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Record No. 6992

In the
Supreme Court of Appeals of Virginia
at Richmond

TOUFIC DOUMMAR, an
incompetent, etc.

v.

MAURICE DOUMMAR, individually,
etc., et al.

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK

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. 6992

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 6th day of June, 1968.

TOUFIC DOUMMAR, an incompetent, who complains by his duly appointed next friend, HABIB DOUMMAR,

Appellant,

against

MAURICE DOUMMAR, individually and as Committee of TOUFIC DOUMMAR, CLAIRE BERNY, individually and as Committee of TOUFIC DOUMMAR, and RELIANCE INSURANCE COMPANY,

Appellees.

From the Circuit Court of the City of Norfolk
Clyde H. Jacob, Judge

Upon the petition of Toufic Doummar, an incompetent, who complains by his duly appointed next friend, Habib Doummar, an appeal is awarded him from a decree entered by the Circuit Court of the City of Norfolk on the 3rd day of January, 1968, in a certain chancery cause then therein depending, wherein the said petitioner was plaintiff and Maurice Doummar, individually, etc., and others were defendants; no bond being required.

RECORD

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* * * * *

This cause came on this day to be heard on the Bill of Complaint, the defendants' special plea of *res adjudicata,* the original record of the Circuit Court of the City of Virginia Beach, Virginia, the evidence taken *ore tenus,* and was argued by counsel.

UPON CONSIDERATION WHEREOF, it appearing to the Court from the above record and evidence that in a prior suit pending in the Circuit Court of the City of Virginia Beach, Virginia, the complainant and defendants, Claire Berny and Maurice Doummar, as committees of Toufic Doummar, an incompetent, and as individuals, parties to this suit, were parties; that the same issues and questions raised, and all other matters asserted, in this suit, including the validity of the lease involved in this suit, were raised and asserted, or could have been raised and asserted, in the aforementioned suit pending the the Circuit Court of the City of Virginia Beach, Virginia, wherein the parties to this suit and their privies were parties; that said Circuit Court of the City of Virginia Beach, Virginia, was a court of competent jurisdiction over the subject matter and the page 45 } parties; that said Circuit Court of the City of Virginia Beach, Virginia, on a trial of the aforementioned suit on the merits, entered a final decree therein upholding the validity of the above lease and determined and adjudicated all other issues and questions raised, or that could have been raised, in said suit, in favor the the defendants, Maurice Doummar and Claire Berny, as Committees of said Toufic Doummar, and as individuals, by reason whereof the questions and issues raised, and matters asserted, in this suit, have been previously adjudicated by a court of competent jurisdiction over the subject matter and the parties, and said decree is binding on all parties to said suit and their privies.

The Court doth, therefore, ADJUDGE, ORDER and DECREE that all issues and questions raised, and all matters asserted, in this suit, have been previously finally determined, and adjudicated on the merits by a court of competent jurisdiction and are now *res adjudicata,* whereupon the Court doth further ADJUDGE, ORDER and DECREE that the defendants' special plea of *res adjudicata* be, and it hereby

is, sustained, and that the Bill of Complaint be, and the same hereby is, dismissed, and that the complainant pay the costs, to which action of the Court the complainant excepts; and it is further ordered that the individual defendants be and they hereby are permitted to withdraw their Motion to Dismiss and Demurrer heretofore filed without prejudice.

Enter Jan. 3rd, '68.

C. H. J.

We ask for this:
Herman S. Sacks, p.d.

Seen and excepted to:
H. Lee Kanter, p.q.

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

Pursuant to the Rules of the Supreme Court of Appeals of Virginia, Rule 5, Section 4, the complainant in the above-styled cause hereby gives notice of intention to apply to the Supreme Court of Appeals of Virginia for a Writ of Error to the judgment of the Circuit Court of the City of Norfolk, Virginia, entered January 3, 1968, for the defendants in the above-styled cause; and the complainant hereby designates as the Assignments of Error in this cause, the following, to-wit:

1. The Court erred in sustaining defendants' special plea of *res adjudicata* and dismissing the Bill of Complaint.

Respectfully,

TOUFIC DOUMMAR, an Incompetent, who complains by his duly appointed next friend, HABIB DOUMMAR

By H. Lee Kanter
Of Counsel

* * * * *

page 3 }

* * * * *

Stenographic transcript of the testimony introduced and proceedings had upon the trial of the above-entitled cause in said Court on December 22, 1967, before the Honorable Clyde H. Jacob, Judge of said Court.

APPEARANCES: Messrs. Kanter and Kanter (Mr. H. Lee Kanter), attorneys for the complainant.

page 4 } Messrs .Sacks, Sacks and Kendall (Mr. Herman A. Sacks and Mr. Allan D. Zaleski), attorneys for the respondents.

The Court: Everyone who is going to testify in this case stand up and hold up your right hand.

(All witnesses were called up and first duly sworn.)

The Court: If counsel for the plaintiff wishes to make an opening statement you may do so.

Mr. Kanter: Excuse me, Your Honor. This matter comes on on Mr. Sacks' motions this morning. I don't know whether Your Honor remembers this case, or not.

This is a suit in which Your Honor appointed Mr. Habib Doummar as next friend of his father who had been adjudged incompetent by Your Honor in 1960 to bring a suit
page 5 } wherein there was a conflict of interest between the incompetent and Mr. Doummar's brother and sister, who are the committees of this man.

Suit has been instituted. It stands on my Bill of Complaint in which it is alleged, Your Honor, that a lease dated November 16, 1959 for very valuable property on Atlantic Avenue in Virginia Beach that was owned by the old man, who is in the Municipal Hospital now, was the paper that on which it was written was not in fact manufactured until 1963, three years after this man had been adjudged incompetent, and that, therefore, that the $100.00 a month lease which destroyed this very valuable piece of property is a nullity.

Now, Mr. Habib Doummar as next friend of his father under Your Honor's appointment has brought the suit. Mr. Sacks has filed, Your Honor, several pleadings today on which we are before the Court.

The first pleading that he filed was a motion to dismiss alleging that Your Honor's order appointing this man as next friend was void because he had no notice of it.

page 6 } The second pleading that he filed was a demurrer saying that it is insufficient at law. There is no specific grounds.

The third pleading that he filed was on behalf of the defendant, Reliance Insurance Company, which was the bonding company that gave bond for these committees just saying that my client has no cause of action against it.

And the fourth pleading, Your Honor, and on which the evidence will be taken today, is a special plea of *res judicata* that Mr. Sacks has filed claiming that we are estopped from this suit because of prior litigation in the Circuit Court of the City of Virginia Beach. This is the plea on which the evidence will be taken.

This gentleman is a deputy clerk, Your Honor, from Mr. Fentress' office. He has the record from the prior proceedings which will be made part of these proceedings.

And Mr. McPhaul was counsel for Mr. Doummar in the prior proceedings. Mr. Glasser is the guardian *ad litem*, Your Honor, for the incompetent in the prior proceedings.

And, that is the nature of the hearing before the Court today. Since they are Mr. Sacks' pleadings, of

page 7 } course he would proceed, and he has the burden of carrying his plea.

The Court: And should it be sustained the case would be over?

Mr. Kanter: In this Court, sir.

Mr. Sacks: Yes, sir.

The Court: Yes.

Mr. Sacks: If Your Honor please, in 1960, young Doummar and his sister were appointed committees for the father in this court. They gave the bond and Mr. Doummar then left certain—

Mr. Kanter: Excuse me, Mr. Sacks. Let me ask you this, sir, and whatever suits you is all right with me.

Your Honor, I presume that Mr. Sacks does not intend to introduce any further evidence on his pleading.

Mr. Sacks: Oh, no, no, no.

Mr. Kanter: You do not, sir?

Mr. Sacks: No. And you can't either.

Mr. Kanter: Well, I have authority that I can. But let me say this to you. Do you want to proceed first by putting—

Mr. Sacks: Let me make my statement, Mr. Kanter, please.

Mr. Kanter: Go ahead.

page 8 } Mr. Sacks: Mr. Doummar left certain personal property, a lease and a little real estate in Virginia Beach. One was a premises and occupied by the son, and unimproved lots. The committees used up all of the personal property for the benefit of their father and they contracted a debt with the hospital for about $2,000.00. So, there were no funds; therefore the real estate had to be sold. So, suit was brought in the Circuit Court of the City of Virginia Beach to sell the property.

The Court: To sell the property of the person under this?

Mr. Sacks: Yes, sir, some real estate.

Mr. Doummar, the plaintiff here, was then represented by Mr. Broyles of Brydges and Broyles. They filed an answer, and their objection was that the property should not have been sold.

The Court: Excuse me, Mr. Sacks. The purpose of that suit was to turn the real estate into cash to take care of the incompetent?

Mr. Sacks: Of the incompetent.

page 9 } So, their contention was that the committees had not accounted for the personal property, that the lease was an invalid lease, that the property was worth more than that, that if they rented the property out there would be enough rent to take care of the incompetent.

The matter was referred to P. B. White as Commissioner in Chancery, and one of the issues was whether or not there was proper accounting; whether or not it was necessary to sell the property to support the incompetent.

After the first hearing, Mr. Doummar, the plaintiff here, had suggested that he wanted the original lease produced in evidence so the case was continued. At the second time he appeared without counsel. They had a very long discussion there. It was continued again. And the third time he appeared with Mr. McPhaul. But before then, Mr. McPhaul had made a motion before Judge Kellam to declare the lease void under certain statutes because it was made with an incompetent and could not be renewed. But it didn't apply to this case and Judge Kellam agreed with me that the lease was in issue in the case before him and to be tried in that case, so we appeared the third time. Mr. Doummar, the plaintiff here,

page 10 } had brought a handwriting expert from Richmond and that man had the lease probably thirty minutes in the anteroom, and when he came back he didn't put him on the stand—at least he didn't introduce it in evidence, we assume because the lease was genuine, otherwise he would have put him on.

Finally, his report was that there was no personal property and the income was not sufficient to support the incompetent and therefore the property should be sold.

Mr. McPhaul filed exceptions, and one of the main grounds was he said that the Commissioner erred in not declaring the lease a nullity. There was argument before Judge Kellam on the exceptions and Judge Kellam said he would take it under advisement. And on it, Mr. McPhaul says this:

"That the Commissioner erred in recommending the sale of the property which is the subject of this suit;

"That the Commissioner erred in finding that said sale would promote the best interests of Toufic Doummar, incompetent:

"That the Commissioner erred in failing to find that the lease between the incompetent and his committee
page 11 } dated November 16, 1959, for 1814-1816 Atlantic Avenue is a nullity and that realization by the incompetent's estate at the fair rental value therefor would render the proposed sale unnecessary."

Judge Kellam, before he entered the decree, gave his opinion in a letter in which he says that he read all the papers, read the lease, and that the Commissioner's report would be sustained and he ordered the property sold setting in the decree that the incompetent had no estate, no personal estate out of which he would be supported, dated October 17, 1966, a letter to each counsel and to the guardian *ad litem*:

"I have read the pleadings, the depositions, the Commissioner's report and exceptions thereto, the lease and report of the Committees filed with the Commissioner of Accounts, as well as inspected the other exhibits in this case. After a consideration of the whole matter, I am of the opinion the exceptions should be overruled and the report confirmed.

"The proposed decree has been endorsed by Mr. Sacks, as well as Mr. McPhaul, with Mr. McPhaul's exceptions noted. However, before entering it, I believe it should be
page 12 } endorsed by the guardian *ad litem*. I am, therefore, enclosing the decree to Mr. Glasser for his endorsement with the request that he return it to me."

And his decree says this:

"This cause came on this day to be heard upon the papers formerly read, upon the report of P. B. White, Commissioner

in Chancery filed Monday, September 19, 1966, upon the exceptions to said Commissioner's report filed by the defendant Habib E. Doummar, the answer of the complainants and defendants Claire Berny and Maurice Doummar to said exceptions, and was argued by counsel.

"It appearing to the Court that the findings of said P. B. White, Commissioner in Chancery, are proper, the exceptions to said report filed by defendant Habib E. Doummar are herewith overruled and said report is hereby approved and confirmed.

"And it further appearing to the Court that all proper parties are before the Court; that defendant Toufic Doummar, an incompetent, is the owner of the unimproved property involved in this suit which is described as Lots Nos. 10, 12, 14 and 16 in Block 12 on the plat of Shadow
page 13 } Lawn Heights, Virginia Beach, Virginia, and recorded in the Clerk's Office of the Circuit Court of Virginia Beach, Virginia; that the said Toufic Doummar, incompetent, now has no personal funds out of which to pay for his support, maintenance and upkeep; that his present income is insufficient to properly support and maintain said Toufic Doummar; that he is now indebted to Norfolk Community Hospital for his maintenance and support and he is also indebted to the Committees for money they advanced for his support; that it is, therefore, necessary to sell the above mentioned unimproved real property belonging to said Toufic Doummar in order to pay his said debts and for his support and maintenance and it will be to the best interests of said Toufic Doummar that the aforementioned unimproved real property be sold for that purpose:

The Court doth, therefore, adjudge, order and decree that the aforementioned unimproved real property specifically set out and described in the Bill of Complaint, and as above set out and described, be sold by the Court in this cause, and the Court doth hereby appoint Thomas F. McPhaul
page 14 } and Herman A. Sacks Special Commissioners to make such sale, either at private or public auction," and so forth.

Now, the sale was had, the case was confirmed and we have been discharged sometime in December or January. Now, no exceptions and no appeal was taken from that decision, although they had four months from the time that the matter was closed.

Now, in March of this year we find Mr. Kanter brought a suit on behalf of Toufic Doummar, incompetent, alleging that

the lease that was involved in this case, and the committees, were all wrong. He wants to be relieved from the decree of that circuit court. I demurred to it on the ground that a person cannot act as next friend unless appointed by the court. Your Honor sustained the demurrer. Then, after that Mr. Kanter gave me notice that he was going to ask for a committee to be appointed to appear before Judge Kellam in the Circuit Court of Virginia Beach asking that court to do what Your Honor refused to do here in the first place.

Mr. Kanter: Your Honor, Your Honor never refused to do that.

Mr. Sacks: He just sustained my demurrer.

page 15 } Mr. Kanter: Yeah, but he said if he didn't I was going to be in trouble in the Court of Appeals, and he was right.

Mr. Sacks: Then, you went to Judge Kellam for the same thing and I filed a plea in abatement, and Judge Kellam held I was correct and had dismissed the case. On the very next day without notice to me, Mr. Kanter came here *ex parte* and, of course, presented Your Honor a state of facts on which you properly did appoint this man as next friend without notice to me and, of course, gave him authority to sue.

Now, I think that is void because they cannot proceed that way under the statute. There is a remedy at law by which a committee can be removed. I am not objecting to that. I then filed a motion to dismiss on the grounds that the notice was not given and it was void because the statute permitting the court to remove a committee expressly provides that notice be given to the other side, which is no more than right.

Then, I filed a plea that the very lease which he is attacking here was a part of the case; it is material and it was decided on. And on May 31, 1966, Mr. McPhaul wrote a

page 16 } letter to Mr. P. B. White, who then got into the case, a copy of which I have, and it says:

"By letter to John Fentress, Clerk of the Circuit Court of the City of Virginia Beach, on May 23, 1966, we requested that our firm be listed as counsel of record for Habib Doummar, a defendant in the above styled matter.

"From our understanding of the proceedings to date evidence has already been taken in support of the allegations of the Bill of Complaint. However, your decision of the matter was to be deferred until production of a certain lease agreement covered by the improvement at 1814-1816 Atlantic Avenue—" the very property involved in this case here.

"—Therefore, on May 27, 1966, we moved the Court for

leave to file supplemental pleas." They wanted to file a plea to attack our lease.

"The Court decided that the matters into which we seek to inquire, to-wit: the lease of November 16, 1959, are already in issue under the Decree of Reference.

"On behalf of our client Habib Doummar, we respectfully request an opportunity to present evidence rela-
page 17 } tive to fair rental value of the Atlantic Avenue property. It would be our contention that Section 8.6-74 of the Code of Virginia, 1950 and the cases decided thereunder, upon the expiration of the original terms of the said lease the tenant could continue in possession of the premises only with the consent of the court. We further contend that such consent is obtainable only after demonstration it is to the best interest of the ward that the tenancy be removed."

Now, he tells the Commissioner he wants to see the original of the lease. Now we have to bring in the lease. That is followed by a subpoena *duces tecum* issued on the affidavit made by Habib Doummar, the plaintiff in this suit, made on July, 1966. Pursuant to that the lease was introduced in evidence, argued and determined.

So, those are the facts in the case, if Your Honor please, and I think that covers the case.

Mr. Kanter: Call the deputy clerk of the Circuit Court of the City of Virginia Beach, please. Take the stand, please, sir.

page 18 } J. CURTIS FRUIT, called as a witness on behalf of the complainant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Kanter:

Q. What is your name, please?

A. J. Curtis Fruit.

Q. And what is your occupation?

A. I am a deputy clerk for the Circuit Court of the City of Virginia Beach.

Q. Mr. Fruit, pursuant to your duties, are you answering a subpoena *duces tecum* issued by the Circuit Court of the City of Norfolk to John V. Fentress, Clerk of the Circuit Court

of the City of Virginia Beach, to produce before this Court the entire record in the case styled Claire Doummar Berny and Maurice Doummar, Committees for Toufic Doummar, an incompetent versus Toufic Doummar, Habib E. Doummar, Henry Doummar, Claire Berny and Maurice Doummar?

A. I am.

Q. Do you have the entire record with you in court today, including the lease allegedly dated November 16, 1959 that was sealed by order of Judge Wahab some months

page 19 } ago?

A. I do; yes, sir.

Mr. Kanter: If Your Honor please, I would like to offer the entire record of the prior proceedings in evidence as Complainant's Exhibit 1 in this proceeding.

The Court: Very well.

Mr. Kanter: And ask Your Honor to have them so marked.

The Court: It will be so marked.

(Received and marked in evidence by the Court as Complainant's Exhibit Number 1.)

Mr. Kanter: I have no further questions of that gentleman.

Mr. Sacks: That is all.

Mr. Kanter: You may come down, Mr. Fruit. Thank you for coming down. I'm sorry to inconvenience you.

Call Mr. Thomas McPhaul.

The Court: This is defendants'?

Mr. Kanter: That is complainant's exhibit.

It is a chancery complainant's exhibit 1.

page 20 } The Court: All right.

Mr. Sacks: If Your Honor please, I don't know what Mr. McPhaul can testify to. It is just a question of what the record shows.

Mr. Kanter: Well, we ought to settle that at this point, Your Honor.

Mr. Sacks basically contends that the issues raised in the case that is now before Your Honor, which is a suit to have declared a nullity the lease allegedly dated November 16, '59, which is sealed in that envelope, on the grounds that the paper on which it was written was not manufactured until 1963, some three years after Your Honor adjudicated this man incompetent, whereas the suit in Princess Anne County, by Mr. Sacks' own admission, was a suit to sell the incompe-

tent's lands, and it is our position, Your Honor, that the best evidence, of course, is the record. It speaks for itself.

But the rule of law in Virginia on a plea of *res judicata* or collateral estoppel is that extrinsic evidence may be used to show the precise points involved and de-
page 21 } termined. This was decided way many years ago in 29 Grat. (70 Va.) 494, *Chrisman's Administrator* v. *Harman.*

Admittedly, that is the best evidence, but you may bring in counsel for the parties, the guardian *ad litem,* and let them testify to the issues involved, because the whole thing that Your Honor has to decide here is whether or not the issue before this Court was in fact litigated down in Virginia Beach.

The Court: Isn't the rule in Virginia as to *res judicata* what you are putting in evidence, what the record shows or you could have put into evidence? That is, not what you did but what you could have done on the pleadings?

Mr. Kanter: I did not mean to begin to argue the law now but Your Honor is perfectly correct.

Let us distinguish, Your Honor, between *res judicata* and collateral estoppel.

The rule in Virginia is that where the parties
page 22 } are the same, the suit is the same, and the issues are the same, you have a case of *res judicata,* and it involves not only what was in fact litigated but what might reasonably have been brought to the attention of the court and litigated in that suit.

Now, contrary to that rule, in Virginia where you have the doctrine of collateral estoppel, that is, where the parties are the same but the suit is different and the issues basically are different, the purpose of the suit that it was brought for, then the rule is only what in fact was litigated and not what might have been litigated. And, Your Honor, I have taken the time to basically research every single case in Virginia. I have prepared a five-page memorandum for the Court, and I want to apologize for the typing, because there are typographical errors. My secretary calls the plea "race *judicata.*" But, at any rate, Judge, the rule in Virginia is pretty clear that if the suit was not for the same purpose—and let me say that Mr. Herman Sacks is a master of it, because there was a case that went to the Supreme Court of Appeals of Virginia in which he was counsel for the appellant.
page 23 } It came out of your Honor's court, and I remember—

Mr. Sacks: It was out of Law and Chancery.

Mr. Kanter: I thought it was in the Circuit Court. But the exact issues came up.

What happened was Mr. Sacks brought a suit for some rent under a lease for one period for monthly payments, and he got a judgment and, basically speaking, when the period rolled around, he brought another suit and, of course, they tried to defend, and the court said the plea was filed *res judicata*, and the Supreme Court of Appeals said clearly, look, it is the same lease, the same issue, the same defendant, and the counsel in the case admitted that. It was just for a different period of time for the rent. And there, our court said *res judicata*. But where you have a different type of suit and a different type of issues, it is not what might have been litigated down there. It was in fact what the court actually litigated, and this court may take extrinsic evidence of the fact which was litigated.

page 24 } Now, in the particular case, Judge, the suit that was brought down in Princess Anne County by Mr. Sacks was a very simple suit. I did not want to take the time, and I will not, to read the pleadings to Your Honor, but the pleadings are to sell the incompetent's lands because he was in the Municipal Hospital without money to pay the hospital and they needed to sell the land to get personalty, nothing about any lease. The Answer and grounds of defense filed by this litigant, one of the brothers, is the same thing, Your Honor: with regard to the sale of the lands and the fair rental value of the property; nothing to do with any validity of the lease.

The Decree of Reference that was entered by Judge Kellam has eleven decrees of reference, nothing at all to do with any validity of this lease, not a scintilla in it.

The report filed by Commissioner P. B. White; not a scintilla; not a word concerning the validity of this lease.

Now, let me tell you why Mr. Sacks ought to be stopped real quick.

Tom McPhaul filed exceptions on behalf of Mr. Doummar, and here is what Mr. McPhaul said in Number 3:

page 25 } "That the Commissioner erred in failing to find that the lease between the incompetent and his Committee dated November 16th, 1959, for 18-14—1816 Atlantic Avenue is a nullity and that realization by the incompetent's estate at the fair rental value therefor would render the proposed sale unnecessary."

And that issue was a very narrow one, Judge. This is a twenty-five-year lease that that son got the old man to sign at a hundred dollars a month for property that should be bringing $500.00 a month. The lease, basically, was a five or ten-year lease with renewal options, and Tom McPhaul properly took the position that when the first term of that lease ran out the committee, as far as his duty should have been, should not have renewed the lease but, of course, the committee and the tenant were the same persons. And that is all that he ever raised.

And let me read to you what Herman did. He filed this Motion to Strike Exceptions to Commissioner's Report, and in Number 2, he says:

"That the validity of the lease referred to in said Exceptions was not in question.

page 26 } He is estopped by his own judicial pleading in which he says this lease was not in issue down in Princess Anne County and, of course, Your Honor, he was sustained in that position. The Commissioner's report was confirmed, the land was sold under order of the court, and the matter of the validity of the lease was not gone into in any event. Mr. Sacks was the one that took that position and he was sustained, and I submit, if nothing else was in the record in this case, the fact that he filed that pleading as counsel in which he says that the valididity of the lease is not at issue is enough to show Your Honor it wasn't in issue in this case. But aside from the record, Judge Jacob, that is before Your Honor, I wanted to produce Mr. McPhaul who was counsel in the case, and produce young Mr. Glasser, who was guardian *ad litem* for the incompetent, to show Your Honor that in fact there was nothing concerning the fact that this lease, that the paper on which it was written was not manufactured until three years later.

I have read all the depositions. I have here a page 27 } certified copy of the depositions for the court. You read the evidence that was taken in the case. It says not a scintilla of evidence in this case that the lease was gone into in any respect. If it is, I want—Mr. Sacks pulled out a letter from Mr. McPhaul's file—I am talking about the record. There is nothing in this record which in any way dealt with that lease, and as a matter of fact, Judge Kellam sustained Mr. Sacks when he filed his pleading that the validity of the lease was not in question.

Now, Your Honor, in order to keep the record entirely straight, I felt, and still feel, it is encumbent on me as counsel not only to place the official record before this court, but to have the extrinsic evidence of Messrs. McPhaul and Glasser to the actual issues litigated, because that is the whole issue before Your Honor. If Your Honor found that the same issue was in fact litigated, then we are out of court. If it wasn't in fact litigated, then we have a right to litigate it before this court where it belongs to be litigated anyway because this court appointed those committees, and I would like to proceed to examine Mr. McPhaul.

page 28 } Mr. Sacks: Are you through?

Mr. Kanter: Yes.

Mr. Sacks: If Your Honor please, Mr. Habib Doummar himself brought the lease in this case—

Mr. Kanter: Take the record, Mr. Sacks, and show His Honor where it is. There is nothing in this record—

Mr. Sacks: Of what?

Mr. Kanter: I want you to show Judge Jacob in that record where either in the Bill of Complaint, the Answer, the referral to the Commissioner, or the Commissioner's report, other than Mr. McPhaul's exceptions which you had stricken on the grounds that the issue of the lease wasn't in issue as to its validity, and Judge Kellam's decree—

Mr. Sacks: Let me finish.

Mr. Kanter: Take the record and show Judge Jacob where it was in issue in this case.

Mr. Sacks: Listen, Judge—

Mr. Kanter: All right.

The Court: You have the right to reply to him, Mr. Kanter.

page 29 } Mr. Sacks: The lease was in fact in issue, on the ground it was a forgery. They brought an expert down here from Richmond, Mr. McPhaul did.

The Court: That was in issue then and ruled on by the court?

Mr. Sacks: Yes, sir, they brought the man from Richmond, an expert.

Mr. Kanter: Now, hold on, Your Honor, I am going to call Mr. Sacks on that.

Mr. Sacks: You weren't there, Mr. Kanter.

Mr. Kanter: Mr. Sacks, I talked to Judge White, I have talked to Judge Kellam. Mr. McPhaul is there under oath. Your Honor, they brought Mr. White, a handwriting expert down from Richmond, Mr. McPhaul did, to look at the lease in the anteroom to see whether or not the signature might

have been forged. Mr. McPhaul did not put him on the stand. He was never before the Commissioner. There is no evidence on it. The issue was not litigated. Mr. McPhaul turned around and sent him back to Richmond and, obviously, the reason he did that is because Mr. White would have gotten on

page 30 } the stand and testified that the signature looked genuine to him. But, Judge, the issue never was raised in the case. There was never any evidence. It was never in the decree of reference. Now, as a matter of fact, only after this was concluded did we find this secret watermark that showed this paper wasn't manufactured until '63, but Mr. McPhaul will testify as to whether or not there was any evidence in this case about forgery.

Mr. Sacks: I don't think they brought the man down here from Richmond to improve the scene of the location. They brought this man down to examine the lease because it was in issue the claim of forgery. That man had the lease for about thirty minutes. We waited for him. Then he presented the lease to Mr. McPhaul and did not take the stand. I would assume that if he had said the signature was a forgery that they would have put him on. The lease was in evidence. It is in the record.

Judge White—

Mr. Kanter: You get the record and show it—

Mr. Sacks: The lease is in evidence.

page 31 } Mr. Kanter: You take the record and show Judge Jacob in the record where this issue was raised.

Mr. Sacks: Judge Kellam says he has read the pleadings and has read the lease. He also makes an order and says that the lease is in issue. Whether I was right or wrong it was in issue in that case.

The Court: I recall.

Mr. Sacks: Mr. Doummar filed an affidavit and said bring that lease in. It is material in this case. What more do you want?

Now, three years later, or last year—this year for the first time, he makes a point that the paper was manufactured three years after the lease was signed. That is novel to me. And he said he wants the lease impounded. I said I have no objection, because we want the lease impounded too.

So, I say this: that everything that is presented in this Bill of Complaint was passed on by the circuit court of Virginia Beach. It held that the Committee accounted for it. The Commissioner of Accounts has okayed the reports annually, and the judge said that the man has nothing that he can be

supported by except the rent and ordered the property sold.

page 32 } Mr. Kanter: Judge, I would like to proceed to put on my evidence through Mr. McPhaul and Mr. Glasser. I think it properly comes before the Court. The Virginia law is very clear. I cited to Your Honor that opinion in which it said extrinsic evidence may be used to show the precise point involved and determined, in *Chrisman, administrator against Harman,* and I would like for Your Honor to hear the testimony, and so I offer it.

The Court: Proceed.

THOMAS F. McPHAUL, called as a witness on behalf of the complainant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Kanter:

Q. All right. What is your name, sir?

page 33 } A. Thomas F. McPhaul.

Q. You are an attorney qualified in the bar of Virginia and the Norfolk-Portsmouth Bar Association?

A. I am.

Q. Mr. McPhaul, were you in fact counsel for Habib E. Doummar during most of, and particularly, the latter part of the stages of the litigation of the case which is shown by the record that has been introduced here today as Plaintiff's Exhibit Number 1; namely, Doummar versus Doummar, et als, in the Circuit Court of the City of Virginia Beach?

A. I was.

Q. Mr. McPhaul, with regard to the issues litigated—and you may—

Can I take the file, Your Honor—

Q. Mr. McPhaul, I am going to start first with the Bill of Complaint. What was the issue raised by the Bill of Complaint in that case of the Committees against Habib Doummar, et als; the purpose of the suit and the issues raised?

Mr. Sacks: I object. The record speaks for itself.

The Court: Objection sustained.

Mr. Kanter: All right.

Thomas F. McPhaul

page 34 } By Mr. Kanter:

Q. Mr. McPhaul, let me ask you this, sir. After the matter was referred to P. B. White, Commissioner in Chancery, did you attend and examine and cross-examine witnesses during those hearings on behalf of Habib Doummar?

A. According to my recollection—I must confess that I haven't had my file until this morning—I attended the third hearing in this case, and I did examine and cross-examine during the third hearing. I was not employed until prior to the third hearing in the case.

Q. All right. During the course of the hearing before the Commissioner under his Decree of Reference, did you or any one else in behalf of Habib Doummar, or any other person present any evidence to the Commissioner concerning the validity of the lease in question for the property on Atlantic Avenue; namely, that it was a forgery, or that the paper on which it was written was not manufactured until after the incompetent had been adjudged by this court as an incompetent?

A. No evidence was presented on those issues. I recall from the depositions that I questioned Maurice Doummar as to whether or not that was his signature; whether it was his father's signature; when it was made, or some-
page 35 } thing of that nature. But no evidence was introduced either on behalf of Mr. Doummar or on Mr. Habib Doummar's behalf, or on behalf of the committees to the issue of forgery or paper printed later.

Q. All right. Now, was that issue ever considered or argued in any way before P. B. White, the Commissioner in the case?

A. The validity of the lease was argued from two standpoints. The first was the statutory argument of 8-16.74, I think, is the appropriate section, that says that a committee cannot renew a lease without the consent of the court. I think from a literal reading of that statute that would have declared the lease invalid, and we argued from that standpoint. We also argued—

Q. You mean, I take it, that there were options to renew in the lease?

A. Yes.

Q. And you took the position that actually a committee could not technically renew a lease without going and getting a court order to do it?

A. That's right. The original term of this lease had expired

prior to bringing the suit and we argued the court—the lease should not have been renewed without the court's permission.

page 36 } Q. Excuse me. Was not the lease actually produced before the court because it was one of the personal assets of the estate?

Mr. Sacks: I object to the leading.
The Court: You're leading.
Mr. Kanter: I'm sorry.

By Mr. Kanter:
Q. What was the purpose of having the lease produced there, Mr. McPhaul?
A. A copy of the lease was in evidence at the time I was employed in the case, and I wanted to see the original lease.
Q. Why had the copy been produced, if you know?
A. I think Mr. Doummar, when he came to the second hearing unrepresented, had requested Mr. White to have the lease introduced and only a copy was presented, and I thought it more proper to have the original in evidence so I subpoenaed the lease.
Q. Was that an asset of the leasehold estate?
A. Definitely.
Q. All right. What was the second technical argument that you made in those proceedings, Mr. McPhaul?
A. Under the terms of the lease the rent was payable on a fixed date every month and there was a provision,

page 37 } to the best of my recollection, in the event the rent was not paid monthly when due the lease should be ended, and we took the fact before Judge Kellam that in one period the rent wasn't paid for some twelve months and technically that should have been a breach and an end of the lease since the committee was dealing with his own ward, and that was the second issue bearing on the lease.
Q. At any time were there any issues concerning either the forgery of the lease or the fact that the paper was not in existence at the time the man was incompetent?
A. We introduced no testimony or evidence of that.
Q. And it was not considered by Commissioner White?

Mr. Sacks: I object to that. Don't testify, sir.

By Mr. Kanter:
Q. Now, when you took exception to the Commissioner's

report, Mr. McPhaul, in Paragraph 3 you again said to the court that the court should declare the lease a nullity. Was that on the same ground that you just recited to Judge Jacob?

A. The same two grounds.

Q. Was there ever litigation or argument or consideration by Judge Kellam of the alleged forgery or

page 39 } nonexistence of the paper on which the lease was written?

A. No, sir, because there had been no evidence to that end.

Q. All right, sir. Now, what plea did Mr. Sacks file in response to your exception on the technical termination of the lease?

A. I think the file will reflect that there was an Answer filed on behalf of Mr. Sacks' client answering the exception I took.

Q. And what position did he take with respect to your exception concerning the fact that the lease should have been terminated because of the technicality?

A. Well, I can find the pleading and read it if you would like.

Q. Well, let me—instead of making you dig through that, let me see if I can find something for you.

Does this refresh your recollection, Paragraph 2 of Mr. Sacks' plea in that case?

(Document shown to the witness.)

A. That's right.

Q. And read the first sentence to Judge Jacob.

A. Paragraph 2 of the motion to strike exceptions to Commissioner's report—

page 39 } Q. Excuse me. This was Mr. Sacks' motion to strike out your exceptions saying that the lease should have been terminated?

A. That is correct.

Q. All right.

A. It is signed by Mr. Sacks.

Q. What is the first sentence of that?

A. "That the validity of the lease referred to in the said exceptions was not in question . . . ."

Q. Did he take that position before Judge Kellam?

Mr. Sacks: Let him read the whole paragraph.

Thomas F. McPhaul

By Mr. Kanter:

Q. All right. Go ahead.

A. "... and if it had been in issue and the Commissioner in Chancery had upheld said lease, he would have been fully supported as to his holding by the uncontradicted evidence that said lease was made on November 16, 1959, between the said Toufic Doummar as the lessor and Maurice Doummar as the lessee, and at the time said lease was executed, the said Toufic Doummar was competent and was legally capable of entering into said lease; that said lease is valid and is binding upon the estate of the said Toufic Doummar."

page 40 } Q. Anything in there about forgery or non-manufacture of paper or anything else?

A. No.

Q. What position did Judge Kellam take with regard to his plea that the lease was not valid?

Mr. Sacks: I object. The record speaks for itself.

The Court: Now, counsel has read, I take it, just what Judge Kellam said.

Mr. Kanter: All right.

By Mr. Kanter:

Q. All right. Now, if you will, is this Judge Kellam's opinion?

(Document shown to the witness for examination.)

A. This is the letter dated October 17th, 1966, to Mr. Sacks, myself, and Mr. Glasser. And it simply says—

Q. All right. If you will read that into the record, please, what Judge Kellam's opinion said.

A. "Dear Sir: I have read the pleadings, the depositions, the Commissioner's report and exceptions thereto, the lease and report of the Committees filed with the Com-

page 41 } missioner of Accounts, as well as inspected the other exhibits in the case. After a consideration of the whole matter, I am of the opinion the exceptions should be overruled and the report confirmed."

He then goes on to say how the decree should be prepared.

Q. All right. At any time before Judge Kellam was the issue of forgery or manufacture of the paper ever argued or mentioned?

A. Not to my knowledge.

Thomas F. McPhaul

Q. Well, you were the one there on behalf of Mr. Doummar, were you not?

A. That is correct.

Q. I show you this paper—

All of which, Your Honor, are contained in Plaintiff's Exhibit Number 1, and for that reason I am not re-introducing these separately.

Q. (Continuing) And ask you if that is the decree entered by Judge Kellam in those proceedings and bearing your endorsement on the order?

(Document shown to the witness for examination.)

A. This is the decree entered on October 20th, 1966, confirming the Commissioner's report.

Q. All right. Read that into the record, please, page 42 } sir.

A. "This cause came on this day to be heard upon the papers formerly read, upon the record of P. B. White, Commissioner in Chancery filed Monday, September 19, 1966, upon the exceptions to said Commissioner's report filed by the defendant Habib E. Doummar, the answer of the complainants and defendants Claire Berny and Maurice Doummar to said exceptions, and was argued by counsel."

Q. Re-read that last one to His Honor. The answer and what?

A. "...the answer of the complainants and defendants Claire Berny and Maurice Doummar to said exceptions, and was argued by counsel."

Q. Was that the pleading in which Mr. Sacks took the position that the validity of the lease was not in issue?

A. That's right.

Q. All right. Go ahead, sir.

A. "It appearing to the Court that the findings of said P. B. White, Commissioner in Chancery, are proper, the exceptions to said report filed by defendant Habib E. Doummar are herewith overruled and said report is hereby approved and confirmed.

"And it further appearing to the Court that all proper parties are before the Court: that defendant Toupage 43 } fic Doummar, an incompetent, is the owner of the unimproved property involved in this suit which

is described as Lots 10, 12, 14 and 16 in Block 12 of the plat of Shadow Lawn Heights, Virginia Beach, Virginia, and recorded in the Clerk's Office of the Circuit Court of the City of Virginia Beach, Virginia; that the said Toufic Doummar, incompetent, now has no personal funds out of which to pay for his support, maintenance and upkeep; that his present income is insufficient to properly support and maintain said Toufic Doummar; that he is now indebted to Norfolk Community Hospital for his maintenance and his support and he is also indebted to the Committees for money they advanced for his support; that it is, therefore, necessary to sell the above mentioned unimproved real property belonging to said Toufic Doummar in order to pay his said debts and for his support and maintenance; and it will be to the best interests of said Toufic Doummar that the aforementioned unimproved real property be sold for that purpose;

"The Court doth, therefore, adjudge, order and decree that the aforementioned unimproved real property specifically set out and described in the Bill of Complaint, and as above set out and described, be sold by the Court in this cause, and the Court doth hereby appoint Thomas F. McPhaul and Herman A. Sacks Special Commissioners to make such sale, either at private or public auction, subject to confirma-
page 44 } tion by the Court, provided that when said Special Commissioners shall sell said property at public auction, they shall do so after advertising said sale and the terms thereof in the Virginia Beach Sun, a newspaper published in the City of Virginia Beach, Virginia, once a week for two successive weeks.

"Before said Special Commissioners shall proceed to advertise the sale of said property and/or to receive private bids, they shall execute a bond with good and sufficient surety in the sum of $3,000.00 according to law." It shows the initials of Judge Kellam, and is dated 10/20/66; the signature of myself, Mr. Sacks and Mr. Glasser.

Q. Was the lands of the incompetent sold pursuant to that decree and disbursement made under order of the court?

A. They were.

Mr. Kanter: Judge, as I said that is all in evidence in that record so I am not putting it in. Answer Mr. Sacks, please, Mr. McPhaul.

Thomas F. McPhaul

CROSS-EXAMINATION

By Mr. Sacks:

Q. Mr. McPhaul, did you have a handwriting expert down to one of the hearings before Commissioner White?

page 45 } A. A handwriting expert by the name of White came from Richmond at my insistence and upon our employment to that hearing. He did not testify.

Q. I understand; I will get to that. Why did you go to the expense of summonsing a handwriting expert to appear before Mr. White?

A. We had subpoenaed the original lease. I wanted to make sure that I had the original lease.

Q. Well, you did question that. You know that Maurice Doummar and his sister were questioning the lease as to the signature of their father; weren't they?

A. I believe the depositions will show that some questions were asked about when it was signed.

Q. Exactly. And you know Mr. Habib Doummar claimed that the lease was a forgery; didn't you know that?

Mr. Kanter: I am going to object to what he claimed. It was what was in the decree of reference; what was before the Commissioner; what evidence was taken and what was ruled on. And what he may have claimed has turned out to be true subsequently in this suit, but what he claimed and was not in issue in this case is irrelevant.

Mr. Sacks: Your Honor, I am on cross-examination.

The Court: You brought that subject up.

page 46 } Mr. Kanter: All right, sir.

Mr. Sacks: Yes, sir.

By Mr. Sacks:

Q. Now, didn't you know that Habib Doummar claimed that the lease was not signed by his father?

A. Did he claim to me privately that?

Q. Whether publicly or privately; yes, sir.

A. I have to resist any communications he made to me privately on the grounds of privilege.

Q. Okay. Well, did you know then that the question of the validity of the lease was raised because it wasn't supposed to have been signed by the owner?

A. No. The question of the validity of the lease was *rasied* properly, I believe, on the two points that I mentioned earlier.

Q. Well, you wouldn't have to have an expert to testify to that, would you?

Mr. Kanter: Let him finish, Mr. Sacks.

By Mr. Sacks:
Q. Go ahead and finish.
A. That is all I had to say.

The Court: Go ahead, Mr. Sacks.
Mr. Sacks: Yes, sir.
page 47 } Mr. Kanter: All right.

By Mr. Sacks:
Q. You didn't have to have a handwriting expert to support those points, would you?
A. No, I wouldn't, Mr. Sacks. You might remember that the handwriting expert did not conclude his examination until after the hearing was over.
Q. Wasn't there some question about the introduction of the lease?
A. The lease was subpoenaed to that hearing.
Q. Right. Now, why was the lease introduced in evidence?
A. Well, I think the lease was properly in evidence. It was subpoenaed to the hearing as an asset.
Q. Exactly. All right. Okay.
Now—

(Document shown to opposing counsel for examination.)

By Mr. Sacks:
Q. This is a copy of the letter you wrote to Mr. White, Commissioner in Chancery?

(Document shown to the witness for examination.)

page 48 } A. It is, May 31, 1966.
Q. And you asked that the lease be gone into?

Mr. Kanter: Excuse me. Your Honor, first of all let me say this. I object to that since it is not part of the *oficial* record of the court proceeding, if that is what you are preparing it for. But, Your Honor, what must be ruled on by the court will be what is contained in the record as explained by those participants. I haven't read that letter, but anything in that letter that isn't part of the record wouldn't be proper.

Thomas F. McPhaul

What are you referring to, Mr. Sacks?

By Mr. Sacks:

Q. Did you write this letter to Mr. White, Commissioner in Chancery? It is addressed to him; isn't it?

A. That is correct.

Q. You asked for permission to introduce the lease in evidence, isn't that right?

A. Pursuant to my argument under this 8.6-74, I think it says further.

Mr. Sacks: You asked that the lease be made
page 49 } part of the evidence. I introduce that letter.

The Court: So marked as Respondents' Exhibit 1.

(Received and marked in evidence by the Court as Respondents' Exhibit Number 1.)

By Mr. Sacks:

Q. Now, I hand you an affidavit of Habib Doummar of June 10, 1967 on which a subpoena *duces tecum* was issued for the production of the lease?

A. That's right, this is authentic.

Q. And it says the lease is material in the case?

A. Which says "... said lease constitutes evidence material to the issues raised in said proceedings."

Q. That's right. And pursuant to that he brought the lease; the lease was brought in evidence?

That is correct.

Mr. Sacks: Number 2—Respondents' Exhibit Number 2.

(Received and marked in evidence by the Court as Respondents' Exhibit Number 2.)

By Mr. Sacks:

page 50 } Q. And I think your exceptions to the Commissioner's report are filed into the record.

A. Yes, sir.

Q. And pursuant to that we argued that case right extensively before Judge Kellam, did we not, orally?

A. Yes, sir.

Q. And didn't I take the position since there was no evi-

dence that the lease was not forged, the evidence was that it was signed by Toufic Doummar, that the lease really was not in point then; there was no contradiction about it?

A. We didn't argue forgery, Mr. Sacks, to my knowledge. My recollection might not be as good as yours.

Q. Okay. Now, why didn't you put the expert on the stand?

A. The expert had concluded his examination after the hearing was over. I could have put him on the stand but I didn't think his testimony would be of any value to my side.

Q. In other words if he had told you that the signatures were a forgery you would have put him on, would you not?

A. I would have attempted to.

Q. I see. All right. So you concluded that the signatures were genuine?

page 51 } The Court: Well, if not it would have became your duty to put it on?

The Witness: Excuse me, Your Honor?

The Court: Would it not have been your duty as attorney to put it on under those circumstances, if you thought it was a forgery?

The Witness: Yes, sir, I would have tried to introduce that testimony.

By Mr. Sacks:

Q. Didn't he tell you that the signatures were genuine?

A. His conclusions were that it was not a forgery.

Mr. Sacks: That's all.

By Mr. Sacks:

Q. Now, I think the case was ended when you and I filed a final report and were discharged sometime in January, was it not, of this year?

A. I defer to your recollection.

Q. Yeah. After the Judge entered the decree on October 20th we had the property for sale and had some little time to elapse and we then filed the final report in January?

A. Yes, sir.

page 52 } The Court: Is that all?
You may be excused.

Mr. Kanter: You may come down.

Mr. Glasser, will you take the stand, please.

Stuart D. Glasser

STUART D. GLASSER, called as a witness on behalf of the complainant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Kanter:

Q. State your name.

A. Stuart Glasser.

Q. And are you an attorney qualified to practice in Virginia and a member of the Norfolk-Portsmouth Bar Association?

A. I am.

page 53 } Q. Were you in fact appointed guardian *ad litem* for Toufic Doummar in the proceedings in the Circuit Court of the City of Virginia Beach last year wherein the Committees sought to sell the lands of the incompetent in order to pay his outstanding bills?

A. I was not the first guardian *ad litem* in this case. Mr. Broyles was the first guardian in the case, and I was not appointed until, I believe, by an order entered in the middle of July of 1966.

Q, Well, were you in fact the guardian *ad litem,* and did you attend the hearings before P. B. White, the Commissioner?

A. I remember distinctly attending one hearing. I believe it was in the end of July, the first hearing before Mr. White, although I believe the depositions state that I was there. There is some question in my mind whether I was there, or not.

Q. Mr. Glasser, at any time before the hearings before Mr. White, the Commissioner, was the issue of the forgery—either the forgery or the non-manufacture of the paper on which an alleged lease between the incompetent and his son, who is also Committee, come into issue?

A. (Pause) Mr. Maurice Doummar, I believe, was questioned as to whether he had seen his father sign

page 54 } the lease. I believe that the depositions will speak for themselves on that matter.

Q. Are you referring to the testimony of Mr. Maurice Doummar, the Committee, shown on Pages 23 and 24 of the deposition evidence?

A. Yes.

Q. Will you read that to Judge Jacob. And these were ques-

tions, I take it, by Mr. McPhaul to Mr. Maurice Doummar, the Committee, and also the lessee under that lease?

A. These are questions by Mr. McPhaul to Mr. Maurice Doummar:

"How many stores did you rent before November 16, 1959?

"The stores at 1816 Atlantic Avenue. "Question: What rent did you pay for 1817 Atlantic Avenue store. What amount did you pay in October of 1959?

"Answer: $100.00.

"Question: Did you have the lease on this store before this lease was executed in November and you paid a hundred dollars for one store at that time?

"Answer: That is correct.

page 55 } "Question: Mr. Doummar, who drew this lease?

"Answer: I don't know.

"Question: Do you recall this lease, when it was signed, the lease that is in evidence as Defendant's Exhibit 1?

"Answer: My father brought me that lease. We signed it—it was dated *Nuvember* 16, 1959.

"Question: Do you recall when you signed it?

"Answer: In 1959.

"Question: Did you see your father sign it?

"Answer: Yes.

"Question: When did you see your father sign it?

"Answer: On the same date, November 16, 1959.

"Question: Was anyone else present when the lease was signed?

"Answer: My sister was present.

"Question: Where was the lease signed?

"Answer: In the store at 1816 Atlantic Avenue.

page 56 } "Question: Did your sister happen to be at Virginia Beach at that time?

"Answer: Yes.

"Question: She did not leave here?

"Answer: No.

"Question: Where was she living?

"Answer: In Boston, Massachusetts.

"Question: And she was down here in November of 1959?

"Answer: Yes.

"Question: Now, during the term of this lease from November 16, 1959 up to the present have you occupied both stores?

"Answer: Yes, both stores."

Stuart D. Glasser

Q. The ramainder of it goes off into another phase of the accounting, does it not, Mr. Glasser?

A. I believe the next question is who has occupied the stores up until the present time.

Q. All right. Other than that testimony that you just read to Judge Jacob which involved questioning him about the existence of an asset of the estate was there any other evidence presented to the Commissioner in the hearings that you attended concerning the alleged forgery of the lease?

A. I believe that that was the only—those were the only questions that were asked. And if you ask

page 57 } me—are you asking me?

Q. No, I just asked you if they were in fact the questions that were asked that bore on the lease.

A. Those were the questions.

Q. You do remember at a time after the hearings, or following the hearing there was in some anteroom a handwriting expert that Mr. McPhaul had brought down from Richmond, is that correct?

A. I very distinctly remember that.

Q. But that was not put before the Commissioner and not litigated before him, was it?

A. The expert witness was never brought in to testify.

Q. All right. Now, did you attend the arguments before Judge Kellam on the exceptions to the Commissioner's report?

A. I did not.

Q. You did not. So you don't know what argument was made by Mr. McPhaul or Mr. Sacks at that time?

A. I do not.

Mr. Kanter: All right, sir.

Answer Mr. Sacks.

CROSS-EXAMINATION

page 58 } By Mr. Sacks:

Q. Mr. Glasser, Mr. Broyles, who had been guardian *ad litem*, had resigned and you were appointed?

A. That is correct.

Q. And you attended the last meeting which was the third hearing?

A. I believe that is correct; yes.

Q. Do you recall a whole lot of discussion about the introduction of that lease into evidence?

Stuart D. Glasser

A. Yes.

Q. Did you see that lease presented to this handwriting expert?

A. I did.

Q. Well, how long did he have the lease in his possession for examination?

A. Certainly it was half an hour or more.

Q. And after he got through with it, did they put him on the stand?

A. They did not.

Q. And the lease was introduced in evidence?

A. The lease was introduced, I believe.

Q. Yes. Do you remember Mr. Habib Doummar taking the stand and saying that the property was worth $500 a month?

A. I believe he did, yes.

page 59 } Q. Of course, you weren't at that prior hearing?

Mr. Sacks: That's all.

The Court: Stand down.

Mr. Kanter: All right, you may come down.

Now, Your Honor, I want to read this to the Court because this is the guts of the law. Your Honor, I put a copy in of my memorandum. If you will look at Page 3, Your Honor:

"The Virginia Supreme Court has, on several occasions, taken the opportunity to compare and explain the difference between *res judicata* and collateral estoppel . . ."

The Court: Yes.

Mr. Kanter: "In *Kemp* v. *Miller,* 166 Va. 661, 186 S.E. 99, the first action was for specific performance regarding a certain land sale. The subsequent action was to recover amounts expended for taxes and insurance pursuant to the land sale agreement. A *res judicata* plea was filed and overruled by the trial court. The trial court's ruling was affirmed on appeal and at 186 S.E. at 103, the Court made the following statement:

"When the second suit is between the same
page 60 } parties as the first, and on the same cause of action, the judgment in the former is conclusive of the latter . . ." Now, Judge, that was the cause of action to sell the excess lands. This is a cause of action to declare this lease a forgery.

"... the judgment in the former is conclusive of the latter, not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings..." And there were, of course, no issues at all in this case involving this forgery in the pleadings.

"...or as incident to or essentially connected with the subject matter of the litigation ...." Which again is not in this case.

"As to such matters, a new suit on the same cause of action cannot be maintained between the same parties."

" 'This doctrine does not apply, however, where the second action between the same parties is upon a different claim or demand. In all cases, therefore, where it is sought to apply estoppel of a judgment rendered upon one cause page 61 } of action to matters arising in the suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the *orignal* action; not what might have been thus litigated and determined. Only upon such matters as the judgment conclusive in another action.' "

Now I want to read you this. Take the last case, which is the closest case in Virginia that I could find. I have not read you the whole memorandum; it is lengthy. But every case is in there.

Here is a case, Judge, in which there were two wills probated at the same time, and it was a suit to sell some lands just like in this case. Here is what Justice Miller said, and he wrote pretty good opinions in 1950. He said:

"The testatrix's testamentary capacity was not an issue in prior proceedings to have the testatrix adjudged insane and a committee appointed for her, and neither judgment in a lunacy proceedings nor judgment in a subsequent chancery suit to sell the testatrix's land to make payment of her indebtedness in which one made as chief beneficiary page 62 } in the will executed by the testatrix became a party by filing a claim for services rendered testatrix did not estop beneficiary from offering the will to probate."

It is the identical case. In this case, Judge, they brought suit to sell testatrix's lands because they did not have enough assets to pay the debts of the estate and they went ahead and

did it. Then subsequently they appealed from the probate ruling of the Clerk's Office, and the issue was raised in that case that they were collaterally estopped *res judicata* from trying this issue as to her testamentary capacity, whether or not the court had to decide whether the two wills were good or bad wills.

What do we have in this case. We have a suit to sell the lands of the committee. The identical type of situation is here. And in my second suit what issue am I raising. I am saying that Herman Sacks' clients went ahead and stuck under this old man's nose in the Municipal Hospital in 1963, three years after this man was adjudicated incompetent by this Court, a piece of paper in which he didn't have the capacity to make that lease for $100.00 a month for that valuable
page 63 } property for twenty-five years. It is an identical case as this. And of course what they did was back-date the lease to November '59, sixty days before Your Honor adjudged him incompetent. But fortunately there was a secret watermark, and they will never get around the testimony that that paper did not exist until 1963. Now here is the identical case in which in the second issue I am raising is his capacity to execute that paper in 1963 contrary to the statute which says he cannot make a lease without Your Honor's approval.

As I said when I first stood up before the evidence was put before the Court if, Judge, this had been a suit brought by my client or brought by the committees in order to test the validity of the lease then, Judge Jacob, you are perfectly correct. It would not only be what was actually litigated but what may have been litigated by the parties down there. But once it is a different type of suit, a suit to sell lands, it is not what may have been litigated, it is what was actually decided by the court and, Judge, you can see the logic of the rule of the Supreme Court of Appeals and the logic of the law in that matter.

page 64 } Suppose we had some crazy rule of law that if you had one suit brought down in a court that you would have to watch yourself or have to try twenty-seven collateral issues because you might be collaterally estopped in a second suit. Our Supreme Court of Appeals says that is a lot of nonsense.

Basically, the issues are set up by the pleadings and litigated as to what is in the pleadings, and then unless they can come and prove that the thing was actually determined, the forgery or the falsification of the date of this lease, unless they can prove that that was in fact litigated, then

my client is not collaterally estopped when he brings a suit to have that direct issue determined in this court, where committees were appointed and the court appointed him as next friend to bring this suit primarily because there is a conflict between the committees and the incompetent, and I submit respectfully to Your Honor that we are not collaterally estopped, that the record speaks for itself.

The testimony of Messrs. McPhaul and Glasser indicate clearly that before Commissioner White and be-
page 65 } fore Judge Kellam there was no testimony and no litigation of the alleged forgery of the lease.

Yes, as Mr. McPhaul said, if that handwriting expert had gone with him, he would have tried to bring it in issue, but it was never raised in the pleadings and was never made an issue in the case. If in fact he had put it in issue and it had been determined by the court, we would be collaterally estopped here. But it was never litigated there so we are entitled to litigate it in this court before Your Honor. That is our position.

Mr. Sacks: If Your Honor please, this looks to me like Hornbook law. Mr. Kanter cited the case that I was in—

The Court: The Cumbley case

Mr. Kanter: That rent case that I mentioned, Judge Jacob. No, he wasn't in the Chumbley case.

Mr. Sacks: No, but he didn't read Judge Whittle's opinion, and here is what Judge Whittle says—

The Court: Is that cited in Mr. Kanter's memorandum?

Mr. Sacks: Is that in your memorandum?

page 66 } Mr. Kanter: His rent case, Your Honor. Yes. If Your Honor will look on the very last page, Judge, the second paragraph, I said "Herman Sacks may rely on the case of *Stores Building Corporation* v. *Conover*." I cited Herman Sacks' case in there.

Mr. Sacks: You never cited it.

Mr. Kanter: I put it in there because I expected Mr. Sacks would argue it.

Mr. Sacks: Judge Whittle said that:

"The instant case is between the same parties involved in the first case, it covers the same subject matter, and a final decision (in the first case) was rendered by a court of competent jurisdiction. Under these circumstances the question is *res judicata* and should not have been in controversy in the instant case. The only difference between the two cases is that the rents involved covered different periods of time.

"It is well settled in this jurisdiction that if an issue is

presented in a subject suit between the same parties in which it is shown to have been determined in a former one the question is *res judicata,* although the action were based upon different grounds, or tried on different
page 67 } theories, or instituted for different purposes and seek different relief."

Now here is a case which is not a case where they are bringing a suit to sell the lands of the incompetent. We only sell the land if he did not have any personal property out of which he could be supported. It was before the court and before the Commissioner. That all that these committees had belonging to the incompetent was an income of a hundred dollars rent and the social security. The court wouldn't have ordered the land sold if there had been enough to support him. The court had to go into the question of the lease.

Now they want the lease set aside. Of course if it could have brought more rent then the land wouldn't have to be sold. So therefore the lease was a material part of this case. They wanted to make it a part of the case; they brought it into evidence.

So here is a lease for so much money; it is a forgery; they want to set it aside.

Now, let's get to the forgery proposition. They are not only bound by what they actually proved but what they
page 68 } could have proved. They raised the point. They raised the question whether or not the lease was signed by the owner. They brought a man here from Richmond to examine the lease. If that man would have said that lease was a forgery they would have put him on the stand. They don't want to suffer the disadvantage.

That man examined the lease and he says that it was not a forgery. That issue was there. We don't have to put in the opinion. If it is something that they could have brought and it wasn't brought then they are bound by it.

They could have put the man on the stand and if the man said it was a forgery the court would have sustained it. That was practically in issue as a part of the case.

Now they cannot come in here now and say this was not in issue. All the information they have they had at the time, because if they didn't they would not have brought that man here.

So, therefore, I submit that here is a suit that we had to determine whether the committees made a proper accounting because if they had any money left they would have to use that to support the father. If the income was

page 69 } sufficient then they couldn't have sold the land. The Court said this:

"I have examined all the papers including the lease and I conclude that here is a lease that I say is a good lease. The rent is proper and the man isn't getting enough and so therefore sell the land to support him."

And I submit that the authorities clearly support our contention.

In the case of *Patterson* v. *Saunders, t*he court says this:

"The doctrine of *res judicata* is that a point once adjudicated by a court of competent jurisdiction may be relied on as conclusive upon the same matter as between the parties or their privies, in any subsequent suit in the same court or any other court, at law or in chancery.

"A final decree, whether right or wrong, from which no appeal is taken, is binding on the litigants."

If they were dissatisfied with the *decion* of Judge Kellam they could have taken an appeal. They had after-discovered evidence so they had information that the lease was a forgery or whatever they claimed it is. We don't concede page 70 } that, and they could have brought that in. They didn't, and I say they are bound by the judgment of the Virginia Beach court.

Mr. Kanter: Judge, the only short reply I have to Mr. Sacks is that the language that he read from Justice Whittle—

The Court: I don't think you have to reply.

Mr. Kanter: Oh, all right, sir.

The Court: The Court is of the opinion that Judge Kellam cleared the decks for this litigation. The Court takes Mr. Sacks' view of it that it is *res judicata.*

Mr. Kanter: Your Honor, I respectfully except to the Court, and we note an appeal.

The Court: It is not necessary to except in chancery, but you may except anyhow.

Mr. Kanter: Yes, Your Honor.

Mr. Sacks: I will draw the decree.

Mr. Kanter: And Your Honor, I take it, dismisses the Bill?

The Court: That's right.

Mr. Kanter: All right, sir. And we except to that, too, please.

(Whereupon the Court adjourned.)

page 71 } JUDGE'S CERTIFICATE

I, Clyde H. Jacob, Judge of the Circuit Court of the City of Norfolk, Virginia, who presided over the trial of the case of Toufic Doummar, an incompetent, who complains by his duly appointed next friend, Habib E. Doummar, complainant v. Maurice Doummar, individually and as Committee of Toufic Doummar, and Claire Berny, individually and as Committee of Toufic Doummar and Reliance Insurance Company, respondents, on December 22, 1967, do hereby certify that the foregoing is a true and correct transcript of the trial of said cause, including all of the evidence adduced, the exhibits offered in evidence and refused, as well as all of the objections to the evidence or any part thereof *offerred,* admitted, rejected or stricken out, together with all motions and objections of the parties, all rulings of the court thereon, and all exceptions of the parties thereto, together with all other incidents of the trial of the said cause.

As to the original exhibits introduced in the evidence as shown by the foregoing report, to-wit: Complainant's Exhibit 1, and Respondents' Exhibits 1 and 2, which have been initialed by me for the purpose of identification, it is agreed between the attorneys for the complainant and the

page 72 } attorneys for the respondents that they shall be transmitted to the Supreme Court of Appeals of Virginia as a part of the record in this case in lieu of certifying to the said court copies of said exhibits.

I further certify that this certificate has been tendered to and signed by me within the time prescribed by Section 8-330 of the Code of Virginia for tendering and signing bills of exception and certificates of record, and that reasonable notice in writing has been given to the attorneys for the respondents of the time and place at which said certificate has been tendered.

This record was tendered to me on the 7 day of Feb., 1968.

Given under my hand this 7 day of Feb., 1968.

Clyde H. Jacob
Judge of the Circuit Court of the
City of Norfolk.

page 73 } CLERK'S CERTIFICATE

I, W. Robertson Hanckel, Clerk of the Circuit Court of the City of Norfolk, State of Virginia, do hereby certify that the foregoing is a true and correct copy of all the testimony, ex-

hibits and other incidents of the trial of the case of Toufic Doummar, an incompetent, who complains by his duly appointed next friend, Habib E. Doummar, complainant v. Maurice Doummar, individually and as Committee of Toufic Doummar, and Reliance Insurance Company, respondents, together with the original exhibits therein referred to, duly initialed and authenticated by the Judge who presided over the trial of the said cause, were lodged and filed with me as Clerk of said court on the 7th day of February, 1968.

W. R. Hanckel
Clerk of the Circuit Court of the
City of Norfolk, Virginia.

By Virginia Manning
Deputy

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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