that the place was ready in May, is that right?

Pearl Edwards Barlow.

A. That is right.

Mr. Minor: That's all.

Witness stood aside.

page 76 } PEARL EDWARDS BARLOW,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Minor:
Q. After Mr. Glasgow came to live with you, did Mrs. Peatross ever say anything to you about the fact he was over there?
A. She told me she wanted me to keep him; she wasn't able to take care of him.

CROSS EXAMINATION.

By Mr. Beazley:
Q. Wasn't her health good at that time?
A. She was getting along very well at that time.
Q. When was this?
A. At a double funeral.
Q. You know nothing about a contract?
A. No.

Mr. Beazley: That's all.

Witness stood aside.

page 77 } Virginia:

In the Circuit Court of Caroline County.

William J. Glasgow,

v.

Seth Peatross.

Transcript of argument on motion to set aside verdict, had

on July 9, 1958, before the Honorable John D. Butzner, Jr., Judge, at Bowling Green.

Appearances:

Mr. James M. Minor, Jr., of Richmond, Virginia, counsel for the plaintiff.

Mr. Frank B. Beazley, of Bowling Green, Virginia, counsel for the defendant.

page 78 } The Court: All right, gentlemen.

Mr. Minor: If Your Honor please, I have a written motion here to set aside the verdict of the jury, based on the memorandum that I presented to the Court and counsel. I will now read it to the Court.

Note: At this point this motion is read to the Court by Mr. Minor, following which it is filed among the papers.

Mr. Beazley: If Your Honor please, I want to say this, that this is a most unusual proceeding, the most unusual one I have ever participated in, or been confronted with in the thirty-five years I have practiced law, and I am certainly sure of this, that Your Honor has certainly never seen anything like it. I don't know how the gentleman, counsel for the plaintiff, practices law in the City of Richmond, but certainly this is the most unusual procedure I have ever participated in, and I am certainly sure the most unusual one Your Honor has ever heard.

Remember, this case was tried on the 23rd. On June 25, I received this letter:

"Dear Mr. Beazley: I talked with Judge Butzner this morning, and he has granted the plaintiff a hearing in the above case on July 9, 1958, at 10:00 A.M., in the Circuit Court of Caroline at Bowling Green. Appropriate motions, orders, and memorandum of law will be filed forthwith, with copies of the same mailed to you."

I must say, that I realize the fact that there are certain courtesies due every individual, and I feel that page 79 } there are certain courtesies due me, even though I may be small, but Mr. Minor wouldn't have the kindly feeling enough to talk to me or ask me what date would suit me or anything of the kind. He never advised me what motion he expected to make, and if he advised Your

Honor, I have no notice of it. The only inclination that I had that anything was happening in this case was the Clerk advised me that Mr. Minor called him and advised that he had this after-discovered evidence. When I got this paper, the first thing I thought of was calling Your Honor, but I was in court, and I was confident that Your Honor wouldn't set any case without ascertaining first, or giving counsel on the opposite side, an opportunity to be heard or determine whether or not he could conveniently meet and discuss or argue a case on a particular date.

But before I got through my case Your Honor called to me to advise that you didn't set this. It so happened that I had that date open. I have waited from that day, which was the 25th to be exact, I waited from that day until the afternoon mail of yesterday to get one single thing from Mr. Minor, and then I got a memorandum that doesn't mean anything. No motion or anything of the kind.

Now, I don't think it is proper, I don't think he has come in here right, and I don't think he is entitled to be heard under the circumstances.

page 80 } If he had, he knew on the 25th that his hearing here would be here on the 9th. He hasn't done a great deal of exhaustive work here. This thing he could have found in an hour's time, and if he had of examined the authorities, he wouldn't have had to have gone outside of Virginia.

In the second place, he comes this morning, though the very day of the hearing, and presents his motion for the first time. He has got the cart before the horse, he has got it hind-part-before. His motion is out of order, and this Court should not hear it for the following reasons: first of all, Mr. Minor had all of the facts and the law before him when he tried this case. He made the motion before Your Honor, and withdrew it. Your Honor knows right over there when he raised the question, talking about the parol evidence, which had nothing to do with the case, and we finally got him on the right track by referring to the Statute of Frauds, although he had the Code right before him. He came up here prepared to introduce that as a defense. I knew nothing about it. But he raised that question over there before Your Honor, and in the discussion of the case, he was of the opinion that it was not a valid defense, and he withdrew his motion.

Now he can't approbate and reprobate at the same time. He has got to do one or the other. He can't come in here and say to the jury, "Gentlemen of the jury, if

page 81 } you find for the defendant it is all right with me, I will abide by it," and then after the jury comes

in and brings in a verdict against his client, he cries like a child with a piece of candy or drinking of milk. He can't have his cake and eat it too.

The time for him to have made this motion was before the trial. If he had made a motion and this Court overruled it, he could have excepted to it, and then he would have been before this Court. He is not properly before the Court this morning. I don't object to arguing this motion that he has here this morning, but I think that it is not germane to the issue. If it was after-discovered evidence, I wouldn't stand here and oppose it, if it was after-discovered evidence, but I say he has not played fair with me, he has not played fair with this Court, and if we are going to play the game we should play it according to the rules.

As I said, this is the first time that I have seen the motion. I don't know when it was prepared, but I assume it was prepared on yesterday. But he didn't even mail that along with his memorandum. I don't believe that we practice law that way.

For those reasons, as I said, I think his motion comes too late. The case has been tried, the jury has brought in its verdict, and has spoken. He had an opportunity to make that motion at that particular time, and he didn't do it.

He had an opportunity to bring in his instruc-
page 82 } tions, and he didn't object to a single instruction,
nor was an exception taken in this case, except when he made a motion to set the verdict aside as being contrary to the law and the evidence, and Your Honor, I know, informed him that he had addressed to the jury and said, "Gentlemen of the jury, if you see fit to bring in a verdict for the defendant, it is all right with me; I know you are honest men, and I am willing to abide by your decision." Then he comes here and hollers about something. If he has slept on his rights, he can't be heard now to say, "Court, give me help."

The motion comes too late, and I submit to you that it should be dismissed for three reasons, and the first is that it is not timely, that he hasn't filed it in accordance with the rules of procedure and as laid down by the Supreme Court, because it wasn't filed in the papers—it has never been filed by Your Honor as yet; and, in the second place, he gave me no notice of it, and he had ample time; in the third place, it is that it comes too late.

Mr. Minor: If Your Honor please, I want the Court to understand clearly in addressing my remarks to this Court and to opposing counsel, in the first place I have not in this case in the slightest way intended to be discourteous or in-

considerate of either the Court or opposing counsel, and I strongly resent the remarks of Mr. Beazley di-
page 83 } rected in that direction. That is the first point.

Your Honor, the Court will recall that this verdict was rendered on the 23rd day of June, and the Court also recalls, from my copy of the file, that the grounds of defense was a general denial. The defendant—

The Court: Before we get into the merits, Mr. Beazley has a motion, as I recall it, before the Court to refuse to hear this at this time. To be perfectly frank with you, I was a little distressed when I got your letter in the way that it was written, because it did look as though I arbitrarily selected the date. I asked you to check with Mr. Beazley and see if the date was satisfactory, and send me a letter of confirmation, and also send a copy of what you heard from Mr. Beazley.

When I got the letter, I immediately checked with Mr. Beazley, the same date, to determine whether the date was open, and fortunately it was open, but I didn't think you should put that burden on the Court. I asked you to do that.

Mr. Minor: I am sorry, Your Honor, and I apologize herewith, and I will say further that if the Court or Mr. Beazley—I say this in the utmost sincerity—feels that I have taken undue advantage or placed Mr. Beazley at a disadvantge in this case because of that, I will not request that I be heard at this time. That is the first thing.

page 84 } Your Honor, with respect to what Mr. Beazley has said, not a remark has been directed to the merits of this situation. I don't mind Mr. Beazley having a reasonable opportunity to reply to my memorandum. I am not coming up here trying to take advantage of any situation.

The Court: When was the memorandum prepared?

Mr. Minor: Sir, the memorandum was finished by my secretary on Monday, and I want to tell the Court this: Mr. Beazley says it took me about an hour to work on this. Maybe it took him an hour, but I worked every spare moment that I had at night on this motion at the university of Richmond law library, and I worked Saturday, and I worked on it Sunday out there at the law library, and on Monday morning I gave it to my secretary, and it took her all day to type it up. The minute that she finished it, at quarter past five, I then put it in the mail.

In all sincerity, Your Honor, it has been two weeks since this case has been tried, and during that time I have had five or six trials. Mr. Beazley has had his work to do, and I have worked on this case every minute that I have had. I have made an exhaustive search of every case in the United States

on this point. Maybe Mr. Beazley could have prepared it in a half an hour, but I spent these twenty hours at least in research on this paper.

The Court: One other question. It was re-
page 85 } ceived. I received a copy of it on yesterday, and
I think certainly if a copy went to Mr. Beazley on the 7th, he would have received it on yesterday.

Mr. Minor: Yes, sir, I mailed it to him the same day I mailed it to you.

The Court: However, it is an involved memorandum, and I don't know whether we are in a position to hear it when a lawyer has just gotten a copy of it on such short notice.

If he makes a motion and it is filed today, I think it would be taking advantage of him. If Mr. Beazley is willing to argue the case this morning without any further notice from you, I will hear it. If Mr. Beazley requires more time to digest this memorandum, I could hear you on the 11th.

Mr. Beazley: If Your Honor please, I couldn't digest this in two days or probably a week.

The Court: You see, Mr. Beazley, we are confronted with this situation, that the twenty-one days is running, and at the end of that the judgment will be final. It was tried on the 23rd, and we are now—we have approximately seven days to go.

Mr. Beazley: I will say this to the Court, that I have not been sleeping on my rights.

Mr. Minor: Your Honor, I can make this suggestion, that the Court can arrest the judgment in this case to give Mr.
Beazley an opportunity, as he said, to digest the
page 86 } memorandum. I don't want the Court to think,
and I don't want Mr. Beazley to think, regardless of what he said this morning, that I come before this Court to take advantage of a situation. I want him to have a reasonble opportunity to be heard and file a memorandum, if he so desires to, in this case, because, regardless of what he says this morning, the Code of Virginia and Burks Pleading and Practice clearly state that while a judgment is within the breast of the Court, the Court of its own motion can set aside the verdict—

The Court: I have no doubt about that, Mr. Minor. What I am trying to do is see that counsel has an opportunity, an adequate opportunity, to present the case so that the Court will ultimately weigh both sides of the matter.

Mr. Beazley: If Your Honor please, this memorandum is based upon cases outside of Virginia.

The Court: Before we get into that, do you want to argue it on the merits today?

Mr. Beazley: No, and I will get to that in a minute. But I want to tell you why I can't prepare this in two days.

I have cases tomorrow and the next day. In addition to that, I don't have all of the cases in my law library of all the courts of the different states, and I would have to of necessity go to the State Law Library and look up these cases.

However, from the standpoint of what he has said, the statement in this matter,—and I assume it is cor-
page 87 } rect, but I will not vouch for it, I will show the Court that it is not applicable to this case. And I am perfectly willing to stand on the Virginia law and argue it this morning.

The Court: Very well, we will proceed this morning. You may proceed with your argument on the merits, Mr. Minor.

Mr. Minor: All right, sir.

Mr. Beazley: Do I understand the Court is overruling my motion that it comes too late, the motion comes too late?

The Court: I understand you are withdrawing your motion for a continuance on the argument.

Mr. Beazley: I have never asked for a continuance.

The Court: Very well, and I overrule your motion that this is brought too late. It is within the twenty-one-day period to set aside a verdict.

Mr. Beazley: I except to that motion on the ground that counsel for the plaintiff raised this particular question at the trial on the 23rd of June, and withdraw his objection, and went to trial on the merits. Having withdrawn his objection and not saving it, it comes too late after the jury has brought in its verdict.

The Court: Very well.

Mr. Minor: If Your Honor please, when this case came be-
fore this Court and jury, it came before the Court
page 88 } on a motion for judgment and a grounds of defense in which the defendant denied and did not set up any new matter in his grounds of defense. It was not suggested in his grounds of defense that he was relying upon a contract not to be performed within the one year. It is freely admitted that when we were arguing the instructions was the first time that I had opportunity to tell the Court about his Statute of Frauds, and it also freely admitted that when the Court asked me did I have any authorities, I told the Court that I did not, because I was not prepared to argue that point at that time.

The Court: Just a minute, Mr. Minor. Did not you go one step further? You had objected to Mr. Beazley's instruction.

Mr. Minor: That is correct.

The Court: And you withdrew the objection.

Mr. Minor: That is correct, sir.

The Court: When the Court concluded the instructions, the conference on the instructions, you stated that there were no exceptions to any instructions whatsoever, and Mr. Beazley said the same thing. Isn't that correct?

Mr. Minor: That is correct, sir.

The Court: Of course, we had no reporter present at the time, but there was no objection made to any of the evidence concerning the contract, was there?

Mr. Minor: That is exactly right, Your Honor.

page 89 } The Court: And no exception taken to any of Mr. Beazley's evidence.

Mr. Minor: That is exactly right.

The Court: Very well, you may proceed.

Mr. Minor: Nevertheless, even if there had been, this matter is before this Court and within the breast of this Court for twenty-one days, and the Court on its own motion can set aside the verdict and enter up final judgment on the jury verdict, if the Court finds that the verdict is not founded on legally sufficient evidence.

Let us go to the substance of the problem. I freely concede what the Court has said. I freely concede that, but the merits of this case are these, Your Honor: regardless of all that, we made a motion to set aside the verdict at the conclusion of the verdict as being contrary to the law and the evidence, and the Court overruled us and we took exception. I have examined the law, and I know of no orderly way to attack this problem that is suggested here than to renew our motion to set aside the verdict. That is what I have done. Here is the situation: regardless of what has transpired in this case previous to this, this case is before this Court now within a time within which the Court has the jurisdiction and the power to set aside the verdict on motion of either side when the evidence is insufficient legally to support the verdict.

Now, it is my contention that nevertheless, upon

page 90 } an examination of the law, the sole basis of the defendant's grounds of defense when he came into Court was a contract which falls within the Statute of Frauds. It is true, Your Honor, that when I came up here to this trial I didn't have any case law on that point, and when the Court asked me if I had any about this, I told them that I did not, and the Court asked me if that statute didn't apply only to the original action, in that it starts out, "No action shall be brought—." I don't believe that it was ever intended by the Rules of Procedure by the Supreme Court of Appeals, which applies to the trial courts, or by any decision

or by any section of the Code, that when the evidence, which has gone to the jury, is legally insufficient, and the case is still within the breast of the Court, that that point can't be raised within twenty-one days. If the error is apparent on the face of the record, then I suggest that this Court has the jurisdiction and the power to set aside the verdict, if the error is apparent on the face of the record, and I submit that it is, because that is the only ground of defense that the defendant had; he admitted that the money was paid; he testified that it was not a loan, though, but it was based on oral contract, not to be performed within the year.

I submit, Your Honor, that under that situation when that is clear from the face of the record, and I might
page 91 } suggest at this time that although I didn't have a court reporter up here,—the reason was because I couldn't get one,—I had my secretary, who took down every word in this case as best she knew how, and although I am not asking that that record be certified, it will give the Court and counsel some aid and guidance in determining how the facts came out in this case.

The Court: Has it been transcribed?

Mr. Minor: No, sir, it has not been completely transcribed, because it was so lengthy that, with the other work in the office, we just couldn't do it, but I intend to have it transcribed, and I am willing to furnish without charge a copy to counsel and the Court of what was taken down.

The Court: Wouldn't it be helpful to have it?

Mr. Minor: Yes, sir.

The Court: Wouldn't it be helpful to help the Court to have the record transcribed here today?

Mr. Minor: If Your Honor please, the only thing I can say to that is that I don't have it, and the only reason that I don't have it is simply because my secretary didn't have sufficient time in which to type it up.

If the Court rules on this motion today, it certainly wouldn't be helpful.

Mr. Beazley: May I interrupt at this particular time before I forget it, about this record?

The Court: Very well.

page 92 } Mr. Beazley: I would certainly strongly object to the introducing to this Court anything that his private secretary sat back there and wrote down unless she was sworn.

The Court: He is not introducing it, and we don't have it at this time, so I do not think the point is well taken.

Mr. Beazley: I say, if he attempts to do it, I would strenuously object to it.

Mr. Minor: I don't ask Mr. Beasley to agree to that.

The Court: Gentlemen, we are talking about something now he doesn't even have, so let us proceed.

Mr. Minor: If Your Honor please, I took the National Reporter System—

The Court: Just one minute. Before you get into that, which certainly is the law, will you state your recollection of the evidence concerning this contract and why it can't be performed, why it falls within the Statute of Frauds before we apply it to the Statute of Frauds?

Mr. Minor: All right, sir. If I may say so, I am not asking Mr. Beazley to agree to this, but I could have a copy of what my secretary took down, in fact I have it right here, as to what Mr. Peatross said, and the only way I am using this is solely to refresh my memory. According to my recollection, the evidence was this, in favor of Mr. Peatross—

Mr. Beazley: If Your Honor please, I object
page 93 } to counsel reading notes which his secretary took.
If he made the notes himself, then I think it is perfectly all right, but where his secretary sits back here and takes notes, I don't know whether she has taken them orderly, or whether she has taken them correctly, and I don't even know if these are the notes that his secretary took.

The Court: The Court overrules your objection, Mr. Beazley.

Mr. Beazley: I will except to that, sir.

The Court: I will let him explain from any record he has there or any material as to what the evidence was.

Mr. Minor: According to my record of it, we have, Your Honor, evidence in favor of the defendant, and in fairness to the defendant, the jury must have accepted the defendant's version of the case, because they found in favor of the defendant. Mr. Peatross had an agreement, a verbal agreement, with Mr. Glasgow that in exchange for $1500.00 paid by Mr. Glasgow, Mr. Peatross would furnish Mr. Glasgow fifteen months room and board at $100.00 per month. That is my recollection of the agreement between the parties.

The Court: Wasn't there some reference made to the building of a room for that $1,500.00?

Mr. Minor: Yes, sir, the agreement was, if Mr. Peatross would put an addition onto the house and Mr. Glasgow would come there and live with him, and he gave him $1500.00, and it was to be boarded out at the rate of a hundred dollars a month for fifteen months. That was the agreement, as I had it.

page 94 } The Court: Was the agreement that the room go on there, the $1,500.00 paid, and the room go

on, and then the repayment be made by board at the rate of a hundred dollars a month?

Mr. Minor: That is right. I will tell you what my secretary took down in the cross-examination of Mr. Peatross by Minor.

"By Mr. Minor: In exchange for $1,500.00 you would board him at the rate of a hundred dollars a month for fifteen months?" And the answer is: "That was not made then before he gave me the money." That was his answer.

In the direct examination, here is what Mr. Beazley elicited from him:

"At the time you got the $1500.00 from him, did you know whether he was going to live with you? A. I thought he was going to live with me. He said that it was for fifteen months board." And then the next question: "Q. Mr. Peatross, did you fix the house as agreed? A. Yes, sir, I did. Q. Did you notify him when it was ready? A. Yes, sir. He notified me that his mail would be coming there and to take care of it."

The next question: "Q. Did any come there? A. No. Q. When did you learn he was not coming there? A. September 1, 1957, on Sunday. Q. Had you completed the house? A. Yes, he was notified in May."

That is my understanding of the agreement.

The Court: The next question I have: your motion is directed to one issue alone, and that is whether the Statute of Frauds applies.

page 95 } Mr. Minor: Yes, sir.

The Court: Assuming that the Statute of Frauds—assuming we didn't have that question, you have no complaint with the instructions or the findings of the jury as set forth in the instructions? It is limited, in other words, to this?

Mr. Minor: That is right.

The Court: You don't say that the jury found contrary to the law and the evidence as it was presented to them, but that the wrong law was presented to them?

Mr. Minor: That is right, sir.

The Court: And you admit that under the law that was presented to them, they could bring in a verdict which they brought in, is that correct?

Mr. Minor: As they were instructed, yes, sir. That is right, sir.

The Court: So we get back to, and the sole thing is, whether that instruction is under the Statute of Frauds?

Mr. Minor: Yes, sir, and I direct my entire line of argument to that one question.

The Court: So when you say set aside the verdict—I think your oral motion was, it was contrary to the law and the evidence, you are speaking of the law that was given to the jury and not the law the way the jury applied it?

Mr. Minor: I am speaking of this, Your Honor, I am speaking of the fact that because the jury had an opportunity to have the evidence before it on the question of
page 96 } the Statute of Frauds, the evidence of the contract, the verbal contract was legally insufficient because it was based on the Statute of Frauds and within the Statute of Frauds. That is what I am saying.

The Court: I think I caught it, but what I want to get definitely established, so I will understand the issue, is that there is no quarrel, you have no objection, to the verdict brought in under the instructions, but that the instruction concerning the Statute of Frauds—concerning the contract was improperly given? Is that right?

Mr. Minor: That is right, sir. Because of the fact that it contained statements concerning a verbal contract which I felt is within the Statute of Frauds, and because further that that was the only ground of defense that the defendant had, and if that contract was within the Statute of Frauds, the defendant had no defense to this action.

The Court: You may proceed with your argument. I think we have limited the issue now. We are not concerned with the jury not following the instructions that were given.

Mr. Minor: No, sir.

The Court: They could have found the verdict that they did under those instructions, in your opinion?

Mr. Minor: That is right, sir.

page 97 } The Court: But we are concerned with whether one instruction, Instruction No.—which instruction are you basing this on?

Mr. Minor: The instruction submitted by the defendant.

The Court: He submitted only one instruction, Instruction No. "A."

Mr. Minor: Yes, sir.

The Court: Very well. Your whole argument is based on the fact that instruction should not have been given because it embraced the Statute of Frauds?

Mr. Minor: Yes, sir.

The Court: Is there any argument as to the form of In-

struction A? You have not covered it in your memorandum, but let's get these non-arguable things out of the way.

Mr. Minor: Your Honor, in answer to the last question, when you speak of "form" I take it you mean, as opposed to substance?

The Court: That is right.

Mr. Minor: I have no quarrel to find with the legal draftmanship as such, I submit that the instruction was improperly given, and had the part been left out as being legally insufficient about the verbal contract, then the form of the instruction would have been improper.

The Court: As I see it, you have no complaint about the verbage. You have no complaint about the verbage of the instruction, it simply gets back to whether that

page 98 } instruction should have been given in view of the Statute of Frauds.

Mr. Minor: That is right.

The Court: We are down to that point.

Mr. Minor: Yes, sir, I will rise or fall on that one point. As I was saying a little while ago, there may be a case in Virginia which has some suggestion about the use of a contract within the Statute of Frauds as a defense, but if it is, if there is a case on that point directly, I, from an examination of the National Digest System, couldn't find the same, and from an examination of the Virginia and West Virginia Digests, I couldn't find it. As a matter of fact, the key number in the Virginia and West Virginia Digest of the West Publishing Company doesn't have any cases with reference to that point. That is what I am saying. I looked it up, and if Mr. Beazley has found a case that says that a contract within the Statute of Frauds can be used as a defense in this Commonwealth, then he has found something that I couldn't find, and I commend him for it. But I'm talking about that point. That is what my question is directed to, just this one point, whether a contract within the Statute of Frauds can be set up as a defense when, if an original action had been brought on that contract, the Statute of Frauds would have applied.

The Court: Is it your position—suppose Mr. Glasgow had taken this position, that that was a contract and claimed a breach of it, that he couldn't recover anything?

page 99 } Mr. Minor: He couldn't recover under a breach of the contract, because it falls clearly within the Statute of Frauds. That is my position.

The Court: You have brought your motion on a proposition of purely and simply a loan, there was no *quantum*

meruit, no *quantum meruit,* it was based on a loan, the entire case?

Mr. Minor: I am bringing my motion on this point, on this ground—

The Court: No, I mean your original motion for judgment was brought on the ground that the money was lent?

Mr. Minor: Yes, sir, that is right, and my client received no benefit and never was repaid.

The Court: Suppose Mr. Beazley tendered an instruction simply along the line that unless you believe from a preponderance of the evidence that this transaction was a loan, you shall find for the defendant?

Mr. Minor: You mean—

The Court: What would be the harm in that instruction?

Mr. Minor: Well, the way the evidence developed, I do not think that an instruction would have been proper on that ground, because his client admitted that he got the money.

The Court: There was no objection to any of the evidence given.

Mr. Minor: That is correct, sir.

page 100 } The Court: And there was no motion to strike any of the evidence.

Mr. Minor: That is correct, and I am going to tell the Court exactly why I didn't in this case.

The Court: Regardless of why you did or did not, that evidence was before the jury, and—

Mr. Minor: Yes, sir, that is right.

The Court: And the whole issue of going before the jury was whether this was a loan or not, was it not?

Mr. Minor: Well, sir, it was a question of whether it was a loan, or whether it was a verbal contract. That is what it was, because Mr. Peatross admitted he got the money, but he said it wasn't a loan, it was an advance on a contract. He admitted that. There is no evidence otherwise in the case. The jury would have to disbelieve the plaintiff and believe the defendant.

The Court: What I am inquiring about, before we get into this problem of whether the Statute of Frauds applies or not, and it is preliminary, is while Mr. Beazley tendered an instruction which was given without objection and exception, speaking of the contract and the allowing the plaintiff to recover certain money even if such a contract did exist, what would have been the effect if he had simply tendered an instruction saying, unless you believe from the evidence that this is a loan, you shall find for the defendant?

There was a conflict of evidence on that, and no objection

taken to any of the evidence that went in. No
page 101 } motion to strike any of the evidence. It was evidence before the jury—

Mr. Minor: There was no such instruction presented, and I think if the Court would tell me why it wants me to answer that question, probably I could better understand what the Court is driving at.

The Court: I am trying to get back, was it in issue as you framed your original motion you were suing for money lent?

Mr. Minor: Right, sir.

The Court: You didn't bring your suit on the theory of unjust enrichment, you didn't bring any suit on the theory of money had and received, nothing under *indebitatus assumpsit*?

Mr. Minor: That is right.

The Court: Simply on money lent. Are you talking about whether a relationship of borrower and lender, debtor and creditor, existed?

Mr. Minor: That was one of the issues, yes, sir. That was one of the issues. The sole issue was whether it was a contract or not.

The Court: You never raised that, and Mr. Beazley simply denied that it was a loan.

Mr. Minor: But he alleged in his opening statement that that was the basis of his defense, and that is what he based
his only instruction on.

page 102 } The Court: He did, and he thought that the instruction was more favorable to your client than the issues justified.

Mr. Minor: If I might say this, when you get right down to that, then we raise another problem which I am not prepared to advance as being controlling in this case, because it wasn't raised at the proper time. How could Mr. Beazley, under his general denial, bring up new matter or affirmative defense in this action? That is what he did.

The Court: There was no objection to that whatsoever as the evidence came in.

Mr. Minor: That is right, sir.

The Court: We can't go back at this time and argue whether evidence was admissable when it was not suggested that it was inadmissable. But I wonder if under the issues that were raised if that instruction wasn't more favorable to you than you were entitled to have?

Mr. Minor: I suggest, Your Honor, that it was not.

The Court: Very well, you may proceed.

Mr. Minor: Your Honor, speaking of the contract I alleged and which is before the Court, the verbal agreement, that you and I have discussed this morning, the question comes up first when you look at the Statute in Virginia, it starts out, "No action shall be brought in any of the following cases—," and I remember that the Court very properly raised that question first and asked me did I have
page 103 } any authority, and I told the Court that I did not, but I do now, sir.

I could not find a case in Virginia which held that the Statute of Frauds was applicable to a contract within its purview when set up as a defense. I could not find any case in Virginia like that. But I found ample authorities in *Corpus Juris Secundum* to support that from other jurisdictions which have statutes almost identical or almost exactly like Virginia.

The first case I cite in my memorandum was a New Jersey case decided in 1947, on page 2.

This case states that although the Statute of Frauds expressly forbids only the bringing of an action on an oral contract, it also precludes the use of such contract as a defense. And I cite the New Jersey statute applicable at that time, and you will notice that it starts out the same way: "No action shall be brought upon any of the following agreements or promises unless the agreements or promises, upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized: E. An agreement that is not to be performed within one year from the making thereof."

And the Virginia Statute says: "Upon any agreement that is not to be performed within a year."

Those statutes are almost identical. Cer-
page 104 } tainly they have the same general content.

That case from New Jersey, *Wujciak, et al.* v. *Wujciak,* cites 37 C. J. S., Sec. 225—

The Court: What were the facts in that case? What were the facts in the Wujciak case?

Mr. Minor: Your Honor, that was a case in which, in fairness to the Court, there was a contract for the sale of land involved, but it was brought with the same situation—that is the Statute of Frauds—as applied in our case here, a contract not to be performed within a year. Both of them are under the Statute of Frauds.

The Court: Would you say the Statute of Frauds was specifically plead?

Mr. Minor: Yes, sir. Well, when you say, "specifically plead," Your Honor, I, of course, don't have a report of the procedure of the filing of the papers, but the question of the Statute of Frauds was raised by the party opposing the oral contract as a ground for eliminating the oral contract.

The same point I have here on the—

The Court: In that case, then, the plaintiff was suing for some money turned over to the defendant?

Mr. Minor: Yes, sir, that was essentially what it was, and the defendant sat up an oral contract.

The Court: What did the plaintiff claim?

page 105 } Mr. Minor: He claimed that it was within the Statute of Frauds.

The Court: What did the plaintiff claim in his motion for judgment? What kind of an action did he bring?

Mr. Minor: If I recall correctly—I can't tell you exactly what it was, Your Honor, but he was asking for recovery of money from the defendant.

The Court: On the basis of a loan, or money he had and received, or breach of contract, or what?

Mr. Minor: It wasn't on the breach of contract in question, because the plaintiff alleged that that contract was within the Statute of Frauds. He claimed that the agreement between the parties, which was within the Statute of Frauds and not applicable, and therefore the money that he paid over to the defendant he is entitled to have it returned. That was the basis of that action.

With reference to the case of *Peck* v. *McCormick Harvesting Machine Company,* stated on page 3, here Your Honor was a case in which there was a verbal contract with a harvesting machine company to serve it as exclusive sales agent on a commission within a particular territory for a period of five years. The court held since it couldn't be performed by either party within one year, it is within the Statute of Frauds: and hence damages for the company's breach thereof couldn't be had by way of recoupment by a surety in defense to an action on a note made by

page 106 } an agent to the company for stock purchased at the time the contract was claimed to have been made. Here is the applicable Illinois Statute: "No action shall be brought—." The case of *Di Blasi* v. *Di Blasi, et al.,* decided in 1932 in Connecticut, this case goes on to say, first—

The Court: Let me get this straight. This Illinois case was for damages for breach of a contract?

Mr. Minor: That was set up as a defense.

The Court: Who was suing for damages?

Mr. Minor: The defendant filed that by way of recoupment. The company brought suit on a note against a surety, and the defendant set up this defense, the contract as a defense, and claimed that the company had breached the contract. That was the case there. Set up this oral contract as a defense to an action on the note.

The Court: Set up the breach of the contract?

Mr. Minor: Set up the contract and the breach thereof.

The Court: Is there any distinction between setting up the contract itself and setting up the breach of the contract?

Mr. Minor: Yes, sir, it is. You can use a contract that would ordinarily be within the Statute of Frauds to create a situation such as this, for instance, you sue me on a note and I state to you in my grounds of defense—I will put it this way to make it a little clearer: you sue me on a contract, on a written contract, and I could say that there was page 107 } an oral contract; that that is really not the contract between the parties at all, but if I attempt to enforce the provisions of the oral contract by indirect means, then the Statute of Frauds is applicable.

Here is what I am saying in this case that we have before us, that Mr. Peatross had brought suit on this contract and he alleged a breach, he alleged a breach in his evidence, and he sets up a breach in his instruction. If he had brought suit on this contract and had alleged a breach as he sets up in his defense, then he would have been denied his remedy, because it would have been clearly within the Statute of Frauds in Virginia.

Here he is setting this contract up in defense and claiming a breach of it, something that he couldn't do by direct means. If you will go on, you will see that the Court doesn't allow you to do this by indirect means, in other words, you could not do by indirect means what you couldn't do by direct means.

The Court: In this Illinois case, that was a suit on a note?

Mr. Minor: Yes, sir.

The Court: And they set up as a defense a breach of the contract?

Mr. Minor: That is right, sir.

The Court: And the Court held that they couldn't assert that breach?

Mr. Minor: That is right.

The Court: Suppose the situation had been this, suit had been brought on the note, and instead of assert- page 108 } ing any breach of contract, they said no, this isn't a true note, it was simply a contract, and it

is not a lender-borrower situation, a debtor-creditor situation, it is a part of a contract, and stopped at that. Would they have set that up?

Mr. Minor: They would be setting up—what they would be doing is this—

The Court: They are not setting up any breach, now. They are saying that you don't ultimately know what the situation is.

Mr. Minor: That is right, and you are trying to draw an analogy between that situation and the one we have before the Court, I presume.

The Court: No, I asked you if there was any difference between setting up a breach and setting up a contract, and you told me there was.

Mr. Minor: It is, sir, yes, sir.

The Court: What is the difference?

Mr. Minor: The difference is this, Your Honor, one is set up to vary the facts as set forth by the plaintiff—

The Court: Is that admissable?

Mr. Minor: Yes, sir, that is admissable when it didn't amount to an indirect enforcement of that contract that they claim existed which is not in writing.

The Court: I will get back to it. Here you sued on a loan.

page 109 } Mr. Beazley said there was no loan. Now, he didn't bring in anything about recoupment. His client, Mr. Peatross, testified it was not a loan at all. They didn't charge a breach, they just said it was a loan—

Mr. Minor: He asserted in his evidence that went to the jury that it was an oral contract and that the plaintiff breached it, and also he put that in his instruction. So the jury couldn't have reached any other conclusion but that Mr. Beazley was setting up an oral contract as a defense to this action, and that the plaintiff breached it.

I do not know how in the world anybody could have reached any different conclusion.

The Court: Could they reach the conclusion, going down further, and I am reading from Instruction A, "Unless the jury further believe that Mr. Peatross later agreed that Mr. Glasgow could stay with Mrs. Barlow and Mr. Glasgow agreed he would stay with Mrs. Barlow, in which event the Court tells you Mr. Glasgow did not breach his contract."

Mr. Minor: At the end of that instruction, if they had found that last phrase, then they would have had to have found for the plaintiff. That is the reason that was put in there.

The Court: I think that was an amendment that you suggested.

Mr. Minor: Yes, sir. If they found under clause one of Mr. Beazley's instruction they would have to find that Mr. Glasgow violated an alleged verbal agreement page 110 } with the defendant Peatross. If they found under clause two, beginning, "Unless," then they would have to find for the plaintiff on that instruction.

The Court: You asked for and were granted Instruction No. 4: "Even if you believe from the evidence that there was an agreement between Mr. Glasgow and Mr. Peatross wherein Mr. Peatross agreed to furnish room and board for Mr. Glasgow, if you further believe that Mr. Glasgow did not breach his agreement, then you must find for the plaintiff, Mr. Glasgow, in the amount he sued for."

Mr. Minor: Yes, sir, that is right.

The Court: So really you got the benefit of an instruction based on the unjust enrichment when you simply sued on a loan.

Mr. Minor: Your Honor, I submit this, and maybe I am wrong, certainly I would like for the Court and counsel to tell me if I am, but as I view it, getting down to brass tacks in this case, the evidence developed and instructions developed simple issues in this case. If you found under one theory they would find for the plaintiff, that is, if it was a loan. If they found under the other theory, that it was a verbal agreement and Mr. Glasgow breached the agreement, then they have got to find for the defendant, and that is what they did.

The Court: You may proceed with your argument.

Mr. Minor: On page 4, Your Honor, I am going to be frank with the Court, I haven't all the facts in this memorandum, I did not intend this as a brief, I only intended page 111 } it as a memorandum of authorities, so if counsel and the Court want to read the cases it is available. I did not have time to prepare a brief.

The Court: The difficulty with the Court is, living in the country, we do not have access to all of these books, you see. Both of us got this yesterday. There is no way that I could possibly examine these case.

Mr. Minor: I have tried—wherever I can I will recite the facts as I remember them. Of course, I do not have these books in my library either. Of course I am a little closer to the west end of Richmond than it is to Richmond from here. I readily concede that.

On page 4, Your Honor, speaking of the Di Blasi case, which is a Connecticut case, proof of this oral agreement, the case

said, "It is therefor an essential part of the defense alleged, and the situation falls within the rule, that a contract upon which the legislature says no action can be maintained, cannot be used to defeat a claim otherwise legal and just."

The statute there starts out, "No civil action shall be maintained," it starts out the same way as the Virginia statute, except that it says, "No civil action shall be maintained," but it goes to the same point that the Court raised.

This next case, a leading case in the United States, I suppose, is on page 5, *Citizens State Bank* v. *Jones*, which is a Kansas case and was decided around 1912. In this case the plaintiff, Rose Jones, sued the Bank on a certi-
page 112 } ficate of deposit, and as a defense the Bank claimed the right to credit the certificate with the amount of two notes made by her husband. When the certificates were presented for payment, one certificate was paid in full, but the Bank would not pay more than $300.00, refusing further payment until the notes had been satisfied.

The defendant offered testimony of the president and another officer of the bank to the effect when the second note was sought to be made, Mr. Jones told the bank if they would make the loan, his wife's money on deposit could be held as security.

The Court said first, "But it requires some stretch of the imagination to find the slightest basis for any authority to pledge the moneys represented by her certificates of deposit as security for the notes of the man * * * Aside from this, the promise relied upon, even if shown to have been made by the plaintiff, was oral, and the sixth section of the Statute of Frauds prohibits the bank from relying upon such a promise. There is no merit in the contention that the Statute of Frauds applies only to the plaintiff in an action. While the Statute reads, 'No action shall be brought whereby to charge any party upon any special promise to answer for the debt, default, or miscarriage of another person; * * * unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing * * *,' it applies with equal force to a defendant who sets up his claim by way of answer or cross-petition."

page 113 } The Court: I read this memorandum yesterday as soon as I received it, and that case bothered me more than any that you have cited, and for this reason. In that case they tried to set up a collateral contract which had nothing to do with the explanation of the nature of the original contract, or transaction, we will call it, that the plaintiff was suing on. The defendant set up a

completely collateral contract, admitted the original contract, but said you are barred by reason of the collateral agreement, and they ruled that as a defense they could not put in—the court rules that as a defense you could not set up a collateral contract to the original claim which was admitted.

Now you get into the situation which is different, it seems to me, from the case we tried here where there wasn't any collateral thing set up at all, the whole thing that the jury had to determine was what kind of a transaction this was. You had limited yourself to saying it was a loan.

Mr. Minor: That is right.

The Court: Mr. Beazley was saying it wasn't any loan at all.

Mr. Minor: Yes, sir.

The Court: That is entirely different from this Citizens against Jones case in the Kansas court.

Mr. Minor: Your Honor, I submit it is not, because the case suggested nothing about it being a collateral
page 114 } agreement.

The Court: It is one of the few cases in which you have cited the facts, and it does show that it was set up as a collateral agreement.

Mr. Minor: The agreement, the bank said, was this: When they made the note with the husband, they alleged that the plaintiff agreed at the time that the certificates that she already had on deposit could be used as security.

The Court: But the gist of the case, Mr. Minor, I think you will agree, didn't go as to what those certificates were.

The bank admitted that those certificates were valid certificates of deposit, creating a debtor-creditor relationship, and they interposed a separate—and I call it collateral—but a separate agreement, saying, "Yes, we grant that these were certificates of deposit creating a debtor-creditor relationship, but these certificates have been pledged under a verbal contract." Now the difference in our case is: Was there a debtor-creditor relationship?

Suppose Mr. Beazley had come in to Mr. Peatross and said, "Yes, this was a loan, but as security—of course the debtor and creditor are reversed—but as security for some other promise, as security that you would do such and such to me, I am going to hold this money under a verbal contract, wouldn't that be comparable to your Kansas
page 115 } case?

Mr. Minor: Your Honor, I do not think so. Your Honor, I submit this. I submit that the Court has read into this case something that the Kansas court did not

decide the case upon. The Kansas court decided it, as I understand from my reading of the case—and, of course, I stand to be corrected by the Court or counsel—in this case there was no question about any collateral agreement—

The Court: Yes, there is a collateral agreement to pay the debt or a note. There were two relationships created by this thing. There was the debtor-creditor relationship between the certificates of deposit, and there was another relationship where those certificates were pledged to pay the debt or note.

Mr. Minor: That is right.

The Court: So there were two situations there, and they stated that you could not show that oral agreement, pledging those certificates of indebtedness, but the case never went to the question of whether they were certificates of indebtedness or some other transaction, and that is what happened in the case at bar here.

Mr. Minor: Your Honor, I do not think the question of whether—

The Court: You think that is immaterial, that distinction?

Mr. Minor: I don't submit that, Your Honor, I do not say that it is immaterial, but I do think it is not
page 116 } germane to the point that we have before the Court, and that is whether the Statute of Frauds, a contract that falls within the Statute of Frauds, can be used as a defense.

The Court: What I am getting at is, I quite agree possibly with what this case has said, where it is set up as a collateral, but do you have a case where the court refused to allow the transaction to be explained? That is what happened here. Where one person says, "No, it is not a loan, it was some other type of agreement."

Mr. Minor: The only thing, Your Honor, that is what I have before the Court to give it—

The Court: Very well, proceed. It may be that it does not, but I am asking you these questions to try and get your thinking on them.

Mr. Minor: I tried to find a case, and I know the Court knows this, and I know Mr. Beazley does, if I could have found a case that was directly on point which rules against me, I would not be up here.

The Court: I am sure of that.

Mr. Minor: I have not weeded out cases that I think are contrary to my situation. These are the majority of the cases in the United States on this point.

The Court: Your memorandum is very helpful, and in

asking these questions, I see distinctions, and I merely want to get your ideas as to whether my mind is applying these distinctions correctly.

page 117 } Mr. Minor: I will be frank with the Court, your raising these points without having had an opportunity to review the question amazes me, because after having reviewed it for some 20 or 30 hours, this is what I came up with, and you haven't had the opportunity to do that. I am amazed that the Court could see those points in these cases, quite frankly, not having had an opportunity to examine them. I am not casting any reflection on the Court when I say that.

With regard to the case, I tried to get some late law, this case of Taylor against Gill, and by the time I got to the end of this thing, Your Honor, I didn't have time to write down the facts in all of these cases. But this Taylor case was a case similar to the case that we had before that I have listed here, in which there was a contract which was made which was intentionally entered into between the parties as Mr. Peatross alleges here and we allege that this contract that they entered into was unenforceable in the Statute of Frauds and the court said, "Courts do not make contracts for litigants. Where parties intentionally make oral agreements which are unenforceable under the Statute of Frauds, court cannot order execution of writing, though parties have erroneously supposed that oral agreement was legally binding."

It is to be presumed, if we take Mr. Peatross' side of this case, that he presumed that Mr. Glasgow presumed that this contract that he was relying upon was en-

page 118 } forceable.

The Court: You go on now and read that next part because that bothers me. There we are in another collateral agreement. The court specifically states it was a collateral agreement.

Mr. Minor: That is right, sir.

The Court: What I am getting at is this. Suppose this case had been—sometimes it is foolish to say "suppose" when it wasn't—but suppose Mr. Peatross came in and said, "Yes, I admit this was a loan, but we did two things. We entered into a loan, which I admit I got the money on, and I haven't repaid, but the reason I haven't repaid that loan is that we entered into this verbal, oral agreement," and it turns out the agreement was contrary to and in violation of the Statute of Frauds. He says, "I admit that I got the money, but I won't repay it because we entered into this oral agreement which we entered into separate and distinct from

the loan." That is one type of case that we could have had here.

The other type of case is the type that we actually had, where the whole issue was: Was it a loan or wasn't it a loan? You sued only on the basis of a loan. You could not recover under any other theory; even if you had proved there was another theory, you could not have recovered under it because you were limited to a loan.

Mr. Minor: That is right, sir.

The Court: Do these cases apply to that
page 119 } situation?

Mr. Minor: Your Honor, I can only answer the question this way, and I think upon examination of the law you will reach the same conclusion, that regardless of which of those situations exists, the same law is applicable. The Statute of Frauds can be used and interposed to prevent the enforcement or setting up as a defense of a contract which an action could not be maintained on, regardless of whether it is either one. I submit that the Statute of Frauds applies in this case. Whether, as you suggested in your supposititious situation, or whether it was one that came out in the evidence, the law would be the same. The courts don't make any distinction, in going through them, between them—

The Court: Do you have a case like that? Where the issue was: Was it a loan or was it a contract or was it some other type of agreement?

So far as I have been able to determine, in all of these cases the defendant has set up a contract to defeat an admitted transaction. Having heard all of the facts, and not having read all of the cases, but from questioning you and your brief, that is the impression that I get.

Mr. Minor: To be perfectly frank, I don't know that I have a case in there that exactly fits the question that the Court is asking me.

The Court: Proceed. What you have is very helpful to me, and I am not criticizing you in the least. I am trying to dig into it a little deeper.

page 120 } Mr. Minor: Here is a case, Your Honor, *Crenshaw* v. *Bishop,* which is a Texas case, on page 7. Here is a case where this is the situation, and clearly here there wasn't any collateral agreement. There was a man who owned some cattle, and there was a man who owned some pasture land; and the man who owned the cattle said to the man who owned the land, "Let me put my cattle on your land. From the increase from the cattle you will get a portion of them." That contract was for three years.

After the contract had been in force for several months, the man that owned the cattle sought to get his cattle back, and the court—the reverse situation was true, where the man who had furnished the pasturage was suing the man after he had taken possession of his cattle. And the court said, "Where an owner makes a parol contract for the care of the stock for three years for a part of the increase and within a few months thereafter takes possession of the stock, he cannot rely on the contract to prevent the recovery of the reasonable value of the pasturage furnished."

The Court: I think that is elemental. The man had a right to come in for the *quantum meruit.*

Mr. Minor: But in that case, Your Honor, he was setting up a contract which was in violation of the Statute of Frauds. He was using that as a defense.

page 121 } Mr. Beazley is not asking for a recovery on a *quantum meruit* basis, and we are not asking for a recovery on a *quantum meruit* basis. He has said that Mr. Peatross and Mr. Glasgow had a verbal agreement and that Mr. Glasgow breached it and therefore Mr. Peatross is entitled to a recovery. And he set that agreement up as his sole ground of defense in this case. He admitted that he got the money. Your Honor, I tell you—

The Court: He says it wasn't a loan, and he shows the circumstances as to why it wasn't a loan.

Mr. Minor: That is right, sir. And he said that he got the money, but it wasn't a loan, it was a contract. It was a contract for fifteen months.

The Court: Do you have a case similar to that?

Mr. Minor: Your Honor, I don't have a case directly on that point wherein the court denied—

The Court: None of these cases touch on that type?

Mr. Minor: I don't say they don't touch on it, Your Honor, because you know these cases aren't tailor-made.

The Court: That is true.

Mr. Minor: Of course, if they were, it wouldn't be up here. The thing would be decided. But because I didn't find any law in Virginia, I had to take what I could find, and I believe that upon complete examination of the law in the United States you will find that this situation here is one in

page 122 } which the courts have said that Mr. Peatross can not set that contract up as a defense when he could not have brought suit on it to start with. What you are allowing him to do—

The Court: What was the loan? What was the loan that you were suing on? What were the terms of it?

Mr. Minor: $1,500.00.

The Court: To be repaid when?

Mr. Minor: Within a reasonable period. The law says when the time for repayment is not stated, it is within a reasonable time. And he claimed that it was not a loan.

The Court: Go ahead.

Mr. Minor: Your Honor, to tell you the truth, I have said just about all that I can say about the situation. I have, not with the least bit of apology. I have done what I thought I owed a duty to this Court to do. I believe that the contract that Mr. Peatross seeks to rely on was a contract that falls within the Statute of Frauds, and therefore he is not entitled to rely upon it, either as a defense or if he brought an action on it, because what the Court is doing, if it allows him to do it, is allowing him to do something by indirect means that he could not do by direct means.

I don't reckon it would be conceded by Mr. Beazley, but I certainly earnestly submit that if Mr. Peatross had brought suit to enforce this verbal agreement that the defense of the Statute of Frauds would certainly have been sustained. So by letting him set it up as a defense—

page 123 } The Court: How could Mr. Peatross have brought a suit to enforce this agreement?

Mr. Minor: I can tell you how it could have been done. Suppose that the $1,500.00 hadn't passed hands and he had, as he claimed, built the room on there. The fact that the money passed hands doesn't change the situation. They still had the agreement whether the money passed hands or not so far as Mr. Peatross is concerned. That doesn't change the fact. The $1,500.00 is just what Mr. Peatross said he was entitled to, but it doesn't alter the terms of the agreement that he said existed.

The Court: But suppose the money had been paid off. I mean, we have the same factual situation. He would not have had any reason for bringing a suit.

Mr. Minor: That is perfectly true, he has got Mr. Glasgow's money and Mr. Glasgow hasn't got any benefit from it. But suppose it is this, and leave you one thing, and I don't see how it changes the agreement Mr. Peatross states exists: Mr. Peatross said it was a verbal agreement of $1,500.00, room and board at $100.00 a month. By the money passing hands—

The Court: Wait a minute right there. Wasn't the evidence—now I want to get it straight in my mind. This is back where we were. This is what you first stated, and then I asked you if there wasn't something about a building. Wasn't the evidence that the $1,500.00 was to be put up, he

page 124 } was to put up a bathroom and that Mr. Glasgow could get repaid the money at the rate of—board it out is what they said. Wasn't putting up the bedroom and bathroom the integral part of the thing, and then it was to be repaid by boarding it out?

Mr. Minor: That is exactly correct. But the putting up the bathroom and the—

The Court: Couldn't the bathroom and the bedroom have been put up within a year?

Mr. Minor: That is correct, sir. But unless the whole contract could have been performed within fifteen months, it is within the Statute of Frauds.

The Court: I mean even the boarding it out?

Mr. Minor: Yes, sir. That is what the cases say. If the contract cannot be fully performed within twelve months, within a year, then it is within the Statute of Frauds.

The Court: All right. Are you finished?

Mr. Minor: Yes, sir.

The Court: The Court will recess for fifteen or twenty minutes.

(Recess).

The Court: You may proceed, sir.

Mr. Beazley: If Your Honor please, as I said, I have not had an opportunity to examine these cases, and it is almost impossible, as Your Honor knows, to get the real points in the case unless you can read the facts, and where page 125 } just excerpts are drawn from, it is merely guesswork.

However, I want to refresh your memory, if I may, and if I am correct in this, as to the testimony, Mr. Glasgow said there was no agreement whatsoever, that he loaned him—I believe he used the work. "I lent him" $1,500.00. "When was it to be paid back, Mr. Glasgow?" "No time, it was to be paid back no specified time."

"Did you ever make demand on him, Mr. Glasgow? Did you ever ask him at any time to pay this money back?" "No, sir."

"Mr. Glasgow, why did you put in your pleadings that you had made demand?" "No," he said, "I didn't do that. My counsel did that. All I asked him for was a note."

Now Mr. Glasgow says that there was no contract, absolutely no contract. In every one of these cases there was an admitted written contract or oral contract and a written contract, admitted.

Now he comes in here without any contract and he must

rise or fall on his own testimony, but he *sayd* there was no contract, and yet after he loses, he comes back now and says there was a contract. Well, he can't blow hot and cold, too. If Mr. Glasgow says there was no contract, then he has got to stand or fall on that statement.

Now Mr. Peatross said, reading from his counsel's notes, "That was for fifteen months' board." But Mr. Glasgow said that when he gave him that $1,500.00, at that time they had no agreement whatsoever as to what should page 126 } be paid for board, how much, that he had come to Peatross and asked him to take him and take care of him. And Mr. Peatross said, "I can't do it unless I have more room. I am not fixed for you." "But, Mr. Peatross, I have got to go somewhere, and you told me if I sold my home I could come and live with you." "All right, Mr. Glasgow, I will provide for you."

So he goes over and sees Mrs. Barlow and Mrs. Barlow agrees to take him and no specified amount be paid unless Mr. Peatross could fix the house.

Now he proceeded then to make plans to put on a room, an additional room, and a bathroom. He testified that he would not have put on that extra room but for Mr. Glasgow coming to live with him, that Mr. Glasgow—getting back to Mr. Glasgow's testimony—told Mrs. Barlow, "As soon as Mr. Peatross gets his house fixed, I am going on back over there with him." And she remonstrated with him and got the man a little upset.

Mr. Peatross then went over to see Mr. Glasgow, and Mr. Glasgow was talking, he said, "You have got me between the hawk and the buzzard. Now Mrs. Barlow wants me to stay with her. He says, "All right, Mr. Glasgow"—he hadn't built his house now, he hadn't made his expenditures—"All right, if you are satisfied over here, you stay over here."

"Oh, no. No, indeed, I want an excuse to get away from her, and here is $1,500.00. You put it on the page 127 } house, help you build that house, and I will—you can take it out at $100.00 a month pay-back for board."

Now that was all of the contract that there was. Remember this: First we must look to see whether or not there was a contract, an agreement. Mr. Glasgow says no. Mr. Peatross says yes.

The Court: Boil that right down there and repeat again what was the agreement?

Mr. Beazley: The agreement, if you take it right there, the agreement was that Mr. Glasgow was going to give Mr.

Peatross $1,500.00 to put on this house, to apply on the construction of his house, and when it was completed, Mr. Glasgow was coming over and live with him, and the $1,500.00 would be paid, $100.00 per month back for board.

The Court: Does that fall within the Statute of Frauds.

Mr. Beazley: No, sir. It doesn't for this reason. The cases are numerous. The contract was performed by Mr. Glasgow at the moment he handed over the $1,500.00. He didn't have to do one more thing. That is all he had to do. Now, in order to fall within the Statute of Frauds, assuming that his argument is correct, which I don't, both parties—it has to be performed by both parties for more than a year. And I have got cases on it.

The Court: All right, let's see the cases.

Mr. Beazley: It doesn't apply to one, it applies to both.

page 128 } Now, Mr. Glasgow had performed within five minutes, when he wrote that check and handed it to Mr. Peatross, he performed all that he was supposed to do under that contract, everything; and whether it was one year of fifteen years, Mr. Glasgow didn't have to do another thing.

Now his counsel would say that the contract is in the teeth of the Statute of Frauds because Mr. Peatross couldn't recover. Of course he couldn't recover. If wasn't by virtue of the fact that it would fall within the Statute of Frauds he couldn't recover; he had nothing to recover on.

He says he didn't get any benefit of it, from $1,5000.00. The benefit was there for him to receive if he wanted to go and get it. Mr. Peatross testified that, "My home is open. He may come and live with me as often as he wants until the fifteen months is out." But he didn't elect or avail himself of the benefits.

Now Mr. Peatross performed his part of the agreement by putting it in the house within the 12-month period. Now I am arguing assuming that the Staute of Frauds prevails.

The Court: I understand. I want to know whether the Statute of Frauds does apply to this transaction.

Mr. Minor has insisted that it did because it required fifteen months to repay.

Mr. Beazley: Let me call your attention to the case of *Greenbrier Farms* v. *Clarke*, 193 Va. 891. That was a case in

page 129 } which this woman had some camellias, and this man seeing them, and they were very fine specimens, and he wanted to get clippings from them, and he entered into an agreement with her by which he would get clippings off of those camellias; he would plant them

and he would sell them and he would pay her a certain percentage, no specified time, but over a period of years.

Well, she brought a suit—"The notice further alleged that said camellia was one of rare and unusual beauty," and so forth and so on. She said she was damged to $7,500.00, because of the cut clippings that he had sold during this period of time, over two or three years. Plaintiff filed a bill of particulars stating among other things that no definite percentage of commission was fixed in the agreement with the defendant and that the plaintiff was entitled to the usual percentage in such cases which was fifty per cent of the sales price of plans, and further that if the plaintiff did not prove a binding contract by reason of the vagueness of the terms, she was entitled to recover the value of the cuttings and grafts taken by the defendant under his promise to pay over that period of time.

Here is what the court said in speaking of the Statute of Frauds: "The plea of the statute of frauds alleged that the contract sued so was not to be performed within a year and hence was not enforceable because not in writing." That is the seventh section of the Statute of Frauds. The plea was inapplicable in the case. The plaintiff performed her part of the alleged agreement when she furnished the clippings.

page 130 } Just like Mr. Glasgow performed his part of the contract when he furnished the $1,500.00.

"The agreement alleged was not one that she could not perform within a year. An agreement does not fall within the Statute if that which one of the parties is to do is all to be performed within a year; in other words, the agreement must contemplate non-performance by both parties within the year. Deferred payments do not change the situation."

I say that is a very recent case and it is very similar to the present case.

That case refers you to *Smith* v. *Payne,* 153 Va. 746, which holds exactly the same thing. Now there you get into a case similar to one of the cases that counsel for the plaintiff has brought out here in the brief. That is where a party leases a store building to another party for a specified sum, and after they get in, I think it was for three years—"You leased said store building from me by a written lease." And this is what he charged—let's get back here—"You are hereby notified that on the 3rd day of the February term, 1929, in the Circuit Court of Clifton Forge, Virginia, I will move said court for judgment and award of execution against you for

the principal sum of $3,400.00, with interest as hereafter set forth, and the costs of said motion; said sum being due me by you for rent of a certain brick store house located at 114 Main street, in the city of Clifton Forge, Virginia, by virtue of the following facts:

page 131 } 'You leased said store building from me by written lease or contract for a period of two years from March 6, 1924, at a monthly rental of $200.00 a month for the first year and a monthly rental of $225.00 per month for the second and last year of said lease. Some time prior to the expiration of said lease, to-wit: Some time during the fall of 1925, '—that is two years later—'we verbally agreed that you might remain in the property after the expiration of the lease on March 6, 1926, at a reduced rental of $200.00 a month, and you continued after March 6, 1926, to occupy said store room under the terms of the original lease, except as to the modification and reduction of the monthly rental, as verbally agreed upon in the fall of 1925, and continued after March 6, 1926, to pay rent to me at the rate of $200.00 per month.

'In August, 1926, it was understood and agreed upon between us orally that you should continue to occupy said store room as my tenant at the same monthly rental of $200.00 per month until March 6, 1929. Thereafter you continued to occupy said store room and to pay rent thereon until March 5, 1927, at which time you notified me that you would not rent said building for a definite period, but that you would consider yourself a tenant from month to month and continue to operate the store room as a monthly tenant. I thereupon notified you that you were not a tenant from month to month and that you could not occupy said property as a page 132 } monthly tenant, but that I would expect and require you to carry out your agreement with me and occupy the property as my tenant until March 6, 1929. After being so notified you continued to occupy the premises until October 5, 1927, paying the rent therefor until that time, and on that date abandoned the premises and refused to pay rent for the said premises thereafter. If the said verbal agreement made August, 1926, whereby you agreed to lease said premises until March 6, 1929, is a valid and legal agreement, you are indebted to me in the sum of $3,400.00 * * *' And so forth and so on.

"Two claims are advanced:

"1. It is said that under the agreement made in the fall of 1925, Payne became a holdover tenant from year to year

after the expiration of the first lease, which was to occur on March 6, 1926, and was to pay an annual rental in monthly installments of $200.00.

"2. It is further said that if this be not true he is still liable under the oral contract of August, 1926, whereby he definitely agreed to continue as tenant until March 6, 1929, and to pay rent at the rate last stated.

"Payne held the store until March 5, 1927. Taking up the first assignment, it will be noted that rent for the second year under the first lease was at the rate of $225.00 a month. That was to become $200.00 after March 6, 1926. The motion makes this statement:

page 133 } 'Some time during the fall of 1925, we verbally agreed that you might remain in the property after the expiration of the lease on March 6, 1926, at a reduced rental of $200.00 per month, and you continued after March 6, 1926, to occupy said store room under the terms of the original lease, except as to the modification and reduction of the monthly rental, as verbally agreed upon in the fall of 1925, and continued after March 6, 1926 ,to pay rent to me at the rate of $200.00 per month.' "

Now they went on to set up the Statute of Frauds in here, and this is what the court said: "In Virginia, by the statute of conveyances, Code, section 5141, leases for more than five years must be by deed * * *" And so forth. "If the situation is covered at all, it must fall under either the sixth or seventh clause of our statute of frauds. That statute declares that no action shall be brought—

"(9, 10) 'Sixth, Upon any contract for the sale of real estate, or for the lease thereof for more than a year; or '* * *"

I think one of his cases was purely on the question of lease and under the sixth clause rather than under the seventh.

" 'Seventh, Upon any agreement that is not to be performed within a year.'

"Clause 6 deals with agreement for a lease, and not with a completed lease at all."

page 134 } The Court: What did they rule on the seventh section?

Mr. Beazley: "If the statute applies at all,"—that is what the court said,—"it must be by virtue of clause 7, and upon

the theory that it is an agreement not to be performed within a year. There is force in the suggestion that this section does not relate to land—this upon the principle that where there is a special statute dealing with a particular subject its provisions are not overborne by a general statute whose terms seem broad enough to cover it, and some of our States so hold. 27 C. J., page 189, and cases cited. This proposition, however, is not sustained by the weight of authority. Brown on Statute of Frauds (4th ed.), section 272; 17 Va. Law Reg. 97; 13 Va. Law Rev. 426.

"Since contracts affecting land are covered by it and since we are dealing with a lease, it may be well to ascertain *in limine* just what a lease is. It is a common law estate."—

Then it goes on down here—"This definition appears in 18 Am. & Eng. Enc. of Law (2d ed.), 597: It is 'a contract for the possession and profits of lands and tenements, on the one side, and the recompense or rents on the other, or in other words, a conveyance to a person for life, years, or at will, in consideration of a rent or other recompense.'—

"In short, it is an estate for life, for years, or for some lesser term.

page 135 } "If this contract of conveyance, coupled with the immediate delivery of possession, is an executed one, then it is a contract to be performed within a year, is not within the statute and our problem is at an end. It cannot be contended that a parol sale of land accompanied by possession is not a completed contract, and the fact that full payment was not made in the beginning does not change the situation. Of course, such a transaction might run counter to other statutes, but we are not now concerned with them. Certainly, the landlord in the instand case has done all that she promised to do."

Mr. Glasgow did all that he promised to do, to pay the $1.500.00.

The Court: Finish that case.

Mr. Beazley: "Complete performance on the part of one of the parties suffices. 'It is established in England and in most of our States that an agreement does not fall within the statute if that which one of the parties is to do is all to be performed within a year;' "—one of the parties, both of them—" 'in other words, the agreement must contemplate nonperformance by both parties within the year.' "

The Court: Regardless of whether this was a contract that related primarily to building the room and bathroom or a contract which related primarily to the board, you can put

the emphasis on either way.

page 136 } Mr. Beazley: That is correct.

The Court: It doesn't fall within the statute, it is your position, because Mr. Glasgow paid $1,500.00 and performed his part?

Mr. Beazley: Yes, sir.

The Court: Mr. Minor suggests that he was to have moved up there and lived. Was that any obligation of his? Does that change it at all?

Mr. Beazley: No, sir.

The Court: How about the obligation of Mr. Peatross to repay by permitting him to board there free, so to speak? It wouldn't be free, but to board there at the rate of $100.00 a month.

Mr. Beazley: He couldn't make him come. He could come if he chose, but that was up to Mr. Glasgow if he elected to do so, and he elected not to do it. But the fact that Mr. Glasgow was to come up there didn't change the status as far as Mr. Peatross and Mr. Glasgow were concerned.

The Court: Mr. Minor says that Mr. Peatross could not bring suit, assuming $1,500.00 having been paid. Is that the reason he could not bring suit, because it hadn't been performed within a year and no definite time is set?

Mr. Beazley: I don't think so, sir. Remember

page 137 } this, that there was not anything said about paying any of this back until after the $1,500.00 had been given to Mr. Peatross. He gave it to him and said, "Here, put it on the house," and he say*d*, "You can pay me back by rent." That was after he gave it to him.

The Court: That was some weeks later?

Mr. Beazley: That was before he completed his house, when he started working on the house.

The Court: But I mean, he talked about how it was to be paid back. Was that simultaneously or some weeks later?

Mr. Beazley: That I don't recall. I couldn't tell you about that. I do remember very distinctly that Mr. Peatross testified, and I think Mr. Glasgow did, too, that he gave me $1,500.00 to put on his house. That is what Mr. Glasgow said—Mr. Peatross said. Mr. Glasgow said that he loaned him $1,5000.0 to go on the house.

The Court: Then you say that the operative thing that takes it out of the Statute of Frauds, when you slough off everything else about the agreement, the thing that keeps it from without the Statute of Frauds is that one of the parties, Mr. Glasgow, has fully performed, and therefore under the cases it is not under the Statute of Frauds?

Mr. Beazley: That is right.

The Court: Just like the rent here that the man paid. He performed his end and paid the rent; and therefore, although it had gone on ten years, he had continued
page 138 } to pay over the period of ten years. He performed in the Smith case by putting him in possession.

Mr. Beazley: That is right, sir.

The same thing is true in *Reed and McCormick* v. *Gold.* That is 102 Virginia at page 37. In this particular case this is very analagous to this one, too. Here is a man who bought stock and he was to pay for it over a period of years, period of months, which went over into about two years, and the stock was delivered to him, and he stopped paying on it. He brought it to suit and they set up the Statute of Frauds, and here is what the court said about this:

"If a person verbally agrees to take stock in a joint stock company to be paid for in instalments covering a period of more than one year, and the company accepts him as a stockholder, and enters his name on the roll of its stockholders, this is sufficient to bind him in his contract of subscription Such action on the part of the company is all that is required to do * * *"

The Court: Is that because it is made a contract in writing, or is it under—is that considered an oral—

Mr. Beazley: This is a contract of more than a year under the Statute of Frauds.

The Court: The case turns on that and not such a thing as in writing?

Mr. Beazley: Yes, sir. "* * * or can do, to clothe the party with the character of a stockholder, and
page 139 } that is all that is necessary to be done for that purpose."

The Court: That would be because the stockholder never signed it, and the statute, to make it a writing the person to be charged, or his agent, has to sign it.

Mr. Beazley: I assume, sir, in either case it would be the same thing if the company has performed all of its duties it is supposed to perform by delivering the stock.

The Court: I am afraid that you don't understand me, and I don't fully understand you. I am sorry. Does that case turn on whether there was a writing, or is it admitted that it wasn't a writing, and the question is whether it comes under the Statute of Frauds?

Mr. Beazley: Let me read you this:

"If a person verbally agrees to take stock in a joint stock company, to be paid for in instalments covering a period of more than one year, and the company accepts him as a stockholder, and enters his name on the roll of its stockholders as a stockholder, this is sufficient to bind him on his contract of subscription."

He hasn't signed any contract. It is a verbal agreement. Now let's read what are the facts in the case. "Gold was appointed receiver in the chancery suit of"—

The Court: Before you do that, is there any pertinent part of that case that refers to the Statute of Frauds? Any pertinent language? Or are we getting now into page 140 } what the corporation statute set up as binding a stockholder?

Mr. Beazley: Yes, sir. "Another error assigned is that the alleged subscription to the stock of the Berryville Land and Improvement Company was not in writing and signed by Reed and McCormick or their agent and that this action cannot be maintained to charge them upon a verbal promise by virtue of the clause of Section 2840 of the Code, which provides that 'no action shall be brought upon any agreement that is not to be performed within a year.' "—That is the Statute of Frauds.

The Court: What does it say about that?

Mr. Beazley: "Unless some memorandum or note thereof be in writing or signed by the party to be charged thereby or his agent." "Plaintiff in error subscribed for 80 shares of stock of the Berryville Land and Improvement Company, 10 per cent thereof to be paid within 15 days from the time of subscription, and the residue at the call of the Board of Directors, provided that no assessment should exceed 10 per cent of the par value, and that no two assesments should be at shorter intervals than 60 days. It appears, therefore, that the whole of the subscription could not be called within one year, and the plaintiff in error insists that this is an executory contract which by its terms could not be wholly performed within a year"—that is what he says here—"and is, therefore, within the operation of the Statute just quoted, and that an action thereupon cannot be main- page 141 } tained. Defendant in error insists, first, that the contract was in writing, within the meaning of the statute; and, secondly, that by the contract there was an immediate sale of a certain number of shares of stock by the company to Reed & McCormick, to be paid for by them in instalments, some of which were payable within and the

remainder beyond a year; that, while the certificates were not in fact delivered within the year, they might have been so delivered, but that the ownership of the stock passed at once,"—just like the ownership of this money passed from Mr. Glasgow to Mr. Peatross—"there being nothing in the contract which restricted its performance on the part of the company to any particular time; and that this is so, although under section 1132 of the Code the company could not have been compelled to deliver to the subscriber a certificate for the shares so taken until the amount of the subscription was fully paid. In other words, the contention of the company is that the contract upon its part was that Reed & McCormick should be entitled to 80 shares of the capital stock of the company, and that upon their subscription, whether that subscription was verbal or written, they became shareholders in the company to the extent of that subscription, clothed with all the rights, interests, and privileges of shareholders, and subject to all the duties and liabilities of shareholders.

"In Cook on Corporations (4th Ed.) Vol. 1, page 142 } at section 13, it is said: 'A certificate of stock is not necessary to the complete ownership of the stock, nor is payment of the subscription necessary thereto'—accepting as authority the decision of the Court of Appeals of New York in *Wheeler* v. *Millar,*" and so forth.

"The title may pass, the right become vested, if such be the intention and contract of the parties, although payment is deferred, and the usual written evidence of title is absent. Whatever may be said of a case where no fact is present at the foundation of an inference that title has passed, except the bare fact of a subscription, it is entirely reasonable but where, in addition, the corporation has explicitly recognized the alleged stockholders as such, and the latter has acted in that capacity, such facts should be deemed sufficient to justify a conclusion of ownership, and make the subscriber a stockholder.

"Speaking of the rule under consideration, Clark on Contracts, page 112, says: 'It is established in England and in most of our States that an agreement does not fall within the statute if that which one of the parties is to do is all to be performed within a year; in other words, the agreement must contemplate nonperformance by both parties within the year.'"

That seems to be the universal law.

The Court: Mr. Minor has suggested to me that Mr.

page 143 } Peatross could not have sued on the contract, assuming that he thought it was a contract, because he would be barred by the statute. Under this theory he could have sued, if he had alleged a contract, because he had completed it and it was—

Mr. Beazley: I think so.

The Court: How about the situation where a man lends $1,500.00 to be paid at the rate of $100.00 a month and it is verbal. Is that barred by the statute?

Mr. Beazley: I don't think so, sir, because when you loan me the $1,500.00, you have completed all of your transaction. You do not have to do anything more. The rest of it is up to me. You may have to sue me to get it back, and you may never get it back from me, but you have performed your part of the agreement the very moment that you pass the $1,500.00 over to me.

The Court: Does it make any difference whether the person sought to be charged is performed or the person charging?

Mr. Beazley: I don't think so, if your Honor please, there is plenty of law in Virginia on that. You asked me, and I am going to tell you that the Statute of Frauds applies to both the defense and—here is a case of *Knox Stove* v. *Ward*, 180 Virginia 267, that is right on that point.

The Court: What is that case?

Mr. Beazley: This case here is where it was an oral contract—That is master and servent. This man was employed

page 144 } as a salesman for stove works, and he went on from time to time and finally—I will just read it to you:

"In the instant case, an action by plaintiff to recover damages for the wrongful discharge of plaintiff by the defendant in violation of a contract between the parties, plaintiff contended that an oral contract was entered into between the date of November 1, 1938, and January 6, 1939, for one year's service from January 1, 1939, while defendant contended that the employment of plaintiff was at the will of both employer and employee. The only persons who know of the contract with plaintiff testified to its terms and conditions and no denial was made of the authority of the executive officer, alleged to have made the contract, to make such yearly contracts. The executive officer who employed plaintiff stated that he did not employ him from month to month but for the year 1939 from January 1st until the end of the year and this uncontradicted evidence was fully corroborated by plaintiff. The services of plaintiff had continued for many years and,

in the language of the parties, the terms of the contract were 'gone over again' in January at which time the arrangement theretofore made was discussed, agreed upon and confirmed by both parties. The trial court entered judgment for plaintiff."

They held: "That the defendant had not overcome the burden of showing that there was error in the conclusion of the trial court that the agreement in question was not within the statute of frauds."

The Court: In other words, the defendant as-
page 145 } serted the Statute?

Mr. Beazley: Asserted it right here. You didn't have to go any further, Mr. Minor.

The Court: You will have a chance to reply in rebuttal.

Mr. Beazley: I say, sir, irrespective of that, I did not try to hide that case from you. I happened to run into that and brought it along because I thought the sooner we got away from that, the better we were.

The Court: In other words, then, to boil your position down, regardless of whatever is said in this memorandum, admitting that it is all correct and in line with the Virginia law, as shown by that last case, you say that it is not applicable because the case itself does not fall within it?

Mr. Beazley: Yes, sir. I have not studied this. I don't know what the law is in this memorandum.

The Court: His memorandum is that primarily a Statute of Frauds can be asserted as a defense.

Mr. Beazley: That is correct, sir, in Virginia.

The Court: But your position is that the Statute of Frauds has no application whatsoever?

Mr. Beazley: No application in this particular case. As I said, he certainly cannot come here and say there wasn't any contract in one breath and say that there was a contract in another breath and that therefore the Statute of Frauds should prevail.

page 146 } If Mr. Glasgow had said, "Yes, that was our agreement, that I was going to move there, and we had that contract, but you can't do anything now because the Statute of Frauds has got you, and you have got to give me that $1,500.00 back." He said it wasn't true. He says they did not have any such contract. But in all of the cases that you have here, and even in Virginia that I can find, there was admitted contract, either oral or written contract.

So it wasn't a question of contradicting the man who is alleging that the Statute of Frauds should apply, the man

who by his own oath and word says no contract existed, and he is bound by it.

The Court: No, he is alleging that—I do not follow you on that, Mr. Beazley, because he is stating there was no contract. This was their position and still is their position, "But nevertheless Mr. Beazley should not be allowed to recover on the basis of a contract which he asserts, not us, but he."

Mr. Beazley: But I say it does not apply. In the next place, when he says we allege there was a contract, we allege there was more than a contract of paying the money back, because the agreement was that he was to fix the house up for him. In addition to that, his daughter testified that Mr. Glasgow told her that he had given, had given, her father $1,500.00 to put on the house as a gift.

page 147 } Now, it is certainly a foregone conclusion—I know that I am rather stupid, it is true—but if that instruction that I asked for hadn't been given, I certainly would have asked, and the Court would have been compelled to give to me, an instruction which said, an instruction to the effect that if the jury believe that the $1,500.00 was not a loan, then you must find for the defendant. Now I was entitled to that instruction if you took the other one away from me, and I certainly would have asked for it.

The Court: What has concerned me are two things: One, if there was error committed, wasn't it more favorable to the plaintiff in Instruction A?

Mr. Beazley: It certainly was. I never saw an instruction drawn that was more favorable to the plaintiff than that instruction. I want to say this, that I bent over backwards because I didn't want any error in this thing, and I would have rather lost it and fought it out in the Supreme Court than to have had this case go up on an error.

The Court: The other thing that bothered me, but that is not at issue, is whether the plaintiff under the instruction wasn't entitled to recover something. Mr. Minor has stated very emphatically that that is not the issue before us.

Mr. Beazley: I didn't understand that.

The Court: Whether the plaintiff was not entitled to recover something in the case.

page 148 } Mr. Beazley: You had an instruction; the jury had that before them, and it was a question of whether or not the question of fact was left to them rather than a question of law.

The Court: However, I should not even interject that because the only issue before us is whether this Statute of Frauds applies, and Mr. Minor has very fairly stated that

the verdict of the jury on the instructions given is not in error, it was the wrong instruction given.

Now, I would like to see that Greenbrier case.

Mr. Beazley: All right, sir.

Mr. Minor: Your Honor, would the Court indulge me for about three minutes in reply to Mr. Beazley?

The Court: You will have an opportunity to rebut. If you want to take a short recess to examine these cases, you will have an opportunity for that.

Mr. Minor: Yes, sir.

(Recess).

The Court: Mr. Minor, Mr. Beazley has based his entire argument on the fact that Mr. Glasgow had paid and, under the decisions of Greenbrier Farms against Clarke and Smith against Payne, this is not a case involving the Statute of Frauds.

Mr. Minor: If Your Honor please, if I remember the language of Mr. Beazley, he said Mr. Glasgow did all that he could do within a year when he paid the $1,500.00.

page 149 } Your Honor, if Mr. Glasgow had done all that he was supposed to do within a year when he paid the $1,500.00, how could he have breached the contract? I just ask that—

The Court: That isn't getting to the issue.

Mr. Minor: That was the point, that Mr. Glasgow had fully performed his contract. Was that not only that Mr. Glasgow was to pay $1,500.00, but he was supposed to come over there and stay for fifteen months at $100.00 a month? If all it was that he paid $1,500.00, what was the rest of the consideration for the payment, $1,500.00?

The Court: Do you think that his going over there and living without any further charge was an obligation on him which he couldn't waive?

Mr. Minor: I think that was a part of the original contract. I don't see how he could waive it as a part of the original agreement, according to Mr. Beazley.

The Court: And that simply by saying it is a way he could recover his $1,500.00?

Mr. Minor: Your Honor here is the thing. Mr. Beazley a little while ago—in answer to that I would like to answer in this way. The motion to set aside the verdict is in the nature of a demurrer to the evidence and because the jury found as it did we come before this Court and have to take

page 150 } the situation as it developed. We deny that there was an agreement, but if there was, it was an

agreement Mr. Beazley can't raise any higher than the agreement that he had, and the agreement was that Mr. Peatross would put the room and bath on, and room and board would be furnished Mr. Glasgow for fifteen months at $100.00 a month. That was Mr. Peatross's side of the bargain. Mr. Glasgow was to put $1,500.00 up and come over there and live for fifteen months. Mr. Glasgow denies that there is a contract. Mr. Beazley, in behalf of his client, Mr. Peatross, says that Mr. Glasgow is bound by this contract. We say that the contract is within the Statute of Frauds in that it is not fully performed or performable by either side within one year, and the Greenbrier case is certainly not on point.

In the first place, in the Greenbrier case you have no mention of any specific time. In the case before us we have got, staring up right in the face, a fifteen months period which is three months beyond a year any way you look at it. That is clearly within the Statute of Frauds. The Greenbrier case didn't mention anything like that. There wasn't any lenght of time. The agreement could have been completed within a year, but the Glasgow arrangement couldn't have been finished and couldn't have been performed within a year from its inception. Now you have to go back to its inception.

page 151 } The contract, according to the vast weight of authority, must have been performable within a year at its inception. Now that is what the law says. It didn't say later or after part of it has been performed that the contract takes over. The contract speaks as of the date it was made.

Now the breach didn't take place when the agreement was made. Certainly Mr. Beazley didn't allege that. If he alleged the breach, he said it didn't take place until in the fall, in September when Mr. Glasgow told him he wasn't coming over there. The contract, when it was made, was not performable within a year, and it certainly didn't fit the Greenbrier case; that is, by theory anyway.

As far as that is concerned in every one of these cases, Your Honor, there is not an executory contract. In every one of these cases there has been a full execution by one party.

In that 153 Va. case, which is the *Smith* v. *Payne* case, I believe, tried around 1929, and which the Greenbrier case relied on, there was a lease from year to year and the party had moved in, and the court said that was an executed agreement, wasn't executory.

In 102 Va., this stock case, that was a case where the stock had been delivered, the contract was completed on the de-

livery of stock. But in this case, the contract hadn't been completed on either side, either by Mr. Peatross
page 152 } or by Mr. Glasgow.

As far as this 180 Va. case, the last one, I will be frank with you, I don't see what bearing it has on the situation at all. I raised the question in my brief whether a contract could be set up as a defense which was within the Statute of Frauds. I didn't raise the question of whether the Statute of Frauds could be raised as a defense in Virginia. This case didn't even mention it. It is worthy to note that it didn't mention the Statute of Frauds in the syllabus, and it certainly didn't have anything to do with the finding of the court in that case. I would like,—if the Court found anything in there which affects this case,—I would like to be told because I certainly intended to inform this Court correct when I said that I found no case in Virginia in which the Statute of Frauds had been raised in regard to a contract used as a defense to transaction, and I still stick to my position. This case certainly didn't change my position on that.

Your Honor, each of these agreements Mr. Beazley has raised is one where there is a completed agreement. In the case before us I earnestly submit that taking Mr. Beazley's theory on it, it certainly has not been completed on Mr. Glasgow's side and the agreement, it must, as I said, must be performable within a year from its inception. The cases state this time and time again.

When we go back to the inception of this agreement, when it was made, was it fully performable within a
page 153 } year, the entire agreement? We know that the agreement was, under the best theory of Mr. Peatross' case, that, one, he would put on a room and bath, and two, he would furnish Mr. Glasgow room and board for fifteen months for $100.00 a month, and under his theory Mr. Glasgow accepted his proposition and refused to comply with it by moving in. He says so in his instruction and "the plaintiff refused to move into the defendant's home; then the Court tells you that the plaintiff breached his contract."

If he breached his contract by refusing to move in, then he didn't fully perform his contract. If he fully performed on his side, how could he have breached his contract? That is what I can't get around.

Mr. Beazley said emphatically that Mr. Glasgow fully performed his contract, the original agreement. If he had, then why, when he refused to move in, did he breach his agreement, if that was a part of it? I don't know how you can get around that, to be truthful, and I submit that sincerely.

I have nothing further to say.

The Court: Do you have Burks' Pleading and Practice here?

Mr. Minor: Yes, sir.

The Court: Mr. Beazley, I would like to have the Greenbriar case and *Smith* v. *Payne,* and your stock page 154 } case.

OPINION FROM THE BENCH.

The Court: Gentlemen, the Court wishes to thank both counsel for the excellent argument that they have presented and the authorities which they have furnished the Court. You have made the task of the Court considerably simpler in reaching a decision in this case by bringing to its attention all the pertinent points and authorities.

The issue is very narrow, as set forth in the motion and as set forth in the statements of counsel for the plaintiff: The issue is simply whether instruction No. A should have been given because of the contention that the agreement or contract by which Mr. Peatross testified was voided under the statute of frauds, it being conceded in argument on behalf of counsel for the plaintiff that the jury could find the verdict that it did under the instructions which were given to it; but simply on the proposition of the statute of frauds instruction A should not have been given. On the other hand, it is conceded in argument by the attorney for the defendant that in a proper case a contract, which is null and void by reason of the statutes of frauds, cannot be relied upon as a defense. The plaintiff contended that he lent the defendant $1500. His motion for judgment was based on loan and loan only. The defendant contended that it was no loan, that a contract had been entered into between the parties whereby the plaintiff paid the defendant $1,500, the defendant was to page 155 } add a room and bath, plaintiff could move in and live with him and would get his board, or, as he expressed it, would be "boarded" at the rate of $100 a month until the $1500 had been repaid in that manner.

The evidence further shows that the $1500 was paid. The defendant Peatross promptly constructed a room and bath, but the plaintiff did not move in and brought this suit for the recovery of what the plaintiff insisted was a loan.

There is a conflict in the evidence which is peculiarly for the jury.

We now come to the matter of law set forth in the motion to set aside the verdict. The defendant testified to the agreement without objection and without counsel noting any ex-

ception whatsoever to his testimony. When instructions were presented to the Court, the defendant objected to instruction A as tendered by the defendant. He objected on the ground that the statute of frauds precluded the granting of such an instruction. Later, the instruction was amended, consequently, the plaintiff suggesting to some extent the amendments. The upshot of it was that counsel for the plaintiff withdrew his objection to instruction A and at the conclusion of the conference concerning instructions both counsel specifically stated that there were no exceptions to any of the instructions. There was no motion to strike the
page 156 } defendant's evidence and the case went to the jury, which found for the defendant.

The evidence showed that Mr. Glasgow had paid the $1500 to Mr. Peatross, and the payment of the $1500 was not denied. It is the opinion of the Court that Mr. Glasgow did all that was required of him, assuming that the transaction was not a loan but a contract. He was under no obligation to move in and live with Mr. Peatross, although Mr. Peatross had stated in the course of his testimony that the room was available and Mr. Glasgow could move in at any time that he saw fit to do so. In view of the fact that the contract was performed on one side, if a contract there was, the Court, under the authority of *Greenbrier Farms* v. *Clarke,* 193 Va., 891, 895, (1952) holds that the contract was not within the statute of frauds. In that case, the Court said, at page 895:

"The plea of the statute of frauds alleged that the contract sued on was not to be performed within a year and hence was not enforcible because not in writing. Code 1950, Title 11, Section 2, Subsection 7. The plea was not applicable to the cause of action alleged nor to the case made by the evidence and no reversable error was committed in overruling it. Plaintiff performed her part of the alleged agreement when she furnished the clippings. The agreement was not one that she could not perform within a year. An agreement does not fall within the statute if that which one of
page 157 } the parties is to do is all to be performed within a year. In other words, the agreement contemplates non-performance by both parties within a year. Defendant's payments do not change the situation. *Smith* v. *Payne,* 153 Va. 746, 758. 151 SE 295 and 299."

To the same effect is *Smith* v. *Payne* supra and Reed and *McCormick* v. *Gold,* 102 Va. 37 (1903) where the Court pointed out while there is a diversity of opinion on the rule above mentioned that the Virginia Court has followed the

rule to the effect as quoted in Clark on Contracts at page 49 of the Virginia Report:

"It is established in England and in most of our states that an agreement does not fall within the statute if that which one of the parties is to do is all to be performed within a year. In other words, the agreement must contemplate nonperformance by both parties within a year."

As a matter of fact, the Court is of the opinion that instruction A and instruction 4 given for the plaintiff were more favorable to the plaintiff's case than the pleadings justified inasmuch as the plaintiff brought his suit on the theory of a loan only and yet was allowed a possibility of recovery under a type of *indebitatus assumpsit* or money had and received, a count which had never been pleaded. The Court page 158 } has had some concern as to whether the jury followed the instruction No. A. However, that has been put at rest by the statement that there is no motion or error assigned in that the jury brought back a verdict contrary to the instruction, and it is not necessary for that reason to pass upon that issue.

The Court is therefore of the opinion that the motion to set aside the verdict should be denied, and it is so ordered.

Mr. Minor: May the record show that the plaintiff excepts to the ruling on the motion to set aside the verdict for the reasons stated in the argument herein.

The Court: Very well. This memorandum I will mark filed and put in the papers.

Mr. Minor: Yes, sir.

* * * * *

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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