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Record No. 6688

In the
Supreme Court of Appeals of Virginia
at Richmond

RICHARD P. ROENKE, ETC.

v.

VIRGINIA FARM BUREAU MUTUAL
INSURANCE COMPANY

FROM THE CIRCUIT COURT OF ~~FAIRFAX~~ Botetourt COUNTY

RULE 5:12—BRIEFS

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

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

HOWARD G. TURNER, Clerk.

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. 6688

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 20th day of April, 1967.

RICHARD P. ROENKE, ALSO KNOWN AS RICHARD ROENKE, Plaintiff in error,

against

VIRGINIA FARM BUREAU MUTUAL INSURANCE COMPANY, Defendant in error.

From the Circuit Court of Botetourt County
Earl L. Abbott, Judge

Upon the petition of Richard P. Roenke, also known as Richard Roenke, a writ of error is awarded him to a judgment rendered by the Circuit Court of Botetourt County on the 18th day of October, 1966, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Virginia Farm Bureau Mutual Insurance Company 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

* * * * *

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* * * * *

SECOND AMENDED MOTION FOR JUDGMENT

TO: THE HONORABLE EARL L. ABBOTT, JUDGE OF SAID COURT:

Richard P. Roenke, plaintiff, who resides in Botetourt County, Virginia, hereby moves the court for judgment against the defendant in the sum of Seven Thousand Three Hundred Dollars ($7,300.00) plus costs of $268.58 with interest thereon from July 17, 1963, court costs incurred by the plaintiff in the United States District Court, Eastern District of Tennessee at Greenville, Tennessee, plus interest and 25% of the principal amount plus interest, all of which is due and payable to the plaintiff by virtue of the following:

1. That on July 17, 1963, plaintiff recovered in the United States District Court for the Eastern District of Tennessee, Northeastern Division, Greenville, Tennessee, in a case therein pending styled Richard Roenke v. William Guy Dempsey, wherein Richard Roenke, a/k/a Richard P. Roenke, was plaintiff and Dempsey was defendant, a judgment against the said William Guy Dempsey in the sum of $7,500.00 together with costs incident to the case. The said $7,500.00 represents recovery of $6,000.00 personal injuries and $1,500.00 property damage; the $1,500.00 as provided by the policy having an exclusion of $200.00 making the total of $7,300.00 due and owing. (Exh. No. 1)

2. The action in which the judgment was secured arose out of an accident on January 29, 1962, on Highway U. S. 11 E. in Sullivan County, Tennessee, approximately four miles from the City of Bluff City, wherein the defendant resided and was domiciled. Defendant Virginia Farm Bureau

page 27 } Mutual Insurance Company is a Virginia corporation organized and existing under the laws of Virginia and was not licensed to do business or was doing business in the State of Tennessee at the time of the accident, institution, pendency or conclusion of the case of *Roenke* v. *Dempsey*. Accordingly, plaintiff was unable to make service

of process out of the State of Tennessee on defendant company and no procedure is provided for such service out of state or federal courts of Tennessee under the fact existing which would enable plaintiff to comply with Virginia Code Section 38.1-281. The application of said code section under the facts and circumstances therein prevailing and enforcement thereunder to plaintiff's claim in this case would deprive plaintiff of his rights of due process under the Constitution of the United States of America Amendment XVI, Section I and Section II of the Constitution of Virginia.

3. That William Guy Dempsey was the operator of an uninsured motor vehicle and he himself was an uninsured motorist within the purview of the Virginia Code provided in such cases.

4. That at all times hereinabove mentioned plaintiff was the holder of a family combination automobile policy issued by the defendant (Policy #32813-1) and attached to said policy was an endorsement providing for family protection against uninsured motorists with the limits of liability of bodily injury $15,000.00 each person, $30,000.00 each accident pursuant to and as required by the Virginia Law, as well as $5,000.00 property damage less $200.00 exclusion. (Exh. No. 2)

5. The judgment which the plaintiff recovered against the said William Guy Dempsey therein was covered under the terms and provisions of the uninsured motorist endorsement on said policy.

6. Execution was issued out of the United States District Court for the Eastern District of Tennessee against said William Guy Dempsey and has been returned "nothing found" and is unsatisfied; that the said William Guy Dempsey is judgment proof, without the financial means to pay said judgment and was not covered with liability insurance on the vehicle being operated by the said Dempsey on the date in question or any other public liability automobile insurance coverage and therefore is an uninsured motorist. (Exh. No. 3)

page 28 } 7. That the judgment which has now become final remains unsatisfied in the United States District Court for the Eastern District of Tennessee, Northeastern Division, Greenville, Tennessee, and the plaintiff pursuant to his policy provisions as hereinabove alleged is entitled to recover from the defendant the amount of his judgment, interest, costs and penalties as hereinafter alleged, less the $200.00 exclusion.

8. On February 9, 1962, the defendant company was notified of the loss and the injuries sustained by the plaintiff and thereupon secured investigators to investigate the accident; also, the attorney for the plaintiff on said date forwarded to the agent of the company, one "John G. Seibel," Form SR-21 to be forwarded to the State of Tennessee. (Exh. No. 4)

9. On February 24, 1962, the attorney for the plaintiff wrote the said Seibel advising that the said William G. Dempsey was an uninsured motorist and that the Virginia Farm Bureau Mutual Insurance Company, defendant, was being advised of the claim of the plaintiff under the uninsured motorist act and policy endorsement. There was also forwarded to the defendant's agent a copy of the proposed complaint which was filed in the United States District Court. (Exh. No. 5)

10. On March 1, 1962, plaintiff's attorney in Elizabethton, Tennessee wrote the defendant's agent advising that the complaint was being filed in the Federal District Court for the Eastern District of Tennessee at Greenville. A copy of which letter of notification was mailed to Gay & Taylor, Insurance Adjusters, employed by the defendant company to adjust this claim. (Exh. No. 6)

11. On March 5, 1962, plaintiff's attorney in Elizabethton, Tennessee, received a letter from Fred H. Evans, Field Claimsman, Roanoke, Virginia advising that he had received the correspondence to John G. Seibel and further that they were continuing their investigation of the accident advising that when the investigation was completed the company's local representative, Mr. Russell, to whom a copy of this letter was sent, would contact the attorney concerning the matter. (Exh. No. 7)

12. On June 29, 1962, the plaintiff's attorney in Elizabethton, Tennessee, forwarded all medical expenses to Mr. Evans which expenses were incurred by the plaintiff. (Exh. No. 8)

page 29 } 13. On July 2, 1962, Mr. Joseph C. Russell, Field Claimsman, Abingdon, Virginia, claims representative for the defendant company, conferred with plaintiff's attorney at Elizabethton, Tennessee, concerning this claim and concerning possible settlement of the claim.

14. On July 6, 1962, Mr. Joseph C. Russell, Field Claimsman, for the defendant company, wrote the plaintiff's attorney in Elizabethton, Tennessee, acknowledging recepit of the letter of July 2, 1962, and further advising that he desired to discuss the matter at a convenient time. (Exh. No. 9)

15. On July 11, 1962, plaintiff's attorney in Elizabethton, Tennessee, wrote Joseph C. Russell advising that he would be available on July 20th to discuss the matter. (Exh. No. 10) On August 1, 1962, Mr. Russell wrote plaintiff's attorney in Elizabethton, Tennessee, advising that he had discussed the claim with the claims' committee of the defendant company and after carefully reviewing the file felt that there was no liability on the part of the defendant, Dempsey. (Exh. No. 11)

16. On January 28, 1963, plaintiff's attorney in Elizabethton, Tennessee wrote the Virginia Farm Bureau Mutual Insurance Company, Richmond, Virginia, with a copy of said letter to Joseph C. Russell, Field Claimsman, Abingdon, Virginia, advising that the case of Roenke v. Dempsey in the Federal District Court in Greenville, Tennessee, had been set for trial on Wednesday, March 6, 1963, and recalling that the defendant company had previously been forwarded copies of the pleadings and copies of interrogatories of the doctors bearing on the medical evidence in the case. (Exh. No. 12)

17. On March 8, 1963, plaintiff's attorney in Elizabethton, Tennessee, again wrote the defendant company at Richmond, Virginia, advising that the case had been tried on March 6 and 7 in the United States District Court at Greenville, Tennessee, and resulted in a hung jury and that the case would have to be re-set for trial. In this letter plaintiff's attorney advised that he had, since the date of trial discovered a statement in a publication that service of process is required upon you (defendant company) and this condition has not been met at this time. The letter stated further "if you are going to stand on this condition or it is considered by you a condition, please advise me in order that we can have you served with process before re-trial of the case." (Exh. No. 13)

page 30 } 18. Plaintiff further alleges that plaintiff's attorney, Dick L. Johnson, then of Elizabethton, Tennessee, now of Johnson City, Tennessee, went to the United States District Court Clerk's Office in Greenville, Tennessee, and talked to Mr. James Parrott, the clerk, at which time he reviewed the matter of serving process out of the United States District Court where the case was pending, on a non-resident foreign insurance company, as the defendant was, which was not commissioned for doing business in the State of Tennessee. The clerk advised Mr. Johnson that there was no way he could issue process. The clerk, Mr. Parrott, then called on Mr. Franklin Glass, being the clerk to Judge Neese, who reviewed the matter with plaintiff's

counsel and on behalf of the Judge advised Mr. Parrott not to issue any process for the reason that there was no procedure for making Virginia Farm Bureau a party and that there was no way to serve them with process from the District Court if the same were issued.

19. On April 2, 1963, plaintiff's attorney again wrote the defendant company at Richmond, Virginia, advising that at the request of Mr. Russell, said attorney was therewith submitting an offer in compromise of the case of Roenke v. Dempsey and further advising that the case was being recalled on the civil docket at Greenville on Wednesday, April 3, 1963, to be again re-set for trial. (Exh. No. 14)

20. On April 4, 1963, the plaintiff's attorney in Elizabethton, Tennessee again wrote the defendant company advising that the case had been *res-et* in Federal Court in Greenville, Tennessee for July 10, 1963, following which on June 27, 1963, plaintiff's attorney in Tennessee had written the defendant company again advising that the case had been continued from July 10, 1963 because of illness of the Judge; further in said letter, said attorney requested that his letter of April 2, 1963 be acknowledged inasmuch as the proposed settlement was submitted at the request of the defendant company. (Exhs. Nos. 15 and 16)

21. On July 1, 1963, Mr. Otis W. Nuckols, Director of Claims of the defendant company, wrote the plaintiff's attorney in Tennessee advising without prejudice that said defendant company would give consideration to a nominal offer in settlement of the case. (Exh. No. 17)

page 31 } 22. On July 10, 1963, plaintiff's attorney in Tennessee wrote the defendant company submitting another offer in settlement of the case against Dempsey and on July 11, 1963, plaintiff's attorney again wrote the defendant company advising that the case had been re-set for trial for July 16, 1963 in the District Court at Greenville, Tennessee. (Exhs. Nos. 18 and 19)

23. On July 17, 1963, plaintiff's attorney in Tennessee again wrote the defendant company advising the defendant company that a jury in the District Court in Tennessee had returned a verdict in plaintiff's favor in the sum of $7,500.00 and demanding therein immediate payment of that amount. (Exh. No. 20)

24. On July 22, 1963, the defendant company through its director of claims, wrote the plaintiff's attorney in Tennessee advising that Mr. Roenke had neither satisfied the uninsured motorist policy provisions nor the statutory provisions of the uninsured motorist coverage and respectfully denying the claim and refusing payment on said claim. (Exh. No. 21)

25. That by virtue of Section 56-1105 of the Code of Tennessee, the plaintiff is entitled to a sum not exceeding a 25% on the liability for said loss in this case due to the failure, not in good faith, on the party of the defendant company to pay the claim herein sued upon and such refusal has resulted in loss and additional expense to the plaintiff, the holder of said policy. Accordingly, the plaintiff is entitled to have the provisions of this statute invoked and the additional 25% added to the claim herein sued upon.

WHEREFORE, the plaintiff respectfully moves for judgment against the defendant for the sum of $7,300.00 plus costs of $268.58 incident to the securing of the judgment in the United States District Court for the Eastern District of Tennessee at Greenville plus a 25% penalty as provided by the Tennessee statute hereinabove alleged and the costs incident to this proceeding.

RICHARD P. ROENKE, Plaintiff
By Counsel

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Filed Feb. 8, 1966.

EARL L. ABBOTT, Judge

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DEFENDANT'S RESPONSIVE PLEADING TO PLAINTIFF'S SECOND AMENDED MOTION FOR JUDGMENT

* * * * *

Comes now the defendant, Virginia Farm Bureau Mutual Insurance Company, by counsel, and pursuant to order of this court dated February 8, 1966, herewith files its responsive pleading to the plaintiff's second amended motion for judgment.

1. The defendant denies that it is obligated to the plaintiff as alleged in the opening paragraph of the second amended motion for judgment.

2. The defendant admits the allegations in paragraph 1 of the second amended motion for judgment except that the defendant is not advised as to how much of the $7,500 judgment was for personal injury and how much was apportioned to the property damage.

3. The defendant admits that it is a Virginia corporation, organized and existing under the laws of the State of Virginia and that it was not licensed to do business in the state of Tennessee at the times alleged. All other factual allegations in paragraph 2 of the plaintiff's second amended motion for judgment are denied.

4. The defendant is not advised as to the allegations in paragraph 3 of the plaintiff's second amended motion for judgment and therefore calls for strict proof of same.

page 62 } 5. The defendant admits the allegations in paragraph 4 of the plaintiff's second amended motion for judgment.

6. The defendant denies the allegations in paragraphs 5 and 6 of the plaintiff's second amended motion for judgment except for those pertaining to exh. No. 3 which are admitted.

7. The defendant admits only so much of paragraph 7 of the plaintiff's second amended motion for judgment which alleges that the judgment has become final and remains unsatisfied in the U. S. District Court for the Eastern District of Tennessee, Northeastern Division, Greenville, Tennessee. The legal conclusions also set forth in said paragraph are denied.

8. The defendant admits allegations in paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the plaintiff's second amended motion for judgment.

9. The defendant denies the allegations in paragraph 18 of the plaintiff's second amended motion for judgment.

10. The defendant admits the allegations in paragraphs 19, 20, 21, 22, 23 and 24 of the plaintiff's second amended motion for judgment. However, the defendant does not admit the relevancy of all the alleged matter which has been admitted herein insofar as the issues of this action are concerned.

11. The defendant denies the allegations in paragraph 25 of the plaintiff's second amended motion for judgment or the legal conclusion based thereon.

12. The defendant takes the position that the plaintiff has not alleged a good cause of action and hereby serves notice that it will oppose any proffer of evidence to support any facts not included in the second amended motion for judgment. The fact that the defendant has not again demurred to the plaintiff's declaration is not to be construed
page 63 } as a waiver or concession that any new matter alleged is sufficient to make out a *prima facie* case of liability against the defendant.

Given under our hand this 11th day of February, 1966.

VIRGINIA FARM BUREAU MUTUAL INSURANCE COMPANY

BY: GENTRY, LOCKE, RAKES & MOORE

BY: RICHARD C. RAKES
Counsel for the Defendant

* * * * *

Filed February 12, 1966.

B. M. ALLEN, D. Clk.

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INTERROGATORIES

* * * * *

4. If a corporation, state where originally incorporated.

5. Is the Company incorporated or domesticated in any other states?

* * * * *

8. Is the Company incorporated, domesticated in, or registered with the State Corporation Commission for the State of Tennessee or any other agency of the State of Tennessee?

9. Does the Company maintain a branch office in the State of Tennessee?

* * * * *

11. Does the Company have any employees within the State of Tennessee engaged in soliciting contracts of insurance, if so, as of what date?

12. Does the Company in any way attempt to solicit or produce contracts of insurance with residents of the State of Tennessee?

* * * * *

page 69 } 14. What policies have been so issued and when, give name of policy holder if any, address of same, policy number and kind of policy?

15. Does the Company have any policyholders residing in the State of Tennessee?

16. If so, were such policyholders residents of the State of Tennessee at the time of entering into an insurance contract with the Company?

* * * * *

19. Does the Company have a registered agent for the service of process in Tennessee?

* * * * *

21. Does the Company have an agent, or agents, for the collection of past due accounts within the State of Tennessee?

* * * * *

29. Has the Company ever been a defendant in any civil litigation in the State of Tennessee?

30. If so, did the Company retain an attorney in Tennessee?

31. If so, state the name and address of such attorney(s) and when and for how long he was retained?

32. Does the Company presently retain for any purposes an attorney in Tennessee?

33. If so, since what date has the attorney been retained? State his name and address.

34. Has the Company ever settled or adjusted claims in the State of Tennessee under policies of insurance issued by it?

* * * * *

36. Does the Company regularly purchase office supplies, materials or other operating equipment from within the State of Tennessee?

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39. Has the Company ever purchased office supplies, materials, or other operating equipment from within the State of Tennessee?

* * * * *

44. If any office supplies, materials, or other operating equipment are purchased by the Company in the State of Tennessee, are such purchases shipped to their point of destination, or picked up in the State of Tennessee by the Company?

* * * * *

55. Does the Company own any stocks or bonds in any domestic corporations within the State of Tennessee?

56. If so, state the name(s) and address(es) of such corporation(s).

57. Does the Company own any real or personal property within the State of Tennessee?

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* * * * *

RICHARD P. ROENKE
By Counsel

HOPKINS, PEARSON & ENGLEBY
131 West Kirk Avenue
Roanoke, Virginia

By W. C. PEARSON

* * * * *

Filed in the Clerk's Office the 1st day of April, 1966.

Teste:

GEORGE E. HOLT, JR., Clerk

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ANSWERS TO INTERROGATORIES

* * * * *

4. In Virginia.
5. No.

* * * * *

8. No: Except a Power of Attorney filed with the Financial Responsibility Division of the Department of Safety for the State of Tennessee, for the sole purpose of satisfying their Safety Responsibility Act.
9. No.

* * * * *

11. No.
12. No.

* * * * *

14. None.
15. Defendant has no knowledge that any of its policyholders is residing in the State of Tennessee.
16. Defendant has no knowledge that any of its policyholders is residing in the State of Tennessee.

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19. Only as is applicable in Paragraph 8.

* * * * *

21. No.

* * * * *

29. Yes.
30. Yes.
31. Don G. Owens, Suite 3118, 100 North Main Building, Memphis, Tennessee. Since August 1963.
32. Yes, as set out in paragraph 31.
33. As set out in Paragraph 31.
34. Yes.

* * * * *

36. No.

* * * * *

39. No.

* * * * *

44. None.

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55. Yes.
56. Tennessee Gas Transmission, First Mortgage. (Bond) City of Memphis, Tennessee. (Bond)
57. No.

* * * * *

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Filed in the Clerk's Office the 21st day of April, 1966.

Teste:

GEORGE E. HOLT, JR., Clerk

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STIPULATION

The parties hereto, plaintiff and defendant, by counsel, hereby stipulate for the purpose of trial and record in this case that § 56-321 of the official Tennessee Code Annotated was inadverently omitted by the Court Reporter, Alma H. Hannah, in transcribing the deposition of James W. Parrott taken on behalf of the defendant in Knoxville, Tennessee, on June 23, 1966, and that a copy of same, enclosed herewith, should be read into said deposition after § 56-320 which was concluded on page 11 of same.

RICHARD P. ROENKE
By W. CLYDE PEARSON
Of Hopkins, Pearson & Engleby

VIRGINIA FARM BUREAU
MUTUAL INSURANCE
COMPANY
By RICHARD C. RAKES
of Gentry, Locke, Rakes & Moore

Filed June 28, 1966.

EARL L. ABBOTT, Judge

page 95 } "56-321. ANY LAWFUL PROCESS MAYBE SERVED ON COMMISSIONER OR SECRETARY OF STATE. REQUIREMENTS. When the Commissioner of Insurance and Banking has been appointed or constituted attorney for any such company, either by power of attorney or by failure to comply with the provisions of Section 56-320, any lawful process against or notice to such company in any action or proceeding against it from any cause of action arising in Tennessee may be served on the Commissioner of Insurance and Banking, and filing such power of attorney or doing such business in Tennessee shall be a signification of its agreement that any such process or notice so served shall be of the same legal force and validity as if served upon it in the State of Tennessee. In case of any action or proceeding instituted by or on behalf of the Commissioner of Insurance and Banking against or with reference to any such company, process may be lawfully served on the Secretary of State of Tennessee.

Service of process shall be made by leaving two (2) copies of the process or notice, together with a fee of three ($3.00) dollars, in the office of the Commissioner of Insurance and Banking, together with an affidavit giving the latest known address of the defendant and such service shall be sufficient if notice of such service and a copy of the process or notice are forthwith sent by registered mail, with return receipt requested, by the Commissioner of Insurance and Banking to the company at such latest known address. An affidavit of Commissioner of Insurance and Banking showing compliance herewith shall be filed with the paper in the action page 96 } or proceeding. The court in which the action or proceeding is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action. No judgment shall be entered against any such defendant under this section until at least thirty (30) days have elapsed after process or notice has been served on the Commissioner of Insurance and Banking. The references in this section to the Commissioner of Insurance and Banking, shall, in the case of any action or proceeding instituted by or on behalf of the Commissioner of Insurance and Banking be deemed to refer to the Secretary of State of Tennessee, and the duties and responsibilities imposed by this section shall, in such cases, be performed and discharged by the Secretary of State."

page 97 } In the Circuit Court for the County of Botetourt on Tuesday, the 28th day of June in the year Nineteen Hundred Sixty-six.

* * * * *

This day came the plaintiff and the defendants, by their attorneys, as well as the plaintiff in person, and neither party demanding a jury all matters of law and fact were submitted to the judge of this Court for decision, and the Court having fully heard the evidence of the plaintiff and the plaintiff having rested, the defendant moved the Court to strike the evidence of the plaintiff on the grounds that the evidence of the plaintiff has shown conclusively that the plaintiff has not complied with Section 38.1-381 of the Code of Virginia in obtaining service on the defendant; and moved the Court to enter up summary judgment on behalf of the defendant, which motion the Court overruled, and the defendant, by counsel, excepted.

And the Court having fully heard the evidence, and the defendant having rested, the Court doth continue this case

and the plaintiff is allowed until August 1, 1966, to file a memorandum, and the defendant is allowed until August 15th to answer the memorandum, and the plaintiff until August 20th to reply to defendant's answer.

And this case is continued.

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MOTION TO STRIKE PLAINTIFF'S EVIDENCE AND FOR SUMMARY JUDGMENT UNDER RULE 3:20

Comes now the defendant, Virginia Farm Bureau Mutual Insurance Company, by counsel, and files the following motions to strike the plaintiff's evidence and motion for summary judgment for the defendant pursuant to Rule 3:20 of the Rules of the Supreme Court of Appeals of Virginia:

1. The defendant moves the Court to strike the following specific evidence offered by the plaintiff:

a. the alleged conversation between Dick L. Johnson and Joseph C. Russell

b. the hearsay statements of James Parrott and Franklin Glass allegedly made to Dick L. Johnson

c. the federal rules of civil procedure

2. If the Court refuses to strike 1-b. above, then the defendant respectfully requests the Court to reverse its previous ruling excluding that portion of the deposition of James Parrott wherein it is stated by this witness that he would have issued any process Mr. Johnson requested. If the plaintiff is going to be permitted to show an unsuccessful effort to get process issued by hearsay evidence to support his contention that same was impossible, then certainly the defendant should be allowed to put on evidence to show that service of process was possible.

3. The defendant moves the Court to strike
page 132 } all the plaintiff's evidence and to enter summary judgment on its behalf on the ground that no material facts are in dispute, and that the plaintiff is not entitled, as a matter of law, to recover against the defendant

for failure to comply with the provisions of §38.1-381 (e)(1) of the Code of Virginia, as amended.

Given under our hand this 18th day of August, 1966.

VIRGINIA FARM BUREAU
MUTUAL INSURANCE
COMPANY
BY: GENTRY, LOCKE, RAKES
& MOORE
BY: RICHARD C. RAKES
Its Attorneys

* * * * *

Filed Aug. 19, 1966.

B. M. ALLEN, Dep. Clk.

* * * * *

page 156 } VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT.

* * * * *

Upon consideration of the evidence and the briefs filed by counsel, it is my opinion that the plaintiff cannot recover judgment against the defendant in this action for the reason that he has not complied with the provisions of Section 38.1-381(e) (1) of the Code of Virginia. This cause of action arose in Tennessee in which state the defendant is not domesticated or qualified to do business but this fact, nevertheless, does not excuse the plaintiff from compliance with the Virginia statute. Section 38.1-381 is the uninsured motorist law in Virginia. When plaintiff sued in Tennessee in the Federal court, where the cause of action arose (he could not sue in Virginia) he did not give the defendant, his insurer, notice as required by law, to bring him within the provisions of the Virginia statute.

Plaintiff could have complied with this statute in one of several ways; he could have had service of the proper Tennessee state official appointed to receive service of non-resident corporations, even though defendant was not doing business in Tennessee; he could have caused service to be served by the United States marshal in Richmond, home office of defendant of the action instituted in Tennessee or he could have had service upon the defendant in Richmond

by the sheriff of the City of Richmond. It is true that none of these services would have been sufficient to bring defendant before the court in Tennessee or make it a party to such proceedings, but it would have given defendant notice of the Tennessee action so that defendant could make itself a party, if permissible, or take any step to protect itself. All the statute contemplates is that notice in the manner provided by law be given, not that the service be legal or sufficient. See *McDaniel* v. *State Farm Mutual Auto Ins. Co.,* 205 Va. 815; *Creteau* v. *Phoenix Assurance Co.,* 202 Va. 641, and *State Farm Mutual Ins. Co.,* v. *Duncan,* 203 Va. 445.

I further find from the evidence that the defendant has not waived the statutory requirements of Section 38.1-381 (e)(1).

Counsel for the plaintiff has requested further
page 157 } argument upon the questions here involved but
I do not see where further argument will be helpful. The questions were fully advance once before upon defendant's demurrer and the briefs filed by counsel are full and complete and the questions at issue very ably presented. I do not wish to deny counsel the right to oral argument. I am suggesting that such argument under the circumstances will not be helpful.

After hearing the evidence the court took under advisement its decision. An order may now be entered finding in favor of the defendant for the reasons given. This decision will be made a part of the record in this action.

EARL L. ABBOTT, Judge.

September 24, 1966.
To:
Mr. H. Clyde Pearson, Esq
Roanoke, Virginia

Mr. Richard C. Rakes, Esq
Roanoke, Virginia

Received and filed September 27, 1966.

GEORGE E. HOLT, JR., Clerk

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On October 3, 1966, counsel for the plaintiff and defendant again appeared before the Court for the purpose of obtaining

a ruling on several motions still pending in this case. In accordance with the decision reached in a written opinion filed on September 24, 1966, it is the ORDER of this Court that:

1. The motion to strike the testimony of Dick L. Johnson pertaining to his alleged telephone conversation with Joseph C. Russell be sustained for the reason that said facts were not alleged in the plaintiff's second amended motion for judgment;

2. The motion of the plaintiff to strike the testimony of Joseph C. Russell pertaining to his alleged telephone conversation with Dick L. Johnson be sustained because of the Court's ruling in paragraph 1 herein;

3. The motion to strike that portion of the testimony of Dick L. Johnson pertaining to hearsay statements of James Parrott and Franklin Glass be overruled;

4. The motion to strike the evidence of the plaintiff concerning the Federal Rules of Civil Procedure be overruled;

5. Paragraph 2 of the defendant's written motion filed on August 19, 1966, be overruled; and

6. The motion of the defendant to strike all of the plaintiff's evidence and to enter summary judgment for the defendant, be overruled.

The Court has found as a matter of fact and law that the defendant, Virginia Farm Bureau Mutual Insurance Company, was not doing sufficient business in the State of Tennessee between January 29, 1962, and July 17, 1963, so as to subject it to a personal judgment against it in that state. Nevertheless, the Court has concluded from the evidence that the plaintiff failed to comply with the terms of §38.1-381 (e) (1) of the Code of Virginia, as amended, and that there has been no waiver of that requirement by the defendant, nor is it estopped to deny same. Accordingly, it is the further ORDER of this Court that the plaintiff, Richard P. Roenke, take nothing from the defendant, Virginia Farm Bureau Mutual Insurance Company, and that said defendant do have and recover its costs of and from the plaintiff.

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The plaintiff respectfully objects and excepts to the ruling of the Court in paragraph 1 for the reason that the evidence was admissible under the pleadings and Russell's statements were those of an authorized agent of the defendant, and to the finding in favor of the defendant.

HOPKINS, PEARSON & ENGLEBY
BY: RAYMOND R. ROBRESHT, JR.
Counsel for the Plaintiff

The defendant respectfully excepts to the ruling of the Court in paragraphs 3, 4, 5 and 6 of this Order.
GENTRY, LOCKE, RAKES & MOORE
BY: RICHARD C. RAKES
Counsel for the Defendant

ENTER: Oct. 18, 1966.

EARL L. ABBOTT, Judge

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

TO: GEORGE E. HOLT, JR., Clerk of Said Court:

Counsel for Richard P. Roenke, the plaintiff in the above-styled case, hereby gives Notice of an Appeal from a final judgment entered herein on October 18, 1966.

The said plaintiff in the above styled suit, will apply to the Supreme Court of Appeals of Virginia for a Writ of Error to said judgment, and herewith sets forth his Assignments of Error as follows:

1. (a) The Court erred in striking the testimony of Dick L. Johnson, a witness for the plaintiff, pertaining to his alleged telephone conversation with Joseph C. Russell, an agent of the defendant.

(b) The Court erred in refusing to admit into evidence a letter to Joseph C. Russell from his superior in defendant's claim department.

2. The Court erred in holding that plaintiff was required to comply with Section 38.1-381(e)(1) of the *Code of Virginia,* as amended under the facts of this case, and in holding that service of process on the defendant was required.

3. The Court erred in holding that defendant, under the facts of this case, should not be estopped from denying that, by its conduct, service of process was required.

4. The Court erred in entering judgment for defendant on the facts presented.

Dated: This 7th Day of December, 1966.

RICHARD P. ROENKE
By Counsel

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Filed in the Clerk's Office the 8th day of December, 1966.

Teste:

GEORGE E. HOLT, JR., Clerk

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ASSIGNMENTS OF CROSS-ERROR

Comes now the defendant, by counsel, and, pursuant to Rule 5:1 §4 of the Rules of the Supreme Court of Appeals of Virginia, files its assignments of cross-error.

ASSIGNMENTS OF CROSS-ERROR

(1) Action of the trial court in receiving as evidence certain hearsay testimony of Dick L. Johnson.

(2) Action of the trial court in receiving as evidence certain of the Federal Rules of Civil Procedure.

(3) Action of the trial court in excluding certain testimony of James L. Parrott given by way of deposition.

(4) Action of the trial court in refusing to strike the plaintiff's evidence and ruling that the defendant was not doing business in the State of Tennessee during January 29, 1962, and July 17, 1963.

Given under our hand this 15th day of December, 1966.

VIRGINIA FARM BUREAU
MUTUAL INSURANCE
COMPANY
BY: GENTRY, LOCKE, RAKES
& MOORE
BY: RICHARD C. RAKES
Counsel for Appellee

* * * * *

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Filed in the Clerk's Office the 16th day of December, 1966.

Teste:

GEORGE E. HOLT, JR., Clerk

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Dep.
page 1 }

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DEPOSITION

The deposition of the Honorable JAMES W. PARROTT taken pursuant to notice hereto attached on June 23, 1966, before Alma H. Hannah, Notary Public.

APPEARANCES:
E. E. CHRISTIAN Attorney at Law Johnson City, Tennessee, for the plaintiff;
RICHARD RAKES Attorney at Law Roanoke, Virginia, for the defendant.

Dep.
page 2 }

The said witness, JAMES W. PARROTT, being of lawful age, and having been first duly sworn, deposed as follows:

James W. Parrott

DIRECT EXAMINATION

By Mr. Rakes:

Mr. Rakes: May we stipulate, Mr. Christian, that if there are any objections, they can be made now without assigning the reason and the answer can nevertheless be given and the objection taken up with the Court at the time of trial.

Mr. Christian: Yes, that's agreeable.

Q. Please state your name and address.

A. J. W. Parrott, Knoxville, Tennessee.

Q. Sir, I believe you are a member of the Judiciary of the State of Tennessee?

A. I am.

Q. What is your position, sir?

A. Judge of the Court of Appeals of the Eastern Division of Tennessee.

Q. This is a Tennessee State Appellate Court?

A. Yes, sir.

Q. How long have you occupied this position, sir?

A. Since January 1, 1964.

Q. What was your position prior to this appointment?

A. Clerk of the United States District Court for the Eastern District of Tennessee.

Dep. page 3

Q. Did this District include the Northeastern Division at Greenville, Tennessee?

A. It did.

Q. How long had you occupied that position, sir, before you assumed your position on the bench?

A. From November 1958 until December 1963.

Q. Then, sir, you were the Clerk of the United States District Court for the Eastern District of Tennessee in 1962 and 1963?

A. I was.

Q. In 1962, an action was commenced in that court styled "Richard Roenke vs. William Guy Dempsey" and was actually tried in mid July 1963, Mr. Dick L. Johnson was counsel for the plaintiff and Mr. James Hardin was counsel for the defendant. Do you off hand recall that case at all?

A. I have no independent recollection of the filing or the trial.

Q. This was a law action arising out of an automobile accident in which the plaintiff, a Virginia resident, brought

suit against the defendant, a Tennessee resident, claiming that the defendant had backed his vehicle out into the main traveled portion of a highway, causing the plaintiff to swerve to avoid a collision, after which he left the roadway and collided with a tree, causing both property damage and personal injuries?

Dep. page 4 } A. The facts do not bring it to my recollection.
Q. Sir, do you know Mr. Franklin Glass?
A. I do.

Q. Who is he?

A. He is law clerk for Judge Charles Neese, United States District Judge for the Eastern District of Tennessee.

Q. Was Judge Neese occupying the bench of that United States District Court of which you were clerk in 1962 and 1963?

A. He was.

Q. And was Mr. Franklin Glass his law clerk at that time?

A. He was.

Q. Judge, the present action pending in the Circuit Court of Botetourt County, Virginia, is an action on an insurance policy, more specifically under the uninsured motorist endorsement of an automobile insurance policy in which the plaintiff is endeavoring to recover a judgment against the insuror for the amount of the judgment which was recovered in this action on the merits, tried in the United States District Court in Greeneville, Tennessee, in July 1963, which resulted in a jury verdict and judgment for the plaintiff in the amount of $7,500.00. Do you recall any conversation with counsel for the plaintiff in that action, Mr. Dick L. Johnson, pertaining to the issuance of process from your court against the Virginia Farm Bureau Mutual Insurance Company?

Dep. page 5 } A. I do not.
Q. In any action?

A. I do not.

Q. Do you know Mr. Dick L. Johnson?

A. I do.

Q. Formerly practicing in Elizabethton and now in Johnson City, Tennessee?

A. Yes, sir.

Q. And you knew him at that time?

A. I did.

Q. At the time we are speaking of?

A. Yes, sir.

James W. Parrott

Q. Earlier today in his discovery deposition, Mr. Johnson testified that he had had a discussion with you in which you two were subsequently joined by Mr. Glass, pertaining to a question of service of process against the said Virginia Farm Bureau Mutual Insurance Company and that he had inquired of you as to whether you were aware of any method by which service of process could be accomplished on this insuror which had not domesticated or was not licensed to do business in the State of Tennessee and accordingly had no appointed agent for service of process in this State and that he had also inquired of you as to whether it might be possible to make this insuror the party defendant in this action of Roenke vs. Dempsey. Do you recall any of this at all?

Dep. page 6 } A. I do not recall any conversation or discussion. I can't say whether we had it or whether we did not.

Q. Mr. Johnson has also testified that he did not specifically request you to issue process against Virginia Farm Bureau Mutual Insurance Company through its principal office in Richmond, Virginia, and directed that it be served on the Secretary of the State of Tennessee. Had he so specifically requested that this be done, would you have complied with that request?

Mr. Christian: Object.

A. I feel sure that any request for issuance of process, unless it appeared on the face of it as void, we would have issued it.

Q. Now, if such a request had been made—

Mr. Christian: Object to the form.

Q. If such request had been made under your Tennessee statutes for service on foreign corporations, it would have been possible for you to have complied with that request, would it not?

Mr. Christian: Renew my objection.

A. I don't believe I can answer that question, I don't completely understand it. May I make this explanation. My answer to the previous question is based on my five years as clerk, I cannot recall of any specific instance that

James W. Parrott

Dep. page 7 } we ever refused to issue a process. We issue them and let them take whatever course they may. That was the basis of my answer.

Q. In other words, if counsel asked you to issue process, you as clerk would have done so and then if there had been any motions to quash that service, these would have been taken up with Judge Neese and you would not have exercised any independent judgment prior to that, is that correct?

A. That is correct.

Q. Judge, at the time this action was tried on July 16, 1963, was there in effect Tennessee statutes pertaining to service of process on foreign corporations?

A. Yes, sir.

Q. Would you read the numbers and substance of those statutes that were in existence at the time the action was tried and verdict and judgment rendered on July 16, 1963?

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Dep. page 9 }

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"56-319. SERVICE OF PROCESS ON FOREIGN AND ALIEN COMPANIES—DEFINITIONS.—For the purposes of Sec. 56-319-56-321, the following definitions shall apply:

(1) 'Insurance company' shall mean an insurance or surety company, including mutual companies, and shall be deemed to include a corporation, company, partnership, association, social, fraternal or otherwise, order, individual or aggregation of individuals engaging in or proposing or attempting to engage in any kind of insurance or surety business, including the exchange of reciprocal or inter-insurance contracts between individuals, partnerships and corporations.

Dep. page 10 } (2) 'Foreign insurance company' shall mean an insurance company, as herein defined, organized under the laws of any state of the United States, other than this state, or under the law of any territory or insular possession of the United States or the District of Columbia.

(3) 'Alien insurance company' shall mean an insurance company, as herein defined, organized under the laws of any

country other than the United States or territory or insular possession thereof or of the District of Columbia.

(4) 'Doing of business in Tennessee' by any foreign or alien insurance company, shall be deemed to mean and include the doing in this state by such company of any act whatsoever, whether interstate or intrastate in nature, including the soliciting, making, or delivery of insurance contracts in Tennessee, by agent, mail or otherwise."

"56-320. COMMISSIONER OF INSURANCE AND BANKING AS ATTORNEY FOR PURPOSE OF PROCESS.—Any foreign or alien insurance company, before doing business in this state, as defined in Sect. 56-319, shall, appoint the commissioner of insurance and banking its true and lawful attorney as required by Sec. 56-308. If any such company shall do business in this state, as defined in Sec. 56-319, without having appointed the commissioner of insurance and banking its true and lawful attorney, as required herein, it shall be doing such business in the state of Tennessee, be deemed to have thereby appointed the commissioner of insurance and bankings its true and lawful attorney for the purposes hereinafter set forth. The requirements hereof shall be in addition to, and not in derogation of, any other provision of law."

Dep. page 11

Q. Were these in effect on July 13, 1963?

A. Yes, sir.

* * * * *

Q. Your Honor, if I understand correctly, sir, these statutes which have been read, any of them would have been sufficient basis for you to have complied with counsel's request to issue process at least until Judge Neese could rule on the propriety of it, is that correct?

A. As I said before, we issue processes and let the attorneys worry about it at a later date. We followed the attorneys' instructions in issuing the processes.

Q. Judge, as Appellate Judge in the State Courts of Tennessee, if I understand your laws and statutes correctly, if a foreign corporation is domesticated to do business in this State and has appointed a resident agent to accept service of process, then that foreign corporation is subject to suit through service of process on that registered agent and having a personal judgment

Dep. page 12

James W. Parrott

rendered against it in this State, is that correct?

A. I believe that is correct, but we have special statutes pertaining to insurance companies and service of process on insurance companies.

Q. One of these that you have just read pertains to the insurance companies?

A. Yes, sir.

Q. And that statute provides for a method of service of process where the carrier is not domesticated to do business in this State by having service of process made on the Commissioner of Insurance?

A. I think so.

Q. And then as you have already read, the statute provides that whether it be served on the Secretary of State or Commissioner of Insurance, that one copy of that process will be mailed to the principal office of the carrier or foreign corporation by registered mail?

A. Correct.

CROSS EXAMINATION

By Mr. Christian:

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Dep.
page 14 } Q. Judge Parrott, do you know of a way to secure process on a non-resident insurance company in Tennessee when the insurance company does no business in this State?

Mr. Rakes: Object.

A. I can't answer that question, but if I had been United States District Court Clerk and some attorney had wanted process, I would have tried it the way he suggested.

Q. Judge, would you have issued process against someone not a party?

Mr. Rakes: Object.

Q. Not a party to the suit that was filed there in Federal Court?

A. I would have issued process as requested by the attorney.

RE-DIRECT EXAMINATION

By Mr. Rakes:

Q. Your Honor, would a fair interpretation of your testimony here this afternoon be that you allowed counsel who practiced in your court to handle and try their cases the way they wanted to, without undertaking to tell them what they could or could not do under the rules and under the law?

A. I think that is true, but often counsel would discuss matters exactly as this.

Q. On an informal basis?

Dep. page 15 } A. On an informal basis, but we never exercised discretion, we left that up to the court.

Q. And counsel?

A. Yes, sir.

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page 11 }

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Mr. Rakes:

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page 14 }

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Now Mr. Pearson in his opening statement has testified that there will be evidence that after Mr. Johnson wrote Virginia Farm Bureau on March 8, 1963, following the first trial on the merits out there in Tennessee which had resulted in a hung jury, advising the Company that since that trial he had read in a periodical a requirement that the Plaintiff intending to rely upon the uninsured motorist provisions of the policy should have service affected on the Company, and inquiring of them as to whether they were going to stand on this condition or require it.

Mr. Pearson said that sometime after that letter Mr. Joe Russell, the Plaintiff's Field Claims Man in Abingdon, Virginia, had called Mr. Johnson and said—and I wrote down what he said—"now that we are in the case, let's negotiate," or words to that effect. I call to Your Honor's attention that this is in the nature apparently of a waiver, that the Plaintiff is contending now the requirement and that this allegation was not made in the second amended

page 15 } Motion for Judgment, and that at the conclusion of the responsive pleading that the Defendant filed to the second amended Motion for Judgment, after we had somewhat tired of filing demurrers, that we served notice at that time, that we would object to the pro-offer of any evidence that was not alleged in the second amended Motion for Judgment.

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page 24 }

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MR. RICHARD P. ROENKE, the Plaintiff, called as a witness in his own behalf, being duly sworn, testified as follows:

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page 30 }

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CROSS EXAMINATION

By Mr. Rakes:

Q. Mr. Roenke, sir, do you recall when you first employed Mr. Dick L. Johnson to represent you in that action out in Tennessee?

A. It was when I was in the hospital. I would say maybe the fourth day. I wasn't very conscious the first two or three.

* * * * *

Mr. Richard P. Roenke

page 31 }

* * * * *

Q. You had known him before the accident, had you not?
A. Yes, sir.
Q. When did you first mention this case to Mr. Pearson?

* * * * *

Q. Let me ask you this, sir: Did you ever talk to Mr. Pearson about this case before it was tried out in Tennessee?
A. Before it was tried in Tennessee?
page 32 } Q. Yes. Not before suit was started but before it actually went to trial in Tennessee. You had talked to him about it before that, hadn't you?
A. Well, I talked to him I believe before the second trial, but I had no contact with him concerning the case as far as the first trial was concerned.

* * * * *

Q. How do you recall that the first occasion you had to discuss this case with him was between the time that you had a hung jury in March of '63 and the time that you got your verdict in July of '63? In other words, how do you place that time here?
A. Some weeks after the hung jury trial I believe he asked me how the case came out, and I said "we had a hung jury". And then some weeks later I saw him again,
page 33 } probably—I'm just surmising—and told him when the new trial was coming up.
Q. Yes, sir. Did you tell him that the Defendant didn't have insurance in the case?
A. That Mr. Dempsey had no insurance?
Q. That's right.
A. I would presume so. Sure, if we were discussing it.
Q. And that you had this policy with the Virginia Farm Bureau that had uninsured motorist protection in it?
A. I believe I said I had uninsured motorist risk. I don't recall that I named the insurance company.
Q. Yes. Did you tell Mr. Johnson any time before the second trial that resulted in a jury verdict that you had discussed this matter in Virginia with Mr. Pearson?

Mr. Dick L. Johnson

A. No. I told him that I understood that there was Virginia Statute that I thought we should check into.

Q. How did you find out about that?

A. We were in a lawyer's office in—no, I found that out from Mr. Pearson, and then we were in a law firm's office in Greeneville—Mr. Johnson and I—and the attorney there had the periodical to which you referred concerning that Statute.

Q. Do you know if Mr. Pearson had any correspondence with Mr. Johnson before the jury verdict in the second trial?

A. I believe—I'm not sure, but I believe he wrote him with reference to that Virginia Statute and that's why we checked it out down in Greeneville.

page 34 } Q. Was Mr. Pearson not undertaking to advise you with reference to this problem at that time, whether he had been technically employed by you or not?

A. No, sir, he was answering a question as a friend.

Q. And he went in and listened to your story and advised you that there was a Statute that required service of process, and went so far as to write Mr. Johnson and tell him to do that, all before the jury verdict in the second trial?

A. I talked about this case to many attorneys and to many insurance agents in my travels, because I cover a lot of territory and I got a lot of opinions about it.

Q. Did all of them write Mr. Johnson and tell him that he ought to check out the Statute to get service?

A. No, but many of them gave me other ideas.

Q. So far as you know, Mr. Pearson was the only one that wrote Mr. Johnson and called his attention to the Statute and suggested that he better comply with it?

A. To the best of my knowledge.

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MR. DICK L. JOHNSON, called as a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

Mr. Dick L. Johnson

DIRECT EXAMINATION

By Mr. Pearson:

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Q. (continued) Now, did you come upon a question of procedure under the uninsured motorist statute in some manner, and, if so, in what manner did you find it?

A. To my recollection, sir, as I remember, that at the first trial of course—first I came on what I thought was the question of procedure under the policy itself. I obtained a copy, or got Mr. Roenke's policy.

Q. Ahum.

A. And attempted to comply with everything
page 44 } set forth in that policy. Then when we went to
trial on the case the first time and had a hung jury. Now after the trial, or after the jury was unable to reach a verdict, a Mr. Herbert Silvers—we call him "Herb Silvers"—an attorney in Greeneville, Tennessee, had filed an intervening petition on this case on behalf of the workmen's compensation carrier on Mr. Roenke. And he stated that he had received in his office either that day or a very short time before—

* * * * *

The Witness: To cut it very briefly, I went to this Attorney's office as a result of this conversation and he furnished to me a periodical which set—which was an article on how having to enter—an article on the Virginia uninsured motorist insurance. And among other things it quoted the provision of the Virginia Statutes requiring service on the insurance company.

Now this was assuming that the trial date was
page 45 } March 6th and 7th, and this was March the 7th,
the last day we were down there for trial.

By Mr. Pearson:

Q. The dates the jury was unable to reach a verdict?

Mr. Dick L. Johnson

A. That's correct.

Q. And then following that, did you make any inquiries as to the compliance with that Statute, or that provision?

A. Well, first I remember—I researched it myself under Tennessee law. I attempted to find in our Code some method to serve Virginia Farm Bureau Insurance Company. Having first ascertained that they were not qualified to do business in Tennessee.

Q. They had not been domesticated?

A. They were not domesticated to do business in Tennessee, and with that assumption I then attempted to investigate and find out whether or not they were doing sufficient business to serve them. Of course, first having checked the Statutes that have been introduced in evidence here today. Then after researching it and not being able to find any way lawfully, or any lawful way to serve them with process through the Tennessee—

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page 47 }

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Q. Now, did you have some correspondence with the Company, and did you send *then* a copy of the Complaint that was filed in Greeneville?

A. Yes, sir, I sent them a copy of the proposed Complaint, as I recall, in February of 1962, when I first drafted it.

Q. And just before you filed your suit?

A. That was before it was filed, and then later I sent them notice that it was filed, and why it was filed prior to waiting for an answer in the first letter. I asked them to please answer me. And in the next one I advised them it was filed and why it was filed before getting an answer.

Q. Now at the time of the setting of this case for trial, did you notify them of that first trial?

A. Yes, sir.

Q. And did you advise them that the trial had
page 48 } resulted in a hung jury?

A. Yes, sir.

Q. And would be reset?

A. That's correct. I wrote to them on March the 8th to advise them—

Mr. Dick L. Johnson

Q. And then when the case was reset in July, you wrote them again that the case had been reset?

A. That's correct.

Q. All this is in the Pleadings?

A. Yes, sir. As a matter of fact, the case was originally set, as I recall from the correspondence here, on July 10th; due to the Judge's illness that was cancelled and it was reset later on for July the 16th—the 16th or the 17th, the time that it was actually tried. And I sent notice of everything that happened, and notice of the depositions that were taken of the doctors, notice of everything that I did in the case.

Q. Now, on March the 8th did you write a letter to the Virginia Farm Bureau?

A. Yes, sir, that was right after the first trial, and wrote to them on March the 8th, 1963.

Q. The first trial was completed on the 7th?

A. That's correct.

Q. And do you have a copy of that?

A. Yes, sir, I do.

Q. That is an exhibit in your Pleadings?

page 49 } A. I believe it is.

Q. Would you read that?

Mr. Rakes: That has already been admitted. But go ahead, have him read the portion you want.

By Mr. Pearson:

Q. Just recite what it says.

A. (Reading) "Please be advised that the above case was tried in the United States District Court for the Eastern District of Tennessee, Eastern Division, at Greeneville on March the 6th and 7th and it resulted in a hung jury. The case will have to be reset for trial. I have, since the date of the trial, run into a statement in a publication that service of process is required upon you, and this condition has not been made at this time.

"If you're going to stand on this condition, or it is considered by you a condition, please advise me in order that we can have you served with process before re-trial of the case. Please also advise as the Defendant is insolvent and has no insurance, whether or not you would be willing to negotiate any settlement at this time under the uninsured motorist policy, or whether you are going to insist on a judgment of Mr. Dempsey."

Mr. Dick L. Johnson

Q. Now following that, did you have some con-
page 50 } tact with Mr. Russell?
A. Yes, sir, sometime after that.

Mr. Rakes: Now I object, Your Honor.

By Mr. Pearson:
Q. And who is Mr. Russell?

The Court: All right, let's see what his objection is.

Mr. Rakes: If Your Honor please, it is my understanding now, if I follow Mr. Pearson's opening statement properly, that despite the failure to allege the testimony that, or the facts sought to be elicited by the expected testimony now, that there was a contact made to Mr. Johnson by Mr. Russell following this letter of March 8th, 1963 which Mr. Johnson directed to the home office in Richmond, Virginia. Something to the effect that Mr. Russell contacted him before the second trial and after this letter, and stated that "now that we are in the case," or "now that we are officially in the case," or something.

And I submit, if Your Honor please, that this is an effort to attempt to show that waiver of this requirement as it seems obvious from the Plaintiff's Counsel's statement, and that we will certainly object to this testimony at this time
as not having been alleged in the Motion for Judg-
page 51 } ment, despite the fact that this was *was* the
second amended Motion for Judgment. And the Court has certainly given the Plaintiff the opportunity to allege every material fact by that time, and if Your Honor will recall, I objected to the second amended Motion for Judgment because every time they made a new one they alleged new matters in the case. And I feel, and as I pointed out in the responsive pleadings, that I filed in the case four months ago, that at the conclusion the Defendant would object to the pro-offer of any other evidence that was not alleged in that.

The Court: All right. Now we do not have a jury here so I am going to let the evidence in over the objection, again with the right to renew your motion to strike it out later.

Mr. Rakes: All right, I except.

The Court: Mr. Johnson is here and I don't want to bring him back again. I'd rather just everything go in and we will eliminate what is not relevant later.

Mr. Dick L. Johnson

By Mr. Pearson: (continues examination):

Q. Yes, sir. Who is Mr. Russell?

A. Mr. Russell and I had had previous contact with him, and he first contacted me not too long after the accident occurred, stating that we was the Adjuster for Virginia Farm Bureau from Abingdon, Tennessee—I mean Abingdon, Virginia.

Q. Did you ever talk to him personally, or was

page 52 } most of this by telephone?

A. On one occasion I talked to him personally in my office.

Q. Now, was this the next contact that you had by anyone from Virginia Farm Bureau Mutual after you wrote the letter on March 8th—

A. Yes, sir.

Q. —Mr. Russell?

A. Yes, on this occasion it was by telephone.

Q. And what happened, what was said?

A. He identified himself as Mr. Joseph Russell, that we had talked, stated that we had discussed this matter before and he stated, "Now that we are officially in the case, would you submit us an offer of compromise?"

Q. And did you proceed to do that?

A. After contacting Mr. Roenke and he came back down, we discussed it and we did, on April the 2nd, 1963, submit an offer of compromise in the amount of $12,000.

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Q. I see. Now, Mr. Johnson, in your inquiries and your research of this problem that you had become aware of as to procedure under the uninsured motorist law, did you have any conversation with the Clerk of the United States District Court—

A. Yes, sir.

Q. —at Greeneville?

A. Yes.

Q. Who was the Clerk?

A. Mr. James Parrott.

Q. And what was the substance of that conversation?

Mr. Dick L. Johnson

A. The substance of the conversation was that in line with having researched myself, attempting to find some way to serve Virginia Farm Bureau and checking their activities and facts, and I was in Greeneville. I didn't go for this specific purpose, but I was there on another matter, but while there I went into the Clerk's office to inquire of Mr. Parrott if he knew of any way that we could get service and get out a process, or get service on them in a

page 54 } legal fashion.

Q. Is it possible to join an insurance *compnay* in a personal injury action in Tennessee?

A. Not properly.

Q. Not properly?

A. But it is possible.

Q. But the Statute would not permit it?

A. That is like these clients that come in and say, "Is it possible, can he beat me up," when he's already done it? No, he can't do it. Yes, you can file such a paper.

Q. Then was it your understanding at that time, after researching this problem, that you couldn't join Virginia Farm Mutual as a party?

A. That's correct.

Q. Now what else occurred there at this time?

A. Well, while we were discussing it and he agreed, of course—I told him, I'm sure I told him and I don't remember the details to that extent of this conversation—but I know that we discussed it. And while we were discussing it neither one of us could find any way to either make them a party or get service of process.

The law clerk of Judge Neese's came in and we were standing here discussing it; and we turned to him and asked him if he knows of any way. He said, "No, I don't—"

Mr. Rakes: If Your Honor please, I will again

page 55 } object to the admissibility of any of this evidence that purports to testify concerning the statements made either by the Clerk, Mr. Parrott, or by the law clerk, Mr. Glass, as being clearly hearsay.

The Court: Well, it is hearsay, Mr. Rakes, but it is admissible for this purpose, to show the efforts made by Mr. Johnson here to obtain process. Now, what the person said isn't material, but he has to show what they said to show his efforts in trying to obtain process.

Mr. Dick L. Johnson

I will rule that it is hearsay, but I have got to rule it as relevant for the purpose of showing the efforts that he went to in order to obtain process.

Mr. Pearson: I can appreciate it.

Mr. Rakes: I can also appreciate the Court's problem, but I respectfully reserve my exception.

By Mr. Pearson (continues examination):

Q. You say the Judge's Clerk came in then?

A. That's right.

Q. And his name was what?

A. Franklin Glass.

Q. Franklin Glass. Is he still the Clerk of the Judge?

A. Yes. Mr. Glass is a man older than I am.

Q. Older than you are?

page 56 } A. Yes.

Q. But he is the Judge's Law Clerk?

A. That's correct. Mr. Glass went to school, went to law school late in life and he serves I guess, or his service will be for as long as he is active in law, and will be serving as the Judge's Law Clerk.

The Court: He is an older law clerk instead of a younger law clerk.

The Witness: That's correct, Your Honor.

By Mr. Pearson:

Q. And in talking to those two, you didn't get any more enlightenment than you had before on this subject?

A. That's correct.

Q. Is there any reason why you posed the question to the Clerk and the Law Clerk?

A. Well, I was wanting to get out of someone and to do something because I had run into this Statute that says that it is necessary in Virginia, and here I am in Tennessee hunting away to do it and trying to get it done.

Q. Trying to get enlightenment on the subject?

A. That's right.

Q. And you went to the Clerk of the District Court where the suit was—

A. I went where the suit was pending to see if there was anything I could do, hoping that he had run into

page 57 } something like this and that I couldn't find, and in his experience as a Clerk.

Mr. Dick L. Johnson

And I don't know whether you all practice law like, up here, that we first attempt ourselves and then we seek help every place we can.

The Court: I think the law practice is the same everywhere.

The Witness: I might further state, Your Honor—this is self-serving and let Mr. Rakes object—that I very seldom find it necessary to go to this extent. I pride myself on being able to find things myself and make up my mind what to do.

The Court: Well, then you have people coming to you.

The Witness: That is right.

By Mr. Pearson:

Q. So actually you did not specifically request the Clerk to issue the process as such yourself?

A. No, sir, I did not say "issue this in spite of the fact you don't think there is any way we can do it."

Q. All right.

A. But I went there for the purpose of getting one out if he could do it.

* * * * *

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CROSS EXAMINATION

By Mr. Rakes:

Q. Mr. Johnson, do you have that periodical with you that you and Mr. Silvers went over together between the two trials on the actual merits?

A. No, sir, I do not.

Q. Do you know what kind of periodical it was?

A. It was an insurance law journal of some type, similar to a Law Review, but it was put out by an insurance
page 61 } association, the exact title of it I do not have. I checked my file again after the pre-trial deposition, and I went by—I was in Greeneville Friday after that and went by to see Mr. Silvers and he was out, and the publication was not available.

Q. It is your recollection that this periodical set forth the Virginia Statute verbatim, that mentioned the requirement of the service of process?

Mr. Dick L. Johnson

A. Yes, sir, my recollection is that it set it out verbatim in a footnote.

Q. Yes, sir. I shall read to you Virginia Section 38.1-381 (e)(I), which provides:

"Any insured intending to rely on the coverage required by Paragraph (b) of this Section shall, if any action is instituted against the owner or operator of an uninsured motor vehicle, serve a copy of the process upon the insurance company issuing the policy in the manner prescribed by law, as though such insurance company were a party defendant; such company shall thereafter have the right to file pleadings and take other action allowable by law in the name of the owner or operator of the uninsured motor vehicle or in its own name; provided, however, that nothing in this paragraph shall prevent such owner or operator from employing counsel of his own choice and taking any action in his own interest in connection with such proceeding."

page 62 } Is this your recollection of the Statute which was quoted verbatim in the periodical you describe?

A. Yes, sir.

Q. Having read this requirement of the Virginia Statute pertaining to policies with uninsured motorist endorsements and coverage in Virginia, did you conclude that if you obtained a judgment out in Tennessee against William Guy Dempsey without complying with the terms of this Statute that it might not be collectible in an action on the policy?

A. No, sir.

Q. That was not your conclusion?

A. My conclusion was two-fold, or really more than that, that, number one — that under — Virginia couldn't pass a statute that would allow some insurance company to appear in a case in Tennessee.

Q. All right, sir.

A. Now, two, that Virginia couldn't pass a statute that would affect who would be parties defendant and who we could make parties defendant in the State of Tennessee.

Q. Yes, sir.

A. That I go in the State of Tennessee and say "look, I want to make so and so a party in this case under a Virginia statute," and my Judge would look at me and say, "look, you're not in Virginia, you're in Tennessee; you're suing this man in Tennessee".

Mr. Dick L. Johnson

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* * * * *

A. Well, after reading the Statute and researching the law in Tennessee and attempting, of course—I still wanted to get service if I could and in any lawful manner from the State of Tennessee to keep just what is happening here from occurring.

Q. Well, was it your conclusion—

A. But I couldn't find any way to do it.

Q. Was it your conclusion, sir, that if you obtained a judgment against William Guy Dempsey in Tennessee, since Virginia Farm Bureau was not named as a party defendant in that action, that in order to recover upon the uninsured motorist provisions of Mr. Roenke's policy that it would be necessary to bring suit in Virginia on a Virginia contract?

A. Well, assuming that Virginia Farm Bureau would do as they have done in this matter and not recognize their liability, yes, sir.

Q. Well, this is the point I'm getting at. So you recognized at that time the possibility that you might have to bring an action on the Virginia contract?

A. That's correct.

Q. And I take it, sir, that you did have some reservations about it, or else you would not have talked to anybody and everybody who would listen to you, and the Clerk and the Law Clerk, with reference to how you might get this process issued?

page 64 } A. I don't believe I would phrase it that way.

Q. Well, were you concerned about it?

A. Yes, sir, I was concerned, but that's not saying I had reservations.

Q. Well, all right, sir.

A. I was concerned.

Q. I will accept your wording.

A. I was getting affirmation from every source that I could get it, that I thought were authoritative.

Q. I will accept your descriptive words over mine; they are perhaps much better.

A. Depending on phraseology and definition of words, I think I have some reservations of every decision I make in the practice of law, and I spent all day, every day making them.

Mr. Dick L. Johnson

Q. I can appreciate your statement. Now, Mr. Johnson, certain Tennessee Statutes have been received in evidence in this case, including Section 56-319 through 321, of the Tennessee Code Annotated and I quote, sir, from Section 56-319, entitled "Service of Process on Foreign and Alien Companies. Definitions." And one of the definitions there under "insurance company":

"Insurance company shall mean an insurance company, including mutual companies, and shall be deemed to include a corporation, co-partnership, association, fraternity or otherwise, or an individual or an aggregation of individuals, engaging in or proposing or attempting to engage in
page 65 } any kind of insurance or surety business, including the change of reciprocal or inter-insurance contracts between individuals, partnerships and corporations. And 'foreign insurance company' shall mean an insurance company as herein defined, organized under the laws of any state of the United States other than this State, or under the laws of any territory or insular possession of the United States and the District of Columbia."

Section 56-320, entitled "Commissioner of Insurance and Banking as Attorney for Purpose of Process," states among other things:

"That if any company shall do business in Tennessee as defined in Section 56-319 without having appointed the Commissioner of Insurance and Banking its true and lawful attorney as required herein, it shall by doing such business in the State of Tennessee be deemed to have thereby appointed the Commissioner of Insurance and Banking its true and lawful attorney for the purposes hereinafter set forth."

And then in Section 56-321 the Statute goes on to say, in substance:

"That service of process can be affected on this foreign insurance company—"

The Court: Here it is if you want it (indicating).

page 66 } By Mr. Rakes:
Q. (continued)—"by leaving two copies with the

fee of three dollars with the Commission of Insurance and Banking, and that it will thereafter be his duty to—" Let me back up, Mr. Bieler. "—leaving two copies of the complaint together with an affidavit giving the latest known address of the defendant insuror, and thereby requiring the Commissioner of Insurance and Banking to forward this by registered mail to the latest known address of the foreign insuror, and execute an affidavit of compliance with this which will be filed in the Clerk's office where the process originated."

Were you familiar with these Statutes prior to the second trial?

A. Yes, sir, those were the Statutes I was looking up.

Q. Yes, sir. Now you mentioned a moment ago a statement that I certainly cannot quarrel with. That a person can certainly file a paper and whether or not it will be valid may be something else again, but certainly nothing prevents him physically from filing a paper. Now, you still agree with that statement, do you not?

A. Yes, sir.

page 67 } Q. Well, you will agree that you could have requested Mr. Parrott to issue process against Virginia Farm Bureau Mutual Insurance Company to be served on the Commissioner of Insurance and Banking in Tennessee by filing an affidavit showing the latest known address—which you already had—and had been corresponding with the Company in Richmond, Virginia?

A. You are—

Q. You could have done that.

A. You are overlooking one thing.

Q. Just answer me as to whether you could have done that, whether you could have asked the Clerk to do this or not?

A. Yes, sir, had I been willing to perjure myself.

Q. To perjure yourself? How would you have to have done that?

A. The first requirement which you referred from that act is a requirement that the company be doing some business in the State. Now before I can go into any Clerk and ask and send it to the, or get out the process and then have them send it on to the Commissioner of Insurance and Banking, I have to make an affidavit that they are doing business in the State, and I was not willing to and am still not willing to walk into any clerk or any court and in any state and ask

them to get out something upon a statement that I know is not true, or feel is not true. In other words, to get Mr. Parrott to get this out and to issue it I have got to allege that the Company is doing business in the State of page 68 } Tennessee, and that this Statute applies. My investigation shows to me the Company was not doing business in Tennessee.

Q. And you make this independent conclusion without the benefit of legal action. In other words, you didn't test it to see whether Virginia Farm Bureau would come in and say "quash this service on us because we are not doing business in Tennessee". You made the independent conclusion that they were not doing business in Tennessee and that you simply weren't going to request the Clerk to issue out this process, isn't that correct, sir?

A. That is correct. As I make that independent investigation in every case that I file to see if I can make the allegation, or have my client make the allegation that is necessary to give the court jurisdiction.

Q. Sir, at the time all of this took place and in view of your many years of practice and as an attorney, had you ever run across the situation, or in law school or otherwise, whereby there are cases—literally hundreds of them all over the country—in which this very question of doing business by foreign corporations is litigated many times over?

Mr. Pearson: Your Honor, I object to the question, that is—

By Mr. Rakes:

Q. Were you aware of this thing at the time?

A. Yes, sir; yes, sir.

* * * * *

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By Mr. Rakes:

Q. After you wrote the letter to the home office of March 8th, 1963 wherein you say that he began the conversation with words "now that we are officially in the case, give us a settlement demand". On the basis of testimony that you

have given concerning your research and efforts to find some way to get process issued out of the District Court in Tennessee, would it be fair to assume that you didn't put any real stock in this statement of Mr.—this alleged statement of Mr. Russell's at that time?

A. No, sir.

Q. All right, would you explain why, sir?

A. The research and the efforts that I'm speaking of occurred prior to this statement.

page 71 } Q. All right, when was the statement made, approximately, sir?

A. Let me see. I wrote the letter for and response to this statement on April the 2nd; it took me somewhere around a week to ten days after the conversation with Mr. Russell to contact Mr. Roenke, and I wrote to him and advised him that we had been contacted. I believe I wrote to him, or I might have called him, I don't remember. I have the file here and I can double check that.

But in any event, I contacted Mr. Roenke and I know we waited for him to make a trip to that area to sit down and discuss it before sending a settlement figure. And so it was somewhere around a week to ten days before April the 2nd that Mr. Russell called me, and my conversation with the Clerk's office and the research was prior to March the 20th.

Q. All right, sir.

A. Now it was a combination. I would not say that I totally relied on this statement and I wouldn't want to mislead you or the Court in that respect. But after having done this research and feeling very strongly myself and believing that under the Tennessee law that there was no possible way to comply with the Virginia Statute, then to receive this phone call had just confirmed my own belief.

Q. And you did nothing after that in an effort to comply with the Virginia Statute prior to the jury verdict

page 72 } on July 17, 19—July 16, 1963?

A. That's correct.

Q. Mr. Johnson, I read, sir, a portion of your letter of April 2nd, 1963 to Virginia Farm Bureau at Richmond, Virginia:

"Dear Sir: At the request of Mr. Joseph C. Russell of Abingdon, Virginia I am herewith submitting an offer of compromise in the case of Mr. Richard P. Roenke against

William Guy Dempsey in the amount of $12,000. The case is being recalled in the civil docket at Greeneville on Wednesday, April 3, 1963 at 1:30 P.M., to be set again for trial. I will advise you as soon as a definite date for trial is set. Very truly yours, Dick L. Johnson."

Is that your letter, sir?

A. That is my letter.

Q. And your letter of March 8th, in which you called attention to the Company of the fact that you had learned of this requirement of service of process was also directed to the home office in Richmond, was it not?

A. That's correct. It was a copy—with a copy to Mr. Russell.

Q. Well, did you send a copy of your letter of April 2nd to Mr. Russell?

A. It does not show a copy to Mr. Russell, no, sir, but Mr. Russell requested, as I recall it—well, Mr. Russell

page 73 } requested that I submit the offer to the home office.

Q. Did you ever receive any communication from the home office between your letter of March 8th, '63 and the jury verdict and judgment on July 16, 1963—

A. Yes, sir.

Q. —in response to the inquiry you made on March 8th?

A. Yes, sir.

Q. What was that?

A. Dated July 1, postmarked July 1, '63, and I couldn't say when I received it. It would be a few—one to three days thereafter—depending on the mail service at the time. I did receive a letter turning down the offer of $12,000.

Q. Was anything mentioned in that letter about this service of process business?

A. Not as such, no, sir. I can read the letter to you if you want.

Q. Is there anything in your letter to the Company of April 2nd, 1963, in which you acknowledged the call of Mr. Russell as being in reply to your inquiry of March 8th concerning service of process?

A. No, sir. No, sir, you have read the entire letter.

Q. All right, sir. Now you wrote the Company on the day the judgment was rendered, on July 17th, 1963, did you not, as follows:

Mr. Dick L. Johnson

page 74 } "Dear Mr. Nuckols: All previous offers are withdrawn and please be advised that the jury in the Federal Court this date returned a verdict on behalf of Mr. Richard Roenke against Mr. William Dempsey in the amount of $7,500. Immediate payment is expected of that amount to Mr. and Mrs. Roenke and to me as their Attorney. Very truly yours, Dick L. Johnson."

Correct, sir?

A. That's correct.

Q. In reply to that letter, did you not receive one from the Company dated July 22nd, 1963, signed by Mr. Otis W. Nuckols, Director of Claims:

"Dear Mr. Johnson: We have your letter of July 17th. This is to advise that Mr. Roenke has neither satisfied the uninsured motorist policy provisions nor the statutory provisions of this uninsured motorist coverage. Therefore it is necessary that this Company respectfully deny payment on this claim. Very truly yours."

You received that letter, didn't you?

A. That's correct.

Q. In reply to which you wrote the Company on July 24, 1963 as follows:

"Dear Sir: I have your letter of June 22nd, 1963 and regret very much that you're taking this position.
page 75 } As you know, you have been advised of every step in the matter. The accident was reported promptly to you and to your Adjustor. You employed adjustors to investigate it and Mr. Russell of your own office further investigated it. You have been given all the notice that Mr. Roenke has had on every step in the matter. You state that the policy provisions have not been followed and I have had a copy of the policy from the beginning and have attempted in every respect to give you every notice that the policy provided and every opportunity to participate in the matter in any manner which you felt was necessary. I do not know what else you could be claiming. In accordance with the above and the policy provisions it will be necessary for me within the next seven days to refer this matter to a Virginia attorney for further action. Very truly yours, Dick L. Johnson."

Mr. Dick L. Johnson

Is this correct?

A. That's correct.

Q. Now is there anything in that letter—first of all with reference to the statutory requirements that Mr. Nuckols mentioned in his of July 22nd, or do you confine your letter to the policy provisions?

A. The statement there was contained, or confined to the policy provisions.

Q. Yes, sir. Now, of course, you had written the

page 76 } Company—

A. I had previously.

Q. —you had written the Company previously about the statutory provisions of the service of process?

A. That's right.

Q. And he mentioned statutory provisions in his letter, denying liability?

A. That's correct.

Q. You didn't mention statutory provisions in your letter back to him, nor did you mention anything at all about any alleged waiver on the basis of any statement of Mr. Russell, did you, sir?

A. That's correct.

Q. Now when Mr. Russell made this statement to you, "that we are officially in the case, submit us a settlement offer," did he tell you that it would not be necessary for you to comply with the statutory requirement of the service of process?

A. Not in that language, no, sir. In other words, the sole discussion on that phase of it was that opening remark, and from there on then we were discussing amounts.

Q. "Now that we are officially in the case," no elaboration on the meaning of that statement at all?

A. That's correct.

Q. Is that correct?

A. That's correct.

page 77 } Q. Sir, I may have asked you this question before and if I have, I apologize, but much has been said in opening statements and what have you, that it is hard to recall everything accurately. Did you ever prepare a copy of the Complaint after learning of this requirement of service of process and mail it to the United States Marshal at Richmond, Virginia or to the Sergeant of the City of Richmond, with the request that it be served upon Virginia Farm Bureau's registered agent?

A. No, sir, I did not.

* * * * *

RE-DIRECT EXAMINATION

By Mr. Pearson:

Q. Mr. Johnson, I hand you a copy of the United States Code Annotated under Rule 4, and the number of these paragraphs—I'm trying to figure out—I believe it's just 4(e). Would you read into the record Paragraph 4(e) and 4(f)?

A. (reading) "Whenever a statute of the United
page 78 } States or an order of the court provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the State, service shall be made under the circumstances and in the manner prescribed by the statute, rule or order."

"(f) Territorial limits of effective service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided under Rule 45."

Q. In other words—now would you read into the record rule 24(a) of the Federal Rules of Civil Procedure?

A. (reading) "Rule 24(a). Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing party is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or
page 79 } subject to the control or disposition of the court or an officer thereof."

Q. Now would you also read the Section, Rule 24(b)?

A. (reading) "Permissive intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene: or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for grounds of

claim or defense upon any statute or executive order administered by a Federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

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MR. JOSEPH C. RUSSELL, called as a witness in behalf of the Defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Rakes:

Q. Please state your name, age and current address?

A. Joseph C. Russell, 1705 Pamela Drive, Richmond, Virginia, thirty-three years of age.

Q. Mr. Russell, are you presently employed?

A. Yes, sir.

Q. By whom?

A. By the Virginia Farm Bureau Mutual Insurance Company.

Q. How long have you been in their employ?

A. Since May of 1959.

Q. What was your position with the Company in 1962 and 1963?

A. I was a Resident Ajuster in Abingdon, Virginia.

Q. Did you have a title "Field Claims Man"?

A. Yes.

Q. Did you investigate cases for the Company in southwest Virginia?

page 90 } A. Yes, sir, I did.

Q. And during the course of that investigation, did you ever have occasion to cross over into Tennessee?

A. Quite often.

Q. For what purpose?

Mr. Joseph C. Russell

A. Investigation of accidents.
Q. Involving insured of Virginia Farm Bureau?
A. Involving Farm Bureau policy holders who had got into difficulty in the State of Tennessee.
Q. Did you have occasion to interview and take statements from witnesses in the State of Tennessee?
A. Yes, sir.

By The Court (interposing):
Q. Did I understand you to say you interviewed policy holders in the State of Tennessee?
A. No, sir, I believe the question was "did I take statements from witnesses".

Mr. Rakes: "Witnesses."
The Court: All right.

Q. Do you have any policy holders in the State of Tennessee?
A. Officially or unofficially?

By Mr. Rakes (interposing):
Q. To your knowledge?

By The Court:
page 91 } Q. Well, you probably have some that insurance was sold to in Virginia and they moved into Tennessee, but do you have any originals that started in Tennessee?
By The Witness:
A. Yes, sir, unauthorized, but I know of my own personal knowledge that the writing agent in Gate City, who is no longer a Company employee, used to steal a few borderline cases that just live in Kingsport, right on the line.
Q. Well, Gate City is on the border itself?
A. Yes, sir. I think how this came about is, they were families of old policy holders who went to work for Kingsport Press or Tennessee Eastman and he had the contacts, and when the children got old enough to go to work and buy their own cars, they could come back to him for policies and he would slip them on through.

The Court: All right.

Mr. Joseph C. Russell

By Mr. Rakes (continues examination):

Q. Did you have occasion to investigate the case of your policy holder Richard Roenke against William Guy Dempsey, or the accident involved—the alleged accident involving these two individuals that occurred in Tennessee?

A. I continued in the investigation of it. It was conducted by several different persons.

Q. And you were one of those persons?

A. Yes, sir.

page 92 } Q. Did you have occasion to contact the insured's Attorney, Mr. Dick L. Johnson of Elizabethton, Tennessee?

A. Yes, I talked to him by phone on several occasions and on one occasion went to his office in Elizabethton.

Q. Tennessee?

A. Tennessee.

Q. Were you aware after the suit was instituted that no service of process had ever been made on Virginia Farm Bureau?

A. Oh, yes.

Q. Were you aware of Mr. Johnson's letter to the home office of March 8th, 1963 in which he pointed out his discovery of the requirement of the service of process?

A. Yes, I got a copy of that letter myself I believe.

Q. You have heard Mr. Johnson testify that several weeks —sometime between May 8th and April the 2nd I believe he said of 1963 he received a telephone call from you which opened with the words "now that we are officially in the case, would you submit a demand figure"?

Did you make that statement, Mr. Russell?

A. That statement alleged to have taken place on more than three years ago now—I wouldn't quite, frankly I don't recall the exact words I used at that date. But I know what my frame of mind was at that time; I know what the Company position was at that time, and I had a memorandum in my hand at the time I made that phone call, instructing me what to say. And I would never have made such a statement.

page 93 } The purpose of my call was to see at that time—at that time it began to look like the Company might be pulled into this case, and we were—I was instructed to send out a feeler to see if there was any possibility of compromising the thing at a nominal figure. And as to the exact words I used in that conversation, I can't

recall. My memory is not that good. But I certainly had been instructed over and over "let's don't waive our one defense". And the only thing that I called Mr. Johnson was to discuss the possibility of a nuisance value settlement, and to the best of my recollection, that's all we did discuss.

Mr. Rakes: Take the witness.

CROSS EXAMINATION

By Mr. Pearson:

Q. Mr. Russell, you stated that you had several conversations with Mr. Johnson concerning the claim?

A. Yes, sir.

Q. And one time you were physically in his office?

A. Yes, sir.

Q. He was at that time in Elizabethton?

A. Yes, sir.

Q. Do you have the memorandum with you that you mentioned a while ago from the office, or their instructions to you?

A. It is in Mr. Rakes' file.

page 94 } Q. May I see it? It is your memorandum?

A. No.

Q. It is a memorandum to you?

A. A memorandum directed to me.

Q. Now may I look at it?

A. (The witness shrugged.)

Q. It is part of your file, isn't it?

A. It was part of my file; I don't have a file right now.

The Court: All right, suppose you get it and show it to Mr. Pearson.

(The witness left the stand, produced the memorandum requested and returned to the stand.)

Mr. Rakes: If Your Honor please, I will object to the introduction of this into evidence. Except from the standpoint of what the witness has already testified would have been his frame of mind concerning his discussions with the witness—the other witness, Mr. Dick L. Johnson. In other words, I think this paper is completely irrelevant as to any part of this case, other than to the point that he has just made.

Mr. Joseph C. Russell

The Court: All right, let it show what his frame of mind was. He is talking about his frame of mind based upon a memorandum. I assume myself that would be the purpose.

page 95 } Mr. Rakes: I think, if Your Honor please, that is the only relevant purpose it could have.

Mr. Pearson: It may be that we don't want to introduce it.

(Memorandum referred to above was then handed to Mr. Pearson for inspection.)

Mr. Pearson: I think it is a communication from the Defendant in this case.

Mr. Rakes: From his home office to him.

The Court: That is what he based his conversation with Mr. Johnson on—on the memorandum.

Mr. Rakes: That's right.

Mr. Pearson: If Your Honor please, you may want to read it before you rule on it. Are you objecting to—

Mr. Rakes: I object to the admissibility of that statement. I think you may cross examine him with reference to his statement on direct of the frame of mind he was in when he went, but that statement is absolutely inadmissible in my honest judgment.

Mr. Pearson: Your Honor, I would like to lay the groundwork and then ask that it be admitted.

The Court: I don't know what is in it. You may lay the groundwork.

By Mr. Pearson (continues examination):

page 96 } Q. Mr. Russell, at the time that you received this memorandum which is dated March 13th, 1963, you were acting at that time as Agent for the Virginia Farm Bureau Mutual in Abingdon, is that right?

A. As Claims Adjuster.

Q. As Claims Adjuster. And their Agent for that purpose?

A. Well, legal agent for settling claims.

Q. In their behaf as Claims Adjuster?

A. Right.

Q. And you received this in the course of your employment as Claims Adjuster and Agent for the Company in that capacity?

A. That's right.

Q. And this is an official memorandum from your Richmond home office?

Mr. Joseph C. Russell

A. From the Director of Claims, the only one I ever received from the Director of Claims.

Q. Of the Virginia Farm Mutual Bureau Insurance Company. And this memorandum that you received prompted the call to Dick L. Johnson that was mentioned here in evidence?

A. Yes, sir.

Q. And based on the information from your home office in this memorandum you proceeded to call Mr. Johnson and the course of your conversation with Mr. Johnson was dictated by this memorandum from your home office?

page 97 } A. I was following the instructions.

Mr. Pearson: All right. I move that it be admitted, Your Honor.

The Court: Well, let me see it.

Mr. Rakes: Let the Court read it. I think it would be perfectly obvious why it isn't admissible.

(Memorandum referred to above was then handed to the Court for inspection.)

The Court: I believe it would be inadmissible also and I will sustain the objection.

Mr. Pearson: Your Honor, we except.

The Court: Do you want it in the record? Because I sustained the objection. I think you were entitled to show that.

Mr. Rakes: If you mark it refused, sir.

The Court: Yes, I will mark it refused. So I will mark it "Plaintiff's Exhibit No. 3 refused" or "for identification," either one.

Mr. Pearson: All right, sir, for identification.

The Court: All right. Marked by the Court "Plaintiff's Exhibit No. 3 for identification".

Mr. Pearson: And I would like to move its admission and let the record show that the Court refused to admit it, and I except to the ruling of the Court.

I might state for the reason that it is an admis-

page 98 } sion against interest by the Defendant Virginia Farm Bureau Mutual Insurance Company to its Agent, upon which he has testified. May I ask him questions about it?

The Court: No, sir, since I have refused it I don't believe you can, unless you want to avow the record.

(Memorandum referred to above was marked "PLAINTIFF'S EXHIBIT NO. 3 for identification" and refused by the Court.)

By Mr. Pearson (continues examination):

Q. All right, sir. Mr. Russell, the conversation which you had with Mr. Johnson at that time was with reference to trying to settle this matter, is that right?

A. The money was the only subject that we discussed.

Q. And despite the fact that you were aware that the service of process hadn't been made, as Mr. Rakes asked you a while ago—

A. Yes, sir.

Q. —nevertheless, in response to the letter, or following the letter of March 8th, with this memorandum you contacted Mr. Johnson in an effort to get an offer submitted for a possible settlement, is that right?

A. I believe I said, and I still do say, "a nuisance value settlement".

page 99 } Q. Well, a settlement. You were talking about getting rid of the case?

A. That's right.

Q. And was this conversation a lengthy conversation or—

A. That I don't recall.

Q. It's been three years ago since all this happened?

A. Yes.

Q. As a matter of fact, for that long a period of time you can't recall whether this conversation took place or didn't take place, do you?

A. No, I distinctly remember and I can tell you where I sat in the house from which I made the call; I made the call from my home.

Q. The conversations you had with Johnson, you can't recall specifically what was said or whether or not this was or was not said, that Mr. Johnson made the statement?

A. No, I wouldn't agree with that. I can't remember specific words that were used and I don't remember the length of the conversations, but I remember talking to Mr. Johnson about this claim on several occasions and it was a very important claim, one that we were interested in, and I do recall it.

Q. Well, was there any reason for soliciting an offer from this policy holder when you all were in a position that you —that there had been no service. And wasn't

page 100 } that the reason for this suggested offer by your home office that you contact Mr. Johnson?

Mr. Joseph C. Russell

A. The reason for contacting Mr. Johnson was that nothing is certain, and it was quite obvious that Mr. Dempsey was judgment proof, and that if a judgment was obtained against him that there was going to be—and it is clear that it has been—an expensive lawsuit involved. And it was just a matter of ecnomics to try to head that off.

Q. And that is—this was following the first trial which resulted in a hung jury, didn't it?

A. That's correct.

Q. Now the mention that you made of policy holders—those were clandestine type of operations I assume, and the Company didn't know anything about it?

A. I guess that would be probably the best description you could use of it.

Q. I call your attention to an interrogatory filed by your Treasurer, Mr. T. J. Sanford—and No. 15—answer No. 15, which is in evidence there.

A. I read the interrogatories.

Q. Would you read that into the evidence, or into the record?

A. (reading) "Defendant has no knowledge that any of its policy holders are residing in the State of Tennessee." I said that was probably accurate from Mr. San-
page 101 } ford.

Mr. Pearson: That's all.

RE-DIRECT EXAMINATION

By Mr. Rakes:

Q. Mr. Russell, just this, sir: Are you at the present time a member of the Virginia State Bar?

A. Yes, I am.

Q. When were you so admitted?

A. September of '65.

Q. You have stated that you are presently in the employ of the Virginia Farm Bureau Mutual Insurance Company. Is this to continue indefinitely?

A. As of July 1st I will join the law firm of Clement, Wheatley and Winston in Danville, Virginia.

Q. In the active practice of law in this State?

A. Yes, sir.

Mr. Rakes: I have no further questions.

Mr. Joseph C. Russell

RE-CROSS EXAMINATION

By Mr. Pearson:

Q. One other question, Mr. Russell. The conversation that you had with Johnson which you stated was as a result of this memorandum, you were to be rather cautious and follow the memorandum itself, were you not?

A. Yes, sir, because, as I explained, in four years that is the only time I ever got a memorandum or a
page 102 } memo from the Director of Claims.

Q. That is Mr. Nuckols?

A. That is Mr. Nuckols.

Mr. Pearson: That's all.

The witness stands aside.

Mr. Rakes: If Your Honor please, other than the deposition of James W. Parrott, I have no further evidence for the defense.

The Court: All right, it is in the file?

Mr. Rakes: Yes, sir, but I would like to move that this be received in evidence and Mr. Pearson has pointed out that there were several objections in it that he would like the Court to pass on at this time.

So if you would point out those objections, Mr. Pearson, maybe it might save a little time.

Mr. Pearson: You don't plan to read it into the record?

Mr. Rakes: Well, since the Court is hearing it without a jury, we could stipulate it.

Mr. Pearson: I would have to check and see what they are. One objection, Your Honor, on Page 6, the question is: "Mr. Johnson has also testified that he did not specifically request you to issue process against Virginia Farm Bureau Mutual Insurance Company through its principal office
page 103 } in Richmond, Virginia and direct that it be served on the Secretary of State of Tennessee. Had he so specifically requested that this be done, would you have complied with that request?"

In the previous testimony he says that there is—he does not recall anything about the conversation; it could or could not have happened. He wouldn't say that it did or didn't happen; he doesn't even remember it.

Then they asked him: "Suppose you did this, what would you do?" I think it is purely speculative.

The Court: I think so. I sustain the objection on that.

Mr. Rakes: If Your Honor please, may I be heard on it before you rule on it?

The Court: All right.

Mr. Rakes: The witness, Mr. Johnson, has testified about so many speculative things throughout this entire trial, about his assumptions and what he concluded he could and couldn't do under Tennessee law, that this statement I think there is no way that we can prove that he could have gotten process issued on Virginia Farm Bureau except to ask the Clerk, "If you had been specifically requested, would you have done it?"

The Court: As far as Johnson is concerned, your question is probably pertinent, but as far as Parrott is
page 104 } concerned, I think it is irrelevant because you asked him, "What would he have done had this happened?" He didn't do it. He's got to testify as to what he did, not what he would have done.

Mr. Pearson: It is purely speculative, Your Honor.

The Court: I think so. I will sustain the objection.

Mr. Rakes: If Your Honor please, I object and except to the Court's ruling on the grounds that it looks as if the burden of this case, which I thought was on the Plaintiff to prove compliance, is somehow being shifted to the Defendant to explain. And I feel that, if Your Honor please—excuse me, I didn't mean to interrupt you.

The Court: Go ahead. I wasn't saying anything.

Mr. Rakes: —that the Plaintiff has put on evidence of Federal Statutes and apparently is prepared to argue that there was no way that this could have been done, and I am simply trying to establish that there was a way that it physically could have been done without reference to what might have occurred thereafter. And in view of the Virginia case of *McDaniel* against *State Farm Mutual Au-*
page 105 } *tomobile Insurance Company,* 205 Virginia 815, 139 S.E. 2d 806, in which there was a service of process on the alleged U.M. Carrier and a motion was made to quash that process and it was sustained.

And then in the action on the policy the State Farm said, "Well, we never were before the court on the first one". And they pointed out that this was a statute that was enacted for the benefit of the insuror, both from a notice standpoint and from a standpoint of permitting them to come in and ask to be heard in that action on the merits, and that if they chose—

The Court: That is true, but that is not the question here. This question here is, "What would you have done if?" That wouldn't pertain at all.

Mr. Rakes: I submit that and my exception, and the grounds for it are that there is no other way that the Defendant can show that process could actually have been issued out of the Court in Tennessee in compliance with the Virginia Statute in this case.

Mr. Pearson: Your Honor, our objections go to the questions concerning this same question and answer in the depositions, and it is put two or three ways, and I think it is the same identical question and I object to all of them.

page 106 } The Court: As to Mr. Parrott?

Mr. Pearson: Yes, sir.

The Court: Well, any similar question of Parrott along that line is properly objected to, and the Court sustains it and Mr. Rakes excepts.

Mr. Pearson: All right.

Mr. Rakes: All right. I didn't think it is necessary, if Your Honor please, since it is written down and I simply want to point out that the answer of the witness is "that whether Virginia Farm Bureau was a party to that suit or not, if they had, or if the request had been made by Counsel to issue service of process on the Commissioner of Insurance and Banking, it would have been done".

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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