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Clerk, Supreme Court of Appeals
Richmond, Va.

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Record No. 6856

In the Supreme Court of Appeals of Virginia at Richmond

LOUVENIA L. NELSON

v.

ROBERT R. VAUGHAN

FROM THE HUSTINGS COURT OF THE CITY OF PETERSBURG

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. 6856

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 4th day of December, 1967.

LOUVENIA L. NELSON, Plaintiff in error,

against

ROBERT R. VAUGHAN, Defendant in error.

From the Hustings Court of the City of Petersburg
Willis W. Bohannan, Judge

Upon the petition of Louvenia L. Nelson a writ of error is awarded her to a judgment rendered by the Hustings Court of the City of Petersburg on the 21st day of April, 1967, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Robert R. Vaughan and another were defendants; upon the petitioner, or some one for her, entering into bond with sufficient security before the clerk of the said hustings court in the penalty of $300, with condition as the law directs.

RECORD

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page 1 }

* * * * *

Comes now the plaintiff by counsel and moves this honorable court for judgment against the above named defendants and each of *lthem* in the amount of fifty thousand dollars for which the plaintiff claims the defendants and each of them are indebted to the plaintiff by reason of the following:

(1) That on or about the 9th day of November, 1963 the plaintiff was operating a motor car in a general westerly direction along and upon Woodpecker Road in the county of Chesterfield, Virginia.

(2) That at the said time and place the defendant Robert R. Vaughan who was then and there acting as agent for the defendant the Citizens Red Top Cab Company, Incorporated was operating a motor car in a generally easterly direction along and upon the said highway.

(3) That as a direct and proximate result of the negligence of the defendants the said motor car operated by the said defendants struck the motor car operated by the plaintiff and caused great serious and permanent injury to the person of the plaintiff and damage to her property.

(4) That as a direct and proximate result of such negligence of the defendants that injury caused the plaintiff to suffer great pain and suffering, a great loss of time from her usual employment, great and permanent loss of the use of portions of her body, and caused her to *incurr* great expense in and about at attempt to be relieved of her injuries. The plaintiff will be forced by reason of the said injuries to suffer great future loss of earnings and medical expense.

LOUVENIA L. NELSON

by W. W. RENNIE
counsel

Filed in the Clerk's Office the 9th day of November, 1965.

Teste:

RUTH M. BAILEY, Clerk
LOUISE W. COX, D. C.

* * * * *

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* * * * *

VIRGINIA:

IN THE HUSTINGS COURT OF THE CITY OF PETERSBURG LAW NO. 208-1965

LOUVENIA L. NELSON, Plaintiff
v. § Motion for Judgment
ROBERT R. VAUGHAN,
104 Chesterfield Avenue,
Ettrick, Virginia, et al Defendants.

Returns shall be made hereon, showing service of Notice issued September 14, 1966, with copy of Motion for Judgment filed November 9, 1965, attached:

Executed on the ..... day of ....., 19....., in the County of Chesterfield, Virginia, by delivering a true copy of the above mentioned papers attached to each other, to ..... in person.

SHERIFF, COUNTY OF CHESTERFIELD, VA.
BY ....., DEPUTY SERGEANT.

(Use the space below if a different form of return is necessary)

Not finding the within named Robert R. Vaughan at his usual place of abode in Chesterfield County, Virginia nor any other person a member of his family there over the age of 16 years, I posted a true copy of the within Motion for Judgment at the front door of the usual place of abode of the said party in said county on the 15 day of Sept. 1966.

O. B. GATES, Sheriff,
Chesterfield County, Virginia

By JOSEPH A. PARTICA, D.S.

Returned and filed the 19th day of September, 1966.

RUTH M. BAILEY, Clerk.
LOUISE W. COX, Deputy Clerk.

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* * * * *

PLEA OF THE STATUTE OF LIMITATION
OF ROBERT R. VAUGHAN

The defendant, Robert R. Vaughan, says that the alleged cause of action asserted in plaintiff's motion for judgment is barred by the statute of limitations.

ROBERT R. VAUGHAN

By J. Y. LAVENSTEIN
Of Counsel

* * * * *

Filed October 3rd 1966.

L. W. C., Dpty. Clk.

* * * * *

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* * * * *

On November 9, 1965, the plaintiff, Louvenia A. Nelson, filed in the clerk's office of this court a motion for judgment in which she sought to recover from the defendants damages for personal injuries alleged to have resulted from an automobile accident that occurred on November 9, 1963. On the same day, the plaintiff paid the required writ tax and deposit against costs, and process against the two defendants, Robert R. Vaughan and Citizens Red Top Cab Company, Inc., was issued and delivered by Louise W. Cox, Deputy Clerk, to William V. Rennie, the plaintiff's attorney. The record does not disclose what became of the process against the defendant Vaughan after it was given to Mr. Rennie. He testified that he did not recall whether or not he delivered it to an officer for service. On September 14, 1966, the clerk, at the request of the plaintiff's attorney, issued another process against Mr. Vaughan and that was served the following day by the Sheriff of Chesterfield County by posting a copy at the front door of the defendant's usual place of abode. This process was

returned and filed in the clerk's office of this court on September 19, 1966. The original process against the defendant, Citizens Red Top Cab Company, Inc., was returned and filed in the clerk's office on October 19, 1966, with a notation thereon under date of October 18, 1966 indicating that the City Sergeant of Petersburg had been unable to serve it on that defendant's registered agent. (The defendant Cab Company is not concerned with the question discussed in this opinion).

page 24 } On October 3, 1966, the defendant Vaughan, relying upon section 8-24 of the Code of Virginia of 1950, which bars actions for personal injuries two years next after the right to bring the same shall have accrued, filed a plea of the Statute of Limitations.

Rule 3:3 of Rules of the Supreme Court of Appeals of Virginia provides (in part):

"(a) *Commencement of Action.* An action shall be commenced by filing in the clerk's office a motion for judgment and by paying the required writ tax and deposit against costs. The action is then instituted and pending as to all parties defendant thereto."

The plaintiff filed her motion for judgment and made the required payments two years to the day after the date of the alleged accident on which her claim is based. There is no question but that this action was commenced before the Statute of Limitations had run. But, the defendant Vaughan argues, the delay of more than ten months in the service of process was brought about by negligence or deliberate action of the plaintiff and the court, therefore, should hold that by a sort of "relation back" process the commencement of the action was vitiated. The court finds no merit in this argument. But the facts of this case do give rise to a question as to whether or not the pending action should be dismissed as a consequence of failure of the plaintiff to proceed with due diligence with the prosecution of her case.

Rule 3:3 of Rules of Court provides (in part):

"The clerk shall issue the notice and attach it to a copy of the motion for judgment and the combined papers shall constitute the notice of motion for judgment to be served as a single paper. The clerk shall deliver the notice of motion for judgment for service as the plaintiff may direct." (The notice of motion is "process". Va. Code § 1-13.23:1).

It is implicit in the language "The clerk shall deliver the

notice of motion for judgment *for service"* that the notice (process) must be delivered by the clerk to an officer having authority to serve it. The language "as the plain-
page 25 } tiff directs" is taken to mean that the plaintiff may designate the officer—the sheriff or sergeant of the appropriate county or city—to whom the process is to be delivered by the clerk. This is not to say that the clerk may not select some person to act for him in delivering the process to the serving officer but that person must do what the clerk is required to do—deliver the process to the officer; or it could be sent by mail. Or, if the plaintiff represents to the clerk that service is to be accepted by the defendant the clerk, following a well established practice, might give the process to the plaintiff, but good faith and reasonably prompt return of the process should be required here.

That there may be, in some cases, delays in service of process is recognized in the last paragraph of Rule 3:3 which provides:

"No judgment shall be entered against a defendant who was served with process more than one year after the commencement of the action against him unless the court finds as a fact that the plaintiff exercised due diligence to have timely service on him."

It has been observed that this provision prevents Rule 3:3 from having harsh results. Phelps, *Handbook of Virginia Rules of Procedure in Actions at Law,* p. 138. The provision apparently is designed to save the plaintiff from the penalty of losing his right of action due to inability to find the defendant and have him served with the initial process. Or the process might be lost. Or an officer may fail to perform some duty under the Rules. Another process may be issued and the defendant further pursued. While this provision of the Rules places an ultimate limit on the time for service of process, and in that way benefits the defendant, this Court cannot believe that its intent is to confer upon the plaintiff, who also benefits from the provision, an absolute and unrestricted right to cause service to be withheld for a full year by either his wilful act or failure to use due diligence to find the defendant and have him served. The defendant has some rights, too, including the right to be notified within a reason-
able time of the pendency of an action against him.
page 26 } Any other construction would mean that the plaintiff (meaning also his attorney) might pocket the process or keep it in his desk drawer for any reason or no reason at all except his own caprice—until just before the

expiration of a year from the commencement of the action—which would have the effect of unnecessarily exposing the defendant further to the disadvantages which are the reasons for the enactment of statutes of limitation. This Court cannot believe that it was the intention of the Supreme Court of Appeals, in adopting this provision of Rule 3:3, to give a plaintiff, or his attorney, a full year's holiday from his obligation to keep the action in motion once he has started it. A fair interpretation of the "one-year provision" of Rule 3:3 is, in the opinion of the Court, that during this one year period the plaintiff is aided by a presumption that any delay in service of process was not caused by his failure to exercise due diligence. This view seems consonant with the provision that the plaintiff may be allowed additional time for service, after the expiration of the one year period, if the Court finds as a fact that the plaintiff exercised due diligence to have service; here the burden of proof is placed on the plaintiff.

But the presumption which aids the plaintiff during the one year period is rebuttable. If it should appear to the Court affirmatively from evidence before it that the plaintiff has failed to exercise due diligence or that he has deliberately caused service to be delayed the presumption that at first favored him is overcome.

This question appears not to have been before the Supreme Court of Appeals of Virginia but this Court has examined authorities from other jurisdictions. It is recognized that procedural statutes and rules vary widely among jurisdictions in which the question involved here has been considered by appellate courts. For this reason the Court has
page 27 } given weight only to principles discussed by authorities in other states which appear to exist independently of the terminology of procedural statutes and rules.

In *Jackson* v. *De Benedetti,* 39 Cal. App. 574, 103 Pac. 2nd 990, where service of process was made after a delay of nearly two years, the action was dismissed, the Court quoted with approval the following language from *Gray* v. *Tumas Mirror Co.,* 11 Cal. App. 155, 104 Pac. 481 (at p. 484):

"The law will presume injury from unreasonable delay. It is the policy of the law to favor and encourage a prompt disposition of litigation, and this policy is the outgrowth of sound and substantial reasons. The doctrine of laches as a bar to the assertion of stale claims and statutes of limitations rest upon the same reasons or principle. A party against whom an action is instituted is entitled to as speedy a disposition thereof as is consistent with his own and the rights

of the plaintiff; and if he who starts the law in motion does not with reasonable promptness pursue all steps necessary to bring the litigation to an end, he should suffer the penalty of his default."

* * * * * * * * * * *

"The only limitation upon the exercise of the discretionary power of the Court to dismiss a cause for delay in the service of summons is that it be not abused."

It was decided in *Lieb* v. *Lager,* 9 Cal. App. 2d 324; 49 Pac. 2d 886, that the court did not abuse its discretion in dismissing an action for want of diligence in prosecution where summons was served *two years* and *three months* after filing of the complaint. A statute provided for mandatory dismissal of an action where summons is not served within *three* years. The Court said:

"It is conceded, however, as indeed it must be, that Courts may, in the exercise of a wise discretion, dismiss a case *when the delay in service is for a period shorter than that named in the statute* * * *. It is the appellants contention, however, that where nothing more than the mere lapse of time is brought to the attention of the Court—where no facts are established to show any prejudice resulting from the delay in serving the summons—and the delay is less than three years, it is an abuse of power to dismiss an action; that in page 28 } order to exercise discretion some facts other than the mere lapse of time must be addressed and presented to the Court in order to enable it to exercise discretion, otherwise the arbitrary policy of the law as expressed by section 581a must govern and only in cases where the delay is for three years or more can an order of dismissal be made. As above indicated, it is an inherent right, and *therefore one existing independent of any statute,* to dismiss a suit for a failure to prosecute it with due diligence [cases cited]. As has been frequently said, the duty rests upon a plaintiff at every stage of the proceedings to use diligence to expedite his case to a final determination that there may be an end to litigation. The question of diligent prosecution is one largely committed to the discretion of the lower court." (Emphasis supplied)

In *Gray* v. *Gray* (Ohio) 142 N. E. 2d 552, the Court said:

"However, it is generally recognized that Courts have

inherent power, independently of statute, to dismiss an action where it appears that plaintiff has failed to have summons issued for an unreasonable period, or there is an unreasonable delay in serving summons, or on failure to comply with an order of court or diligently prosecute his case. The right of the court to dismiss for want of prosecution must be determined in the light of the surrounding facts and circumstances and in the exercise of the sound discretion of the Court."

In 27 C. J. S. DISMISSAL and NONSUIT, § 62, it is said:

"Defendant is entitled to a dismissal unless a summons is issued or process is served within the time prescribed by statute, or within a reasonable time, unless delay in the issue, service, and return of process is justified.

"It has been held, under some rules of court, that dismissal for failure to serve a summons within a specified time is within the discretion of the court. Under these rules, the fact that plaintiff's attorney was under the impression that a summons had been timely issued when it actually had not been, or the fact that plaintiff's attorney employed another attorney who attended to the pleadings, has been held insufficient justification for the exercise by a court of its discretionary right to refuse dismissal."

And, in 27 C. J. S. *Id* § 65(1):

"The same public policy which requires that actions be seasonably instituted requires that they be diligently prosecuted, and the mere institution of an action does not of itself relieve a person from a charge of laches or inexcusable delay.

page 29 } It is the duty of plaintiff to prosecute his case with due diligence, and, if he fails in this duty, the consequences are the same as though no action had been begun. Thus an action may be dismissed or a nonsuit granted for the failure of plaintiff to prosecute it with due diligence, although the statute of limitations will bar another suit, unless the presents a sufficient excuse for his failure to prosecute. This rule has been held to apply to a failure to prosecute a cross complaint, counterclaim or plea in reconvention."

The following statement is from an annotation in 167 ALR 1058:

"The question whether an action may be dismissed or

discontinued because of a delay in the issuance or service of process is, like all questions of adjective law, closely dependent upon the particular statutes or court rules under which the individual cases arise. In some jurisdictions there are statutes or rules which expressly authorize dismissal of a suit because of a delay in the issuance or service of process or a delay in the prosecution of an action generally, which is construed as including a delay in issuing or serving summons. Apart from such enactments it is widely recognized that a court has the inherent power, independent of statute or court rule, to dismiss or discontinue an action because of a lack of due diligence in its prosecution and that an unreasonable delay in the issuance or service of summons may be treated as a lack of diligence in prosecution within the meaning of this principle."

* * *

"The principle is *deducible* from the decisions that courts of original jurisdiction—especially courts of equity, but the principle is not confined to them—may exercise their recognized power to dismiss an action because of the plaintiff's failure to prosecute it with due diligence, which is an inherent power and exists independently of any statute or rule of court, where an unreasonable delay occurs in the issuance of service of summons. The question of what constitutes such a delay is, in the first instance, within the discretion of the court before whom the application to dismiss or discontinue is made, and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion."

The principles set forth in the foregoing quotations, in so far as applicable, here, may be thus summarized: A plaintiff is required to pursue with reasonable promptness all steps necessary to bring the litigation to a conclusion. It is the duty of plaintiff to exercise due diligence to see that process is served without unreasonable delay; and this is so even where the delay in service is for a *shorter period than that specified in a statute or rule of court.* A court has
page 30 } the inherent power, independently of any statute or rule of court, to dismiss an action where there has been a lack of due diligence on the part of a plaintiff in prosecuting the action and an unreasonable delay in the service of process may be treated as a lack of diligence in prosecution within the meaning of this principle; and the principle is applicable although the statute of limitation will bar another action. What constitutes unreasonable delay in

service of process is to be determined by the court in its discretion and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion.

The question remaining for determination is that of whether or not the evidence in this case establishes a lack of due diligence on the part of the plaintiff in causing service of process to be made on the defendant Vaughan.

Louise W. Cox, deputy clerk, testified that, upon completing the preparation of the notice of motion and proof of service, she gave them to the plaintiff's attorney, Mr. W. V. Rennie, at his request and that he gave her no reason as to why he wanted the papers turned over to him. Transcript of Testimony, pp. 30, 31. It is common practice for the clerk, upon request by the plaintiff's attorney, to turn process over to him for the purpose of having it delivered by him to the city sergeant or other proper officer for service:

Mr. Rennie's testimony (in part) follows:

"Q Is that correct, Mr. Rennie? Did you say that you did not recall what you did with the first process?

A. My testimony was that I did not recall what I did with the first one. It has been over a year ago, I expect, or something. I have handled, I guess, a good many cases since then. Transcript p. 45.

Q Specifically, Mr. Rennie, as to the first Motion for Judgment and the process that was issued on it, why page 31 } didn't you place that in the hands of the serving authority, or arrange for it to be so placed, promptly upon its issuance to you?

Mr. Rennie: Does Your Honor rule that I have to answer that question? I have objected to inquiries as to my work product, and motives.

The Court: I rule that you should answer the question.

A. The answer is very simple, Your Honor; I simply don't recall why I didn't do it. I assume that I had a reason—if I held it, which I don't recall whether I did or not, if I did, I assume that I had some good reason for doing it at that time. What that reason was, I do not recall now. This has been over a year ago that this happened, and, as I say, I have had a number of cases since then.

I would like to make my position clear. Number one, I don't recall what happened to the original Motion for Judgment, whether it was lost in the mail, or what happened to it; I don't know. I don't recall at this time. If I did retain it in the file, I must have, at that time, had some good reason

for doing that. But, at this moment, I don't recall what that motive was, or if there were any motive at all.

By Mr. Wallace:

Q Mr. Rennie, it is conceivable that the holding back on the placing of this motion had to do with the condition of your plaintiff, physical condition?

A. It could well have been. As I recall, at the time, that Mrs. Nelson was in and out of the hospital and it may well have been that that was the reason that the matter was not served—if I did it, I don't recall whether I did or not, but that would be a possible motive.

Q Is that the reason that you gave to the Judge, at the prior hearing on this matter?

page 32 } A I think that I suggested that that might have been a motive; yes.

Mr. Wallace: All right, sir, I have no other questions of Mr. Rennie."

Transcript pp. 48 and 49.

Only Mr. Rennie could have explained the delay of about ten months in the service of process on the defendant Vaughan but he offers no clear-cut and satisfactory explanation. He says that he does not recall why he did not place the process in the hands of a "serving authority"; he assumes that he had "some good reason." But Mr. Rennie also says that he does not recall what happened to the original process and he speculates that it might have been "lost in the mail" or retained "in the file." Then, the surprising possibility is offered that the process might have been withheld from service because the *plaintiff* was "in and out of the hospital." Such "explanations" for the delay as have been made negative any idea that the original process or any other process was in fact delivered to an officer for service at any time during the period between November 9, 1965 (when the process was given to Mr. Rennie upon the institution of the action) and September 14, 1966 (when another process was issued—which process was served the day following the date of its issuance).

It is implicit in Rule 3:3 that the clerk (including any person acting for him) deliver the process to the serving officer forthwith or within a *reasonable* time. When a statute, rule or contract does not prescribe the time within which an act must be performed or notice given it is implied that a reasonable time is required. 36 WORDS AND PHRASES, *"Reasonable Time"*, especially pp. 615, 619, 620, 635. "Reasonable

time" is such length of time as may fairly, properly and reasonably be allowed or required, having regard to the nature of the act or duty, or of the subject matter, and to attending circumstances. *Id,* generally. This court does not believe that it was the intention of the Supreme
page 33 } Court of Appeals in adopting Rule 3:3 to confer upon the plaintiff authority to take the process of a court from the clerk's office for any purpose, although there could hardly be any objection to his taking it, with the clerk's permission, for delivery with *reasonable* promptness to an officer for service (or, possibly, for acceptance of service and prompt return). It should be kept in mind that process is a mandate from a court. It is an official document of a court. It is one of the essential "court papers" in a judicial proceeding. It is the means of compelling a defendant to appear before a court. Process is not the property of the plaintiff or any party; the Rules, and only the Rules, control the disposition to be made of it.

At the moment a motion for judgment is filed and the required payments made the action is "instituted and pending as to all parties defendant thereto." The Rules of Court then come into play. It is apparent from a view of the Rules in their entirety that they are designed to move the proceeding, step by step, expeditiously and in an orderly manner to its conclusion. It is implicit in this concept that the parties and their attorneys act in good faith at all stages and that they do nothing to impede the orderly progress of the case.

Process in this case was prepared and ready for delivery for service on the day the action was commenced and it was in fact given that day to the plaintiff's attorney. In the absence of facts indicating that more time was required, it may be fairly stated that a reasonable time for delivery of the process by the plaintiff's attorney (acting for the clerk) to an officer for service would be a day or two, or at the outside, five days. Rule 3:4 makes it "the duty of officers to make service within five (5) days after receipt and make return as to those served within five (5) days after the earliest service upon any party shown on each Proof of Service * * *." Had the process in this case been delivered to an officer with reasonable promptness it may be presumed that it would have been returned to the clerk's office within three weeks after the action was commenced. The original process has never been returned.

page 34 } The Court has no difficulty in concluding that the plaintiff did not exercise due diligence to cause timely service of process to be made on the defendant Vaughan.

Since counsel for the defendant Vaughan argues in the brief filed by him in support of the defendant's plea of the Statute of Limitations that this action should be dismissed because of the plaintiff's failure to cause process to be served within a reasonable time his plea might be regarded as being in substance a motion to dismiss. But, the Court being of the opinion that it has inherent power, under the facts of this case, to dismiss the action on its own motion as to the defendant Vaughan, will do so.

Accordingly, an order will be entered dismissing this action as to the defendant Robert R. Vaughan.

WILLIS W. BOHANNAN, Judge

April 14, 1967.

Filed 4/14/67. W. W. B., Judge

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This day came the plaintiff, by counsel, and came also the defendant, Robert R. Vaughan, by counsel, and the Court, having heard in open court evidence offered by the said defendant in support of his plea of the statute of limitations and having also heard arguments of counsel, doth find

(a) that there is no merit in the position taken by the said defendant in his brief that the last paragraph of Rule 3:3 of Rules of the Supreme Court of Appeals of Virginia is unconstitutional because the effect thereof is to extend for an additional year the period of the statute of limitations (§ 8-24 of the Code of Virginia of 1950); the reason for this finding being that this Court does not believe that it was the intention of the Supreme Court of Appeals, in adopting the said provision of Rule 3:3, to confer upon a plaintiff an absolute right, during the period of one year after the commencement of an action, to prevent, by his deliberate action or lack of due diligence, timely service of process on a defendant;

(b) that this action is not barred by the statute of limitations;

(c) that the defendant's plea of the statute of limitations, to the extent that it seeks dismissal of this action because of alleged delay on the plaintiff's part in causing process to be served, may be treated as a motion to dismiss;

(d) that the court has authority to dismiss this action, on its own motion, because the evidence offered on behalf of the defendant, Robert R. Vaughan, establishes that the long delay (from November 9, 1965, until September 15, 1966) in service of process on the said defendant was caused by deliberate action and lack of due diligence on the part of the plaintiff.

It is accordingly ORDERED (1) that the plea of the statute of limitations filed herein by the defendant, Robert R. Vaughan, be, and it is hereby overruled except to the extent that it is treated as a motion to dismiss under finding (c) of this order; (2) that this action be, and it is hereby,
page 36 } dismissed as to the said defendant Vaughan for the reasons stated in this order and in the Court's memorandum opinion filed herein on April 14, 1967, and (3) that the said memorandum opinion be made a part of this order.

Enter this: April 21, 1967.

WILLIS W. BOHANNAN, Judge

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April 29, 1967

The Honorable Willis W. Bohannan
Judge
The Hustings Court of the City of Petersburg
Petersburg, Virginia

Re: Louvenia L. Nelson v Robert R. Vaughan and Citizens Red Top Cab

Dear Judge Bohannan:

I am today in receipt of a copy of the order entered by the Court in this case.

I most respectfully object to the entry of the order and except to the Court's action. It being my intent to save the point.

The following reasons are advanced in support of my objection and exception.

(1) The order is contrary to the law and evidence in this action.

(2) It is in error in that rule 3:3 of the rules of the Supreme Court of Appeals for such cases made and provided clearly permits the service of process (motion for judgment and notice thereof) within a year from the date of the filing of the motion for judgment and that during that period there need be no explanation of a delayed service or a showing of diligence to effect service.

(3) That any delay in the service of the process caused either by lack of diligence or by a deliberate act was the act and sole responsibility of counsel for the plaintiff and the plaintiff should not be penalized therefor.

(4) While we take the position that the Court under the circumstances was without authority to dismiss the action and without waiving the other reasons advanced submit that if the Court did have authority to dismiss this action that the exercise of that authority under the circumstances constituted an abuse of judicial discretion.

Sincerely,

W. V. RENNIE

CC: all counsel of record
Clerk Hustings Court.

Filed 5/1/67. W. W. B., J.

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

The plaintiff, Louvenia L. Nelson, hereby gives notice of her appeal to the Supreme Court of Appeals of Virginia from the final judgment entered in this action by this Court on April 21st, 1967, and duly files her appeal, together with the following assignment of error.

(1) The Court erred in dismissing the action against the defendant Robert R. Vaughan.

Given under my hand this 2nd day of May, 1967

LOUVENIA L. NELSON

by W. V. RENNIE, pq

* * * * *

Filed May 3, 1967.

R. M. B., Clerk

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The Court: All right, gentlemen.

Mr. Wallace: May it please the Court, briefly what we are doing is this is a case involving Louvenia Nelson versus Robert Vaughan, et al. Today, we are appearing on a plea of the Statute of Limitations, to take evidence as to the memorandum which we have previously filed, in regards to the Statute of Limitations. I think previously we had met with you, and had Mr. May present, and had taken his statement at that time. I belive a copy has been sent to Your Honor.

The Court: Yes. You completed his testimony that day, I believe?

Mr. Wallace: Yes, sir, on Mr. May.

This, in nature, is only a special appearance by Mr. Smith and myself on behalf of Robert R. Vaughan, and also, on behalf of Citizens Red Top Cab Corporation.

The Court: All right, sir. What witnesses do you have?

page 13 } Mr. Wallace: Well, the witnesses that we have today are Mrs. Bailey, Mr. Rennie, Mrs. Cox, and Mr. Hawkins. If we could have them all sworn at one time, it might—

The Court: How about Mrs. Bailey? Who is going to swear her? Swear the other three, then, Mrs. Bailey.

Mrs. Bailey (Clerk): All right.

Mr. Rennie: Before we proceed, I would like to make a statement, Your Honor.

The Court: All right, sir.

Mr. Rennie: If Your Honor please, I think this procedure is entirely improper. Any evidence that is taken is irrelevant and immaterial to the issues in this case. The law is very

clear that the return of a Sergeant cannot be attacked collaterally, and that is what is attempting to be done in this case. The record in this file will show that the process, Motion for Judgment, was filed within the period prescribed; that is, two years from the date of the accident. I do not think that the records of the Clerk's office, nor the return of the City Sergeant can be attacked at this time by collateral testimony.

The only issue in this case is whether or not the Statute of Limitations has run. The file—the records in the Clerk's office show, on its fact, that the Motion for Judgment was timely filed, and I don't believe that it is proper to

page 14 } go beyond that. That is the only issue that I have.

The Court: What do you have to say, gentlemen?

Mr. Smith: Does your Honor want to hear argument on that point?

The Court: Yes, your reply to Mr. Rennie.

Mr. Wallace: If Your Honor please, I believe after we had filed a memorandum to the question of the Statute of Limitations, you had suggested that evidence be taken as to the facts concerning just the Statute of Limitations, and not involving merits. And this time had been set aside merely for that, and not for anything else.

The Court: It might not be exactly accurate to say that I suggested that evidence be taken. The Court could not do that. But I will say this, that upon examining some of the authorities that have been submitted by counsel, I could observe, from reading those cases which involve pleas of the Statute of Limitations, that there must necessarily have been some evidence taken in support of the plea or to show that the plea was not proper. And I pointed that out to counsel, and made the observation that they might want to take more evidence, or, at least, I would give counsel an opportunity to present evidence, if they wish to do so.

page 15 } I was not, by doing that, intending to urge that counsel take evidence. You could be free to let it stand on the plea, alone; or to take evidence, if you wished to.

Mr. Wallace: Yes, sir. I think, in addition, we are not attacking collaterally the service. We are merely questioning the time involved as to the filing of the Motion for Judgment, and the actual service, not whether or not service was good or bad, or one way or the other. It is the time involved that we are questioning, in relation to the statutes, and the rules of court promulgated by the Supreme Court of Appeals.

The Court: Well, the Court will certainly rule that you have a right to present evidence, or offer it; and the admis-

sibility of it as to its being relevant can be determined by the Court.

Is anyone raising any question as to admissibility? Mr. Rennie, do you object to being called as a witness?

Mr. Rennie: I was about to raise that point. Have you ruled on the previous point?

The Court: I have ruled. I said that counsel would have an opportunity to present evidence, if it wished to, and the Court would later rule on whether it is admissible, page 16 } or not. There is no way of determining that before it is heard.

Mr. Rennie: Yes, sir. We desire to save that point, Your Honor.

Now, if Your Honor please, I understand that counsel for the plaintiff has been subpoenaed as a witness in this case. I respectfully call Your Honor's attention to Canon 19, adopted by the Supreme Court of Appeals for the Commonwealth of Virginia, and it reads as follows:

"When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court on behalf of his client."

What the defendants are attempting to do in this case is by indirection, because counsel for the plaintiff violated Canon 19 of the Rules of the State Bar. Now, I submit it is entirely improper; it puts counsel for the plaintiff in the position of either violating the Canon of Ethics, or being forced to withdraw as counsel in this case. And if Your Honor feels that counsel should withdraw, I move that this case be continued, and that the plaintiff have an page 17 } opportunity to employ other counsel.

The Court: Were you subpoenaed as a witness?

Mr. Rennie: Sir?

The Court: Were you served with a subpoena?

Mr. Rennie: I have been served with a subpoena, Your Honor.

The Court: All right. I will hear counsel on that.

Mr. Wallace: In reply to what Mr. Rennie has to say, Your Honor, quoting Canon 19, we do feel there is a question as to custody of an instrument; the actual Notice of Motion and the Motion for Judgment, itself, were in his custody, and we feel that this is material, and not a violation of Canon 19, to have him testify as to his actions concerning that document in his custody.

Second, the case is not being heard on the merits, at all; it would not prejudice his client as to the merits of the case, and the proceeding today is a formality only, and not actually getting down to the meat of the case as to which side has the better argument.

The Court: The Court will reserve decision on that, at this time, and will let you call your other witnesses. Whom do you wish to call?

Mr. Wallace: First, I would like to call Mrs. Bailey, please, sir.

page 18 } EVIDENCE ADDUCED IN BEHALF OF MOVANTS-DEFENDANTS

(NOTE: Mrs. Bailey was sworn by the Court.)

RUTH M. BAILEY, was sworn, and testified in behalf of movants-defendants, as follows:

DIRECT EXAMINATION

By Mr. Wallace:

Q. Will you state your name and occupation, please?

A. Ruth M. Bailey; Clerk of the Hustings and Circuit Courts, Petersburg, Virginia.

Q. As Clerk of the Hustings Court of Petersburg, what are your duties, generally?

Mr. Rennie: If Your Honor please, I think the duties of the Clerk of Court are set out in the Code.

The Court: The Court will take judicial notice of the duties of the Clerk, being fairly familiar with them.

Mr. Wallace: I think, specifically, in regard to her duties in regards to motions for judgment and their filing.

The Court: Well, you might get that into the record, then. Ask her the more specific question, to elicit that

page 19 } answer. It could be a little leading, I think.

Mr. Wallace: I believe it was.

The Court: I say, you can ask it to elicit the answer that you obviously need. It would have to be a little leading, the Clerk wouldn't have to recite all of her duties, to get what you want.

What, Mr. Rennie?

Mr. Rennie: If Your Honor please, I think that the duties of the Clerk are set forth in the Code of Virginia, and those —that law is the best evidence of the duties of the Clerk.

Ruth M. Bailey

The Court: Go ahead and ask her the question that you think is proper, to bring out what you want.

By Mr. Wallace:

Q. Mrs. Bailey, what process do you go through, when a motion for judgment is presented to you?

A. In our office, we mark the motion for judgment filed on the day it is presented, and the tax and deposit paid, and we issue process to direct—as directed by the attorney filing the case.

Q. Do you also prepare a notice of motion?

A. We prepare a notice—a proof of service, and a subpoena; and a copy of the motion for judgment is
page 20 } attached to the subpoena, to each subpoena.

Q. And after this is prepared, what do you do with the document?

A. We either send it to the officer—

Mr. Rennie: If Your Honor please, I think that this witness might be asked what she did with this particular document. What she does with other documents is not relevant in this case.

The Court: Objection overruled.

By Mr. Wallace:

Q. After this document is prepared, then what would be the next step that you would go through?

A. We forward it to the Sergeant, or Sheriff to be served, or as directed. We do what is directed by the attorney to be done in the case.

Q. Specifically, what does your record show in relation to a case Louvenia L. Nelson v. Robert R. Vaughan?

Mr. Rennie: Objection, Your Honor. The record speaks for itself.

The Court: I do not think that is well taken. I think it is good to have in the record just what was done, aside from having to search through the papers, if it is certainly not prejudicial to anyone to admit it in evidence.

page 21 } Mr. Rennie: If your Honor please, I want to renew my motion. I think that this is entirely irrelevant and immaterial to the issues in this case. The only issue in this case is whether or not a Motion for Judgment was filed timely. And I think that if Mr. Wallace wants to inquire into that, that is perfectly all right; but that is the only issue before Your Honor.

Ruth M. Bailey

The Court: It is difficult for a court to tell just what is going to be relevant in a case, until it hears some matters leading up to some crucial point. You cannot start out by eliminating all evidence in this, or any other case, because the immediate relevancy doesn't appear.

Go ahead. It is being heard by the Court, and if any improper evidence is admitted, the Court will strike it on their motion.

Mr. Rennie: Yes, sir. Exception, Your Honor.

The Court: All right.

By Mr. Wallace:

Q. (Continuing) Mrs. Bailey, has a Motion for Judgment been filed in the case of Louvenia L. Nelson versus Robert R. Vaughan?

A. It has been.

page 22 } Q. Is this record the record of the Motion for Judgment? Is this the one?

A. Yes, it is.

Q. Who were the defendants listed on the Motion for Judgment, please, ma'am?

A. Robert R. Vaughan, and Citizens Red Top Cab Company, Incorporated.

Q. Do your records indicate if service has been obtained on both defendants, or not? And, if so, would you state whether it has or has not?

Mr. Rennie: If Your Honor please, I would like to renew my objection. I think that the record—

The Court: It seems to be the same objection, Mr. Rennie, and the Court has ruled on that.

Mr. Rennie: Yes, sir.

The Court: And has ruled that if any evidence is admitted that should not be admitted, the Court will strike it from the record, or will not consider it, if it proves not to be relevant.

Mr. Rennie: Yes, sir.

A. It appears that a notice was served on Robert R. Vaughan by—at his usual place of abode in Chesterfield County, by posting a copy at the front door of his residence, on the 15th day of September, 1966, by O. B. Gates,

page 23 } Sheriff, Chesterfield County, by Joseph A. Pardon, Deputy Sheriff.

Q. This is service on Robert A. Vaughan?

A. Robert A. Vaughan.

Ruth M. Bailey

Q. Is there any service on Citizens Red Top Cab Company?

A. It appears that James E. May, Jr., registered agent for Citizens Red Top Cab Company, Incorporated, service could not be obtained on him, on October 18, 1966. This return was by Alex V. Hawkins, Deputy Sergeant, City of Petersburg.

Q. When was the Motion for Judgment filed in your office?

A. November 9, 1965.

Q. When was the service had upon Robert R. Vaughan?

A. September 15, 1966.

Q. When was the service attempted upon Citizens Red Top Cab?

A. October 18, 1966.

Q. I call your attention to the Motion for Judgment, itself —let me just hold it—could you read the body of the main paragraph, and then paragraph 1, please, for the Court?

A. "Comes now the plaintiff by—"

The Court: Just a minute now. I think there
page 24 } is some limit to how much of this can be done;
that is, reading from the record things that can be gathered by looking at the record.

Mr. Wallace: Yes, sir. The purpose of this was to show the date of the injury upon which this suit was based, and to show the times involved.

The Court: You can state that. The Court will accept what you say, if you look in the record and it is not contradicted.

Mr. Wallace: Do you want me to, or her?

The Court: You just state what you wish about what you see there.

Mr. Wallace: The date of the injury stated in the Motion for Judgment is November 9, 1963.

By Mr. Wallace:

Q. Do you have your docket sheet available here in the courtroom?

A. Yes.

Mr. Rennie: Are you offering that in evidence, Mr. Wallace?

The Court: What was the question now?

Mr. Rennie: I was inquiring as to whether this was to be offered in evidence.

The Court: Let Mr. Wallace go ahead. If he
page 25 } offers it, then you might object.

Ruth M. Bailey

By Mr. Wallace:
Q. What date does your docket sheet show—

Mr. Rennie: I object to any testimony from a docket not in evidence, Your Honor.
The Court: How is this book that the Clerk has described? Just what is it?

By Mr. Wallace:
Q. Describe the book that you have, Mrs. Bailey?
A. It is the common—it contains the common-law docket sheets for the Hustings Court.

By The Court:
Q. What is meant by that? What is kept in it?
A. It is a sheet, showing when the suit was filed, and the nature; and a memorandum of the—and when process was issued and served, and memorandums of orders, and proceedings in the case.
Q. Is that one of the official books or records in your office?
A. Yes, it is.

The Court: Now what question do you want to ask her about it? and we will see if Mr. Rennie objects. Go ahead.
Mr. Wallace: I had a series of questions, Your
page 26 } Honor. The first is what date her docket book
would indicate process was actually filed with the Court; and then, second question: When was process served upon the defendants, or attempted to be served?
The Court: As shown by this record?
Mr. Wallace: Yes, sir.
The Court: Mr. Rennie, do you object?
Mr. Rennie: If Your Honor please, my objection to this is the same as I previously stated. I do not want to keep repeating my objections. I don't think any of this is material or relevant to the issues in this case. For that reason, I will not continue to object. I understand your ruling to be that you would not consider anything that wasn't relevant.
The Court: Yes. This has to do with records that are not a part of the record in this case now, and may have in them some things that bear on the case; and, as indicated before, I will let counsel proceed with the questioning, and will later strike out anything that proves to be irrelevant.
Go ahead, Mr. Wallace.

Ruth M. Bailey

By Mr. Wallace:

Q. What date was process issued in this case, please, ma'am?

page 27 } A. On November 9, 1965.

Q. Was that as to both defendants?

A. Both defendants.

Q. On what date was process served?

A. Process was served—another process was issued against Robert Vaughan on September 14, 1966, and it shows that that was served on September 15, 1966.

Q. Was there any service of the original processes on November 9, 1965?

A. There does not appear to be any entry under the process-served column.

By The Court:

Q. That is a process against the defendant, Robert R. Vaughan?

A. Issued November 9.

Q. The first one issued, then, you say, is not, as far as the records go, that one was not served?

A. Yes, sir; correct.

By Mr. Wallace:

Q. On either defendant?

A. The notation by the Citizens Red Top Cab Company, Incorporated, not served 10-18-66, and filed 10-19-66. No entry by the process issued against Robert Vaughan on November 9, 1965.

page 28 } Q. And the only process issued against Robert *Vaighan* which was served, was issued on November—September 6—14, of '66?

A. Yes.

Q. And served on September 15 of '66?

A. Yes.

Q. In the particular Motion for Judgment and process which we are dealing with, were you present at the time it was filed with the Court?

A. Well, Mrs. Louise Cox, the Deputy Clerk, handled this case, at the time.

Mr. Wallace: Fine. Thank you, ma'am.

The Court: What was that last question?

Mr. Wallace: The question was, was she the one present at the time that the Motion for Judgment and process—

The Court: I understood you to say process was "filed"; did you mean that?

Mr. Wallace: No, sir, the Motion for Judgment filed, and the process issued.

The Court: All right. That straightens it out. Go ahead. Is that all?

Mr. Wallace: I have no other questions of Mrs. Bailey.

page 29 } The Court: Mr. Rennie?

Mr. Rennie: No questions.

* * * * *

LOUISE W. COX was sworn, and testified in behalf of movants-defendants, as follows:

Mr. Rennie: If Your Honor please, we are willing to stipulate Mrs. Cox's testimony would be substantially the same as Mrs.—

The Court: I do not know whether they want that.

page 30 } Mr. Wallace: Basically, we would, but we have a couple of things we would like to ask that would differ from Mrs. Bailey.

The Court: Yes. Go ahead and question.

DIRECT EXAMINATION

By Mr. Wallace:

Q. Mrs. Cox, would you state your name and occupation, please?

A. Louise W. Cox; I am retired Deputy Clerk of the Hustings Court.

Q. Were you performing your duties as Deputy Clerk on the day that Motion for Judgment in this case was filed?

A. Yes.

Q. Were you the one who handled the filing of it?

A. Yes.

Q. When this was brought in to you, did you prepare then —

A. Yes.

Q. —the Notice of Motion?

A. Yes, and the Proof of Service.

Q. What did you do with it, upon completion of preparing these documents?

Louise W. Cox

A. Well, according to the records here, I gave
page 31 } them to Mr. Rennie.

Q. Why did you give them to Mr. Rennie?

A. Because he requested them.

Q. And you gave them to him on what day?

A. On the day that it was filed.

Q. Which was?

A. November 9, 1965.

Q. Did Mr. Rennie give you any reason why he wanted them turned over, to you?

A. No, sir.

Mr. Wallace: I have no other questions.

Mr. Rennie: I have no questions, Your Honor.

The Court: Mrs. Cox, that is all.

* * * * *

page 33 } Mr. Wallace: I would like to call Mr. Rennie, now.

The Court: I will hear you further on whether Mr. Rennie can be called as a witness.

Mr. Wallace: Did you want to hear us?

The Court: Yes. Refresh my memory, please, on the section of the Canon on Ethics.

Mr. Rennie: I have it here, if you would like to see it, Your Honor.

Mr. Wallace: I think Mr. Rennie was referring to Canon 19, dealing with the calling of the attorney representing the parties, as a witness.

Mr. Rennie: Canon 19.

The Court: 19?

Mr. Rennie: Yes.

Mr. Wallace: Our reply to his argument would be that he is not being called upon to testify as to the merits in the case, but only as to the procedure, in which he was the only one directly involved. He had custody of the instruments; Mrs. Cox has stated that she turned them over to him; and Mrs. Cox stated that he took them, at his request. And it is as to his custody of these instruments during this ten-month period, from the time that the Motion for Judgment was filed, until the Motion for Judgment was
page 34 } served upon Mr. Vaughan, that we are concerned.

The Court: This provides: "When a lawyer is a witness for his client, except as to merely formal matters,

such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court on behalf of his client."

All this seems to be concerned with a lawyer testifying on behalf of his client, or being called as a witness for his client. It doesn't necessarily follow from that that it is proper if he is called as a witness for an adverse party.

What is your view of that?

Mr. Wallace: If Your Honor please, we are both a little concerned here. We feel that Mr. Rennie was a witness as to only the facts, and not on behalf of his client, nor otherwise. I think we could treat it as being called for the adverse party, but I think you would run into the same objection that he has already made. The format of the procedure is involved, and not the merits of the case. And I think that the impact of this particular canon is as to the merits, and not as to the procedure involved. Certainly, Mr. Rennie is the only one who knows exactly what he did, or why

page 35 } he did it, or what steps he took as regards his Motion for Judgment.

The Court: As I understand, the reasoning behind this canon is that the lawyers should not be put into the position of having himself on the witness stand testifying, or offering testimony in his case as a witness, when, as an attorney in the case, he might be called upon to argue—should not be put in an awkward position in testifying as a witness to facts in his capacity as a witness; and then, as a lawyer, having to argue that he, as a witness, was telling the truth.

That reasoning would hardly apply where he is called by the attorneys for the opposing parties, to testify to something that, as a lawyer, he will not have to argue is the truth. I am just suggesting this from memory, now. I will be glad to hear your comments on this. And I have in mind, too, that this has to do with some preliminary matter, and is not testimony that Mr. Rennie would be called upon to give as to the merits in the case.

I will be glad to hear from you now, Mr. Rennie.

Mr. Rennie: Is Your Honor ruling that I would not be violating Canon 19?

The Court: I have not ruled. I was just expres-

page 36 } sing some preliminary views of my own, and asking counsel to comment on the question further.

Mr. Rennie: Yes, sir. I would respectfully request a ruling on that point, your Honor.

The Court: You have nothing to say further?

Mr. Rennie: Nothing further than I have already said.

The Court: You have pointed to Canon 19, or Rule 19, and have said that was applicable; and the Court made the observation that that seemed to be aimed at a lawyer appearing as a witness for his client; and it said that in certain formal matters it might be proper for him to testify on behalf of the client. And then, there is this admonition: "Except when essential to the ends of justice, a lawyer should avoid testifying in behalf of his client."—except for the ends of justice.

What relevance does that have here, when you, as *as* attorney for the plaintiff, are being called by the defendants' attorneys?

Mr. Rennie: If Your Honor please, I understand now that I am called as a witness for the defendants—

The Court: I asked you to state your position on that.

Mr. Rennie: Well, if Your Honor please, I do not want to labor the point. I am under subpoena for this
page 37 } court, and, of course, required to testify, as I understand the law.

I do call to the attention of the Court, Canon 19. I think it puts counsel for the plaintiff in a very awkward position.

The Court: The Court would certainly not require you to testify in what the Court thought was violation of Rule 19, and I do not believe that you are being called on to testify under these circumstances that we have here in violation of Rule 19, or any other rule that has been called to the attention of the Court. The Court is ruling that you may be called as a witness by the defendants.

All right, sir.

Mr. Wallace: I would like to call Mr. Rennie, please, sir.

W. V. RENNIE was sworn, and *destified* in behalf of movants-defendants, as follows:

Mr. Rennie: If Your Honor please, do I understand that I am a witness for the defendants, and that my testimony is binding on them?

The Court: I cannot rule on that until the question arises. You have not testified yet. You are being called by the defendants, to testify.

page 38 } DIRECT EXAMINATION

By Mr. Wallace:

Q. Would you state your name and occupation, please?

W. V. Rennie

A. W. V. Rennie; I am an attorney at law.

Q. Do you represent Mrs. Louvenia Nelson?

A. I did, up until this moment. I don't know what the situation will be from now on.

Q. Did you file a Motion for Judgment on behalf of Mrs. Nelson?

A. Yes, I did.

Q. Against whom was this brought?

A. The motion was filed naming the defendant Vaughan, whose first name I don't recall, and the Citizens Red Top Cab Company.

Q. When did you file this Motion for Judgment?

A. I don't recall. The record speaks for itself. If you hand me the record, I will be glad to read it.

Q. Do you want your glasses?

A. Yes, please.

The file indicates that the Motion for Judgment was filed on the 9th day of November, 1965, and I assume that to be correct. I am sure it is.

Q. Was the Notice of Motion, and Motion re-
page 39 } returned to you at that time by Mrs. Cox?

A. I don't recall whether it was at that time, or not. If Mrs. Cox said it was, I am sure her memory was correct.

Q. But, at some time, it was returned to you?

A. Yes.

Q. For what purpose was it returned to you? Why did you take it back?

Mr. Rennie: If Your Honor please, I object to that question. I think that calls for a privileged communication. I think it is seeking to inquire into the work product of the attorney for the plaintiff. You might as well inquire, and want to look at my file. I don't think it is proper, and I object to that question.

The Court: Just a minute. You asked why the Motion for Judgment and Notice were turned over to Mr. Rennie; is that it?

Mr. Wallace: Yes, sir.

The Court: I doubt it is a matter of reason behind it, or motive. I could see that you might properly inquire as to what occurred, what happened, what the facts were. I mean,
it is not a matter of motive involved in this, I
page 40 } don't believe. So the objection made by Mr. Rennie
is sustained.

Mr. Wallace: All right, Your Honor.

By Mr. Wallace:

Q. After this Motion for Judgment was turned over to you, did you ever attempt to get service on the defendant?

A. Not personally. I transmitted the Motion for Judgment and Notice of Motion, and the Proof of to the appropriate officers.

Q. Did you do that right away, after this was put in your hands?

A. I don't recall the exact date.

Q. Was what was testified to, as to the dates of service, correct?

A. As far as I know, they were. I am not in a position to contradict the official records of this court.

Q. Mr. Rennie, why was this Motion for Judgment not served immediately upon its receipt by you? Why didn't you turn it over, at that time, to the serving authority? Why did you wait for ten months?

A. I think the Court has already ruled that that question is improper. He has overruled a previous question that was seeking to elicit the same information.

Q. I think that would be up to the Judge to decide.

page 41 } The Court: Your question seems to assume that the motion was held for some stated length of time, and I do not think Mr. Rennie has said how long it was that it was held before, if any time, he turned it over to an officer, has he?

Mr. Wallace: No, sir. But I believe Mrs. Bailey's records had already pointed out that the time interval was brought—

The Court: Time interval what?

Mr. Wallace: The Motion for Judgment was filed on September 14, '65, it was turned over to Mr. Rennie on that day; and it was not served or placed in the hands of the authority and served, until—

The Court: Does her record show when it was placed in the hands of an officer to serve?

Mr. Wallace: No, sir. That is what we are trying to get at.

The Court: The record shows when it was served.

Mr. Wallace: The docket also showed when the second process was issued, in September of 1966.

The Court: Does the record show what became of the first process?

Mr. Wallace: No, sir, they do not. I think the

page 42 } Rules require that service be within five days after process is issued. Now, I think that might explain the September reissuance of the process, and why the one in November before had not been served upon anybody.

The Court: What is this provision of five days?

Mr. Wallace: It is Rule 3.4 on Proof of Service: "It shall be the duty of officers to make service within five days after receipt and make return as to those served within five days after the earliest service upon any party shown," and I think it goes on—

The Court: What followed that, in this case?

Mr. Wallace: Service was had on Mr. Vaughan in September of '66, and service would have had to have been made within five days after receipt of the service authority.

The Court: Has it been shown when it was served by the serving officer?

Mr. Wallace: We showed that the second process was issued on September 14 of 1966, and was served the next day upon Mr. Vaughan. And the first process was never served upon anybody.

page 43 } The Court: Have you shown what became of the first process?

Mr. Wallace: Other than it went into the hands of Mr. Rennie, no, sir. That is what we are trying to find out from him, what happened.

The Court: Have you asked him that question?

Mr. Wallace: All right. No, sir, I can ask him now.

The Court: All right, sir.

By Mr. Wallace:

Q. Mr. Rennie, what happened to the first service that was placed in your hands?

A. I don't know.

The Court: The "first service," what do you mean?

Mr. Wallace: Well, the first process that was placed in his hands.

A. (Continuing) Let me say this. I don't recall at this time what happened to it.

By Mr. Wallace:

Q. Did you go back and get a second process?

A. Yes, I did.

Q. And this second one was the one that you placed in the hands of the serving authorities?

page 44 } A. I don't recall whether I delivered that directly to the serving authority, or not.

Q. You did deliver it to him, at some time, the second one?

A. No, sir, I said I don't recall whether that was delivered to the serving authority, by me, or by the Clerk.

Q. But, in either instance, it was the second?

A. It was placed in the hands of the City Sergeant by either me or someone from the Clerk's office.

By The Court:

Q. Referring to the first or second?

A. The second one.

I might amplify this by saying that sometimes I take the Motion of Judgment to the Sergeant for service, and sometimes, they are sent by the clerk. I don't recall what happened in his particular case.

Mr. Wallace: Your Honor, the question we are trying to get at is the reason behind Mr. Rennie for getting the first one in the hands of the serving authority, after he obtained receipt of it. I think this would be applicable, since we are arguing the good faith without more requirements as set forth in the cases cited in our memorandum.

page 45 } The Court: I understood Mr. Rennie to say that he didn't know what he did with the first process. Is that correct?

Mr. Wallace: I would like, then, to take exception as to why Mr. Rennie didn't do this, and why we are not allowed to go into the why behind it.

By The Court:

Q. Is that correct, Mr. Rennie? Did you say that you did not recall what you did with the first process?

A. My testimony was that I did not recall what I did with the first one. It has been over a year ago, I expect, or something. I have handled, I guess, a good many cases since then.

The Court: Isn't that the answer?

Mr. Wallace: Well, sir, it still doesn't give you the why behind the first Motion for Judgment and the Notice of Motion, why it wasn't placed in the hands of the serving authority on its turnover to Mr. Rennie, or certainly, within a reasonable time thereafter. He, in fact, had to come back and get a second one some ten months later, I think, according to the records of the Court, which have already been produced in evidence.

The Court: You are assuming that Mr. Rennie
page 46 } did not place the first process in the hands of an officer to serve, while he is saying that he doesn't know whether he did that, or not.

Mr. Wallace: Yes, sir. But I think it is more than an assumption, because if he had placed it in the hands of a serving authority, the serving authority would have had to have made some attempt at service within five days from its receipt; and it would either have to be noted on the record that no service was made, or that service was made. And there is no indication on Mrs. Bailey's records either way, as I remember her testimony.

The Court: But do you think that would establish that the process was not issued to an officer?

Mr. Wallace: I think it is rather conclusive of that, yes, sir.

The Court: The officer might fail to do his duty.

Mr. Wallace: It is conceivable that he might have failed to do his duty; but I don't think that he normally would have failed. My recollection is that the statute states that you have to presume that the serving authority, or the sheriff, in this case, would do his duty, and do what he was
page 47 } supposed to have done.

The Court: But I don't know that you can say that is a fact, in questioning the witness. Your question seems to be: Why did he not deliver it to an officer?

Mr. Wallace: Not so much why he didn't deliver it, but why the delay, the reason that he held on to it, if he did; or, if he didn't, why did he have to go back and get a second one, if he already had one?

Mr. Rennie: May it please Your Honor, I am on the witness stand, I don't know what my position is now; but I expect I occupy a dual position, and wear two hats. It seems to me that these questions are argumentative and if Mr. Wallace desires to testify, I submit that he should be sworn and submit himself to cross-examination.

The Court: I don't know that he has attempted to testify.

Do you wish to consider this further, Mr. Wallace?

Mr. Wallace: If you have overruled the possibility of asking him the reason for holding onto this thing, yes, sir, I would like to note an exception, and stop.

page 48 } The Court: Ask the question anew, please, so it will be clear.

Mr. Wallace: All right, sir.

By Mr. Wallace:

Q. Specifically, Mr. Rennie, as to the first Motion for Judgment, and the process that was issued on it, why didn't you place that in the hands of the serving authority, or arrange for it to be so placed, promptly upon its issuance to you?

Mr. Rennie: Does Your Honor rule that I have to answer that question? I have objected to inquiries as to my work product, and motives.

The Court: I rule that you should answer the question.

A. The answer is very simple, Your Honor; I simply don't recall why I didn't do it. I assume that I had a reason—if I held it, which I don't recall whether I did or not, if I did, I assume that I had some good reason for doing it at that time. What that reason was, I do not recall now. This has been over a year ago that this happened, and, as I say, I have had a number of cases since then.

I would like to make my position clear. Number one, I don't recall what happened to the original Motion page 49 } for Judgment, whether it was lost in the mail, or what happened to it; I don't know. I don't recall at this time. If I did retain it in the file, I must have, at that time, had some good reason for doing that. But, at this moment, I don't recall what that motive was, or if there were any motive at all.

By Mr. Wallace:

Q. Mr. Rennie, is it conceivable that the holding back on the placing of this motion had to do with the condition of your plaintiff, physical condition?

A. It could well have been. As I recall, at the time, that Mrs. Nelson was in and out of the hospital and it may well have been that that was the reason that the matter was not served—if I did it, I don't recall whether I did or not, but that would be a possible motive.

Q. Is that the reason that you gave to the Judge, at the prior hearing on this matter?

A. I think that I suggested that that might have been a motive; yes.

Mr. Wallace: All right, sir, I have no other questions of Mr. Rennie.

The Court: All right, Mr. Rennie, stand aside.

(Witness stood aside.)

page 50 } Mr. Wallace: Your Honor, we feel that with the evidence that we have taken, that we have shown this lack of good faith, or without more requirement that we cited in the memorandum. At this time, I don't know whether you want us to present argument on the evidence in the cases, or whether you want Mr. Rennie to present anything that he might like.

The Court: Mr. Rennie, do you have anything?

Mr. Rennie: Yes, sir. I renew my motion to—my objection to the evidence taken in this case; and move, at this time, that the testimony be stricken from the record. The only issue in this case is whether or not the Motion for Judgment was filed within the required two years from the date of the accident. That is the issue that is raised on the plea of Statute of Limitations.

The records in this case show that the Motion for Judgment was filed within two years from the date of the accident. That is the only thing that is before Your Honor to determine. All of this testimony is, plaintiff's counsel very respectfully submits, is immaterial, irrelevant and improper to be considered on a plea of the Statute of Limitations.

The Court: I understand, then, that the plaintiff does not wish to put on any evidence at this time, or page 51 } any other, on this issue?

Mr. Rennie: On this issue, we do not, sir.

The Court: All right, sir. What would you like to do now, Mr. Wallace?

Mr. Wallace: If it please the Court, we would like to present the argument that we raised in the memorandum filed as relates to the facts, and evidence as taken today; and, in the end, renew our request that the case be dismissed as the Statute of Limitations has run.

The Court: Am I correct in this? Upon a previous oral argument, counsel for both sides were given a certain time within which to file a memoranda of their authorities, and that time has expired. Counsel for the defendants have submitted such a memorandum, and the counsel for the plaintiff has not. Is that correct?

Mr. Rennie: That is correct.

Mr. Wallace: Yes, sir.

The Court: It would seem to the Court to be best that, since this testimony is to be, I suppose, transcribed—is it not?

Mr. Wallace: Yes, sir.

The Court: —that it would be better to wait until that is done; and then, a date can be set for a further hearing on this question.

page 52 } Mr. Wallace: That is fine, Your Honor.
The Court: All right, sir. Is that all for now?
Mr. Wallace: Yes, sir, it is.
The Court: All right. Sergeant, adjourn court.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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