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Richmond, Va.

209 VA 482

Record Nos. 6798, 6799

In the
Supreme Court of Appeals of Virginia
at Richmond

JETCO, INC.
v. Record No. 6798
BANK OF VIRGINIA

LOUIS J. POMPONIO, JR.
v. Record No. 6799
BANK OF VIRGINIA, et. al.

FROM THE CIRCUIT COURT OF ARLINGTON 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. 6799

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 10th day of October, 1967.

LOUIS J. POMPONIO, JR., Plaintiff in error,

against

BANK OF VIRGINIA AND WILLIAM N. BARTON, Defendants in error.

From the Circuit Court of Arlington County
William L. Winston, Judge

Upon the petition of Louis J. Pomponio, Jr., a writ of error *supersedeas* is awarded it to a judgment rendered by the Circuit Court of Arlington County on the 6th day of April, 1967, in a certain motion for judgment then therein depending, wherein Bank of Virginia was plaintiff and William N. Barton and others were defendants; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of $28,000, with condition as the law directs.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6798

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 10th day of October, 1967.

JETCO, INC., Plaintiff in error,

against

BANK OF VIRGINIA, Defendant in error.

From the Circuit Court of Arlington County
William L. Winston, Judge

Upon the petition of Jetco, Inc., a writ of error and and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Arlington County on the 6th day of April, 1967, in a certain motion for judgment then therein depending, wherein Bank of Virginia was plaintiff and William N. Barton and others were defendants; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of $28,000, with condition as the law directs.

RECORD

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* * * * *

This cause came on this day upon the plaintiff's motion for judgment; service of process on the defendant, William M. Barton; that no service was affected on the defendant, 3-M Distributing Corporation; upon the grounds of defense filed by the defendant, William M. Barton; upon the pre-trial hearing; upon the oral motion of the plaintiff that the pleadings should be amended to show the defendant's correct name of William N. Barton instead of William M. Barton; upon the representation of the counsel for the defendant, William N. Barton, that the defendant had no effective defense, and was argued by counsel.

And it appearing to the court that the pleadings should be amended to show the defendant's correct name of William N. Barton; that as the defendant has no effective defense to the plaintiff's motion for judgment, that judgment should therefore be entered for the plaintiff, upon consideration whereof, it is,

ADJUDGED AND ORDERED that the plaintiff, The Bank of Virginia, a Virginia corporation, recover and have judgment against the defendant, William N. Barton, in the sum of Twenty Thousand Eight Hundred Thirty-seven and 8/100 ($20,837.08) Dollars, with interest thereon from December 15, 1964, until paid, plus an attorney's fee of Two Thousand and no/100 ($2,000.00) Dollars, and the costs of this proceeding, and it is further,

ORDERED that the pleadings in this cause be, and they hereby are, amended to reflect the correct name of the defendant, William N. Barton instead of William M. Barton, and it is further,

page 22 } ORDERED that this cause remain open for any further proceedings that the plaintiff may desire against the defendant, 3-M Distributing Corporation.

Entered this 11th day of February, 1966.

WILLIAM D. MEDLEY, Judge

* * * * *

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THE COMMONWEALTH OF VIRGINIA

To the Sheriff of the County of Arlington, Greeting:

Whereas, On the 4th day of November 1966 a writ of *fieri facias* was sued out of the Clerk's Office of the Circuit Court of Arlington by The Bank of Virginia, a Virginia Corporation the County of Arlington by The Bank of Virginia, a Virginia corporation to the Sheriff of the County of Arlington directed, returnable within sixty days from the 4th day of November, 1966, in favor of the said The Bank of Virginia, a Virginia Corporation against William N. Barton et al for $20,837.08, Plus $2,000.00 Attys fees, with legal interest thereon from the 14th day of December, 1964, till paid, and $49.00 costs; and a suggestion having been filed in the Clerk's Office aforesaid, by the said The Bank of Virginia, a Va. Corp., that by reason of the lien of ..... said writ of *fieri facias* there is a liability on Jetco, Inc. and Lewis J. Pomponio, Jr. Therefore, we command you that you again summon the said William N. Barton, 1610 N. Harrison St. Arl. Va., Jetco, Inc. Serve: Rex M. Phares, 2780 Jefferson Davis Highway, Arl. Va. and Louis J. Pomponio, Jr., 3537 N. Abingdon St., Arl. Va. to appear before the Judge of our Circuit Court of the County of Arlington at the Court House thereof, on the 2nd day of December next), at 10 o'clock a.m., to answer the said suggestion. And have then there this writ.

Witness, H. BRUCE GREEN, Clerk of the said Court, at the Court House, the 4th day of November, 1966, and in the 191st year of the Commonwealth.

H. BRUCE GREEN, Clerk.
By VIRGINIA GREEN Deputy Clerk

* * * * *

The Bank of Virginia, a Va. Corp.
(GARNISHEE
vs. (SUMMONS
(

Law No. 10330

William N. Barton, Jetco, Inc., Louis J. Pomponio, Jr.
E. Milton Farley, III p.q.
To December 2, 1966 Term.
Arlington County Circuit Court.

Executed this 7 day of Nov. 1966, by serving a true copy of the within process on Rex M. Phares in person, in Arlington County, Virginia.

Given under my hand this 7 day of Nov. 1966.

J. Elwood Clements
Sheriff of Arlington County, Va.
By H. H. Anderson
Deputy Sheriff

Time 11:55 A.M.

Executed in Arlington County, Virginia, this 14 day of Nov. 1966, by posting a true copy of the within process on the front door of the usual place of abode of William N. Barton; he or no member of his family over sixteen years of age, being found there.

Given under my hand this 14 day of Nov. 1966.

J. Elwood Clements
Sheriff of Arlington County, Va.
By James R. Shute
Deputy Sheriff

Time 11:15 A.M.

Executed this 30 day of Nov. 1966, by serving a true copy of the within process on Louis J. Pomponio in person, in Arlington County, Virginia.

Given under my hand this 30 day of Nov. 1966.

J. Elwood Clements
Sheriff of Arlington County, Va.
By R. * * *
Deputy Sheriff

Time 10:00 A.M.

Not found in my bailiwick. Given under my hand this 15 day of Nov. 1966.

J. Elwood Clements
Sheriff of Arlington County, Va.
By James R. Shute
Deputy Sheriff

Time—M.
No such address to be found in Arlington, Va.

Filed Nov. 15, 1966.

H. BRUCE GREEN, Clerk
County Court, Arlington County, Va.
By: V. G., Deputy Clerk

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ANSWER AND AFFIDAVIT

TO THE HONORABLE JUDGES OF THE ABOVE COURT:

Comes now the defendant, Louis J. Pomponio, Jr., and respectfully says:

He is not indebted to William N. Barton and he holds no property or effects belonging to the said William N. Barton other than as a co-tenant with others under a 99-year lease covering certain property owned in whole or in part by the said William N. Barton under which there is presently no rent due.

LOUIS J. POMPONIO, JR.

* * * * *

Filed Dec. 2, 1966.

H. BRUCE GREEN, Clerk
Circuit Court, Arlington County, Va.
By: V. G., Deputy Clerk

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AFFIDAVIT FOR PRODUCTION OF DOCUMENTS

This day in the City of Richmond personally appeared before me, Janice Mae Andrews, Notary Public in and for the City of Richmond, Virginia, Joseph M. Spivey, III, and made oath that he is counsel for the plaintiff in the above styled action and that he verily believes that there are in the possession of H. Burton Bates, Jr., Vice President and Treasurer of Jetco., Inc., Suite 1004, 1117 North 19th Street, Arlington, Virginia, certain writings, to-wit, a Stock Purchase Agreement dated the day of August, 1964, between William N. Barton and Jetco, Inc., Margate Capital Corporation and Rex M. Phares and a copy of an assign-
page 42 } ment dated August 15, 1964, made by William N. Barton to Rosalind C. Barton of the proceeds of a certain promissory note, the said assignment being noted as accepted by Rosalind C. Barton on September 30, 1964; the said Bank of Virginia being plaintiff in the above styled action and the said Joseph M. Spivey, III, further made oath that the aforesaid documents constitute material evidence for the plaintiff in the aforesaid action and that the aforesaid action is set for trial in the Circuit Court of the County of Arlington on December 28, 1966; and the said Joseph M. Spivey, III, further made oath that the plaintiff in the said action desires that a summons be issued in accordance with Section 8-324 of the Code of Virginia, 1950, as amended, requiring the said H. Burton Bates, Jr., or someone on his behalf, to produce all of the aforesaid documents, or exact copies thereof, before the Clerk of the said Circuit Court of Arlington County, at 10:00 a.m. on December 21, 1966, for use by the plaintiff in the aforesaid action.

JOSEPH M. SPIVEY, III

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ANSWER AND AFFIDAVIT

TO THE HONORABLE JUDGES OF THE ABOVE COURT:

Comes now H. Burton Bates, Jr., Vice President and Treasurer of Jetco, Inc., and on behalf of Jetco, Inc., files this Answer to the Suggestion in Garnishment heretofore filed and for the Answer of Jetco, Inc., says:

1. The corporation is not indebted to William N. Barton. A note dated August 1964 payable to the order of William N. Barton has been assigned by William N. Barton to Rosalind C. Barton, notice of which was received by the corporation sometime during the year 1965.

2. The corporation is not indebted under said note due to the offset provisions contained in said note.

And now having fully answered Jetco, Inc., prays that the garnishee summons against it be dismissed together with its costs.

JETCO, INC.
By H. BURTON BATES, JR.
Vice President and Treasurer

page 44 } STATE OF VIRGINIA
COUNTY OF ARLINGTON, to-wit:

This day before me came H. Burton Bates, Jr., a person well known to the undersigned notary public, before the said notary in the County and State aforesaid and swore that the foregoing Answer is true to the best of his knowledge and belief.

Given under my hand this 12th day of December, 1966.

RUTH K. PARRELL

RUTH K. PARRELL
Notary Public

My Commission Expires 9/9/69.

Filed Dec. 13, 1966.

H. BRUCE GREEN, Clerk
Circuit Court, Arlington County, Va.
By: V. G., Deputy Clerk

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REPLY TO MOTION TO PRODUCE DOCUMENTS

Jetco, Inc., in response to the motion of the Plaintiff to produce herewith submits the following:

1. Photostatic copy of copy of assignment from William N. Barton to Rosalind C. Barton dated August 15, 1964.
2. Conformed copy of stock purchase agreement.

JETCO, INC.
By KARL G. SORG
Counsel

SPELMAN, SORG & WAGNER
By KARL G. SORG
Counsel for Jetco, Inc.

Filed Dec. 13, 1966.

H. BRUCE GREEN, Clerk
County Court, Arlington County, Va.
By V. G., Deputy Clerk

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BRIEF OF FACTS AND MEMORANDUM OF LAW

FACTS:

The facts are substantially as contended by The Bank except that Jetco, Inc. contends it has offset moneys under provisions of the note for $218,000.00 not limited to "the offset provisions of the note . . ." as stated by The
page 47 } Bank, but also under the terms of the Stock Purchase Agreement, the note expressly being subject thereto.

LAW OF CASE:

A. The Assignment of the Note.

The principles of law recited by The Bank with respect to badges of fraud in assignments are undisputed. *Arguendo,* however, it would appear the rights of the assignee cannot be litigated to her prejudice without her having been made a party to the litigation. The assignor is properly before the Court as a party defendant. The fact he and the assignee occupy a husband-wife relationship does not vitiate the rule that the rights of persons cannot be prejudiced or be subject to *estoppel* when they are not parties to the action attempting to determine those rights. In the event of a suit on the note by Rosalind Barton, as assignee of the note in question, the defense of *res judicata* could not be raised against her since there is no identity of parties. 8 *Michie's Jurisprudence* 588 (*See footnote* 12) and 8 *Michie's Jurisprudence* 592 *Sec.* 16.

B. The Right to Offset.

Jetco contends it is allowed to offset and to secure indemnification from the maker by withholding in-
page 48 } stallments until full indemnification provided for in the Stock Purchase Agreement has been made.

Paragraph 3c provides indemnity "from any *and all* claims . . . . against the corporation" (emphasis added). This indemnity provision would be rendered meaningless if the interpretation the bank seeks was adopted. Since *all claims* have not yet been ascertained and are not ascertainable at this time to require Jetco to pay the installments while allowing claims to accrue and to be charged against the end of the note would appear to put the end of the note at the end of an elastic band which could be contracted and expanded at the command of forces unknown to Jetco. It is conceivable a claim could be made immediately after the debt The Bank seeks to garnish is discharged which could be larger than the debt of Jetco to Barton. Where, in that case, is Jetco's option to offset on a note clearly non-negotiable and subject to all defenses of the maker? Such interpretation strains the clear intendment of the maker and payee.

The Restatement of the law in Restitution (Chap. 3, Topic 3) says that indemnity is "an action seeking *full reimbursement*" (*Equity Mutual Ins. Co.* v. *Kroger* 175 SW 2d 153) (emphasis added).

page 49 } The only cases cited by The Bank to establish Barton's right to installments while claims are compounded on the terminal end of the note are those recit-

ing a fundamental proposition that a maker who prepays part, but not all, of a note is not excused from making installments as they come due. This is a far cry from damages sustained by maker who asserts his right to indemnity. The cases cited indicate a voluntary payment by maker and not an indemnification. The use of offsets to obtain indemnification are as akin to right of prepayment (as urged by The Bank) as apples are to the Mongolian yak.

The Bank urges the proper inquiry is: What were Barton's rights on the date the garnishment suggestion was served and do these rights continue to exist? The Bank answers the question by stating, without citing any legal authority, that "...he (Barton) would not be *estopped* to successfully demand payment for the simple reason that there was no consideration for his consent."

After warranties of no debt by Barton, warranties recited in the note on which this attempted garnishment is maintained, Barton would be *estopped* to maintain an action for payment, the consideration being amply demonstrated in page 50 } the Stock Purchase Agreement (See unnumbered paragraph preceding paragraph 1 in Plaintiff's Exhibit No. 2). The Bank stands in Barton's shoes and the shoes pinch, because Barton has apparently breached his warranties in the approximate amount of $85,000 and may still cause Jetco to become liable for further claims now unknown to Jetco but known to Barton.

The Bank contends that Barton's failure to indemnify Jetco benefits him because now The Bank cannot collect on the monthly installments under the note. This averment ignores the protestations of The Bank that it "stands in the shoes of Barton". It is agreed The Bank stands in those shoes, and in so doing takes subject to all defenses, real and personal, including any "malfeasance" of Barton in making the warranties.

Further, The Bank contends that Barton can be obliged "to save Jetco harmless, and failing this, Jetco can select the alternative of rescinding the entire contract." The Bank here seeks to remove the *other* alternative, namely the right of offsent under the indemnification agreement of Barton, which alternative is clearly available to Jetco on the note under which The Bank claims. The Bank, unfortunately for its position, can't take that part of the note it likes and ignore that part which it finds disadvantageous.

Respectfully submitted,
KARL G. SORG
Counsel for Jetco

* * * * *

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PETITION

Comes now the Co-Defendant Jetco, Inc., by counsel and petitions that the Court suspend or stay the execution of the judgment order, and for its Petition says:

1. It is aggrieved of the judgment rendered herein.
2. It intends to petition the Supreme Court of Appeals of Virginia for a writ of error.
3. It is prepared to file a bond, with approved surety, in such penal sum as this Court may require.

JETCO, INC.
By KARL G. SORG
Counsel

KARL G. SORG, p.d.

* * * * *

Filed Mar. 23, 1967.

H. BRUCE GREEN, Clerk
Circuit Court, Arlington County, Va.
By: V. G., Deputy Clerk

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JUDGMENT

The issues in the above-entitled action having been regularly brought on for hearing before the Honorable William L. Winston on December 28, 1966, and The Bank of Virginia and the co-defendant, Jetco, Inc., having appeared by their respective counsel; the co-defendant, Louis J. Pomponio, Jr., having filed an answer by counsel but counsel for him having made no other appearance, and there being no appearance for the principal defendant, William N. Barton, the issues were duly tried in open court.

page 54 } And after having considered the testimony of H. Burton Bates, the argument of counsel for The Bank of Virginia and Jetco, Inc., in open court and the memoranda of law submitted on behalf of The Bank of Virginia and Jetco, Inc., and the Court having filed its Opinion herein on February 23, 1967, directing judgment as hereinafter provided, which Opinion is hereby made a part of the record in this case, it is

ADJUDGED, ORDERED and DECREED that the plaintiff, The Bank of Virginia, recover and have judgment against the co-defendants, Jetco, Inc., and Louis J. Pomponio, Jr., jointly and severally, the sum of Twenty Thousand Eight Hundred Thirty-Seven Dollars and 08/100 cents ($20,837.08), with interest thereon at 6 percentum per annum from December 15, 1964, until paid, plus an attorney's fee of Two Thousand Dollars and 00/100 cents ($2,000.00) and the costs incident to all of these proceedings.

Dated: April 6, 1967.

Enter this: WILLIAM L. WINSTON, Judge

I ask for this:
JOSEPH M. SPIVEY, III
Counsel for The Bank of Virginia

Seen and objected to:
KARL G. SORG
Counsel for Jetco, Inc.

Seen and objected to:
HERBERT C. HARPER
Counsel for Louis J. Pomponio, Jr.

page 55 } February 23, 1967

Joseph Spivey, III, Esq.
P.O. Box 1535
Richmond, Virginia

Karl G. Sorg, Esq.
1111 19th North Street
Arlington, Virginia

Charles Herbert Harper, Esq.
1111 19th North Street
Arlington, Virginia

re: Bank of Virginia
v Barton, et al.
Law No. 10330

Gentlemen:

The facts are stated in the memoranda of counsel are substantially agreed upon by the parties. They will therefore not be repeated here.

The first question presented is the effect of the Plaintiff's Exhibit #3, the assignment dated August 15, 1964. The parties relying upon this assigment have failed to produce those witnesses available to them to explain the ambiguities that are apparent upon a comparison of it with the note (Plaintiff's Exhibit #1). Nor is there any explanation why the assignment was not delivered to Jetco until "during 1965" as testified to by the accountant, Bates. The Court has reached the conclusion that the assignment did not validly transfer to Barton's wife any interest which he had in the note. *Morrisette* v *The Cook and Bernheimer Company,* 122 Va. 588; Sec. 55-80, *Code.*

Next the question is whether the co-defendants were indebted to the principal defendant at the time of the service of the writ. A determination of this will decide whether the creditor is entitled to judgment against the co-
page 56 } defendants. The *creidtor* is entitled to no greater standing than is the principal defendant. In order to resolve this question it is necessary to consider carefully the subparagraphs (c) and (e) of paragraph 3 of the Stock Purchase Agreement (Plaintiff's Exhibit #2). In the first instance Barton agrees to indemnify and save harmless Jetco and Margate from, among other things, "any and all claims" except certain ones stated in the agreement. The breach of this covenant by Barton was immediate and substantial as seen from the Bates testimony that no installments have been paid to Barton or his wife, and that $84,167.55 has been "set-off" as a result of numerous payments to Barton's creditors. The agreement further provides that if there is a breach of warranty by Barton, the corporation (Jetco), may void the sale and seek restitution or offset against the note the damages suffered. The alternative is at the corporation's option. The evidence before the Court permits the inference that the corporation determined prior to the date of its first installment obligation to stay with the contract and attempt to limit its liability as best it could by withholding payment on the note and instead to pay such claims against the corporation as they accrued. The Court is of the opinion that a

fair and logical interpretation of this contract does not permit that, and that the corporation having elected not to rescind and seek restitution was bound to pay the installments on the note as they accrued until it had set off by payments to corporate creditors an amount which equalled or exceeded its then balance due upon the note.

The evidence of acquiescence by Barton in the non-payment of his note does not have the effect of a novation of the original contract. His failure to assert what appears to have been his legal right does not lose that right.

Counsel will accordingly prepare an order consistent with the foregoing awarding judgment against the co-defendants.

After it has been endorsed by all counsel it should
page 57 } be submitted to the Court for entry.

Yours very truly,
WILLIAM L. WINSTON, Judge

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NOTICE

TO: Joseph M. Spivey, III, Esquire
700 East Main Street
P.O. Box 1535
Richmond, Virginia

You are hereby notified that the undersigned will present to the Honorable William L. Winston on Friday, May 12, 1967, at 10:00 a.m., E.D.S., Incidents of Trial, in lieu of a transcript of testimony, for signature by the Court. A copy of the sketch of Incidents of Trial was sent you under cover of letter dated March 29, 1967.

KARL G. SORG
Counsel for Defendant

* * * * *

Filed Apr. 20, 1967.

H. BRUCE GREEN, Clerk
Circuit Court, Arlington County, Va.
By: V. G., Deputy Clerk

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

Jetco, Inc. hereby notes its appeal to the Judgment order entered herein April 6, 1967, and assigns as error the following:

1. The Court erred in declaring the assignment of the note of Jetco, Inc. for $218,000.00 from William N. Barton to Rosalind C. Barton to be fraudulent without making Rosalind C. Barton a party to the suit denying her rights to the note.
2. The Court erred in holding that the installments due on the note were required to be paid, at the onset of the note, irrespective of offset and indemnification provisions of the note and the appurtenant Stock Purchase Agreement, and that any offsets would have to be deducted from the balance on the note.

KARL G. SORG
Counsel for Jetco, Inc.

Filed Apr. 20, 1967.

H. BRUCE GREEN, Clerk
Circuit Court, Arlington County, Va.
By: VA. GREEN, Deputy Clerk

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PETITION

COMES NOW Louis J. Pomponio, Jr., co-defendant in the above-styled suit, by counsel, and petitions the Court to suspend or stay the execution of the judgment entered in the said suit April 6, 1967 against Jetco, Inc. and Louis J. Pomponio, Jr., jointly and severally, and for reason therefor says:

1. He is aggrieved of the judgment rendered herein.
2. He intends to petition the Supreme Court of Appeals of Virginia for a writ of error.

3. He is prepared to file a bond with approved surety in such penal sum as the Court may require.

LOUIS J. POMPONIO, JR.
By HERBERT C. HARPER
Counsel

HERBERT C. HARPER
Suite 300, Universal Bldg.
2400 Wilson Boulevard
Arlington, Virginia
Counsel for Louis J. Pomponio, Jr.

Filed May 4, 1967.

H. BRUCE GREEN, Clerk
Circuit Court, Arlington County, Va.
By: V. GREEN, Deputy Clerk

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NOTICE OF APPEAL AND ASSIGNMENT OF ERRORS

To: H. Bruce Green, Clerk
Circuit Court of Arlington County
Arlington, Virginia

Defendant, Louis J. Pomponio, Jr., by his attorney, hereby gives notice, pursuant to the provisions of Section 4, RULE 5:1 of the Rules of the Supreme Court of Appeals of Virginia, as amended, of his appeal from that certain Judgment entered in the above-styled case on April 6, 1967, in which it was adjudged that the Bank of Virginia recover and have judgment against the co-defendants, Jetco, Inc. and Louis J. Pomponio, Jr., jointly and severally, the sum of $20,837.08, with interest thereon at 6% per annum from December 15, 1964, until paid, plus an attorneys' fee of $2,000.00, and the costs incident to the proceedings.

Defendant assigns the following errors:

1. The Trial Court erred in holding, contrary to the law and the evidence, that defendant, Louis J. Pomponio, Jr., is jointly

and severally liable upon the promissory note made by co-defendant, Jetco, Inc., payable to the order of the principal defendant, William N. Barton.

2. The Trial Court erred in holding, contrary to the law and the evidence, that payments made by co-defendant, Jetco, Inc., to discharge liens, charges and other claims against the said corporation, which were in existence prior to the date of the Stock Purchase Agreement, cannot be offset

page 67 } against the payments due under the promissory note given as part consideration of the said Stock Purchase Agreement.

3. The Trial Court erred in holding, contrary to the law and the evidence, that the assignment of the Jetco, Inc. note of $218,000.00 from William N. Barton to Rosalind C. Barton was invalid.

4. The Trial Court erred in holding, contrary to the law and the evidence, that the assignment of the $218,000.00 note from William N. Barton to Rosalind C. Barton was a fraudulent conveyance without joining Rosalind C. Barton as a co-defendant to the suit.

5. The Trial Court erred in holding, contrary to the law and the evidence, that co-defendant, Louis J. Pomponio, Jr., is liable to the plaintiff in the absence of any evidence that the holder of the promissory note presented the said note to the said Louis J. Pomponio, Jr. upon default in payment thereunder, in the absence of any evidence that the holder of the said note made any demand for payment to the said Louis J. Pomponio, Jr., and in the absence of any evidence that the holder of the note gave notice of dishonor to the said Louis J. Pomponio, Jr.

LOUIS J. POMPONIO, JR.
By: HERBERT C. HARPER
Counsel for Louis J. Pomponio, Jr.

HERBERT C. HARPER
Suite 300, Universal Bldg.
2400 Wilson Boulevard
Arlington, Virginia
Counsel for Louis J. Pomponio, Jr.

Filed May 4, 1967.

H. BRUCE GREEN, Clerk
Circuit Court, Arlington County, Va.
By: V. GREEN, Deputy Clerk

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ORDER

THIS CAUSE came on to be heard upon the petition of Louis J. Pomponio, Jr. for an order suspending or staying execution of the judgment heretofore rendered in this cause, and was argued by counsel; and

IT APPEARING that good cause exists for the granting of the prayers of the petition, it is, therefore,

ADJUDGED, ORDERED and DECREED that the execution of the judgment order entered herein on the 6th day of April, 1967, be, and the same hereby is stayed and suspended as to Louis J. Pomponio, Jr., conditioned, however, upon the said Louis J. Pomponio, Jr. entering within five days of the entry of this order into bond in the penal sum of $28,000.00, with surety thereon approved by the Clerk of this Court and the said execution of judgment is suspended until August 8, 1967, and thereafter until a petition for writ of error is acted upon, provided the petition is filed in a timely fashion.

Entered: May 23, 1967.

WILLIAM L. WINSTON, Judge

page 71 } I ASK FOR THIS:

HERBERT C. HARPER
Suite 300, Universal Bldg.
2400 Wilson Boulevard
Arlington, Virginia
Counsel for Louis J. Pomponio, Jr.

SEEN:
SEEN AND OBJECTED TO:
Joseph Marvin Spivey, III
700 East Main Street
P. O. Box 1535
Richmond, Virginia
Counsel for The Bank of Virginia

KARL G. SORG
105 Annandale Road
Falls Church, Virginia
Counsel for Jetco, Inc.

* * * * *

MEMORANDUM OF LAW

PRELIMINARY STATEMENT

On February 11, 1966, the plaintiff, Bank of Virginia, (the Bank) obtained judgment against William N. Barton (Barton) in the Circuit Court of Arlington County (At Law No. 10-330)

page 2 } in the amount of $20,837.08, with interest thereon from December 15, 1964, until paid, plus an attorney's fee of $2000.00 and costs.

The Bank now seeks to collect that judgment by garnishment proceedings against a $218,000.00 non-negotiable note (Plaintiff's Exhibit No. 1) payable to Barton, made by Jetco Incorporated (Jetco) and Louis J. Pomponio, Jr., as endorser. The note is a purchase money note given for the purchase of the capital stock of Jetco owned by Barton and is subject to the terms of a Stock Purchase Agreement (Plaintiff's Exhibit No. 2) of purported even date. Both the note and the Stock Purchase Agreement are dated August, 1964, but no day is recited.

In its answer to the Bank's garnishment suggestion, Jetco asserts that it owes Barton nothing, alleging that the proceeds of the note have been assigned by Barton to his wife. The supposed assignment (Plaintiff's Exhibit No. 3) is dated August 15, 1964, refers to the note as being "approximately $212,000.00" and states that it was given to Barton by Jetco on July 31, 1964. Jetco also contends that even if the proceeds should be payable to Barton, nothing is due and owing at the present time for it has availed itself of the offset provisions of the note and the Stock Purchase Agreement to recoup payments made by it as a result of the surfacing of latent liabilities of Jetco which were incurred while Jetco was in the hands of Barton.

page 3 } Liabilities offset by Jetco as of December 28, 1966, totaled approximately $85,000.00, leaving a current balance due on the note of approximately $133,000.00. As liabilities became known and the privilege of offset available, Jetco elected to apply the offsets to the "front end" of the note, in effect, continually excusing itself from the payment of the next succeeding $2000.00 monthly installment, or part thereof, to which it had not already applied an offset. Jetco now deems itself to be excused from the payment of any installments until sometime in March of 1968. H. Burton Bates, Treasurer of Jetco, testified in open Court on De-

cember 28, 1966, that the manner in which Jetco elected to apply the offsets was acquiesced in by Barton.

Because the Bank's right to garnishee the proceeds of the note are derived solely through Barton, it must demonstrate that Barton, at the time the garnishment suggestion was served and up through the time of the resolution of this question, had and now has the right to demand and receive payment of the monthly installments. *Lynch* v. *Johnson,* 196 Va. 516 (1954). From Jetco's point of view the payments would, of course, be in addition to the amounts it has paid as a result of the latent liabilities and for which it seeks to claim offset.

page 4 } Before reaching a discussion of Barton's right to be paid presently, and hence the Bank's right to satisfy its judgment by the garnishment process, it must be first determined that Barton has the right to be paid at all. This determination necessarily turns on the efficacy of the purported assignment and will be discussed immediately below.

THE ASSIGNMENT OF THE NOTE BY BARTON TO HIS WIFE IS PRESUMPTIVELY FRAUDULENT AND HENCE VOID

The Bank takes the position that the assignment of the proceeds of the note is not effected by the document which has been introduced in evidence as Plaintiff's Exhibit No. 3 for the reasons that the note to which the written assignment refers obviously existed prior to August, 1964, it being recited by Barton that he received a note of "approximately $212,000.00" on July 31, 1964, and the note under discussion here came into existence, at the earliest, on August 1, 1964. Further, the note under discussion is in the amount of $218,000.00 whereas the note which Barton attempted to assign was for "approximately $212,000.00." The description is ambiguous at best. Only the testimony of Barton could

page 5 } resolve this ambiguity and lacking such testimony, as is the case, the only logical choice is to conclude that the written assignment does not effect an assignment of the proceeds of the $218,000.00 note.

But even if the document does adequately describe the $218,000.00 note and the mystery of the delivery of the non-existent note is resolved in Barton's favor, the assignment is so patently fraudulent as to require little discussion.

The purported assignment is between husband and wife and under the law in Virginia is presumptively fraudulent.

"There are certain well-established doctrines affecting the question, which are admitted by all: Among them are, that such transactions between husband and wife, as a matter of public policy, are presumed to be fraudulent, because of the temptation to commit frauds upon creditors and the ease with which they may be perpetrated; and that this presumption must be overcome by evidence; that where a husband who is indebted conveys his property to his wife, the wife must prove the good faith of the transaction by clear and satisfactory evidence; that if the deed be tainted with actual fraud, it is void as to all creditors, whether existing or subsequent; that when post nuptial settlements are assailed by creditors, they must be upheld by proof; and that the answer of the wife is not evidence, but must be sustained by proper proof. [Citations omitted]. *Morrisette* v. *The Cook & Bernheimer Co.,* 122 Va. 588, 592 (1918).

page 6 } The transaction discussed in *Morrisette* was a conveyance of real property by deed; however, we can think of no reason why the same principles would not apply to the assignment of a chose in action. Neither Barton nor his wife has ever appeared in this garnishment proceeding nor have they ever attempted in any fashion to uphold the validity of the assignment, which is tainted with the badges of fraud, hence the presumption of fraud goes unrebutted. This being the case, the assignment is void. Va. Code Ann. §55-80 (1959 Repl. Vol.).

SINCE SEPTEMBER 1, 1964, BARTON HAS CONTINUALLY HAD THE RIGHT TO DEMAND AND RECEIVE MONTHLY INSTALLMENT PAYMENTS, NOTWITHSTANDING THE AVAILABILITY TO JETCO OF THE OFFSETS

Neither the note nor the Stock Purchase Agreement contains any provision which specifically allows Jetco to apply the offsets to the "front end" of the note. In fact, both documents are completely silent as to the manner in which the offsets should be applied. Nor does either document specifically relieve Jetco from the obligation of making the monthly installments should the privilege of offset arise. The note states that it "is subject to all setoffs, counterclaims and recoupments set forth in said [Stock Purchase] Agreement."

The sole mention of any "setoffs, counterclaims and page 7 } recoupments" which appears in the Stock Purchase

Agreement is in the final paragraph of numbered paragraph 3.

"In the event of the breach of the warranties herein contained, the corporation may, at its option, void the sale under paragraph 2 hereof and sue for restitution of all moneys paid thereunder, or it may offset against the promissory note referred to in paragraph 2-c any damages suffered by reason of the breach of warranty."

According to the testimony of H. Burton Bates, the warranty which Barton has breached, and for which Jetco has elected the offset alternative, is contained in paragraph 3c:

"He [Barton] will indemnify and save the corporation and the primary purchaser harmless from any and all claims, liquidated or unliquidated, demands, charges or debts against the corporation or against all of the stock of the corporation or against its officers and directors . . . ."

There being no provision in either document regarding the application of the offsets, the problem necessarily becomes one of construction. If the construction is that Barton has had the right to demand and receive the monthly installments from the time of service of process on Jetco until such time as this question is resolved, the Bank is entitled to recover in this garnishment proceeding all installments falling due during that period.

page 8 } The law on the particular question, *i.e.*, how should the offsets be applied, is scarce. No Virginia case squarely on point can be found; however, the controlling principles appear in cases from other jurisdictions.

Smith v. *Renz*, 265 P. 2d 160 (Cal. Dist. Ct. App. 1954) contains perhaps the most enlightening discussion. In this case, the question for decision was how an advance payment was to be applied on the principal amount of a negotiable instrument. As in the instant situation, no question of interest was involved. The note was in the principal amount of $148,000.00 payable in monthly installments of $500.00 *or more*.[1] Prior to the due date of the first installment, the

[1] It is worthy to notice at this point that the $218,000.00 note given by Jetco to Barton contains a provision allowing Jetco "full pre-payment privileges in any amount at any time without penalty," however no provision has been made for the application of any possible prepayments. Hence, the Bank submits that there is no factual distinction in terms of payment in excess of the stated monthly installments between the Jetco Barton note and the note in *Smith*.

maker made a payment of $23,500.00, and thereafter there arose a dispute as to how that sum should be applied. The trial court ruled that the money should be applied to the first 47 installments; the appellate court reversed:

page 9 } "In the absence of agreement to the contrary, it is undoubtedly the rule in installment cases providing for the payment of a specific amount *or more* at fixed intervals, that an excess payment made prior to or on one installment date is not effective to reduce the amount of or obviate the necessity of paying subsequent installments as they fall due according to the agreed schedule.

* * *

We are aware of no law or binding precedent to the contrary, and therefore hold that consistent with what we deem to be the intent of the parties the $23,500 must all be considered as an advance payment of the first installment of $500 *or more,* but that it does not in any wise affect the remaining schedule of installments provided in the note, *other than to lessen the principal sum by that amount and consequently reduce the number of installments remaining to be paid.* (Latter emphasis added.)

Since the judgment of the trial court directed application of the $23,500 to the first 47 installments, instead of only the first, it must be, and it is, reversed with directions to the trial court to amend its findings and conclusions and to enter judgment in accordance with the views herein expressed." 265 P. 2d at 163.

The case of *McBride* v. *Stewart,* 249 Pac. 114 (Utah 1926) is cited for the proposition that one purchasing real estate under a contract calling for installment payments of $30.00 or more per month could not, by paying more than $30.00 in any one month, relieve himself from the duty of

page 10 } making payments on the succeeding monthly installments of at least $30.00. For a collection of cases supporting this general proposition see Annot., 48 A.L.R. 273 (1927).

No logical distinction may be seen between the right of Jetco to prepay in any amount at any time and its right to offset in any amount at any time. And because no logical distinction exists between the payment provision in the *Smith* note of $500.00 or more" and the payment provision in the Jetco-Barton note of $2000.00 per month with its right of prepayment, it must follow that the principles enunciated in

Smith apply to the application of the offsets in the instant situation.

Assuming, but not conceding, the truth of the hearsay testimony of H. Burton Bates that Barton has acquiesced in the presently existing manner of offset, it would be appropriate to inquire as to the effect of his acquiescence. The inquiry properly takes this form: At any time after the alleged acquiescence, would Burton have been *estopped* to rescind and thereafter demand and receive payment of the monthly installments. The Bank believes that the inquiry properly takes the stated form for the essence of this memorandum is what were Barton's right on the date that the garnishment suggestion was served and do these
page 11 } rights continue to exist. The answer is that he would not be *estopped* to successfully demand payment, for the simple reason that there was no consideration for his consent. Also, in making the determination of Barton's right to demand and receive payment, the Bank contends that the Court is entitled to consider the fact that the note in question does not bear interest. If the monthly installments were being made, as the authorities so indicate, Barton could be realizing some return on his money. As matters currently stand, Barton is, in effect, paying double interest on the principal of the note.

While not necessarily germane to the present right of Barton to successfully demand payment, there are two other factors which the Court is entitled to consider. First, Barton has agreed to indemnify Jetco for any claims or charges validly levied against the corporation, its officers or directors, or against the stock. It is necessarily implied that the matters for which he has agreed to indemnify arose during the time the corporation was controlled by him. By failing to indemnify Jetco, Barton, insofar as the Bank is concerned is currently benefiting from his own malfeasance for had he made the promised indemnifications, he would now be receiving payments of the monthly installments and
page 12 } the Bank, standing in his shoes, would unquestionably be able to satisfy its judgment. Secondly, Barton's promise to indemnify assures Jetco that it will never have to satisfy latent liabilities or levies against the note in excess of $218,000.00, for upon the relevation of further latent liabilities, Barton will be obliged to save Jetco harmless, and failing this, Jetco can select the alternative of rescinding the entire contract, tendering back the stock and recovering all of the moneys paid by it to date pursuant to the note and Stock Purchase Agreement.

CONCLUSION

For the foregoing reasons, judgment should be entered in favor of the Bank and against Jetco and Louis J. Pomponio, Jr., for the full amount of the Bank's judgment against Barton.

Respectfully submitted,
THE BANK OF VIRGINIA
By JOSEPH M. SPIVEY, III
Counsel

* * * * *

REPLY MEMORANDUM

There are only minor points to which The Bank desires to make any reply and no citations are needed in its support.

The first regards Jetco's concern with the status of Rosalind Barton. Jetco is attempting to protect itself from the effect of this garnishment by interposing between itself
page 2 } and The Bank the purported assignment from Barton to his wife. But the unrebutted presumption of fraud working in favor of The Bank obviates this interposition. If either Jetco or Barton, both of whom have been properly notified of this proceeding, wished to maintain the regularity of the assignment, it was their burden to come forward with Mrs. Barton to "prove the good faith of the transaction by clear and satisfactory evidence." *Morrisette* v. *The Cook & Bernheimer Co.,* 122 Va. 588, 592 (1918). This they have not done nor may Jetco circumvent the burden by saying that The Bank must take care to insure Mrs. Barton's status as a party defendant.

In any event, the correct view of this aspect of the problem is this: Because the presumption of fraud goes unrebutted the only permissible conclusion is that the assignment was for the benefit of Barton. Hence, an adjudication in favor of The Bank can only affect Barton's rights. And, of course, there is no question of his status as a properly served party defendant.

The essence of the next contention raised by Jetco is this: The note provides a pool out of which Jetco may indemnify itself for paying "Barton-incurred" liabilities and because liabilities, unknown to it at this time, may continue to arise, no other debts may be satisfied by the note proceeds.
page 3 } The fallacy of this contention is at once obvious.

In the first place, Jetco has a privilege of offset only when Barton fails to indemnify rather than a method of indemnification by offset. Of course, so long as the amount of the latent liabilities do not exceed the amount of the note, the practical effect is the same, however, the distinction is more than semantics. By Jetco's theory, should all of the latent liabilities eventually exceed the amount of the note, it would no longer have any right of indemnification against Barton. This simply is not so; the note and the Stock Purchase Agreement speak for themselves and we will not attempt to argue the obvious. For these purposes, it is sufficient to say that no harm can befall Jetco by The Bank's satisfying its judgment against Barton out of the proceeds of the note.

The Bank surely recognizes that it can rise no higher than Barton, and it reasserts that the determinative question posed on page 10 of its Memorandum of Law is properly drawn. Jetco attempts to say that the consideration which would now *estop* Barton to withdraw his acquiescence and demand payment is the $10,000 recited in the unnumbered paragraph prior to paragraph 1 in the Stock Purchase Agreement. That $10,000 is consideration for the stock. The consideration with which we are concerned here is the consideration page 4 } for Barton's acquiescence in the manner in which the offsets are being applied. Obviously, there is none and no authority or protracted thought is needed to establish this point.

Finally, because at no time since September 1, 1964 (the due date of the first installment), would Barton have been *estopped* to successfully demand and receive all past due installments, it follows that on the date that the garnishment suggestion was served, and up through the time of the resolution of this question, he could demand and receive all past due installments, which, as of January 1, 1967, totalled $58,000. The Bank's claim, as of January 26, 1967, totals $20,837.08 plus $2538.62 interest and an attorney's fee of $2,000. Consequently, The Bank, standing in Barton's shoes, is entitled to recover judgment against Jetco's and Pomponio's note to Barton in the amount of $25,375.70.

Respectfully submitted,
THE BANK OF VIRGINIA
By JOHN M. SPIVEY, III
Counsel

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page 75 }

* * * * *

NOTICE

To: Joseph M. Spivey, III, Esquire
700 East Main Street
P. O. Box 1535
Richmond, Virginia

Karl G. Sorg, Esquire
105 Annandale Road
Falls Church, Virginia

You are hereby notified that the undersigned will present to the Honorable William L. Winston on Monday, June 5, 1967 at 10:00 A.M., E.D.S.T., or as soon thereafter as he may be heard, Incidents of Trial, in lieu of a transcript of testimony, for signature by the Court. A copy of the sketch of Incidents of Trial is attached hereto.

HERBERT C. HARPER
Counsel for Louis J. Pomponio, Jr.

HERBERT C. HARPER
2400 Wilson Boulevard
Arlington, Virginia
Counsel for Louis J. Pomponio, Jr.

* * * * *

Filed Jun 8, 1967.

H. BRUCE GREEN, Clerk
Circuit Court, Arlington County, Va.
By V. GREEN, Deputy Clerk

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page 1-D }

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INCIDENTS OF TRIAL

The following represents the incidents of trial before the undersigned Judge and is presented in lieu of a transcript of testimony.

The case was heard *Ore Tenus* before the undersigned, without a jury, a jury having been waived, on the garnishee summons issued against the Principal Defendant, William N. Barton, (hereinafter called "Barton"), and the Co-Defendants Jetco, Inc. (hereinafter called "Jetco"), and Louis J. Pomponio, Jr. (hereinafter called "Pomponio"). No appearance was entered by or on behalf of Defendant Barton. Co-Defendants Jetco and Pomponio appeared by counsel, and filed answers under oath.

page 2-D } Pursuant to an Affidavit for Production of Documents filed herein by The Bank of Virginia, Co-Defendant Jetco was ordered to produce a copy of an assignment and a copy of a stock purchase agreement referred to in the note, the proceeds of which note were the subject matter of the garnishment.

These documents were produced and the case was heard on December 28, 1966. True copies of the assignment, the stock purchase agreement and the note were introduced as Plaintiff's exhibits. The only sworn testimony taken was that of H. Burton Bates, Vice President and Treasurer of Co-Defendant Jetco who was called as a witness by the Plaintiff. Mr. Bates testified that sometime during the year 1965 he received the photostatic copy of the assignment of the proceeds of the note to Mrs. Rosalind C. Barton. He stated that he could not recall what day or month in 1965 he received the assignment. He also stated that the date of the assignment was blank as tendered pursuant to the order to produce.

Mr. Bates also stated that before one payment was made on the promissory note of Jetco, claims started to accrue against Jetco arising out of debts of Jetco which accrued prior to the sale to the present owners. Therefore, he stated that under the terms of the stock purchase agreement, Jetco offset the claims and has not paid anything on the note. Mr. Bates testified that when claims against Jetco began to appear, Jetco paid them and offset these payments against the note installments, which Jetco elected to do in lieu of rescinding the stock purchase agreement; that Jetco made these offsets

against the "front end" of the note because it could not pay the surfacing liabilities, continue the day-to-day business operations, and make note payments of $2,000.00 page 3-D } per month; that Mr. Bates had informed Barton of their decision to make these offsets and that Barton acquiesced with the method of offset but without agreement. He further stated that Jetco had paid out to the date of the hearing the sum of $84,167.55, offsetting the same against installments into March 1968.

The Court then asked for a memorandum of law from each side and the same were duly submitted. Following this, the Court rendered its memorandum opinion and in accordance with the terms thereof entered judgment on April 6, 1967, against the Co-Defendants, Jetco, Inc., and Louis J. Pomponio, Jr., jointly and severally, for the sum of $20,837.08, with interest thereon at 6 percentum per annum from December 15, 1964 until paid, plus an attorney's fee of $2,000.00 and the costs incident to these proceedings. The execution of said order was stayed pending filing for writ of error.

Date tendered: May 15, 1967.

Date signed: May 23, 1967.

WILLIAM L. WINSTON, Judge

Received by me this 23rd day of May, 1967.

H. BRUCE GREEN, Clerk

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page 1 }

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INCIDENTS OF TRIAL

The following represents the incidents of trial before the undersigned Judge and is presented in lieu of a transcript of testimony.

The case arose out of a garnishment proceeding against William N. Barton, principal defendant (hereinafter referred to as Barton), Jetco, Inc., co-defendant (hereinafter referred to as Jetco) and Louis J. Pomponio, Jr., co-defendant (hereinafter referred to as Pomponio). A garnishment summons was served upon Pomponio on November 30, 1966. Pomponio

filed with the Court on December 2, 1966 a statement, verified by affidavit. Neither Pomponio nor his counsel appeared in Court on the said December 2, 1966.

On December 2, 1966, no appearance was entered by or on behalf of Barton. Co-defendant, Jetco, appeared, by counsel. The case was thereupon continued to December 28, 1966.

page 2 } The case was heard by the Court on December 28, 1966. Pomponio was not present in person or by counsel at the said hearing. True copies of the assignment, plaintiff's Exhibit No. 3, the stock purchase agreement, plaintiff's Exhibit No. 2, and the note, plaintiff's Exhibit No. 1, were introduced as plaintiff's exhibits. H. Burton Bates, Vice President and Treasurer of co-defendant, Jetco, was called as a witness by the plaintiff. Mr. Bates testified that some time during the year 1965 he received the photostatic copy of the assignment of the proceeds of the note to Mrs. Rosalind C. Barton. He stated that he could not recall what day or month in 1965 he received the assignment. He also stated that the date of the assignment was blank.

Mr. Bates also stated that before any payment was made on the promissory note of Jetco, claims arose against Jetco which had been incurred prior to the sale to the present owners. He stated that under the terms of the stock purchase agreement, Jetco offset the claims and has not paid anything on the note. Mr. Bates testified that when claims against Jetco began to appear, Jetco paid them and offset these payments against the note instalments, which Jetco elected to do in lieu of rescinding the stock purchase agreement; that Jetco made these offsets against the "front end" of the note because it could not pay the surfacing liabilities, continue the day-to-day business operations, and make note payments of $2,000.00 per month; that Mr. Bates had informed Barton of their decision to make these offsets and that Barton acquiesced with the method of offset but without agreement. He further stated that Jetco had paid out to the date of the hearing the sum of $84,167.55, offsetting the same against instalments until March, 1968.

page 3 } The Court then asked for a memorandum of law from counsel for plaintiff, The Bank of Virginia, and co-defendant, Jetco, and the same were duly submitted. The Court on February 23, 1967 rendered its memorandum opinion and in accordance with the terms thereof entered Judgment on April 6, 1967, against the co-defendants, Jetco and Pomponio, jointly and severally, for the sum of $20,-837.08, with interest thereon at six per centum per annum

from December 15, 1964, until paid, plus an attorney's fee of $2,000.00 and the costs incident to these proceedings. The execution of said order was stayed pending filing for writ of error.

Original draft Date tendered; June 2, 1967.
Date signed: June 12, 1967.

WILLIAM L. WINSTON, Judge

Seen and objected to on the grounds that counsel for the plaintiff was not given reasonable notice of the time and place of tendering these Incidents of Trial or a reasonable opportunity to examine it within 60 days as required by Rule of Court 5:1 §3(e) & (f).

JOSEPH M. SPIVEY, III
Counsel for Plaintiff

Seen:
KARL G. SORG
Counsel for Defendants

HERBERT C. HARPER
Counsel for Louis J. Pomponio, Jr.

Received by me this 12th day of June, 1967.

H. BRUCE GREEN, Clerk

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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