

166-61 992

Record No. 1618

In the
Supreme Court of Appeals of Virginia
at Richmond

W. J. COULTER,
Plaintiff in Error,

v.

J. A. GILLIO,
Defendant in Error.

FROM LAW AND EQUITY COURT, PART TWO, OF CITY OF RICHMOND

“The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements.”

The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

166 Va 61

IN THE
Supreme Court of Appeals of Virginia
AT RICHMOND.

Record No. 1618

W. J. COULTER, Plaintiff in Error,

versus

J. A. GILLIO, Defendant in Error.

PETITION FOR WRIT OF ERROR AND *SUPERSEDEAS*

*To the Honorable Chief Justice and Associate Justices of the
Supreme Court of Appeals of Virginia:*

Your petitioner, W. J. Coulter, respectfully represents unto this Court that he is aggrieved by a judgment entered against him in favor of the defendant in error by the Law and Equity Court of the City of Richmond, Part Two, on the 25th day of July, 1934. (MS. R., p. 12.)

J. A. Gillio instituted an action against your petitioner, W. J. Coulter, before the Civil Justice in the Civil Justice Court of the City of Richmond alleging that W. J. Coulter was indebted to him upon a claim of Nine Hundred Sixty Dollars and Seventy-nine Cents (\$960.79) alleged to be due said J. A. Gillio from said W. J. Coulter by damages, with interest from August 14, 1933. (MS. R., p. 1.)

Judgment was entered in favor of J. A. Gillio, defendant in error herein, and W. J. Coulter, plaintiff in error herein, noted an appeal to the Law and Equity Court of the City of Richmond, Part Two.

STATEMENT OF FACTS.

The plaintiff in error was, and still is, the President and a director of the Broad Street Amusement Corporation, which corporation owns and operates Tantilla Gardens. (MS. R., p. 60.) He was also the owner of all of the stock of the corporation. Prior to December 6, 1932, the real estate, together with all equipment, etc., of Tiny Town Amusement Centre and Tantilla Gardens stood in his name. During December, 1932, Mr. Coulter conveyed the real and personal property, known as Tantilla Gardens, or Tiny Town, to the Broad Street Amusement Corporation (MS. R., p. 61), and on December 19, 1932, the corporation executed a deed of trust to T. Justin Moore and Harold S. Bloomberg, Trustees, securing the principal sum of Forty-five Thousand (\$45,000.00) Dollars and interest, which deed of trust, together with the deed of bargain and sale above referred to, was duly recorded in the Clerk's Office of the Chancery Court of the City of Richmond. (MS. R., p. 62.) After this conveyance was made all of the stationery of Broad Street Amusement Corporation, 3817 West Broad Street, Richmond, Va., bore the following words: "Tiny Town Amusement Centre, operated by Broad Street Amusement Corporation." (MS. R., p. 62.) This style of stationery was in use in June, 1933. (MS. R., p. 63.)

Prior to January 15, 1933, an agreement was entered into by and between the plaintiff in error and the defendant in error regarding the operation of the drink and lunch counter at Tantilla Gardens. (MS. R., p. 49.) According to the evidence of the plaintiff in error (MS. R., p. 49), Mr. George Dewey Gilbert, J. A. Gillio and W. J. Coulter were present at Mr. Gillio's place of business when the deal was consummated and the complete and final terms were agreed upon. This took place approximately June 8, 1933, about 8:00 o'clock P. M., and J. A. Gillio's place, where this oral contract was made, is located about eight blocks west of Tantilla Gardens on Broad Street. (MS. R., p. 50.)

According to the testimony of Mr. Gilbert, who was present with Messrs. Gillio and Coulter at the time and place aforesaid, the following conversation was had (MS. R., pp. 50-52):

"A. The conversation started with reference to Mr. Gillio taking over the concession at Tantilla Gardens. The concession consisted of soft drinks and sandwiches. Mr. Gillio said he was very desirous of getting the place. In fact, I think some reference was made to the fact that Mr. Gillio wanted it before.

“By Mr. Williams: I object.

“By the Court:

“Q. Do you know of your own knowledge?

“A. No, sir. Mr. Gillio said he would be very anxious to get the place and would accept it at any kind of proposition. Mr. Coulter said, ‘Well, I think you would possibly make me a good man, and there is an opportunity for both of us to make some money, provided the place is operated properly’. Mr. Gillio asked what rent he wanted. Mr. Coulter said he would not rent the place, because he would not know what to ask for rent. In the event the place went over large it would not be on a rent basis, and in the event it did not go over Mr. Gillio would not be tied up in a lease. Therefore, he thought the best proposition was for Mr. Gillio to furnish such equipment as necessary at that time. Mr. Coulter said, ‘I have about \$5,000 worth of equipment there now, but it will be necessary to add some few things in order to open. You furnish those things and we will open. We will pay all expenses, and we will divide all profits’. Joe said ‘That suits me all right. I will accept the proposition’. Mr. Coulter said, ‘The reason I don’t want to go in a lease with you is, in the event you do not suit me I can get rid of you, and if you want to get out you can get out. The only thing that will be necessary will be for us to take an inventory and settle up’.

“Q. Was anything said about putting the agreement in writing?

“A. No; Joe said, ‘That suits me’.

“Q. Was anything said about a term of one year?

“A. No, nothing said about any time. Mr. Coulter said it was his idea—Mr. Gillio never advanced any idea about anything—Mr. Coulter said, ‘In the event you don’t make any money I don’t want to tie you up in a lease, something you cannot pay. In the event you don’t suit me I can take over the place and pay you for the equipment you have paid for, my half of it, and in the event it don’t suit you, you can get out at any time you want to’.”

According to the testimony of W. J. Coulter, who was present at the time and place aforesaid (MS. R., pp. 70-72), the following is a summary of what was stated:

That an oral agreement was entered into between Mr. W. J. Coulter and Mr. J. A. Gillio wherein the latter was to operate the drink and lunch counter at Tantilla Gardens as a trial proposition on a percentage basis; that Mr. Gillio made men-

tion of a rent contract and wanted to know how long the agreement would continue. Mr. Coulter stated that it was impossible to enter into an agreement for any definite term for the reason that it was a new enterprise and he did not know what rent to charge. A percentage basis of an equal division of the profits was agreed upon, Mr. Coulter to furnish about Five Thousand (\$5,000.00) Dollars' worth of the equipment, which was on the place, and whatever equipment was further needed Mr. Gillio was to buy, and the purchase price was to be paid for out of the proceeds taken in, and at the end of each month Mr. Gillio and Mr. Coulter were to divide the profits on a fifty-fifty basis. Mr. Coulter further testified that he and Mr. Gillio agreed that the arrangement could be terminated at any time, and that he stated to Mr. Gillio that he did not want to tie himself up with a lease, and that he wanted to be able to dispense with Mr. Gillio's services at any time, to which terms Mr. Gillio made no objection. Mr. Coulter repeated to Mr. Gillio that if things went bad with Mr. Gillio that Mr. Coulter could terminate the arrangement at any time. Mr. Gillio began operating on June 15, 1933, and continued for a period of about two and one-half months when Mr. Gillio was given notice that Mr. Coulter wished to terminate the arrangement. This notice was given on Saturday evening and the following Sunday a meeting took place at Tantilla Gardens for the purpose of taking inventory and settling the partnership arrangement.

Among those present at this conference were Messrs. Gillio, Coulter, Art Brown, Tom Leech, Hughes and Gilbert. At this meeting a proposition was made on behalf of Mr. Gillio to Mr. Coulter that the former wanted Fifteen Hundred (\$1,500.00) Dollars for good will, plus inventory. This proposition was refused by Mr. Coulter and the amount was reduced to One Thousand (\$1,000.00) Dollars and inventory. This, in turn, Mr. Coulter refused and Mr. Hughes, a friend of Mr. Gillio's, spoke up and said that the least that Gillio ought to have was Five Hundred (\$500.00) Dollars, plus inventory. Mr. Coulter refused to accept the proposition.

According to the understanding entered into between the plaintiff in error and the defendant in error, the plaintiff in error was liable to the defendant in error for only the sum of Four Hundred Sixty Dollars and Seventy-two Cents (\$460.72), which amount the plaintiff in error tendered in the grounds of defense filed in the Civil Justice Court of the City of Richmond. (MS. R., pp. 6 and 7.) The next morning Mr. Snyder (Mr. J. A. Gillio's bookkeeper) called at Mr. Coulter's office and Mr. Coulter tendered him a check for Four Hundred and Sixty (\$460.00) Dollars, the amount which

Coulter was indebted to Gillio under the terms of the agreement, and Mr. Snyder refused to accept said check. (MS. R., p. 76.)

The evidence of Mr. J. A. Gillio, defendant in error, was to the effect that he and Mr. Coulter entered into an arrangement in reference to the drink and lunch counter at Tantilla Gardens on a fifty-fifty basis, that Gillio's testimony was further to the effect that he was to have a contract for the concession on that basis for one year. This latter statement was denied by Messrs. Gilbert and Coulter. (MS. R., pp. 51 and 72.)

The sole question in the case is the item of Five Hundred (\$500.00) Dollars above referred to. Mr. Gillio contended that he was entitled to this item in addition to the inventory amount of Four Hundred Sixty Dollars and Seventy-nine Cents (\$460.79), for the reason that he understood that he was to have this concession on a fifty-fifty basis with Mr. Coulter for one year, and that by reason of the fact that Mr. Coulter terminated this agreement prior to that time he was entitled to this Five Hundred (\$500.00) Dollars as good will of the concession. On the other hand, Mr. Coulter contended, which contention was borne out by Mr. Gilbert, that this drink and lunch counter granted to Mr. Gillio was one terminable at will and was to be operated on a fifty-fifty basis, and that either party could terminate it at any time, and if and when done the only thing that would be necessary for Gillio and Coulter to do was to take an inventory and settle up.

BOTH PLAINTIFF AND DEFENDANT HAD DIFFERENT THEORIES OF THE CASE.

From the foregoing, it is exceptionally plain that, in addition to there being a conflict in the evidence of the parties hereto, the law regarding said conflict of the evidence was entirely different as applicable to the statement of facts of the plaintiff and defendant. If the defendant's evidence was believed to be true by the jury, then it would be unquestioned that the law regarding same as embodied in Instructions C and D, which were refused, should have been given as offered. The plaintiff introduced evidence, and the court gave Instruction No. 1 in support of the plaintiff's theory. The defendant introduced evidence wholly different in fact from the plaintiff, and which evidence offered by the defendant embraced different phases of the law than that applicable to the plaintiff's case, yet the trial court refused the instructions offered by the defendant supporting the defendant's theory of the case, which instructions correctly stated the

law and was directly applicable and based on the preponderance of the evidence as was offered by the defendant.

ASSIGNMENT OF ERROR.

In the light of what has been said above, the trial court granted Instruction No. 1 offered by the defendant in error (MS. R., p. 90), which instruction the defendant in error claimed that he was entitled to in order that his view of the case may be presented to the court under proper instructions. The instruction reads as follows:

“The court instructs the jury that if they believe from the evidence in this case that the plaintiff and the defendant were conducting the business of refreshment stand at the Tantilla and that the defendant agreed to pay \$500.00, and dollar for dollar for inventory to be made by them to the plaintiff for his interest, and that the inventory totaled \$792.79, then you must bring in your verdict for the plaintiff for \$1,292.79 less \$332.00, and admitted credit, or a total of \$960.79.”

In view of the fact that a reading of the evidence will disclose that there were conflicting theories of the case, the plaintiff in error asked for Instructions A, C and D (MS. R., pp. 93, 94 and 95), which instructions the court refused, and which instructions read as follows:

“A.

“The court instructs the jury that as a matter of law when two parties enter into a partnership agreement without indicating when the partnership shall terminate, then the partnership can be dissolved at any time at the will of either party.”

“C.

“The court instructs the jury that if you believe from the evidence that the contract in question could be terminated at any time by either party, then you are instructed that the promise, if made, to pay the sum of \$500.00 in question was without consideration in law and the plaintiff cannot recover said sum.”

“D.

“The court instructs the jury that if you believe from the evidence that the defendant made a new promise to the plaintiff to pay the sum of \$500.00 and the said new promise was

without other consideration than the performance of his existing contract in accordance with its terms, then you are instructed that said new promise is a naked promise without legal consideration therefor and unenforceable.”

It is very apparent that the refusal of the trial court to give Instructions A, C and D, asked for by the plaintiff in error, caused prejudicial error to be committed for the reason that the plaintiff in error was deprived of having the jury instructed on his theory of the case, which theory was fully supported by the law and the evidence appertaining thereto.

If the witnesses for the plaintiff in error were to be believed by the jury regarding the fact that the partnership agreement was entered into without indicating when the partnership should terminate, then the partnership could be dissolved at any time at the will of either party.

“Where no fixed term has been agreed upon for the duration of a partnership, or where no term is fixed by the nature of the business, and it is therefore a partnership at will, any partner may dissolve it at any time without the consent of his copartners, by notice to all the other partners of his intention so to do; * * * .”

47 C. J., Section 758, page 1104, *et seq.*

If the jury believed the witnesses on behalf of the plaintiff in error to the effect that this partnership was terminable at will, then not only did the trial court commit grievous error by refusal to grant Instruction A, offered by the plaintiff in error, but the trial court erred further in refusing to grant Instructions C and D for the reason that had the jury further believed that this drink and lunch counter was terminable at the will of either party, and that according to the testimony of the defendant in error that Mr. Coulter agreed (which Mr. Coulter denied) to give Mr. Gillio the additional Five Hundred (\$500.00) Dollars, included in the judgment, then it is respectfully submitted that this promise to pay the further sum of Five Hundred (\$500.00) Dollars, together with inventory, was without consideration and in no event would the defendant in error be entitled to that additional sum.

For the sake of brevity, attention is respectfully called to Manuscript Record, pages 84 to 88, inclusive. The Manuscript Record at these pages set forth in detail the reasons and the authorities stated to the Court why Instructions A,

C and D, offered by the plaintiff in error, which were refused, should be given.

Special attention is directed to Manuscript Record, pages 87 and 88, wherein the trial court said:

“By the Court: The trouble with these instructions is, while they are drawn from a correct principle of law, they are not applicable to the facts of this case. Had there been only a promise by Gillio to move out of the premises at once, the principles invoked by counsel for the defendant might be applicable, but there were other considerations moving Gillio, according to his theory, to-wit: that he was not only to get out of the premises, but that he was to accept a price to be ascertained for his property on the premises, and the plaintiff's theory is, further, that in consideration of these two acts on the plaintiff's part, the defendant was to pay him the inventory price of the articles referred to and \$500. The several considerations are so interwoven that it is impossible from the evidence to segregate them and say that a part of the consideration emanating from one party was solely applicable to a part of the consideration emanating from the other party.”

Your petitioner respectfully submits that the testimony of Messrs. Dewey and Coulter clearly show that their statements are applicable to the correct principles of law set forth in these instructions.

CONCLUSION.

Your petitioner respectfully submits that Instructions A, C and D, above referred to, correctly state the law, and there is abundant testimony on behalf of the plaintiff in error to support the granting of these instructions. The trial court having refused to grant these instructions, which correctly stated the law and which were supported by the evidence, amounted to nothing more than prohibiting the plaintiff in error from submitting his theory of the case to the jury under proper instructions.

The jury retired to its room after having been instructed on the defendant in error's theory of the case. Although the refused instructions asked for by the plaintiff in error correctly stated the law and were strongly supported by the evidence, nevertheless, the trial court refused to instruct the jury on his theory of the case. No principle of law is better settled than the statement that “where conflicting theories of a case are presented by the evidence, each party is entitled

to have his view of the case presented to the jury by proper instructions, although this may necessitate a statement of converse legal propositions—provided there is evidence to sustain both. * * * ” Volume 1, Instructions for Virginia and West Virginia, Michie, pages 7 and 8, and cases cited.

For the foregoing reasons, your petitioner respectfully prays that he may be granted a writ of error and *supersedeas* to the judgment aforesaid, and that the same may be reviewed and reversed.

Your petitioner adopts this petition as his brief, and avers that on January 2nd, 1935, a copy of same was delivered to Thomas A. Williams, Esq., counsel for Mr. J. A. Gillio, the plaintiff in the court below.

Your petitioner requests that he may be permitted to supplement this written petition by oral statement of the reasons for reviewing the judgment complained of.

A certified copy of the transcript of the record, duly authenticated, as required by law, to the pages of which reference has been made in this petition, is presented herewith.

Respectfully submitted this 2nd day of January, 1935.

W. J. COULTER,
By Counsel.

KIRSH & BAZILE,
Counsel for Petitioner.

The undersigned attorney at law, practicing in the Supreme Court of Appeals of Virginia, does certify that in his opinion there is error in the judgment complained of in the foregoing petition, for which the same should be reviewed and reversed by the Supreme Court of Appeals of Virginia.

ALFRED J. KIRSH.

Received January 2, 1935.

M. B. WATTS, Clerk.

January 23, 1935. Writ of error and *supersedeas* awarded by the Court. Bond \$300.

M. B. W.

RECORD**VIRGINIA:**

Pleas before the Honorable Frank T. Sutton, Jr., Judge of the Law and Equity Court of the City of Richmond, Part Two, held for the said City at the Courtroom thereof in the City Hall on the 7th day of August, 1934.

Be it remembered that heretofore, to-wit: In the Clerk's Office of the Law and Equity Court of the City of Richmond, Part Two, the 14th day of October, 1933: Came the Clerk of the Civil Justice Court of the City of Richmond, Part II, and filed a Civil Warrant of J. A. Gillio, plaintiff, against W. J. Coulter, defendant, which Civil Warrant is in the words and figures following, to-wit:

WARRANT.

City of Richmond, to-wit:

To H. C. Farmer, High Constable of said City:

In the name of the Commonwealth of Virginia, I command you to summon the defendant W. J. Coulter if residing in said city, to appear before the Civil Justice at the Civil Justice Court, Room 416, City Hall, on the 30 day of Aug., in the year 1933, at 9:30 o'clock A. M., to answer the complaint of the plaintiff J. A. Gillio upon a claim of Nine hundred Sixty dollars and 79 cents, alleged to be due said plaintiff from said defendant by damages with interest from Aug. 14, 1933. And do you then and there make return of this warrant and how you executed the same.

Given under my hand this 24 day of Aug. in the year 1933.

J. H. B. PEAY, J. P.

page 2 }

JUDGMENT.

In the Civil Justice Court Part II of the City of Richmond.

6 day of Oct., 1935.

Judgment that the said plaintiff recover of the said defendant the sum of Nine hundred & sixty dollars and 79 cents,

with interest thereon from the 6 day of Oct., 1933, until paid and for the further sum of \$6.25 for costs expended in the prosecution of this warrant.

BRANCH JOHNSON,
Civil Justice. #2.

Upon a claim against which the
homestead cannot be demanded.

STATEMENT OF COSTS INCLUDED IN THE FORE- GOING JUDGMENT:

Magistrate's fee for issuing warrant	\$.50
Constable's fee for serving warrant50
Trial fee50
Filing and indexing fee25
Constable's fee for summoning....witness.....	—
.....	—
.....	—
.....	—

page 3 } And at another day, to-wit: At a Law and Equity
Court of the City of Richmond, Part Two, held the
13th day of June, 1934.

This day came the defendant, by counsel, and filed herein
a statement in writing of the additional grounds of his de-
fense to this action.

page 4 } (Filed June 13th, 1934.)

Virginia:

In the Law and Equity Court of the City of Richmond,
Part Two.

J. A. Gillio, Plaintiff

v.

W. J. Coulter, Defendant.

ADDITIONAL GROUNDS OF DEFENSE.

The defendant, W. J. Coulter, in addition to the grounds
of defense heretofore filed, relies upon the following grounds
also:

1. That the said defendant had the right to terminate any
and all relationship with the plaintiff at will, and that the

said plaintiff, who claims that he was a partner with the aforesaid W. J. Coulter, could be dispossessed and the status terminated at any time; and,

2. That the relationship between the said plaintiff and the defendant was of such a nature that no specific time for notice was necessary in order to terminate the relationship; and,

3. That the promise of Five Hundred (\$500.00) Dollars, as alleged by the plaintiff, which the defendant denies, was not based on any valid consideration in law.

The defendant reserves the right to add to or amend any and all of his grounds of defense at any time before this case is disposed of.

W. J. COULTER,
By KIRSH & BAZILE, Counsel.

page 5 } (Filed June 18th, 1934.)

Virginia:

In the Civil Justice Court of the City of Richmond.

J. A. Gillio, Plaintiff

^{v.}
W. J. Coulter, Defendant.

BILL OF PARTICULARS.

For answer to defendant's call for bill of particulars the plaintiff comes and says:

That the defendant is indebted to the plaintiff in the sum sued for by reason of an agreement entered into between the plaintiff and the defendant, whereby the defendant agreed to pay to the plaintiff the inventory price of stock and fixtures in the business operated by them and the sum of \$500.00 additional for the good will and immediate possession. The inventory of said business, amounting to the sum of \$792.79, together with the \$500.00 for good will and immediate possession, totals \$1,292.79, subject to a credit of \$332.00 for money in hand due the defendant derived from said business, leaving a balance due the plaintiff of \$960.79.

J. A. GILLIO,
By Counsel.

page 6 } (Filed June 18th, 1934.)

Virginia:

In the Civil Justice Court of the City of Richmond.

J. A. Gillio, Plaintiff

v.

W. J. Coulter, Defendant.

GROUND OF DEFENSE.

The defendant comes and says that he is not liable to the plaintiff in any amount or manner whatsoever, and for his grounds of defense, among other things, assigns the following:

1. The defendant pleads the general issue.
2. The defendant denies that he entered into any agreement between himself and the plaintiff, as set forth in the plaintiff's bill of particulars, but alleges that he was acting as an officer and agent for and on behalf of Broad Street Amusement Corporation at the time an agreement was made with the plaintiff. The defendant denies that he agreed either for himself or as agent or officer of the Broad Street Amusement Corporation to pay the plaintiff the inventory price of stock and fixtures in the business operated by the plaintiff and the sum of Five Hundred (\$500.00) Dollars additional for the good will and immediate possession.
3. The said plaintiff was a licensee of Broad Street Amusement Corporation, of which corporation the above defendant was an officer and agent. That the nature of the agreement between the plaintiff and the aforesaid corporation was that the said plaintiff, who was licensee, was to give up immediate possession of the premises referred to in the bill of particulars and that said defendant acting as agent and
page 7 } officer for the aforesaid corporation agreed to pay the plaintiff the sum of Seven Hundred Ninety-three Dollars and Twenty-four Cents (\$793.24), represented by inventory, less the sum of Three Hundred Thirty-two Dollars and Twenty-three Cents (\$332.23), which the plaintiff had on hand belonging to the aforesaid corporation.

The defendant, in view of the aforesaid facts and circumstances, as officer and agent of the Broad Street Amusement Corporation, alleges that there is due to the aforesaid plaintiff by the aforesaid corporation the sum of Four Hundred Sixty-one Dollars and One Cents (\$461.01), which amount

the aforesaid corporation is ready and willing to pay the plaintiff for a full and complete release to the aforesaid corporation and all of its officers and agents.

The defendant reserves the right to amend his grounds of defense at any time, if and as he may be so advised, and to move the Court to strike out the same, or any part thereof, as insufficient in law, or for lack of evidence to support it.

W. J. COULTER,
By KIRSH & BAZILE, Counsel.

page 8 } And at another day, to-wit: At a Law and Equity
Court of the City of Richmond, Part Two, held the
18th day of June, 1934:

This day came the plaintiff and defendant, by counsel, and thereupon the plaintiff filed herein a bill of the particulars of his claim and the defendant filed herein a statement in writing of the grounds of his defense to this action and pleaded "not guilty" and put himself upon the Country and the plaintiff likewise.

And thereupon came a jury, to-wit: Frank A. Scott, H. R. Scherer, J. A. Richards, James C. Ratcliffe, A. B. Gardner, Luther F. Robertson and J. P. Pregnall, being sworn well and truly to try the issue joined in this case and having heard the evidence and arguments of counsel were sent out of court to consult of a verdict and after some time returned into court with a verdict in the words and figures following, to-wit: "We, the Jury, on the issues joined, find for the plaintiff and assess his damages at Nine Hundred Sixty and 79/100 Dollars (\$960.79) with interest at six per cent per annum from August 14, 1933."

Thereupon the defendant, by counsel, moved the Court to set aside the said verdict of the jury as contrary to the law and the evidence and for other reasons set forth in writing and now made a part of the record, which motion the Court continued for argument to be heard thereon.

page 9 } (Filed June 18, 1934.)

Virginia:

In the Law and Equity Court of the City of Richmond,
Part II.

J. A. Gillio

v.

W. J. Coulter.

The defendant by counsel moves the Court to set aside the verdict of the jury, as being contrary to the law and evidence and without evidence to support it, and bases his motion on the following grounds:

1. Admitting evidence offered by the plaintiff over the objection of the defendant; and,
2. Refusing evidence offered by the defendant and objected to by the plaintiff; and,
3. For the refusal to withdraw a juror and declare a non-suit on motion of the defendant; and,
4. The refusal to grant instructions numbered A, C and D offered by the defendant and objected to by the plaintiff.

KIRSH & BAZILE, p. d.

page 10 } (Filed July 25th, 1934.)

Virginia:

In the Law & Equity Court of the City of Richmond,
Part II.

J. A. Gillio

v.

W. J. Coulter.

MEMORANDUM OF THE COURT.

The court is asked to set aside the verdict of the jury in favor of the plaintiff because the court refused to give instructions A, D and C requested by the defendant. These instructions sufficiently appear from the papers and will not be set forth herein verbatim.

There was but one issue between the parties. The plaintiff contended that the partnership agreement hitherto existing between him and the defendant was terminated by an agreement that the accumulated profits be divided between them and that the personal property which the plaintiff had brought upon the premises be inventoried and that the defendant should pay him the inventory prices therefor and in addition \$500.00. The defendant contended that he made no promise to pay the additional \$500.00. This fact was submitted to the jury upon conflicting testimony, and the instructions given in the opinion of the court fully instructed the jury as to the law of the case.

Instruction A dealt with the time a partnership might be

terminated. That was not an issue in this case nor does it seem to have been seriously contended that the partnership could not be terminated at any time. To have given this instruction would have unduly emphasized a matter that was not an issue in this case and in no sense decisive, but by giving the instruction the jury might have been misled into thinking that it was decisive of the case. Instruction C did not cover a theory advocated by either party. It failed to deal with the issue in this case and was properly refused, and so with instruction D. Both parties agreed that the partnership could be settled by dividing the accumulated profits and the defendant taking personal property on the premises belonging to the plaintiff at inventory prices. The conflict in the testimony was whether or not the defendant was to pay \$500.00 in addition. A contract must be based on a valuable consideration. In this case both parties agreed that there was a contract. The several items of consideration are so interwoven that it is impossible from the evidence to segregate them and say that a part of the consideration, or any particular item, emanating from one party was solely applicable to any particular item, or any part of the consideration, emanating from the other party. The consideration must be read as a whole. I do not think that the defendant was entitled to the instructions refused.

Motion to set aside the verdict will be overruled.

FRANK T. SUTTON, JR.

July 20/34.

page 12 } And at another day, to-wit: At a Law and Equity
Court of the City of Richmond, Part Two, held the
25th day of July, 1934:

This day came again the plaintiff and defendant, by counsel, and the Court having heard argument upon the motion of the defendant to set aside the verdict of the jury rendered in this case and now being advised of its judgment to be rendered herein doth overrule the said motion.

Therefore it is considered by the Court for reasons stated in writing and now made a part of the record, that the judgment of the said Civil Justice Court of the City of Richmond, Part II, be affirmed and that the plaintiff recover against the defendant and Jacob Lovenstein, his surety, the sum of Nine hundred sixty dollars and seventy-nine cents, with interest thereon to be computed after the rate of six per centum per annum from the 14th day of August, 1933, until the 25th day of July, 1934, and the sum of \$6.25 costs by the plaintiff

in said Civil Justice Court of the City of Richmond, Part II, expended, with damages upon the aggregate amount thereof to be computed after the rate of ten per centum per annum from the 25th day of July, 1934, until paid, and his costs by him about his suit in this behalf expended.

Memorandum: Upon the trial of this case the defendant, by counsel, excepted to sundry opinions of the Court given against him and on his motion leave is hereby given him to file bills of exceptions or certificates of exception herein at any time within sixty days from this date as prescribed by law.

And the defendant having indicated an intention to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to said judgment, execution thereon is suspended for a period of six months from this date, and until the appellate court has acted on a petition for page 13 } writ of error, presented to said court, or one of the justices thereof, within six months from this date, and until this court shall thereafter authorize execution to issue, upon condition however, that the defendant, or some one for him shall, within ten days from this date enter into bond in the clerk's office of this court with surety to be approved by its clerk in the penalty of Two thousand dollars with all the conditions prescribed by section 6351 of the Code of Virginia relating to *supersedeas* bonds.

page 14 } And now at this day, to-wit: At a Law and Equity Court of the City of Richmond, Part Two, held the 7th day of August, 1934:

On the motion of W. J. Coulter, by counsel, and after due written notice to the plaintiff, the stenographic transcript of the testimony and other incidents of the trial in this case was authenticated pursuant to Rule 24 of the Supreme Court of Appeals by the Judge of this Court and is ordered to be made a part of the record in this case.

page 15 } Virginia:

In the Law and Equity Court of the City of Richmond,
Part Two.

J. A. Gillio, Plaintiff,

v.
W. J. Coulter, Defendant.

**AUTHENTICATION OF STENOGRAPHIC REPORT OF
TESTIMONY AND OTHER INCIDENTS OF THE
TRIAL AUTHENTICATED AND CERTIFIED PUR-
SUANT TO RULE 24 OF THE SUPREME COURT OF
APPEALS OF VIRGINIA.**

I, Frank T. Sutton, Jr., Judge of the Law and Equity Court of the City of Richmond, Part Two, do hereby certify that the following is an accurate and authentic stenographic report of the testimony and other incidents of the trial of the above-styled cause, and that it appears in writing that the attorneys for the plaintiff were given reasonable notice of the time and place when the said report would be tendered and presented to me for authentication, and was presented to me on the 6th day of August, 1934.

Given under my hand this 7th day of August, 1934.

FRANK T. SUTTON, JR.,
Judge of the Law and Equity Court of the
City of Richmond, Part Two.

page 16 } Virginia:

In the Law and Equity Court, Part II, of the City of
Richmond.

J. A. Gillio, Plaintiff,

v.

W. J. Coulter, Defendant.

June 18, 1934.

Appearances: Thomas A. Williams, Esq., Counsel for
Plaintiff; Alfred J. Kirsh, Esq., of Kirsh & Bazile, Counsel
for Defendant.

page 17 } **JOSEPH A. GILLIO,**
the plaintiff, being first duly sworn, testified as
follows:

DIRECT EXAMINATION.

By Mr. Williams:

Q. Mr. Gillio, will you state to his Honor and these gentlemen of the jury your name and your business?

A. Joseph A. Gillio; I operate a little place just a little outside of town, the other side of Tantilla Gardens.

Q. Mr. Gillio, will you state to these gentlemen just how it happened you and Mr. Coulter struck up this arrangement for running that refreshment arrangement at Tantilla Gardens last year and when?

A. I was running this place on Broad Street, where I have an inn and barbecue. I was in the front part of my place and he was in there and he called me over and said, "Joe, how would you like to have an interest in Tantilla Gardens?" I did not know what he meant. I said, "What do you want me to do?" He said, "I want you to run it". I said, "I don't know; I will let you know later". I went upstairs and went on back. The next day he came to the barbecue and said, "Have you decided what you want to do?" I said, "No, I have not seen it, yet. I will come down in a day or two and look at it". In a couple of days I looked it over
page 18 } and thought it would be a good thing. I asked him 25 per cent.

Q. What do you mean by that?

A. I take it on 25 per cent. and furnish everything, myself, all the china and glassware, &c. He said, "No, I won't do that. We will go fifty fifty". He had an electric refrigerator, coffee urn, &c., and I put up the money and bought the equipment, all the china, glass, &c. We finally started and got to running pretty good. We started to making money right off the jump. The first month we had six hundred dollars and something, three hundred and some dollars apiece when divided between us. He was perfectly satisfied. He said "Will you take over downstairs?" I gave him a check for \$600 for downstairs.

Q. Whom did you make the check payable to?

A. Mr. W. J. Coulter.

Q. Anything said about a corporation?

A. No; me and Mr. Coulter there together; no corporation.

Q. Anything said about an agreement in writing?

A. I was trying to get in touch with Mr. Coulter to get a little contract. Everybody said, "You have got a good thing; you had better take care of it". Every time I went to Mr.

Coulter, he was too busy; did not have time. I
page 19 } thought everything would be all right until he got time. Every time I saw him he said, "I will see you a little later". The next month we got along pretty good. Mr. Coulter went away. He did not have the nerve to tell me, himself; so he got Art Brown. He did not have nerve enough to—

By Mr. Kirsh: I object.

By the Court: Tell the facts.

By Witness: Mr. Coulter left and Art Brown came on the scene there. He came and said Mr. Coulter had decided to take it over, himself; that he needed the income.

Q. Needed what?

A. Needed the revenue, himself. He wanted it all. I said, "It is a wonder he could not have told me. He was up here just a few minutes ago". I said, "I did not have any dealing with you; I want to see Mr. Coulter". I tried for a week to see him. He was so busy all the time he did not have time to talk to me. That Sunday we got together.

Q. What Sunday was that?

A. That was about August 14th, I think.

Q. August 14th was on Monday; Sunday was what?

A. The 13th. On Sunday we were in there and got together. It happened Mr. Hughes was up there and Mr. Snyder. He kept the books at Tantilla. I told him to come with me and see what Mr. Coulter said about it. We went down page 20 } there. I asked him what he meant by that. He said he wanted to take it over, himself. I said, "Do you think that is right? I don't know why you should throw me out like this. You came after me about it first". I said, "Will you give me \$1,500 for equipment and all?" He said, "No", he would not give me \$1,500. We stayed up there about two hours. I said, "Will you give me \$500 and what I have invested in it?" He said, "Yes". We left. He said to be down the next morning and we would check things and "I will pay you for what I get". So, the next morning, Monday morning, we started in.

Q. Whom do you mean by "we"?

A. Mr. Tom Leach was working for me at the time. He was with me and the boys and we went down there. We finally got everything checked up and I handed the paper over to him and asked him if he was satisfied. He said, "Yes, I will see you tonight", and I turned the key over to him. That night at Tantilla Mr. Coulter did not show up. He was in Petersburg the next day. I did not see him for three days. I saw him at Tantilla. We went in the office and I said, "Mr. Coulter, it is time to settle up". He said, "How much do I owe you?" I said, "You have the paper". He said, "No, I did not promise you \$500". I said, "Do you mean you did not promise me dollar for dollar for the inventory and \$500?"

I told him "I wanted \$1,500 and then you refuse page 21 } to give me \$500 after you promised it?" He said, "No". I went out and went to talk to Mr. Williams.

Q. When you were talking to Mr. Coulter and arrived at

an arrangement by which he agreed to pay \$500 and dollar for dollar for your inventory, who was present?

A. Mr. Hughes and Mr. Snyder, Mr. Arthur Brown, Mr. Coulter and myself. Just us five.

Q. Mr. Snyder was the bookkeeper?

A. Yes, sir. I got him to open the books up, so you could see at any time what was going on.

Q. Who had been keeping the keys to the place before you turned them over to Mr. Coulter?

A. Keeping them myself.

Q. In whose name was the bank account kept?

A. In my name.

Q. In the name of J. A. Gillio?

A. Yes, sir.

Q. The check you gave Mr. Coulter for his profits in the business, in whose name was it made out?

A. Mr. W. J. Coulter.

Q. Who signed the check?

A. I signed all checks.

Q. You did all the buying?

A. Yes, took charge of the buying; took charge
page 22 } of the waiters and everything.

Q. And made the division?

A. Yes, sir.

Q. How many divisions did you have before he said he wanted the revenue?

A. Two.

Q. When he told you that he wanted you to come there and handle this end of it, in the manner you have described, was anything said about reducing the agreement to writing?

A. After we decided to split fifty-fifty, I was going to get a contract for a year. There would be no use of me going in there for less than a year. I put all the china and equipment in there, amounting to \$500 and some dollars. He did not put anything in there except what stuff he had upstairs.

Q. Have you the sheet on which the inventory was made? Do you know what was the amount of the inventory there?

A. No, I could not tell you.

Q. Could you refresh your memory and state what was the original amount of the inventory due you?

A. \$792.79.

Q. That was to be added to the \$500?

A. Yes, sir.

Q. Making \$1,292.79?

page 23 } A. Yes, sir.

Q. Did you have any money in your hands there, Mr. Coulter?

A. We had about \$600 and some dollars in the bank, which amounted to \$332 apiece.

Q. \$332 of that six hundred and some dollars was due Mr. Coulter?

A. Yes, sir.

Q. That was to be taken off the \$1,292?

A. Yes, sir.

Q. Leaving \$960.79?

A. Yes, sir.

Q. Is that the amount due you now from Mr. Coulter?

A. Yes, sir.

Q. With interest from August 14, 1933?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Kirsh:

Q. Mr. Gillio, prior to the agreement that was entered into between you and Mr. Coulter that afternoon at your place in reference to your going in with him and your running the place and dividing the profits, had you not spoken to Mr. Coulter about wanting the place prior to that?

A. No, sir. Mr. Coulter came after me. I did not have any idea of knowing what Tantilla was. I never saw
page 24 } the place upstairs before until he mentioned it to me first.

Q. He mentioned it to you several times before you entered into an agreement?

A. He asked me several times about coming and taking the place over.

Q. Did not Mr. Gilbert and Mr. Coulter come to your place one afternoon about your taking the place?

A. No, Mr. Coulter came up once or twice and had a sandwich and a bottle of beer. Mr. Gilbert was never in the place until after I entered into the agreement to take the place.

Q. Was not Mr. Gilbert and Mr. Coulter together when the contract was entered into?

A. No, sir.

Q. Who was present at your place?

A. I decided to take the place over at Tantilla, up at my place, and Mr. Leach was with me.

Q. You did not enter into the agreement until after Mr. Coulter came up to you to speak to you at your place—the agreement was made at your place—you testified to that, did you not?

A. The agreement was made there one afternoon.

Q. At your place?

A. No; made at Tantilla. Mr. Tom Leach was there at the time. I said "Mr. Coulter, I think I will take it".

Q. Was not the agreement at your place?

page 25 } A. After Mr. Coulter came to my place.

Q. When Mr. Coulter came up there the next day, in the afternoon, when he and Mr. Dewey Gilbert came up there and talked with you?

A. No; Mr. Coulter used to run up occasionally and get a bottle of beer and a sandwich after I went down there a couple of days; after I told Mr. Coulter I would take it.

Q. Was that your idea of the contract?

A. He was going to draw a contract. I was to get a lawyer and arrange about the papers.

Q. When you told Mr. Coulter that you had decided to take the place on a fifty-fifty basis that was all that was said about terms, was it not?

A. No; we were to draw a contract for one year.

Q. Please state, when you said to Mr. Coulter, "I will take the place on a fifty-fifty basis", was that all that was said in reference to terms?

A. We were supposed to draw up a contract for one year.

Q. Mr. Gillio, don't you know that Mr. Coulter and Mr. Dewey Gilbert came up to your place after you had come down and looked at Tantilla, and is it not a fact that you said, "Mr. Coulter, I will take the place on any terms you will give it to me"?

A. No.

page 26 } Q. Do you deny that?

A. Yes, sir.

Q. Mr. Gillio, you said you had spent money in equipping the place, buying china, glass, &c. When you made a settlement with Mr. Coulter all that was figured in, was it not?

A. No, indeed; I bought that when it was first opened.

Q. Did you take them out?

A. No, sir.

Q. You left them there?

A. Yes, sir.

Q. Who does the stuff belong to now that you left there?

A. Mr. Coulter.

Q. Do you still own it, or is he supposed to pay for it out of these figures?

By Mr. Williams: If your Honor please, as I understand it, we are suing now for an agreed accounting. I think that is irrelevant and immaterial.

By the Court: It seems to me that has a bearing on the

case. As I understand, Mr. Coulter bought the equipment.

By Mr. Williams: He took over the full interest, for the figures set down. I understand he admits Mr. Coulter owns it and owes him money for it. There is no use going into something already admitted, Mr. Kirsh.

page 27 } By Mr. Kirsh: Mr. Gillio said he had gone through a hardship by stocking up the place. I want to show that every dollars' worth he has put in there is in this \$460 that is charged against Mr. Coulter.

By the Court: You will be allowed to show that, but don't argue that with the witness.

By Mr. Kirsh: Has your Honor any objection to my asking how he arrived at this figure, to show what items were included?

By the Court: No.

By Mr. Kirsh:

Q. Mr. Gillio, read the statement to the jury showing how you arrived at the \$792.79?

A. Four slot machines—

Q. At how much?

A. One at \$80; one at \$55; one at \$41.50; one at \$22.50; Straus Co. acct. \$116; Richmond Fixture Co. \$221.17; 1 cash register \$10.00; 1 Coca Cola stand \$5; benches \$10; Federal beer license \$25, 1/2—\$12.50; inventory stock \$118.25, \$59.12; downstairs stock \$160. I inventoried that stuff at practically what it cost me.

By the Court: There is no use arguing that. I understand it is admitted. Confine the examination to questions of fact. The paper has been introduced in evidence. You may take it and ask questions from it.

By Mr. Kirsh:

Q. All the fixtures, &c., that you put in there, they comprise a part of the \$792.79, as shown on this exhibit, do they not?

A. Yes, sir.

Note.—The exhibit is filed, marked "Exhibit J. A. G. No. 1".

page 29 } EX. J. A. G. NO. 1.

Sold to Tantilla Aug. 14, 32.

2 Slot Machines (5c) @ 40..... 80.00

1 Slot Machine (10c)	55.
1 Slot Machine (25c)	41.50
1 Slot Machine (25c)	22.50
Straus Co. a/c	116.
Richd. Fix. Co. a/c	221.17
1 Cash Register	10.
1 Coca-Cola Stand	5.
Benches	10.
Federal Beer License 25.00— $\frac{1}{2}$	12.50
Inventory Stock 118.25	59.12
Down Stairs Stock	160.
	<hr/>
	792.79
Key	500.
	<hr/>
	\$1,292.79
	332.
	<hr/>
	\$960.79
	<hr/>
	sue for \$1,000.00

J. A. Gillio

v.

W. J. Coulter.

page 30 } Q. Mr. Gillio, according to this statement, leaving out the \$500 item, which I will come to later, taking the \$332, the share of the profits from the \$792.79, would leave \$460.79, would it not?

A. Yes, sir.

Q. Is it not a fact, Mr. Gillio, that when you made up that statement that you left off a \$30 item, which should have been deducted, that was to Sam Abady?

A. No, sir.

Q. You do not owe him \$30?

A. No, sir.

Q. I hand you herewith. Mr. Gillio, a paper, which we file, marked "Exhibit J. A. G. No. 2", dated "Richmond, Va. October 2, 1933", to Tantilla Gardens, from Richmond Fixture and Equipment Company, in the amount of \$30.00, and ask you whether or not this was for things used in your joint enterprise while you operated this concession?

Phone Madison 3122

Richmond, Va. 10/2 1933

Tantilla Gardens
W Broad St.

RICHMOND FIXTURE AND EQUIPMENT CO.
7 North 13th Street

We Buy and Sell Complete Store Fixtures
We Pay Highest Cash Prices for Second-Hand Fixtures and
Equipment
We Buy, Sell and Exchange Store Fixtures of Every
Description

	6 24		
June 15	Loan Tables & Chairs to July 15th	9.00	
July 15	Loan Tables & Chairs to Aug. 15th	9.00	
Aug. 15	Loan Tables & Chairs to Sept. 15th	9.00	
Sept. 20	Hauling above to store	3.00	
	Total		\$30.00
	I do not owe it		
	JOE A. GILLIO		
	Paid		
	By Check #845		
	W. J. C.		
	June		
	9-34		

BUY FROM US AND BANK THE DIFFERENCE

page 32 } A. We ordered some things there for Tantilla.

Q. You do not deduct this \$30 from the \$460?

A. No. *we* bought afterwards; we bought every day; we bought things from them straight along. We gave Mr. Coulter the whole thing when *he* got it.

Q. You got these things on loan?

A. I did not have anything to do with that. Mr. Coulter furnished that for the opening night. Mr. Abady asked about that bill half a dozen times, but I had nothing to do with that.

Q. I hand you herewith a statement from the Richmond Ice Company to Tantilla Gardens, amount to \$8.67, which we file, marked "Exhibit J. A. G. No. 3", and ask you if that was not your bill?

page 33 } EX. J. A. G. NO. 3.

RICHMOND ICE CO., INC.

Main Office
Harrison & Marshall Sts.
Phone 5-9117

Richmond, Va.
NOV 1-1933

Tantilla Gardens,
c/o Gillio's-Tinytown,
Richmond, Va.

Rate	Ice	Furnished	Pounds	Amount
	Month of			
Account Rendered				8.67

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31

page 34 } A. I don't think so. I remember we owed them about 60 cents or 80 cents for 100 pounds of ice. I thought that was taken care of.

By Mr. Williams: That bill is dated November 1, 1933, and I object to it being used in evidence here. There is no evidence here on it. The item was incurred after the agreement to sell to Mr. Coulter.

By the Court: The bill isn't evidence.

By Mr. Kirsh:

Q. Did I understand you to say you owed them about sixty cents of it?

A. Might have been 60 cents of it. I paid the driver downstairs. We paid practically cash every day.

Q. Mr. Gillio, I hand you herewith a statement, reading "Mr. Joe Gillio, Tiny Town Amusement Company, 3817 West Broad Street, To advertising, balance \$48.20". I file this statement, marked "Exhibit J. A. G. No. 4", and ask you did you owe that to the Broad Street Amusement Company?

page 35 }

EX. J. A. G. NO. 4.

Richmond, Va., Oct. 3, 1933.

Mr. Joe Gillio,
City.

Dial 4-3421

TINY TOWN AMUSEMENT CENTRE
Operated by Broad Street Amusement Corp.
3817 WEST BROAD STREET

Terms: Prompt Net Cash.

To Advertising	Balance	\$48.20
----------------	---------	---------

page 36 } A. Yes, sir.

Q. It was not deducted from this \$460.79?

A. No; that is a personal bill of my own.

Q. You owe that to the Broad Street Amusement Corporation?

A. That happened before I ever thought of the Tantilla Gardens.

By Mr. Williams: I move to exclude that.

By the Court: That is admitted for the purpose of Mr. Kirsh's question, but the bill is not evidence of any debt due by Mr. Gillio.

Q. Did I understand you to say that after you had been told that you were to give up the place on that Sunday afternoon there only five of you there—are you not mistaken, was not Mr. Gilbert there?

A. No; he was up in the front. We were talking back next to the kitchen. Mr. Coulter said, "Just get away page 37 } from this crowd". There were six or eight there at first; but only five back there where we were talking about his matter.

Q. At first, you wanted \$1,500?

A. Yes, sir.

Q. Your next offer was \$500 and dollar for dollar money invested?

A. Yes, sir.

Q. There was no offer between \$1,500 and \$500?

A. No, sir.

Q. Nothing between \$1,500 and the \$500?

A. Just offered for \$500 and dollar for dollar and turned the keys over.

Q. Did not Mr. Coulter when you went up there have about \$5,000 worth of equipment that you got the use of?

A. Oh, yes; he had nice equipment there.

(The witness stood aside.)

page 38 } F. W. SNYDER,
a witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Williams:

Q. State your name and occupation?

A. F. W. Snyder; I am a bookkeeper and accountant.

Q. Where do you live?

A. 1300 Claremont Avenue.

Q. Did you keep the books up there for the account of J. A. Gillio for the handling of this refreshment stand, &c.?

A. Yes, sir.

Q. In whose name were the books kept?

A. Kept in the names of Mr. Coulter and Mr. J. A. Gillio.

Q. How was the bank account kept?

A. In Mr. Gillio's name.

Q. Did Mr. Coulter ever come and go over the books with you?

A. Every afternoon I showed him the statement. I don't think he asked to see the books.

Q. Were you present at any conversation at which there was an agreement to separate and settle between them?

A. Yes, sir.

Q. Will you state to the jury what that was, when page 39 } and who was present?

A. It happened up in the Tantilla Gardens and present was Mr. Hughes, Mr. Coulter, Mr. Brown, Mr. Gillio and myself.

Q. State what happened then?

A. Well, we tried to get at first—first brought up the proposition that Mr. Coulter pay \$1,500 beyond the inventory. Then I think it was brought up would he accept \$1,000; then got to \$500 and he accepted the \$500 and inventory and we closed.

Q. Who accepted the \$500 and inventory proposition?

A. Mr. Coulter.

Q. Pursuant to that conversation what was done?

A. What do you mean?

Q. Following that was the inventory taken?

A. Oh, yes; we were to meet the next morning, close up the books, take inventory and settle.

Q. What day was that you mean to take the inventory and close the books and make the settlement?

A. The next day after we had the agreement.

Q. It is shown that was on August 13th?

A. Then, that would be August 14th, 1933.

Q. Are these figures the inventory results here (indicating statement)?

A. Yes; that is my writing there.

page 40 } Q. Your writing?

A. Yes.

Q. Did Mr. Coulter have anybody there checking that inventory?

A. Yes, sir.

Q. Was the inventory agreed upon by him?

A. Yes.

Q. Did he raise any objection to it at all?

A. None that I remember.

Q. What did he say about settling at those figures at that time?

A. He said it was all right. He and Joe made an agreement to meet, I think; I don't remember all of it.

Q. Did Mr. Gillio turn the keys over to him?

A. Yes, sir.

Q. When did he say he would pay over this money?

A. I don't remember. He made an appointment to settle up.

Q. He did make an appointment?

A. Yes.

CROSS EXAMINATION.

By Mr. Kirsh:

Q. This was all on Sunday afternoon?

A. Yes.

Q. Mr. Snyder, in reference to this exhibit you referred to, you say these figures were put there by you.
page 41 } These ink figures were put in by Mr. Williams?
A. Yes.

By Mr. Williams: Yes, I put them there.

By Mr. Kirsh:

Q. Mr. Snyder, have you those books?

A. Yes, we have the books.

Q. Would it take you long to get them?

A. Yes, they are out at Joe's place.

Q. Will you go out and get them?

A. Yes, if his Honor instructs me to do so.

By the Court: Mr. Kirsh, have you made any defense that the account is not correct?

Mr. Kirsh: No, sir, but my defense is this deal was made by the Broad Street Amusement Corporation and not by Mr. Coulter. They state that the books were in the name of Mr. Gillio and Mr. Coulter.

By the Court: You want the books in order to show that?

By Mr. Kirsh: Yes, sir.

By the Court: You may do that.

By Mr. Kirsh:

Q. Do you know Mr. Dewey Gilbert?

A. No, I don't think I do.

page 42 } By Mr. Kirsh: I will waive his getting the books.

Q. Mr. Snyder, Mr. Gillio kept the money in the Southern Bank and Trust Company, did he not?

A. Yes, sir.

Q. He made two payments to Mr. Coulter?

A. Two dividends.

Q. Two payments of \$200 each?

A. Yes, that is right.

Q. Have you examined those two checks that he gave to show where those two checks were deposited?

A. No, I have not examined them.

Q. Don't you know those two checks were deposited in the Corporation account and not Mr. Coulter's?

A. No, I don't know about that. I know I wrote the checks.

Q. You are satisfied that the first proposition Mr. Gillio made was \$1,500 beyond the inventory; the next \$1,000 beyond the inventory and the next \$500? You are positive of that?

A. Yes, sir.

(The witness stood aside.)

page 43 } HARRY HUGHES,
another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Williams:

Q. Please state your name?

A. Harry Hughes.

Q. What is your business?

A. Contractor.

Q. Were you present at Tantilla on August 13th when there was an agreement and settlement of the difference between Mr. Coulter and Mr. Gillio?

A. Yes, sir.

Q. Will you state where you were; about what time of day it was and what happened?

A. I met Mr. Snyder in Helstern's one Sunday afternoon in August. He asked me if I was going up town. I said, "Yes", and I drove him up to Mr. Gillio's inn.

Q. And you went down there?

A. Yes, I went down with Mr. Gillio, and Mr. Coulter and Mr. Brown went into a conference at the upper end of the building. I was down about the middle way of it. They talked there for some time, but did not seem to arrive at any agreement, and came down, and Mr. Gillio asked if
page 44 } there was any objection to my sitting at the table with them.

Q. Tell what was done?

A. I asked Mr. Coulter would he settle for \$1,500 plus inventory. He said "No". I asked would he settle for \$1,000. He said, "No". I asked would he settle for \$500 plus inventory. He said, "Yes". I said, "That is thoroughly agreed?" He said, "Yes". So, that ended that.

Q. What was to be done further?

A. There was an inventory to be taken the next day and a

settlement to be made the next day. Mr. Gillio was to have a man there and Mr. Coulter to have a man there to check over the stock and what was there.

CROSS EXAMINATION.

By Mr. Kirsh:

Q. The settlement was not to be made that night?

A. No, to be made the next day.

Q. Mr. Hughes, what reason did you have for asking \$1,500?

A. Mr. Gillio left that to me.

Q. What was the basis?

A. I don't know.

Q. Was anything said about any agreement that had been originally made by Mr. Coulter with Mr. Gillio
page 45 } about the place?

A. Not that I know.

Q. The terms of the agreement had not been talked about at all?

A. No, not while I was there.

Q. Do you know Mr. Gilbert?

A. Yes, sir.

Q. Was he not there?

A. Yes, sir.

Q. Did he not hear what was going on?

A. He was at the table at first. I won't say positively. He was at the table when I went in there.

Q. Was he not amongst them?

A. Yes, sir.

Q. Sitting at the table with them?

A. Yes, sir.

Q. Was he not within hearing distance?

A. I think he was. I would not be positive, but I think he was.

Q. As I understand, there were three propositions suggested by you; the first \$1,500, plus inventory—

By Mr. Williams: I object. He has been over that.

By the Court: Did you understand what the witness said, Mr. Kirsh? There is no use repeating things if you
page 46 } understand him clearly. If you failed to catch what the witness said, I will let you ask it over.

By Mr. Kirsh: I failed to catch his last answer.

Q. When you mentioned the \$1,500, and the \$1,000, and the \$500, you meant plus the inventory?

A. Yes, sir.

Q. And, whatever he had coming to him out of the profits?

A. Yes, sir.

Q. In other words, that was in addition to his share, the inventory and profits?

A. The last suggestion was \$500 on top of the inventory.

RE-DIRECT EXAMINATION.

By Mr. Williams:

Q. Mr. Hughes, at the time the \$1,500, \$1,000 and \$500 were suggested by you and the \$500 accepted by Mr. Coulter, are you sure Mr. Gilbert was in hearing distance of that conversation?

A. No, I would not be positive, not while I was there; but I do remember he was with them when I first went in.

Q. Where was that?

A. That was in the upper part of the hall.

Q. When you came down there was nobody but the five of you sitting there?

A. No, sir.

(The witness stood aside.)

page 47 } By Mr. Williams: That is the plaintiff's case.

By Mr. Kirsh: If your Honor please, I would like to make a motion.

By the Court: Gentlemen, of the jury, please walk out in the corridor.

Jury out.

By Mr. Kirsh: May it please the Court, the defendant moves to strike the evidence of the plaintiff insofar as it pertains to the \$500 for the good will and immediate possession as claimed, and as a basis for that I wish to say that according to the plaintiff's own evidence he testified that the understanding was that he was to run the business and divide the profits with Mr. Coulter. As I understand it, he made no reference to any particular time that this contract was to be in effect. The defendant contends that if there was just an arrangement whereby he was to run the business and divide the profits (and I asked him the question, "Were those all the terms?" and he said "Yes"), that that was merely a partnership or joint enterprise, which could be terminated at the will of either party, and that, therefore, if Mr.

Gillio had the right to terminate and Mr. Coulter page 48 } had the right to terminate it, that they could not exact the one from the other any amount of money to terminate it. To do that was a legal duty on them.

By the Court: A contract must be based on a valuable consideration; but there were several phases of this agreement. For instance, Mr. Coulter was buying the equipment. He might not have been able to buy it at inventory price. The court don't know that. According to the plaintiff's theory, he was to pay \$500 and the inventory price. The motion is overruled.

By Mr. Kirsh: We note an exception.

EVIDENCE FOR DEFENDANT.

GEORGE DEWEY GILBERT,
a witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Kirsh:

Q. Your name is Mr. George Dewey Gilbert?

A. Yes, sir.

Q. Where do you live?

A. 3136 Griffin Avenue.

page 49 } Q. Your parents run the Gilbert Hotel?

A. Yes, my parents still run the Gilbert Hotel.

By Mr. Williams: I object.

By the Court: I don't think that has anything to do with it.

By Mr. Kirsh:

Q. What is your occupation?

A. Auctioneer and floor manager of Tantilla Gardens.

Q. You are floor manager of Tantilla Gardens at night, are you not?

A. Yes, sir.

Q. That is, the dance hall of Tantilla Gardens?

A. Yes, sir.

Q. When did you go to work for the Tantilla Gardens?

A. The night the Tantilla Gardens opened up.

Q. June 15, 1933,—I think that date is correct?

A. Yes, the night it opened up.

Q. Prior to that time were you present with Mr. Coulter and Mr. Gillio when an agreement was made in reference to

Mr. Gillio running the drink and lunch counter at Tantilla Gardens?

A. Mr. Coulter requested me to go up to Mr. Gillio's with him.

Q. When was that?

A. Approximately a week before they opened page 50 } up; approximately June 8th, 1933, one night about 8 o'clock.

Q. Where did you go?

A. Went from Tiny Town Bowling Alleys to Mr. Gillio's, about eight blocks west on Broad Street.

Q. Where Mr. Gillio runs a barbecue and inn?

A. Yes, sir.

Q. Were you present when the entire conversation took place between Mr. Gillio and Mr. Coulter?

A. I was with them during the entire conversation. The agreement they made, I heard every word.

Q. Outside of Mr. Gillio, Mr. Coulter and yourself, who was present?

A. No one else listened to the conversation. The three of us were sitting in a booth.

Q. Tell the jury what the conversation was?

A. The conversation started with reference to Mr. Gillio taking over the concession at Tantilla Gardens. The concession consisted of soft drinks and sandwiches. Mr. Gillio said he was very desirous of getting the place. In fact, I think some reference was made to the fact that Mr. Gillio wanted it before.

By Mr. Williams: I object.

By the Court:

Q. Do you know of your own knowledge?

A. No, sir. Mr. Gillio said he would be very page 51 } anxious to get the place and would accept it at any kind of proposition. Mr. Coulter said, "Well, I think you would possibly make me a good man, and there is an opportunity for both of us to make some money, provided the place is operated properly". Mr. Gillio asked what rent he wanted. Mr. Coulter said he would not rent the place, because he would not know what to ask for rent. In the event the place went over large it would not be on a rent basis, and in the event it did not go over Mr. Gillo would not be tied up in a lease. Therefore, he thought the best proposition was for Mr. Gillio to furnish such equipment as necessary at that time. Mr. Coulter said, "I have about \$5,000 worth of equipment there now, but it will be necessary to add some few

things in order to open. You furnish those things and we will open. We will pay all expenses, and we will divide all profits". Joe said "That suits me all right. I will accept the proposition". Mr. Coulter said, "The reason I don't want to go in a lease with you is, in the event you do not suit me I can get rid of you, and if you want to get out you can get out. The only thing that will be necessary will be for us to take an inventory and settle up".

Q. Was anything said about putting the agreement in writing?

A. No; Joe said, "That suits me".

page 52 } Q. Was anything said about a term of one year?

A. No, nothing said about any time. Mr. Coulter said it was his idea. Mr. Gillio never advanced any idea about anything—Mr. Coulter said, "In the event you don't make any money I don't want to tie you up in a lease, something you cannot pay. In the event you don't suit me I can take over the place and pay you for the equipment you have paid for, my half of it, and in the event it don't suit you, you can get out at any time you want to".

Q. About how long did Mr. Gillio operate the place?

A. I don't know, exactly; I think approximately two and a half months.

Q. Was the service he gave satisfactory to the patrons?

A. It was not satisfactory to the patrons, no.

Q. Did you have any complaints in reference to his service?

A. They complained about it.

Q. What was the nature of the complaints?

By the Court: Mr. Kirsh, why are you taking up the time of the court with that?

By Mr. Williams: I ask that that be excluded, as not being in their grounds of defense. There was nothing mentioned in it about any complaints at all. I ask that the Court strike that, as being irrelevant and instruct the jury to disregard it.

page 53 } By the Court: It strikes me as having no bearing on the issue.

By Mr. Kirsh: I understood Mr. Gillio to say that they were going to draw up a paper giving him one year's privilege. In the grounds of defense the defendant pleads general issue. I want to lead him to show exactly why they canceled the agreement with Mr. Gillio.

By the Court: The sole issue before this jury is the terms upon which they settled, upon which they agreed to make a division or settlement and wind up the matter.

By Mr. Kirsh: If your Honor please, we do not want it said that the cancellation was arbitrary. We want to show the reason for it.

By the Court: The jury will determine what were the terms from the evidence. This question has nothing to do with the issue. The jury will disregard anything said as to any complaint made to the management.

By Mr. Kirsh: I note an exception.

By Mr. Kirsh:

Q. Mr. Gilbert, were you present at a meeting during the month of August, when the terms of settlement page 54 } were arrived at?

A. I was present there one Sunday afternoon, when we were supposed to come up there to check and take the inventory. I came there and there was a great deal of argument, instead of taking the inventory. They were discussing in my presence and finally Mr. Coulter said, "My business and your business is not everybody's business. Come back here where we can talk in private". I did not follow them back there.

Q. Five of them went back eventually: Mr. Hughes, the bookkeeper, Mr. Brown, Mr. Gillio and Mr. Coulter?

A. Mr. Hughes, the bookkeeper, Mr. Gillio, Mr. Brown and Mr. Coulter.

Q. And you were not present there?

A. No, sir.

(The witness stood aside.)

page 55 } ARTHUR W. BROWN,
 another witness introduced on behalf of the de-
fendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Kirsh:

Q. Mr. Brown, what is your name and residence?

A. Arthur W. Brown, 3123 West Grace Street, Richmond,
Va.

Q. What is your occupation?

A. Manager of Tantilla Gardens.

Q. You are also organist at Byrd Theatre, are you not?

A. Yes, sir.

Q. Do you know Mr. Gillio, the plaintiff in this case?

A. Yes, I do.

Q. Did you have any business connection with him in refer-

ence to the cancellation of his operation of the concession at Tantilla Gardens?

A. I did; I notified him of the cancellation.

Q. Tell what you did with reference to the cancellation?

A. Acting on the instructions of Mr. Coulter, who employed me, I notified Mr. Gillio on Saturday afternoon that Mr. Coulter desired to take over the operation the following week; that is, one week following the succeeding Monday—one week for notice.

Q. Pursuant to that did he vacate?

page 56 } A. Mr. Gillio vacated on the following Monday; that is, one week.

Q. Were you present on a Sunday afternoon where a meeting took place between Mr. Coulter, Mr. Gillio, Mr. Hughes and Mr. Snyder?

A. Yes, sir.

Q. Were you present while they discussed the dissolution?

A. Yes; I was present all the afternoon.

Q. I wish you would tell the jury what was said with reference to the terms of the dissolution?

A. Well, there was a great deal of talk about the terms of the dissolution. The main point seemed to be the settlement to be made, and it was agreed, as I understood, to settle on the inventory. There was considerable talk about an additional settlement, but the way I understood it, there was no settlement made, whatever; that Mr. Coulter was entirely ready to settle on the basis of the inventory.

Q. Was there any discussion of an additional settlement of \$1,500, or \$1,000, or \$500 for good will and immediate possession?

A. Yes, there was considerable discussion on that.

Q. Did Mr. Coulter agree to pay \$500 plus inventory?

A. Not to my knowledge.

Q. Did he agree to settle for that?

page 57 } A. He refused to settle for anything over the inventory.

Q. How many payments were made to Mr. Coulter by Mr. Gillio during the period he was operating there?

A. According to my recollection, two.

Q. Did you attend to the depositing of this?

A. Yes, sir.

Q. Have you the bank book with you?

A. Yes, sir.

Q. Tell whether Mr. Coulter got the use of this money, or the Broad Street Amusement Company got the use of the money?

By Mr. Williams: Is that not self-serving?

By the Court: You can show where the money went.

A. I am not clear whether the checks were made to Mr. Coulter or the Broad Street Amusement Corporation; but the money was deposited to the credit of the Broad Street Amusement Corporation.

Q. And not to Mr. Coulter personally?

A. No, sir.

Q. Who operated that amusement center?

A. The Broad Street Amusement Corporation.

Q. What connection has Mr. Coulter with that corporation?

A. The President.

Q. President and owner?

A. Yes, sir.

page 58 { CROSS EXAMINATION.

By Mr. Williams:

Q. When was it these checks were deposited?

A. July 17th and August 17th.

Q. What were the amounts of them?

A. Both for \$200.

Q. What name was the bank account in?

A. Tantilla Gardens.

Q. Is the word "Incorporated" there?

A. This book reads "Tantilla Gardens". The bank record has the name "Broad Street Amusement Corporation".

Q. The bank book reads "Tantilla Gardens"?

A. Yes, sir.

Q. And does not say "Incorporated"?

By Mr. Kirsh:

Q. How are the sums withdrawn on the books?

A. The same are withdrawn by check.

By the Court:

Q. How are the checks signed?

A. W. J. Coulter.

By Mr. Kirsh:

Q. Was there any printed matter on the check, above the signature?

A. We carry three or four different bank accounts. We carry them on different banks.

page 59 { Q. Do all of the checks have "Broad Street Amusement Corporation" printed on them?

A. Yes, that is what we use.

Q. Is this the same type of check you use all the time (referring to a check given the stenographer reporting this case for services)?

A. Yes, sir.

By the Court:

Q. Is that the kind of check you were using at the time?

A. Yes, that is the same check we have used right along.

By Mr. Williams:

Q. Mr. Brown, you said that there was a lot of argument and talk about arrangement and settlement. What is the final arrangement made between them that you heard?

A. They never did get to a final arrangement. Mr. Gillio insisted he wanted one thing and Mr. Coulter insisted he would not give it to him; that he would settle on the basis of inventory.

Q. Then, as far as you know, they have never arrived at a settlement?

A. I would not say that. Mr. Coulter has been perfectly willing to settle on the basis of inventory and has offered a check for same.

Q. I asked you, do you know whether they ever
page 60 } arrived at an agreement and settled their differ-
ences?

A. Not so far as I know.

(The witness stood aside.)

W. J. COULTER,
the defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Kirsh:

Q. Is this Mr. W. J. Coulter?

A. Yes, sir.

Q. Mr. Coulter, you are the President of the Broad Street Amusement Corporation, that owns and operates Tantilla Gardens?

A. Yes, sir.

Q. Do you own all of the stock?

A. Yes, sir.

Q. Is it not a fact that prior to December 6, 1932, the property and equipment of Tiny Town Amusement Center and Tantilla Gardens stood in your name?

page 61 } By Mr. Williams: I object.

By the Court: What difference does that make, way back there?

By Mr. Kirsh: If your Honor please, let the jury go out.

By the Court: The jury will retire.

Jury out.

By Mr. Kirsh: What is the relevancy of going back one year or two years prior?

By Mr. Kirsh: We want to show that it was a known fact when this contract was entered into in June, 1933, between Mr. Gillio and Mr. Coulter that the property up there and the Center was all owned and operated by the Broad Street Amusement Corporation and not by Mr. Coulter, who has been sued here, personally, and the suit has not been brought against the Broad Street Amusement Corporation.

By the Court: Go ahead and put your evidence in the record. I don't understand at this time the relevancy.

By Mr. Kirsh:

Q. Mr. Coulter, when did you convey the real and personal property known as Tantilla Gardens, or Tiny Town, to the Broad Street Amusement Corporation?

A. December, 1932, I think some time in December, 1932.

Q. Was the deed of bargain and sale recorded in the Clerk's Office of the Chancery Court of the City of Richmond, Virginia?

A. It was.

Q. Do you know whether or not on December 19, 1932, the Corporation executed a deed of trust to T. Justin Moore and Harold S. Bloomberg, trustees, securing the principal sum of \$45,000 and interest?

A. That is correct.

By Mr. Kirsh: I take the position, your Honor, that the recordation of that deed, plus other facts we will put in the record, will put this question in issue.

By the Court: Show the other facts at this time, then.

By Mr. Kirsh:

Q. Mr. Coulter, I hand you herewith stationery of "Tiny Town Amusement Center, operated by Broad Street Amusement Corporation, 3817 West Broad Street, Richmond, Va." On the side it says: Affiliated with Byrd & Brookland Theatres, Richmond, Bluebird, Petersburg, Tantilla Gardens, Rich-

mond's Finest Dance *Rendezvous*; Where the Finest Bands in the Country Play", and ask you whether or not when this contract was entered into was that the type of stationery the Broad Street Amusement Corporation used?

page 63 } A. It was.

Q. I hand you herewith a bill in the amount of \$48.20, reading, "Richmond, Va., October 3, 1933, Mr. Joe Gillio, City., Tiny Town Amusement Center, operated by Broad Street Amusement Corporation, 3817 West Broad Street, Richmond, Va. To advertising, balance, \$48.20", and ask you whether this was the type of stationery used by the Broad Street Amusement Corporation, in June, 1933?

A. Yes, sir.

By the Court:

Q. When did you send this bill to Mr. Gillio?

A. They simply go out on the first of the month.

Q. I did not ask you that. I said, when did you send it to him?

A. I don't know. The bookkeeper sends them out. I never see them when they go out.

By Mr. Williams: I object to all this. It has no bearing on the case.

By the Court: I will consider that with the other testimony and will let you make all your objections at one time.

By Mr. Kirsh:

Q. Mr. Coulter, for the purpose of the record, I ask you whether or not this is the minute book of the Broad Street Amusement Corporation?

page 64 } A. Yes, sir.

Q. I hand you the minutes of a special meeting of the Board of Directors of Broad Street amusement Corporation held on December 12, 1932, at 4 o'clock P. M., and ask you to read same into the record?

(Note.—It is agreed that these minutes may be copied into the record at this point.)

**"MINUTES OF A SPECIAL MEETING OF THE BOARD
OF DIRECTORS OF THE BROAD STREET
AMUSEMENT CORPORATION.**

"A special meeting of the Board of Directors of the Broad Street Amusement Corporation was held at Room 1003, Electric Building, Seventh and Franklin Streets, Richmond, Vir-

ginia, at 4:00 o'clock P. M., on December 12, 1932, at which meeting there were present the following members of the Board:

Walter J. Coulter
Robert H. Coulter
C. V. Blackburn

being all of the Directors of the said corporation, notice of said meeting having been duly waived by all of the Directors.

"Mr. Walter J. Coulter, President, acted as Chairman of the meeting and C. V. Blackburn, Secretary, kept the record.

"The Chairman stated that the charter of the corporation had been properly amended, and presented to the meeting a notice from the State Corporation Commission of Virginia of the issuing and certification of the amendment to the charter of the Broad Street Amusement Corporation, so that the capital stock of the corporation was now \$250,000.00.

"On consideration whereof, the following resolution was presented, and, on motion duly seconded, was unanimously adopted:

"BE IT RESOLVED, that the action of the
page 65 } officers of the corporation in amending the charter of this corporation so as to increase the maximum authorized capital stock to \$250,000.00 par value, be, and it is hereby approved."

"The Chairman stated that he was the owner of the building and premises occupied by the corporation on West Broad Street, in the City of Richmond, Virginia, which it was necessary for the corporation to acquire in connection with certain financing for the corporation. He, therefore, tendered the following offer:

"Richmond, Virginia,
December 12, 1932.

"Broad Street Amusement Corporation,
Richmond, Virginia.

"Gentlemen:

I am the owner of the following described premises:

"All that certain lot or parcel of land in the City of Richmond, Virginia, with the improvements thereon known as 'Tiny Town', and more particularly described as commencing on the south line of Broad Street at a point thereon distant

one hundred and eighty-two (182) feet west of the intersection of the south line of Broad Street with the west line of Hamilton Street, thence running westwardly along and fronting one hundred and ninety-one (191) feet on the said south line of Broad Street, thence running S. 40° 41' W. one hundred and thirty (130) feet, more or less, to the north line of an eighteen (18) foot alley extending from Hamilton Street to Kent Road, thence S. 46° 10' E. along the north line of said alley one hundred and seventy-two (172) feet to a point thereon distant one hundred and eighty-four (184) feet west of Hamilton Street, thence N. 44° 25' E. forty-eight and seventy-three one-hundredths (48.73) feet, thence continuing 53° 49' E. forty-eight and sixty-eight one-hundredths (48.68) feet to the point of beginning; being the same real estate conveyed to the aforesaid Walter J. Coulter by two deeds, -one from W. S. Johnston and wife, bearing date of July 31, 1929, and recorded in the Clerk's Office of the Chancery Court of the City of Richmond in Deed Book 364-B, page 194, and the other from Emma R. Daly, bearing date of December 24, 1930, and recorded in said clerk's office in Deed Book 373 D, page 32.'

page 66 } "The cost of these premises to me was \$158,-
770.23. There are now outstanding three deeds of trust on these premises in the total principal sum of \$8,071.50. There is due on said premises three additional items, namely, Note to Massey Builders Supply Company, due on December 24, 1932, in the sum of \$500.00; \$1,000.00 due to Reuben Burton, Incorporated; and \$292.07 due to E. C. Harris Company; so that the total outstanding debts chargeable to the said building are \$9,863.57; which leaves my equity in said building \$148,906.66.

"I hereby offer to sell the above described premises to the corporation for the sum of \$158,770.23, the cost of the premises to me, and will accept in payment thereof \$6.66 in cash and \$148,900.00 of the capital stock of the corporation, the corporation to assume and agree to pay the above-mentioned liens and indebtedness on the building, which will make the total purchase price of \$158,770.23.

Very truly yours,

WALTER J. COULTER."

"Thereupon, after careful consideration and on motion duly made and seconded, the following resolutions were unanimously adopted:

“ ‘RESOLVED, that the real estate described in the foregoing offer of Walter J. Coutler is necessary for carrying on the business of the corporation.

“ ‘RESOLVED FURTHER, in the opinion of the Board of Directors of the corporation the fair cash value of said real estate is \$158,770.23.

“ ‘RESOLVED FURTHER, that subject to the approval of the stockholders of the corporation, the offer of Walter J. Coulter to sell and convey to the corporation the real estate described in the foregoing offer be, and the same is hereby accepted, and the corporation hereby agrees to assume and pay off the indebtedness of \$9,863.57 mentioned in said offer and to pay to the said Walter J. Coulter \$6.66 in cash and issue to him \$148,900.00 of the capital stock of the corporation in payment for said real estate.

“ ‘RESOLVED FURTHER, that, subject to the approval of the stockholders of this corporation, the officers of the corporation be, and they are hereby authorized to pay to the said Walter J. Coulter \$6.66 in cash and to issue to
page 67 } him capital stock of this corporation in the aggregate sum of \$148,900.00 and to accept a good and sufficient deed of General Warranty from the said Walter J. Coulter, conveying the said real estate to the corporation upon the terms and conditions set forth in said offer.’ ”

“The Chairman then stated to the meeting that he had arranged to borrow the sum of \$45,000.00 to be secured by deed of trust on the real estate and personal property of the corporation, which money was necessary in connection with the business of the corporation. Upon consideration whereof, the following resolution was presented, and, on motion duly made and seconded, was unanimously adopted:

“ ‘RESOLVED, that, subject to the approval of the stockholders of the corporation, the officers of this corporation be, and they are hereby authorized and directed to negotiate for the corporation, on such terms as they deem advisable, a loan in the principal sum of \$45,000.00, to be secured by deed of trust on the real estate and personal property of the corporation.’ ”

“The Chairman then presented to the meeting form of deed of trust to be executed by the officers of the corporation and, on motion, the following resolutions were unanimously adopted:

“ ‘RESOLVED, That the form of deed of trust submitted to this meeting, bearing date of December 10, 1932, from

Broad Street Amusement Corporation to Harold S. Bloomberg and T. Justin Moore, Trustees, conveying the real estate owned by this corporation and situate on the south line of Broad Street, between Hamilton Street and Kent Road, and the personal property, equipment and fixtures located therein, all as more fully described in the said deed, be and the same is hereby approved; that the president and treasurer be and they are hereby authorized and directed to sign in the name of this corporation the notes therein described, the said notes being one hundred and eighty (180) in number and aggregating the sum of Forty-five Thousand Dollars (\$45,000.00) and interest; that the president be and is page 68 } hereby authorized to sign the corporate name to said deed; that the secretary be and he is hereby authorized to affix the corporate seal thereto and to attest the same; that the said president and secretary do acknowledge the said deed as and for the act and deed of this corporation, and do deliver the said deed and notes to the purchaser thereof, in accordance with the terms of the agreement between the corporation and the said purchasers."

" 'BE IT FURTHER RESOLVED, that a meeting of the stockholders of the corporation be, and the same is hereby called to be held at Room 1003, Electric Building, Seventh and Franklin Streets, Richmond, Virginia, at 4:30 o'clock P. M., on December 12, 1932, to take action on the following matters:

" "(1) Action upon the proposed sale to the corporation of certain real estate occupied by the corporation on West Broad Street, in the City of Richmond, Virginia.

" "(2) Action upon a loan of \$45,000.00 proposed to be made to the corporation and to be secured by deed of trust on certain real estate and personal property of the corporation.

" 'BE IT FURTHER RESOLVED, that the Secretary shall give notice in writing to each stockholder of the corporation of the said meeting to be held for the aforesaid purposes, or obtain from each stockholder waiver of such notice.'

"There being no further business, on motion, the meeting adjourned.

WALTER J. COULTER, Chairman."

"C. V. BLACKBURN, Secretary."

page 69 } (Note.—It is stipulated that the same minute book, which appears to be the minute book for the same Corporation, contains no minutes for June 15, 1933, nor any time previous thereto, or just following, as being held by the Corporation, affecting the agreement between Mr. Gillio and Mr. Coulter, as set out in the plaintiff's case in this matter.)

By Mr. Kirsh: That is the evidence.

By Mr. Williams: If your Honor please, my objection to the record is that the evidence is too far removed, inconclusive, irrelevant, inadmissible and immaterial, self-serving, and for the further reason that the very minute book used to attempt to prove the proposition that the Corporation made this agreement with Mr. Gillio, gives no minutes of any transaction between Mr. Gillio and Mr. Coulter, and for that further reason the evidence is irrelevant and inadmissible.

By the Court: I think this evidence should be excluded, on the doctrine they were dealing for an undisclosed principal. No notice having been brought to Mr. Gillio that Mr. Coulter was dealing for any other person than himself. The evidence is therefore irrelevant.

By Mr. Kirsh: We except.

page 70 } By the Court: Bring the jury in.

Jury in.

By Mr. Kirsh:

Q. Mr. Coulter, will you tell the jury whether or not a contract was made between Mr. Gillio and yourself in June, 1933; if so, who was present where and what was the nature of the contract?

A. There was no contract made.

Q. I should have used the word agreement?

A. There was no agreement made in writing.

Q. Was an oral agreement made between Mr. Gillio and yourself?

A. Only he was to operate the place as a trial proposition on a percentage basis.

Q. Where was this agreement entered into?

A. At Mr. Gillio's place one evening; I don't know the exact time.

Q. Was it before June 15, 1933?

A. A week or ten days before that.

Q. Who was present?

A. Mr. Gilbert, Mr. Gillio and myself.

Q. What was said?

A. At Mr. Gillio's barbecue, sitting in one of the booths, I think we were eating a sandwich and drinking a bottle of beer. Joe made mention of a rent contract; wanted to know what time I would let him have it for, and how long the agreement would be for. I told him it was impossible to enter into an agreement of how long, on account of the fact it was a new enterprise, and we did not know how valuable it was, or what rent to put on it.

Q. Did you agree to let him operate this place?

A. Yes, sir.

Q. On what terms?

A. On a percentage basis.

Q. Please tell the jury in your own words the conversation that took place?

A. Well, I was to furnish what equipment I had up there, and whatever equipment was needed he was to buy it, and whatever he bought was to be paid for by the firm and at the end of the month we would settle up and divide the profits on a fifty-fifty basis.

Q. Was any specific time set that you were to allow him to operate the place?

A. None whatever.

Q. Was anything said about the terms of the agreement?

A. He first wanted to rent the place. I told him no way to fix any sum to rent it for, because no way to tell how valuable the place was; that there was a certain amount of equipment up there, and he would have to add some equipment.

Q. Was anything said between you and Mr. Gillio about how you could end the agreement at any time?

A. Yes. I told him I did not want to tie myself up in a lease. We were handling the ball-room and he was handling the soft drinks. We would work together on it. We cover a lot of space. I did not want to tie him up, or tie myself up on an unknown quantity. I wanted to be able to dispense with his services at any time.

Q. Did he make any objection to it?

A. No, not at any time.

Q. Did he ever call on you afterwards for a written contract?

A. No. I told him on the start I could not make a lease. We had a big place there, more than an acre of ground, and we were after making it all pay.

Q. In case it went bad you wanted to get him out any time you wanted?

A. Yes, sir.

Q. Was that the agreement whereby you started to operate?

A. Yes, sir.

Q. When did you start to operate?

A. We opened on June 15th.

page 73 } Q. 1933?

A. Yes, sir.

Q. About how long did you operate?

A. I think about two and a half months.

Q. Did you get any revenue or any dividend from him for your share of the profits?

A. We got \$400 for two and a half months, with a balance due us of \$360.

Q. Did you get credit for the \$360?

A. Yes, on the final statement we got credit for three hundred and sixty some dollars.

Q. Which left a balance due Mr. Gillio, without counting the subsequent items, of how much?

A. I don't know the exact figures on that.

By the Court:

Q. Is there any other dispute between you and Mr. Gillio except whether you were to pay him \$500?

A. That is all. In other words, that there is a good will proposition he claims he should have. I claim there was no good will established.

Q. You deny you agreed to give him \$500?

A. Yes, sir.

By Mr. Kirsh:

Q. These checks of \$200 each, who used these checks?

page 74 } A. They were deposited to the credit of the Broad Street Amusement Corporation. They may have been made out to me personally, but they were deposited to the credit of the Broad Street Amusement Corporation.

Q. When was notice given Mr. Gillio to vacate the premises?

A. I think it was on a Saturday evening, by Mr. Brown.

Q. In August?

A. The first part of August.

Q. Pursuant to that notice were you present on a Sunday afternoon to take inventory?

A. Yes, we went up there on a Sunday afternoon to take inventory.

Q. Who was present at that conference?

A. Mr. Gillio was there; Mr. Gillio's bookkeeper, Art

Brown and Mr. Gilbert and two or three others that came there with Mr. Gillio. Mr. Tom Leach was one of them, I think.

Q. Was a proposition made you on behalf of Mr. Gillio that he wanted \$1,500 for good will, plus inventory?

A. The first proposition I knew of was \$1,000. Mr. Hughes made a statement of \$1,500, but the proposition was \$1,000.

Q. Did you accept that offer?

A. No, sir.

Q. After you declined that offer was another proposition made you on behalf of Mr. Gillio?

A. I think Mr. Hughes came back in and said
page 75 } at least he ought to have \$500.

Q. Plus inventory?

A. Yes, plus inventory.

Q. Did you accept that proposition?

A. No.

Q. What did you say?

A. I asked what the \$500 was for. They said for good will. I said, "No good will established".

Q. Did you agree to pay the \$500?

A. No.

Q. Did you refuse to pay the \$500?

A. Yes.

Q. Have you ever agreed to pay them \$500?

A. No.

Q. As I understand, you are perfectly willing to pay them the \$460.72?

A. Yes.

Q. Did you make them that offer at that time?

A. Yes; that was the statement made up at that time. They were to come up the next morning and make the inventory and that is when the claim was made for the \$500.

Q. The next morning?

A. Yes.

Q. Who came?

page 76 } A. Mr. Gillio's bookkeeper.

Q. Mr. Snyder?

A. Yes.

Q. What did you tell him?

A. I told him there was no good will established and I was ready and willing to take over the proposition at the inventory.

Q. He refused to take the \$460 check?

A. Yes. The check was never drawn, but I was willing to give him the check.

CROSS EXAMINATION.

By Mr. Williams:

Q. Mr. Coulter, you were a right hard man to catch about that time, were you not, before and after the arrangement?

A. Just what do you mean—right hard man to catch?

Q. You had so many engagements you could not meet them with him?

A. My time is consumed about eighteen hours a day; four or five of that spent in the office.

Q. You had about four engagements with me and did not meet them, did you?

By Mr. Kirsh: I object.

By the Court: Objection sustained.

page 77 } By Mr. Kirsh: I wish to make a motion in the jury's absence, your Honor.

By the Court: Gentlemen of the jury please walk out in the corridor.

Jury out.

By Mr. Kirsh: If your Honor please, I move that a juror be withdrawn and a mistrial ordered, on the ground of the improper remark of counsel for the plaintiff. The remark just made by counsel for the plaintiff has a tendency to convey to the jury that Mr. Williams was making a desperate effort to collect this money and at the same time Mr. Coulter was making a desperate effort to evade him, and that question, which was entirely improper, can do nothing other than to prejudice the jury against the defendant, and, therefore, we ask that a juror be withdrawn and a mistrial directed, as I feel that just noting an exception and asking his Honor to tell the jury to disregard that statement would not accomplish the result that a new trial would.

By the Court: Such remarks may or may not have that effect. I thought the remark was irrelevant and I excluded it. The motion to declare a new trial is overruled.

By Mr. Kirsh: I note an exception.

page 78 } By the Court: Bring the jury in.

Jury in.

By Mr. Kirsh: Your Honor, I ask that you tell the jury to disregard that remark.

By the Court: Gentlemen of the jury, just before you left the room, Mr. Williams asked the witness if he was not a

hard man to catch, and he explained that by saying his time was so occupied. Then Mr. Williams followed that up by asking the witness if he did not have four or five engagements with him and not meet them. That has no relevancy; that has nothing to do with the question here. You will disregard that question and when you go to your jury room decide the case on the evidence and not on any remark or question of that kind.

By Mr. Williams:

Q. Mr. Coulter, what day was it that you all met to arrive at a settlement of your differences?

A. On a Sunday.

Q. You don't remember the date?

A. No, I don't remember the date.

Q. Do you remember the month?

A. I think it was August. The first part of August.

Q. Several times you have said, I believe, and Mr. Brown, too, that the business that was carried on by Mr. Gillio and you was carried on for two and a half months, what two and a half months were they?

A. I would not say it was two and a half months. It was from June 15th until the time of the settlement, whatever that was.

Q. Then, if the settlement was arrived at on Monday, the 14th of August it was only two months, was it not?

A. I could not tell you as to the dates.

Q. You don't remember the dates?

A. No, sir.

Q. You are positive that Mr. Hughes did mention the \$1,000 item, plus inventory, that Mr. Gillio would settle for?

A. Yes, sir.

Q. You refused to accept that?

A. Yes, sir.

Q. And, likewise, the \$500?

A. Yes, sir.

Q. You are positive that he did not mention the \$1,500?

A. I did not hear anything mentioned about \$1,500.

Q. You would not say he did not mention it?

A. No, sir.

Q. When you refused to take the \$500 offer and inventory, what then transpired there between you and Mr. Gillio in the presence of these other gentlemen?

A. They were still talking about the \$500 when we left there that Sunday. Just previous to that we had agreed to meet on Monday morning and settle up on inventory.

Q. Only on inventory?

A. When did you get the keys?

A. Monday afternoon, I think it was.

(The witness stood aside.)

By Mr. Kirsh: That is the defendant's case.

page 81 }

REBUTTAL EVIDENCE.

J. A. GILLIO,

being recalled by Counsel for Plaintiff, testified as follows in rebuttal:

DIRECT EXAMINATION.

By Mr. Williams:

Q. Mr. Gillio, was there any other question left open to be settled up on Monday?

A. Just to take the inventory and to be settled up that evening.

CROSS EXAMINATION.

By Mr. Kirsh:

Q. You took inventory on Monday, did you not?

A. No, we took it Monday morning.

Q. You did not take it on Sunday?

A. No, we took it Monday morning.

(The witness stood aside.)

page 82 }

F. W. SNYDER.

being recalled by Counsel for Plaintiff in rebuttal, testified as follows:

DIRECT EXAMINATION.

By Mr. Williams:

Q. Mr. Snyder, was any question left open to be settled later at that meeting on Sunday?

A. You mean any other proposition?

Q. Anything left open to be settled on Monday?

A. Nothing but to take inventory and settle up.

CROSS EXAMINATION.

By Mr. Kirsh:

Q. When you came up to take the inventory you refused to accept the check for \$460 from Mr. Coulter, did you not?

A. I don't think any check was ever offered. I understood he made an engagement to settle at a later time.

Q. Were you present when a check was offered?

A. I don't know anything about it.

Q. Were you present when Mr. Gillio came up for a check on Monday?

A. No, sir, I was not.

(The witness stood aside.)

page 83 }

HARRY HUGHES,

being recalled by Counsel for Plaintiff in rebuttal,
testified as follows:

DIRECT EXAMINATION.

By Mr. Williams:

Q. When the conversation was closed there on that Sunday was there anything left undecided between them?

A. Other than the taking of the inventory the next day.

Q. That was all?

A. Yes, sir.

(The witness stood aside.)

page 84 }

INSTRUCTIONS.

By Mr. Kirsh: The defendant respectfully submits that the refusal of the Court to give Instruction A offered by the defendant practically cuts out the evidence of the defendant as to the terms of the agreement that were entered into at Gillio's place. This instruction is based purely on horn book law and the decisions of the Court of Appeals, and is clearly applicable to the facts in these particulars: that two witnesses, namely, Messrs. Gilbert and Coulter, in substance, testify that when this contract was entered into between the defendant and the plaintiff that Mr. Coulter stated and Mr. Gillio agreed that either party could terminate this contract at any time they wanted; that Mr. Coulter did not want Mr. Gillio to sign up to pay a rent which in case the place turned out bad would be a hardship on him, and he, in turn, did not want to sign up to tie his hands in the event he wanted to get rid of Mr. Gillio. In other words, the testimony of these two witnesses clearly indicates that they believed and

it was their interpretation that the contract was one terminable at the will of either party, and under the law an agreement of that kind can be terminated at any time, and to refuse that instruction would prevent the defendant
 page 85 } having an instruction given on his theory of the case.

Instruction No. C, the defendant contends, correctly states the law as applicable to the facts of this case, as set forth in reasons why Instruction A offered by the defendant should be given.

The same rule is applicable to the instruction of the defendant No. C. It is the theory of the defendant that this contract was entered into and could be terminated at any time; then if one of the parties availed himself of it, the other party cannot obtain something from him for something he was bound to do. That opinion has been recently expressed by our Court, in the opinion in 152 S. E., p. 346, at page 350, 9th syllabus, in the case of *Seward v. New York Life Insurance Company*. In that case the court said:

“The general rule is that a new promise, without other consideration than the performance of an existing contract in accordance with its terms, is a naked promise without legal consideration therefor and unenforceable.”

The Court of Appeals refers to the notation in 34 L. R. A., beginning on page 33 thereof. In this notation we find on page 37 the following:

page 86 } “If one party has a right to terminate the agreement at his option, a promise by the other party to pay a certain compensation as an inducement not to exercise the option is not without consideration.”

On page 35 of the same notation we find this statement:

“Where a person has agreed to surrender a contract whenever requested by another to do so, his surrender would furnish no consideration for a new promise by the other.”

We respectfully submit to your Honor that here we have a question as to what were the terms of dissolution. The testimony of Mr. Gillio was one thing at the time the contract was entered into. The testimony of the two witnesses for the defendant were in substance that the contract was terminable at will, and that in the event that Mr. Coulter ter-

minated the contract that he would pay for the fixtures, &c., that Mr. Gillio had put in. That is the uncontradicted testimony of Mr. Coulter and Mr. Gilbert.

Now, I ask for Instruction No. C, which I think correctly states the law, based on that contract, and if that is refused we respectfully submit that the defendant is deprived of an instruction which correctly propounds the law based on his theory of the case.

In reference to Instruction D asked for by the page 87 } defendant, the defendant respectfully submits that this instruction, for the same reasons heretofore given pertaining to defendant's Instructions A and C, correctly states the law, and also is based on the evidence in the case, and correctly states the law according to the ruling of the Court of Appeals of Virginia as applicable to the defendant's theory of the case as adduced by the two witnesses, Messrs. Gilbert and Coulter.

By the Court: The trouble with these instructions is, while they are drawn from a correct principle of law, they are not applicable to the facts of this case. Had there been only a promise by Gillio to move out of the premises at once, the principles invoked by counsel for the defendant might be applicable, but there were other considerations moving Gillio, according to his theory, to-wit: that he was not only to get out of the premises, but that he was to accept a price to be ascertained for his property on the premises, and the plaintiff's theory is, further, that in consideration of these two acts on the plaintiff's part, the defendant was to pay him the inventory price of the articles referred to and \$500. The sev-

eral considerations are so interwoven that it is page 88 } impossible from the evidence to segregate them and say that a part of the consideration emanating from one party was solely applicable to a part of the consideration emanating from the other party.

Note.—At this point the Court read the Instructions to the jury, and after reading Instruction No. 1 of the plaintiff stated: It is in your discretion, gentlemen, whether or not you will allow interest should you find for the plaintiff.

The court further stated: By weight of evidence, or preponderance of the evidence, gentlemen of the jury, is not meant the number of witnesses, but you are to weigh the testimony and determine which is the most worthy of belief. If there is one witness that you thoroughly rely on, that witness may furnish the weight, or the preponderance, of the testimony. There was a defense in the pleadings interposed

that this defendant did not make the contract for himself, but made it for a corporation. The law is that if a party is acting for an undisclosed principal—in other words, he goes to another party and makes a bargain, in his own words, as if he were the person, and does not tell who he is dealing for, then, the law holds him liable. In other words, if
 page 89 } he makes a contract and don't say who he is making it for that is the doctrine of undisclosed principal.

Note.—The jury, after retiring to consider their verdict, returned with the following verdict:

“We, the jury, on the issue joined, find for the plaintiff and assess his damages at \$960.79, with interest at six per centum per annum from August 14, 1933.”

The defendant by counsel moves the court to set aside the verdict of the jury, as being contrary to the law and the evidence and without evidence to support it, and bases his motion on the following grounds:

1. Admitting evidence offered by the plaintiff over the objection of the defendant; and,
2. Refusing evidence offered by the defendant and objected to by the plaintiff; and,
3. For the refusal to withdraw a juror and declare a non-suit on motion of the defendant; and,
4. The refusal to grant instructions numbered A, C and D offered by the defendant and objected to by the plaintiff.

page 90 } INSTRUCTION NO. 1.

In the Law and Equity Court of the City of Richmond,
 Part II.

J. A. Gillio

v.

W. J. Coulter.

The court instructs the jury that if they believe from the evidence in this case that the plaintiff and the defendant were conducting the business of refreshment stand at the Tantilla and that the defendant agreed to pay \$500.00, and dollar for dollar for inventory to be made by them to the plaintiff for his interest, and that the inventory totaled \$792.79, then you must bring in your verdict for the plaintiff for \$1,292.79 less \$332.00, and admitted credit, or a total of \$960.79.

page 91 }

B.

The court instructs the jury that the burden of proof is on the plaintiff to make out his case by a preponderance of the testimony, and that if they find the evidence evenly balanced, their verdict must be for the defendant. In other words, the plaintiff's claim to recover in this action must be established by evidence which in the opinion of the jury outweighs the evidence produced by the defendant to resist the plaintiff's claim. If, therefore, in the opinion of the jury, the weight of the evidence on each side is exactly equal, the plaintiff must fail in his recovery.

page 92 } This is to certify that the foregoing instructions marked No. 1 and B, are all of the instructions given in the trial of the case of J. A. Gillio v. W. J. Coulter, on the 18th day of June, 1934.

Teste:

LUTHER LIBBY, Clerk.
By E. M. EDWARDS, D. C.

page 93 }

A.

The court instructs the jury that as a matter of law when two parties enter into a partnership agreement without indicating when the partnership shall terminate, then the partnership can be dissolved at any time at the will of either party.

page 94 }

C.

The court instructs the jury that if you believe from the evidence that the contract in question could be terminated at any time by either party, then you are instructed that the promise, if made, to pay the sum of \$500.00 in question was without consideration in law and the plaintiff cannot recover said sum.

page 95 }

D.

The court instructs the jury that if you believe from the evidence that the defendant made a new promise to the plaintiff to pay the sum of \$500.00 and the said new promise was without other consideration than the performance of his existing contract in accordance with its terms, then you are instructed that said new promise is a naked promise without legal consideration therefor and unenforceable.

Supreme Court of Appeals of Virginia.

page 96 } This is to certify that the foregoing instructions marked A, C and D are all of the instructions refused by the Court on the 18th day of June, 1934, in the case of J. A. Gillio *against* W. J. Coulter.

Teste:

LUTHER LIBBY, Clerk.
By E. M. EDWARDS, D. C.

page 97 } Virginia:

In the Law and Equity Court of the City of Richmond,
Part Two.

J. A. Gillio, Plaintiff,

v.

W. J. Coulter, Defendant.

AUTHENTICATION OF STENOGRAPHIC REPORT OF
TESTIMONY AND OTHER INCIDENTS OF THE
TRIAL AUTHENTICATED AND CERTIFIED PUR-
SUANT TO RULE 24 OF THE SUPREME COURT OF
APPEALS OF VIRGINIA.

I, Frank T. Sutton, Jr., Judge of the Law and Equity Court of the City of Richmond, Part Two, do hereby certify that here ends the stenographic report of the testimony, the instructions given and refused, and other incidents of the above-entitled trial.

Given under my hand this 7th day of August, 1934.

FRANK T. SUTTON, JR.,
Judge of the Law and Equity Court of
the City of Richmond, Part Two.

page 98 } I, Luther Libby, Clerk of the Law and Equity Court of the City of Richmond, Part Two, do hereby certify that the foregoing is a true transcript of the record in the above-entitled action wherein J. A. Gillio is plaintiff, and W. J. Coulter is defendant, and that the plaintiff had due notice of the intention of the defendant to apply for such transcript.

Witness my hand this 19th day of October, 1934.

LUTHER LIBBY, Clerk.

Fee for Record \$35.70.

A Copy—Teste:

M. B. WATTS, C. C.

INDEX

	Page
Petition for Writ of Error and <i>Supersedeas</i>	1
Record	10
Warrant	10
Judgment, Civil Court Part II	10
Additional Grounds of Defense	11
Bill of Particulars	12
Grounds of Defense	13
Verdict	14
Motion to Set Aside Verdict	15
Memorandum by the Court	15
Judgment, July 25, 1934,—Complained of.....	16
Judge's Certificate—Authentication of Testimony, &c..	18, 60
Joseph A. Gillio	18, 54
F. W. Snyder	29, 54
Harry Hughes	32, 54
George Dewey Gilbert	35
Arthur W. Brown	38
W. J. Coulter	41
Exhibit J. A. G. No. 1—Inventory of Fixtures, &c.....	24
Exhibit J. A. G. No. 2—Bill for Fixtures.....	26
Exhibit J. A. G. No. 3—Ice bill	27
Exhibit J. A. G. No. 4—Advertising Bill	28
Minutes Special Meeting Directors Broad Street Amuse- ment Corp.	43
Instructions—Objections <i>in re</i>	55
Instructions Given and Refused	58
Judge's Certificate—Authentication of Testimony, &c..	18, 60
Clerk's Certificate	60